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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
7

8 ALLIANCE FOR THE WILD
ROCKIES,

9 Plaintiff,

10 vs.

11 JIM PENA, in his official capacity as
Regional Forester of Region Six U.S.
Forest Service, UNITED STATES
12 FOREST SERVICE, an agency of the
United States, and RODNEY
13 SMOLDON, in his official capacity as
Supervisor of the Colville National
14 Forest,

15 Defendants.

Case No. 2:16-cv-00294-RMP

FEDERAL DEFENDANTS' CROSS-
MOTION FOR SUMMARY
JUDGMENT AND RESPONSE TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

16 Federal Defendants, pursuant to the Court's Scheduling Order (ECF No. 99),
17 hereby submit this Motion for Summary Judgment and Response to Plaintiff's Motion
18 for Summary Judgment (ECF No. 104).

19 **I. INTRODUCTION**

20 The Colville National Forest is managed in accordance with the Colville
21 National Forest Land and Resource Management Plan (Forest Plan). AR 120866.
22 The Colville Forest Plan, developed in accordance with the National Forest
23 Management Act (NFMA), was approved in 1988. *Smoldon Decl.* at 3 (ECF No. 22).
24 Proposed projects on the Colville National Forest, such as the North Fork Mill Creek
25 A to Z Project (Project), are designed to move the Forest toward the desired future
26 conditions identified in the Forest Plan. *Id.*
27

1 To meet the objectives of the Forest Plan, move the forest toward the desired
2 future conditions described in the Forest Plan, and engage in forest restoration, the
3 Forest Service worked closely with a coalition of community leaders, timber industry
4 representatives, local government officials, and environmental groups such as The
5 Lands Council, Conservation Northwest, and The Nature Conservancy, to design the
6 Project. AR 120875-79. The Forest Service used its stewardship contracting
7 authority to design and offer this forest restoration project, funded through
8 commercial timber harvesting and supporting rural community needs. *See* Section
9 347 of the Omnibus Consolidated Appropriations Act of FY 1999, as amended by
10 Sec. 323 of P.L. 108-7.

11 The Colville National Forest offered, through competitive bidding, the North
12 Fork Mill Creek Stewardship Contract. Under the contract, the successful contractor
13 works collaboratively with the Forest Service to design and implement this Project.
14 *Id.* at 4. The Forest Service solicitation for this Contract was advertised as a Request
15 for Proposal, and sought full and open, competitive proposals for a single award to
16 conduct all the work required in the Stewardship Project. *Id.* For this Project, the
17 environmental analysis under the National Environmental Policy Act (NEPA) was
18 conducted by a private contractor, although the Forest Service supervised and held
19 final decision-making authority over the NEPA process. The successful bidder
20 provided the funding for the environmental analysis. *Id.* at 3. The sole bidder,
21 Vaagen Brothers Lumber (Vaagen Brothers) from Colville, Washington, was awarded
22 the Contract. *Id.* at 4. As part of its overall contract proposal, Vaagen Brothers
23 proposed using Cramer Fish Services (Cramer or CFS) as an independent contractor
24 to conduct the NEPA analysis. *Id.* at 3. The work of Cramer, (the “NEPA
25 contractor”) was reviewed and approved by the Forest Service. *Id.*

26 Following preparation of an environmental assessment (EA) pursuant to NEPA,
27 the Forest Service released the North Fork EA for public comment and objections in

1 July 2015. AR 123048. Based on feedback from the public, the Forest Supervisor
2 decided to revise the EA to allow the Forest Service and the NEPA contractor to
3 address the issues raised by the public. *Id.* In January 2016, the revised EA was again
4 released to the public and the Forest Service invited objections. Those new objections
5 were addressed by the Forest Service. The EA was not reopened for an additional
6 public comment period, as the updated information in the EA merely clarified the
7 project parameters. *Sanchez Meador Decl.* at 3 (ECF No. 24). Colville National
8 Forest Supervisor Rodney Smoldon signed the Decision Notice/Finding of No
9 Significant Impact (DN/FONSI) on June 13, 2016. AR 123066. The Court is familiar
10 with the facts and procedural history. *See* prior briefing at ECF No. 21 at 2-4; ECF
11 No. 28 at 1-3.

12 **II. STATUTORY BACKGROUND**

13 **A. The National Forest Management Act (“NFMA”)**

14 Administration of the National Forest System is chiefly governed by NFMA.
15 16 U.S.C. §§ 1600-1614. Forest planning under NFMA is carried out at two levels.
16 *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 728-32 (1998). The first level is
17 embodied by the forest plan, which is a broad, programmatic document. *Id.* at 729-30;
18 16 U.S.C. § 1604. At the second level, the Forest Service undertakes site-specific
19 actions to achieve the desired conditions in the forest plan. *Ohio Forestry*, 523 U.S. at
20 729-30. Proposed projects must be consistent with the forest plan. *See* 16 U.S.C. §
21 1604(i).

22 **B. The National Environmental Policy Act (“NEPA”)**

23 NEPA serves the dual purpose of informing agency decision-makers of the
24 environmental effects of proposed federal actions and ensuring that relevant
25 information is made available to the public so that it “may also play a role in both the
26 decisionmaking process and the implementation of that decision.” *Robertson v.*
27 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA does not mandate

1 particular results or impose substantive environmental obligations on federal agencies.
2 *Id.* at 351-52; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). Instead,
3 NEPA ensures “that [an] agency will not act on incomplete information, only to regret
4 its decision after it is too late to correct.” *Id.* NEPA requires the preparation of an
5 environmental impact statement (“EIS”) for “major Federal actions significantly
6 affecting the quality of the human environment . . .” 42 U.S.C. § 4332(2)(C). If the
7 project does not have significant effects, and environmental assessment (EA) may be
8 prepared. In reviewing NEPA decisions, courts evaluate whether the analysis includes
9 a “reasonably thorough discussion of the significant aspects of the probable
10 environmental consequences.” *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)
11 (internal quotation marks omitted).

12 **III. STANDARD GOVERNING REVIEW OF AN AGENCY DECISION**

13 Because the NFMA and NEPA do not provide a private right of action, a
14 district court’s review of an agency’s final decision is reviewed under the
15 Administrative Procedure Act (“APA”). 5 U.S.C. §§ 701-706; *Earth Island Inst. v.*
16 *U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012). The APA imposes a
17 deferential standard of review limited to the determination of whether the agency
18 acted in a manner that was “arbitrary, capricious, an abuse of discretion, or otherwise
19 not in accordance with law.” *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162,
20 1168 (10th Cir. 2007) (citing 5 U.S.C. § 706(2)(A)). Review under the arbitrary and
21 capricious standard ‘is narrow, and [courts] do not substitute our judgment for that of
22 the agency.’” *Earth Island Inst.*, 697 F.3d at 1013 (citing *Lands Council v. McNair*,
23 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). “This deference is highest when
24 reviewing an agency’s technical analyses and judgments involving the evaluation of
25 complex scientific data within the agency’s technical expertise.” *League of*
26 *Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122,
27

1 1130 (9th Cir. 2010) (citing *McNair*, 527 F.3d at 993), overruled on other grounds,
2 *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)).

3 The APA directs courts to “review the whole record or those parts of it cited by
4 a party . . .” 5 U.S.C. § 706. Thus, the Court’s review is limited to the administrative
5 record before the agency decision-maker. *See Fla. Power & Light Co. v. Lorion*, 470
6 U.S. 729, 743 (1985). A reviewing court should only reverse an agency’s decision as
7 arbitrary and capricious when “the agency relied on factors Congress did not intend it
8 to consider, entirely failed to consider an important aspect of the problem, or offered
9 an explanation that runs counter to the evidence before the agency or is so implausible
10 that it could not be ascribed to a difference in view or the product of agency
11 expertise.” *McNair*, 537 F.3d at 987 (internal quotations omitted).

12 IV. LEGAL ANALYSIS

13 A. The North Fork Project had Independent Utility and the NEPA 14 Analysis in Project Phases is Reasonable.

15 Plaintiff alleges that the Forest Service did not provide sufficient reasons for
16 limiting the geographic scope of its Project Area to the North Fork of Mill Creek
17 drainage area. Yet “an agency has the discretion to determine the physical scope used
18 for measuring environmental impacts.” *Idaho Sporting Congress v. Rittenhouse*, 305
19 F.3d 957, 973 (9th Cir. 2002). Identifying the appropriate geographic scope “is a task
20 assigned to the special competency of the appropriate agenc[y],” *Kleppe v. Sierra*
21 *Club*, 427 U.S. 390, 414 (1976), and the agency must balance need for a
22 comprehensive analysis versus considerations of practicality, while also keeping in
23 mind that use of a larger analysis area can dilute the apparent magnitude of
24 environmental impacts. *See Friends of the Wild Swan v. Weber*, 767 F.3d 936, 943
25 (9th Cir. 2014); *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 958–59 (9th
26 Cir. 2003).

1 Analyzing the environmental impacts of multi-phase projects in a single
2 document is not required when “many of the details and planning decisions” regarding
3 the later phases are incomplete. *Wetlands Action Network v. U.S. Army Corps of*
4 *Eng’rs*, 222 F.3d 1105, 1119 (9th Cir. 2000), *abrogated on other grounds by*
5 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *see also* 40
6 C.F.R. § 1508.25(a) (requiring a single NEPA document only for (1) connected
7 actions, (2) cumulative actions, and (3) similar actions). To mandate such analysis
8 “would require the government to do the impractical.” *Id.* Ultimately, the agency
9 must provide a reasoned decision and support for its chosen level of analysis, and
10 must appropriately address the cumulative effects beyond the Project Area in the first
11 instance. *See Idaho Sporting Cong.*, 305 F.3d at 973. An agency must draw the line
12 somewhere, therefore, courts need only consider whether the agency “has offered a
13 reasonable justification for why it drew the line where it did.” *Friends of the Wild*
14 *Swan*, 767 F.3d at 944. During this inquiry, courts routinely defer to agencies’
15 specialized expertise concerning the appropriate scope of analyses. *See, e.g.*,
16 *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 1000 (9th Cir. 2004); *Earth*
17 *Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305 (9th Cir. 2003); *Churchill Cty.*
18 *v. Norton*, 276 F.3d 1060, 1079 (9th Cir. 2001).

19 For example, in *Earth Island*, the Ninth Circuit found it reasonable for separate
20 NEPA documents to analyze Project effects when the individual projects had: (1)
21 “independent utility;” (2) when the boundary between adjacent sale areas predated the
22 agency decision; (3) when the sales and analyses proceeded on separate time
23 schedules; and, (4) when the environmental document explicitly discussed the
24 cumulative impact of many elements of the other projects in its environmental
25 document. *Earth Island Institute v. U. S. Forest Serv.*, 351 F.3d 1291, 1305-06 (9th
26 Cir. 2003). Similarly, here, the division of the two projects was reasonable because
27 each of the planning areas encompasses distinct creek drainages, divided by a

1 ridgeline, which have different main access points. (AR026082). As further
2 discussed below, the EA also adequately addresses cumulative effects as the details
3 and planning decisions of the later Middle/South Fork Project were developed.

4 Similarly, in *Selkirk Conservation Alliance*, the Ninth Circuit ruled that that it
5 was reasonable for the Forest Service to limit the geographic boundary of its
6 environmental analysis to one bear management unit in the Colville National Forest,
7 rejecting plaintiff’s argument that the Forest Service had acted arbitrarily and
8 capriciously by not fully considering the cumulative impact of another project
9 proposed in the bordering Idaho Panhandle National Forest. *Selkirk Conservation*
10 *All.*, 336 F.3d at 951. Affirming the Forest Service’s decision, the Ninth Circuit
11 concluded that the Forest Service’s rationale for the geographic boundary was
12 reasonable and supported for several reasons. *Id.* at 960. First, the boundary fit the
13 objectives and purpose of the environmental analysis by including the “bear seasonal
14 habitat components” and was “large enough to encompass the home range of a female
15 grizzly bear.” *Id.* at 951. Second, the smaller geographic scope avoided the danger of
16 diluting the cumulative effects of a proposed activity. *Id.* Third, the two proposal
17 areas had a separate transportation system and distinct geographic features with a
18 “ridgeline [that] separates the watersheds, causing hydrological effects to be separate;
19 it also separates the viewsheds, and serves as a boundary line for analysis of wildlife
20 effects.” *Id.* (internal citations omitted).

21 The North Fork Project area, in conjunction with the other project areas, is
22 reasonable because each of the planning areas encompasses distinct creek drainages,
23 divided by a ridgeline, which have different main access points. (AR026082). The
24 Forest Service’s justification is reasonable and entitled to deference.

25 Furthermore, the North Fork and Middle/South Project areas have independent
26 utility. As in *Earth Island*, “the two restoration projects in this case have independent
27 utility in that they each generate revenue and implement distinct forest conservation

1 measures, and each plan would go forward without the other.” *Earth Island Inst.*, 351
2 F.3d at 1305. Here, the EA sets forth substantial environmental benefits obtained
3 from the North Fork Project alone. AR104515-527. Indeed, the Project has
4 proceeded independently, on its own timeline, as have the Middle and South Fork
5 Projects. (*See* AR026084; AR026080-123).

6 Plaintiff contends that the “decision to conduct two separate analyses of the
7 adjacent Mill Creek projects was made before any substantial environmental
8 information was gathered or evaluated.” ECF No. 104 at 13. This is inaccurate. The
9 decision was made after review of geodatabase information (AR024252), the large
10 size of the area addressed in the A-Z Stewardship Contract, and recognition of
11 distinctions in the sub-watersheds of North, South, and Middle Fork (AR024221,
12 AR024252). Furthermore, this decision was made after review of “planning area
13 boundaries intersected with management emphasis areas per the CNF Forest Plan”
14 (AR024252).

15 Plaintiff acknowledges that Administrative Record documents explain that the
16 decision was made because “resource characteristics and issues will be fairly distinct
17 between these two planning areas”, (AR024252) and that “road access for the most
18 part, will be distinct.” (AR 024252). But, Plaintiff essentially states that those
19 geographic, logistical and practical distinctions do not matter because the project areas
20 are largely adjacent. ECF No. 104 at 13. Plaintiff’s argument that adjacent projects
21 must be analyzed in the same environmental document is wrong. *See, e.g., Klamath-*
22 *Siskiyou Wildlands Ctr.*, 387 F.3d at 1000; *Earth Island*, 351 F.3d at 1305.

23 Plaintiff further contends that the Forest Service divided the proposed actions
24 into component parts in violation of 40 CFR 1508.27(b)(7) to avoid a finding of
25 “significance.” ECF No. 104 at 14. Plaintiff only points to the potential “significant
26 effect” as being the significance of increased sedimentation of fish-bearing streams in
27 the Project Area. *See id.* Critically, Plaintiff recognizes that the North Fork and

1 Middle/South Fork Projects are in distinct drainages or sub-watersheds. *See id* at 13-
2 14. This distinction is meaningful for the close study of the hydrologic effects and
3 effects of sediment that Plaintiff mischaracterizes and claims is the “significant”
4 impact that the Forest Service fails to analyze. The EA’s analysis of sedimentation is
5 sound and the Finding of No Significant Impact is well-reasoned, supported, and not
6 arbitrary, as discussed in further detail below.

7 The Forest Service’s geographic scope for the North Fork Project Area is
8 reasonable, supported, and entitled to deference.

9 **B. The Forest Service Properly Considered Cumulative Effects.**

10 The North Fork Project EA and its supporting documents adequately consider
11 and address the Project’s cumulative effects within and outside the Project area. In
12 particular, the Forest Service’s determination that sediment loads do not have a
13 significant impact on fish and fish reproduction is reasonable and supported. As
14 discussed in detail below, Plaintiff mischaracterizes the EA’s time-specific analysis of
15 sediment discharges and ignores the immediate benefits of road maintenance work,
16 enhanced design standards, and “hot spot” restoration that will improve fish habitat
17 and fish reproduction. The EA’s cumulative effects analysis also sufficiently
18 describes the interaction of logging activities with sediment production and addresses
19 the Middle/South Fork logging areas. The Forest Service’s Decision Notice and
20 Finding of No Significant Impact is well-supported by the North Fork Project EA and
21 its supporting documents. The Plaintiff’s arguments regarding cumulative effects fail
22 and the Forest Service’s motion for summary judgment should be granted.

23 1. The Forest Service Properly Considered Cumulative Effects of the
24 Middle and South Fork Project in the Environmental Assessment.

25 Plaintiff claims that the Forest Service did not adequately evaluate cumulative
26 effects for this Project with respect to sediment delivery (Plaintiff does not challenge
27 cumulative effects analysis for other resources). A cumulative-impact analysis “must

1 provide a useful analysis of the cumulative impacts of past, present, and future
2 projects.” *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 868 (9th
3 Cir. 2004) (quoting *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1075 (9th
4 Cir. 2002)). Where such an analysis “is fully informed and well considered,” as in
5 this case, the court “should defer to that finding.” *Id.*; see *Churchill County v. Norton*,
6 276 F.3d 1060, 1081 (9th Cir. 2001) (“We could certainly ‘fly-speck’ [the cumulative-
7 impacts] chapter . . . and find instances where the inclusion of quantitative data would
8 benefit the Service and the public. . . . That is not our role . . .”).

9 Cumulative impact “is the impact on the environment which results from the
10 incremental impact of the action when added to other past, present, and reasonably
11 foreseeable future actions.” 40 C.F.R. § 1508.7; 36 C.F.R. § 220.3. The EA must
12 consider the future actions for which “the effects can be meaningfully evaluated.” See
13 40 C.F.R. § 1508.23; 36 CFR § 220.4(a)(1).

14 Plaintiff claims that the Forest Service did not adequately evaluate cumulative
15 effects of the North Fork and Middle/South Fork proposed projects. Yet the
16 cumulative effects analyses in the EA do precisely this: they consider the effects of
17 the Middle/South Fork Mill Creek A to Z project for resources where effects of these
18 two projects may overlap in time and space, and for which the effects could be
19 meaningfully evaluated. See cumulative effects sections for sediment delivery (AR
20 104563-65), stream flow (AR 104568-71), water quality (AR 104572-76), soil
21 productivity (AR 104578-79), fish (AR 104585-89), special status wildlife (AR
22 104598-608, 104610-32), snags and down wood (AR 104636-39), big game winter
23 range (AR 104643-47), special status plants (AR 104649-52), dispersed recreation
24 (AR 104665-67), and visual quality (AR 104671-73).

25 For example, the EA, as Plaintiff concedes, addresses all past, present, and
26 reasonably foreseeable future actions in the project area. AR 121091-121093; See
27 *Pl’s Mtn.* at 19-20 (ECF No. 104). Plaintiff contends that two areas of the EA that

1 address cumulative effects are inadequate: (1) the analysis of the cumulative effect of
2 sediment delivery within the North Fork Project Area, and (2) the analysis of the
3 cumulative impacts of sediment delivery of the Middle and South Fork Project. *Pl's*
4 *Mtn.* at 19-24. The Plaintiff's objection to the cumulative effects analysis of sediment
5 delivery in the North Fork Project is addressed in detail below. Plaintiff's concerns
6 about the cumulative impacts of the Middle and South Fork Project on sediment
7 delivery highlights the forest acreage impacted, mileage of forest roads at issue, and
8 amount of timber extracted. *Pl's Mtn.* at 21-24. Plaintiff's core argument, however,
9 is largely based on its inaccurate, exaggerated portrayal of sediment impacts that
10 ignore the EA's detailed analysis of how the North Fork Project's timing, restoration,
11 and design features decrease sediment prior to timber hauling. AR 100029.

12 Furthermore, the interaction between the sediment effects of the North Fork Project
13 and the Middle and South Fork Project is minimal because these two project areas are
14 in separate drainages, and the hydrologic effects do not overlap. AR 104563-65.

15 Streams from the two project areas only converge downstream, outside of the Project
16 areas after both projects have implemented similar timing, restoration, and design
17 features that decrease sediment delivery. *Id.*; AR 121708-09. Thus, the EA
18 reasonably concludes that for sediment delivery: "cumulative effects downstream
19 from the North and South Forks of Mill Creek within the mainstem of Mill Creek
20 within the cumulative effects analysis area would therefore be expected to decrease."
21 (AR 104565).

22 Plaintiff's examples and focus on sediment effects on fish fail, as detailed
23 below, because the Project would lead to a net *decrease* in sediment delivery, moving
24 *toward* INFISH RMOs and improved riparian buffers that would improve stream
25 habitat for native fish species. AR 121500, 121520-21, 121641, 121684.

26 Additionally, the Fisheries Specialist Report specifically addresses how the
27 cumulative effect of "[s]ediment delivery from logged areas within the Middle and

1 South Fork Mill Creek watersheds is expected to remain a minor component of total
2 sediment delivery due to implementation of erosion and sediment control [Best
3 Management Practices], including INFISH buffer requirements, such as those
4 proposed for the North Fork proposed action.” AR 121709.

5 Plaintiff cannot demonstrate that the Forest Service’s EA’s evaluation of
6 cumulative effects for Middle and South Fork was unreasonable.

7 2. The Project Will Improve Fish Habitat and Fish Reproduction and the
8 Forest Service’s Determination that Sediment Loads Do Not Have a Significant
9 Impact on Fish is Reasonable and Supported.

10 The Forest Service properly evaluated the Project’s adverse, beneficial and
11 cumulative impacts relating to sediment delivery and reasonably concluded that the
12 Project would have a net decrease in sediment delivery. AR 100028-30. The Forest
13 Service also properly concluded that the Project’s sediment load impacts on fish and
14 fish habitat were not significant. *See* 40 C.F.R. § 1508.27(b)(1); *Friends of the*
15 *Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993) (“we
16 can consider the effect of mitigation in determining whether preparation of an EIS is
17 necessary” and mitigation measures need not completely compensate for adverse
18 environmental impacts). Plaintiff mischaracterizes the EA’s analysis of sediment
19 discharges and ignores the immediate benefits of road maintenance work beyond the
20 rehabilitation of “hot spots.”

21 Plaintiff takes sediment load numbers out of context and ignores the Project’s
22 timing, restoration, and design features that decrease sediment. *See* Pl.’s Mot. at 20-
23 21; AR 100028-29. As detailed in the Hydrology Report, the benefits of road
24 maintenance throughout the Project area and “hot spot” restoration occur first, **prior**
25 **to** the sediment increases resulting from logging, hauling and burning (possibly years
26 later) in the specific Task Order Project area: “[t]he outcome from this sequence
27 would be immediate benefit of the maintenance and reconstruction, followed by the

1 effects of road construction, logging, hauling, and prescribed burning.” AR 100029;
2 AR 121706.

3 Because “the sediment increases and decreases predicted to occur with project
4 implementation will occur as a sequence through time,” *id.*, with the sediment effects
5 first being lowered, the later increases in the sediment delivery would not cause
6 significant impacts to fish due to the Project implementation. (AR 100029). Thus,
7 Alliance’s claims of fine sediment percentages over 25%, which may affect egg
8 survival rates, do not reflect the actual predicted sediment amounts in the Project area
9 over time, because the road rehabilitation and restoration work that occurs first lowers
10 the total sediment delivery before any potential sediment delivery increases caused by
11 logging, hauling and prescribed burning. AR 121706 (“Rehabilitation of NFS roads
12 and treatment of ‘hot spots’ would occur prior to harvest activities and would reduce
13 sediment delivery”); AR 121709. The Ninth Circuit, in its decision in this case on
14 Plaintiff’s request for a preliminary injunction, found that the timing of various
15 aspects of the project, allowed the Forest Service to permissibly rely “on both the
16 benefit of a net sediment reduction and the specific sequence of sediment reduction
17 followed by sediment increase to conclude that the A to Z Project’s sediment
18 accumulation activities would not create a significant environmental impact.”
19 *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211 1222 (9th Cir. 2017).

20 The Fisheries Report specifically details why short- and long-term impacts to
21 fish and fish habitat due to sediment loads are not adverse: for example, “road
22 rehabilitation [is completed] prior to logging activities,” AR 121683-63; culvert
23 replacement and restoration is planned “during winter months so spring freshets
24 would clear any trace sedimentation immediately following completion,” AR 121684,

25 ///

26 ///

27 ///

1 AR 121704-05; and compliance with INFISH¹ buffer requirements protects stream
2 shade and limits sediment load, AR 121703. Furthermore, commercial timber harvest
3 and associated fuel management (i.e., prescribed burning) will not occur in Riparian
4 Habitat Conservation Areas (“RHCA”). AR 121705. As detailed in the Fisheries
5 Report, this will allow forest vegetation within RHCA to continue to progress through
6 “[n]atural channel-forming processes” that are “associated with large wood
7 recruitment and increased canopy complexity as riparian forests age These
8 channel-forming processes would lead to increased pool frequency, lower pool width
9 to depth ratios and lower (i.e., undercut) bank angles.” AR 121705-06. Plaintiff is
10 simply wrong that the Project EA and its supporting documents do not address how
11 the Project complies with these INFISH requirements and ignores the resulting
12 benefits for the Project area.

13 Plaintiff’s attempt to minimize the Project benefits to downstream effects of
14 “hot spot” restoration is also inaccurate. AR 100017-30. These “hot spots” are five,
15 targeted road improvement projects that were identified as the “best sediment
16 reduction opportunities” that are being completed in addition to Project-wide road

17
18 ¹ “The Project would comply with the Clean Water Act to control sources of non-point
19 pollution including delivery of sediment by applying standards and guidelines
20 described in the Forest Service Manual and Handbook, General Water Quality - Best
21 Management Practices and the Inland Native Fish Strategy (INFISH) riparian goals
22 for stable and productive riparian and aquatic ecosystems, stream channel integrity,
23 regulating stream flows including water table variability in meadows and wetlands,
24 protecting riparian plant communities, and providing riparian vegetation to ensure
25 LWD, thermal regulation, surface and bank erosion and channel migration similar to
26 those that existed during development of riparian areas, and would implement the
27 INFISH Riparian Habitat Conservation Area requirements.” AR 100036.

1 maintenance. AR 100018. Additional restoration work is planned throughout the
2 Project area – for example, work in Strauss Creek, Clugston Creek, and the upper
3 North Fork of Mill Creek includes graveling of the road surface, which provides a
4 large decrease in sediment for those areas. *Id.* The Hydrology Report details how the
5 sediment-reducing hot spot restoration and road improvement projects “must be
6 completed before logging and hauling can occur within the Marble Creek and much of
7 the Strauss Creek watersheds” because “there is no other haul route out of these
8 areas.” AR 099898. Plaintiff completely ignores all the significant restoration work
9 that is being done in addition to the “hot spot” restoration. *See Pl. Mot.* at 17-19.

10 Additionally, the Hydrology Report provides detailed Best Management
11 Practices that would be applied to the Project, utilizes “WEPP” Assessment methods
12 that are commonly applied to National Forest Service Projects, and explains why these
13 analytical tools and referenced scientific studies support the short-term slight decrease
14 in sediment delivery and long-term decrease of 65 percent after project-related log
15 hauling traffic ceases. *See* AR 099873-78; AR 099907; AR 124341-43. The finding
16 of no significant impact for sediment delivery in this context is supported, reasonable
17 and not arbitrary.

18 Alliance also contends that a Travel Analysis Report explaining the costs of
19 maintaining roads demonstrates that the Forest Service did not properly consider long-
20 term cumulative impacts of sediment delivery. *Pl.’s Mot.* at 17. To the contrary, the
21 Forest Service sufficiently addressed this concern by discussing potential sources and
22 allocations of road maintenance funds in the Transportation Report and in response to
23 Plaintiff’s objections. AR 124317, 124319. The road restoration work for the project
24 results in substantial improvement in the reduction of sediment delivery. AR 099907.

25 The EA’s analysis regarding the Forest’s Service’s finding of no significant
26 impact for sediment delivery is supported and reasonable, and Defendants’ motion for
27 summary judgment should be granted.

C. The Forest Service Properly Evaluated The Effects on Furbearers.

The Forest Plan established minimum amounts of old-growth-like stands that are to be protected for those species that use such stands. The Forest Service, in this Project, protected all such old-growth stands and then protected thousands of acres of the next-best “mature” stands in amounts that exceed the Forest Plan requirements. Plaintiff cannot show otherwise and the Court should grant summary judgment in favor of the Federal Defendants on this issue.

Plaintiff’s challenge to the North Fork Project related to furbearers alleges (1) the Forest Service did not conduct monitoring required under the Colville Forest Plan and should have identified fisher as a Management Indicator Species (MIS), resulting in not adequately analyzing the effects on the marten and fisher, and (2) the Forest Service’s application of the proxy-on-proxy approach for evaluating effects on the pine marten and fisher is flawed. Plaintiff’s claim fails because the Forest Service conducted the required monitoring of the properly designated Management Indicator Species for other furbearers.

1. Plaintiff’s Monitoring and MIS Claims Have no Validity.

Plaintiff initially alleges that the Forest Service violated NEPA and NFMA because the Colville National Forest stopped its annual monitoring effort, including efforts to monitor the pine marten (the Forest Plan’s MIS for furbearers). *Pl’s Brief* at 24-26. Plaintiff claims that the failure to conduct this monitoring results in the Forest Service failing to designate the fisher as a MIS and thus not adequately assessing the effects of the project on fisher.

Plaintiff’s allegations are premised on several incorrect assumptions. First, issues regarding long-term monitoring are a forest planning issue, not a project level

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1 issue. The decision to use marten and not the fisher as the MIS for old-growth
2 dependent species is not subject to challenge in this project.²

3 At the time the Forest Plan was approved in 1988, the pine marten was
4 identified as one of the indicator species for old-growth dependent species. AR
5 003787-88. Fisher were not identified as a MIS because it occupied much the same
6 habitat as the marten, so there was no need to identify two mammals as MIS that
7 occupy much of the same type of stands. Plaintiff now claims the Forest Service
8 should have, sometime after 1988, made a decision to identify the fisher as a MIS.
9 Plaintiff's grievance, however, is with the Colville Forest Plan – the identification of
10 indicator species is a forest planning issue that is not properly raised by challenging
11 this Project's compliance with the Forest Plan.

12 Second, Plaintiff also claims that the Forest Service ignored newer studies that
13 showed that the fisher's habitat requirements differ from the marten. *Pl's Brief* at 26,
14 34. Plaintiff, in its objection to the DN/FONSI, indicated that “martens tend to occur
15 at higher elevations than fishers.” AR 120694. It is not altogether clear that the
16 elevational difference between the two species makes a difference in this project. In a
17 paper cited by Plaintiff in its objections to the North Fork Project (AR 120694),

18 _____
19 ² Even if the Forest Service had conducted forest plan implementation monitoring,
20 including habitat utilization monitoring, whatever the results of that monitoring (lots
21 of martens or very few martens), the Colville National Forest would have been
22 obligated, at the project level, to provide marten habitat in accordance with the Forest
23 Plan standards and guidelines. Thus, the lack of conducting forest plan
24 implementation monitoring would not invalidate a specific project. The issue before
25 this Court in this action is not whether the Forest Service properly monitored the
26 Colville Forest Plan, but whether the Forest Service complied with its obligations
27 under NEPA and NFMA at the project level.

1 researchers found that fishers on the east side of the Cascades were generally found at
2 elevations between 1,800 and 2,200 meters (5,905 to 7,217 feet). Ruggiero, Leonard
3 F; Aubry, Keith B.; Buskirk, Steven W.; Lyon, L. Jack; and Zielinski, William J.,
4 *American Marten, Fisher, Lynx, and Wolverine in the Western United States*,
5 U.S.D.A. Forest Service, General Technical Report RM-254 (1994). The elevations
6 in the project area range from 2,200 feet to 5,770 feet. AR 099914. For the elevations
7 in this Project, the difference in elevational preferences between the species does not
8 affect the analysis of habitat needs.

9 Third, the preferred forest habitat for marten and fisher are very similar. In a
10 paper cited by Plaintiff in its objections, researchers found “[i]n most studies of
11 habitat use, martens were found to prefer late-successional stands of mesic coniferous
12 forest, especially those with complex physical structure near the ground.” Ruggiero
13 et. al. at 22. Riparian areas were also important to marten. *Id.* Important structural
14 features important to marten include overhead cover, especially near the ground; high
15 volumes of coarse woody debris, especially of large diameter; and small-scale
16 horizontal heterogeneity of vegetation, including the interspersions of herbaceous
17 patches with patches of large, old trees. *Id.* at 25.

18 “Fisher occur most commonly in landscapes dominated by mature forest cover
19 and they prefer late-seral forests over other habitats.” Ruggiero at 52. “In the Pacific
20 states and in the Rocky Mountains, they appear to prefer late-successional coniferous
21 forests and use riparian areas disproportionately more than their occurrence.” *Id.*;
22 Schwartz, Michael K; DeCesare, Nicholas J; Jimenez, Benjamin S.; Copeland, Jeffrey
23 P.; and Melquist, Wayne E., *Stand- and landscape-scale selection of large trees by*
24 *fishers in the Rocky Mountains of Montana and Idaho*, USDA Forest Service/UNL
25 Faculty Publication 273 (2013); (also published in *Forest Ecology and Management*
26 305: 75-84 (2013)) (also cited in Plaintiff’s objections at AR 120695). Fishers are
27 heavily associated with older forests throughout the year. AR 120695.

1 During forest planning, marten was identified as the MIS for species that
2 occupy “Mature and old growth mesic conifer forest, down trees at moderate to high
3 elevations.” AR 003788. Based on research cited by Plaintiff in its objections, the
4 overall habitat used by marten is very similar to that used by fisher. The Colville
5 Forest Plan and North Fork EA both recognize the type of habitat preferred by marten
6 and fisher, and those habitats are not altogether different. Even Plaintiff recognized,
7 when it objected to the North Fork EA, that the geographic distribution of marten and
8 fisher “overlap considerably.” AR 120694. Because the preferred habitats of the two
9 species are similar, the Forest Service was not arbitrary or capricious in its continued
10 use of marten as an MIS.

11 Plaintiff’s reference to a 2011 Forest Service statement that fisher had been
12 extirpated from the Colville National Forest reflects long-standing historical facts. “In
13 the last part of the 19th century and the early part of the 20th century trapping and
14 habitat alteration caused the extirpation of fisher.” Ruggiero et. al. at 41; Schwartz et.
15 al., p. 103. Even the map of fisher distribution provided in AWR’s objections to the
16 project show that the historical range of the fisher included only part of what is now
17 the Colville National Forest in northeast Washington and that the current range of
18 fisher has retreated far into British Columbia. AR 120695. There is no evidence of
19 any sudden drop in population. The fact that the Forest Service reported two
20 documented sightings in recent years (which were reported in the EA (AR 120990)) is
21 not significant because the management requirements and constraints put in place to
22 protect marten will also provide the needed protection for fisher.

23 Thus, the selection of marten as the MIS during forest planning and continued
24 use of marten as a MIS (rather than the fisher) for the North Fork Project was not
25 arbitrary and is supported by the published science. Thus, whatever slight differences
26 there are in preferred habitat between martens and fisher does not lead to the
27

1 conclusion that fisher habitat was not considered in forest planning or the North Fork
2 EA or that continued use of marten as a MIS was not proper.

3 2. The North Fork Project Complies With the Forest Plan and NEPA.

4 Plaintiff alleges the Forest Service did not disclose the status of the fisher and
5 did not adequately address the impacts to fisher. Plaintiff appears to argue that the
6 two documented sightings of fisher on the Colville National Forest in recent years
7 indicates that the fisher may be present and that this is a significant issue. Plaintiff's
8 argument fails because (1) the Forest Service considered the status of the Fisher and
9 addressed it in the EA and (2) the Project area provided the best habitat available for
10 fisher in the Project area – preserving all the old-growth areas and exceeding the
11 amount of next-best “mature” stands required by the Colville Forest Plan.

12 The Forest Service considered the status of the fisher, when, in the Wildlife
13 Specialist Report, it documented that the fisher was a former sensitive species in
14 Region 6 of the Forest Service (the Colville N.F. is in Region 6). AR 100728.
15 Furthermore, because the North Fork EA considered the habitat needs of the marten
16 and fisher to be very similar, the analysis conducted by the Forest Service adequately
17 addresses impacts to the fisher. Ultimately, the Forest Service concluded that the
18 minimal impacts to individuals “would not lead to a trend toward federal listing of the
19 pine marten or fisher and would not reduce the viability of the species.” AR 104608.

20 Plaintiff, in discussing the marten core areas that will not be harvested, also
21 complains that the Forest Service “admits that “many, if not most” of these patches
22 themselves do not actually satisfy the habitat requirements of the pine marten.” *Pl's*
23 *Brief* at 26. This is accurate in that the stands preferred by marten are stands that are
24 commonly referred to as old-growth³. AR 023421; 023466-468 (describing in detail

25
26 ³ The Forest Plan FEIS provided a definition of old-growth, which generally contain
27 mature and over-mature trees that are well into the mature growth stage, multi-layered

1 habitat preferred by marten). However, that fact does not mean the Forest Service did
2 not conduct the appropriate analysis.

3 The Forest Plan standard for marten habitat requires identification and
4 preservation of “core area” made up of old growth or mature stands of at least 160
5 acres, distributed every 2 to 2 ½ miles. *Id.* The EA discusses that there are only about
6 217 acres of such multi-storied large-tree stands in the Project area. AR 104592.
7 These 217 acres of multi-storied large-tree stands are preferred by pine marten and
8 fisher and in accordance with the Forest Plan, core areas must be maintained. These
9 217 acres are identified as structural stage 6 stands and are in “retention units” that
10 will not be harvested. *Id.* Consistent with the Forest Plan, because there are only 217
11 acres of stands with large, old trees, additional acres of the next best habitat, in this
12 case, mature stands, will also be retained in the Project.

13 As background for why these mature stands constitute the next best habitat,
14 understanding the history of the forest is key. Nearly 100 percent of the North Fork of
15 Mill Creek drainage was burned in two large fires in 1926 and 1929. AR 104475 and
16 AR 104590. “Stands in identified pine marten habitat were determined to be
17 approximately 70-90 years old and generally lacking a large standing and downed
18 dead wood structural component.” AR 121756. The EA discusses (Table 5) that 78
19 percent of the national forest system lands in the Project area are currently in the
20 middle structural stages. AR 104550. Those middle structural stages are comprised of

21 _____
22 canopies and trees of several age classes, with standing dead trees and down material.
23 AR 004227. “Old-growth is a stage of forest development characterized by large
24 components (e.g., logs, snags, live trees) and structural complexity (e.g., vertical and
25 horizontal) ... Old-growth characteristics develop gradually as forests mature, so that
26 there is no specific threshold where mature stands become old growth.” Ruggiero at 4.

1 structural stages 4 and 5. AR 099245-46. The EA goes on to explain that 78% of
2 those stands are made up of stands in the “middle structural stages.” AR 104550. At
3 least seventy-five percent of these stands are in the multi-story young stand
4 development stage. *Id.* These “multi-story young stands” are the structural stage that
5 comes closest to representing the mature forest in the Project area (structural stage 5)⁴.
6 These mature stands in the Project area consist of approximately 7,489 acres (12,802⁵
7 acres x .78 x .75 = 7,489).

8 From the 7,489 acres of trees that represent the mature class of timber in the
9 Project area, the Project would conduct commercial thinning and shelterwood harvest
10 on 3,916 acres. AR 104594 (Table 9). After the Project is completed, there would
11 still be 3,573 acres of forest in this mature class that would not have been harvested
12 (7,489-3,916 = 3,573 acres). This 3,573 acres includes the 1,950 acres of “core areas”
13 the EA discloses will be retained in the project area, as required to meet the Forest
14 Plan standard, that will not be harvested. AR 104604. And in the stands where
15 commercial thinning is planned, the resultant stands would still be considered fully
16 stocked, show enhanced growth on residual trees (growing larger diameter trees),
17 develop multi-story stand structure, and favor early seral tree species (AR 121763), all
18 characteristics preferred by both marten and fisher. Furthermore, pine marten use

19 _____
20 ⁴ As seen in the Biological Evaluation prepared for this project, the “multi-story young
21 stands” is the classification for stands that have not yet developed into Forest
22 Structural Stage 6 (multi-stratum with large trees) or Forest Structural Stage 7 (single-
23 stratum with large trees). AR 099245-46. The stands in Forest Structural Stage 5
24 (young forest, multi-story) thus represented the class of trees that are chronologically
25 the next best stands to provide marten habitat when only 217 acres of Forest Structural
26 Stage 6 stands, the preferred habitat, similar to old-growth, are available.

27 ⁵ The North Fork Project area contains 12,802 acres. AR 104475.

1 snags of larger diameters, typically 23.9 inches in diameter and larger, although they
2 also utilize smaller snags in the 10 to 19.9-inch diameter classes. AR 104604. The
3 proposed project would retain or create snag habitat to meet Forest Plan guidelines by
4 retaining the snags present in the project area. AR 104593. Because the current snag
5 level is below the Forest Plan standard, recruitment of larger trees over time would be
6 accomplished by thinning, which accelerates tree growth on trees not harvested,
7 thereby providing a future source of larger snags through the production of larger trees
8 in a shorter time. *Id.*

9 With this background, it becomes clear that the Forest Service acted
10 appropriately and was not arbitrary when it designed the North Fork Project to retain
11 all 217 acres of old stands that meet the definition of old growth and are the preferred
12 habitat for both marten and fisher, but also provided almost 1,600 acres more in the
13 next-best habitat that will not be harvested in this project. The reality is that most
14 stands in the North Fork project area are not the old, complex stands preferred by
15 marten and fisher. But those stands, and much more, are reserved from harvesting and
16 provide far more protection than the 1,950 acres called for under the Forest Plan. In
17 sum, the Forest Service provided far more old-growth and the next-best “mature”
18 stands than required by the Colville Forest Plan. Implementation of the Project will
19 not result in a trend toward federal listing or reduce the viability of either species. AR
20 104608.

21 3. The Proxy-on-Proxy Analysis Used by the Forest Service Was Proper.

22 Plaintiff complains that the proxy-on-proxy analysis used in the North Fork
23 Project is not valid, citing *Native Ecosystems Council v. Tidwell*, 599 F.3d 926 (9th
24 Cir. 2010). *Pl’s Brief* at 30. This is the same argument that has been presented to this
25 Court and more importantly, to the Ninth Circuit Court of Appeals in AWR’s appeal
26 of this Court’s decision denying a preliminary injunction. This issue was decided by
27 the Court of Appeals in that appeal. *Pena*, 865 F.3d at 1217-19. The doctrine of “law

1 of the case” precludes Plaintiff from relitigating this issue again before this Court.

2 The Ninth Circuit has stated that the “law of the case” doctrine:

3 is a judicial invention designed to aid in the efficient operation of court
4 affairs. Under the doctrine, a court is generally precluded from
5 reconsidering an issue previously decided by the same court, or a higher
6 court in the identical case. For the doctrine to apply, the issue in question
must have been decided explicitly or by necessary implication in [the]
previous disposition.

7 *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993). “The law of the
8 case doctrine states that the decision of an appellate court on a legal issue must be
9 followed in all subsequent proceedings of the same case.” *Id.* This Court should not
10 litigate an issue that was already decided in this case by the Court of Appeals.

11 Even if this Court believes it should address this issue, a review of the Court of
12 Appeals’ decision is instructive. The Court of Appeals recognized that “[p]roxy
13 approaches are permitted where both the Forest Service’s knowledge of what quality
14 and quantity of habitat is necessary to support the species and the Forest Service’s
15 method for measuring the existing amount of that habitat are reasonably reliable and
16 accurate.” *Pena*, 865 F.3d at 1218 (*quoting Friends of the Wild Swan*, 767 F.3d 936,
17 949 (9th Cir. 2014)) (internal quotations omitted). The Court of Appeals noted that
18 AWR had conceded that the Forest Service had the requisite knowledge of the pine
19 marten’s habitat requirements because of the Youkey Report and that AWR did not
20 challenge the Forest Service’s identification of pine marten core areas and preference
21 for Stage VI old stands. *Id.*

22 Alliance’s complaint then, and now, is that the Forest Service’s lack of pine
23 marten monitoring since 1995 makes the proxy-on-proxy approach “questionable”
24 where the MIS is missing from the project area. *Id.*; *Pl’s Brief* at 30-34 (*citing*
25 *Tidwell*). The Court of Appeals first noted that the Colville Forest Plan did not
26 necessarily require population monitoring because marten monitoring could be done
27 through “[a]cres of suitable habitat in defined distribution; localized population *or*

1 activity trends within specified areas.” *Id.* at 1218 (emphasis in original). The Court
2 of Appeals also found AWR’s reliance on *Tidwell* misplaced because *Wild Swan*
3 clarified “that the absence of the management indicator species on the project site
4 does not necessarily invalidate a proxy analysis.” *Id.* at 1219. The Court of Appeals
5 also noted that pine marten have been seen on other parts of the Colville National
6 Forest although not recently in the project area, that there was evidence the species
7 might be “difficult to detect”, and that there was no challenge to the Forest Service’s
8 knowledge of marten habitat requirements or the location of such habitat in the project
9 area. *Id.*

10 The Court of Appeals in *Wild Swan* indicated that that the proxy-on-proxy
11 approach is only invalid where (1) there was no data indicating the presence of the
12 species in the area, (2) no suggestion there was difficulty monitoring the species, and
13 (3) a flaw in the Forest Service’s methodology that further undermined the use of the
14 habitat proxy approach. *Wild Swan*, 767 F.3d at 949. “We have generally accepted
15 the use of habitat as a proxy for population absent some indication in the record that
16 the USFS’s underlying methodology is flawed.” *Id.* Indeed, in *Friends of the Wild*
17 *Swan*, the Court of Appeals held that the Forest Service’s use of the best available
18 scientific data to define potential fisher habitat, considering the maturity of the forest,
19 proximity to riparian features, and connectivity of habitat areas was sufficient for use
20 of the proxy approach. *Id.* at 949-50. Here, as in *Friends of the Wild Swan*, the Forest
21 Service’s use of habitat by proxy in this project is appropriate.

22 The *Wild Swan* holding comports with the Court of Appeals’ earlier statement
23 in *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1251 (9th Cir.
24 2005) where it said “[o]ur case law permits the Forest Service to meet the wildlife
25 species viability requirements by preserving habitat, but only where both the Forest
26 Service’s knowledge of what quality and quantity of habitat is necessary to support
27 the species and the Forest Service’s method for measuring the existing amount of that

1 habitat are reasonably reliable and accurate.”

2 The Youkey Report (AR 023420-510) provides the best scientific data
3 confirmation regarding what the habitat needs of the pine marten are. This 2012
4 report confirms the assumptions made in the Forest Plan regarding habitat needs.
5 Furthermore, the North Fork EA explained, all known areas of old growth and
6 structural stages 6 and 7 (generally described as older, multi-storied stands) have been
7 explicitly identified and are not planned for harvesting. AR 104604. The
8 Silviculture/Fuels Special Report (AR 121738-122683) provides the detailed
9 description of the vegetation in the project area. That Report documents the manner
10 in which stand/inventory data was used to develop stand prescriptions. AR 121752-
11 760. That Report also documents the current stand conditions in the Project area.
12 121760-762. As has been shown (above), the Forest Service classified the tree stands
13 in the project area and determined that after harvesting is completed, there would still
14 be 3,573 acres of stands that approximate the mature stand requirement in the Forest
15 Plan, far in excess of the Forest Plan requirement.

16 Overall, the Forest Service complied with the NFMA in the way it analyzed
17 MIS habitat and impacts to both the pine marten and fisher. None of the preferred
18 “old growth” stands would be harvested in the project area. Thousands of additional
19 acres of the chronologically “next-best” stands are also not going to be harvested in
20 this project. The Forest Service has demonstrated that the impacts to both marten and
21 fisher will be minimal and that the amount of undisturbed habitat it is providing for
22 those species greatly exceeds the Forest Plan standards. The Forest Service was not
23 arbitrary and there has been no violation of NEPA. The Court should grant summary
24 judgment in favor of the Forest Service on this issue.

1 **D. The Forest Service Had Complete Oversight and Control of the NEPA**
2 **Process and There Was Not a Conflict of Interest.**

3 The Forest Service engaged in a collaborative process to design this forest
4 restoration stewardship project. The Forest Service then publicly advertised the
5 project, seeking a contractor that could perform the project. The solicitation for this
6 project stated “The Forest Service maintains all inherently governmental functions
7 such as selecting the preferred alternative.” AR 124213-214. This governmental
8 control was maintained throughout the Project. The Forest Service obtained the
9 documentation that the NEPA contractor (Cramer Fish Sciences or Cramer) had no
10 conflict of interest, and then maintained complete control of the NEPA process so
11 there could be no conflict of interest. The Court should grant summary judgment in
12 favor of the Federal Defendants on this issue.

13 Alliance alleges that inclusion of the NEPA analysis in the stewardship contract
14 has inherent conflicts that render the NEPA analysis “highly suspect.” *Pl’s Brief* at 6.
15 Specifically, AWR alleges: (a) The subcontractor chosen to perform the NEPA
16 analysis was not selected solely by the lead agency, in violation of 40 CFR 1506.5(c);
17 (b) allowing the contractor to select the NEPA subcontractor is even more likely to
18 result in a conflict of interest where the analysis may result in the identification of a
19 significant impact requiring an EIS; and (c) The Forest Service, in granting the
20 stewardship contract to one company, granted that company the exclusive right to any
21 and all future timber sales that flowed from that stewardship contract.

22 The NEPA regulations provide in relevant part:

23 Except as provided in §§ 1506.2 and 1506.3 any environmental impact
24 statement prepared pursuant to the requirements of NEPA shall be
25 prepared directly by or by a contractor selected by the lead agency or
26 where appropriate under § 1501.6(b), a cooperating agency. It is the
27 intent of these regulations that the contractor be chosen solely by the lead
28 agency, or by the lead agency in cooperation with cooperating agencies,
or where appropriate by a cooperating agency to avoid any conflict of
interest. Contractors shall execute a disclosure statement prepared by the

1 lead agency, or where appropriate by the cooperating agency, specifying
2 that they have no financial or other interest in the outcome of the project.
3 If the document is prepared by contract, the responsible Federal official
4 shall furnish guidance and participate in the preparation and shall take
5 responsibility for its scope and content.

6 40 C.F.R. § 1506.5(c); *Communities Against Runway Expansion, Inc. (CARE) v.*
7 *F.A.A.* 355 F.3d 678, 686 (D.C. Cir. 2004) (citing 40 C.F.R. § 1506.5(c)(2003)).

8 When a plaintiff alleges conflict of interest in the preparation of a NEPA
9 document, the Court “can evaluate the oversight that the agency provided to the
10 [document] as a factual matter and make a determination upholding the [document].
11 *Associations Working for Aurora’s Residential Environment (AWARE) v. Colorado*
12 *Dep’t of Transportation*, 153 F.3d 1122, 1129 (10th Cir. 1998). The Tenth Circuit
13 held that when reviewing a NEPA document prepared by a contractor for alleged
14 conflicts of interest, “the ultimate question for the court is thus whether the alleged
15 breach compromised the ‘objectivity and integrity of the NEPA process.’” *Id.* (citing
16 *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991)); 40
17 C.F.R. § 1500.3 (“it is the Council’s intention that any trivial violation of these
18 regulations not give rise to any independent cause of action”).

19 1. The Evidence Shows That the Forest Service Took Effective
20 Steps to Eliminate Potential Conflicts of Interest.

21 a. Selection of Cramer Fish Sciences as the NEPA Contractor
22 Does Not Invalidate the EA That Was Prepared.

23 AWR complains that because the Forest Service allowed Vaagen Brothers to
24 select the NEPA contractor (Cramer), the Forest Service violated 40 C.F.R. §
25 1506.5(c). But in fact, the Forest Service’s decision to award the stewardship contract
26 to Vaagen Brothers was approval of Cramer Fish Sciences to be the NEPA contractor.
27 The solicitation for the stewardship contract showed that NEPA analysis was an
28 integral part of the overall contract. AR 124204; 124209, 124213. Thus, approval of

1 the stewardship contract by the Forest Service was approval of the NEPA contractor.
2 The Court should grant summary judgment in favor of the Forest Service on this issue.

3 Furthermore, even a technical violation of the NEPA regulations in this manner
4 does not, by itself, provide a reason to invalidate the NEPA document and the
5 resultant decision. In *Busey*, the Toledo-Lucas County Port Authority planned to
6 expand the airport servicing the area near Toledo, Ohio. Airport expansion required
7 approval by the Federal Aviation Administration (FAA), which thus required
8 compliance with NEPA. The Port Authority hired Coffman Associates, Inc., a
9 consulting firm to prepare the environmental assessment that was later converted into
10 an EIS. The Citizens Against Burlington sued, in part, alleging that the FAA violated
11 NEPA by not selecting the contractor that wrote the EIS, and asked the court to
12 invalidate the EIS. The D.C. Circuit rejected this request. *Busey*, 938 F.2d at 202.
13 While the D.C. Circuit found that the FAA had violated NEPA by allowing the Port
14 Authority to select the NEPA contractor, the court refused to invalidate the EIS,
15 holding “[t]his particular error did not compromise the objectivity and integrity of the
16 [NEPA] process.” *Id.*

17 Similarly, in *Colorado Rail Passengers Ass’n v. Federal Transit Admin.*, 843
18 F.Supp.2d 1150 (D. Col. 2011), a group of citizens sued the Federal Transit
19 Administration (FTA) alleging violations of NEPA after the FTA issued a Final EIS
20 and Record of Decision (ROD) which allowed for redevelopment of the transit options
21 at the Denver Union Station (DUS). The Regional Transportation District (RTD) had
22 purchased the land on which the Denver Union Station sat and sought to develop the
23 DUS as a multi-modal transportation hub of its larger FasTracks program. The
24 plaintiffs alleged in part that the contractor hired to prepare the EIS had a conflict of
25 interest that compromised the integrity of the NEPA process. RTD had initially
26 contracted with Union Station Alliance to prepare an environmental assessment. *Id.* at
27 1161. The FTA advised RTD it preferred an EIS and RTD modified its contract with

1 Union Station Alliance accordingly. *Id.* The plaintiffs alleged that another entity,
2 Jacobs, Carter & Burgess (Jacobs), who served as the Project Management Consultant
3 on RTD's FasTracks project, who was to coordinate and review the EIS, had a conflict
4 of interest because it had a financial interest in encouraging selection of the "Build
5 Alternative" as the preferred option. The district court for the District of Colorado
6 disagreed, finding no evidence that Jacobs had a financial incentive to manipulate the
7 EIS process. *Id.* at 1162. The court found that the Jacob's representative (McAfee),
8 who had an administrative oversight role in the EIS process, was merely one of 68
9 consultants and preparers listed for the EIS. *Id.* Finally, the court found that even if
10 there was a conflict of interest, its review of the record showed the "FTA exercised
11 sufficient control over the process such that the integrity of the NEPA process was not
12 compromised." *Id.* at 1162-63; *see also CARE*, 355 F.3d at 686 (we find, as in *Busey*,
13 that there is not cause to invalidate the EIS, because any error in the selection of the
14 contractor did not compromise the objectivity and integrity of the [NEPA] process);
15 *Stand Up for California v. U.S. Dep't of the Interior*, 919 F.Supp.2d 51 , 80 (D. D.C.
16 2013) (no error where the contractor selected to conduct NEPA analysis was hired by
17 an Indian tribe rather than federal agency in land-to-trust project).

18 Similarly here, the fact that Vaagen Brothers selected the NEPA contractor does
19 not result in the automatic invalidation of the North Fork Mill Creek decision. The
20 Forest Service maintained all inherently governmental control. Plaintiff must do more
21 than speculate that there was a conflict of interest.

22 AWR also contends that the Forest Service violated NFMA because the Forest
23 Service's "internal guidelines" contained in the Forest Service Handbook (FSH) do
24 not allow for preparation of NEPA documents under a stewardship contract.

25 The FSH "do[es] not have the independent force and effect of law." *Western*
26 *Radio Serv. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (citing 36 C.F.R. § 200.4(b),
27 (c)(1)); *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d

1 1443 (9th Cir. 1996) (citing *Western Radio*); *Stone Forest Indus. v. United States*, 973
2 F.2d 1548, 1551 (Fed. Cir. 1992). Instead, the Forest Service Handbook establishes a
3 series of guidelines and “[p]rocedures for the conduct of Forest Service activities.” *Id.*

4 Indeed, for the A to Z Stewardship Contract, the Forest Service adjusted the
5 usual sequence of events by including provisions for the NEPA analysis to be
6 performed under the overall A to Z contract, rather than the contract being issued after
7 a NEPA analysis was completed. AR 124208-09. But this is not prohibited under
8 either the NFMA or the stewardship contracting authority – it is simply a different
9 approach from the non-binding guidelines in the FSH. To be clear, the NEPA
10 analysis and process – performed by a contractor in collaboration with the Forest
11 Service and over which the Forest Service had final decisional authority – still had to
12 be completed as a condition to any further actions to be performed under the contract.
13 AR 124203-04; 124209; 124213-14. In other words, the Project could only proceed
14 after the NEPA analysis was completed and approved by the Forest Service.

15 *b. The Record Provides the Requisite Documentation of the Forest*
16 *Service’s Complete Control and Lack of Any Conflict.*

17 Cramer provided a statement that it had no financial conflict of interest in
18 preparing the NEPA analysis and documentation for the North Fork Project.
19 *Declaration of Carl Ericksen*, ¶ 5 (ECF No. 87-3) and Exhibit 3 (ECF No. 87-4).
20 Exhibit 3 clearly states that CFS has no financial interest in the outcome of the North
21 Fork Project. Since CFS provided exactly the type of document required by 40 C.F.R.
22 § 1506.5(c), there is no basis to invalidate the North Fork DN/FONSI. Furthermore,
23 Exhibit 2 to the Ericksen Declaration shows how Vaagen Brothers committed to not
24 interfere with the NEPA process being conducted by CFS. ECF No. 87-4 (Exhibit 2).
25 Further still, Forest Supervisor Rodney Smoldon explained that CFS was not
26 controlled by Vaagen Brothers and that Vaagen Brothers had no control of the
27

1 outcome of the NEPA process. *Declaration of Rodney Smoldon*, ¶¶ 5-6 (ECF No. 87-
2 5). The Forest Service obtained the documentation required by the NEPA regulations.

3 *c. There is No Evidence of a Conflict of Interest.*

4 As discussed in *Busey* and *Colorado Rail*, the fact that the agency did not select
5 the contractor is not reason enough to invalidate an EA or EIS. Rather, the Court
6 should look at the involvement of the agency in the NEPA process. *Colorado Rail*,
7 843 F.Supp.2d at 1162-63.

8 As an initial matter, Plaintiff has not met its burden of pointing to evidence in
9 the record that shows that CFS had a conflict of interest. Plaintiff alludes to possible
10 conflicts of interest or speculates that conflicts might be present. In the absence of
11 evidence of a conflict of interest by CFS, Plaintiff's claim fails. *Colorado Rail*, 843
12 F.Supp.2d at 1162-63 (plaintiff failed to identify any incentive clauses or guarantees
13 of future work in Jacob's contract that would have been significantly impacted by the
14 results of the process).

15 When one looks at the process followed by the Forest Service and CFS, it is
16 obvious the Forest Service exhibited oversight throughout the NEPA process. Rodney
17 Smoldon testified in his declaration that then-Forest Supervisor Laura Jo West was the
18 official who approved the proposed action, scoping, issues to be addressed,
19 development of alternatives, the depth of analysis, mitigation measures, and review of
20 the comments and objections made by the public. *Smoldon Decl.*, ¶ 4. He also
21 described the approval of CFS as the NEPA contractor (¶ 9), that the process used by
22 CFS is the same process used by the Forest Service when it conducts the NEPA
23 analysis and documentation. *Id.* ¶ 8. Supervisor Smoldon also discussed the oversight
24 role the Forest Service maintained while CFS was conducting its NEPA analysis and
25 documentation. *Id.*, ¶ 11.

26 The discussion in Supervisor Smoldon's declaration regarding oversight is
27 clearly seen when one examines the evidence in the administrative record of the

1 Forest Service's oversight of the NEPA process. It quickly becomes apparent that the
2 Forest Service had constant oversight of the NEPA process. One can only conclude
3 that the integrity of the NEPA process was not compromised.

4 From the start, the Forest Service had oversight of the NEPA process. The
5 Forest Service invited comments from the public (this step is known as scoping) and
6 provided information on the proposed project, the Purpose and Need, existing
7 conditions in the project area, and the desired future condition as defined by the
8 Colville Forest Plan. *Defendants' Statement of Material Facts* (DSMF) # 5. Once the
9 comments from the public were received, CFS sent those back to the Forest Service.
10 DSMF # 16. In terms of identification of issues and preliminary development of
11 alternatives, CFS responded to direction given by the Forest Service. DSMF # 17.
12 Forest Supervisor Laura Jo West approved moving forward with the project after her
13 review of the scoping comments and Key Issues and Alternatives. DMSF # 22.

14 Regarding the development of alternatives to be considered, CFS respond to the
15 comments provided by the Forest Service. DSMF # 27. CFS's interdisciplinary team
16 (IDT) was advised of the final Key Issues and Alternatives Statement which reflect
17 concerns raised by the Forest Service. DSMF # 30. When CFS completed a draft of
18 Chapter 1 of the EA, it was sent to the Forest Service for review and comments.
19 DSMF # 31 and 36. When CFS completed a draft of Chapter 2 of the EA, it was sent
20 to the Forest Service for review and comment and CFS then revised Chapter 2 based
21 on the Forest Service comments. DSMF # 41-42; 45.

22 Throughout the analysis and writing of the EA, CFS sent the various resources
23 specialists' reports to the Forest Service for review and comment. DSMF # 33, 36,
24 37, 39, 40, 43, 46, 47, 49, 55. CFS's IDT was provided the comments made by the
25 Forest Service regarding the various resource reports and CFS indicated back to the
26 Forest Service how those comments would be incorporated. DSMF # 50-52.

1 By January 31, 2015, CFS had a draft of the entire EA incorporating the Forest
2 Service's comments ready to send to the Forest Service, and forwarding revised
3 versions of many of the resource specialists' reports that had incorporated the Forest
4 Service's comments. DSMF # 56-57. Following that, CFS sent a draft of the public
5 notice for Forest Service review. DSMF # 59. On March 4, 2015, Mike North sent an
6 email to Mark Teply forwarding a letter from the Colville Forest Supervisor
7 documenting the Forest Services' review of the North Fork EA and approving release
8 of the EA to the public. DSMF # 62. In the Notice of Opportunity to Comment on
9 the draft EA, published on March 11, 2015 in the Statesman-Examiner, Forest
10 Supervisor Laura Jo West was identified as the Responsible Official. DSMF # 63.

11 Following release of the draft EA, CFS forwarded a compilation of public
12 comments to the Forest Service, requesting to meet with the Forest Service. DSMF #
13 67. Shortly after that, the CFS IDT was informed that CFS had gotten concurrence
14 from the Forest Service on a strategy to addressing the public's comments on the draft
15 North Fork EA. DSMF # 69. CFS then proceeded to finalize the EA, incorporating
16 the Forest Service's comments. DSMF # 72. On July 10, 2015, CFS forwarded a
17 copy of the revised EA to the Forest Service. DSMF # 79. On July 14, 2015, the
18 Forest Service issued the Draft Decision Notice and Finding of No Significant Impact
19 for the North Fork Project, and on July 15, 2015, the agency opened the objection
20 period. DSMF # 80. CFS continued to send revised sections of the EA back to the
21 Forest Service incorporating the Forest Service's comments. DSMF # 82-85. On
22 October 16, 2015, the Forest Supervisor decided to withdraw the draft DN/FONSI.

23 On February 17, 2016, the Colville National Forest issued a revised EA and
24 DN/FONSI and opened the second objection period. DSMF # 88. On June 13, 2016,
25 Colville Forest Supervisor Rodney Smoldon signed the final DN/FONSI for the North
26 Fork Mill Creek Project. DSMF # 90.

1 Furthermore, all through the process, CFS was providing the Forest Service
2 with updates on the progress of the project every two weeks. DSMF # 4, 6-15, 18-21,
3 23-25, 44, 49, 54, 58, 61, 65, 71, 73-75, 78.

4 What these facts show is that the Forest Service was intimately involved in
5 every step of the environmental analysis and preparation of the North Fork EA. The
6 Forest Service was constantly updated on the status of the project and as key sections
7 of the EA were completed, CFS sent them to the Forest Service for review and
8 comment. CFS then incorporated the Forest Service comments into the EA. In sharp
9 contrast to Plaintiff's motion, which merely speculated on the possibility of a conflict
10 of interest (and was nothing more than innuendo and speculation), the Defendants'
11 Statement of Material Fact summarized continuous oversight by the Forest Service of
12 the NEPA process.

13 In the *AWARE* case, the court found the agency's independent and extensive
14 review of the contractor's analysis, the agency's comments on the contractor's field
15 data and requirements to gather more field data or analysis provided sufficient reason
16 to conclude that the EIS's integrity and objectivity were protected. *Id.* at 1129; *see*
17 *also Western Organization of Resource Councils v. Bureau of Land Management*, 591
18 F.Supp.2d 1206 (D. Wyo. 2008) (affirming agency decision and finding no evidence
19 that the objectivity and integrity of the NEPA process had been compromised);
20 *Northern Crawfish Frog (Rana Areolata Circulosa) v. Federal Highway Admin.*, 858
21 F.Supp. 1503 (D. Kan. 1994)(finding no conflict of interest after reviewing evidence
22 and argument presented by parties); *Vermonters for a Clean Environment, Inc. v.*
23 *Madrid*, 73 F.Supp.3d 417, 424 (D. Vt. 2014) (even where a conflict of interest exists
24 and is known to the agency, an EIS may be upheld if the agency provided oversight to
25 the EIS process).

1 Such is the case here and the extensive overview by the Forest Service
2 throughout the entire NEPA process demonstrates the integrity of the NEPA process
3 was not compromised.

4 2. Plaintiff's Complaint Regarding the Lack of Open and Fair
5 Procedures Has No Merit.

6 Plaintiff's also alleges under NFMA that the Forest Service's contracting
7 procedure for the Stewardship Contract for the North Mill Project was not "open and
8 fair," claiming the awarding of the contract to Vaagen Brothers amounts to a
9 privatization of the national forests. Alliance claims the bidding process was not
10 competitive and amounts to a "sweet deal" for Vaagen Brothers. This claims fails for
11 several reasons.

12 As an initial matter, AWR does not have Article III standing for a bid protest
13 claim because AWR was not a bidder on the contract. The Supreme Court has
14 foreclosed such a challenge where AWR does not have a redressable "personal injury"
15 separate from that of any other taxpayer. *See Hein v. Freedom From Religion Found.,*
16 *Inc.*, 551 U.S. 587, 599 (2007). The Supreme Court held that to satisfy the standing
17 requirement of Article III, a plaintiff must demonstrate:

18 (1) that plaintiff has suffered an injury in fact – an invasion of a judicially
19 recognized interest which is (a) concrete and particularized, and (b)
20 actual or imminent, not conjectural or hypothetical;

21 (2) that there is a causal connection between the injury and the conduct
22 complained of; and

23 (3) that it is likely, as opposed to merely speculative, that the injury will
24 be redressed by a favorable decision.

25 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

26 Moreover, the award of the A to Z Stewardship Contract was competitive,
27 advertised and offered through open bidding. *Declaration of Rodney Smoldon*, ¶4
28 (ECF No. 22); AR 124203-07; 124208-266. Although a few other entities expressed

1 interest and participated in field trips to view the project, only Vaagen Brothers
2 submitted a bid. ECF No. 22. The offering of the Project was thus open and fair. *See*
3 *e.g., Summit Contractors v. United States*, 21 Cl. Ct. 767, 779 (1990), *aff'd sub nom.*
4 *Ins. Co. of N. Am. v. United States*, 951 F.2d 1244 (Fed. Cir. 1991) (ruling that 30–day
5 advertisement period for original bid date and 9–day readvertisement period generated
6 adequate competition for timber harvest contract); *Siller Bros., Inc. v. United States*,
7 655 F.2d 1039, 1045 (Ct. Cl. 1981) (explaining that although only one bid was
8 submitted, this did not convert the advertised and solicited bidding procedure into sole
9 source arrangement when the Forest Service sent invitations to 19 concerns and
10 advertised in local newspaper).

11 AWR’s complaint that awarding the stewardship contract to just one contractor
12 guaranteed that all timber sales under the stewardship contract went to Vaagen
13 Brothers. This complaint shows a fundamental misunderstanding of the stewardship
14 contract. That single contract that was awarded to Vaagen Brothers was for all the
15 work identified in the contract: timber harvesting, road construction and
16 reconstruction, culvert replacement, graveling of some roads, aspen treatment, fish
17 barrier removal, “hot spot” sediment remediation, placement of down-woody material
18 to improve fish habitat in part of the North Fork of Mill Creek. There are not multiple
19 timber sales generated by this stewardship contract. There was one contract to
20 perform all the work – the timber harvesting along with all the restoration work.

21 AWR also complains that the A to Z Stewardship Contract violates the NFMA
22 because the contract was awarded without stating the value of the timber that the
23 contractor must pay. This argument also has no merit. The statute that provides
24 stewardship contracting authority directs that “the value of timber or other forest
25 products ... shall be determined using appropriate methods of appraisal commensurate
26 with the quantity of products to be removed.” Section 347 Omnibus Consolidated
27 Appropriations Act of FY 1999, as amended by Sec. 323 of P.L. 108-7, 2003 (16

1 U.S.C. 2104 Note). The Forest Service Handbook directs “Forest products must be
2 appraised at fair market value.” FSH 2409.19, section 61.4.

3 Here, the Stewardship contract specifically states that “All products will be sold
4 at current appraised rates.” AR 124211. This means the Forest Service will use the
5 appraisal process used in typical timber sales to ensure that the appraised rates account
6 for the current value of timber on the stump, just as the Forest Service Handbook
7 requires. Thus, the A to Z Stewardship Contract complies with applicable law, and
8 the government and taxpayers are receiving the appropriate value for timber products
9 sold.

10 **E. Remaining Issues.**

11 Plaintiffs’ motion for summary judgment addressed only a limited number of
12 issues when compared to the Amended Complaint in this matter. The remaining
13 claims in the Amended Complaint regarding big game winter range, cavity
14 excavators, northern goshawk, soils, grazing impacts, climate change, and use of the
15 best science should be considered abandoned because they were not addressed in
16 Plaintiffs’ motion for summary judgment. *Grenier v. Cyanamid Plastics, Inc.*, 70
17 F.3d 667, 678 (1st Cir. 1995); *Head Start Family Educ. Program, Inc. v. Coop. Educ.*
18 *Serv. Agency 11*, 46 F.3d 629, 635 (7th Cir. 1995); *Steeves v. City of Rockland*, 600 F.
19 Supp. 2d 143, 173 n. 117 (D. Me. 2009) (citing *Grenier*, 70 F.3d at 678). Plaintiffs
20 may not now rely on these claims. The Court should grant summary judgment to
21 Defendants on the remaining claims.

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IV. CONCLUSION

For the foregoing reasons, the Court should grant Defendant’s Motion for Summary Judgment and deny Plaintiff’s Motion for Summary Judgment.

Dated: May 18, 2018.

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