IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

SHARON J. HAPNER, NATIVE ECOSYSTEMS COUNCIL, and ALLIANCE FOR THE WILD ROCKIES, Plaintiffs, vs. TIM TIDWELL, Regional Forester of Region One of the U.S. Forest Service; and UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture, Defendants.	CV 08-92-M-DWM ORDER

I. Introduction

Sharon Hapner, Native Ecosystems Council, and Alliance for the Wild Rockies (collectively "Plaintiffs") bring this action seeking judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, of agency actions by the United States Forest Service ("Forest Service") concerning the Smith Creek Vegetation Project ("Project") on the Livingston Ranger District of the Gallatin National Forest. The Complaint alleges the agency violated the National Environmental Policy Act

("NEPA"), 42 U.S.C. §§ 4321 et seq., and the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 et seq. Before the Court are the parties' cross-motions for summary judgment. As explained below, while the Forest Service has complied with the law for the most part, it is deficient regarding mapping of key habitat components for elk. Consequently, in the absence of that mapping, it is impossible to fashion a remedy that could permit the project to go forward.

II. Factual Background

The Project is located on the north end of the Crazy Mountains, approximately 35 miles north of Livingston, Montana. AR 1-1 at 9.[1] The dominant cover is lodgepole pine and Douglas fir in the drier areas, and Engelmann spruce and quaking aspen in wetter areas. AR 1-1 at 74. The Project area historically experienced stand-replacing wildfires. AR 1-1 at 134. The Smith Creek area was previously logged, and evidence of past logging remains, including roads, soil disturbance, skid trails, and riparian damage. AR 1-1 at 158-59.

The Project is located in Timber Compartment 221, which is 14,487 acres. AR 1-1 at 39. The Smith Creek area, includes a mix of public and private land, and the Environmental Assessment ("EA") examined the wildland-urban interface. AR 1-1 at 316.

[1]Citations to the Forest Service administrative record are presented in the following format: AR (chapter number)-(document number) at (page number).

There are about 30 residences in the Smith Creek subdivision, and the Park County "Community Wildfire Protection Plan" identified the place as a community at risk from wildfire. AR 1-1 at 9, 12. The fire risk results from limited access, with only one route in and out of the area and high fuel build-up, both of which create a potentially unsafe environment for the public and firefighters in the event of a forest fire. AR 1-1 at 11-12.

Because of these concerns, the Livingston District Ranger developed the current proposal. The stated purposes of the Project are to "modify potential wildfire behavior and provide for safer firefighter response and public evacuation," "improve wildlife habitat diversity," and decrease tree densities . . . so that the remaining trees are less susceptible to future insect and disease infestations." AR 1-7 at 8.

Before reaching a decision, the Forest Service conducted an EA pursuant to NEPA. The EA reviewed three alternatives in detail. Alternative 1 is a "no action" alternative meaning no fuel reduction, either through logging or prescribed burns. AR 1-7 at 18. Alternative 2, the initial proposed action, would allow thinning of timber in the Smith Creek area to address the specified purposes of the Project. AR 1-7 at 19. Alternative 3 incorporates the timber harvest proposed in Alternative 2, and also adopts a prescribed burn in one unit. AR 1-7 at 10. The Forest Service chose Alternative 3 as the preferred alternative.

Id. Alternative 3 permits mechanical thinning or hand treating vegetation on up to 810 acres, and permits prescribed burning on an additional 300 acres. Id. It allows harvesting with ground-based equipment on 435 acres, helicopter logging on 145 acres, and thinning on the remaining area would involve hand treatments. Id. Mechanical harvesting using ground-based equipment would occur only from November 1 through April 30 over frozen ground or eight inches of snow. AR 1-7 at 11.

Plaintiffs participated in the public review phase of the proposed Project. During both the scoping period and the EA comment period, the Alliance for the Wild Rockies raised concerns about soil quality and the Regional Soil Quality Standards. AR 3-18 at 10-14; AR 4-11 at 25-27. Plaintiff Hapner also commented during the EA comment period on erosion and sedimentation issues. AR 4-6 at 12. In December 2007, the Forest Service issued its Decision Notice for the Project. AR 1-7. The Plaintiffs filed an administrative appeal. AR 18-2; 18-3. The Forest Service denied their appeal, and Plaintiffs instituted the present action. AR 18-12; 18-17. Because the key habitat components for elk are inadequate, the project will be remanded to the Forest Service.

Additional facts pertinent to each issue are discussed below as necessary.

III. Legal Standards

A. Summary Judgment Standard

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is a particularly appropriate tool for resolving claims challenging agency action. Occidental Eng'g Co. v. INS, 753 F.2d 766, 770 (9th Cir. 1985). Summary judgment is appropriate in this case because the issues presented address the legality of Defendants' actions based on the administrative record and do not require resolution of factual disputes.

B. Standard of APA Review

Judicial review of an agency's compliance with NEPA and NFMA is governed by the judicial review provisions of the APA. Native Ecosystems Council v. Dombeck, 304 F.3d 886, 891 (9th Cir. 2002). Agency decisions can only be set aside under the APA if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (quoting 5 U.S.C. § 706(2)(A), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977)). Review under the arbitrary and capricious standard is "narrow," but "searching and careful." Marsh v. Or. Natural Res.

Council, 490 U.S. 360, 378 (1989). Agency action can be set aside "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 U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). The court must ask "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . [The court] also must determine whether the [agency] articulated a rational connection between the facts found and the choice made." Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1119 (9th Cir. 2004) (internal citations and quotations omitted). Nevertheless, a court may not substitute its judgment for that of the agency or merely determine it would have decided an issue differently. Or. Natural Res. Council, 476 F.3d at 1035.

IV. Analysis

A. The Forest Service did not violate soil quality standards or fail to take a hard look at soil conditions.

The first claimed issue is that the Forest Service violated both NFMA and NEPA because the Project violates Regional Soil Quality Standards and the EA does not take a "hard look" at soil conditions. The Forest Service counters that Plaintiffs did not

properly raise this issue during the administrative process, so they are barred from raising it now. They also argue that, even if Plaintiffs did raise the issue, the soil analysis was adequate and the Project will not violate soil quality standards.

1. Legal Standard

NFMA imposes both substantive and procedural requirements on the Forest Service. 16 U.S.C. §§ 1600–1687. Procedurally, it requires the Forest Service to develop a forest plan for each forest it manages. 16 U.S.C. § 1604(a). Subsequent individual site-specific projects must not only comply with NFMA, but also be consistent with the governing forest plan. 16 U.S.C. § 1604(I); Rittenhouse, 305 F.3d at 961–62.

NEPA, on the other hand, imposes only procedural requirements. It requires federal agencies to prepare an Environmental Impact Statement ("EIS") whenever they propose to undertake any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The goal of NEPA is two-fold: to "ensure the agency will have detailed information on significant environmental impacts when it makes its decisions" and to "guarantee that this information will be available to [the public]." Inland Empire Pub. Lands Council v. U.S. Forest Service, 88 F.3d 754, 758 (9th Cir. 1996). NEPA, therefore, "does not mandate particular results, but simply describes the necessary process that an agency must follow in

issuing an EIS." Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853, 865 (9th Cir. 2004) (quotation omitted). In reviewing agency action under NEPA, a district court may not substitute its judgment for that of the agency. Id. Rather, the "focus must be on ensuring [the agency] took a 'hard look' at the environmental consequences of [its] decision[]." Id.

2. Plaintiffs exhausted administrative remedies.

The Defendants argue the Plaintiffs did not "exhaust all administrative appeal procedures established by the Secretary or required by law" as to their soil claims, and are thus barred from raising them here. Def.'s Br. at 3-4 (quoting 7 U.S.C. § 6912(e)). "A]s a general rule, if a petitioner fails to raise an issue before an administrative tribunal, it cannot be raised on appeal from that tribunal." Reid v. Engen, 765 F.2d 1457, 1460 (9th Cir. 1985). However, a party is only "obligated to raise . . . issues during the comment process" for the issue to "form a basis for reversal of an agency decision." Havasupai Tribe, 943 F.2d at 34.

The Forest Service has too narrowly construed what is needed to adequately raise an issue during an administrative proceeding. The Alliance for the Wild Rockies raised comments regarding soil disturbance and soil standards during the scoping process and the EA comment period. AR 3-18 at 10-14; AR 4-11 at 25-27. Hapner also raised more general concerns about erosion and sedimentation

during the EA comment period. AR 4-6 at 12. The agency was adequately on notice throughout the administrative phase of the process that the Plaintiffs had raised issues regarding soils so there is no bar to consideration here. Havasupai Tribe, 943 F.2d at 34. It is undisputed that Plaintiffs then filed administrative appeals, which were denied. AR 18-12; 18-17. They exhausted their administrative remedies, and the Court may consider the soil claims.

3. The soil analysis complies with NFMA and NEPA.

Plaintiffs first argue the Project violates NFMA because it will not adhere to soil quality standards. Under NFMA, the Forest Service must insure that timber harvest occurs only if "soil . . . conditions will not be irreversibly damaged." 16 U.S.C. § 1604(g)(3)(E). The Northern Region Soil Quality Standards implement NFMA as follows:

> Design new activities that do not create detrimental soil conditions on more than 15 percent of an activity area. . . . In areas where more than 15 percent detrimental soil conditions exist from prior activities, the cumulative detrimental effects from project implementation and restoration should not exceed the conditions prior to the planned activity and should move toward a net improvement in soil quality.

AR 1-1 at 160. As Plaintiffs note, soil disturbance in several Project units already exceeds 15%, and the Project, prior to restoration, will increase disturbance. However, the agency responds that the net effects of the Project and restoration will not increase soil disturbance over current levels.

"Detrimental soil disturbance" measures the percentage of an area that is disturbed, and monitoring for disturbance involves visual and qualitative estimates. AR 10-8 at 2-3. The EA estimates that the Project will cause an additional 3.5% disturbance in areas that already exceed the 15% standard, for a total of about 14 acres additional disturbance (3.5% of 408 acres contained in these units). Def.'s Resp. at 5; AR 1-1 at Table 3-20. The Forest Service intends to conduct soil restoration in disturbed areas by placing coarse woody debris on roads at a rate of about five tons per acre. Doing so is scientifically accepted as a method for improving soil conditions. AR 1-1 at 162; AR 10-21. The proposed restoration work would treat approximately 15 acres, which would offset the additional disturbance to 14 acres, and there will be no net increase in detrimental soil disturbance. Id.

Plaintiffs criticize the EA for stating that soil restoration measures will "qualitatively" reduce detrimental effects, without including any quantitative measures of reduction. AR 1-1 at 162. The argument is unpersuasive because measurement of soil disturbance is a qualitative analysis. The numeric measurement involved is the percentage of disturbed soil, which will not increase after the Project and restoration. The EA provides sufficient evidence to show that the Project, with restoration, will not violate the Soil Quality Standards.

The Plaintiffs next claim the Forest Service violated NEPA's "hard look" requirement because it did not conduct a unit-by-unit inventory of soil disturbance. The Ninth Circuit holds it is a violation of NEPA for an agency to rely on expert opinion without data to support the opinion. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998).

The Plaintiffs' claim that there is no unit-by-unit inventory is plainly contradicted by the record. In contrast to Thomas, the record here contains current, site-specific data assessing the actual soil disturbance in the Project area, rather than just an expert opinion report. The EA contains a table listing the current detrimental disturbance in each unit, the disturbance expected from the Project, and disturbance after restoration. AR 1-1 at 158, Table 3-20. Plaintiffs also criticize the data because it does not provide specific numbers for the disturbance in Units A2, C, or H. While true, the EA estimates that these units, in which only hand-thinning is authorized, will not sustain additional disturbance from the Project. AR 1-1 at 158, Table 3-20. The EA shows the "cumulative detrimental effects from project implementation and restoration will not exceed the conditions prior to the planned activity" as required by the Regional Soil Quality Standards.

In response to Plaintiffs' claims that this table does not constitute sufficient "hard data," the Forest Service

supplemented the record with soil surveys conducted in 2006 and 2007. The field investigation was referenced in the EA, indicating that the agency relied on this hard data in analyzing the soil disturbance. AR 1-1 at 158. Table 3-20, included in the EA, as well as the raw data provided by the agency, fulfills the "hard look" requirement of NEPA.

B. The Forest Service complied with the Forest Plan and did not violate NFMA and NEPA, with the exception of the requirement to map key habitat components for elk.

The Plaintiffs raise numerous arguments that the EA violates NFMA. They add a brief claim to each argument that the purported NFMA violations also constitute violations of NEPA because the agency did not take the required "hard look." Each of their NFMA/NEPA claims are considered under the legal standards articulated above.

1. The EA sufficiently monitored old growth management indicator species using the habitat proxy method.

The argument here is that the Forest Service violated NEPA and NFMA by failing to monitor population trends of old growth management indicator species.[2] Pl.'s Br. at 11-12. The Ninth Circuit holds that the Forest Service may substitute an analysis of the amount of suitable habitat as a proxy for monitoring population trends. McNair, 537 F.3d at 996. "[W]hen the Forest

[2] A Management Indicator Species is a species "identified in a planning process . . . used to monitor the effects of planned management activities on viable populations of wildlife and fish." AR 7-5 at 161.

Service decides, in its expertise, that habitat is a reliable proxy for species' viability in a particular case, the Forest Service nevertheless must both describe the quantity and quality of habitat that is necessary to sustain the viability of the species in question and explain its methodology for measuring this habitat." Id. at 997-98. "[A]n analysis of the habitat that uses all the scientific data currently available is a sound one," and if there is no data available on particular habitat requirements of a species, the agency is not required to conduct a more extensive analysis. Inland Empire Pub. Lands Council, 88 F.3d at 762. In that case, the Ninth Circuit concluded that the agency did not need to consider nesting and feeding requirements of the flammulated owl where such data was not available, but the agency had considered other existing information regarding owl habitat needs. Id.

The management indicator species for dry Douglas fir old growth is the Northern goshawk. The management indicator species for moist spruce old growth is the pine marten. AR 1-1 at 222. The record shows that the agency does not have population data for the goshawk or pine marten. AR 18-3 at 308. However, the record also states that "[h]abitat for species such as goshawk and marten for which population data is not available is being managed by the Forest to maintain these species." Id. Thus, the agency follows the habitat proxy method.

In this case, the Forest Service has sufficiently "describe[d] the quantity and quality of habitat that is necessary to sustain the viability" of the goshawk. McNair, 537 F.3d at 997-98. The EA reviewed numerous studies regarding necessary nesting and foraging habitat which goshawks require. The studies quantify the acreage necessary for goshawk nesting, and concluded that the goshawk does not need large unbroken tracts of old growth for nesting. AR 1-1 at 223-24. The EA also explains the Forest Service's "methodology for measuring this habitat." McNair, 537 F.3d at 998. The agency modeled goshawk habitat using the Timber Stand Management Resource System (TSMRS) database, in accordance with established protocols. AR 1-1 at 225. Through modeling, the service identified the amount of potential goshawk habitat. Id. In 2005-2006, the Forest Service also conducted surveys in one of the units with potential habitat and did not find any goshawks or documented nest stands. Id. Based on the review of data, the Forest Service concluded that impacts to the goshawk would be negligible. Plaintiffs offer no evidence, nor do they suggest, that the Forest Service ignored relevant, available data regarding the habitat needs of goshawks. Because the record indicates the Forest Service considered the available data in assessing habitat requirements for goshawk populations, the agency's measurement of goshawk populations did not violate NFMA. Inland Empire Pub. Lands Council, 88 F.3d at

762. The habitat modeling and surveys employed satisfy the "hard look" requirements of NEPA. Westlands Water Dist., 376 F.3d at 865.

Likewise, the Forest Service adequately analyzed pine marten habitat. Based on available science reviewed in the EA, pine marten prefer "structurally complex conifer forests," and providing adequate snags and down woody debris is key to maintaining their populations. AR 1-1 at 229. The agency modeled marten habitat and concluded that 492 acres of preferred habitat exist in the area, and 171 acres of spruce and subalpine fir old growth exist in the Project area. Id. at 229-30. Based on the modeling, the EA concluded that 74 acres of marten preferred habitat would be affected, that any reductions would still meet habitat requirements, and that snag and woody debris requirements in the Forest Plan would adequately protect marten. Id. at 230-31. Here again, there is nothing to contradict the science relied upon in the EA. The agency did not violate NFMA with its habitat analysis for pine marten because it explained its methodology and described the quantity and quality of habitat needed by pine marten. McNair, 537 F.3d at 997-98. The data provided on pine marten also fulfilled the "hard look" requirement of NEPA. Westlands Water Dist., 376 F.3d at 865.

2. The Forest Service adequately designated retention and replacement snags.

The Forest Plan requires the Forest Service to designate

retention and replacement snag trees[3] when laying out a timber sale. AR 7-6 at 11. During layout, there is a need to designate an average of 30 snags per 10 acres for retention (three snags per acre), and the Forest Service must mark snags that could be easily accessed for firewood. Id. Plaintiffs argue that the Forest Service violated both NEPA and NFMA because the agency did not physically mark the snags to be retained. Pl.'s Br. at 12.

Agency employees are responsible for "[d]esignation, marking when necessary, and supervision of harvesting of trees, portions of trees, or forest products." 16 U.S.C. § 472a(g). "Marking" is a forestry term that "is well defined and means 'selection and indication by a blaze, paint * * * or marking hammer on the stem of trees to be felled or retained.'" W. Va. Div. Of Izaak Walton League of Amer., 522 F.2d at 949 (footnote omitted). In contrast, "designate" is a broader and more general term, and the "words are not synonymous or interchangeable." Id.

Contrary to Plaintiffs' claims, the Forest Service was not required to physically mark the retention snags. AR 7-6 at 11. The agency only needs to mark snags to prevent firewood cutting, but that requirement is irrelevant here because the area will be closed to firewood cutting. Id.; AR 1-7 at 17. Further, the Decision Notice requires mitigation in the timber contract to

[3] A snag is a "standing dead tree usually greater than 5 feet in height and 6 inches in diameter at breast height." AR 7-5 at 186.

ensure retention of existing snags. AR 1-7 at 17.

The principle point of the argument rests on an email by a Forest Service biologist suggesting that snag retention is inadequate because it states that "we did not mark the dead [trees]." Pl.'s Br. at 12 (citing AR 5-18). However, this email indicates the agency complied with the snag requirements. The email details a snag inventory done in several units to ensure that snag retention would be adequate.[4] The email states the biologist plotted only those snags that were not "cruised" as part of the potential harvest, so the snag numbers reflect what will remain after the Project. AR 5-18. The inventory reflects that snag retention rates average four to six snags per acre. Id. This surpasses the standard of three snags per acre required under the Forest Plan. AR 7-6 at 11. It is not a violation of NFMA or NEPA to designate retention snags through an inventory, including a clause in the timber contract requiring that snags be maintained at a level that will comply with the Forest Plan standard.

3. The EA does not comply with mapping requirements for elk, but does comply with hiding cover and security cover requirements.

The Plaintiffs next argue that the Forest Service violated

[4]The remaining units either involve hand-thinning of small trees that will not affect snag numbers or cover areas not previously logged, which the Forest Service concluded would easily surpass snag retention requirements. AR 5-18; 1-7 at 17.

requirements for protecting elk in three respects: (1) the agency failed to map elk habitat elements; (2) the Project will violate the Forest Plan's hiding cover standard; and (3) the Project will violate the Forest Plan's elk security cover requirements. It is here that there is merit in Plaintiffs' argument.

a. Mapping requirements

The Forest Plan requires the Forest Service to maintain two-thirds of the hiding cover associated with key habitat components for wildlife. AR 7-5 at 27 #5. This standard provides that the Forest Service will:

> [m]aintain at least two third of the hiding cover associated with key habitat components over time. . . . Key habitat components are important features for wildlife. They include moist areas (wallows, etc.); foraging areas (meadows and parks); critical hiding cover . . .; thermal cover; migration routes and staging areas. *These areas will be mapped on a site-by-site basis* during project area analysis.

Id. (emphasis added). Plaintiffs argue the Forest Service failed to map these areas as required by the Forest Plan and failed to provide the maps in the EA. Pl.'s Br. at 12-13.

Defendant-Intervenors respond that the Forest Service fulfilled the obligation to map these areas as part of its Travel Management Plan, which included the Project area. Def.-Int. Br. at 10-11. The record shows that Plaintiffs made a Freedom of Information Act (FOIA) request for maps and were told that elk analysis was done as part of the Travel Management Plan, but the agency did not provide any maps. AR 4-2, 4-3. In response to

Plaintiffs' different FOIA requests for maps, the agency provided maps. AR 4-3. Even so, a review of the Travel Management Plan Final Environmental Impact Statement does not show any maps of key habitat components for elk.

The Forest Service responds that the above provision of the Forest Plan does not require mapping of habitat components, but is intended to protect hiding cover, and hiding cover is what must be mapped. Def.'s Br. at 10. The agency claims that it fulfilled this requirement by conducting field reconnaissance to assess key habitat and mapping hiding cover accordingly. Id.; AR 9-43 at 7.

The Forest Service did not comply with the Forest Plan provision that mandates mapping of elk habitat. The language of the Forest Plan requires mapping of "[t]hese areas." The most sensible construction of this phrase is that "these areas" refers not to hiding cover, but to the areas listed in the immediately preceding sentence, i.e. the key habitat components. This provision of the Forest Plan requires the agency to map key habitat components, and the agency does not argue that it has done this, nor does the record indicate that it has. Without a map to indicate where key habitat components are located, this makes it nearly impossible to be informed about whether a Project will impact the habitat components.

The plain language of the Forest Plan requires the Forest

Service to map key habitat components for elk. AR 7-5 at 27 #5. While the record contains a map of hiding cover generally, this map does not indicate the location of any of the key habitat components listed in the Forest Plan. Therefore, the Project violates NFMA because the site-specific project is not consistent with the requirements of the governing forest plan. 16 U.S.C. § 1604(I); Rittenhouse, 305 F.3d at 961–62.

b. Hiding cover requirements

The Forest Plan requires that the agency "[m]aintain at least two thirds of the hiding cover associated with key habitat components over time." AR 7-5 at 27 #5. Plaintiffs claim the Forest Service violated this requirement. The argument is based on a statement in the EA that hiding cover will be reduced from 70%-90% to 55%, below the two-thirds standard. Pl.'s Br. at 13 (citing AR 1-1 at 149, 228).

The EA indicates that the Project will not violate the hiding cover requirements. But the EA does indicate the hiding cover could be unacceptably reduced below the standard. However, this involves a selective reading of the record: the EA states that "[a]ssuming that the proposed vegetation treatment eliminated all cover," hiding cover would be reduced to 55% for Alternative 3. AR 1-1 at 228. The EA goes on to state that "this is a liberal estimate of the decrease in cover as the individual prescriptions would not reduce hiding cover to an

unacceptable level." Id. The EA also indicates that actual reductions in cover will be minimal: "The vegetative structural diversity analysis indicates a 1% decrease in the pole, mature, and old growth structural classes, maintaining acceptable levels of hiding cover." AR 1-1 at 149, 228; AR 12-1 at 6. The Forest Service argues that because the 55% figure assumes all cover will be eliminated, but the Project would not eliminate all cover, the two-thirds standard will still be met. Assuming hiding cover is at the bottom of the current estimated range at 70%, the planned 1% reduction each in pole, mature, and old growth structural classes would reduce hiding cover to 67%, thus meeting the standard. The Forest Service has complied with the limited part of the Forest Plan's requirement to maintain two-thirds elk hiding cover.

c. Security cover requirements

The Forest Plan also requires the Forest Service to adequately maintain "elk security cover," which is "[e]lk hiding cover modified by open roads." AR 7-5 at 27 #11. The Plaintiffs recognize that the Forest Plan does not contain a numeric standard for elk security cover, yet argue that the Forest Service should have relied on a 70% effective elk security cover standard. Pl.'s Br. at 13 (citing Gallatin Travel Plan ROD at 78-79). However, the Travel Plan expressly rejects the 70% standard, stating that it "was not scientifically supportable or

logical." Gallatin Travel Plan ROD, AR 19-3 at 78. While the Travel Plan recognizes the 70% standard may be used as a tool, it is no longer a requirement. Instead, the agency now engages in site-specific determinations of elk security cover. Id. at 78-79.

The EA states that the Project area currently provides 58% security cover. AR 1-1 at 228. While this is below the 70% benchmark advocated by Plaintiffs, the EA cites studies concluding that 30% cover is adequate. Id. Further, the EA also concludes that the Project will not change road densities, and security cover will be unaffected. Id. The Plaintiffs offer nothing to show that the Forest Service should not have eliminated this standard. Likewise, they fail to show why the site specific determination of elk security cover in the EA is inadequate. Therefore, the agency's determination that the Project would not violate standards for elk security cover is not in error.

4. The EA shows that sedimentation from the Project will not impact Yellowstone cutthroat trout.

The Forest Plan requires the Forest Service to manage habitat to maintain sensitive species, including Yellowstone cutthroat trout. AR 7-5 at 27 #12. In the Project area, Smith Creek and East Fork of Smith Creek have heightened sediment levels, and increases in sediment yield could "perpetuate degraded spawning habitat conditions for trout." AR 1-1 at 114. The Plaintiffs argue the Project will violate this requirement

and cause habitat degradation by increasing stream sedimentation. Pl.'s Br. at 14. Specifically, Plaintiffs focus on sedimentation caused by the temporary reopening of roads and how proposed road treatments will affect sedimentation.

The EA demonstrates that temporary road re-openings will not cause significant impacts to sedimentation. First, the Project contains numerous mitigation measures that the agency asserts will minimize sedimentation increases. AR 1-1 at 56-57. Additionally, the seasonal restrictions on harvesting activities are also expected to reduce sedimentation concerns. AR 1-1 at 95. A Court may not substitute its judgment for the agency's in determining which mitigation measures are appropriate. Or. Natural Res. Council, 476 F.3d at 1035.

The road treatment projects will have a net positive impact on sediment conditions. The EA indicates sediment will not increase, even if some road treatments are not completed. Road Treatment A, which is not part of the Project, was intended to be completed during 2007. AR 1-1 at 10. Treatment A is designed to address road sedimentation issues by installing culverts, clearing brush, and conducting blading and road clean-up. AR 1-1 at 15. The Forest Service conducted modeling, which indicates that Road Treatment A will decrease sedimentation over present levels, even taking into account the temporary increases in sedimentation that will occur during the Project. AR 1-1 at

Tables 3-6, 3-8, 3-10, 3-12. The modeling assumptions included, among other things, the effects of temporary road re-openings. AR 1-1 at 96. As Plaintiffs point out, Road Treatments B and C will be completed only if funding allows. AR 1-1 at 15. However, modeling for Road Treatment A takes into account the increased sedimentation from the Project and shows sediment levels will improve, even if Treatments B and C do not occur. AR 1-1 at Tables 3-6, 3-8, 3-10, 3-12. All road treatments affect the same creeks, Smith Creek and East Fork of Smith Creek, so even without Treatments B and C, there will be no net increase in sediment levels from the Project. Id.

A Project does not violate NFMA when there is sufficient evidence to show it will comply with the Forest Plan. Here that evidence exists. Further, the agency's analysis of fisheries complies with NEPA's "hard look" requirement. Westlands Water Dist., 376 F.3d at 865.

5. The Forest Service complied with the 10% old growth standard and adequately analyzed old growth habitat.

The Plaintiffs next claim that the EA does not demonstrate compliance with the 10% old growth standard required under the Forest Plan. They argue that the agency's data is too old and does not contain sufficient on-site verification.

The Forest Plan standards state that "the Forest will strive to develop" 10% old growth "in timber compartments containing suitable timber." AR 7-5 at 29. When the Forest Service has

tentatively identified stands containing old growth or has evidence that previously identified stands no longer contain old growth, the agency must "insure that compartments identified as old growth do, in fact, contain it." Rittenhouse, 305 F.3d at 970. In Rittenhouse, the Ninth Circuit held that the Forest Service did not comply with the Forest Plan's old growth standard when it had not updated its data to reflect loss of old growth due to forest fires. Id. Similarly, where the agency relied on 15-year-old data from the TSMRS database, but had indications it was inaccurate, the agency did not demonstrate compliance with the old growth standard. Lands Council v. Powell, 395 F.3d 1019, 1036-37 (9th Cir. 2005). In Powell, the Forest Service did not have adequate data to use habitat as a proxy for monitoring populations of old growth management indicator species, and had entirely omitted data on snags. Id. at 1036, n. 24.

This Court has concluded that the Forest Service does not comply with old growth standards when it has only "tentative" data to determine old growth numbers. Wilderness Society v. Bosworth, 118 F. Supp. 2d 1082, 1095-96 (D. Mont. 2000). The tentative numbers in Bosworth showed that old growth measured just over the standard at 10.3%, but verification revealed that up to 50% of tentatively identified old growth was not, in fact, old growth. Therefore, the agency had likely not complied with the 10% old growth standard. Id. at 1093.

In this case, the EA complied with the Forest Plan's 10% old growth standard through a combination of older stand data, aerial photos, and on-site verification. The Forest Service relied largely on stand exam data and the TSMRS database compiled from the 1980s through the early 1990s, which indicated that old growth constituted approximately 21% of Compartment 221, well above the 10% standard. AR 1-1 at 243; AR 12-7. The Plaintiffs argue that the data is inadequate because it is several years old. However, unlike Rittenhouse, Plaintiffs offer no evidence of factors that would render the data invalid. In contrast to Bosworth, the data here indicate that the percentage of old growth in the Project area surpasses the 10% standard, and the Project would cause only a small loss of old growth.

The Forest Service took additional steps to verify that the data was valid. The Forest Service recognized in team meetings before the completion of the EA, in 2006, that it did not have sufficient old growth data. E.g. AR 5-10 at 4. The agency reviewed 2005 aerial photos which confirmed that the amount of old growth was well above the 10% standard. AR 1-1 at 243. The agency also took steps to verify on site that the data on old growth was correct. The record contains a printout of stand data which includes handwritten verification of old growth numbers in Compartment 221 from June 2006. AR 12-22. Based on this field data, the Forest Service concluded in the EA that old growth

numbers comported with the older stand data. Unlike Bosworth, there was no indication from the field data that stand data and satellite data were providing incorrect estimates. AR 1-1 at 243. The Forest Service "insure[d] that compartments identified as old growth do, in fact, contain it." Rittenhouse, 305 F.3d at 970.

Plaintiffs also criticize the Forest Service for failing to monitor population trends of old growth management indicator species. However, as discussed above, the agency used the habitat proxy method and there is no basis to remand founded on this proposition.

The EA shows the Forest Service has complied with NFMA and the Forest Plan's requirement to maintain 10% old growth. The data compiled and reviewed by the agency satisfy NEPA's "hard look" requirement. Westlands Water Dist., 376 F.3d at 865.

C. The Gallatin Forest Plan ensures the viability of the elk population and adequately protects snag dependent species.

The National Forest Management Act requires the Forest Service to develop regulations that "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. § 1604(g)(3)(B). Until recently, this statute was implemented by a regulation that required the Forest Service "to maintain viable populations of existing species." 36 C.F.R. § 219.19 (2000). This regulation

is now defunct, and the agency must follow 36 C.F.R. § 219.10 (2008). McNair, 537 F.3d at 989, n.5. The new regulation requires the Forest Service to "provid[e] appropriate ecological conditions to support diversity of native plant and animal species in the plan area." 36 C.F.R. § 219.10(b).

Plaintiffs argue that § 219.19 applies here because the agency incorporated it into the Forest Plan. Assuming § 219.19 still applies, the analysis is the same under the facts of this case. The Plaintiffs argue that, in order to ensure wildlife viability, the Forest Service must comply with a standard for elk security cover and for snag management. However, as discussed below, both issues involve discretionary guidelines that allow the Forest Service to make site-specific determinations, and the agency adequately supported its decision on both of these issues. Under either § 219.10 or § 219.19, the agency's conclusion passes muster.

1. Justiciability

Plaintiffs argue the Forest Plan violates NFMA because it fails to ensure the viability of elk populations and protect snag dependent species. The Defendants claim these arguments are not properly before the Court because the Plaintiffs were obligated to raise these violations at the time the Plan was implemented. However, the Supreme Court has held that a challenge to a Forest Plan, without a site-specific challenge, is not ripe for review.

Ohio Forestry Assn., Inc. v. Sierra Club, 523 U.S. 726, 734 (1998). Instead, a party may challenge a Forest Plan in the context of a specific project, if implementation of the Plan will cause harm. Id. Plaintiffs' challenges to the Forest Plan are justiciable because of the harm they allege could result if the Forest Plan is implemented via the Project.

2. The Plan likely ensures the viability of the elk population.

Plaintiffs argue that the Forest Plan will not protect elk viability because there is no adequate standard for elk security cover, and the previous standard should be reinstated. Pl.'s Br. at 17-18. As discussed above, the Forest Service eliminated the requirement in the Forest Plan to maintain 70% cover for elk viability after concluding that the requirement "was not scientifically supportable or logical." Gallatin Travel Plan ROD, AR 19-3 at 78. Instead, the Forest Service now applies a site-by-site determination as to which roads may be maintained without negatively impacting elk. GNF Travel Plan FEIS 3.8 at 5. The record adequately supports the Forest Service's conclusion that increased road density caused by the Project will not threaten elk viability.

The Plaintiffs offer nothing to demonstrate that eliminating the standard was arbitrary and capricious, or that elk viability will be threatened without the standard in place. Without more than an unsubstantiated assertion, the agency is entitled to a

presumption of legality regarding its conclusion that the 70% standard is not necessary to ensure elk viability. Citizens to Pres. Overton Park, Inc., 401 U.S. at 415.

3. **The Plan adequately protects snag dependent species.**

Plaintiffs also claim the Forest Plan does not ensure the viability of snag dependent species. The Forest Plan does not include an indicator species for snag-dependent wildlife, and uses the habitat proxy method instead. AR 7-6 at 11. Plaintiffs argue the Forest Plan is inadequate in this regard because the Plan's snag standard was invalidated by the 2000 Northern Region Snag Protocol. Pl.'s Br. at 18. However, the Northern Region Snag Protocol specifically states that it provides an "*optional* snag retention standard." AR 9-2 at 3 (emphasis added). The Snag Protocol also recommends that "[w]here local data are available . . . Forests have the option to use those data to set their snag retention standards." Id. The record here provides site-specific data on snags, as permitted under the Snag Protocol. AR 9-27. Plaintiffs' argument alone does not show the Forest Plan fails to protect snag dependent species beyond their reliance on the optional Snag Protocol. The Forest Service did not violate NFMA by relying on site-specific data rather than the optional standard in the Snag Protocol.

D. The Forest Service did not violate NEPA with its policy of timber harvest in the Project area.

1. The Forest Service policy underlying the Project is rationally based.

The Plaintiffs argue that the Forest Service violated NEPA because it did not provide any studies to support the proposition that the Project will reduce stand-replacing wildfires, and there is thus no basis for the Project. Pl.'s Br. at 19. First, Plaintiffs mistakenly focus on whether the Project will reduce stand-replacing wildfires, because that is not the stated purpose of the Project. The Project is intended to modify wildfire behavior, provide for safer firefighter response and public evacuation, and decrease tree densities. AR 1-7 at 8.

The Forest Service supported its conclusion that the Project would accomplish the stated objectives. Plaintiffs argue the study relied on by the Forest Service to support the use of thinning actually demonstrates that thinning will exacerbate wildfires. Pl.'s Reply at 18. However, the study concludes that, "[f]uel treatments intended to minimize tree mortality will be most effective if both ladder and surface fuels are treated." AR 8-15 at 1. This is what the Project intends to do: there will be prescribed burning in one unit, Unit J, and in the remaining units, hand thinning and mechanical thinning would be conducted to create "highly variable" spacing and patches of multi-storied trees and irregular stand structure. AR 1-7 at 7. The thinning

treatment "would break the continuity of vertical and horizontal fuels among individual trees." Id. The Project will meet the suggestions of the study cited by the Forest Service for the most effective means of reducing wildfire risk. While the Forest Service policy of reducing wildfire danger by thinning is debatable, on this record, it is rational and does not violate NEPA. It is also a matter within the expertise of the agency.

2. The EA did not have to consider climate change.

Last, Plaintiffs argue that the Forest Service should have considered whether climate change will cause droughts that could negate the fire suppression purposes of the Project, and the failure to do so violates the "hard look" requirement of NEPA. Pl.'s Br. at 19-20; see Ctr. for Biological Diversity, 538 F.3d 1172. In Ctr. for Biological Diversity, the Ninth Circuit concluded that the National Highway Traffic Safety Administration erred when it did not consider climate change in setting fuel economy standards. Id. at 1216. However, Ctr. for Biological Diversity did not establish an absolute requirement that every action analyzed under NEPA must include an analysis of climate change, and NEPA does not require the Forest Service to "affirmatively present every uncertainty" in the EA. McNair, 537 F.3d at 1001.

Further, Plaintiffs misstate the analysis required by NEPA. NEPA does not categorically require an analysis of how

environmental factors such as climate change may impact an action. Instead, NEPA requires a "'hard look' at the impacts of [an] action [and] a reasonably thorough discussion of the significant aspects of the probable environmental consequences." Ctr. for Biological Diversity, 538 F.3d at 1194 (internal citations omitted). In Ctr. for Biological Diversity, an analysis of climate change was necessary because fuel standards and the resulting emissions would have a "direct effect on greenhouse gas emissions." Id. at 1214, n.68. That same analysis does not apply here because there is no evidence to show that the Project would directly impact climate change. The Forest Service's decision not to consider climate change in its analysis of the Project did not violate NEPA.

V. CONCLUSION

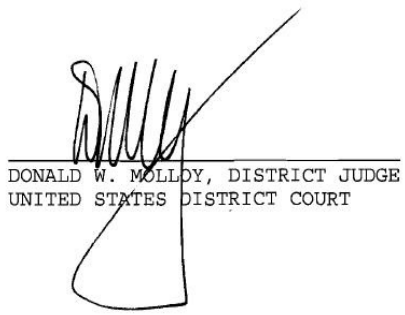
IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment (dkt #22) is GRANTED IN PART and DENIED in PART. Plaintiffs' motion is GRANTED with respect to Count II regarding mapping of key habitat components for elk and DENIED as to all other claims.

IT IS FURTHER ORDERED that Defendants'/Defendant-Intervenors' motions for summary judgment (dkt ## 27, 29) are GRANTED IN PART and DENIED IN PART. Their motions are DENIED with respect to Count II regarding mapping of key habitat components for elk and GRANTED as to all other claims.

IT IS FURTHER ORDERED that Defendants are ENJOINED from commencing the Project, and the matter is REMANDED to the Forest Service to conduct mapping of key habitat components for elk.

The Clerk of Court is directed to (1) enter final judgment in favor of Plaintiffs and against Defendants/Defendant-Intervenors in Count II of Plaintiffs' Complaint regarding mapping of key habitat components for elk; (2) enter final judgment against Plaintiffs and in favor of Defendants/Defendant-Intervenors as to the remaining Counts of Plaintiffs' Complaint; and (3) close this case.

DATED this 30th day of October, 2008.



DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT