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

WESTERN WATERSHEDS PROJECT, a non-profit organization, *et al.*,

Plaintiffs,

vs.

TOM SCHULTZ, in his official capacity as Chief of the U.S. Forest Service, *et al.*,[1]

Defendants.

CV 22-149-M-DLC-KLD

FINDINGS AND RECOMENDATIONS

This matter comes before the Court on cross-motions for summary judgment filed by Plaintiffs Western Watersheds Project, Alliance for the Wild Rockies, Native Ecosystems Council, Center for Biological Diversity, Wyoming Wildlife Advocates, Sierra Club, Friends of the Bitterroot, Wildearth Guardians, and Gallatin Wildlife Association ("Plaintiffs") (Doc. 29) and Defendants Tom Schultz, in his official capacity as Chief of the United States Forest Service, the United States Forest Service, Paul Souza, in his official capacity as acting Director of the United States Fish and Wildlife Service, Doug Burgum, in his official

[1] Pursuant to Federal Rule of Civil Procedure 25(d), the current public officers are substituted for their predecessors as named Defendants.

capacity as Secretary of the Interior, and the United States Department of the Interior (Doc. 35). Also pending before the Court is Plaintiffs' Motion to Supplement the Administrative Record (Doc. 25). The Court held oral argument on the motions on October 29, 2024. For the reasons set forth below, it is recommended that Plaintiffs' Motion to Supplement the Record be denied, Plaintiffs' Motion for Summary Judgment on their National Environmental Policy Act be granted in part and denied in part, Defendants' Motion be granted in part and denied in part, and Plaintiffs' Endangered Species Act claim be dismissed.

I. Background

The Custer Gallatin National Forest ("Forest") spans over three million acres in southern Montana. AR_389.[2] The Forest contains approximately 173,378 acres of "suitable livestock range" and includes 140 active grazing allotments and 11 inactive allotments. AR_177. The Forest Service administers allotment management plans to "[p]rescribe[] the manner in and extent to which livestock operations will be conducted in order to meet the multiple-use, sustained yield, economic, and other needs and objectives as determined for the lands involved …." 36 C.F.R. § 222.1(b)(2); *see also* 36 C.F.R. § 222.1(b)(2) (allotment

[2] "AR_" citations refer to the Forest Service's Supplemental Administrative Record lodged with the Court November 2, 2023, Doc. 23.

management plans specify "the program of action designated to reach a given set of objectives.").

In May 2013, the Forest Service issued a scoping letter to analyze six East Paradise Allotments in order "to determine whether or not the allotments should remain open to livestock grazing, and if so under what conditions." AR_18169; AR_2379. The East Paradise Allotments are six allotments located in the Absaroka Beartooth Mountains on the east side Paradise Valley and the north entrance of Yellowstone National Park. When the scoping letter was issued, the Elbow Creek, Pine Creek, and Sixmile North had active permits for livestock grazing; Sixmile South, Suce Creek, and Mill Creek were in vacant status. AR_18160.

In November 2020, following public comment, the Forest Service issued a draft Environmental Assessment ("EA") to analyze the potential impacts of a revised allotment management plan ("AMP"). *See* AR_2375; AR_2242. The Forest Service issued a final EA in April 2021. AR_2267. The Forest Service concluded the AMP would not significantly affect the environment, and issued a Decision Notice ("DN") and Finding of No significant Impact ("FONSI") in December 2021. AR_2235–47.

The Forest Service considered four alternatives for the AMP: (1) no action/no grazing; (2) maintaining the current allotment management; and (3) an adaptive management strategy. AR_2236. The fourth alternative proposed to eliminate grazing entirely and was reviewed but dismissed from detailed analysis. AR_2236. The Forest Service implemented alternative 1 for Suce Creek, Mill Creek, and Sixmile South allotments, and alternative 3 for Pine Creek, Elbow, and Sixmile North allotments. AR_2236. Under alternative 1, the Suce Creek, Mill Creek, and Sixmile South allotments will remain vacant and are not authorized for grazing. AR_2236. The Sixmile North allotment boundary will expand to incorporate the area east and south of the Gold Pasture, adding approximately 1,356 new grazing acres. AR_2237. The AMP also expands the start of the grazing period to June 1. AR_2236–37.

Plaintiffs' Complaint challenges the Forest Service's decision and U.S. Fish and Wildlife Service's ("FWS") subsequent biological opinion under Section 11(g) of the Endangered Species Act ("ESA"), 17 U.S.C. § 1540(g), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, for violations of the ESA and National Environmental Policy Act ("NEPA"). (Doc. 20 at ¶¶ 1, 2).[3]

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[3] Plaintiffs do not brief the ESA claim in their motion for summary judgment. (*See* Doc. 20 at ¶¶ 114–127). This claim is therefore waived. *See Western Org. of Res. Councils v. Bernhardt*, 412 F. Supp. 3d 1227, 1240 n. 4 (D. Mont. 2019) (finding plaintiff's failure to brief a claim on summary judgment constituted waiver).

II. Legal Standards

A. NEPA

NEPA is a procedural statute requiring government agencies to "take a hard look" at the "environmental consequences of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). An agency adequately conducts a "hard look" "by providing a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of a proposed action. *Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1149 (9th Cir. 2008) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). Taking a "hard look" includes "considering all foreseeable direct and indirect impacts." *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 916–17 (9th Cir. 2012). NEPA "does not mandate particular results", but "prescribes the necessary processes" agencies must follow to identify and evaluate "adverse environmental effects of the proposed action." *Robertson*, 490 U.S. at 350. The court's review is complete if, upon review of the record, it is satisfied the agency took a "hard look" at the proposed action's environmental impacts. *Idaho Conservation League v. Mumma*, 965 F.2d 1508, 1519 (9th Cir. 1992).

Pursuant to NEPA's implementing regulations, an agency may prepare an Environmental Assessment ("EA") to determine whether a proposed action may significantly affect the quality of the environment such that the agency must prepare a more detailed Environmental Impact Statement ("EIS"). *See* 40 C.F.R. 1501.4(b), 1508.9. An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact ("FONSI"). *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 954 (9th Cir. 2008).

If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why the project's impacts are insignificant. *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). "The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of the project." *Save the Yaak Committee*, 840 F.2d at 717.

B. Summary Judgment

Courts review agency decisions under NEPA by applying the standard of review set forth in the APA. *Center for Biological Diversity v. Zinke*, 868 F.3d 1054, 1058 (9th Cir. 2017). The Rule 56 summary judgment standard is therefore modified in cases requiring review of an administrative record pursuant to the APA; courts are required to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", or "without observance of procedure required by law." *Center for Biological Diversity*, 868 F.3d at 1057; 5 U.S.C § 706(2)(A); 5 U.S.C. § 706(2)(D).

The APA standard of review is deferential. Courts must refrain from substituting their judgment for that of the agency and should limit their review of the agency's action to determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Greater Yellowstone Coalition v. Servheen*, 655 F.3d 1015, 1023 (9th Cir. 2011) (citing *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)). An action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

However, the deference owed to an agency is not unlimited. *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). The court does "not automatically defer to any agency's conclusions, even when those conclusions are scientific." *San Luis & Delta-Mendota Water Authority*, 776 F.3 at 994. Instead, the court's review must be "sufficiently probing" to ensure that the agency decision is "founded on a reasoned evaluation of the relevant factors." *San Luis & Delta-Mendota Water Authority*, 776 F.3d at 994.

III. Discussion

A. Supplementation of the Record

Plaintiffs seek to introduce the Declaration of Dr. David Mattson for the Court's consideration of the merits or, alternatively, as to remedy. (Doc. 26-1). Based upon his background and his review of the record, Dr. Mattson opines that the Forest Service ignored the impacts of declining whitebark pine and grizzly bears' subsequent increased reliance on meat, particularly livestock. Dr. Mattson's declaration largely mirrors his comments submitted to the USFS on December 2, 2020, during the public comment period. AR_24677 *et seq*.

The court's review of an agency action is generally limited to the administrative record. 5 U.S.C. § 706. Administrative review accordingly disfavors consideration of extra-record evidence. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). Indeed, "[w]hen a reviewing court considers evidence that was not before the agency, it inevitably leads the reviewing court to substitute its judgment for that of the agency." *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980).

The Ninth Circuit recognizes four "narrow exceptions" to the general rule prohibiting extra-record evidence: (1) when supplementation is necessary to determine whether the agency has considered all factors and explained its decision; (2) when the agency relied on documents not in the record; (3) to explain or clarify technical matters or complex subjects; and (4) where plaintiffs make a strong showing of agency bad faith. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). These exceptions are limited in scope and must not undermine the general rule that the court's review is limited to the administrative record. *Lands Council*, 395 F.3d at 1030. Because the agency's "designation and certification of an administrative record" is entitled to a "presumption of regularity," the plaintiff must provide "clear evidence" that one of the above exceptions applies. *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1232 (E.D. Cal. 2013).

Here, Plaintiffs seek to admit the declaration of Dr. Mattson under the first and fourth *Lands Council* exceptions or, in the alternative, to evaluate Plaintiffs' request for equitable relief. (Doc. 25 at 2). Citing *Speaks v. Mazda Motor Corp.*, Defendants first contend that Plaintiffs failed to comply with this Court's case management order (Doc. 18) and have therefore waived their right to seek supplementation of the record. (Doc. 31 at 11–12) (citing *Speaks v. Mazda Motor Corp.*, 2015 WL 1189520, *3 (D. Mont. March 16, 2015)). *Speaks*, however, pertained to pre-trial discovery deadlines for expert disclosures and sufficiency of the record. The more instructive case here is *Washington v. U.S. Dep't of the Navy*, wherein the government made a similar argument claiming that the motion to admit extra-record evidence was untimely due to its failure to comply with the case management order. 2021 WL 8445582, *6 (W.D. Wash. 2021). The court held that "[c]ontrary [to the government's] argument, the motion was not 'untimely' because the deadline [in the case management order] referred to … was for arguing the sufficiency of the record, not whether to allow evidence outside the record." *Washington*, 2021 WL 8445582, *6. Here, like *Washington*, the case management deadline pertained to the sufficiency of the record and not, as Defendants argue, to the issue of whether outside evidence should be permitted.

The Court now turns to the *Lands Council* exceptions.

1. *Lands Council* Exceptions

The first *Lands Council* exception permits admission of extra-record material to "determine whether the agency has considered all relevant factors and has explained its decision." 395 F.3d at 1030; *See Washington*, 2021 WL 8445582, *6 ("[T]he Court will allow such evidence for the limited purpose of determining whether there are matters that the [agency] did not include or disclose [] and of which the public should have been informed."). The court may not consider extra-record evidence as a challenge to the "substantive merits of the agency action" or to "determine the correctness or wisdom of the agency's decision." *Asarco, Inc.*, 616 F.2d at 1160 (9th Cir.1998).

Plaintiffs claim Dr. Mattson's declaration falls under this first exception because the Forest Service failed to analyze (1) escalating conflicts, (2) early stocking dates, (3) connectivity, and (4) cumulative effects. (Doc. 26 at 20–32). In response, Defendants maintain the record considers the "increased risk" of conflicts related to grazing management activities as well as Dr. Mattson's claims that grizzly bears' "increased reliance on meat" will result in an "exponential" rise in bear-livestock conflicts. (Doc. 31 at 13) (citing AR_20778). The Court agrees. Although the EA is lacking in these areas—as will be explained below— the record itself contains adequate discussion of these factors. *See* AR_2486 (whitebark pine decline); AR_2296 (earlier stocking dates); AR_20907 (connectivity); and AR_20909 (cumulative effects). Consideration of Dr. Mattson's extra-record declaration would be an impermissible attack on the substance of the Forest Service's decision.

Plaintiffs further urge this Court to admit Dr. Mattson's declaration under the third *Lands Council* exception (Doc. 26 at 36). When "highly technical matters" are involved, extra-record evidence may be necessary to "determine what matters the agency should have considered but did not." *Asarco*, 616 F.2d at 1160. This is not the case here: the issues presented are familiar to the Court and are not of such a complex or technical nature as to require extra-record explanations.

2. Remedy

Plaintiffs alternatively urge this Court to consider Dr. Mattson's declaration solely for its decision as to the proper remedy. (Doc. 26 at 37). Defendants argue this inquiry is a legal issue that must be informed by the merits and not by extra-record evidence. Defendants' argument is misplaced. When sitting in equity, courts do not apply the standards set forth in 5 U.S.C. § 706, but rather independently weigh the facts and evidence to determine appropriate relief. *See N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1037 (D. Mont. 2020) ("A district court possesses broad latitude … in fashioning equitable relief when necessary to remedy an established wrong") (cleaned up)). Accordingly, this Circuit permits extra-record evidence to inform the determination of relief. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 797 (9th Cir. 2005) (considering expert declarations to determine temporary relief). However as noted above, Dr. Mattson's opinions and conclusions are to a great extent already in the record, and the Court does not need a supplementation to determine the remedy. Accordingly, the motion to supplement should be denied.

B. Cross-Motions for Summary Judgment

Plaintiffs argue the Forest Service failed to take the requisite "hard look" at the potential effects on grizzly bears by (1) relying on inadequate baseline information, (2) downplaying the effect of earlier stocking dates, (3) failing to assess potential effects to habitat connectivity, (4) not sufficiently considering cumulative effects, and (5) failing to prepare an EIS.

An EA satisfies NEPA's "hard look" mandate if it contains a "reasonably thorough discussion of the significant aspects of probable environmental consequences." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998). "The purpose of an EA under NEPA is not to amass and disclose all possible details regarding a proposal, but to create a 'concise public document' that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or [FONSI]." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1128 (9th Cir. 2012).

1. Whether the Forest Service Violated NEPA

a. The Baseline

Plaintiffs first contend the Forest Service failed to adequately assess the current baseline conditions in the project area. NEPA requires that Federal agencies "assess the environmental consequences of their actions before those actions are undertaken." *Great Basin Resource Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016). "An agency need not conduct measurements of actual baseline conditions in every situation—it may estimate baseline conditions using data from a similar area, computer modeling, or some other reasonable method." *Great Basin Resource Watch*, 844 F.3d at 1101. "But whatever method the agency uses, its assessment of baseline conditions must be based on accurate information and defensible reasoning." *Great Basin Resource Watch*, 844 F.3d at 1101 (internal quotation marks and citation omitted). Without establishing the baseline conditions which exist … before [a project] begins, there is simply no way to determine what effect the [project] will have on the environment, and, consequently, no way to comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

Here, Forest Plan standards for the Gallatin National Forest require that areas within the grizzly bear Recovery Zone or Primary Conservation Zone ("PCA") meet the Livestock Grazing Standard, which directs that there "shall be no increase in the number or acreage of active livestock grazing allotments above that which existed in 1998." AR_2424–25. Bears are known to occur within the project area, and some of the East Paradise allotments lie within the recovery zone. AR_2426.

In a section titled "Changes to existing conditions under alternative management actions", the EA provides that:

> The overall objective for habitat management inside the Recovery Zone/PCA is to reduce access-related disturbances and human-caused mortalities by maintaining or improving habitat with respect to 1998 conditions (the time when grizzly bears met recovery goals) while maintaining options for resource management activities at approximately the same level that existed in 1998. Habitat standards apply to Federal lands inside the PCA and identify three factors that must be maintained at, or improved upon with respect to conditions

> existing in 1998: (1) secure habitat, (2) number and capacity of developed sites, and (3) number and acreage of active commercial livestock grazing allotments. All three of these factors are linked to human activities that can result in grizzly bear mortality and displacement. Habitat standards applicable to this analysis include the Livestock Grazing Standard.

AR_2425. The Forest Service determined that "[t]he current condition on the Custer Gallatin meets the Livestock Grazing standard, as the number and acreage of active cattle allotments is below the 1998 baseline level." (AR_2425). Moreover, "[c]hanges in allotment acreage proposed under the [AMP] will be compared to the 1998 baseline to determine whether alternatives are consistent with the Livestock Grazing Standard." AR_2427.

Plaintiffs argue that baseline conditions have changed dramatically since 1998 and a "static '1998 baseline'" that considers only the number of allotments and available acreage provides "no insight into the *actual* baseline conditions at the time the decision was made." (Doc. 30 at 27). In support, Plaintiffs first point to documented declines in cutthroat trout, ungulates, and whitebark pine in the GYE. Prior to the 1990s, spawning cutthroat trout represented a valuable food source for grizzly bears living near the Yellowstone Lake tributaries. AR_16490. However, grizzly bears today consume 70 percent less biomass of cutthroat trout due to a 10 percent loss in cutthroat populations. AR_16491. Similarly, although several GYE elk herds east of Yellowstone National Park have remained constant or increased, elk populations have declined in the northern range, Madison-Firehole, and

Gallatin Canyon. AR_16490; *see also* AR_19815. Finally, whitebark pine populations have experienced well-documented declines over the last 24 years due to wildland fire, mountain pine beetle, and white pine blister rust. AR_16489; AR_16492–99; AR_17504. From 2000 to 2010, roughly 70 percent of mature cone-producing whitebark pine trees were lost in the GYE due to a climate-driven outbreak of mountain pine beetles. AR 24689 (Mattson 2020). This loss was most pronounced in the Absaroka Mountains and in the Bridger-Teton National Forest in Wyoming. (AR_24697).

Citing Mattson (2017), Plaintiffs argue that because of the regional decline in whitebark pine, "Yellowstone's grizzly bears have become increasingly reliant on meat from ungulates at precisely the same time that elk and moose populations were in major decline, along with one of two bison populations in the ecosystem." AR_19819 (Mattson 2017). As a result, "Yellowstone grizzly bears have been involved in mounting numbers of conflicts with humans over contested meat – principally livestock and actual or potential remains of hunter-killed elk. Numbers of bear mortalities have sky-rocketed, especially since 2017." AR_19820 (Mattson 2017).

For example, Plaintiffs point out that from 1992 to 2000, there were 74 incidents of human-caused grizzly bear mortalities, or an average of eight per year. AR_14891. Of the 21 related to management removals, five were due to livestock depredations. AR_14891. In 2010, there were seven mortalities attributed to livestock depredation.[4] AR_18932–33. And in 2015, 29 of the 53 human-caused losses involved either management removals due to livestock depredations (13) or site conflicts (16). AR_19481. Similar numbers were reported in 2016. *See* AR_19627 (14 mortalities due to livestock depredations and 13 due to site conflicts). In 2021, the year the AMP was approved, 20 of the 59 human-related mortalities were attributed to management removals for livestock depredation. AR_17789. Most of these livestock related conflicts have occurred on the periphery of the GYE, in areas recently colonized by grizzly bears. AR_19820 (Mattson 2017).

Plaintiffs also rely on *Greater Yellowstone Coal., Inc. v. Servheen* to highlight their concerns regarding whitebark pine. 665 F.3d 1015 (9th Cir. 2001). In *Greater Yellowstone Coal*., the Ninth Circuit upheld the district court's refusal to delist grizzly bears, in part because of the Court's recognition that the loss of whitebark pine may threaten grizzly bears as they adapt and "seek[] substitute foods." *Greater Yellowstone Coal.,* 665 F.3d at 1026. The court cautioned that the

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[4] Plaintiffs argue that there were 21 mortalities related to livestock depredation in 2010, but the study attributes only 7 of the 21 human-caused mortalities to livestock depredations. *See* AR_18932–33 ("Twenty-one [] of the human-caused losses involved management removals due to livestock depredation (*n* = 7), site conflicts (*n* = 8), humane removal (*n* = 1), and in response to human fatalities (*n* = 5)").

"threat from decreases in whitebark pinecones is not one of starvation, but one of larger home range size and movements," which "may result in increased conflicts with humans and increased mortality…." *Greater Yellowstone Coal.*, 665 F.3d at1026. The concerns articulated in *Greater Yellowstone Coal.*, Plaintiffs argue, were "prophetic."

In response, Defendants first proffer that the agency identified current conditions by "disclosing the GYE grizzly bear population and secure habitat throughout the six recovery zones established for conservation", (2) "quantif[ying] grizzly bear conflicts associated with livestock depredation on all National Forests within the GYE"; and (3) "disclos[ing] the number of active, vacant, and closed allotments, along with their acreage" within grizzly bear recovery zones. (Doc. 35-1 at 26–27) (citing AR_7971; AR_17872; AR_17862; AR_7848). However, the studies upon which Defendants rely—a 2021 FWS Grizzly Bear Recovery Program Annual Report, AR_7971, a 2021 Yellowstone Grizzly Bear Interagency Report, AR_17861–72, and a 2020 East Paradise Allotments Management Plan Update—are neither referenced to, nor found in, the EA. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (finding that the EA is where "Forest Service's defense of its position must be found", and the agency's argument that the 3,000 page administrative record contains supporting data is insufficient).

Defendants further claim that Plaintiffs "misunderstand the point of the 1998 baseline" and "misleadingly conflate the concept of *assessing the existing conditions* to analyze the [project's] potential environmental effects with *maintaining or improving on the conditions that existed in 1998* to promote grizzly bear conservation." (Doc. 35-1 at 27) (emphasis added). The 1998 baseline, Defendants contend, is "not used for considering the existing conditions under NEPA." (Doc. 37 at 10–11). But this is not Plaintiffs' argument. Rather, Plaintiffs decry the use of the 1998 baseline as a static benchmark against which current conditions are measured and compared. (*See* Doc. 36 at 10). At any rate, Defendants' position is contradicted by the plain language of the EA, which clearly references the 1998 baseline to measure current conditions. *See* AR_2426 ("The current condition on the Custer Gallatin meets the Livestock Grazing standard, as the number and acreage of active cattle allotments is below the 1998 baseline level.").

Defendants also claim Plaintiffs are launching a "substantive attack on the Forest Service's methodology for conservation management of grizzly bears." (Doc. 35-1 at 28). The 1998 baseline is indeed utilized as a measure of grizzly bear recovery in the Forest Plan and other planning documents, which advise that secure habitat must be "at or above 1998 baseline levels." AR_322. However, Plaintiffs' argument is discretely focused on whether the metrics established by the 1998 baseline adequately captures the current conditions in the East Paradise allotments—this is not, as Defendants assert, an attack on the agency's underlying methodology and usage of the 1998 baseline to measure grizzly bear recovery in the GYE. *See Great Basin Res. Watch*, 844 F.3d at 1101 (regardless of the method used, the agency's "assessment of baseline conditions must be based on accurate information and defensible reasoning.").

The Court acknowledges Plaintiffs' concerns regarding increased grizzly bear mortality but disagrees that this information must be explicitly considered as part of the project baseline, albeit for reasons not explicitly raised by Defendants.

The EA contemplates that the Grizzly Bear Conservation Strategy ("GBCS") is "generally accepted as incorporating the best, most current scientific information with respect to grizzly bear management." AR_2426. In response to GBCS's updated management recommendations, the Custer Gallatin National Forest amended its Forest Plan in 2015 to reflect the current guidance. AR_2427. The metrics imposed by the 1998 baseline is driven by that guidance. Notably, with respect to whitebark pine, the GBCS provides that "[a]lthough whitebark pine has experienced widespread declines in the GYE [], extensive studies by the IGBST showed no profound negative effects on grizzly bears at the individual or population level." AR_17504.

Grizzly bear and livestock conflicts were discussed in the Grizzly Bear Conservation Strategy (2016) and a 2015 amendment to the Gallatin Forest Plan implanted Livestock Grazing Standards. AR_2251. According to the GBCS, whitebark pine is an important fall food source for bears in the GYE due to their high fat content and potential abundance. AR_17504. However, "[a]lthough whitebark pine has experienced widespread declines in the GYE [], extensive studies by the IGBST showed no profound negative effects on grizzly bears at the individual or population level (IGBST 2013)." AR_17504. Additionally, Costello *et al*. (2014) "reported that approximately one-third of GYE grizzly bears in their study included little or no whitebark pine stands within their fall range." AR_17504.

The Court "may not impose itself 'as a panel of scientists that instructs the [agency] …, chooses among scientific studies …., and orders the agency to explain every possible scientific uncertainty.'" *Tri-Valley CAREs*, 671 F.3d at 1124. An agency must support its conclusions with studies the agency has deemed reliable, and that is precisely what the Forest Service has done here. *See Tri-Valley CAREs*, 671 F.3d at 1124. Indeed, the Forest Service relied on the GBCS and the Forest Plan in its determination of the appropriate baseline conditions. The GBCS found that the decline in whitebark pine was not significant. Plaintiffs have not shown that the Forest Service's choice rested on inaccurate information or indefensible reasoning, and the EA's reliance on the GBCS and Forest Plan guidance is not arbitrary and capricious. *Or. Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016).

b. Earlier Stocking Dates

Plaintiffs next allege the EA fails to consider the effects of earlier stocking dates, particularly with respect to the depredation risk posed by younger calves. (Doc. 30 at 27) (citing AR_2236). Plaintiffs rely on commentary by Dr. Mattson which claims that "stocking the East Paradise allotments with cow-calves in June virtually guarantees a depredation problem, even in allotments that have historically not had one." AR_24683. This information, Plaintiffs complain, was neither referenced to nor included in the EA, where it "must be found." (Doc. 30 at 30) (citing *Blue Mountains Biodiversity Project*, 161 F.3d at 1214.

In response, Defendants contend that the agency took a "hard look" at the earlier stocking dates in both the EA and in documents incorporated by reference. (Doc. 35-1 at 34). First, with respect to the EA, Defendants rely on a statement that maximum Animal Unit Months ("AUMs") will "not be exceeded regardless of how early or late cattle may be on an allotment." (Doc. 35-1 at 34) (quoting AR_2386). However, managing allotments to maintain a certain number of cattle or AUMs—i.e., the amount of forage available and consumed over a month by a cow—does little to address potential risks posed by early-season stocking. *See* AR_2417.

Defendants further urge this Court to look beyond the "four corners" of the EA to the Decision Notice, FONSI, Environmental Assessment, and wildlife reports. (Doc. 35-1 at 34) (citing *Ctr. for Biological Diversity v. Blank* 933 F. Supp. 2d 125, 151–52 (D.D.C. 2013) ("the Court is not strictly confined to the …. four corners of the EA[.]")). Defendants maintain these documents were incorporated by the reference into the EA and provide greater detail as to the effects of earlier stocking dates. For example, Defendants highlight the Decision Notice's conclusion that "only a small percentage of depredations by grizzly bear occur in June (3 percent, Gunter [] 2004) but most occur within the hyperphagia period between September 1 and November 30 (Wells [] 2019), suggesting that increasing the grazing season into June will have little effect on grizzly bear conflict." AR_2251.

Indeed, "[t]he EA may incorporate by reference information that is reasonably available to the public." 36 C.F.R. § 220.7(b) (2008).[5] However, "[a]ny material incorporated by reference must be 'cited in the statement,' 'briefly

[5] The CEQ issued revised regulations effective September 14, 2020. Because this project was developed and scoped prior to September 14, 2020, the agency has elected to follow the 1978 CEQ regulations. AR_2375. Accordingly, this Order cites to the 1978 CEQ regulations.

described,' and 'reasonably available for inspection by potentially interested persons[.]'" *California ex rel Imperial Cnty Air Pollution Control Dist. v. U.S. Dept. of the Interior*, 767 F.3d 781, 792 (9th Cir. 2014) (quoting 40 C.F.R. § 1502.21 (2008)).[6] Defendants fail to provide, nor can the Court ascertain, any indication that the EA referenced the materials upon which Defendants rely for their contention that the EA adequately considered the potential effects of the earlier stocking dates. Defendants' argument thus amounts to impermissible post-hoc rationalization, and Court finds that the East Paradise EA failed to take a "hard look" at the potential effects of earlier stocking dates.

c. Habitat Connectivity

Plaintiffs argue the EA fails to address whether grizzly bears—particularly female grizzly bears with cubs—utilize the East Paradise area for dispersal north, and, in turn, whether and how the AMP will affect connectivity. (Doc. 36 at 16) (citing AR_20161; AR_24690); (*see also* Doc. 37 at 16) (citing AR_2584). In response, Defendants maintain that the agency took a "hard look at the potential effects to connectivity in light of the minimal potential effects the AMP may have on grizzly bear movements." (Doc. 35-1 at 38). The Court disagrees.

To support their argument, Defendants rely primarily on two documents contained elsewhere in the record. The first—a 2022 species status assessment—

[6] Now located at 40 C.F.R. § 1501.12.

states that "there is no indication that human activities are preventing grizzly bears from moving freely" within the GYE. AR_8154. The second, Defendants claim, demonstrates that the greatest probability of connectivity between the GYE and NCDE occurs north and west of the East Paradise allotments, through the Bridger and Bangtail Mountains. AR_17617–21. The issue, however, is that Defendants again rely on information that is neither referenced to nor cited by the EA, where it "must be found." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d at 1214.

Defendants further assert Plaintiffs' request for an in-depth connectivity analysis exceeds NEPA's procedural mandates. (Doc. 35-1 at 38). Indeed, "NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail." *League of Wilderness Defs. Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1136 (9th Cir. 2010) (quoting 40 C.F.R. § 1500.1(b)). Yet NEPA also "guarantees that the relevant information is made available to the larger [public] audience." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Both this District and the Forest Service recognize that a lack of connectivity and genetic exchange between subpopulations remains a threat to the species' recovery, and as a result, restoring connectivity to grizzly bear habitat in the lower-48 United States is recognized as an important factor to securing the long-term viability of grizzly bears. FWS_505, 597–598, 667–82; AR_21199–200; *see also Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1018–21 (D. Mont. 2008) and *WildEarth Guardians v. Bucknall*, 2024 WL 4711128, * 11-13 (D. Mont. November 7, 2024). The issue of connectivity is therefore not one of "needless detail", but rather one of great relevance to grizzly bear recovery. In this case, Peck (2017) recognized that "[p]redicted paths" from the GYE to the NCDE "originating in the Absaroka and Gallatin ranges were concentrated and formed a corridor along the Bridger and Big Belt Mountains or branched at the southern portion of the Big Belt Mountain to the Elkhorn and Boulder Mountains." AR_17619. The Court is not faulting Defendants for the breadth of the analysis of connectivity; it is faulting them for failing to have any meaningful discussion of connectivity in the EA. Because the EA did not address this issue, the Court finds that the Forest Service failed to take a "hard look" at the AMP's potential effects on habitat connectivity.

d. Cumulative Effects

Plaintiffs next challenge the sufficiency of the EA's cumulative impacts analysis, particularly due to its alleged failure to address cumulative effects of actions taken on private lands in the project area. (Doc. 36 at 19). A cumulative effect or impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions ….” *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't. of the Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (citing 40 C.F.R. § 1508.7). "General statements about 'possible effects' and 'some risk' do not constitute a 'hard look' absent a justification regarding why a more definitive information could not be provided." *Te-Moak Tribe*, 395 F.3d at 1028. To prevail on a cumulative effects claim, environmental plaintiffs "need not show what impacts would occur. To hold otherwise would require the public, rather than the agency, to ascertain the cumulative effects of a proposed action." *Te-Moak*, 608 F.3d at 605.

The EA acknowledges the Forest Service's obligation to address cumulative effects, stating that "[t]he purpose of cumulative effects analysis is to capture and evaluate any effects from other past, present, or reasonably foreseeable activities that may contribute to the magnitude, extent, duration, or intensity of the effects described above." (AR_2430). The EA further notes "[t]he contributions of any past effects have already been incorporated into the analysis […] and cannot reasonably be separated from the current environmental conditions." AR_2430. Past effects to the project area include timber harvest and livestock grazing. AR_2430. Similarly, timber harvesting, livestock grazing, and livestock management activities are also the primary contributors to current conditions in the project area. AR_2430. Because "[t]he effects of grazing, from the past and project forward, are the primary subject" of earlier sections, the Forest Service determined they need not be repeated as "cumulative" effects. AR_2431. The Forest Service further concluded that "there are no present or reasonably foreseeable projects or proposed actions that would meaningfully contribute to the effects described in the analysis above." AR_2431.

Plaintiffs posit that this discussion fails to offer a quantitative analysis of housing development, new roads or areas open for motorized access, and mining activities on private land, as well as increased recreation, trail building activities, wildfires, increased big game hunting, and the escalation in grizzly bear mortalities. (Doc. 30 at 40–41). This analysis is needed, Plaintiffs argue, so that the Forest Service may properly examine how these activities, in combination with the AMP and other Forest Service endeavors, may cumulatively affect grizzly bears. (Doc. 30 at 38). The question, therefore, is whether the EA adequately analyzed the cumulative effects of private activities. The Court finds that it has not.

Defendants contend that in *Friends of Wild Swan v. Kehr* this District rejected similar "quantitative analysis" argument as the one made by Plaintiffs here. 321 F. Supp. 3d 1179, 1191–93 (D. Mont. 2018). There, plaintiffs challenged the sufficiency of the environmental assessment in part because it allegedly failed to provide quantitative information regarding the impacted acreage. *Friends of Wild Swan*, 321 F. Supp. 3d at 1192. The court disagreed, finding that although the total acreage was "not revealed in the narrative discussion[,]" when read in conjunction with the accompanying graphs, "the total impacted acreage" became clear. *Friends of Wild Swan*, 321 F. Supp. 3d at 1192.

Unlike *Friends of Wild Swan*, however, the EA does not mention—let alone analyze—cumulative effects associated with private activities. Indeed, Defendants rely primarily on a Terrestrial Wildlife Report and Biological Evaluation for the East Paradise Allotments, wherein the Forest Service examined "mineral development, firewood gathering, and recreational activities" and determined that, when combined with authorized grazing, the cumulative impacts on grizzly bears would be insignificant. (Doc. 35-1 at 41) (citing AR_7886). "Thus", Defendants argue, "the EA explains to the reader *why* the impact [of the AMP] will not be significant" when combined with other actions. (Doc. 35-1 at 41) (citing *Friends of Wild Swan v. Kehr*, 321 F. Supp. 3d 1179, 1192 (D. Mont. 2018). But the issue here—as in the preceding two sections—is that this report is not incorporated into the EA.

Defendants further argue Plaintiffs' concerns are obviated by the growing GYE grizzly bear population. (Doc. 35-1 at 42_43). The Court disagrees. The overall GYE grizzly bear population shares nothing with the public about whether the AMP, in combination with private land activities such as grazing or mining, may cumulatively affect grizzly bears. The Forest Service must account for private actions "that will cumulatively affect the environment, even though private actions are not under the Forest Service's control." *Conservation Congress v. U.S. Forest Service*, 377 F. Supp. 3d 1039, 1049 (E.D. Cal. March 28, 2019) (citing *Res. Ltd. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1993)). Indeed, in the GYE, grizzly bear survival declines as road density, number of homes, and site developments increase; grizzly bears are similarly affected in areas open to ungulate hunting. AR_16114. These considerations should have been accounted for in the EA.

Finally, although the Court is mindful to not conflate the distinct standards provided for in the ESA and NEPA, the Biological Assessment's ("BA") seemingly inapposite conclusion gives reason for pause. *See* AR_2545. There, the Forest Service explained that when East Paradise is "combined with those of private actions[]" such as livestock grazing, residential and recreational developments, and mining, "there would be a cumulative impact on grizzly bear in the area." AR_2545. This impact, the Forest Service concluded, "would be neither beneficial, discountable, or insignificant." AR_2545.

Defendants argue that because the threshold for finding "effect" under ESA differs from the of NEPA—ie, "[a]ny possible effect" and "significantly", respectively—the Forest Service's determination in the EA does not conflict with the agency's opposite conclusion in the BA. (Doc. 35-1 at 44). This argument is misplaced. To determine whether something is "significant" under NEPA, the agency must first provide the information and engage in the analysis. That was not done here.

Defendants further emphasize that the "scope of cumulative impacts analysis is related to the magnitude of the environmental impacts of the proposed action" and "[p]roposed actions of limited scope typically do not require as comprehensive an assessment of cumulative impacts as proposed actions that have significant impacts over a large area." (Doc. 35-1 at 39) (quoting *Native Ecosystems Council v. U.S. Forest Serv.*, 2015 WL 4606392, * 4 (D. Mont. July 30, 2015)). While that may be, the Forest Service's cumulative effects analysis must still be "useful". *N. Plains Res. Council*, 668 F.3d at 1076. In any event, the Court "cannot defer to a void." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 957 F.3d 1024, 1035 (9th Cir. 2020) (internal quotation marks and citation omitted).

Because the EA lacks any consideration of impacts by private actions, the Court finds that the Forest Service has failed to take a "hard look" at the cumulative effects of the AMP.

e. Whether an EIS was Required

"A threshold question in NEPA cases is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirements for an EIS." *Blue Mountains Biodiversity Project*, 161 F.3d at 1212. To determine whether an action significantly affects the environment, the agency must consider the context and intensity of the project. 40 C.F.R. § 1508.27. Context means "that the significance of an action must be analyzed in several contexts such as society as a whole, the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a) (2019). Intensity "refers to the severity of impact" and is evaluated using ten factors. 40 C.F.R. § 1508.27(b)(1)–(10). An agency's finding of no significant impact "may be overturned only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Anderson v. Evans*, 475 F.3d 475, 486 (9th Cir. 2004). The presence of just "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, (9th Cir. 2005).

For purposes of determining whether an action requires an EIS, an agency may prepare an EA. 40 C.F.R. § 1501.4(b) (2019). Here, the Forest Service prepared an EA and summarized its finding of no significant impacts in its Decision Notice and FONSI document. AR_2235. Plaintiffs contend the Forest Service did not fully address five intensity factors— (1) "ecologically critical areas"; (2) "highly controversial" effects; (3) "highly uncertain" effects; (4) cumulatively significant impacts; and (5) may adversely affected a listed species— thus failing to provide a convincing statement of reasons as to why an EIS was not required. (Doc. 30 at 46).

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i. Substantial Question on Ecologically Critical Areas—40 C.F.R. § 1508.27(b)(3)

Plaintiffs maintain there are substantial questions as to whether the AMP is located in an "ecologically critical area[]". 40 C.F.R. § 1508.27(b)(3). Plaintiffs point to the fact that portions of all six East Paradise allotments are located within the North Absaroka Roadless Area and the Dome Mountain Wildlife Management Area, and the boundaries of the two vacant allotments—Suce Creek and Sixmile South—include a portion of the Absaroka-Beartooth Wilderness. AR_2244; AR_2236; AR_2375.

This area, Plaintiffs maintain, includes not just the Absaroka-Beartooth Wilderness, the North Absaroka Roadless Area, and Dome Mountain Wildlife Management Area, but also the grizzly bear recovery zone, which serves as a "unique and ecologically critical area for the species." (Doc. 30 at 46) (citing 82 Fed. Reg. at 30,519; *see also* AR_2424; AR_2426). Relying on comments submitted during the NEPA consultation process, Plaintiffs maintain this area of the Absaroka Mountains is a "key part of connective habitat potentially linking grizzly bears" between GYE and the NCDE. (Doc. 30 at 47) (citing AR_24690; AR_20161). As Dr. Mattson observed, "[t]he Absarokas have repeatedly been identified as a key part of connective habitat[]", and "the costs to long term-recovery entailed by grizzly bear[] deaths in Absaroka Mountains are proportionately greater than costs entailed by deaths closer to the center of the ecosystem.” AR_24690.

The Court agrees. Plaintiffs have raised “substantial questions” as to whether the AMP is located in an area critical to connectivity. *Bark v. United States Forest Serv.*, 958 F.3d 865, 868 (9th Cir. 2020). Indeed, this District has recognized that connectivity is key to ensuring grizzly bear’s long term genetic health and viability. *See Crow Indian Tribe v. United States*, 343 F. Supp. 3d at 1018; *WildEarth Guardians v. Bucknall*, * 11-13. Therefore, the Forest Service’s failure to consider connectivity specifically in its EA rendered its finding of no significant impact unreasonable.

ii. Substantial Question on Highly Controverial---40 C.F.R. § 1508.27(b)(4)

Second, Plaintiffs argue that the East Paradise decision is “highly controversial.” 40 C.F.R. § 1508.27(b)(4) (2019). A project is “highly controversial “where there is a substantial dispute about the size, nature, or effect of the action rather than the existence of or opposition to a use. *Helena Hunter & Anglers v. Tidwell*, 841 F. Supp. 2d 1129, 1136 (D. Mont. 2009). “A substantial dispute” exists when evidence … casts serious doubt upon the reasonableness of an agency’s actions.” *Bark*, 958 F.3d at 870. “[M]ere opposition alone is insufficient to support a finding of controversy.” *Bark*, 958 F.3d at 870.

Plaintiffs contend that a high degree of controversy exists regarding the importance of the project area as a linkage for grizzly bears' movement north. (Doc. 30 at 47). This issue, Plaintiffs argue, was raised by Dr. Mattson and Gilbert during the comment period but was subsequently ignored by the Forest Service in the EA. *See* AR_24690; AR_20161. Plaintiffs further maintain the use of the 1998 baseline is controversial in that it fails to account for increased mortalities due to livestock depredations. (Doc. 30 at 48) (citing AR_19820). Defendants respond that the AMP's purported "importance" to connectivity "is irrelevant without Plaintiffs first establishing that the AMP would significantly increase livestock-related conflicts and that livestock grazing itself significantly impedes the grizzly bear's movements." (Doc. 35-1 at 50).

Plaintiffs need only raise "substantial questions" about whether the AMP will have a significant environmental effect—an environmental plaintiff "need not show that significant effects *will in fact occur*." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992). With that said, although it appears the AMP is indeed plagued by some degree of uncertainty, two comments do not equate to a high degree of controversy, nor do they raise "substantial" questions. Similarly, Plaintiffs' disagreement with respect to the 1998 baseline does not, in and of itself, render the AMP "highly controversial."

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iii. Substantial Question as to highly uncertain effects---40 C.F.R. § 1508.27(b)(5)

Plaintiffs further claim the project's effects are "highly uncertain" given the EA's failure to analyze earlier stocking dates. (Doc. 30 at 48). An EIS is not required "anytime there is some uncertainty, but only if the effects of the project are 'highly' uncertain." *In Def. of Animals v. U.S. DOI*, 841 F.3d 1054, 1070 (9th Cir. 2014). To require otherwise, Defendants argue, would in essence always require an EIS for grazing allotments. (Doc. 35-1 at 52). The Court agrees. Although the Forest Service failed to properly analyze earlier stocking dates in the EA, there is simply not enough information to ascertain whether the project's effects regarding earlier stocking dates are "highly uncertain" at this time.

iv. Substantial Question as to cumulativively significant impacts—40 C.F.R. § 1508.27(b)(7)

Plaintiffs argue that the AMP will have cumulatively significant impacts. (Doc. 30 at 49). The cumulative impacts factor requires the Forest Service to evaluate whether the action "is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7) (2019). In response, Defendants aver the Forest Service considered other Forest Service activities in addition to "other past and present activities such as recreation", which were "incorporate[d] into the existing conditions analyzed." (Doc. 35-1 at 53) (citing AR_2245). It appears the "recreation activities"

Defendants reference is the Forest Service's plan to reconstruct the Sixmile Trailhead—i.e., an agency activity. *See* AR_2431; AR_2245. The issue here is that the Forest Service failed to discuss private, not agency, activities. In light of the issues contained in the Forest Service's cumulative effects analysis, the Court finds it reasonable—and indeed, the Forest Service's Biological Assessment found it reasonable—to "anticipate a cumulatively significant impact on the environment," which the EA fails to sufficiently address.

v. Substantial Question as to adverse effects on threatened species—40 C.F.R. § 1508.27(b)(9)

Finally, Plaintiffs claim the AMP will adversely affect grizzly bears, a threatened species. (Doc. 30 at 50). In support, Plaintiffs point to the determination that "the action alternatives *may affect, and are likely to adversely affect, grizzly bear*" because of the "potential for removal of individual depredation on livestock or bear-human encounters related to livestock management activities that could result in mortality of grizzly bears," as well as the BA's apparent conclusion that the AMP, combined with private land activities, could result in not insignificant cumulative effects. AR_2246; AR_2545. Defendants maintain it is the "degree of any effect" on a listed species and not, as Plaintiffs argue, the presence of an ESA-listed species that determines a project's significance. (Doc. 35-1 at 54). Although Defendants are correct in that it is indeed the "degree" to which a species is impacted, the agencies' failure to adequately consider connectivity and cumulative effects in relation to the grizzly bear makes it impossible for the Court to determine the degree to which the AMP will adversely affect grizzly bears as required under § 15.08.27(b)(9).

On balance, the Court concludes Plaintiffs have raised substantial questions about whether the AMP will have a significant environmental effect under 40 C.F.R. §§ 1508.27(b)(3), (7) and (9), and thus the FONSI was arbitrary and capricious.

vi. EIS on remand

The determination that a FONSI is arbitrary and capricious does not always require preparation of an EIS. *Alliance for the Wild Rockies v. Gassmann*, 678 F.Supp. 3d 1249, 1297-98 (D. Mont. 2023), citing *Ctr. for Biological Diversity v. Nat'l. Highway Traffic Safety Admin.*, 538 F.3d 1172, 1225 (9th Cir. 2008). When there is uncertainty over the impact of a proposed project caused by an inadequate EA, "the court should ordinarily remand for the agency to either prepare a revised EA or reconsider whether an EIS is required."

Under the facts of this case, the Court finds it appropriate to remand to allow the Defendants to follow their ordinary processes, in line with the errors identified above, to determine whether an EIS is required or whether the issues may be adequately addressed in a revised EA.

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IV. Remedy

Plaintiffs request that this Court vacate the decision and remand for a new NEPA analysis. (Doc. 30 at 50). Vacatur typically accompanies a remand under the APA. *Alliance for the Wild Rockies*, 907 F.3d at 1121. The court must evaluate the seriousness of the agency's errors and the disruptive consequences of an interim change. *Cal Cmties. Against Toxics v. Envt. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012). Plaintiffs argue the disruptive consequences of vacatur primarily include maintaining the status quo and not allowing the revised and expanded grazing decision to occur pending compliance with NEPA. (Doc. 30 at 51). Defendants did not address this issue in briefing, instead taking the position that discussing remedy would be premature at the merits briefing stage. (Doc. 35-1 at 56).

At oral argument, counsel for Plaintiffs conceded there were some beneficial aspects of the AMP, including riparian restoration and minimization of invasive grasses from expanded grazing. However, there is not a meaningful way to carve out beneficial aspects from the AMP without first addressing the NEPA errors discussed above. Accordingly, the Court agrees that vacatur is appropriate to allow the Defendants the opportunity to remedy the issues addressed in this order. Of course, this recommendation does not affect the "status quo" prior to the project, which the Court understands to be the grazing leases as they existed prior to the AMP.

V. Conclusion

For the reasons set forth above,

IT IS RECOMMENDED that the parties' cross-motions for summary judgment (Docs. 29, 35) be GRANTED in part and DENIED in part, as set forth below:

1. Plaintiffs are entitled to summary judgment on their NEPA claims insofar as the Forest Service failed to consider earlier stocking dates, connectivity and cumulative effects;
2. Defendants are entitled to summary judgment on Plaintiffs' NEPA claim insofar as the Forest Service adequately set the project baseline.

IT IS FURTHER RECOMMENDED that the EA be REMANDED WITH VACATUR and with instructions for the Forest Service to address the deficiencies identified in this Finding and Recommendation;

IT IS FURTHER RECOMMENDED that Plaintiffs' motion to supplement the record (Doc. 25) be DENIED;

IT IS FURTHER RECOMMENDED that Plaintiffs' claim for relief under the ESA be deemed waived.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendation of the United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after entry hereof, or objection is waived.

DATED this 27th day of March, 2025.

Kathleen L. DeSoto
United States Magistrate Judge