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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

I.

INTRODUCTION

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

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

5 II.

6 SUMMARY OF FACTS AND PROCEEDINGS

7 In March 2018, the Forest Service proposed the Tecuya Ridge
8 Shaded Fuelbreak Project. The project provided for the thinning of
9 1,626 acres of forest by cutting down some trees and clearing
10 underbrush. The motivation behind the thinning was to reduce the risk
11 of damage from wildfires and to improve the health of the forest,
12 which was, among other things, susceptible to beetle infestation due
13 to overgrowth and drought. Experts from the Forest Service weighed in
14 on the project and the impact it might have on the forest and its
15 inhabitants, including the California condors. The Forest Service
16 prepared a Biological Assessment and also consulted with experts from
17 the United States Fish and Wildlife Service who agreed that the
18 project was not likely to adversely affect the California condors in
19 the area.

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

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

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

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

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

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

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

11 III.

12 ANALYSIS

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

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

1 A. The Standard of Review

2 The Court reviews the Forest Service's decision to approve the
3 Tecuya Ridge Project under the arbitrary and capricious standard set
4 out in the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Under
5 this standard, the Court is required to affirm the Agency's decision
6 unless Plaintiffs establish that it was arbitrary, capricious, an
7 abuse of discretion, or otherwise not in accordance with the law. 5
8 U.S.C. § 706(2)(A). The Court's review of the Agency's decision is
9 highly deferential, beginning with the presumption that the Agency's
10 decision is valid. *Short Haul Survival Comm. v. United States*, 572
11 F.2d 240, 244 (9th Cir. 1978); *United States Postal Serv. v. Gregory*,
12 534 U.S. 1, 7 (2001).

13 B. Plaintiffs' Request to Supplement the Record

14 Plaintiffs seek to supplement the administrative record with
15 their November 2019 Notice of Intent Letter and two attachments to
16 that letter, the Cogan study and a map showing roosting sites within
17 the project area. They argue that, despite the general rule that the
18 Court is limited to considering only what is in the administrative
19 record, expansion should be allowed in this case for the limited
20 purpose of addressing the Forest Service's reasons for disregarding
21 the telemetry data since Plaintiffs have included a claim under the
22 Endangered Species Act, citing *W. Watersheds Project v. Kraayenbrink*,
23 632 F.3d 472, 497 (9th Cir. 2011). The Forest Service argues that
24 expansion of the record is warranted in only narrow circumstances,
25 none of which applies here, citing, inter alia, *Camp v. Pitts*, 411
26 U.S. 138, 142 (1973) (per curiam), and *Fence Creek Cattle Co. v.*
27 *United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

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

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

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

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

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

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

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

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

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

23 To the extent that the language is ambiguous, the arbitrary and
24 capricious standard applies to the Forest Service's decision that the
25 project falls within categorical exclusion 6. See *Mountain Cmty. For*
26 *Fire Safety v. Elliott*, 2020 WL 2733807, at *5 (C.D. Cal. May 26,
27 2020). The Forest Service need only explain its decision as to why a
28 project fits within the exclusion and, as long as it is clear that it

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

3 The regulation setting out categorical exclusion 6 does not limit
4 the Forest Service to cutting down saplings without machinery.
5 Plaintiffs seem to concede this point but note that the 2014 Forest
6 Service Manual provides that timber stand improvement is limited to
7 cutting down saplings (i.e., less than five inches) and argue that the
8 Forest Service is bound by that limitation when construing the
9 regulations. This argument is rejected. The Forest Service Manual is
10 not part of the regulations and the Service is not limited under the
11 regulations by its Manual. *See W. Radio Servs. Co. v. Espy*, 79 F.3d
12 896, 901 (9th Cir. 1996) (finding Forest Service Manual is an advisory
13 document that "'does not act as a binding limitation on the [Forest]
14 Service's authority'" (quoting *United States v. Doremus*, 888 F.2d
15 630, 633 n.3 (9th Cir. 1989)). The regulation does not limit the size
16 of trees that can be cut down to accomplish stand improvement. Nor
17 does it limit the equipment the Forest Service can use to cut them
18 down. The Court will not read into the regulation limitations that
19 are not there.²

20 Plaintiffs argue that the Forest Service's reliance on
21 categorical exclusion 6 was simply a way to circumvent an injunction
22 on the use of categorical exclusion 10, which covers "[h]azardous
23 fuels reduction activities using . . . mechanical methods for
24

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

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

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

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

24 (Decision Memo at 3-4.)

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

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

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

11 The Forest Service considered the fact that the project would
12 impact the California condor. It determined, however, that because
13 the project was not likely to adversely affect the condors and did not
14 involve critical habitat (as discussed infra) further analysis was not
15 warranted. The Forest Service did not err in doing so. *See, e.g.,*
16 *Conservation Cong. v. United States Forest Serv.*, 2016 WL 1162676, at
17 *3 (E.D. Cal. Mar. 24, 2016) (“[W]hile the [Biological Assessment]
18 reported that the Tatham Project ‘may affect, but is not likely to
19 adversely affect’ the northern spotted owl, the degree of potential
20 effects on the species is low enough that a categorical exclusion [6]
21 is still appropriate.”).

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

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

6 Plaintiffs argue that locating the fuelbreak in the project area
7 is unwise and will not accomplish its goal. They point to experts
8 that support their view. A disagreement between scientists on the
9 efficacy and/or placement of this fuelbreak, however, does not amount
10 to an extraordinary circumstance under the regulations. 36 C.F.R.
11 § 220.6(b).

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

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

18 In their many arguments and numerous claims, Plaintiffs' main
19 complaint boils down to their argument that the Forest Service's
20 decision that the project would not endanger California condors was
21

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

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

9 The record undermines Plaintiffs' argument. To begin with,
10 though the Decision Memo states that condors do not roost in the
11 project area, it also states that they do, albeit infrequently.
12 Further, the record demonstrates that the government's biologists were
13 intimately familiar with the telemetry data and took it into account
14 in analyzing the project's impact on the condors. Even if they had
15 not been familiar with it, Plaintiffs raised their concerns about the
16 condor roosting sites in the project area as evidenced by the
17 telemetry data before the Decision Memo was issued. In a September
18 2018 email, Forest Service personnel, including biologist Lieske,
19 discussed Plaintiffs' concerns based on the telemetry data and
20 confirmed that they had considered it and that it did not cause them
21 to change their recommendations. (AR 4710, Email from Cooper to
22 Thompson and Lieske.) The Forest Service reinforced the fact that it
23 had considered the telemetry data when it responded to Plaintiffs'
24 July 2019 Notice of Intent Letter. (September 2019 Letter From the
25 Forest Service to Plaintiffs.) Finally, government biologists Lieske
26 and Brandt have declared under oath in responding to Plaintiffs'
27 November 2019 Notice of Intent Letter that they were well aware of the

28

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

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

14 The Court need not resolve the dispute over the wording in order
15 to determine whether the Forest Service's decision to approve the
16 project was arbitrary and capricious. The telemetry data itself,
17 which, for the most part, the parties agree on, answers that question.
18 According to the telemetry data, over a five-year period, from
19 December 2013 to December 2018, the 78 tagged condors that inhabit the
20 17,558 square miles of the southern California range roosted for 1,826
21 nights, for a total of 142,428 roosting events (78 condors x 1826
22 nights). Plaintiffs point out that the telemetry data shows that 46
23 of those roosting sites occurred in or near the project area.
24 Forty-six out of 142,428 nights amounts to .032 percent of the roost
25 activity. By any standard, this is a relatively small percentage and
26 is consistent with the Forest Service's finding in the Decision Memo
27 that this roosting was "infrequent." The telemetry data also shows
28 that the condors did not return to these sites, that they did not

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

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

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

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

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

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

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

23
24 ⁴ It seems that Plaintiffs are also arguing that the Forest
25 Service's decision runs counter to the evidence before it. In other
26 words, they believe that the telemetry data and the current science
27 regarding condors contradicts the Forest Service's finding that the
28 project will not likely harm the condors. But the Court is not
empowered or inclined to substitute its judgment for the Forest
Service's. See *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th
Cir. 2008) (en banc) (explaining courts may not substitute their

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

12 VI.

13 CONCLUSION

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

21 IT IS SO ORDERED.

22 DATED: August 20, 2020

23 

24 _____
25 PATRICK J. WALSH
26 UNITED STATES MAGISTRATE JUDGE

27 O:\PJW\ECF Ready\Order MSJs.wpd

28 judgment for an agency's).