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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS,

Plaintiff,

v.

UNITED STATES FOREST SERVICE,

Defendant.

No. 2:18-cv-01694-JAM-DMC

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

On June 9, 2018, Plaintiff Conservation Congress filed a complaint against Defendant United States Forest Service ("the Forest Service"), alleging that the Service violated the Administrative Procedures Act, National Environmental Policy Act, and the National Forest Management Act. See Compl., ECF No. 1. The parties filed cross-motions for summary judgment and reply briefs. See Pl.'s Mot. Summ. J., ECF No. 19; Def.'s Mot. Summ. J., ECF No. 33; Pl.'s Reply, ECF No. 34; Def.'s Reply, ECF No. 35. For the reasons set forth below, the Court DENIES Conservation Congress's Motion for Summary Judgment and GRANTS the Forest Service's Motion for Summary Judgment.¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for March 19, 2019.

1 I. FACTUAL AND PROCEDURAL BACKGROUND

2 A. The Lassen 15 Project

3 The Lassen 15 Restoration Project ("the Lassen 15 Project")
4 is planned for the Lassen Creek area of the Modoc National
5 Forest. LC15_000001. It is comprised of 8,004 acres of
6 treatment areas within the approximately 25,000 acres of analysis
7 area. Id. The Modoc National Forest Land and Resource
8 Management Plan, amended by the Sierra Nevada Forest Plan
9 Amendment, contains the standards and guidelines with which the
10 Lassen 15 Project must comply. Id.

11 The primary objective of the Lassen 15 Project is to address
12 forest health concerns, including the risk of insect infestation,
13 disease, and wildfire in the dense, homogeneous conifer forest.
14 LC15_000002. The Lassen 15 Project calls for 7,002 acres of
15 vegetation treatments, including thinning and fuel break
16 treatments; prescribed fire of 6,146 acres to be implemented over
17 10 to 15 years; and several miles of temporary roads, to be
18 decommissioned after use. LC15_000003. The Project also
19 involves tree planting of 90 acres at the rate of 200 trees per
20 acre and stream restoration to restore aquatic conditions.
21 LC15_000035. Implementation of the Lassen 15 Project was
22 scheduled for 2018 to 2024. LC15_000011.

23 In the no action alternative, "no harvesting, tree planting,
24 or other restoration actions" would occur; however, "[o]ngoing
25 management practices such as limited road maintenance, fire
26 suppression, and livestock grazing would continue[.]"
27 LC15_000041.

28 After considering ten factors identified in 40 C.F.R.

1 § 1508.27(b), Forest Supervisor Amanda McAdams issued a Finding
2 of No Significant Impact ("FONSI") for the Lassen 15 Project on
3 May 21, 2018. LC15_000001. The FONSI followed a revised final
4 Environmental Assessment, made available in August 2017,
5 LC15_000005, in which the Forest Service weighed the impacts of
6 implementing the Project against a no action alternative.
7 LC15_000001. Conservation Congress was one of three objectors to
8 the initial final Environmental Assessment. LC15_000005.

9 B. The Joseph Creek Project

10 The Joseph Creek Forest Health Project ("the Joseph Creek
11 Project") is planned within the Warner Mountain Ranger District
12 of the Modoc National Forest. JC_000011. It is comprised of
13 approximately 2,800 acres. Id. Like the Lassen 15 Project, the
14 Joseph Creek Project is governed by the standards and regulations
15 in the Modoc National Forest Land and Resource Management Plan,
16 amended by the Sierra Nevada Forest Plan Amendment. Id.

17 The Joseph Creek Project seeks to remedy the above average
18 stocking levels in the area and the tree mortality attributed to
19 bark beetles, Heterobasidion root disease, and dwarf mistletoe.
20 Id. The Project will remove dead trees and thin areas of live
21 trees to meet desired stocking levels. JC_000012-13.

22 The Joseph Creek Project was approved pursuant to a decision
23 memorandum signed by Forest Supervisor Amanda McAdams on March
24 16, 2018. JC_000019. The Forest Service seeks to carry out the
25 Joseph Creek Project pursuant to the authority granted in Section
26 8204 of the Agricultural Act of 2014, Pub. L. No. 113-79.
27 JC_002512.

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1 II. OPINION

2 A. Legal Standard

3 1. The National Environmental Policy Act

4 The National Environmental Policy Act ("NEPA") "is a
5 procedural statute that requires the federal government to
6 carefully consider the impacts of and alternatives to major
7 environmental decisions." Native Ecosystems Council v. Weldon,
8 697 F.3d 1043, 1051-52 (9th Cir. 2012) (citing 42 U.S.C.
9 §§ 4321, 4331). NEPA does not mandate specific results, but
10 instead requires agencies take a "hard look" at the
11 environmental consequences of their actions and disseminate
12 relevant environmental information to the public. Robertson v.
13 Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). "NEPA
14 is concerned with process alone and merely prohibits uninformed-
15 rather than unwise-agency action." Turtle Island Restoration
16 Network v. United States Dep't of Commerce, 878 F.3d 725, 730
17 (9th Cir. 2017) (internal quotation marks omitted). Judicial
18 review of agency decision-making is "at its most deferential"
19 when reviewing scientific judgments and technical analyses
20 within the agency's expertise. N. Plains Res. Council, Inc. v.
21 Surface Transp. Bd., 668 F.3d 1067, 1075 (9th Cir. 2011)
22 (quoting Balt. Gas & Elec. Co. v. Natural Res. Def. Council,
23 Inc., 462 U.S. 87, 103 (1983)).

24 2. Administrative Procedure Act

25 The Court reviews an agency's NEPA compliance under the
26 Administrative Procedure Act ("the APA"). Churchill Cty. v.
27 Norton, 276 F.3d 1060, 1071 (9th Cir. 2001), opinion amended on
28 denial of reh'g, 282 F.3d 1055 (9th Cir. 2002). The APA

1 "empowers federal courts to 'hold unlawful and set aside agency
2 action, findings, and conclusions' if they fail to conform with
3 any of six specified standards." Marsh v. Oregon Nat. Res.
4 Council, 490 U.S. 360, 375 (1989) (quoting 5 U.S.C. § 706).
5 Courts set aside agency actions that are "arbitrary, capricious,
6 an abuse of discretion, or otherwise not in accordance with
7 law." 5 U.S.C. § 706(2) (A).

8 "Judicial review of an agency decision typically focuses on
9 the administrative record in existence at the time of the
10 decision and does not encompass any part of the record that is
11 made initially in the reviewing court." Sw. Ctr. for Biological
12 Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir.
13 1996). This "highly deferential" review of the administrative
14 record affirms an agency action if there is a rational basis for
15 the decision. Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.,
16 475 F.3d 1136, 1140 (9th Cir. 2007). The Court may not
17 substitute its judgment for that of the agency. Id.

18 3. The National Forest Management Act

19 The National Forest Management Act ("the NFMA") "directs
20 the Forest Service to develop a comprehensive land and resource
21 management plan ('Forest Plan') for each unit in the national
22 forest system." Great Old Broads for Wilderness v. Kimbell, 709
23 F.3d 836, 849-50 (9th Cir. 2013) (citing 16 U.S.C. § 1604(a)).
24 Forest Plans "manage forest resources by balancing the
25 consideration of environmental and economic factors," furthering
26 the NFMA's purpose of "provid[ing] for diversity of plant and
27 animal communities" in forest management. Native Ecosystems
28 Council v. Weldon, 697 F.3d 1043, 1056 (9th Cir. 2012); 16

1 U.S.C. § 1604(g) (3) (B). After the Forest Service adopts a
2 Forest Plan, the "NFMA prohibits any site-specific activities
3 that are inconsistent with the Forest Plan." Lands Council v.
4 Powell, 395 F.3d 1019, 1033 (9th Cir. 2005). Courts accord
5 substantial deference to the Forest Service's interpretation and
6 implementation of its Forest Plan. Weldon, 697 F.3d at 1056.

7 B. Evidentiary Objections

8 "In general, a court reviewing agency action under the APA
9 must limit its review to the administrative record." San Luis &
10 Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 992 (9th Cir.
11 2014). There are three narrow exceptions to this rule. Id.
12 Reviewing courts "may consider extra-record evidence where
13 admission of that evidence (1) is necessary to determine whether
14 the agency has considered all relevant factors and has explained
15 its decision, (2) is necessary to determine whether the agency
16 has relied on documents not in the record, (3) when
17 supplementing the record is necessary to explain technical terms
18 or complex subject matter, or (4) when plaintiffs make a showing
19 of agency bad faith." Id. at 992-93 (internal quotation marks
20 omitted).

21 Conservation Congress has objected to the Forest Service's
22 inclusion of a declaration from Forestry Technician Traci Silva.
23 See Silva Decl., ECF No. 33-1. The Forest Service submitted
24 this declaration to explain the difference and distinction
25 between the Lassen 15 Project and the Joseph Creek Project. See
26 Def.'s Mem. at 13 n.2. Clarification regarding the nature of
27 Conservation Congress's claims renders this declaration
28 unnecessary. See Def.'s Reply at 3-4. The Court will not

1 consider the Silva Declaration or other materials outside of the
2 administrative record.

3 C. Analysis

4 1. Conservation Congress Has Abandoned Three Claims

5 Conservation Congress's Complaint lists seven claims. The
6 Forest Service argues in its Motion for Summary Judgment that
7 Conservation Congress has abandoned its second, third, and
8 fourth claims. Those claims alleged that the Forest Service
9 violated NEPA, the NFMA, and the APA by failing to take a hard
10 look at the environmental impacts of the Lassen 15 Restoration
11 Project (second claim); failing to adequately analyze and
12 disclose the mitigation measures for the Lassen 15 Restoration
13 Project (third claim); and failing to comply with the Sierra
14 Nevada National Forest Plan Amendment for American (Pine) Marten
15 (fourth claim). Conservation Congress does not present any
16 arguments on or acknowledgements of these claims in its summary
17 judgment briefing. It also fails to address the Forest
18 Service's argument that it has abandoned the three claims. The
19 Court finds that Conservation Congress's second, third, and
20 fourth claims have been abandoned and summary judgment on these
21 claims in favor of the Forest Service is granted. See Native
22 Ecosystems Council v. Weldon, 697 F.3d 1043, 1050 (9th Cir.
23 2012).

24 Conservation Congress's four remaining claims allege that
25 the Forest Service violated NEPA and the APA: (1) by failing to
26 adequately analyze and disclose the cumulative effects of the
27 Lassen 15 Restoration Project (first claim); (2) by using a
28 Categorical Exclusion where extraordinary circumstances required

1 preparation of an Environmental Assessment (fifth claim); (3) by
2 failing to adequately or accurately evaluate and disclose the
3 cumulative effects of the Joseph Creek Project in relation to
4 other projects, including the adjacent Lassen 15 Project (sixth
5 claim); and (4) by violating the NFMA Standards and Guidelines
6 for Minimum Proportions of Seral Stages and for Average Snag
7 Densities (seventh claim). Compl. at 10-20.

8 2. First Claim: Cumulative Effects of Grazing on the
9 Lassen 15 Project

10 Conservation Congress's first claim asserts that the Forest
11 Service violated NEPA by failing to take a hard look at the
12 baseline and cumulative impacts of grazing on the Lassen 15
13 Project. Compl. at 10-12. Conservation Congress argues that
14 the Forest Service did not "provide a meaningful description of
15 the baseline through past and ongoing impacts of cattle grazing
16 in the project area." Opp'n Mem. at 13.

17 This argument lacks merit. The Forest Service adequately
18 evaluated the cumulative effects of grazing in the Lassen 15
19 Project area. For example, the Environmental Assessment
20 discusses how free-range cattle and sheep began grazing in the
21 area in the late 1800s. LC15_000080. It discusses how seasonal
22 grazing in the area is on a rotation system from May to
23 September and notes that most of the area is subject to light
24 livestock use and is in satisfactory condition. LC15_000124.
25 While some of the existing grazing is moderate or heavy in key
26 riparian areas, the Forest Service found that the Lassen 15
27 Project would not contribute to the problem. Id. Rather, the
28 Environmental Assessment anticipates that the Project may reduce

1 the number of cattle in riparian areas by improving grazing
2 distribution patterns in the uplands. LC15_000163-64. Although
3 the present grazing activities could have adverse effects on the
4 Lassen 15 Project's newly planted conifer seedlings, the
5 Environmental Assessment finds these impacts will be mitigated
6 by the planting in areas that have low forage use for cattle.
7 LC15_000066.

8 Outside of the Environmental Assessment itself, the Forest
9 Service reviewed the impact of grazing in the Revised Range
10 Resource Specialist Report for Lassen 15 Restoration Project,
11 LC15_001316-41, and in the reports considering the impact of the
12 Project on aquatic species, LC15_000872; fuels, LC15_000988,
13 LC15_001017-18; heritage, LC15_001132; hydrology, LC15_001193,
14 LC15_001196; roads, LC15_001430; soils, LC15_001553; and
15 wildlife, LC15_001595-001603. The Ninth Circuit has found
16 similar grazing analysis to be sufficient for an Environmental
17 Impact Statement, which requires more stringent analysis. See
18 League of Wilderness Defs.-Blue Mountains Biodiversity Project
19 v. U.S. Forest Serv., 549 F.3d 1211, 1220 (9th Cir. 2008). The
20 Forest Service's assessment of the cumulative effects of grazing
21 on the Lassen 15 Project fully satisfies NEPA's "hard look"
22 requirement. Cf. WildEarth Guardians v. Provencio, 923 F.3d 655
23 (9th Cir. 2019) ("[A]lthough Plaintiffs disagree with the EAs'
24 factual conclusions, the Forest Service nonetheless considered
25 the issues, gave them the requisite 'hard look,' and thus
26 fulfilled their NEPA obligations.").

27 Many of Conservation Congress's arguments focus on the
28 negative impacts of preexisting grazing activity on riparian

1 areas, and what it views to be insufficient baseline
2 information. See Opp'n Mem. at 14-15. The Forest Service
3 identifies creeks that have been impacted by grazing as part of
4 the existing conditions baseline. LC15_001185, LC15_001193.
5 Conservation Congress seeks a level of specificity and detail
6 that statute and regulations do not require.

7 Some of the detail Conservation Congress seeks pertains to
8 future conditions and grazing patterns. It takes issue with the
9 Forest Service's assessment that improving grazing distribution
10 patterns in the uplands would potentially decrease grazing in
11 riparian areas, LC15_000163-64, while simultaneously noting that
12 livestock have an affinity for meadows and streams, LC15_000097.
13 These statements are not inherently contradictory. Rather, the
14 Forest Service has provided information about the possible
15 consequences of future actions, without wading into the murky
16 waters of speculation. NEPA does not require the Forest Service
17 become an oracle, predicting exactly which variable outcome will
18 flow from its proposed action.

19 The Forest Service has elucidated the possible impacts of
20 the Lassen 15 Project, in conjunction with the cumulative
21 effects of grazing, with a sufficient degree of detail. The
22 Lassen 15 Project Environmental Assessment is not arbitrary,
23 capricious, an abuse of discretion, or otherwise not in
24 accordance with the law. 5 U.S.C. § 706(2). The Court grants
25 summary judgment in favor of the Forest Service and against
26 Conservation Congress on Conservation Congress's first claim.

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1 3. Fifth Claim: Extraordinary Circumstances and the
2 Joseph Creek Project's Categorical Exclusion

3 Conservation Congress's fifth claim asserts that the Forest
4 Service violated NEPA by failing to consider extraordinary
5 circumstances that preclude the use of categorical exclusion for
6 the Joseph Creek project. Compl. at 16-17. The main issue
7 raised here is whether "extraordinary circumstances review,"
8 required for categorical exclusion under NEPA regulations,
9 applies to categorical exclusions permitted by the Health Forest
10 Restoration Act, 16 U.S.C. § 6591 et seq.

11 Five years ago, Congress amended the Healthy Forests
12 Restoration Act of 2003 to add a new type of categorical
13 exclusion for projects that address qualifying insect and
14 disease infestations on National Forest System lands. 16 U.S.C.
15 § 6591a, et al. (hereinafter, "Farm Bill Amendment"). This
16 statutory categorical exclusion contains different requirements
17 and limitations from the categorical exclusion contained in
18 NEPA's implementing regulations. Compare 16 U.S.C. § 6591b with
19 40 C.F.R. § 1508.4. To claim categorical exclusion under NEPA's
20 regulations, the agency must "provide for extraordinary
21 circumstances in which a normally excluded action may have a
22 significant environmental effect." 40 C.F.R. § 1508.4.
23 Conservation Congress argues that this requirement similarly
24 applies to categorical exclusion under the Health Forest
25 Restoration Act.

26 The parties provided the Court with prior cases on this
27 issue that reached different conclusions. See Native Ecosystem
28 Council v. Marten, No. 17-153-M-DWM, 2018 WL 6046472 (D. Mont.

1 Nov. 19, 2018); Greater Hells Canyon Council v. Stein, No. 2:17-
2 CV-00843-SU, 2018 WL 3966289, at *8 (D. Or. June 11, 2018),
3 report and recommendation adopted, No. 2:17-CV-00843-SU, 2018 WL
4 3964801 (D. Or. Aug. 17, 2018); Ctr. for Biological Diversity v.
5 Ilano, 261 F. Supp. 3d 1063, 1068-69 (E.D. Cal. 2017). After
6 reviewing these nonbinding opinions, the Court finds that Stein,
7 and Marten which adopted Stein's reasoning, provide a more
8 thorough and better reasoned analysis than the assumption in
9 Ilano. See Ilano, 261 F. Supp. 3d at 1069 (“[T]his ruling will
10 assume for purposes of analysis that [extraordinary
11 circumstances] review was indeed required”).

12 Stein reviewed the plain language of the Farm Bill
13 Amendment and NEPA's implementing regulations. 2018 WL 3966289,
14 at *8 (noting the Supreme Court's direction to “ordinarily
15 resist reading words or elements into a statute that do not
16 appear on its face.”). The Farm Bill Amendment does not mention
17 extraordinary circumstances review, while NEPA regulations limit
18 extraordinary circumstances review to “procedures under this
19 section” of the Code of Federal Regulations. Compare 16 U.S.C.
20 § 6591b with 40 C.F.R. § 1508.4. The Farm Bill Amendment
21 provides conditions for qualifying projects, § 6591b(b);
22 limitations, § 6591b(c); and exclusions, § 6591b(d). These
23 subsections do not list extraordinary circumstances review as a
24 necessary condition of or limitation for categorical exclusion.
25 Conversely, other sections of the Healthy Forests Restoration
26 Act expressly state a requirement for “extraordinary
27 circumstances procedures” in order for an agency action to
28 qualify for categorical exclusion. 16 U.S.C. § 6554(d). Had

1 Congress intended to impose an extraordinary circumstances
2 requirement on statutory categorical exclusion, presumably the
3 requirement would have been expressly stated as it is in other
4 parts of the Health Forests Restoration Act. See Sandoz Inc. v.
5 Amgen Inc., 137 S. Ct. 1664, 1677 (2017).

6 Accordingly, the Court agrees with the Forest Service's
7 interpretation of section 6591b statutory categorical exclusion.
8 The Forest Service was not required to perform extraordinary
9 circumstances review for a qualifying project under section
10 6591b. The Court grants summary judgment in favor of the Forest
11 Service and against Conservation Congress on Conservation
12 Congress's fifth claim.

13 4. Sixth Claim: Cumulative Effects of the Joseph
14 Creek Project

15 Conservation Congress's sixth claim alleges that the Forest
16 Service violated NEPA by failing to evaluate and disclose the
17 cumulative effects of the Joseph Creek Project in relation to
18 the Lassen 15 Project. Compl. at 17-18.

19 The scope of an environmental impact assessment requires an
20 agency consider "direct," "indirect," and "cumulative" impacts.
21 40 C.F.R. § 1508.25. "By its plain language, however, this
22 regulation applies only to environmental impact statements."
23 Ctr. for Biological Diversity v. Salazar, 706 F.3d 1085, 1096-97
24 (9th Cir. 2013). The Ninth Circuit has determined that "where a
25 proposed action fits within a categorical exclusion, full NEPA
26 analysis is not required." Id. at 1097 (finding that
27 "application of section 1508.25's requirements to categorical
28 exclusions is inconsistent with the efficiencies that the

1 abbreviated categorical exclusion process provides.”).

2 Here, the Forest Service issued the Joseph Creek Project
3 categorical exclusion pursuant to the Farm Bill Amendment, 16
4 U.S.C. § 6591b, rather than NEPA’s regulatory categorical
5 exclusion, 40 C.F.R. § 1508.4. The provisions under which the
6 Forest Service may issue a statutory categorical exclusion does
7 not include a requirement that the documentation include a
8 cumulative effects analysis. Conservation Congress has not
9 provided any sections of the applicable statute that provide
10 otherwise.

11 In the absence of a clear requirement that the Forest
12 Service consider cumulative impacts in statutory categorical
13 exclusion analysis, the Court declines to require such
14 consideration. The Court grants summary judgment in favor of
15 the Forest Service and against Conservation Congress on
16 Conservation Congress’s sixth claim.

17 5. Seventh Claim: Joseph Creek Project’s Consistency
18 with the Forest Plan

19 Conservation Congress’s seventh claim asserts that the
20 Forest Service violated NEPA and the Forest Act because the
21 decision memorandum for the Joseph Creek Project does not contain
22 findings of consistency with the Forest Plan. Compl. at 18-20.
23 Conservation Congress argues that the lack of express findings of
24 consistency with the Forest Plan standards, see 36 C.F.R.
25 § 220.6(f) (4), renders the Forest Service’s determination
26 arbitrary, capricious, or not in accordance with law. Def. Mem.
27 Summ. J., ECF No. 23, p. 24-25.

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1 Here, the Court does not apply the requirements for
2 regulatory categorical exclusions, 36 C.F.R. § 220.6(f)(4), but
3 rather those for statutory categorical exclusions, 16 U.S.C.
4 § 6591b. Regulatory categorical exclusions from NEPA require that
5 decision memoranda include “[f]indings required by other laws
6 such as, but not limited to findings of consistency with the
7 forest land and resource management plan as required by the
8 National Forest Management Act; or a public interest
9 determination.” 36 C.F.R. § 220.6(f)(4). Statutory categorical
10 exclusions under the Farm Bill Amendment do not contain a similar
11 requirement. See 16 U.S.C. § 6591b. Projects “in which
12 activities . . . would be inconsistent with the applicable land
13 and resource management plan,” however, are not covered by the
14 statutory categorical exclusion. 16 U.S.C. § 6591b(d)(4).

15 Conservation Congress’s arguments rely on the requirements
16 for regulatory categorical exclusions. The organization has not
17 argued that the Joseph Creek Project is excluded from statutory
18 categorical exclusion under subsection 6591b(d)(4), and the Court
19 will not rule upon arguments that were not raised. Indeed, even
20 if that argument had been raised, the administrative record does
21 not support a finding of inconsistency. See Joseph Creek R. at
22 JC_000169-70, JC_000201-12, JC_000283-90, JC_000317-23,
23 JC_000330-58, JC_000368-407, JC_000416-24, JC_000427-28.

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1 The Court grants summary judgment in favor of the Forest
2 Service and against Conservation Congress on Conservation
3 Congress's seventh claim.

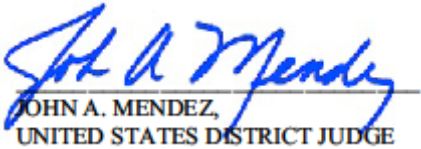
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III. ORDER

For the reasons set forth above, the Court DENIES Conservation Congress's Motion for Summary Judgment and GRANTS the Forest Service's Motion for Summary Judgment.

IT IS SO ORDERED.

Dated: June 4, 2019



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE