

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CONSERVATION CONGRESS,

Plaintiff,

v.

UNITED STATES FOREST SERVICE
and UNITED STATES FISH AND
WILDLIFE SERVICE,

Federal
Defendants, and

TRINITY RIVER LUMBER CO.,

Defendant-
Intervenor.

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

**ORDER GRANTING DEFENDANTS'
MOTION TO STRIKE**

This matter is before the Court on the U.S. Forest Service and U.S. Fish and Wildlife Service's ("Federal Defendants") Motion to Strike a declaration Conservation Congress ("Plaintiff") submitted in support of its Motion for Summary Judgment and three paragraphs in two of Plaintiff's other declarations.¹ (ECF No. 107) For the reasons stated below, this

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing is scheduled for December 13, 2016.

1 Court GRANTS the motion.

3 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

4 Plaintiff filed this lawsuit against Federal Defendants for
5 alleged violations of the National Environmental Policy Act, the
6 National Forest Management Act, and the Endangered Species Act.
7 Specifically, Plaintiff challenges Federal Defendants' decisions
8 with respect to the Smokey Project, a timber sale that will
9 affect a section of the Mendocino National Forest that Northern
10 spotted owls are known to inhabit. Second Amended Complaint, ECF
11 No. 65.

12 On April 5, 2016, this Court heard oral arguments on
13 Plaintiff's Motion for Order Regarding Scope of Review. ECF No.
14 76. Plaintiff sought to supplement the administrative record
15 with extra-record evidence, including a declaration from Tonja
16 Chi. See Exhibit 10 at Rows 11 & 16, ECF No. 76-10. The Court
17 took the motion under submission and ordered the parties to
18 submit supplemental briefing. ECF No. 83. On April 12, 2016,
19 Plaintiff submitted its Statement of Response to Court's April 5,
20 2016 Order in which it stated: "Conservation Congress reviewed
21 the utility of submitting declarations in support of its
22 Endangered Species Act citizen's suit claims against Defendant
23 United States Forest Service. As a result of that review,
24 Conservation Congress has determined that it will no longer
25 request the Court to consider extra-record declarations in this
26 matter." ECF No. 84.

27 Plaintiff filed its Motion for Summary Judgment with four
28 declarations attached. ECF No. 103. It submitted declarations

1 from Denise Boggs, Douglas Bevington, and Ellen Drell in support
2 of Plaintiff's standing. See Mot. for Sum. J. at 8. The fourth
3 declaration is from wildlife biologist Tonja Chi. Plaintiff uses
4 this declaration in support of one of its Endangered Species Act
5 claims. Id. at 29.

6
7 II. OPINION

8 Federal Defendants argue, *inter alia*, that Plaintiff should
9 not be permitted to submit the Chi Declaration because Plaintiff
10 chose not to submit supplemental briefing in response to the
11 Court's April 5th Order. Mot. to Strike at 1. Further,
12 Plaintiff explicitly stated that it would not seek to admit
13 extra-record declarations. Id. Plaintiff contends it "did not
14 previously submit the Chi Declaration to the Court, [because] it
15 is based on events that occurred during the month of July 2016
16 and [] could not have been produced earlier." Mot. for Sum. J.
17 at 29.

18 Given Plaintiff's unequivocal statement that it would not
19 "request the Court to consider extra-record declarations in this
20 matter.", Statement at 2, and Plaintiff's failure to seek leave
21 of Court before filing the Chi Declaration, the Court holds
22 Plaintiff to its prior representation and grants Federal
23 Defendants' request to strike the Chi Declaration.

24 Federal Defendants also move this Court to strike paragraphs
25 11 and 12 from Denise Boggs' Declaration and paragraph 10 from
26 Ellen Drell's Declaration. Mot. to Strike at 5. Plaintiff did
27 not oppose this request. See Plaintiff's Mem. Br. in Opposition
28 to Defendants' Mot. to Strike, ECF No. 113. As such, the Court

1 will also grant the motion with respect to those paragraphs.

3 III. ORDER

4 For the reasons set forth above, the Court GRANTS
5 Defendants' Motion to Strike.

6 Due to the complex nature of this litigation and calendar
7 congestion on the present hearing date, the hearing on the
8 motions for summary judgment, scheduled for December 13, 2016, is
9 vacated. The Court specially sets the hearing on these motions
10 for January 26, 2017, at 10:00 AM.

11 IT IS SO ORDERED.

12 Dated: December 5, 2016

13 
14 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE