

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

NATIVE ECOSYSTEMS COUNCIL,
a non-profit organization, ALLIANCE
FOR THE WILD ROCKIES, a non-
profit organization

Plaintiffs,

vs.

FAYE KRUEGER, in her capacity as
Regional Forester for the United States
Forest Service, Region One, UNITED
STATES FOREST SERVICE, an
agency of the U.S. Department of
Agriculture, and UNITED STATES
FISH & WILDLIFE SERVICE, an
agency of the U.S. Department of
Interior,

Defendants.

CV 13-167-M-DLC

ORDER

FILED

JUN 04 2014

Clerk, U.S. District Court
District Of Montana
Missoula

Before the Court are the parties cross-motions for summary judgment. For the reasons explained the Court grants Defendants' motion and denies Plaintiffs' motion.

BACKGROUND

Plaintiffs challenge the Defendants' approval of the Millie Roadside Hazard Tree Removal Project under the National Environmental Protection Act (NEPA),

42 U.S.C. § 4331, *et seq.*, the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* Plaintiffs seek declaratory and injunctive relief.

The Millie Roadside Hazard Tree Removal Project (“the Project”) authorizes removal of dead or dying trees along 15 miles of existing roads in the Gallatin National Forest. All of the approved tree removal will occur within 150 feet of existing roads. The land surrounding the roads in the project area burned in an approximately 10,000-acre lightning-ignited forest fire in 2012, called the Millie Fire. The area is popular for recreation and is home to “existing high human development and activity.” FS-A-1:1-2. The Project’s objective is to address the “immediate hazard” posed, as a result of the fire, by the existence of dead and dying trees that are predicted to fall or roll on to the roads, thereby disrupting use and potentially endangering users. *Id.* at 1. Tree removal activities are predicted to occur on approximately 300 acres of the burned land alongside the roads, but may affect up to 730 acres. Initially, the Project envisioned an additional 180 acres of salvage logging beyond 150 feet of any existing road, but that portion of the Project has been eliminated and is not authorized by the Forest Service’s decision, a fact that has been repeatedly conceded by Defendants.

Prior to authorizing the Project, the U.S. Forest Service prepared a biological assessment in which it determined that the Project is not likely to

adversely impact any threatened or endangered species or critical habitat.

Through informal consultation, the U.S. Fish and Wildlife Service reviewed the Forest Service's determination and concurred. The Forest Service did not complete an environmental assessment or environmental impact statement in relation to the Project, because it determined that the Project consisted of "road maintenance," which is categorically excluded under NEPA from the requirement to prepare of an environmental impact statement or environmental assessment. The Forest Service did, however, conduct a scoping review of the Project in which it analyzed the potential that extraordinary circumstances precluded application of the categorical exclusion. The Forest Service concluded that extraordinary circumstances did not exist and the Forest Service issued its Decision Memo approving the Project on April 17, 2013.

Plaintiffs timely appealed the Decision Memo and Forest Supervisor Mary Erickson denied the appeal on July 8, 2013. This action followed.

LEGAL STANDARD

A party is entitled to summary judgment if it can demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is warranted where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Only disputes over

facts that might affect the outcome of the lawsuit will preclude entry of summary judgment; factual disputes that are irrelevant or unnecessary to the outcome are not considered. *Id.* at 248.

DISCUSSION

I. Standing

In order to satisfy the case or controversy requirement of Article III, a plaintiff must establish standing to bring a claim. *Summers v. Earth Island Inst.*, 555 U.S. 488, 491 (2009). An organizational plaintiff has standing to sue if its members would have standing to sue in their own right, the “interests at stake are germane to the organization’s purposes,” and the members’ participation is not necessary to the claim or the relief requested. *Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Three elements are essential to member standing: injury in fact, causation, and redressability. An “injury in fact” must be (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical.” *Summers*, 555 U.S. at 493 (citation omitted). An organization must show, through specific facts, Fed. R. Civ. P. 56(e), that at least one member has concrete and personal interests in a specific area of the environment that is affected by the challenged government action and that the member’s interests have been and will be directly harmed by the government action. *Summers*, 555 U.S. at 494–98. Additionally, the injury

must be “fairly traceable to the challenged action” and likely to be redressed by a favorable decision. *Id.*

Defendants contend Plaintiffs lack standing because they have failed to show that they will suffer a concrete injury as a result of Defendants’ approval of the Project. Defendants assert that Plaintiffs’ standing declarations are deficient because “declarants do not show that they have used or will use this tiny portion of the forest,” and thus Plaintiffs’ asserted injury is too general. (Doc. 24 at 12.) Defendants further assert that the declarants fail to establish how damage to the threatened species will produce imminent injury, because declarants have not specifically asserted that they wish to photograph either species, would derive aesthetic benefits from seeing them, or that the Project makes spotting them less likely.

Although Plaintiffs standing in this case is a close call, the Court nevertheless concludes that Plaintiffs standing declarations establish their interest in the preservation and protection of threatened and endangered wildlife species in the Gallatin National Forest as well as the biological integrity of the Gallatin National Forest. Both declarants frequently recreate in the Gallatin National Forest and “derive aesthetic, ecological, conservation, recreational, and professional” benefits from spending time in the Gallatin National Forest. (Doc. 22-4, -5.) Declarants assert that approval of the Project violates the Endangered

Species Act and NEPA and will harm grizzly bears and lynx in the Gallatin National Forest, thus damaging their interest in preserving, protecting, and restoring the Gallatin National Forest and its biological integrity.

While Plaintiffs' declarations could be more specific, the declarations are nevertheless sufficient to establish standing. It is true that the declarants fail to establish that they plan to again use the particular portion of the forest where trees will be removed or that they plan to use it specifically for the purpose of engaging in some way with lynx or grizzly bears.¹ In many ways, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885-890 (1990) and *Lujan v Defenders of Wildlife*, 504 U.S. 555, 562-67 (1992) suggest that these failures require dismissal of Plaintiffs' action for lack of standing. However, Plaintiffs here do not merely allege an injury to their "recreational use and aesthetic enjoyment of federal lands" as in *National Wildlife Federation*, or an injury based on a theory of "ecosystem nexus" as in *Defenders of Wildlife*. In addition, Plaintiffs' injury, unlike the plaintiffs in *Defenders of Wildlife*, does not arise from an alleged failure of the government to regulate "someone else." *Defenders of Wildlife*, 504 U.S. at 562 (emphasis in the original). Plaintiffs assert an injury based on their interest in the preservation and protection of threatened and endangered wildlife species in the Gallatin National

¹ In fact, it is unclear whether Steve Kelly, unlike Sara Jane Johnson, has actually visited the project site.

Forest, an area which both declarants use and frequent. While the Gallatin National Forest covers an enormous area of land (approximately 1.7 million acres), the Plaintiffs' interest in the preservation and protection of the threatened and endangered wildlife species that range throughout the Gallatin National Forest, and the fact that the Project affects designated critical habitat for the threatened lynx, make Plaintiffs' asserted injury sufficiently specific and concrete for standing purposes. Plaintiffs here do not simply complain that the government violated the law, but complain that the government's alleged violations in approving the Project will injure them in concrete ways. Therefore, Plaintiffs' declarations are minimally sufficient to establish Plaintiffs' standing to challenge the Project.

II. Endangered Species Act Claims

A. Grizzly Bears

1. Section 9 of the ESA

Plaintiffs contend that Defendants' approval of the Project violates section 9 of the ESA by authorizing unpermitted "take" of the threatened grizzly bear. Plaintiffs assert that the Project authorizes unpermitted take because it fails to comply with the 2006 Gallatin Travel Plan biological opinion ("Travel Plan") and its incidental take statement. Plaintiffs appear to assert that, aside from the Project, there is, and has been since before 2010, a standing violation of the Travel

Plan's incidental take statement relative to the Gallatin Bear Management Unit because the Forest Service's 2010 monitoring report indicated that secure habitat outside the grizzly bear recovery zone has fallen below that mandated by the Travel Plan.

When an agency action is likely to cause a "take" of a listed species, the Fish and Wildlife Service may issue an "incidental take statement" that sets out the predicted impact on the species, as well as the terms and conditions of the action that will minimize takes. See 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(I). Here, it is undisputed that all agency actions within the Gallatin National Forest must comply with the Travel Plan's incidental take statement in order to ensure compliance with section 9 of the ESA.

Defendants assert that the Travel Plan sets no numeric percentage for secure habitat outside the recovery zone, and imposes only monitoring requirements with respect to secure habitat outside the recovery zone. Defendants further assert that the most recent monitoring report regarding secure habitat actually supports its position because it demonstrates an increase in secure habitat in the relative area.

The Travel Plan states that "[i]n the action area outside the recovery zone, proposed secure habitat listed in Table 7 will represent the surrogate measure of take." M-19:60. Table 7 indicates that for the Gallatin/Madison area outside of the recovery zone, 57.0 is "the proposed action percent of secure habitat." *Id.* at

45. These two statements in the Travel Plan form the basis of Plaintiffs' assertion that the Travel Plan mandates maintenance of a numeric percentage of secure habitat in areas outside the recovery zone, and more particularly, that the Travel Plan requires that secure habitat in the Gallatin Bear Analysis Unit outside the recovery zone be maintained at 57%.

Plaintiffs fail to demonstrate that the Travel Plan requires the Forest Service to constantly maintain a numeric percentage of secure habitat in areas outside the recovery zone. No such requirement appears in the terms and conditions of the incidental take statement. Instead, the Travel Plan suggest that areas outside the recovery zone are subject only to the monitoring requirements as set forth in Term and Condition No. 8 of the Travel Plan. *Id.* at 65. Condition No. 8 requires the Forest Service to “[m]onitor the amount of secure habitat in the action area outside of the recovery zone and report any changes.” *Id.* Other parts of the Travel Plan confirm that this constitutes the primary requirement with respect to secure habitat outside the recovery zone. For instance, the Travel Plan states that “percent secure [in areas outside of the recovery zone] will be monitored and reported on a regular basis.” *Id.* at 7. Thus, Plaintiffs' claim that the Travel Plan imposes a requirement that secure habitat in the Gallatin Bear Analysis Unit be maintained at 57% is without merit.

In addition, and more fundamentally, Plaintiffs fail to link their allegations

regarding secure habitat and “take” to the Project at issue. The Project at issue will have no effect on secure habitat because secure habitat, by definition, exists only in areas that are more than 500 meters from any motorized access route, *id.* at 84, and the Project challenged authorizes tree removal only in areas that are within 150 feet of existing roads. Thus, Plaintiffs allegations that Defendants failed to adequately analyze or abide by secure habitat standards ring hollow. Even if the Travel Plan required the Forest Service to maintain a certain percentage of secure habitat outside of the recovery zone, which it does not, the Project does not affect or in any way reduce secure habitat; an analysis of secure habitat would be largely superflous under the circumstances. The Project will not result in unpermitted take of grizzly bear. Accordingly, Plaintiffs’ claim that authorizing the Project violates section 9 of the ESA fails.

2. Best Available Science

Plaintiffs further claim that in approving the Project the Forest Service should have analyzed and relied on the most recent reports regarding secure habitat in order to ensure the Project did not authorize a further decrease in secure habitat. This claim is also unavailing.

The ESA requires the agencies to use the best available science when conducting their analysis. 16 U.S.C. § 1536(a)(2). “Courts grant considerable deference to agencies on issues requiring great technical expertise, including the

important question of what is the best available science.” *W. Watersheds Project v. Salazar*, 766 F.Supp.2d 1095, 1114 (D.Mont.2011) (citing *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir.2009)). A plaintiff alleging that an agency did not use the best available science should be able to “cite[] ... scientific studies that indicate the [agency's] analysis is outdated or flawed” or “scientific information directly undermining” the agency's conclusion. *Ecology Ctr.*, 574 F.3d at 659–60. The best available data requirement “merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.” *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006).

Plaintiffs’ fail to demonstrate how use of these reports would undermine the agencies’ decision or would have made any difference in the agencies’ decision. Both the Forest Service’s 2010 and 2012 monitoring reports confirm that secure habitat in the Gallatin/Madison area outside the recovery zone has been increasing since 2008 as a result of implementation of the Travel Plan. More fundamentally, the Project will not affect secure habitat, so more recent reports on secure habitat are of no relevance.

3. Section 7 of the ESA

Plaintiffs also contend that the Forest Service’s determination in its biological assessment that the Project “may affect but is not likely to adversely

affect” the threatened grizzly bear and the U.S. Fish & Wildlife Service’s concurrence in that determination violate section 7 of the ESA. This claim is partially predicated on Plaintiffs’ contention, rejected above, that the Forest Service is not complying with the Travel Plan’s incidental take statement. This claim is also partially predicated on Plaintiffs’ contention that the Project calls for construction of a half mile of temporary road to allow for salvage logging beyond 150 feet from any existing road. This contention is also without merit. The Project does not authorize salvage logging beyond 150 feet of any existing road. As the Decision Memo makes clear, the Project authorizes removal of hazard trees within 150 feet of existing roads.

All that remains as the basis for Plaintiffs’ claim of section 7 violations is that the Project will adversely affect grizzly bears by allowing logging alongside eight miles of roads that are currently restricted to administrative use and not open to the public. Plaintiffs contend that the roadside tree removal activity on these administrative roads will increase motorized activity on the administrative roads, effectively increasing road density, and causing adverse impacts to grizzly bears.

Section 7 of the ESA requires an agency to ensure that no discretionary action will “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.12(a). “Only

after the [agency] complies with § 7(a)(2) can any activity that may affect the protected [species] go forward.” *P. Rivers Council v. Thomas*, 30 F.3d 1050, 1055–57 (9th Cir.1994).

In an action area where listed or proposed species or designated or critical habitat may be present, the Forest Service must complete a biological assessment to determine if the proposed action “may affect” or is “likely to adversely affect” the listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.12(f), 402.14(a), (b)(1). In cases in which the Forest Service determines that a proposed action “may affect but is not likely to adversely affect” a listed species or critical habitat, the agency must engage in informal consultation with the Fish and Wildlife Service to obtain its determination with respect to the proposed action. If the Fish and Wildlife Service concurs in the Forest Service’s determination, no further consultation is required and the process ends. 50 C.F.R. § 402.14(b)(1); *Karuk Tribe of Cal. v. U.S. Forest Service*, 681 F.3d 1006, 1027 (9th Cir. 2012).

The Administrative Procedure Act governs review of agencies' actions under Section 7. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2010). The Court must determine whether the agencies' actions were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* (citation omitted). “Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving scientific

matters.” *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir.1989). However, the “presumption of agency expertise may be rebutted if the decisions, even though based on scientific expertise, are not reasoned.”

Greenpeace v. NMFS, 80 F.Supp.2d 1137, 1147 (W.D.Wash.2000).

Here, the Forest Service prepared a biological assessment in which it determined that adverse affects to the grizzly bear are unlikely for several reasons, including, *inter alia*,: (1) the Project is located entirely outside the recovery zone, in an area where grizzly bears may exist, but where grizzly bears have not been seen in recent decades; (2) habitat alteration will be insignificant given the small amount of treatment and the abundant availability of adjacent, similar habitat; (3) roadside tree removal will have minimal impacts given the grizzly bear’s natural tendency to avoid motorized roads; (4) noise disturbance of grizzly bears and added human presence will be minor compared to existing levels of activity from recreation and administrative use; (5) disturbance impacts will be limited by the requirement that all roads be closed to the public during tree removal operations; (6) the Project will have no effect on secure habitat because all activities occur within 150 feet of existing roads. The Fish and Wildlife Service concurred in the Forest Service’s determination that the Project may affect but is not likely to adversely affect the grizzly bear.

All of the concerns Plaintiffs raise here were considered and reasonably

rejected by the agencies. Plaintiffs' contention that the Project will increase road density is without merit. The Project opens no new roads, closes roads to public use during tree removal activities, and authorizes only administrative use on administrative roads. In addition, the administrative roads are in close proximity to roads open to the public and grizzly bears naturally avoid motorized roads. The agencies reasonably concluded that the Project is not likely to adversely affect the grizzly bear.

Plaintiffs also contend the agencies violated section 7 of the ESA because they failed to use the best available science. Plaintiffs point to two documents which, originally, were not included in the administrative record, but which were subsequently added to it. In adding the documents to the administrative record, agency representatives attested that the documents were in fact "indirectly" considered. (Doc. 17-1 & 17-2.) Despite this, Plaintiffs continue to insist that the agencies failed to rely on the documents. Plaintiffs contend that the documents are the best available scientific information on the condition of the Yellowstone grizzly bear population.

Plaintiffs' contentions are without merit for several reasons. First, the agencies declarations represent that they did in fact rely on the documents, even if reliance was only indirect. Second, Plaintiffs failed to raise any issue regarding these documents during the administrative process. *DOT v. Pub. Citizen*, 541 U.S.

752, 764-65 (2004). Third, the best available data requirement “merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.” *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006).

Here, Plaintiffs fail to show how a *more* direct reliance on these documents would have changed the agencies’ decision to approve the Project or how the science in these documents undermines the agencies’ determinations. The Interagency Grizzly Bear Study Team (IGBST) 2012 report discusses population estimates and how to improve models for calculating population estimates. The report concludes that “the GYE bear population remains healthy and stable at this time and there are no indications the grizzly bear has entered a prolonged declining trend.” (Doc. 22-1 at 36.) Likewise, the IGBT 2011 report concerns monitoring and population estimates of grizzly bears in the Greater Yellowstone Ecosystem. Plaintiffs fail to demonstrate that the documents undermine the agencies’ determinations or represent superior scientific evidence relative to the agencies’ decision to approve the Project. These documents, discussing grizzly bear population and models for estimating grizzly bear population, are largely irrelevant to the agencies’ determination to approve this roadside hazard tree removal project that will not affect grizzly bear secure habitat. Moreover, both documents attest to the health and stability of the GYE grizzly bear population.

Plaintiffs' section 7 claims fail.

B. Lynx

Plaintiffs contend that the Project must be enjoined based on this Court's decisions in *Salix v. U.S. Forest Service*, 944 F.Supp.2d 984, 988 (D. Mont. 2013) and *Alliance for the Wild Rockies v. Krueger*, 950 F.Supp. 2d 1196. In essence, Plaintiffs contend that the biological assessment's analysis of effects on lynx and lynx critical habitat impermissibly relied on the flawed 2007 Northern Rockies Lynx Amendment² ("the Lynx Amendment") in making the determination that the Project is not likely to adversely affect lynx or lynx critical habitat.

In *Salix*, this Court determined that the designation of critical habitat triggers the need for reinitiation of consultation under Section 7(a)(2) of the ESA, and that when the Fish and Wildlife Service designated lynx critical habitat in 2009, the Forest Service was required to reinitiate consultation on the Lynx Amendment. A project affecting lynx or lynx critical habitat will be enjoined if its approval is contingent on an analysis that is "inextricably intertwined and inescapable of separation" from a reliance on the standards set forth in the Lynx Amendment, because such project's approval is dependent on an underlying ESA violation. *Krueger*, 950 F.Supp.2d at 1206-1207. However, a project affecting

² The Lynx Amendment is the Forest Service's primary management direction for the conservation of the threatened Canada lynx. In 2007, it was programatically added to the forest plans for 18 National Forest, including the Gallatin National Forest.

lynx or lynx critical habitat may be appropriately and reasonably approved even if the agencies' analysis mentions or relies in part on the Lynx Amendment, so long as the agencies' analysis also contains a reasonable independent basis for its conclusions with respect to affects on lynx and lynx critical habitat. *Id.*; *Alliance v. Weber*, 2013 WL 5844447, *12 (D. Mont. Oct. 30, 2013). Agencies may show an independent basis for their conclusions regarding lynx critical habitat by demonstrating that “the affected critical habitat will remain functional and that the [primary constituent elements for critical habitat] will not be altered to an extent that appreciably reduces the conservation value of the critical habitat, and neither the recovery nor the survival of the species will be jeopardized.” *Weber*, at *15.

The final rule for lynx critical habitat states that the primary constituent element for lynx critical habitat is:

1. Boreal forest landscapes supporting a mosaic of differing successional forest stages and containing:

- a. Presence of snowshoe hares and their preferred habitat conditions, which include dense understories of young trees, shrubs or overhanging boughs that protrude above the snow, and mature multistoried stands with conifer boughs touching the snow surface;
- b. Winter snow conditions that are generally deep and fluffy for extended periods of time;
- c. Sites for denning that have abundant coarse woody debris, such as downed trees and root wads; and
- d. Matrix habitat (e.g., hardwood forest, dry forest, non-forest, or other

habitat types that do not support snowshoe hares) that occurs between patches of boreal forest in close juxtaposition (at the scale of a lynx home range) such that lynx are likely to travel through such habitat while accessing patches of boreal forest within a home range.

74 Fed.Reg. at 8638.

In reviewing Plaintiffs' section 7 claim, the Court must determine whether the agencies' determinations were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *W. Watersheds Project*, 632 F.3d at 496. Deference to the agency's technical expertise with respect to questions involving scientific matters is especially appropriate. *Alpine Land & Reservoir Co.*, 887 F.2d at 213 (9th Cir. 1989).

Here, the Project falls within lynx designated critical habitat. In particular, the Project will affect lands within the West Gallatin lynx analysis unit ("LAU"), which is roughly 131,162 acres, and which contains approximately 79,380 acres of preferred lynx habitat in the form of boreal forest. However, "lynx habitat within the entire burn area [of the Millie Fire] is currently unsuitable for use by lynx; i.e. it is in a stand-initiation structural stage that does not yet provide summer or winter snowshoe hare habitat, coarse woody debris for denning, or adequate cover for travel and resting." M-6:16.

The Forest Service's biological assessment provides analysis of the primary constituent elements for lynx critical habitat, noting, among other things, that (1)

“the project would not reduce snowshoe hare habitat, since the area to be treated is currently in a stand-initiation stage that does not yet provide summer or winter snowshoe hare habitat” (PCE1a) (2) there will be no effect on winter snow conditions because there will be no winter logging (PCE1b); (3) the Project will have minimal or no affect on lynx denning habitat because areas within 150 feet of roads are not expected to be selected as denning sites, the Project size is small, and because denning habitat is ample elsewhere in the LAU (PCE1c); (4) the Project would not significantly affect matrix habitat because it would not create a barrier or impede lynx movement (PCE1d). The biological assessment contains additional analysis of the affects of the Project on lynx critical habitat with reference to the standards set forth in the Lynx Amendment. But aside from the references to the Lynx Amendment standards, the biological assessment contains a separate and independent reasonable basis for its determination that the Project may affect but is not likely to adversely affect lynx or lynx critical habitat. The agencies reasonably determined that the Project is not likely to adversely affect lynx or lynx critical habitat.

Plaintiffs also contend that the agencies’ determination is not supported by best available science because the best available science shows that (1) lynx depend on a winter prey base at or slightly above the threshold required for persistence; and (2) lynx do not like to cross roads. Even assuming this is the best

available science and also assuming that this science was not considered by the agencies, Plaintiffs fail to show how this science is relevant to the Project. The determination that the Project is not likely to adversely affect lynx or lynx critical habitat is premised on the reasonable and unchallenged conclusion that the Project will not adversely affect winter snowshoe hare habitat because the Project will affect lands that are not suitable for snowshoe hare. Furthermore, the Project does not authorize the construction of any new roads. Plaintiffs' concern about lynx habitat fragmentation due to roads is misplaced. Finally, Plaintiffs misread *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069-1071 (9th Cir. 2004). *Gifford Pinchot* imposes no obligation on agencies to show that an approved project affirmatively contributes to the recovery of an endangered species. Accordingly, Plaintiffs contention that the agencies' authorization of the Project violates section 7 of the ESA with respect to lynx is without merit.

III. NEPA claims

Plaintiffs contend that the agencies failed in their obligation to take a hard look at the potential environmental consequences of the Project. As noted above, the Forest Service approved the Project on the basis that it fell within a categorical exclusion which exempts it from the requirement under NEPA that the action agency produce an environmental impact statement ("EIS") or environmental

assessment (“EA”). Plaintiffs also reiterate their concern here that the Project approves 180 acres of salvage logging in addition to the roadside tree removal, but, as explained above, this worry is unsupported by the record and the agencies’ decision authorizes only the removal of roadside hazard trees.³ Ultimately, then, Plaintiffs’ NEPA challenge boils down to whether or not the Forest Service properly concluded that the Project was categorically excluded from the requirement that it produce an EIS or EA.

NEPA requires agencies to make an informed decision by considering the environmental consequences of major federal actions in environmental impact statements. 42 U.S.C. § 4332(2)(C). NEPA regulations permit agencies to designate certain categories of actions as categorically excluded from the ordinary requirement to prepare an EIS or EA when the category of actions “do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4. In some cases, actions that ordinarily do not have a significant effect on the human environment may present extraordinary circumstances, requiring an EA or EIS. *Id.* Thus, two requirements need to be met in order for an agency to be exempt from the requirement to prepare an EIS or EA: (1) the proposed action must fit within the categorical exclusion category; and

³ Plaintiffs primarily contend that the 180 acres of salvage logging called for a more thorough analysis of the cumulative effects of the Project in NEPA documents. This contention is without merit because Project decision does not authorize the 180 acres of salvage logging.

(2) no extraordinary circumstances exists that create the potential for significant effects. 36 C.F.R. § 220.6.

Resource conditions that agencies should consider in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or EIS include “(i) Federally listed threatened or endangered species or designated critical habitat.” 36 C.F.R. § 220.6(b)(1). However, “[t]he mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion.” 36 C.F.R. 220.6(b)(2). Instead, the agency must determine whether there exists “a cause-effect relationship between a proposed action and the potential effect on these resource conditions.” *Id.* If such a cause-effect relationship is determined to exist, the agency must consider “the degree of the potential effect” of the proposed action on the resource conditions present in the action area to determine if extraordinary circumstances exist. *Id.*

“An agency's determination that a particular action falls within one of its categorical exclusions is reviewed under the arbitrary and capricious standard.” *Alaska Ctr. for Environment v. United States Forest Service*, 189 F.3d 851, 857 (9th Cir.1999). Furthermore, “an agency’s interpretation of the meaning of its own categorical exclusion should be given controlling weight unless plainly erroneous or inconsistent with the terms used in the regulation.” *Id.*

Here, the Forest Service determined the Project fell within the categorical exclusion for “[r]epair and maintenance of roads.” 36 C.F.R. 220.6(d)(4). The Project authorizes removal of trees within 150 feet of roads “based on . . . consideration of whether the tree is expected to fall onto the roadway or cause another tree to fall into the roadway.” A-1:1-2, 6. The Decision Memo explains that “the purpose of this hazard tree removal proposal is to provide for safety of road users and maintenance of the roads within the Millie Fire perimeter.” *Id.* at 1. Contrary to Plaintiffs’ assertion, the Project does not authorize a free-for-all of commercial logging on hundreds of acres of land, but allows only removal of “hazard tree[s]” within 150 feet of roads based on specific considerations in order to alleviate a situation in which “sliding, falling and rolling trees landing in the roadway [will] create[] snag hazards and roadway blockages.” *Id.* To minimize potential impacts, mechanized equipment will be required to stay on the roads and all tree removal activities will be done by hand felling. *Id.* at 19.

The Forest Service reasonably concluded that the Project fell within the categorical exclusion for road maintenance. *See Forest Conservation Council v. USFS*, 2003 WL 23281957 (D. Ariz. July 9, 2003) *aff’d* 110 F. App’x 26 (9th Cir. 2004) (holding that “removal of dead trees within 150 feet of fences is generally within the scope of the repair and maintenance of roads, trails, and landline boundaries”). Under the circumstances, removing hazard trees within 150 feet of

these roads is consistent with the categorical exclusion for road maintenance.

Thus, the Forest Service's determination is not clearly erroneous with regard to the first prong of the categorical exclusion test.

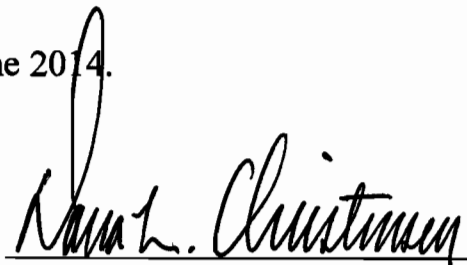
Plaintiffs also contend that use of the categorical exclusion is inappropriate because extraordinary conditions preclude it. Plaintiffs emphasize that the Project will occur on designated lynx critical habitat and in an area where grizzly bears and Canada lynx are present. However, the mere presence of these resource conditions does not preclude the use of the categorical exclusion. 36 C.F.R. 220.6(b)(2). Plaintiffs must show that the "degree of the potential effect" on these resources as a result of this Project is such that extraordinary circumstances exist. Plaintiffs' arguments in this regard rely on the arguments made relative to their ESA claims. For the same reasons as explained with respect to Plaintiffs' ESA claims, Plaintiffs fail to show that the agencies' adoption of the categorical exclusion for this Project was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

The degree of potential effects on grizzly bears, lynx, and lynx critical habitat is demonstrated to be minor or insignificant through the Forest Service's biological assessment and the Forest Service's consideration of the possibility of extraordinary circumstances in the scoping process. As the Forest Service's documentation makes clear, the Project will have no impact on secure habitat for

grizzly bears, because none of its activities affect secure habitat. In addition, disturbance effects on grizzly bears from the Project will be minor when compared to the normal, high level of human use in the Project area. The Project will also have insignificant effects on lynx and lynx critical habitat because the size of the Project is small, the area affected does not currently provide snowshoe hare habitat, does not currently provide denning habitat, areas within 150 feet of roads are generally unsuitable for denning sites, there will be no effect on snow compaction, and the Project will not impede lynx movement. The Forest Service adequately documented its reasoning with respect to the potential for extraordinary circumstances and reasonably concluded that extraordinary circumstances precluding the use of the categorical exclusion are not present. The Forest Service thus meets both requirements for applying the categorical exclusion to this Project. Plaintiffs' NEPA claims fail.

IT IS ORDERED that Defendants' motion for summary judgment (Doc. 27) is GRANTED. Plaintiffs' motion for summary judgment (Doc. 21) is DENIED. This case is CLOSED.

DATED this 4th day of June 2014.



Dana L. Christensen, Chief Judge
United States District Court