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PATRICK E. DUFFY
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DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES and THE LANDS COUNCIL, Plaintiffs, vs. UNITED STATES FISH AND WILDLIFE SERVICE, an agency of the U.S. Dept. of Interior, and UNITED STATES FOREST SERVICE, an agency of the U.S. Dept. of Agriculture, Defendants.	)	CV 04-216-M-DWM ORDER

I. Introduction and Factual Background

In 1999, the Alliance for the Wild Rockies filed a lawsuit against the Kootenai and Idaho Panhandle National Forests over their use of interim rules for managing motorized access on the Cabinet-Yaak and Selkirk Ecosystems without amending their Land and Resource Management Plans. The case settled in 2001 with the Forests agreeing to amend their Plans to include motorized access rules. The Final Environmental Impact Statement (FEIS) and Biological Opinion (BiOp) at issue in this case are the result of

the Forests' attempts to amend their Forest Plans.

The Forest Plan Amendments address grizzly bear habitat management within the Cabinet-Yaak and Selkirk Recovery Zones[1] by changing the objectives, standards, and guidelines related to open motorized route density (OMRD), total motorized route density (TMRD), and core habitat through implementation of Alternative E from the Forest Service's 2002 FEIS. FWS AR 1:6. Alternative E establishes specific standards for the management of core habit, OMRD, and TMRD for individual bear management units (BMUs), taking into consideration the unique biological and social features[2] within each BMU. The amendments also limit administrative travel on restricted[3] roads in the BMUs. The amendments are programmatic; modification to any specific road or its use will be subject to project-level analysis. FS AR 19-9 at 1-1.

The amendments do not make radical changes in motorized access standards. The standards on which the rules are based require maximum TMRD of 26%, total OMRD of 33%, and core habitat of 55%. In the Cabinet-Yaak Recovery Zone, twenty of twenty-two

[1]The Fish and Wildlife Service's Grizzly Bear Recovery Plan identifies six separate recovery zones or ecosystems, including Yellowstone, the Northern Continental Divide, the North Cascades, the Bitterroot, and the two at issue here, the Cabinet-Yaak and Selkirk.

[2]Social features include, among other things, highways, topography, and residential developments.

[3]A road is considered "restricted" if it is gated or otherwise obstructed.

BMUs will exceed the research-identified level for core habitat of 55%, while currently only fourteen do. FWS AR 1:12. Seventeen of the twenty-two will beat the OMRD and/or TMRD levels. Id. In addition, the overall core habitat throughout the Cabinet-Yaak will increase slightly from 56% to 58%. FWS AR 1:108-109. In the Selkirk Recovery Zone, seven of nineteen BMUs will better the core and OMRD/TMRD levels.[4] FWS AR 1:12. In addition, the terms of the biological opinion require that there be no permanent reduction in core area in any BMU, and that temporary losses of core occur in no more than three of each ten years. FWS AR 1:141-42.

Plaintiffs challenge the Forest Service's March 2004 Record of Decision regarding the Forest Plan Amendments for Motorized Access Management in the Cabinet-Yaak and Selkirk Ecosystems; the Forest Service's March 2002 Final Environmental Impact Statement for those Plan Amendments; FWS's February 9, 2004 Biological Opinion on those amendments; and FWS's decision to concur in the Forest Service's "not likely to adversely affect" determinations for grizzly bears affected by the White Pine, Lower Big Creek, and West Troy Projects on the Kootenai National Forest and the Mission Brush Project on the Idaho Panhandle National Forest.

[4]The FEIS states that the Selkirk Recovery Zone has 9 BMUs. That number does not include the Canadian ones. FS AR 19-9 at 3-10. Ten Selkirk BMUs are in the United States; eight are managed by the Idaho Panhandle National Forest, one by the Colville National Forest, and one by Idaho state lands (over which the Plan Amendments have no control). FWS AR 1:33.

Compl. ¶ 2.

Plaintiffs' Complaint states eight claims for relief:

1. FWS's 2004 BiOp for the "Forest Plan Amendments for Motorized Access Management within the Selkirk and Cabinet-Yaak Grizzly Bear Recovery Zones" arbitrarily fails to consider grizzly mortality rates, contrary to 16 U.S.C. § 1536(a)(2) and in violation of 5 U.S.C. §§ 701-706.

2. The BiOp also arbitrarily fails to consider the best scientific and commercial data available regarding likely levels of take of grizzly bears, in violation of 16 U.S.C. § 1536(a)(2) & (b)(4), and 5 U.S.C. §§ 701-706.

3. The BiOp also arbitrarily fails to assess the potential for grizzly bear recovery, contrary to 16 U.S.C. § 1536(a)(2) and in violation of 5 U.S.C. §§ 701-706.

4. The BiOp arbitrarily fails to consider conflicts with the Interagency Grizzly Bear Committee Guidelines for grizzly habitat management, contrary to 16 U.S.C. § 1536(a)(2) and in violation of 5 U.S.C. §§ 701-706.

5. The BiOp also fails to use the best scientific evidence available, contrary to 16 U.S.C. § 1536(a)(2) and in violation of 5 U.S.C. §§ 701-706.

6. The FWS "Letters of Concurrence" for the White Pine, Lower Big Creek, West Troy, and Mission Brush Timber Sales are arbitrary, capricious, and in violation of the Endangered Species Act (ESA).

7. The Forest Service's March 2002 EIS is arbitrary, capricious, and in violation of the National Environmental Policy Act (NEPA).

8. The March 2004 Record of Decision, including the decision to implement Alternative E from the 2002 EIS, is arbitrary, capricious, and in violation of National Forest Management Act (NFMA). 5 U.S.C. § 706(2)(A), (D).

For the reasons set forth below, I find the Defendants are entitled to summary judgment. The Plaintiffs are not, and no injunction will be issued.

II. Analysis

Plaintiffs have three major contentions: the BiOp issued for the "Forest Plan Amendments for Motorized Access Management within the Selkirk and Cabinet-Yaak Grizzly Bear Recovery Zones" is arbitrary and capricious, FWS's letters of concurrence for timber sales within the area are arbitrary and capricious, and the Forest Service's 2002 EIS for the Forest Plan Amendments violates NEPA. Plaintiffs request summary judgment and injunctive relief. The Government also moves for summary judgment.

A. BiOp for the "Forest plan Amendments for Motorized Access Management within the Selkirk and Cabinet-Yaak Grizzly Bear Recovery Zones"

1. Analytical Framework

Both parties have moved for summary judgment on all counts: ESA, NEPA, and NFMA. Because these statutes do not provide an

independent basis for review, the action is governed by the Administrative Procedure Act (APA), which permits judicial review of final agency action. 5 U.S.C. § 706. Judicial review under the APA is limited to the question of whether the Forest Service or FWS acted arbitrarily, capriciously, or otherwise not in accordance with the law. 5 U.S.C. § 706. In making this determination, the Court must consider whether the agency's decisions were based on a consideration of the relevant factors and determine whether the agency made "a clear error of judgment." Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989). The Court's review is limited to the information that was before the agency at the time it made its decision. Friends of the Earth v. Hintz, 800 F.2d 822, 828-29 (9th Cir. 1986). The basis for the decision must be articulated by the agency in the record. Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001); Camp v. Pitts, 411 U.S. 138, 142 (1973).

ESA § 7(a)(2) provides the standard by which to consider FWS's and the Forest Service's actions.

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for

> such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2). Counsel for the Government put his finger on the crux of this dispute at oral argument, when he pointed out that Plaintiffs appear to be demanding that Fish and Wildlife and the Forest Service in particular actually save the grizzly bear from extinction, rather than, as ESA § 7(a)(2) requires, ensure that the actions taken by the Forest Service do not "jeopardize the continued existence" of the grizzlies.

Plaintiffs have reason to be concerned about the fate of the grizzlies in the Cabinet-Yaak and Selkirk Ecosystems. The populations are paltry and would qualify as endangered but for FWS's policy about priority.[5] However, a § 7(a)(2) consultation is not a mechanism by which all harms to the grizzlies can be erased. The question here is narrow: Do the Forest Service amendments jeopardize grizzlies? Plaintiffs maintain that the status quo is unacceptable and the amendments only barely improve on the status quo. Thus, according to Plaintiffs, the amendments jeopardize grizzlies by failing to sufficiently improve on the status quo. Conversely, Defendants maintain that because the chosen alternative would improve upon current conditions, if only slightly, the Amendments do not jeopardize the bears.

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[5]FWS has found that reclassification of grizzly bears in the Cabinet-Yaak and Selkirk from threatened to endangered species is "warranted but precluded by work on higher priority species." FWS AR 1:10-11.

In Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998), the Ninth Circuit discussed the Secretary's decision to adopt a biological opinion, reasonable and prudent alternative, and incidental take statement. Plaintiffs in that case alleged various violations of the ESA. The Court wrote:

> [U]nder the ESA, the Secretary was not required to pick the first reasonable alternative the FWS came up with in formulating the RPA. The Secretary was not even required to pick the best alternative or the one that would most effectively protect the Flycatcher from jeopardy. The Secretary need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency.

Id. at 523 (internal citation omitted). The Court went on to say:

> The district court correctly held that the only relevant question before it for review was whether the Secretary acted arbitrarily and capriciously or abused his discretion in adopting the final RPA. In answering this question, the court had only to determine if the final RPA met the standards and the requirements of the ESA. The court was not in a position to determine if the draft RPA should have been adopted or if it would have afforded the Flycatcher better protection.

Id. This framework is useful in evaluating Plaintiffs' persuasive, but legally unavailing, claims.

2. Grizzly Bear Mortality

Plaintiffs' first argument, which is a theme throughout much of their Complaint, is that FWS's various decisions in this matter are not supported by sufficient science. Plaintiffs argue that FWS did not adequately consider grizzly mortality rates and

that the BiOp's baseline artificially excludes other simultaneous projects with effects on grizzlies. Plaintiffs cite this Court's opinion in Rock Creek Alliance v. U.S. Fish and Wildlife Service, 390 F.Supp.2d 993 (D. Mont. 2005), for the idea that improper reliance on poor science takes a decision out of the realm of FWS's discretion and into a violation of the law. Plaintiffs point to the BiOp's opinion that sanitation issues remain problematic in the recovery zones and "up to one bear" is likely to die as a result, yet the Amendments do nothing to improve sanitation. FWS AR 1: 136. Plaintiffs also argue that FWS should have done a Rock Creek Alliance-type analysis and estimate the mortality that the population can withstand.

Defendants' view is that their scientific information is credible, and Plaintiffs must defer to the agency's scientific expertise. Specifically on mortality rates, Defendants contend the BiOp sufficiently addresses mortality in the Selkirk and Cabinet-Yaak Ecosystems, citing FWS AR 1:38-43, 53-58, 130, 135, & 139. Defendants characterize these discussions as considering mortality, the mechanisms affecting mortality, and the effects of the proposed action on mortality. That, they argue, is sufficient to meet their ESA burden.

It is important to clarify the distinction between this situation and the situation this Court considered in the Rock Creek Alliance case. In Rock Creek Alliance, FWS issued a biological opinion and Incidental Take Statement that allowed a

mine to go forward in the Rock Creek area of the Cabinet-Yaak, despite the fact that additional bear mortality was expected due to the mine. 390 F.Supp.2d at 997-98. Unlike the BiOp here, which involved programmatic amendments, the Rock Creek BiOp considered a site-specific project. Id. The Court concluded it was arbitrary to allow a project (especially a private mining project) go forward that would result in further deaths in a threatened (and, but for bureaucratic restrictions) population that was quite possibly in decline. Id. at 1009.

Unlike in Rock Creek Alliance, here the amendments will, however slightly, *improve* the situation for bears in the Cabinet-Yaak and Selkirk Recovery Zones. The only predicted take identified by the FWS relates to sanitation, which, since it was not part of the modification of access management, occurs at the same level or is not expected to increase as a result of the Amendments. In addition, the Rock Creek Alliance BiOp relied on the disputed Harris Report, which explicitly stated that its analysis was not applicable to small populations. This Court determined that it was arbitrary and capricious to rely on a predictive model that, by its own plain terms, was not applicable to a population as small as the Cabinet-Yaak. Id. In this case, the agencies are not relying on a model like Harris' that predicts population status, but rather a collection of data about a few bears in the very ecosystem at issue in this case. Whether the science is sufficient is a separate question, but as a

preliminary matter, the problems with the science in the Rock Creek Alliance case are not the same issues presented here. Rock Creek Alliance does not decide this case.

The BiOp is candid about the mortality challenges facing these bears. In the "Status of the Grizzly" section of the BiOp, FWS states that neither population is statistically increasing, though the Selkirk population appears to be in better shape. The BiOp also states the modeling in 1999 suggested that one more subadult death in the Selkirk could "push the trend into a decline." FWS AR 1:17. In the Selkirk Recovery Zone, only one of the four grizzly recovery goals is being met, and the present mortality goal is zero bears due to the small population. FWS AR 1:38-39. The BiOp reports that mortality was unusually high in 2002. FWS AR 1:41-43. The FWS's general conclusion is that, although the numbers are inconclusive and there is a lot of habitat improvement to make, based on the experience and perception of the researchers and field personnel, the situation in the Selkirk is slightly improving for bears. FWS AR 1:51.

The picture in the Cabinet-Yaak Ecosystem is worse. The Cabinet-Yaak population appears to be decreasing, especially due to high mortalities in 1999 and 2000. FWS AR 1:16-17. The population is slightly smaller (estimated 30-40 bears) and "[e]ven though the trend estimates are inconclusive, due primarily to recent high levels of grizzly bear mortalities, the Service is concerned about the status of this population." Id.

at 55. Mortality has not been as high in the Cabinet-Yaak as in the Selkirk in the last twenty-five years or so. Id. at 56.

Plaintiffs contend this statistical information is useless, because telling us how many bears have died does not tell us how many more can die before the population fails to recover and goes extinct. However, the law requires FWS to use the best scientific and commercial information available. It is clear from the record in this case that there is not an abundance of firm information about how much mortality grizzly bears can withstand. Further, there is no suggestion from the Plaintiffs that the information they want is available. Fish and Wildlife made its decision based on the best scientific information available. In conjunction with FWS's determination that bears will not die as a result of the Plan Amendments, it is not arbitrary and capricious not to calculate the effects of additional (unlikely) mortality. Additionally, under the standard set forth in ESA § 7(a)(2), the question is whether the Plan Amendments will jeopardize the bears. The bears' current situation is bad, but over time their habitat will improve as the BMUs conform to the Amendments. FWS sufficiently considered grizzly bear mortality in its biological opinion.

3. Grizzly Bear Recovery

Plaintiffs contend that the record raises substantial doubt about whether grizzly bears will recover. Plaintiffs state that FWS must specifically find that grizzlies affected by the Plan

Amendments still have the potential to recover. Plaintiffs draw this requirement from the ESA's implementing CFRs, which define "jeopardize the continued existence of" as actions that would "reduce appreciably the likelihood of both the survival and recovery of the listed species." 50 C.F.R. § 402.02. Plaintiffs claim that the record "raises substantial doubt as to whether there remains a realistic possibility that grizzly bears in the CYE and SE will eventually recover." Plaintiffs also argue that linkages between habitat areas are crucial for recovery and entirely ignored in the BiOp. Even if there are enough bears, without linkages, bears still may not recover over time.

The Government points to the increased core areas across the Cabinet-Yaak and Selkirk Recovery Zones, the decreased linear densities outside of the recovery areas, and restrictions on further losses of core habitat, and cites the BiOp's conclusion that "overall core grizzly bear habitat within these Recovery Zones will increase, and will be provided at quantities sufficient to support the average female grizzly bear's home range needs, as indicated by research in these Recovery Zones." FWS AR 1:130. From FWS's perspective, the improved conditions support the conclusion that bears will probably do better under the Amendments. But FWS does express some uncertainty in this conclusion. "[D]isplacement and mortality effects upon grizzly bears resulting from roads and road densities will likewise decrease with the Recovery Zones, which *may result* in increased

grizzly bear numbers and distribution within the Recovery Zones." FWS AR 1:131 (emphasis added).

Again, the question is does the agency action "reduce appreciably the likelihood of both the survival and recovery" of the grizzly? 50 C.F.R. § 402.02. The Ninth Circuit has held that the FWS's duty is to assess a project's potential to adversely modify critical habitat's ability to support both survival *and* recovery. See Gifford Pinchot Task Force v. U.S. Fish and Wildlife, 378 F.3d 1059, 1069 (9th Cir. 2004). However, this Court is unaware of any BiOps that have been held arbitrary and capricious for failing to discuss recovery adequately where the FWS made a finding of no jeopardy. As seen through the lens of ESA § 7(a)(2), the amendments proposed do slightly more for recovery and survival than the status quo. Consequently, the FWS saatisfied its legal obligation in concluding that the Amendments do not reduce the likelihood of the survival and recovery of the grizzly.

4. Interagency Grizzly Bear Committee Guidelines

Plaintiffs argue that the projects do not comply with the Interagency Grizzly Bear Committee Guidelines ("Guidelines") and that compliance with the Guidelines is considered necessary to prevent jeopardy to grizzlies. The diversions from the Guidelines pointed out by Plaintiffs stem from the Forest Service's goal of flexibility in the Recovery Zones. The Guidelines state that "[m]anagement decisions will favor the

needs of the grizzly bear when grizzly habitat and other land use values compete," and incompatible uses with grizzly needs should be "disallowed or eliminated." FS AR 30:14 at 3. FWS acknowledges in its Incidental Take Statement that take of, or impacts to, grizzlies may occur because of repeated activities such as mining and helicopter logging. FWS AR 1:134-35.

Defendants dispute that they have ignored the Guidelines by emphasizing the degree to which their information and guidance is a localized result of prior IGBC directives. The Wakkinen standards were developed in response to IGBC's direction to its subcommittees in each recovery zone to develop road density and core habitat standards. The IGBC Selkirk/Cabinet-Yaak subcommittee developed a set of interim rules governing motorized access management in Recovery Zones in January 1999 based on the Wakkinen Report. The Forest Plan Amendments standards are more restrictive than this interim rule set, the Government argues, and because they derive from the Wakkinen Report, Defendants claim they meet the Guidelines.

This claim reveals the philosophical divergence between the Plaintiffs and Defendants in this case. Plaintiffs disagree with the Forest Service's emphasis on "management flexibility," because, in their view, management flexibility prioritizes activities such as logging, with its known detrimental impacts on grizzlies.

The Guidelines themselves do not have legal force, except to

the extent that an agency decision could become arbitrary or capricious because of its expressed adherence to and later contradiction with the Guidelines.[6] Plaintiffs point to the Implementation Schedule of the Recovery Plan, which is "a guide for meeting the objections elaborated under the recovery section of this plan." FWS 398:4797. The Schedule says that adherence to the Guidelines is a priority one task, i.e., "must be taken to prevent extinction." FWS AR 398: 4797. Plaintiffs maintain that this makes the Guidelines mandatory. However, the Recovery Plan itself states that "[t]his recovery plan is not intended to provide precise details on all aspects of grizzly bear management. . . . The recovery plan is not a "decision document" as defined by the National Environmental Policy Act (NEPA)." FWS AR 398:4690.

Plaintiffs also point out that the forest plans have expressly adopted the Guidelines. The Idaho Panhandle National Forest Forest Plan says the Forest should "manage grizzly bear

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[6]In Ecology Center, Inc. v. Austin, 430 F.3d 1057, 1069-70 (9th Cir. 2005), the Ninth Circuit indicated that even when a standard like the Guidelines "does not have the independent force and effect of law" with respect to a particular forest, "it would nonetheless be arbitrary and capricious for the Forest Service to ignore it" if the EIS discusses the standard as if it was binding and claims that the project was prepared in compliance with its provisions. The court cited Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 n.3 (9th Cir. 1994), the only Ninth Circuit case to discuss the Guidelines, in which the court rejected the argument that the Forest Service could treat the Guidelines as optional where the FWS had made a "no jeopardy" conclusion contingent on the Forest Service's continued adherence to the Guidelines. Neither case states a legal conclusion that the Guidelines are legally binding direction from which the Forest Service and FWS must never deviate.

habitat according to the IGBC guidelines." 1987 IPNF Forest Plan, II-27. The Lolo Forest Plan refers to activities in Management Situation 1 and then states that MS-1 is defined by the IGBC. It also speaks more generally about moving toward recovery and cooperating with any future interagency efforts toward that goal. 1986 Lolo Forest Plan, II-13, 14. Contrary to Plaintiffs' interpretation, neither plan mandates compliance with IGBC. The Kootenai Forest Plan expressly allows for deviation from the IGBC, though it requires Forest Supervisor approval for such deviation. This case would fall within the exception based on Forest Supervisor approval.

Even if the Guidelines were mandatory, Plaintiffs have not established a clear violation of their standards. Plaintiffs emphasize one sentence of the Guidelines: "Land uses which can affect grizzlies and/or their habitat will be made compatible with grizzly needs or such uses will be disallowed or eliminated." FS AR 30:14 at 3. Plaintiffs contend that this sentence mandates elimination of the land use in this case. However, an alternative interpretation to Plaintiffs' is that FWS considers the land use in this case, i.e., road density, to have been made compatible with grizzly needs, at least as far as this revision of the plans goes, and thus allowable under the Guidelines.

The Amendments do not clearly fail to comply with the Guidelines, since the standards used to develop the Amendments

were developed at the direction of the IGBC. Additionally, the Guidelines are not binding direction to the Forests, even as adopted in the Forest Plans. Therefore, it was not arbitrary and capricious for FWS not to expressly consider consistency of the Plan Amendments with the Guidelines in its jeopardy determination.

5. Best Scientific Data Available

Plaintiffs argue that FWS and the Forest Service failed in their 16 U.S.C. § 1536(a)(2) duties because they did not "use the best scientific and commercial data available." Plaintiffs dispute FWS's and the Forest Service's reliance on the "Wakkinen Report," which is the grizzly habitat study for the Cabinet-Yaak and Selkirk ecosystems relied on by the Government. Plaintiffs question the validity of this study because it is based on only six bears in what they consider "a highly degraded ecosystem." Plaintiffs argue that "the record in this case simply does not support the agencies' finding that the Wakkinen report's road density and core parameters represent the most scientifically defensible standards for management." Even assuming the Report is the best science available, Plaintiffs contend that the Plan Amendment does not meet the Report's standards. Plaintiffs point out that the agencies have established 2400 acres (about 4 square miles) as the minimum core habitat block size, when Wakinnen found that ninety per cent of habitat use in the CYE occurred in areas of at least 8 sqare miles. Plaintiffs also dispute the

lack of strict road guidelines outside the recovery zones.

Defendants respond by pointing out that Plaintiffs have not identified any information they ignored or that was available and better than the information they used. Defendants emphasize the fact that Wakinnen's study is the only one specifically dealing with the Cabinet-Yaak and Selkirk Ecosystems and was subject to peer review. FWS AR 277:2826-28; 333:3210-15; 334:3216-18; 332:3206-08; 133:1483; FS AR 26:9 at 5.

The ESA requires that the biological opinion and agency action be based on "the best scientific and commercial information available." 16 U.S.C. § 1536(a)(2). This court "cannot substitute [its] judgment for that of the Forest Service and Fish & Wildlife but instead must uphold the agency decisions so long as the agencies have considered the relevant factors and articulated a rational connection between the facts found and the choice made." <u>Selkirk Conservation Alliance v. Forsgren</u>, 336 F.3d 944 (9th Cir. 2003)(internal quotation marks and citations omitted). The standard does not require the agency to rely on indisputable or unequivocal evidence. The Court may conclude that"[w]hile another decisionmaker might have reached a contrary result, the agencies conducted a reasonable evaluation of the relevant information and reached a conclusion that, although disputable, was not arbitrary and capricious." <u>Id.</u> at 956.

As for the first step of this analysis, FWS's reliance on the Wakkinen Report cannot be assailed. There are problems with

the study, and it might have been better to have higher population numbers from which to work. These shortcomings are acknowledged by FWS. FWS AR 277:2826-28; 333:3210-15; 334:3216-18; 332:3206-08. However, FWS's preference for a study in the ecosystem at issue is reasonable and should be left to FWS's discretion. While other studies might consider higher numbers of bears, the record shows that this ecosystem has an unusually high road density. There is a rational and articulated reason in the record for basing the Amendment on research in the area to be managed.

Fish and Wildlife, and the Forest Service, considered other sources of information, including the Mace and Manley study of grizzlies in the South Fork of the Flathead River. FS AR 26:9 at 5; FWS 1:44. Plaintiffs do not show which other information would have been more appropriate, but rather attempt to poke holes in the Government's choices. The Court does not have grounds to conclude FWS's information was not the best information available.

Plaintiffs alternatively contend that if Wakinnen is the best science available, then Defendants' choice to authorize BMUs with less habitat than Wakinnen recommends cannot have been based on the best information. However, FWS and the Forest Service both explain why some units do not meet the standards required by Wakinnen. FWS 1:43, 46-47; FS AR 15-43 at 3-10. The Amendments require no permanent loss of core habitat. FWS AR 1:107-11.

This dovetails with the reasons for a programmatic amendment. The BMUs have widely diverse characteristics. While most BMUs are 100 square miles, there are smaller ones, such as the thirty square mile Lakeshore BMU on Priest Lake. FS AR 15-43 at 3-10. There are BMUs that consist of wilderness areas, BMUs that abut towns or highly used recreational areas, and BMUs with highways and railroad tracks. FWS AR 1:61. There are BMUs, such as the two slender ones that connect the Cabinet and Yaak portions of the CYE that might be particularly crucial for genetic and population purposes. FWS AR 1:54. The programmatic amendments set standards for across the forest, but their effects on and implementation in particular BMUs will vary. This was the reason the Forest Service chose to design the amendments the way it did.

Based on review of the administrative record and discussions within it of the shortcomings of the scientific information and the lack of availability of alternate site-specific information, it was not arbitrary and capricious for Defendants to rely on the scientific information included in the record.

B. The Letters of Concurrence for the White Pine, Lower Big Creek, West Troy, and Mission Brush Timber Sales

Plaintiffs contend that since FWS relied on what they consider the faulty 2004 biological opinion as the basis for its letters of concurrence on these sales, the letters themselves are arbitrary and capricious and contrary to the ESA.

Defendants reject this argument on two grounds. First,

Defendants disagree with the underlying premise that the BiOp is faulty. Second, Defendants dispute the conclusion that a faulty BiOp would necessarily invalidate letters of concurrence. For example, the Mission Brush Timber Sale occurs outside of the Cabinet-Yaak Recovery Zone. If the BiOp were invalidated, the amendments would be withdrawn, but the project could still go ahead because it would not have somehow also become arbitrary.

As a preliminary matter, there is the issue of The Flathead and Kootenai National Forest Rehabilitation Act of 2003, P.L. 108-108 § 407, which reads:

> IMPLEMENTATION OF RECORDS OF DECISION. The Secretary of Agriculture shall publish new information regarding forest wide estimates of old growth from volume 103 of the administrative record in the case captioned Ecology Center v. Castaneda, CV-02-200-M-DWM (D. Mont.) for public comment for a 30-day period. The Secretary shall review any comments received during the comment period and decide whether to modify the Records of Decision (hereinafter referred to as the "ROD's") for the Pinkham, White Pine, Kelsey-Beaver, Gold/Boulder/Sullivan, and Pink Stone projects on the Kootenai National Forest. The ROD's, whether modified or not, shall not be deemed arbitrary and capricious under the NFMA, NEPA or other applicable law as long as each project area retains 10 percent designated old growth below 5,500 feet elevation in third order watersheds in which the project is located as specified in the forest plan. This Act may be cited as the 'Department of the Interior and Related Agencies Appropriations Act, 2004'.

At oral argument, Plaintiffs attempted to distinguish their claims from those addressed in the above section, arguing that Congress did not intend to write the Forest Service a blank check to violate any environmental laws in its actions. The Government

responded that by the terms of the law, the ROD for the White Pine project shall not be deemed arbitrary and capricious under "applicable law." Congress, the Government argues, wanted these projects to go ahead.

> It is well settled that, in a statutory construction case, analysis must begin with the language of the statute itself; when the statute is clear, judicial inquiry into [its] meaning, in all but the most extraordinary circumstance, is finished. Another fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

U.S. v. Carter, 421 F.3d 909, 911 (9th Cir. 2005) (internal quotation marks and citations omitted). Given the language of the statute, the Government has the more persuasive argument. Congress evinced a clear intent to free these projects from litigation and get them done. Thus, this Court lacks subject matter jurisdiction over Plaintiffs' claim regarding the White Pine project.

As to the other three projects, the Government also has the better of the argument but on other grounds. As the Government explained at oral argument, if the amendments are determined to be contrary to law, the agencies go back to the drawing board. That decision on its own has no effect on these projects.

Plaintiffs argue that since the Letters of Concurrence rely on the BiOp, they are undermined by a determination that the BiOp itself is flawed. Letters of concurrence are regulated by 50 C.F.R. 402.13, which reads:

> Informal consultation. (a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

The specific letters in this instance vary in their language but none relies solely on the 2004 BiOp. The Lower Big Creek Project letter, for instance, says: "Our concurrence is based on information and analysis from a variety of sources including, but not limited to, the BA, our files, discussions with the Forest during regular consultations visits, . . . the Incidental Take Analysis for Grizzly Bears That Occur Outside Recovery Zones on the Kootenai and Idaho Panhandle National forests and a Portion of Lolo National Forest [and the 2004 Biop]." FWS AR 470. The West Troy letter does not mention the BiOp at all. FWS AR 472. The Mission Brush letter mentions the BiOp, but also explains exactly how the road densities will improve upon completion of the project, in addition to being outside of the Recovery Zone and not subject to the Plan Amendments, as pointed out by the Government. FWS AR 467:2. None of these Letters of Concurrence is so dependent on the Biological Opinion that its conclusions would be undermined or become arbitrary and capricious if the BiOp itself was found to be faulty.

C. The 2002 EIS

NEPA aims to promote environmentally sensitive governmental decision-making, without prescribing substantive standards. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989); Tillamook County v. U.S. Army Corps of Eng'rs, 288 F.3d 1140, 1143 (9th Cir. 2002). To fulfill their NEPA obligations, agencies must consider the environmental impact of their actions.

The adequacy of an Environmental Impact Statement (EIS) is judged by whether it constitutes a "detailed statement" that took a "hard look" at the potentially significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(a); 40 C.F.R. § 1502.1; Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). The critical question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action as well as a range of alternatives to that action. California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting Trout Unlimited, Inc. v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)). The review is essentially the same as a review for abuse of discretion. Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998).

1. Scientific Integrity of EIS Analysis

40 C.F.R. § 1502.24 directs agencies to insure the

scientific integrity of their EIS analyses, identify any methodologies used, and make explicit reference to sources relied upon. Plaintiffs argue that the EIS must point out incomplete or weak sources of information, citing Lands Council v. Powell, 395 F.3d 1019, 1031 (9th Cir. 2005). The Wakkinen report, in Plaintiffs' view, is just such a weak source, and Plaintiffs believe the EIS should more fully discuss the report's shortcomings. Plaintiffs' argument and quotations of criticisms of the Wakkinen Report emphasize that Wakkinen's figures reflect the degraded status quo, with the implication that since the bears are not doing well now, maintenance of the status quo is not an improvement. Defendants reject Plaintiffs' reliance on Lands Council, arguing that the Wakkinen Report is not a model, like the WATSED model at issue in Lands Council, but rather a collection of data regarding grizzly habitat use in the very area the agencies are trying to manage through the Plan Amendments.

The objective, "to insure the scientific integrity of the analysis," is vague, and the case law does not provide much guidance about what it means. Generally, courts have interpreted this phrase to mean that analysis cannot be based on faulty information or flawed models. See, e.g., Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953 (9th Cir. 2005).

As a preliminary matter, Defendants are incorrect that Lands Council does not apply in a case that involves a collection of data rather than a model. Lands Council reiterated the NEPA

requirement of "up-front disclosures of relevant shortcomings in the *data* or models." 395 F.3d at 1032 (emphasis added). Thus, the Lands Council reasoning is applicable in this case.

Nevertheless, Lands Council does not dictate a finding in Plaintiffs' favor on this issue. In Lands Council, the Forest Service's WATSED model was inadequate because it did not include some variables determined to be crucial. Id. at 1031. The bottom line of that case, however, is that if the agency knows something is wrong with its model or data, it must disclose that fact.

Similar to Lands Council, in Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291 (9th Cir. 2003), the Ninth Circuit emphasized how important it is for an agency to disclose the scientific information upon which it has relied so that the public may challenge its reliance on that information:

> Failure to provide [scientific] information either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. However, an agency is entitled to wide discretion in assessing the scientific evidence, so long as it takes a hard look at the issues and responds to reasonable opposing viewpoints. Because analysis of scientific data requires a high level of technical expertise, courts must defer to the informed discretion of the responsible federal agencies. When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts, even if a court may find contrary views more persuasive. At the same time, courts must independently review the record in order to satisfy themselves that the agency has made a reasoned decision based on its evaluation of the evidence.

Id. at 1301 (internal quotation marks and citations omitted).

In the end, the FEIS in this case provides enough information about the shortcomings of the Wakkinen study to allow someone to perceive its weaknesses and to challenge the agency's action. The record also includes information about various criticism's of the Wakkinen information, such that an interested member of the public would be able to analyze the study knowingly. At the same time, the Forest Service articulated a reasonable explanation for why it relied on the information. The Forest Service sufficiently maintained the scientific integrity of the EIS by making a reasonable decision about the Wakkinen study and providing the public with sufficient information in the EIS to understand that there is a deficit of local grizzly information available to them.

2. Exclusion of the Colville National Forest

The Forest Service must specify the underlying purpose and need that leads to the publication of the EIS. 40 C.F.R. § 1502.13. In this case, that purpose was defined as amending "Forest Plans to include a set of motorized access and security guidelines to meet our responsibilities under the Endangered Species Act to conserve and contribute to recovery of grizzly bears." FS AR 19:9 at 1-4. The Colville and Idaho Panhandle Forests make up the Selkirk Recovery Zone, yet the Colville's

Forest Plan is not included in this amendment.[7] Plaintiffs consider the Forest Service's choice to exclude the Colville from its analysis arbitrary.

Defendants contend that NEPA does not require the Forest Service to include the Colville National Forest in this EIS's analysis. According to Defendants, the Forest Service has the discretion to determine the scope and purpose of its EIS. In addition, the Colville had already consulted with FWS about motorized access in its existing Forest Plan and therefore it had already satisfied its ESA obligations. FWS AR 417:6339.

Several cases consider the geographic scope of an EIS, usually in the context of determining whether the Forest Service has properly considered the cumulative effects of its proposed action. For example, the Supreme Court in Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976), discussed an agency's decision in determining the area it must include in its analysis:

> The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agency.

If Plaintiffs are unable to produce evidence of arbitrary action,

[7]Three Colville BMUs are shared with the Idaho Panhandle National Forest. One of these shared BMUs, LeClerc, has only 64% federal ownership and is 90% on the Colville, so it is not subject to these Plan Amendments.

this Court must conclude that the Forest Service exercised its wide discretion appropriately. Id.

Plaintiffs have not shown that the Forest Service's choice to exclude the Colville National Forest from its analysis was arbitrary. The Plan Amendments affect only the plans of the Lolo, Kootenai, and Idaho Panhandle Forests. The Colville had already consulted with FWS on its motorized access plan. Though the Colville includes BMUs in the Selkirk Recovery Zone, an improvement of access in the Selkirk region would not have deleterious effects on bears in the Colville. The Forest Service properly limited its consideration to the geographic areas the plans of which were being amended. This type of amendment is different from a timber sale, for example, where clearly deleterious effects will occur in a limited area and the Forest Service must consider its effects on nearby areas. For a programmatic amendment that should improve conditions locally, it makes less sense to question the Forest Service's choice of the scope of its EIS. The Forest Service did not unreasonably or arbitrarily exclude the Colville National Forest from its EIS analysis in this case.

3. Reasonable Range of Alternatives

NEPA requires agencies to study, develop, and describe appropriate alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii), (E); 40 C.F.R. § 1502.14. Plaintiffs allege the Forest Service failed to include an alternative that would

"improve habitat conditions to protect and recover these populations."

All alternatives were based on the Wakkinen Report's standards of 55% core habitat, 33% open road density, and 26% total road density. The most protective of the original proposals, Alternative D, was eventually removed from the final version. Alternative D would have cleaved to the Wakkinen Report's maximum habitat security figures, rather than its averages. Standards would be set at 72% core habitat, 17% open road density, and 14% total road density. Plaintiffs consider this alternative "reasonable" and contend it should have been considered.

Defendants respond that their NEPA obligation is only to consider reasonable choices, and that Plaintiffs failed to provide a reasonable option that was not considered by the Forest Service. Defendants claim Alternative E would be more protective in fourteen of thirty BMUs than the Wakkinen Report would require. In addition, Defendants argue that Alternative D was impossible because it required the closing of all roads under Forest Service jurisdiction, and even then, several of the BMUs could not reach the proposed standard. Finally, citing Department of Transportation v. Public Citizen, 541 U.S. 752, 764-65 (2004), Defendants contend that plaintiffs who fail to raise specific alternatives during the NEPA process forfeit the objection that the NEPA analysis failed to consider potential

alternatives.

"The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 575 (9th Cir. 1998) (quoting Robertson, 35 F.3d at 1307) (internal quotation marks omitted). However, the EIS need only consider reasonable alternatives, not every conceivable alternative. See 40 C.F.R. § 1502.14(a). "The touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." California v. Block, 690 F.2d 753, 767 (9th Cir. 1982). The Ninth Circuit applies a "rule of reason" to this review, asking "whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 810 n.27 (9th Cir. 2005) (quoting Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001)).

The issue here is whether the former Alternative D was a reasonable choice that should have been considered in the FEIS. The Forest Service ran a model to determine whether Alternative D was feasible and concluded that there were not enough roads to close in federal jurisdiction to make Alternative D possible. FS AR 19-9 at 4-177-78, 4-180. The FEIS responds to extensive public comment lobbying for a stricter standard and for Alternative D. The FEIS explains why Alternative D was not

feasible and why Alternative E was a reasonable compromise. The record demonstrates that the Forest Service engaged in a reasonably thorough discussion of Alternative D during the public comment period and reasonably concluded that Alternative E was a better selection. Its choice was not arbitrary and capricious.

4. Linkage Zones

Plaintiffs allege that linkage zones are "relevant factors" in the environmental analysis and therefore should have been considered. Defendants argue that agencies have considerable discretion to define the purpose and need of a project, citing Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998). Defendants contend that, although linkage zones might be important to bear recovery, this project was not designed to accomplish every task important to recovery.

The Forest Service's stated purpose of the amendments is to "to include [in the Forest Plans] a set of motorized access and security guidelines to meet our responsibilities under the Endangered Species Act to conserve and contribute to recovery of grizzly bears." FS AR 19-9 at 1-4. Though "an agency cannot define its objectives in unreasonably narrow terms," "when the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." Friends of Southeast's, 153 F.3d at 1066 (quoting City of Angoon v. Hodel,803 F.2d 1016, 1021 (9th Cir. 1986)). Plaintiffs would rewrite the Forest Service's statement of purpose as generally to

conserve grizzly bears without acknowledging the logistics required to accomplish amending the Forest Plans to include a set of motorized access and security guidelines. Although linkage zones might be important to the recovery of the bears, the Forest Service is not required to use linkage zones to effect its purpose for these amendments.

5. Risk and Uncertainty of the Chosen Alternative

Plaintiffs contend that the EIS fails to disclose the high risk of extinction of the grizzly bears and the scientific uncertainty about whether the chosen alternative will alleviate this risk. The small population of bears may face as high as an 85% chance of extinction. Plaintiffs believe the EIS should have made this clear to the public, who may then have demanded greater protection for the bears. Also, Plaintiffs point to what they consider increasing grizzly mortality in recent years, since thirteen bears died in the Cabinet-Yaak in the three years leading up to the 2002 EIS, yet none of those deaths were mentioned in the EIS. FS AR 90:14. Plaintiffs believe the EIS should have disclosed that bear biologists believed that other alternatives were better than Alternative E for bears. FS AR 19:11 at 12; FWS AR 231 & 225.

Defendants point to discussions of these issues in the EIS at FS AR 19:9 at 3-6, Figure 3-1, 3-8, 1-4, 3-10, 3-18- 3-21, and generally to the proposition that "in determining whether the EIS contains a reasonably thorough discussion, we may not fly-speck

the document and hold it insufficient on the basis of inconsequential, technical deficiencies." Friends of Southeast's, 153 F.3d at 1063. Defendants reiterate their goal of contributing to the conservation of grizzly bears and state that road management is only one factor in the process. Defendants also argue that the Forest Service has never represented to the public that Alternative E would lead to grizzly recovery.

This last point is crucial. The FEIS explains that grizzly bears are in trouble and explains that the Plan Amendments will slightly improve their habitat conditions. The FEIS does not state that all problems for the bears will be solved by these Amendments. The FEIS's purpose, to establish road standards, does not encompass doing everything possible to prevent harm to grizzlies. The Forest Service's choice in the FEIS is not arbitrary, given that FWS determined the Amendments do not jeopardize the continued existence of the bears. Having said this, it will be a sad day indeed if these bears become extinct because of a "Grover Norquist" thought processes invading the agency decision-making process.[8]

III. Conclusion

Based on the foregoing, I find that Defendants' various decisions related to the "Forest Plan Amendments for Motorized

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[8] "I don't want to abolish government. I simply want to reduce it to the size where I can drag it into the bathroom and drown it in the bathtub." See FN 5 supra.

Access Management within the Selkirk and Cabinet-Yaak Grizzly Bear Recovery Zones" were not arbitrary and capricious. Plaintiffs' claims fail.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion for Summary Judgment and Injunctive Relief (**dkt #20**) is DENIED.

2. Defendants' Motion for Summary Judgment (**dkt #30**) is GRANTED.

3. Plaintiffs' Motion for Preliminary Injunction (**dkt #37**) is DENIED.

DATED this 28th day of August, 2006.

DONALD W. MOLLOY, CHIEF JUDGE
UNITED STATES DISTRICT COURT