IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 21-cv-02992-RM

DEFENDERS OF WILDLIFE,

Petitioner,

v.

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

Respondents.

ORDER

The Rio Grande National Forest provides habitat for the Canada lynx, a species listed as threatened under the Endangered Species Act ("ESA") since 2000.[1] Respondents are federal agencies charged with managing the Forest and implementing the ESA. Petitioner, a conservation organization, has filed a Petition for Review of Agency Action (ECF No. 1), asserting that Respondents are failing to protect the lynx by inadequately limiting logging in the Forest under a revised forest plan in violation of the ESA, the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA"). The Petition has been fully briefed (ECF Nos. 22, 24, 25) and is denied for the reasons below.

I. BACKGROUND

In 2008, Respondent United States Forest Service implemented new protections for lynx

[1] Though the species occurs primarily in Canada and Alaska, lynx in the contiguous United States represent a distinct population segment, which is the sole focus of this Order. (*See* ECF No. 16-7 at 139 (FWS01970).)

habitat, including restrictions on logging, with the adoption of the Southern Rockies Lynx Amendment ("SRLA"). (ECF No. 1, ¶¶ 4, 5.) The SRLA divides lynx habitat in the Forest into lynx analysis units ("LAUs") and sets limits on the amounts and types of logging projects permitted in each LAU to maintain sufficient suitable habitat. (*Id.* at ¶¶ 49-51.) Meanwhile, a beetle epidemic swept through the Forest, peaking around 2014. (*Id.* at ¶ 6.) The beetle epidemic decimated the Forest's largest trees and increased both the amount of unsuitable lynx habitat and the incentive to allow commercial salvage harvest—harvesting dead, dying, and damaged trees. (*Id.* at ¶¶ 6, 7.)

By 2017, conditions in the Forest had changed so significantly from when the SRLA was created that the Forest Service began consulting with Respondent United States Fish and Wildlife Service ("FWS") about revising the forest plan. (*Id.* at ¶ 9.) The revised forest plan adopted a new distinction between "low-use" and "high-use" areas of lynx habitat, and it modified the SRLA by adding a new standard for salvage harvest in "high-use" areas and by removing two restrictive logging standards in "low-use" areas. (*Id.* at ¶¶ 9, 10.) As the plan evolved, FWS issued a biological opinion ("BiOp") in 2019 followed by a revised and superseding BiOp in 2021,[2] both concluding that the revised forest plan was not likely to jeopardize the continued existence of the lynx. (*Id.* at ¶ 15.) In addition, the Forest Service prepared an environmental impact statement ("EIS") that supported implementing the revised forest plan.

Petitioner contends that Respondents' analyses of the revised forest plan fall short of the

[2] In light of Petitioner's apparent concession that no agency continues to rely on the 2019 BiOp (*see* ECF No. 22 at 14 n.2), this Order focuses solely on the 2021 BiOp and deems moot any arguments raised with respect to the 2019 BiOp alone.

requirements imposed by the ESA, NEPA, and the APA. It argues that the 2021 BiOp—and the Forest Service's reliance on it—is arbitrary and unlawful. It also argues that the EIS is arbitrary and unlawful. Respondents contend that the BiOp complies with the ESA, that the Forest Service has complied with its obligations under the ESA, and that the EIS complies with NEPA.

II. LEGAL STANDARDS

A. ESA

Section 7(a)(2) of the ESA requires the Forest Service, in consultation with FWS, to ensure that any action that it authorizes, funds, or carries out is not likely to jeopardize the continued existence of a listed species. *See* 16 U.S.C. § 1536(a)(2). Whenever, as here, the agencies agree that an action may affect a listed species, formal consultation must occur, and FWS is required to formulate a BiOp using "the best scientific and commercial data available." *Id.*; 50 C.F.R. § 402.14(a).

B. NEPA

NEPA requires federal agencies to pause and take a "hard look" at likely environmental consequences and satisfy various procedural and substantive requirements before acting. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). To comply with NEPA, a federal agency must prepare an EIS if a proposed action will significantly the quality of the human environment. *See* 42 U.S.C. § 4332(2)(C). An EIS informs federal agency decision making and the public and must "provide full and fair discussion of significant environmental impacts" as well as reasonable alternatives that would avoid or minimize those impacts or enhance the quality of the human environment. 40 C.F.R. § 1502.1.

C. APA

Under the APA, a reviewing court must set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under the "arbitrary and capricious" standard is narrow, and a court will not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A decision is arbitrary and capricious if it relies on factors which Congress did not intend the agency to consider, entirely fails to consider an important aspect of the problem, offers an explanation that is contrary to the evidence before the agency, or is so implausible it cannot be ascribed to a difference in view or the product of agency expertise. *Id.* Courts may not accept post hoc rationalizations for agency action, and "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 50. A presumption of validity attaches to agency action, and the burden of proof rests with the party challenging the action. *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008).

III. DISCUSSION

As a threshold jurisdictional matter, Respondents do not challenge Petitioner's assertion of standing, and the Court finds the allegations in the Petition are sufficient to establish Petitioner has standing to bring its claims. *See Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 840 (10th Cir. 2019).

A. ESA and APA Claims Against FWS

Petitioner's ESA and APA Claims against FWS are premised on the 2021 BiOp. But Petitioner has not shown that the BiOp's overall conclusion—that the revised forest plan is not

likely to jeopardize the existence of the Canada lynx in the contiguous United States—is incorrect. The Court initially finds that Petitioner's position is fundamentally flawed for at least three reasons.

First, the revised forest plan is a programmatic management plan that does not actually authorize any specific project in the Forest. *See Utah Env't Cong. v. Bosworth*, 443 F.3d 732, 736 (10th Cir. 2006) ("The Forest Service manages each forest unit at two different levels: (1) programmatic and (2) project."). As stated in the BiOp, "no immediate consequences occur directly to Canada lynx caused by the proposed action. Project-level activities that result from implementation of Forest Plan direction will undergo site-specific environmental review and section 7 ESA consultation, as appropriate." (ECF No. 16-1 at 351 (FWS00351); *see also id.* at 357 (FWS00357) ("The revised Forest Plan is a framework programmatic action and does not authorize, fund, or carry out an action, but provides direction for future actions.").) Thus, although the revised forest plan provides guidance for managing lynx habitat in the Forest, its implementation cannot be said to jeopardize the lynx directly.

Second, lynx habitat in the Forest amounts to just over 2 percent of the lynx habitat in the contiguous United States (*id.* at 359 (FWS00359)), and none of that habitat was designated as critical when the lynx was listed as threatened (*id.* at 345 (FWS00345)). As discussed below, the existence of the Colorado lynx population provides some added security to the distinct population segment, but it is not critical. In other words, even if the lynx were extirpated in the Forest, that would not significantly affect the status of the lynx across the contiguous United States. Indeed, although the lynx is still listed under the ESA, the Forest Service has concluded that it no longer meets the definition of a threated species. (*See id.* at 356 (FWS00346).)

Therefore, Petitioner cannot show that the revised forest plan will put the distinct population segment in jeopardy, even in the event of the worst-case scenario for lynx in the Forest.

Third, a mere difference in view with respect to FWS's conclusions—even if Petitioner could show they were incorrect—is not enough to establish that the BiOp, or the Forest Service's reliance on it, is arbitrary or capricious. The Court "must uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors." *Copart, Inc. v. Admin. Review Bd.*, 495 F.3d 1197, 1202 (10th Cir. 2007) (quotation omitted). And judicial deference to an agency is especially strong where, as here, the challenged decisions involve technical or scientific matters within the agency's area of expertise. *See Dine Citizens Against Ruining Our Env't*, 923 F.3d at 839. Fundamentally, the Court finds it was reasonable for the Forest Service to propose and FWS to approve modification to the SRLA due to the significantly changed conditions in the Forest resulting from the beetle epidemic. Put differently, the Court does not find that the presumption of validity that attaches to agency action is overcome merely because the revised forest plan changes the way the SRLA was previously applied in the Forest.

Having addressed these overarching flaws with Petitioner's position, the Court now turns to the more specific arguments raised in its Opening Brief.

1. Consideration of the 2017 SSA

In 2017, FWS conducted a species status assessment ("SSA"), separately assessing conditions for the lynx both as a distinct population segment and in six separate geographic units across the contiguous United States. Petitioner argues that the BiOp is arbitrary and unlawful because FWS failed to reconcile "the trend toward lynx extirpation in Colorado" articulated in the SSA with "increased salvage logging in the state's most important lynx habitat." (ECF

No. 22 at 21.) However, the Court is not persuaded by this argument for several reasons.

First, the "trend toward lynx extirpation" Petitioner derives from the SSA is not as unequivocal as Petitioner suggests. Although the SSA concludes that the Colorado geographic unit is the least secure of the units and ultimately doubts the future of the lynx population in Colorado, the expert projections relied on in the SSA express considerable uncertainty, are not entirely consistent with one another, and contain several nuances and caveats based on potential impacts from beetle kill, fire, and climate change. (ECF No. 16-8 at 18 (FWS02192).)

The experts FWS consulted to opine on lynx populations in 2025, 2050, and 2100 express "low confidence" in predicting the likely conditions of lynx populations beyond 2050 and "great uncertainty" in their projections out to 2100. (ECF No. 16-7 at 143 (FWS01974), 148 (FWS01979).) Indeed, as noted in the BiOp, "accurate lynx population numbers are unknown in Colorado" even currently. (ECF No. 16-1 at 349 (FWS00349).) As summarized in the SSA: "Most experts indicated an initially high and subsequently decreasing likelihood that resident lynx will persist in this unit, with uncertainty increasing substantially over time; however, experts also expressed substantial uncertainty of the near- and mid-term." (*Id.*)

The SSA ultimately reaches a conclusion that is "less optimistic than the expert panel" and finds that, because of numerous factors and uncertainties, there is reason to "doubt that resident lynx will persist in this unit through the end of the century (2100)," even while concurring with the experts that "lynx will persist over the short-term (2025) and possibly until mid-century (2050)." (*Id.* at 22 (FWS02196).) On this record, given that the revised forest plan is intended to remain in effect only until about 2036 (ECF No. 16-1 at 338 (FWS00338)), the Court is not persuaded that the SSA and other evidence assessed in the BiOp point to as clear a

trend toward extirpation as Petitioner asserts.

Second, the BiOp shows that FWS considered and applied the information in the SSA as part of its review of the revised forest plan. The BiOp notes that while efforts to introduce the lynx in Colorado have established a viable population (ECF No. 16-7 at 147 (FWS 01978)), "[t]he best available information indicates that the lynx population in Colorado is, and likely has always been low" (*id.* at 346 (FWS00346)). Nonetheless, the BiOp states that due to efforts in Colorado and Maine, there may be more resident lynx in the contiguous United States as of 2017 than occurred historically. (ECF No. 16-1 at 345 (FWS00345.).) And although the SSA "found no reliable information indicating a substantial reduction of the current distribution and abundance of resident lynx, in the contiguous U.S., from historical conditions," the BiOp notes that the broad distribution of lynx in large geographically discrete areas makes it invulnerable to extirpation caused by a single catastrophic event. (*Id.*) As noted above, the BiOp notes as well that the lynx no longer meets the definition of a threatened species and that habitat in the Forest—none of which was designated as critical (*id.* at 345 (FWS00345))—constitutes just over 2 percent of the total lynx habitat (*id.* at 359 (FWS00359)). The BiOp also finds that the Colorado population provides increased redundancy for the distinct population segment as a whole, at least temporarily, even though the long-term persistence of the Colorado population remains uncertain. (*Id.* at 346 (FWS00346).) Thus, far from ignoring the information in the SSA, the BiOp considers the low population of lynx in Colorado historically and how it benefits the distinct population segment while implicitly acknowledging that the geographic unit is not critical to the continued existence of the distinct population segment.

Third, Petitioner has not shown that threats to lynx habitat in the Forest pose an outsize

risk that FWS failed to consider. Broadly, the SSA contemplates that while some of the geographic units support resident populations that are higher than occurred historically, continued climate warming and associated impacts will reduce favorable habitat for the lynx, and only one geographic unit has a high likelihood of supporting resident lynx by 2100. (*See* ECF No. 16-7 at 143 (FWS01974) ("We are aware of no management actions that could be expected to abate the projected long-term retreat of boreal forests, declining hare populations, and diminished snow conditions expected under continued climate warming.").) The SSA also notes that "[t]he loss of viable resident lynx populations from 1 or more geographic units would represent reduced future redundancy, representation, and resiliency" for the distinct population segment as a whole. (ECF No. 16-7 at 309 (FWS02140).) As noted in the BiOp, however, the approximately 661,000 acres of lynx habitat in the Forest represent just over 2 percent of 30 million acres of habitat found across the country. And aside from the fact that lynx have been successfully reintroduced in the Forest, Petitioner has identified no unique benefits provided by the Colorado population to support its contention that threats to lynx habitat in the Forest pose an outsize risk. (ECF No. 22 at 22.) On its face, Petitioner's contention is at odds with the lack of designated critical habitat in Colorado. Nor has Petitioner shown that FWS failed to apply the best available science when making its jeopardy determination. Thus, the Court finds Petitioner has not shown that the Colorado lynx population represents a distinct or outsized risk to the distinct population segment. The Court therefore finds FWS adequately considered the SSA and that the BiOp is not arbitrary and capricious on this basis.

Fourth, Petitioner has not shown that any "increase" in salvage harvest will put the lynx in jeopardy. Petitioner seems to assume that all logging—including salvage harvest—is harmful

to lynx. But a general, unproven assumption that any timber harvesting in the Forest equates to negative effects on lynx habitat and population, without more, cannot defeat FWS's contrary conclusion. *See Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 442 (10th Cir. 2011). Further, there is evidence in the record that some salvage harvest in beetle-impacted forest may be beneficial to lynx and its primary prey, the snowshoe hare. (*See* ECF No. 16-1 at 264 (FWS00264) (stating salvage harvest should be prioritized in areas with good habitat restoration potential where the best available science suggests conditions could be improved through vegetation management).)

To support their contention that salvage harvest may benefit the lynx, Respondents also cite a draft biological assessment which states that "habitat improvement can still be associated with salvage harvest depending upon where the activities are focused and their scale and intensity in relationship to core habitat areas for lynx." (ECF No. 16-1 at 212 (FWS00212).). The draft biological assessment further supports Respondents' position:

> [F]orest vegetation management through timber harvest can also provide beneficial influences on lynx habitat, particularly when management activities are focused in areas that can promote regeneration and help develop landscape heterogeneity by mimicking the blowdown patterns that contribute to the small gap dynamics in spruce-fir forest types.

(*Id.*; *see also* ECF No. 16-6 at 321 (FWS01773) ("[S]ilvicultural prescriptions for tree salvage that protect and promote the existing spruce and subalpine fir understory and maintain the necessary shading, would be most consistent with conservation of lynx habitat in spruce beetle-impacted forests.").) In short, the issue of what types of logging are harmful to lynx is not as clear-cut as Petitioner suggests, and Petitioner has not established that FWS had no rational basis for concluding that allowing some salvage harvest within the limits prescribed in the revised

forest plan will not cause the lynx to be in jeopardy.

Fifth, Petitioner has not shown that the amount of salvage harvest allowed under the revised forest plan will put the lynx in jeopardy. The revised forest plan incorporates a 7 percent cap on salvage harvest in "high-use" areas of lynx habitat. According to Petitioner, this represents an arbitrary increase from the 0.5 percent cap on multi-storied spruce-fir stands that protect the highest-quality lynx habitat under SRLA. (*See* ECF No. 22 at 15.) But as explained in the BiOp, under the SRLA alone, salvage harvest without creating unsuitable conditions could have continued in the Forest with no restrictions or limitations. (ECF No. 16-1 at 356 (FWS00356).) Because the multistory conditions where the 0.5 percent standard applied either no longer exist or are limited on the landscape, "[t]he stand conditions caused by the beetle epidemic created conditions that are outside the conservation framework offered by the SRLA." (*Id.* at 345 (FWS00343).) The BiOp further explains that the 0.5 percent standard "retains limited utility over the life of this proposed plan" and that the new 7 percent standard was added "to address lynx habitat conservation where the mature overstory spruce succumbed to the beetle epidemic." (*Id.* at 352 (FWS00352).)

In its Reply, Petitioner fails to meaningfully address the changed conditions in the Forest resulting from the beetle epidemic or the SRLA's lack of standards pertaining to salvage harvest. In light of the significant alteration of the Forest caused by beetle epidemic, Petitioner's contention that the habitat protections in the revised forest plan are "relaxed" and "weak" compared to the SRLA misses the mark. (ECF No. 22 at 17.) Again, as noted in the BiOp, "the bark beetle epidemic created scenarios not contemplated under the SRLA framework. (ECF No. 16-1 at 356 (FWS00356).) Because Petitioner's argument is not rooted in an apples-to-

apples comparison, it does not provide a basis for finding FWS acted unreasonably by approving the revised forest plan.

Accordingly, even if the SSA were more definitive about the likelihood of extirpation of the lynx population in Colorado, Petitioner has not shown the revised forest plan places the lynx in jeopardy or that FWS's conclusion to the contrary is unreasonable. Taken together, the BiOp's findings and conclusions support FWS's reasonable expectation that consequences of the revised forest plan will be minor and are "not likely to appreciably reduce the likelihood of both survival and recovery of the Canada lynx." (ECF No. 16-1 at 359-60 (FWS00359-60).)

2. Designation of "Low-Use" Habitat

In assessing the revised forest plan's designation of areas of the Forest as "low-use" or "high-use," FWS relied on a 2020 study by Dr. John Squires and other biologists. (ECF No. 16-1 at 353 (FWS00353).) Although Petitioner faults the revised forest plan for designating the northern portion of the Forest as "low-use" habitat, it has not identified evidence that this designation is incorrect[3] or shown that it was unreasonable for FWS to rely on Dr. Squires and other biologists in the field in deciding which areas of the forest should be considered "low-use" and "high-use." Instead, Petitioner contends the Forest Service did not adequately analyze the northern portion. However, the requirement that agencies use the best scientific and commercial data available "does not require an agency to conduct new studies when evidence is available upon which a determination can be made." *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004); *see also Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1194 n.4

[3] While Petitioner has identified some evidence that lynx sometimes used the northern portions of the Forest and that it contains significant "linkage areas" for the lynx, the Court is not persuaded that such use is necessarily inconsistent with the "low-use" designation applied to those areas.

(10th Cir. 2006) (citing *Heartwood*). Respondents point out as well that the Squires study is consistent with an earlier report by Theobald and Shenk indicating limited use by lynx of the northern portions of the Forest. (ECF No. 24 at 25-26.) Accordingly, Petitioner has not shown that FWS acted arbitrarily by accepting the Forest Service's designation of the northern portion of the Forest as "low-use."

Petitioner also contends that FWS did not use the best data available in its assessment of the northern portion of the Forest. But Petitioner's reliance on a 2012 study by Jake Ivan is misplaced. First, the Ivan study is older than the Squires study and was completed before the beetle epidemic reached its peak in the Forest in 2014. As noted above, the epidemic significantly altered lynx habitat in the Forest. Second, the Ivan study analyzed data from reintroduction of lynx into the Forest—which mostly occurred in the southern and central portions of Colorado—that was not collected for the purpose of constructing a predictive map. (ECF No. 16-5 at 72-73 (FWS001341-42); *see id.* ("These maps should be viewed as a compliment to expert opinion and existing maps produced by other means.").) The Ivan study further notes that "predicting lynx habitat use in northern Colorado is difficult because the landscape is different." (*Id.*) Third, Mr. Ivan was a contributor to the Squires study. To extent, if at all, the studies contradict one another, it is reasonable to presume that either Mr. Ivan did not see any such contradictions as material or that his views as a researcher had evolved.

In any event, it is clear from the record that FWS considered and applied what it considered to be the best available science in approving the revised forest plan. "[A]n agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Ecology Ctr.*, 451 F.3d at

1189 (quotation omitted). And to the extent FWS concluded that the Squires study was the best available data on lynx use of the Forest, it is not the Court's role to weigh competing scientific analyses or to second-guess the agency's decisions about which data and studies are the best available. *See Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 442 (10th Cir. 2011); *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1265 (11th Cir. 2009). Moreover, even assuming that the northern portion of the Forest is used by and important to the lynx, Petitioner has not shown that necessarily precludes a "low-use" designation for those areas. Notably, the BiOp concludes that lynx are unlikely to establish home ranges in the "low-use" portion of the Forest even as they are likely continue to use the area to make exploratory and dispersal movements. (ECF No. 16-1 at 353 (FWS00353).) Therefore, Petitioner has not established that the Ivan study constitutes the best available science data on lynx use of the northern portion of the Forest or that the BiOp's acceptance of the "low-use" designation for the norther portions of the Forest is arbitrary.

3. Treatment of "Low-Use" Habitat

Petitioner next argues that the revised forest plan "stripped key SRLA protections in most of the newly designated 'low-use' habitat" (ECF No. 22 at 29) and that the removal of these protections is arbitrary because FWS "fails to identify the accurate description of the new standard, fails to analyze a fundamental shift in approach to lynx habitat protection, and dismisses the impacts of the new standards for reasons that are illogical and unsupported" (*Id.* at 34). These arguments lack merit.

With respect Petitioner's first reason, Respondents contend that the BiOp is clear with respect to LAUs in "low-use" areas—all SRLA standards apply except for the 30 and 15 percent

standards referred to as "VEG S1" and "VEG S2." As stated in the BiOp: "[SLRA] standards VEG S1 and VEG S2 do not apply within [LAUs] that have no overlap (primarily the northern part of the Forest), either wholly or partially, with the ['high-use'] areas." (ECF No. 16-1 at 343 (FWS00343).) The Court agrees with Respondents that the BiOp contains a sufficiently clear description of how the revised forest plan applies in "low-use" areas.

Petitioner's second reason—that FWS failed to analyze a fundamental shift in approach—is somewhat perplexing. As already discussed, the impetus behind the revised forest plan was the significant alteration of the Forest caused by the beetle epidemic, necessitating evaluation of new conditions in the Forest that were not contemplated by the SRLA. This is not a case where the agency failed to explain its reasons for deviating from a prior policy position. *Cf. Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1255 (10th Cir 2020) (stating that an '*unexplained inconsistency* in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice' (quotation omitted, emphasis added)). Given the severity of the beetle epidemic, it is hardly surprising that the forest plan needed to be revised. And the BiOp includes several statements to the effect that "the SRLA did not provide a conservation framework for the current conditions now occurring on the [Forest]." (ECF No. 16-1 at 359 (FWS00359); *see id.* at 357 (FWS00357).)

With respect to Petitioner's third reason above, Respondents point out that the BiOp anticipates "some low level of negative consequences to lynx caused by anticipated salvage activity" in the "low-use" area, which is "used primarily for movement and dispersal rather than home range establishment." (ECF No. 16-1 at 359 (FWS00359); *see also id.* at 358 (FWS00358) (noting that lynx "are significantly less likely to establish home ranges" in "low-use" areas).)

Again, Petitioner has not shown that the "low-use" designation is incorrect, and the Court finds it unremarkable that lynx sometimes use LAUs or "linkage areas" in "low-use" areas of the Forest. Petitioner raises speculative arguments about how the standards that apply to linkage areas could be loosely interpreted, but it has not shown that FWS's conclusion that the consequences of the revised forest plan with respect to "low-use" areas will not appreciably reduce the likelihood of survival and recovery of the lynx is incorrect or arbitrary. *See Wild Fish Conservancy v. Salazar*, 682 F.3d 513, 522-23 (9th Cir 2010) (noting that agency action may have some impact, but not an appreciable impact, on the likelihood of both the survival and recovery of the affected species).

Therefore, Petitioner has not shown that treatment of "low-use" areas under the revised forest plan is arbitrary or capricious.

4. Treatment "High-Use" Habitat

Petitioner also argues that FWS approved an arbitrary 7 percent cap on salvage harvest in "high-use" areas of the Forest. But, as explained above, this standard did not replace the 0.5 percent cap that applies under the SRLA to multi-storied spruce-fir stands that are rare-to-nonexistent in the advent of the beetle epidemic. Rather, it filled a gap where the SRLA did not provide direction. Petitioner has not meaningfully addressed Respondents' contention that the revised forest plan imposed a standard on salvage harvest where none existed previously under the SRLA. Thus, comparisons between these two standards are inapt, and the Court is not persuaded that implementation of the revised forest plan is likely to make conditions worse for the lynx or that the imposition of a cap where none existed can be considered arbitrary under the circumstances.

Petitioner also argues that the 7 percent standard is arbitrary because it has significant exceptions. But Petitioner's speculation that these exceptions might jeopardize lynx habitat is insufficient to show that FWS acted arbitrarily by concluding the revised forest plan would not jeopardize the lynx. And to the extent Petitioner argues that Respondents have failed to provide a justification for the 7 percent standard, FWS's role in producing the BiOp was merely to determine whether that standard—along with the other standards in the revised forest plan—would place the lynx in jeopardy. Petitioner has not shown FWS's conclusion that the new standard for LAUs containing "high-use" habitat would not jeopardize the lynx is arbitrary.

5. Determination of the Environmental Baseline

Under the ESA, FWS was required to assess an environmental baseline for the revised forest plan. The environmental baseline is the condition of the listed species without the consequences caused by the proposed action and includes "the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." 50 C.F.R. § 402.02.

Petitioner contends that FWS improperly defined the environmental baseline by omitting the La Garita Hills Restoration Project, which the Forest Service approved in 2017. (ECF No. 22 at 38.) Although the Project is not mentioned by name in the BiOp, Respondent contends it was included in the LAU statistics that are incorporated into the BiOp. (ECF No. 24 at 21.) In its Reply, Petitioner does not dispute that the figures in the BiOp include treatments that were completed as part of the Project but faults the BiOp for not including "anticipated impacts" from

the Project, given the Project's contemplation of more than 60,000 acres of "potential treatment areas" in two LAUs located in the "low-use" area. (ECF No. 25 at 17.) However, FWS clearly considered the Project in assessing the environmental baseline, and, even assuming the potential treatment areas are treated at some point, Petitioner has not developed this argument by showing what difference that would make to the environmental baseline or to the BiOp more generally. Accordingly, the Court discerns no basis for finding the BiOp arbitrary and capricious on grounds that it failed to assess the environmental baseline.

6. Consideration of Species Recovery

Petitioner argues FWS failed to meet its obligation to analyze species recovery and that the BiOp focuses on only the lynx's survival. (ECF No. 22 at 38.) Citing numerous references to both survival and recovery, Respondents contend that Petitioner's argument lacks merit. (ECF No. 24 at 36-38.) The Court agrees with Respondents.

As noted in the BiOp, the Forest contains only about 661,000 acres, which is about 2 percent of the 30 million acres of lynx habitat in the contiguous United States. The BiOp states that it does not include a recovery plan because the lynx no longer meets the definition of a threatened species. According to Petitioner, FWS has since stated that it will prepare a recovery plan. Be that as it may, the Court is satisfied that the BiOp adequately assessed the lynx's recovery given the best available evidence about its status across the contiguous United States at the time the revised forest plan was being implemented.

B. ESA and APA Claims Against the Forest Service

Because Petitioner has not shown the BiOp to be arbitrary or capricious, its argument that the Forest Service is not entitled to rely on it necessarily fails as well.

C. NEPA and APA Claims Against the Forest Service

Petitioner relies on substantially the same arguments to support its contention that the EIS prepared by the Forest Service is arbitrary and capricious. The Court likewise discerns no basis for vacating the EIS based on the overarching flaws with Petitioner's position set forth at the outset of this Order and for substantially the same reasons that it rejected Petitioner's more specific arguments.

IV. CONCLUSION

Therefore, the Court DENIES the Petition (ECF No. 1), and the Clerk is directed to CLOSE this case.

DATED this 27th day of January, 2023.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge