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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS, a non-profit organization,

Plaintiff,

v.

UNITED STATES FOREST SERVICE,

Defendant.

No. 2:14-CV-02228-GEB-AC

**ORDER GRANTING DEFENDANT'S
SUMMARY JUDGMENT MOTION AND
DENYING PLAINTIFF'S SUMMARY
JUDGMENT MOTION**

Plaintiff Conservation Congress and Defendant United States Forest Service ("Forest Service") each move for summary judgment on all claims in Plaintiff's Complaint. The County of Siskiyou filed an amicus curiae brief in support of the Forest Service's motion.

Plaintiff alleges in its Complaint that the Forest Service's decision authorizing the Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") for the Porcupine Vegetation and Road Management Project ("the Project") violated the National Environmental Policy Act ("NEPA") and the

1 National Forest Management Act ("NFMA"). The Forest Service
2 identified the purposes of the Project as (1) improving forest
3 health by thinning trees, thereby reducing fuels that pose a risk
4 of igniting a catastrophic fire in the Shasta-Trinity National
5 Forest ("the Forest"), (2) maintaining a fuel break, and (3)
6 restoring meadow and aspen habitat. (Project Administrative
7 Record ("PAR") 1, 4, 370, ECF No. 11.) "The project area is
8 located near Porcupine Butte approximately 20 miles northeast of
9 McCloud," California. (PAR 1.)

10 I. LEGAL STANDARD

11 "Agency decisions that allegedly violate . . . NEPA and
12 NFMA are reviewed under the Administrative Procedure Act ('APA'),
13 and may be set aside only if they are 'arbitrary, capricious, an
14 abuse of discretion, or otherwise not in accordance with the
15 law.'" Or. Natural Res. Council Fund v. Goodman, 505 F.3d 884,
16 889 (9th Cir. 2007) (quoting 5 U.S.C. § 706(2)(A)). Agency action
17 is arbitrary or capricious if it fails to "examine the relevant
18 data and articulate a satisfactory explanation for [the] action
19 including a rational connection between the facts found and the
20 choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State
21 Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983). Judicial
22 "[r]eview under this standard is to be 'searching and careful,'
23 but remains 'narrow,' and a court is not to substitute its
24 judgment for that of the agency. This is especially appropriate
25 where . . . the challenged decision implicates substantial agency
26 expertise." Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571
27 (9th Cir. 1993).

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1 A party seeking summary judgment bears the initial
2 burden of demonstrating the absence of a genuine issue of
3 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323
4 (1986). If the movant satisfies its "initial burden," "the
5 nonmoving party must set forth, by affidavit or as otherwise
6 provided in Fed. Rule Civ. Proc. ("Rule") 56, 'specific facts
7 showing that there is a genuine issue for trial.'" T.W. Elec.
8 Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630
9 (9th Cir. 1987) (quoting former Rule 56(e)).

10 Because a district court has no independent
11 duty "to scour the record in search of a
12 genuine issue of triable fact," and may "rely
13 on the nonmoving party to identify with
14 reasonable particularity the evidence that
precludes summary judgment," . . . the
district court . . . [is] under no obligation
to undertake a cumbersome review of the
record on the [nonmoving party's] behalf.

15 Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir.
16 2010) (quoting Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir.
17 1996)).

18 II. REQUEST TO SUPPLEMENT THE ADMINISTRATIVE RECORD

19 Plaintiff seeks in its reply brief to supplement the
20 Project Administrative Record ("PAR") by having judicial notice
21 taken of the Forest Service's Annual Progress Report. (Pl.'s
22 Reply Supp. Summ. J. ("Pl. Reply") 2 n.1, ECF No. 31.) However,
23 the district court need not consider a request made for the first
24 time in a reply brief. See Zamani v. Carnes, 491 F.3d 990, 997
25 (9th Cir. 2007).

26 "Generally, judicial review of agency action is limited
27 to review of the administrative record." Animal Def. Council v.
28 Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988). The administrative

1 record may be supplemented only:

2 (1) if necessary to determine "whether the
3 agency has considered all relevant factors
4 and has explained its decision," (2) "when
5 the agency has relied on documents not in the
6 record," [] (3) "when supplementing the
7 record is necessary to explain technical
8 terms of complex subject matter,"
9 [or] [4] "when plaintiffs make a showing of
10 agency bad faith."

11 S.W. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d
12 1443, 1450 (9th Cir. 1996) (quoting Inland Empire Pub. Lands
13 Council v. Glickman, 88 F.3d 697, 703-04 (9th Cir. 1996)).
14 Plaintiff's request is untimely and does not address the relevant
15 legal standard. Therefore, Plaintiff's request to supplement the
16 administrative record is denied.

17 **III. DISCUSSION**

18 Plaintiff alleges in its Complaint that the Forest
19 Service violated NEPA by (1) conducting an arbitrary and
20 capricious cumulative effects analysis on the northern spotted
21 owl, (2) failing to consider a reasonable range of alternatives
22 to the Project, (3) failing to take a "hard look" at the
23 environmental impacts of the Project, and (4) failing to prepare
24 an Environmental Impact Statement ("EIS"); and that the Forest
25 Service violated the NFMA by failing to comply with the Forest
26 Plan's snag retention standard.

27 **A. Cumulative Impacts of Future Projects**

28 Plaintiff alleges in its Complaint that the Forest
Service used an inappropriately narrow geographic boundary for
its cumulative impacts analysis to assess the Project's impact on
the northern spotted owl. (Compl. ¶¶ 46-47.) Plaintiff argues the
narrowness of this analysis fails to comply with the Council on

1 Environmental Quality ("CEQ") guidelines that require analyzing
2 the Project's effects using the largest area occupied by the
3 owls, which in this case is the owl's natal dispersal distance of
4 10 to 15 miles, and that the Forest Service abused its discretion
5 when only analyzing the Project's impact using the owls 1.3 mile
6 median home range. (Pl.'s Am. Mot. Summ. J. ("Pl. Mot.") 12:23-
7 13:9; 13:15-25; 14:24-26, ECF No. 20.)

8 NEPA requires that an agency's assessment of the
9 environmental impacts of a proposed Project include an analysis
10 of the action's cumulative impact. Ctr. for Env'tl. Law & Policy
11 v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1007 (9th Cir.
12 2011). NEPA regulation 40 C.F.R. § 1508.7 defines cumulative
13 impact as "the impact on the environment which results from the
14 incremental impact of the action when added to other past,
15 present, and reasonably foreseeable future actions
16 Cumulative impacts can result from individually minor but
17 collectively significant actions taking place over a period of
18 time." "[S]ometimes the total impact from a set of [projects]...
19 may be greater than the sum of the parts." Goodman, 505 F.3d at
20 893. The CEQ publishes guidelines instructing federal agencies
21 how to define the geographic boundaries of a cumulative effects
22 analysis; the guidelines explain: "[a]nalyzing cumulative effects
23 . . . requires the analyst to expand the geographic boundaries
24 [of the analysis] . . . to encompass additional effects on the
25 resources, ecosystems, and human communities of concern" beyond
26 the Project area. (Malone Decl. Ex. A, p. 21, ECF No. 16.) "CEQ's
27 interpretation of NEPA is entitled to substantial deference."
28 Andrus v. Sierra Club, 442 U.S. 347, 358 (1979). The portion of

1 the guidelines relevant to Plaintiff's claim states: "[f]or a
2 proposed action . . . the analysts should . . . [d]etermine the
3 geographic areas occupied by [the northern spotted owl]
4 [i]n most cases, the largest of the[] areas [occupied by the owl]
5 will be the appropriate area for the analysis of cumulative
6 effects." (Malone Decl. Ex. A, p. 21, 24) (emphasis added.)

7 The Forest Service's cumulative effects analysis
8 "includes the effects from habitat modification within an owl's
9 home range, which is an estimated 1.3-mile radius around an
10 activity center (e.g., nest site) or approximately 3,400 acres."
11 (PAR 1291) (emphasis added.)

12 The Forest Service explains its analysis is
13 "scientifically valid" and consistent with the CEQ guidelines
14 since the owl's natal dispersal distance does not represent the
15 "geographic area [they] occup[y]" but instead "represents the
16 transient/movement phase of young owls . . . en route to
17 establishing new permanent territory." (Fed. Def.'s Mem. Opp'n
18 Pl.'s Mot. Summ. J. ("Def. Opp'n") 2:2-4; 5:4-15, ECF No. 24.)

19 Further, the Forest Service states in the
20 administrative record, in relevant part:

21 The 1.3-mile bounding on the assessment area
22 . . . allows for analysis of . . . adjacent
23 territories, is an accepted range by the
24 [Fish and Wildlife Service] for completing
25 [northern spotted owl] effects analysis and
26 includes managed private timberlands that may
27 influence [northern spotted owl] habitat use
28 within the project assessment area. The
Action Area is approximately 88,657 acres.
Although there is only one known [northern
spotted owl] activity center and home range
in the Action Area . . . , the 1.3-mile buffer
area was still assessed to account for any
future overlapping activity centers, or
partial/entire cores or home ranges(s).

1 (PAR 1291.)

2 "The Forest Service's choice of home range as the
3 physical scope for cumulative effects analysis was not arbitrary
4 or capricious," and there is no evidence indicating that the CEQ
5 guidelines consider the natal dispersal distance a better scope
6 of analysis. Idaho Sporting Congress, Inc. v. Rittenhouse, 305
7 F.3d 957, 974 (9th Cir. 2002)); see also Conservation Congress v.
8 U.S. Forest Serv., 555 F. Supp. 2d 1093, 1108-09 (E.D. Cal. 2008)
9 (approving of cumulative effects analysis that used the northern
10 spotted owl's home range).

11 Therefore, the Forest Service's motion on this claim is
12 granted and Plaintiff's motion is denied.

13 **B. Failing to Consider a Reasonable Range of Alternatives**

14 Plaintiff argues the Forest Service violated NEPA by
15 failing to consider a reasonable range of alternatives to the
16 Project in its EA. (Compl. ¶¶ 53-56.)

17 Before approving a proposed action, NEPA requires the
18 Forest Service to "study, develop, and describe appropriate
19 alternatives." 42 U.S.C. § 4332(2)(E). "[A]n agency's obligation
20 to consider alternatives under an EA is a lesser one than under
21 an EIS." Ctr. for Biological Diversity v. Salazar, 695 F.3d 893,
22 915 (9th Cir. 2012). "Where with an EIS, an agency is required to
23 'rigorously explore and objectively evaluate all reasonable
24 alternatives,' with an EA, an agency is only required to include
25 a brief discussion of reasonable alternatives." Id. at 915
26 (quoting N. Idaho Cnty. Action Network v. U.S. Dep't of Transp.,
27 545 F.3d at 1153.) "The touchstone of [the] . . . inquiry is
28 whether an [EA's] selection and discussion of alternatives

1 fosters informed decision-making and informed public
2 participation." Cal. v. Block, 690 F.2d 753, 767 (9th Cir. 1982).
3 An agency is not required to consider alternatives "beyond those
4 reasonably related to the purposes of the project." Westlands
5 Water Dist. v. U.S. Dep't of Interior, 376 F.3d 853, 868 (9th
6 Cir. 2004).

7 **1. Alternative That Would Preclude Logging Trees**
8 **Greater Than or Equal to 21-Inches in Diameter**

9 The Forest Service considered "[a]n alternative that
10 precludes the harvest of trees above . . . 21 inches" in
11 diameter, but did "not consider[] [it] in detail because [the
12 alternative] would not reasonably meet the [P]roject purpose and
13 need." (PAR 99.) Plaintiff argues this conclusion was arbitrary
14 or capricious since it was not supported by evidence and because
15 the Forest Service unfairly considered the 21-inch alternative in
16 combination with other more restrictive diameter-based
17 alternatives. (Pl. Mot. 16:5-9; 18:16-20.)

18 The Forest Service responds it was not required to
19 consider the 21 inch alternative in isolation and its analysis
20 sufficiently explained why the alternative did not meet the
21 Project's purpose of improving forest health, since it "would
22 allow disease-infected . . . trees . . . to continue to infect
23 adjacent young [trees]" and "would prevent the species-
24 composition of mixed stands from shifting back to pine, leaving
25 more stands vulnerable to wildfire." (Def. Opp'n 12:12-22.)

26 The Forest Service discussed the Project's goals in the
27 PAR, specifically stating its objectives included "improve[ing]
28 forest health and growth" and "reducing the risk of catastrophic

1 fire." (PAR 4065-66, 370.)

2 When considering the 21-inch alternative, the Forest
3 Service stated in part:

4 An alternative that precludes the harvest of
5 trees above a set diameter (several upper
6 limits were suggested, including 12, 18 and
7 21 inches) and larger was not considered in
8 detail because it would not reasonably meet
9 the project purpose and need An upper
10 diameter limit that excludes overstory tree
11 diameters would not be effective in
12 accomplishing treatment objectives for the
13 following reasons:

- 14 • High stocking levels include overstory
15 trees and stocking could not be reduced
16 to desired levels by limiting harvest to
17 trees based solely on dbh [diameter at
18 breast height].
- 19 • Disease-infected lodgepole pine
20 overstory trees would continue to infect
21 adjacent young lodgepole pine.
- 22 • The species composition of mixed stands
23 . . . on dry, fire-maintained sites
24 would not shift back to pine, leaving
25 stands more vulnerable to wildfire.
- 26 • Aspen would remain overtopped and
27 suppressed by conifers exceeding the
28 diameter limit.

19 (PAR 99.)

20 The Forest Service provided "satisfactory
21 explanation[s]" for concluding Plaintiff's alternative would not
22 further the Project's purposes of improving forest health and
23 reducing the risk of catastrophic wildfire, by stating that
24 Plaintiff's alternative would allow disease-infected trees to
25 infect nearby trees, would not properly redistribute the species
26 composition mix in dry areas, and would leave the forest open to
27 catastrophic fires. Motor Vehicle Mfrs. Ass'n of U.S., Inc., 463
28 U.S. at 43; (see PAR 99.) These rationales apply to the 21-inch

1 alternative regardless of whether it was considered alone or in
2 combination with other diameter based logging restrictions. NEPA
3 does not require the Forest Service to consider alternatives
4 "beyond those reasonably related to the purposes of the project."
5 Westlands Water Dist., 376 F.3d at 868. Therefore, the Forest
6 Service's motion on this claim is granted and Plaintiff's motion
7 is denied.

8 **2. Alternative that Does Not Affect Northern Spotted**
9 **Owl Habitat**

10 Plaintiff argues that the Forest Service's conclusion
11 that "an alternative that does not affect [northern spotted owl]
12 habitat and specifically does not propose activity within
13 critical, suitable (nesting, roosting, foraging) capable or
14 dispersal habitat," "fail[ed] to adequately meet the major
15 aspects of the purpose and need" of the Project is arbitrary or
16 capricious since the Forest Service's reasoning is contradictory
17 and inconsistent with prior Forest management decisions. (PAR 99,
18 100.)

19 **a. Contradictory Reasoning**

20 Plaintiff argues the Forest Service's stated reasons
21 for dismissing the alternative that does not affect northern
22 spotted owl habitat are inconsistent with each other and
23 therefore arbitrary.

24 The Forest Service stated in the relevant part of its
25 discussion of the alternative:

26 The predicted effects of [this alternative]
27 (no treatment in critical, dispersal or
28 suitable habitat) would be very similar in
effects to [northern spotted owl] habitat
under the action alternatives analyzed in

1 detail, as all treated critical foraging and
2 dispersal habitat would continue to function
3 as such in both the short- and long-term. . .
4 The exception is that capable habitat would
5 remain in its overstocked, stagnant
6 condition. . . .

7 This alternative fails to adequately meet the
8 major aspects of the purpose and need and was
9 eliminated from detailed study because:

- 10 • Inter-tree competition would not be
11 alleviated within foraging and capable
12 stands, and therefore the project would
13 not meet the purpose and need in these
14 areas of improving forest health and
15 reducing fuels;
- 16 • Stand density indices would remain at
17 240 to 470 within 17 percent of the area
18 proposed for treatment, continuing to
19 result in poor tree health, reduced
20 vigor, increased competition for
21 nutrients, light and water, and leading
22 to future disease and mortality
23 increases within these adjacent healthy
24 stands;
- 25 • It would result in increased stress
26 induced mortality within suitable and
27 capable habitat, with fewer large
28 diameter trees and snags over time
(based on growth modeling). . .
- It would not encourage or accelerate the
development of resilient late-
successional habitat within current
suitable habitat, nor protect it from
loss resulting from disease or fire.

(PAR 100) (emphasis added.)

NEPA does not require that the Forest Service consider
alternatives "beyond those reasonably related to the purposes of
the project." Westlands Water Dist., 376 F.3d at 868. Nor does it
"require[] [the Forest Service] to undertake a separate analysis
of alternatives which are not significantly distinguishable from
alternatives actually considered, or which have substantially
similar consequences." Id.

1 Plaintiff argues that when the Forest Service dismissed
2 the alternative because it simultaneously did not meet the
3 Project's purpose and was "very similar" to alternatives that met
4 the Project's purpose, its analysis was internally inconsistent.
5 (Pl. Mot. 24:18-27.)

6 The Forest Service responds that it "described several
7 ways in which the proposed alternative would fail to adequately
8 meet . . . the Project's purpose and need" and that "[w]hile the
9 Forest Service recognized that the predicted effects of [other
10 alternatives analyzed in detail] would be similar to the proposed
11 alternative insofar as neither . . . would downgrade or remove
12 northern spotted owl habitat," the similarities did not extend to
13 the Project's purpose of promoting forest health. (Def. Opp'n
14 9:18-19; 10:20-21) (emphasis added).

15 The Forest Service provided a reasoned explanation for
16 its conclusion that Plaintiff's alternative did not meet the
17 Project's purpose of promoting forest health since it would not
18 alleviate inter-tree stress, which causes stress-induced tree
19 mortality. (PAR 99-100.) Its conclusion is reasonable even though
20 the alternative was "very similar" to alternatives that met the
21 Project's purpose and need, since their similarity only concerned
22 their "effects to [northern spotted owl] habitat" and the Forest
23 Service's reasons for determining Plaintiff's alternative did not
24 meet the Project's purpose and need are unrelated to its effects
25 on northern spotted owl habitat. (PAR 100.) For these reasons,
26 NEPA did not require the Forest Service to consider the
27 alternative in further detail. Westlands Water Dist., 376 F.3d at
28 868 (agency need not consider alternatives "beyond those

1 reasonably related to the purposes of the project.”).

2 Therefore, the Forest Service’s motion on this claim is
3 granted and Plaintiff’s motion is denied.

4 **b. Inconsistent Reasoning**

5 Plaintiff argues that because the Forest Service
6 decided at an earlier date not to log northern spotted owl
7 habitat in other parts of the forest, it now cannot reject an
8 alternative that would prevent logging in northern spotted owl
9 habitat in the Project area. (Pl. Mot. 24:18-23; 22:22-24:5.)
10 Specifically, Plaintiff argues the Forest Service previously
11 considered logging northern spotted owl habitat in a part of the
12 forest referred to as the Porcupine Late Successional Reserve
13 (“LSR”), but ultimately decided against logging there and, as a
14 result, the Forest Service cannot now log northern spotted owl
15 habitat in the Project area without further explanation. (Pl.
16 Mot. 24:2-5.)

17 The Forest Service contends Plaintiff’s focus on the
18 LSR is a red herring because of the geographic differences
19 between the Project area and the LSR. (Fed. Def.’s Reply Supp.
20 Def.’s Mot. Summ. J. (“Def. Reply”) 7:15-18, ECF No. 30.)

21 “In order to balance environmental and economic needs,
22 the [Forest Service] designates certain forest areas for logging
23 and reserves other areas, called late successional reserves
24 (LSRs), for conservation.” League of Wilderness Defenders Blue
25 Mountains Biodiversity Project v. Allen, 615 F.3d 1122, 1125 (9th
26 Cir. 2010). LSRs are designated areas of forest land that “lie at
27 the heart of the [Forest Service’s] ecosystem-based conservation
28 strategy for the northern spotted owl.” Or. Natural Res. Council

1 Fund v. Brong, 492 F.3d 1120, 1126 (9th Cir. 2007). "The . . .
2 LSR [at issue] was established to maintain the few late-
3 successional stands on the far eastern edge of the Shasta-Trinity
4 National Forest and to help provide for connectivity of habitat
5 for late-successional species, including the northern spotted
6 owl." (PAR 274-275.)

7 The Forest Service previously considered, but decided
8 against logging in the LSR in part because "several public
9 commenters expressed concern." (PAR 61.) The Forest Service
10 explained in its EA in relevant part:

11 Prior to the 2012 EA, a similar project that
12 additionally included the Porcupine Late
13 Successional Reserve (LSR) was considered in
14 a 2009 EA (USDA-FS, 2009a) and decision. The
15 2009 decision was reversed on appeal. The
16 Forest Supervisor opted to defer treatment
17 units within the LSR in the Proposed Action
18 in the 2012 EA and in this revision. No
19 silvicultural or fuels treatments are
20 included in the Porcupine LSR in alternatives
21 considered in detail. While it is recognized
22 that the original purpose and need for Action
23 in the LSR is still valid, actions in the
24 Porcupine LSR may be considered in a future
25 proposal specific to the Porcupine LSR. Road
26 actions in the LSR remain in the action
27 alternatives of this revised analysis."

28 (PAR 44 n.2.)

21 The location of northern spotted owl habitat in the LSR
22 is geographically distinct from the location of northern spotted
23 owl habitat in the Project area. (Compare PAR 2729 (map showing
24 northern spotted owl habitat in the Late Successional Region)
25 with PAR 100 (explaining that northern spotted owl habitat in the
26 Project area is "interspersed").) Specifically, owl habitat in
27 the LSR is contained in a discrete area while habitat in the
28 Project is noncontiguous. (Id.)

1 The geographic distinction, between the LSR and the
2 Project area, combined with the LSR's unique purpose of
3 "maintain[ing] the few late-successional stands on the far
4 eastern edge of the Shasta-Trinity National Forest and to help
5 provide for connectivity of . . . the northern spotted owl," make
6 it reasonable for the Forest Service to reject an alternative
7 that would prevent logging northern spotted owl habitat in the
8 Project area while "defer[ring] treatments . . . within the LSR."
9 (PAR 247-75, 44 n.2.) Therefore, the Forest Service's summary
10 judgment motion on this claim is granted and Plaintiff's motion
11 is denied.

12 **3. Remaining "Reasonable Range of Alternatives"**

13 **Claims**

14 The Forest Service seeks summary judgment on
15 Plaintiff's remaining "reasonable range of alternative" claims,
16 in which Plaintiff alleges the Forest Service "considered only
17 near-identical alternatives" and "prepared an unreasonably narrow
18 purpose and need statement." (Compl. ¶¶ 53, 56.) The Forest
19 Service argues it is entitled to summary judgment on these claims
20 since it considered fourteen alternatives and gave detailed
21 consideration to five, which "span a tremendous range, including
22 numerous permutations of actions and treatment locations;" and
23 therefore, the PAR does not support Plaintiff's claims. (Fed.
24 Def.'s Mot. Summ. J. ("Def. Mot.") 15:7-11; 17:17-18, ECF No.
25 13.)

26 Plaintiff did not address these allegations in the
27 Complaint or respond to the Forest Service's arguments.

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1 The Forest Service prevails on this portion of its
2 motion since it "point[ed] out that there is an absence of
3 evidence to support the nonmoving party's case." Soremekun v.
4 Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007).

5 **C. Failing to Take a "Hard Look" at the Project's**
6 **Environmental Impacts**

7 Plaintiff alleges the Forest Service failed to take a
8 "hard look" at the environmental impacts of the Project. (Compl.
9 ¶ 62.) "The hallmarks of a 'hard look' are thorough investigation
10 into environmental impacts and forthright acknowledgment of
11 potential environmental harms." Nat'l Audubon Soc'y v. Dep't of
12 Navy, 442 F.3d 174, 185 (4th Cir. 2005). "NEPA . . . require[s]
13 that agencies take a 'hard look' at the environmental effects of
14 their planned action." Marsh v. Or. Natural Res. Council, 490
15 U.S. 360, 374 (1989). To satisfy the "hard look" standard
16 "federal agencies must 'carefully consider[] detailed information
17 concerning significant environmental impacts [of the proposed
18 action],' but . . . are not require[d] to do the impractical.'" Klamath-Siskiyou Wildlands Ctr. v. Burea of Land Mgmt., 387 F.3d
19 989, 992-93 (9th Cir. 2004) (alterations in original) (quotations
20 omitted). "The role of the courts is simply to ensure that the
21 agency has adequately considered and disclosed the environmental
22 impact of its actions and that its decision is not arbitrary or
23 capricious." Balt. Gas & Elec. Co. v. Natural Res. Def. Council,
24 462 U.S. 87, 97 (1983).

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1. Snag Baseline Data and Snag Deficits

Plaintiff argues the Forest Service failed to take a "hard look" at whether the number of snags in the Project area met or exceeded the Forest Plan's snag retention standard. (Compl ¶ 62.)

All management activities undertaken by the Forest Service must comply with the [F]orest [P]lan . . . [and the Forest Plan must address how to] maintain viable populations of native and desired non-native wildlife species. In order to ensure compliance with the [F]orest [P]lan . . . the Forest Service must conduct an analysis of each "site specific" action, such as a timber sale, to ensure that the action is consistent with the [F]orest [P]lan.

Rittenhouse, 305 F.3d at 961 (citations omitted).

The Forest Plan for Shasta-Trinity Forest states: at "a minimum, snags are to be retained . . . at levels sufficient to support species of cavity-nesting birds at 40 percent of potential population levels . . . [with] an average of 1.5 snags per acre greater than 15 inches in diameter and 20 feet in height." (PAR 4480) (emphases added.) As part of the EA for the Project, the Forest Service determined:

[a]ll action alternatives [for the Project] retain existing snag treatment units at a level that exceeds the Forest Plan standards and guidelines for matrix lands and that support species of cavity-nesting birds at 40 percent of potential population levels. At a minimum, two snags per acre at least 15 inches in diameter and at least 20 feet in height would be retained and snags will be retained in groups where available.

(PAR 1259.)

Plaintiff argues that the Forest Service relied on "conclusory allegations" when stating the Project will satisfy the Forest Plan snag retention standard, and therefore failed to

1 demonstrate that the agency took a "hard look" at the issue. (Pl.
2 Mot. 28:1-7.) Specifically, Plaintiff contends the Forest Service
3 did not disclose the data on which it relied in reaching its
4 conclusion and did not address conflicting 2003 survey results.

5 The Forest Service contends it disclosed data in the EA
6 supporting its conclusion that the Forest Plan snag retention
7 standard was being met and that it was not required to address
8 prior conflicting survey results since those results had "been
9 superseded by more recent and more site-specific evaluations."
10 (Def. Opp'n 15:4-9; 16:10-13; 19:6-20.)

11 The PAR reveals that the Forest Service has conducted
12 several analyses of snag levels in the Forest; relevant here are
13 analyses conducted in 2003 and 2011. The 2003 analysis concluded:
14 "[c]urrent snag levels in the watershed are unknown. Snag
15 distribution is not uniform across the landscape (Snag
16 distribution may be correlated with landtype associations). Snag
17 surveys for existing and past projects . . . indicate that snag
18 levels are lower than Forest Plan minimums." (PAR 4070.) The 2011
19 analysis observed: "snag... habitat continues to increase over
20 time as a result of wildfire events and insect and disease
21 outbreak" and determined that the Project's "[p]roposed treatment
22 units have at least two snags per acre greater than 15 inches dbh
23 [diameter at breast height] . . . [b]ased on unit assessment[s]
24 [conducted] in October 2011." (PAR 1259, 1261.)

25 The Forest Service concluded based on the 2011 survey
26 data that the Project would not reduce snag levels below the
27 Forest Plan snag retention standard, stating:

28 [it] would not reduce the amount of snag...
 habitat at the Forest level (or project

1 level). The extent of reduced snag density is
2 negligible considering that ongoing snag ...
3 recruitment from insect and disease activity
4 would continue across the Forest. Natural
5 recruitment will also continue within the
6 project area, only at slower rates than what
7 is currently occurring.

8 (PAR 1261.)

9 Further, the Forest Service opined:

10 [the Project will] retain all snags 15 inches
11 in diameter and larger and at least 20 feet
12 in height . . . with the following [two]
13 exceptions: . . . If more than 10 snags exist
14 in a group (snag pocket) retain at least 10.
15 Snags in excess of 10 in snag pockets in the
16 coarse woody debris deficit units may be
17 felled and left only as necessary to meet
18 large woody material requirements for Soil
19 Quality Standards. . . . [and] Hazardous
20 snags (snags that pose a threat to life or
21 property) may be cut, as necessary for
22 safety.

23 (PAR 77.)

24 The Forest Service's analysis of the 2011 survey data
25 shows it took a "hard look" at snag levels. The Forest Service
26 sufficiently disclosed the data on which it relied, stating:
27 "[p]roposed treatment units have at least two snags per acre
28 greater than 15 inches dbh [b]ased on unit assessment[s]
[performed] in October 2011." (PAR 1259.) Further, it was
reasonable for the Forest Service to conclude that snag levels
exceeded the Forest Plan snag retention standard since its most
recent 2011 survey data showed snag levels increased over time
and exceeded the Forest Plan snag retention standard. (PAR 1259,
1261.) It was also reasonable for the Forest Service to conclude
that implementing the Project would not cause snag levels to fall
below the Forest Plan snag retention standard since insect and

1 disease activity continue to recruit new snags and the Project
2 will not log existing snags except where they occur in groups of
3 ten or more or where a snag poses a threat to life or property.
4 (PAR 1261, 77.)

5 The data and conclusions in the EA demonstrate the
6 Forest Service "carefully consider[ed] detailed information
7 concerning significant environmental impacts" of the Project on
8 snag levels. Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 992
9 (quotations omitted). Therefore, the Forest Service's motion on
10 this claim is granted and Plaintiff's motion is denied.

11 **2. Remaining "Hard Look" Claims**

12 Plaintiff's remaining "hard look" claims allege the
13 Forest Service did not "adequately analyze":

14 (A) the potential for wildfire in the project
15 area as a result of logging; (B) northern
16 spotted owl use of burned forests of all
17 severities; (C) degradation of existing and
18 future northern spotted owl habitat; (D)
19 effects to northern spotted owl prey; (E)
20 barred owls and their effects on the northern
21 spotted owl; (F) the effects of regeneration
22 logging on fire behavior; (G) the effects of
23 wildfire, vegetation, and natural recovery
24 process from logging large diameter trees;
25 (H) the past, present, and reasonably
26 foreseeable cumulative impacts; . . . [and]
27 (J) landings.

28 (Compl. ¶ 62.)

29 The Forest Service argues it is entitled to summary
30 judgment on Plaintiff's remaining "hard look" claims since the
31 "EA and its Appendices span over 500 pages," "rest[] upon dozens
32 of individual specialists' reports spanning thousands of more
33 pages" and do not support Plaintiff's allegations. (Def. Mot.
34 21:27-22:1; 22:1-5.) Plaintiff has not addressed the Forest
35 Service's argument.

1 The Forest Service's motion is granted since it
2 "point[ed] out that there is an absence of evidence to support
3 the [Plaintiff's] case" and Plaintiff failed to come forward with
4 "specific facts showing there is a genuine issue for trial."
5 Soremekun, 509 F.3d at 984.

6 **D. Failing to Comply with the Forest Plan's**
7 **Snag Retention Standard**

8 Plaintiff argues the Forest Service violated the NFMA
9 by failing to ensure the Project satisfied the Forest Plan snag
10 retention standard. (Pl. Mot. 35:10-21.) The Forest Service
11 contends its analysis was sufficient. (Def. Opp'n 23:22-24.)

12 "It is well-settled that the Forest Service's failure
13 to comply with the provisions of a Forest Plan is a violation of
14 NFMA" and for an agency action to comply with the NFMA, a
15 reviewing court must be "[able to determine from the
16 [administrative] record that the agency is complying with the
17 forest plan standard[s]." Native Ecosystems Council v. U.S.
18 Forest Serv., 418 F.3d 953, 961-62 (9th Cir. 2005).

19 The Forest Service has shown it complied with the
20 Forest Plan snag retention standard and that it "articulate[d] a
21 rational connection between the facts found and the conclusions
22 reached." Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147,
23 1157 (9th Cir. 2006) abrogated on other grounds by Winter v.
24 Natural Res. Council, Inc., 555 U.S. 7 (2008). Therefore, the
25 Forest Service's summary judgment motion on the NFMA claim is
26 granted and Plaintiff's motion is denied.

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1 **E. Failing to Prepare an Environmental**
2 **Impact Statement ("EIS")**

3 Plaintiff alleges the Forest Service violated NEPA by
4 failing to prepare an EIS for the Project. (Compl. ¶¶ 70-71.)

5 In 42 U.S.C. § 4332(2)(C), NEPA requires that all
6 federal agencies must include "a detailed statement . . . on the
7 environmental impact of the proposed action" "in every . . .
8 major Federal action[] significantly affecting the quality of the
9 human environment." (emphasis added). "Where an EIS is not
10 categorically required, the agency must prepare an Environmental
11 Assessment to determine whether the environmental impact is
12 significant enough to warrant an EIS." Ocean Advocates v. U.S.
13 Army Corps of Eng'rs, 402 F.3d 846 864 (9th Cir. 2004). If, after
14 preparing an EA, the agency concludes an EIS is not required, it
15 must put forth "a convincing statement of reasons that explain[s]
16 why the project will impact the environment no more than
17 insignificantly." Id. "An agency's decision not to prepare an EIS
18 will be considered unreasonable if the agency fails to 'supply a
19 convincing statement of reasons why potential effects are
20 insignificant.'" Save the Yaak Comm. v. Block, 840 F.2d 714, 717
21 (9th Cir. 1988) (quoting The Steamboaters v. FERC, 759 F.2d 1382,
22 1393 (9th Cir. 1985)).

23 The term "significantly" is explained in 40 C.F.R. §
24 1508.27 as requiring consideration of the intensity of the
25 proposed action's impact. 40 C.F.R. § 1508.27(b)(1)-(10)
26 identifies "intensity factors" an agency must consider when
27 evaluating a Project's impact, including inter alia:

28 (5) the degree to which the possible effects
 on the human environmental are highly

1 uncertain or involve unique or unknown risks;
2 . . . and (9) "the degree to which the action
3 may affect an endangered or threatened
4 species or its habitat that has been
5 determined to be critical under the
6 Endangered Species Act of 1973.

7 An EIS is not required each time an "intensity factor"
8 is implicated; instead it is only required if the "degree to
9 which an action may adversely affect" one of the intensity
10 factors is significant. Env't'l Prot. Info. Ctr. v. U.S. Forest
11 Serv., 451 F.3d 1005, 1012 (9th Cir. 2006).

12 The Forest Service considered the "intensity factors"
13 in the EA and concluded that "an environmental impact statement
14 will not be prepared" because the Project "will not have a
15 significant effect on the quality of the human environment,
16 considering the . . . intensity of impact[]." (PAR 25.)

17 **1. Significant Effects on the Northern Spotted Owl**

18 Plaintiff argues NEPA required the Forest Service to
19 prepare an EIS for the Project since it will have a significant
20 impact on northern spotted owls by logging "within . . . critical
21 [northern spotted owl] habitat." (Pl. Mot. 31:5-9.)

22 The Forest Service responds that the Project will not
23 have a significant impact on critical owl habitat since the
24 Project will improve treated foraging and dispersal habitat and
25 "any impact the Project[] . . . [is] expected to have on northern
26 spotted owl habitat [is] . . . predicted to be beneficial over
27 the long-term even though in the short-term, there would be some
28 habitat elements reduced." (Def. Opp'n 22:9-24.)

 The Forest Service addressed the Project's impact on
northern spotted owl habitat in the EA, stating in relevant part:

1 Approximately 137 acres of foraging
2 habitat..., 23 acres of dispersal habitat...,
3 and 41 acres of capable habitat . . . are
4 proposed for treatment Given that: 1)
5 treatments are not proposed within
6 nesting/roosting habitat or high-quality
7 foraging habitat and, 2) treatments within
8 137 acres of foraging habitat will not remove
9 primary constituent elements of critical
10 habitat because they have been designed to
11 retain the current function of foraging
12 habitat following treatment, and 3)
13 treatments in dispersal and capable habitat
14 will not significantly affect [northern
15 spotted owl] dispersal through the [P]roject
16 area, the [Forest] Service determines that
17 the Project may affect, but is not likely to
18 adversely affect designated critical habitat
19 in the action area.

20 (PAR 371.)

21 The Forest Service adequately explained that the
22 Project will not have a significant impact on northern spotted
23 owl habitat since it will not log in areas that serve as
24 "nesting/roosting habitat or high-quality foraging habitat," and
25 that in the areas where the Project intersects northern spotted
26 owl foraging and dispersal habitat, the logging will not
27 interfere with the owl's use of the land. (PAR 371.) This
28 provides "a convincing statement of reasons explaining why the
29 project will impact [the spotted owls critical habitat] no more
30 than insignificantly," even though it proposes logging in 201
31 acres of northern spotted owl habitat. Ocean Advocates, 402 F.3d
32 at 864. Since the Forest Service's conclusion that the Project
33 would not have a significant impact on critical owl habitat was
34 not arbitrary or capricious, no EIS was required. Therefore, the
35 Forest Service's motion on this claim is granted and Plaintiff's
36 motion is denied.

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1 **2. Highly Uncertain or Unknown Risks to Northern**
2 **Spotted Owls**

3 Plaintiff additionally argues an EIS was required since
4 the Project aims to support northern spotted owls by reducing the
5 risk of wildfire yet, "there is significant uncertainty as to
6 whether [the prevention of wildfire] . . . is beneficial or
7 adverse to the northern spotted owl." (Pl. Mot. 31:21-32:2.)

8 The Forest Service acknowledges "some uncertainty as to
9 the extent to which northern spotted owls used burned forest to
10 forage" but argues "the effects of the Project as a whole . . .
11 are [not] highly uncertain" since "[t]here is no serious
12 uncertainty that . . . the loss of nesting and roosting habitat
13 from catastrophic wildfire remains among the primary threats to
14 the survival of the owl." (Def. Reply 12:22-13:7.)

15 The "scientific uncertainty" concerning northern
16 spotted owls' use burned habitat is addressed in the EA where the
17 Forest Service states in relevant part:

18 While it has been shown that California
19 spotted owls show an apparent preference for
20 foraging in burned areas of all severities
21 (Bond, et al., 2009) the author attributed
22 the majority of these results to the
23 likelihood that post-burn use by owls is
24 associated with an "increased abundance or
25 accessibility of prey." The . . . study also
26 noted that while California spotted owls
27 foraged in all burn severity areas (and may
28 have preferred high-severity burn areas) they
avoided high and moderate severity areas for
roosting, and presumable nesting.

(PAR 143.)

 The Forest Service states in the PAR that this research
calls into question conventional wisdom that northern spotted
owls do not prefer high-severity burn areas for foraging, but

1 does not suggest the owls prefer high-severity burn areas for
2 roosting. (PAR 143.) The distinction is important because the
3 Revised Recovery Plan for the northern spotted owl states that
4 one of "the most important . . . threats to [the species is] ...
5 habitat loss or degradation from [high-severity] stand replacing
6 wildfire." (PAR 27416) (emphasis added.) Stand replacing wildfire
7 "reset[s] [northern spotted owl habitat] to an early-seral stage
8 with small tree size and large openings that would be unsuitable
9 for [northern spotted owl] nesting, roosting, foraging and
10 dispersal." (PAR 143.) Plaintiff offers no evidence to refute
11 this.

12 Scientific controversy over whether northern spotted
13 owls prefer to use severely burned forests is not relevant to the
14 question whether wildfire's overall effect on the northern
15 spotted owl is highly uncertain since stand replacing wildfire
16 "reset[s]" the Forest and produces habitat containing "small tree
17 size and large openings that would be unsuitable" for the
18 northern spotted owl. (PAR 143.) These stand replacing fires
19 eliminate rather than create new northern spotted owl habitat and
20 the Project is designed to "reduc[e] the risk of [just such]
21 catastrophic fire[s]." (PAR 370.) Since uncertainty over whether
22 northern spotted owls prefer to forage in burned habitat does not
23 raise concerns as to whether the Project's overall effect on the
24 owls would be highly uncertain, no EIS was required. Barnes v.
25 U.S. Dep't of Transp., 655 F.3d 1124, 1140 (9th Cir. 2011) ("An
26 agency must generally prepare an EIS if the environmental effects
27 of a proposed agency action are highly uncertain").

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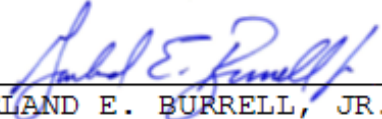
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Therefore, the Forest Service's motion is granted and Plaintiff's motion is denied.

IV. Conclusion

For the stated reasons, Plaintiff's summary judgment motion is DENIED and the Forest Service's summary judgment motion is GRANTED. The Clerk of the Court shall enter judgment in favor of the Forest Service and close this action.

Dated: March 20, 2015



GARLAND E. BURRELL, JR.
Senior United States District Judge