

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

SWAN VIEW COALITION and  
FRIENDS OF THE WILD SWAN,  
Plaintiffs,

vs.

DEBRA HAALAND, Secretary of the  
Interior; MARTHA WILLIAMS,  
Director of the U.S. Fish and Wildlife  
Service; RANDY MOORE, Chief of  
the U.S. Forest Service, KURTIS  
STEELE, Forest Supervisor for the  
Flathead National Forest; U.S.  
FOREST SERVICE; and U.S. FISH  
AND WILDLIFE SERVICE,

Defendants.

CV 22-96-M-DLC-KLD

FINDINGS AND  
RECOMMENDATIONS

This matter comes before the Court on cross-motions for summary judgment filed by Plaintiffs Swan View Coalition and Friends of the Wild Swan (“Plaintiffs”) (Doc. 26) and Defendants Debra Haaland, Secretary of the Interior, Martha Williams, Director of the U.S. Fish and Wildlife Service, Randy Moore, Chief of the U.S. Forest Service, Kurtis Steele, Forest Service Supervisor for the Flathead National Forest, U.S. Forest Service, and U.S. Fish and Wildlife Service (“Defendants”) (Doc. 29). Also pending before the Court are Defendants’ Motion to Strike Paragraphs 13–16 and Exhibit 13 (Doc. 38-1) of the Second Declaration

of Keith Hammer (Doc. 47) and Plaintiffs’ Motion for Leave to File Third Hammer Declaration (Doc. 51). For the reasons set forth below, the Court recommends that the parties’ cross-motions be granted in part and denied in part, Defendants’ motion to strike be denied, and Plaintiffs’ motion for leave be granted.

**I. BACKGROUND<sup>1</sup>**

**A. Flathead National Forest**

The Flathead National Forest (“FNF”) contains 2.4 million acres of public land located in the Rocky Mountains of northwestern Montana. FS-054717. The FNF is home to vast amounts of wilderness, scenic rivers, and undeveloped backcountry. FS-054718. The FNF is part of several regional ecosystems and recovery units that support populations of and habitats for grizzly bear and bull trout, including the Northern Continental Divide Ecosystem (“NCDE”), one of six grizzly bear recovery zones. FWS\_037293. The FNF also provides terrain for hiking and Nordic skiing. FS-054718. In addition to its open wilderness, the FNF plays a central role in the timber harvest industry, supporting roughly 1,500 jobs and 50 million dollars in labor income. FS-054718.

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<sup>1</sup> This case involves two administrative records: the Forest Service administrative record, cited as “FS-[bates page #], and the Fish and Wildlife Service administrative records, cited as “USFWS\_[bates page #].”

## **B. Historical Management of the Forest**

The FNF's 1986 Land and Resources Management Plan ("1986 Plan") and its accompanying amendments provided the operating framework for forest management for several decades. FS-054719. Forest Plans are the primary source of direction for a National Forest, and are intended to provide forest-wide, geographic-area, and management-area desired conditions, objectives, standards, guidelines, and suitability of lands for specific use. FS-051881. Pursuant to the National Forest Management Act, Forest Plans must undergo revision at least every 15 years. 16 U.S.C. § 1604(f)(5)(a); FS-054719.

### **1. Amendment 19**

Amendment 19 was adopted into the 1986 Plan in the 1995 Record of Decision and outlined objectives for motorized use and route density within bear management units. FS-002015. Amendment 19 provided that there would be no net increase in total motorized route density ("TMRD") greater than two miles per square mile, no net increase in open motorized route density ("OMRD") greater than one mile per square mile, and no net decrease in secure core area. FS-002015. Additionally, Amendment 19 established management directives "reduc[ing] impacts of forest management activities on grizzly bears (especially females) by adopting [certain directives] for subunits where the [Forest Service] managed more than 75 percent of the acres in a submit." FS-002015. Such directives included (1)

limiting high-density OMRD access to no more than nineteen percent per subunit by 1999, (2) limiting high-density TMRD access to more than 19 percent of a subunit by 1999, and (3) providing security core areas that equaled or exceeded 60 percent of each subunit by 1999 and that equal or exceeded 68 percent by 2005. FS-042259.

Relevant here, Amendment 19 required that the U.S. Forest Service (“Forest Service”) “reclaim” any road excluded in TMRD calculations. FS-178392–93. A reclaimed road is a road “has been treated in such a manner so as to no longer function as a road or trail and has a legal closure order until reclamation treatment is effective.” FS-178392. Road reclamation was accomplished through one or more treatments, “including: recontouring to original slope, placement of natural debris, or revegetation with shrubs or trees.” FS-178392. Minimum treatment requirements included removal of stream-aligned culverts. FS-178392. Although the FNF never fully realized the objectives contained in Amendment 19, grizzly bear range and population nonetheless increased and is now estimated to be over 1,000 individuals. USFWS\_037284.

## **2. 2011 Baseline**

Although the criteria provided for in Amendment 19 was based upon the work of Mace and Manley (1993), there is no published method to definitively calculate minimum habitat values required to support a healthy grizzly bear



population. USFWS\_037283. Grizzly bears are opportunistic mammals, and their food and space requirements vary depending upon the individual bear and a multitude of other environmental and behavioral factors. USFWS\_037283. However, research suggests that minimum habitat criteria may be established by maintaining past conditions that were compatible with a healthy grizzly bear population (i.e, a “no net loss” approach). USFWS\_037283.

This was the approach taken by the NCDE Conservation Strategy in determining the 2011 baseline (“2011 baseline”). USFWS\_037283. The 2011 baseline reflected the on-the-ground habitat conditions similar to what supported grizzly bear population growth from 1995 to 2011. USFWS\_037283.

**C. Revision of the Flathead National Forest Land Management Plan**

In 2018, the Forest Service replaced the 1986 Plan with the 2018 Land Management Plan for the Flathead National Forest (“Revised Plan”). FS-054711; FS-037790–91. The Revised Plan’s framework and management direction guide current and future resource management in the FNF. FS-051882. The Revised Plan does not authorize specific projects or activities. FS-051882. Components of the Revised Plan include desired conditions, objectives, standards, guidelines, suitability, monitoring questions, and indicators. FS-051884.

The Revised Plan replaced Amendment 19 with a new direction requiring no net decrease to the baseline for secure core and, relevant here, no net increase to

the baseline for OMRD or TMRD during the non-denning season.

USFWS\_037283. As part of this new direction, the Revised Plan also replaced

Amendment 19's "reclaimed" road standard, as described above, for an

"impassable" road standard. FS-052087. An impassable road is

a road that has been treated in such a manner that the road is blocked and there is little resource risk if road maintenance is not performed on a regular basis (self-maintaining). Roads may become impassable due to a variety of causes, including but not limited to one or more of the following: natural vegetation growth, road entrance obliteration, scarified ground, fallen trees, boulders, or culvert or bridge removal. Impassable roads may remain on the inventoried road system if use of the road is anticipated at some point in the future. Some, but not all, roads placed in intermittent stored service may be impassable.

FS-052079. Under the Revised Plan, impassable roads no longer count toward

TMRD as long as the road—generally the first 50 to 300 feet—has been treated to

make it inaccessible to wheeled vehicles during the bear's non-denning season. FS-

052079

On October 31, 2017, the U.S. Fish and Wildlife Service ("FWS") completed a Biological Assessment for the Revised Plan. FWS\_001332. This Biological Assessment concluded, in relevant part, that the Revised Plan was likely to adversely affect grizzly bears, bull trout, and designated bull trout critical habitat. FWS\_001341–42. As a result, FWS issued a Biological Opinion for the Revised Plan on November 22, 2017 ("Initial BiOp"). FWS\_001855; FWS\_001857. The Initial BiOp concluded that the Revised Plan was not likely to

jeopardize the continued existence of grizzly bears, FWS\_002058, bull trout, FWS\_002058, or adversely modify designated bull trout critical habitat, FWS\_001959.

#### **D. Prior Litigation**

In April 2019, WildEarth Guardians, Swan View Coalition, and Friends of the Wild Swan filed a lawsuit in the U.S. District Court for the District of Montana, challenging the Revised Plan, the accompanying Environmental Impact Statement (“EIS”), and the Initial BiOp. *See WildEarth Guardians v. Steele*, 545 F. Supp. 3d 855 (D. Mont. 2021) (“*Flathead I*”). *Flathead I* held that the Revised Plan violated the Endangered Species Act (“ESA”) to the extent it (1) failed to consider impacts to grizzly bears due to its departure from Amendment 19’s road density and reclamation standards; (2) did not consider impacts to the entire grizzly population; (3) did not adequately explain the adoption of the 2011 access conditions; and (4) adopted a flawed surrogate in its take statement. 545 F. Supp. 3d at 863–64. With respect to bull trout, *Flathead I* held that the Revised Plan’s departure from Amendment 19’s culvert removal requirements also violated the ESA. 545 F. Supp. 3d at 869–71. Finally, the court held the Forest Service violated the ESA to the extent it relied upon the flawed Initial BiOp. *Flathead I*, 545 F. Supp. 3d at 865. The court remanded without vacatur for further consideration by the agencies. *Flathead I*, 545 F. Supp. 3d at 886.

Plaintiffs appealed *Flathead I* to the Ninth Circuit Court of Appeals. See *Swan View Coalition v. Steele*, 2023 WL 3918686 (9th Cir. 2023). Relevant here, the Ninth Circuit dismissed plaintiff-appellants' ESA claims as moot due to FWS's issuance of a superseding Revised Biological Opinion in 2022. *Swan View Coalition*, 2023 WL 3918686, \*1. The court correspondingly vacated the portions of *Flathead I* that relied upon FWS's Initial BiOp (WildEarth Claim II, Count II; Swan Valley Claims I and II) as moot. *Swan View Coalition*, 2023 WL 3918686, \*1.

#### **E. Revised Biological Opinion**

On June 15, 2022, Federal Defendants notified this District that they had satisfied their remand obligations pursuant to *Flathead I*. (See Doc. 154, Case Nos. 9:19-cv-0056-DWM (lead case) and 9:19-cv-0060-DWM (member case)). The notice included a Revised Biological Opinion prepared by FWS in February 2022 ("Revised BiOp"). The Revised BiOp concluded that the Revised Plan is not likely to jeopardize the continued existence of grizzly bears, FWS\_037364, bull trout, FWS\_037250, or adversely modify designated bull trout critical habitat, FWS\_037252.

#### **F. Current Litigation**

Plaintiffs filed the current litigation on May 31, 2022 (Doc. 1). On September 23, 2022, Plaintiffs filed their First Amended Complaint (Doc. 16),

alleging that FWS and the Forest Service failed to rationally consider threats to grizzly bears, in violation of the ESA (Claim I), and failed to rationally consider threats to bull trout, in violation of the ESA (Claim II). On March 27, 2023, Plaintiffs filed a Motion for Summary Judgment (Doc. 26); Defendants filed a Cross-Motion for Summary Judgment on May 31, 2023 (Doc. 29).

## II. LEGAL STANDARDS

### A. ESA

Congress enacted the ESA to protect and conserve endangered and threatened species and the ecosystems they depend upon. 16 U.S.C. §1531(b). The Supreme Court has deemed the ESA “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174, 180 (1978). The hallmark of the ESA is its solemn resolve that endangered species “be afforded the highest of priorities” with the goal to “halt and reverse the trend toward species extinction, whatever the cost.” *Tennessee Valley Authority*, 437 U.S. at 174, 184.

The ESA and its implementing regulations require action agencies such as the Forest Service to consult with the consulting agency, often FWS, to ensure the 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[.]” 16 U.S.C. § 1536(a)(2). Where the proposed action is

“likely to adversely affect” a listed species or critical habitat, the Forest Service must engage in formal consultation. 50 C.F.R. § 402.14. To effectuate consultation, the Forest Service must “conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.” 16 U.S.C. § 1536(c)(1).

If the biological assessment concludes that the proposed project is likely to adversely affect a listed species, the Forest Service must engage in informal or formal consultation with FWS. *Forest Guardians v. Johanns*, 450 F.3d 455, 457–58 (9th Cir. 2006). If, after informal consultation, FWS concludes that the action is not likely to adversely affect a listed species or critical habitat, the consultation ends as to that species. *See* 50 C.F.R. § 402.14(b)(1). Otherwise, the Forest Service must initiate formal consultation, after which the FWS issues a biological opinion evaluating the effects on the listed species and making a “jeopardy” or “no jeopardy” determination. 50 C.F.R. § 402.14(h)(iv).

If the biological opinion concludes that the proposed action is “likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat” the biological opinion must propose reasonable and prudent alternatives and measures that could minimize or avoid the adverse effects. 50 C.F.R. § 402.14(g)(4), (5), (h)(2). If the biological opinion concludes that implementing a proposed action will not jeopardize a protected

species or modify critical habitat, but will nevertheless result in “take” of such species, the agency must issue an incidental take statement with its biological opinion. 50 C.F.R. § 402.14(i)(1); *see also* 16 U.S.C. § 1532(19) (defining “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” a protected species “or to attempt to engage in any such conduct”). The incidental take statement may also specify “reasonable and prudent measures” that it considers necessary and appropriate to minimize such impact. 16 U.S.C. § 1538(a)(1)(B), 1539; *see also* 50 C.F.R. §§ 17.40(b), 17.44(w) (regulations concerning take of grizzly bears and bull trout).

A biological opinion violates the ESA if it “fails to consider[] the relevant factors and articulate a rational connection between the facts found and the choice made.” *Center for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1121 (9th Cir. 2012) (internal quotation marks and alternations omitted)). The Forest Service violates the ESA where it relies on a deficient biological opinion. *Center for Biological Diversity*, 698 F.3d at 1128.

## **B. Administrative Procedure Act**

The Administrative Procedures Act (“APA”) governs judicial review of agency actions under the ESA. *Center for Biological Diversity v. Zinke*, 868 F.3d 1054, 1058 (9th Cir. 2017). Under the APA, a reviewing court may hold agency actions, findings, and conclusions unlawful and set them aside only if they are

“arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

This is a narrow standard. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1993). The court may not “substitute its judgment for that of the agency,” especially where the agency’s decision “implicates substantial agency expertise.” *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993). Courts should limit their review of an agency’s action to determine whether the agency “considered the relevant factors and articulated a rational connection between the facts found and the choices made.” *Greater Yellowstone Coalition v. Servheen*, 655 F.3d 1015, 1023 (9th Cir. 2011) (citing *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)).

An action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43. However, an “agency’s action must be upheld, if at all, on the basis articulated by the agency itself”; the court “may not accept ...



counsel’s post hoc rationalizations for agency action.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

### III. DISCUSSION

#### A. Defendants’ Motion to Strike and Plaintiffs’ Motion for Leave to File Third Keith J. Hammer Declaration

Defendants move to strike Paragraphs 13–16 and Exhibit 13 of the Second Declaration of Keith Hammer (Doc. 38-1), submitted in support of Plaintiffs’ Reply in Support of Motion for Summary Judgment and Response in Opposition to Defendants’ Cross Motion for Summary Judgment. (Doc. 47). Plaintiffs filed a response to Defendants’ Motion to Strike on October 17, 2023. (Doc. 47). Plaintiffs also request leave to file the Third Declaration of Keith J. Hammer, maintaining that this information is necessary to inform the Court on Forest projects implicated by this litigation. (Doc. 42). Defendants oppose Plaintiffs’ request for leave. (Doc. 55).

Under the APA, the court’s review of an agency action is limited to the administrative record. 5 U.S.C. § 706. Administrative review accordingly disfavors consideration of extra-record evidence. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court”) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). The Ninth Circuit recognizes four “narrow exceptions” to the general rule against extra-

record evidence: (1) when supplementation is necessary to determine whether the agency has considered all factors and explained its decision; (2) when the agency relied on documents not in the record; (3) to explain or clarify technical matters or complex subjects; and (4) where plaintiffs make a strong showing of agency bad faith. *Nw. Env't Advocs. v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1145 (9th Cir. 2006) (citing *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)). These exceptions are limited in scope and must not undermine the general rule that the court's review is limited to the administrative record. *Lands Council*, 395 F.3d at 1030.

In addition to the four exceptions outlined above, courts also permit extra-record evidence to demonstrate the factors needed to justify equitable relief or Article III standing. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 797 (9th Cir. 2005) (considering expert declarations to determine temporary relief); *Nw. Coal for Alts. to Pesticides v. EPA*, 920 F. Supp. 2d 1168, 1176 (W.D. Wash. 2013) (holding that “a party may only ‘supplement the record with evidence that is relevant to the question of whether relief should be granted’”) (citation omitted); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (considering declarations submitted to demonstrate standing)). When sitting in equity, courts do not apply the standards set forth in 5 U.S.C. § 706, but rather independently weigh the facts and evidence to determine appropriate relief. *See N.*

*Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1037 (D. Mont. 2020) (“A district court possesses broad latitude ... in fashioning equitable relief when necessary to remedy an established wrong”) (cleaned up)).

Here, Defendants’ Motion to Strike challenges Paragraphs 13–16 and Exhibit 13 of the Second Hammer Declaration (Doc. 38-1). Paragraphs 13–16 summarize the information contained in Exhibit 13, a 52-page report entitled “Road Hunt: A Survey of Road Closure Effectiveness in the Flathead National Forest’s Swan Valley Geographic Area.” (Doc. 38-1, Exbt 13). The report, dated May 2023, details the results of a Plaintiff-conducted survey regarding the effectiveness of road closures in the FNF. According to the survey, road closure devices were 68 percent effective when adjusted to account for possible administrative and contractor use. (Doc. 38-1, ¶ 13).

Defendants argue that the Court should strike the above portions of the Second Hammer Declaration because Plaintiffs failed to (1) timely move to supplement the Administrative Records, (2) make the threshold showing that the Administrative Records are so inadequate that they will frustrate judicial review, or (3) demonstrate that one of the four exceptions to the APA’s record rule applies. (Doc. 45 at 7–8). The report, Defendants assert, represents inadmissible “post-decisional” evidence about unauthorized motorized use. (Doc. 45 at 8–9). Defendants do not challenge the remainder of the Second Hammer Declaration,

acknowledging that the testimony may be admissible for purposes of determining equitable relief. (Doc. 45 at 6–7). In response, Plaintiffs maintain that the Second Hammer Declaration and report were submitted to inform this Court’s equitable determination, not its review of the merits. (Doc. 48 at 2). Indeed, Plaintiffs’ briefing relies upon the report only as to their request for vacatur; Plaintiffs do not cite to or rely upon the information in their merit arguments. (Doc. 38 at 20–21).

Relatedly, Plaintiffs also maintain that the information contained in the Third Hammer Declaration supplements or updates portions of the Second Hammer Declaration that were not targeted in the Motion to Strike. (Doc. 52 at 3). Plaintiffs assert that this declaration contains the most recent information relating to projects approved under the Revised Plan and will assist the Court in resolving Plaintiffs’ remedial request. (Doc. 52 at 3).

Courts within this District and the Ninth Circuit have consulted extra-record evidence to inform their determination of relief. *See N. Plains Res. Council*, 460 F. Supp. 3d at 1037 (considering plaintiffs’ summary judgment brief and “additional declarations”); *Nat’l Wildlife Fed’n*, 422 F.3d at 797–98 (considering expert reports and historical record in selection of remedy). Therefore, the Court finds it appropriate to consider the evidence contained in the Second and Third Hammer Declarations in fashioning the appropriate relief. The evidence contained in the declarations will not be considered in the merits analysis. Furthermore, because

Defendants had the opportunity to respond to the Second Hammer Declaration in their summary judgment reply brief, their request to file a supplement response to the Second Hammer Declaration should be denied.

**B. Cross-Motions for Summary Judgment**

Plaintiffs allege that Defendants violated the ESA in reviewing, approving, and adopting the 2018 revision to the Land Management Plan for the Flathead National Forest (Doc. 26 at 2).

**1. Grizzly Bears**

Grizzly bears in the lower-48 United States are listed as a threatened species under the ESA. 40 Fed. Reg. 31, 734 (July 28, 1975). Today, grizzly bears remain confined to a few populations throughout the United States. *See* FWS\_001984 (describing grizzly bear recovery zones). During grizzly bears' non-denning season, roads and associated human use displace bears and increase the risk of mortality from poaching and other conflicts with humans. FWS\_037306.

Displacement due to roads occurs because grizzly bears form “negative association[s] with roads aris[ing] from the fear of vehicles, vehicle noise, and other human-related activities around roads,” as well as “from human scent along roads and hunting and shooting along or from roads.” FWS\_037332.

Consequently, “[g]rizzly bears adjust[] their habitat use patterns in response to total and open road densities, as well as traffic levels on roads.” FWS\_037307.

Roads impact female grizzly bears in particular, as “[b]oth harassment and harm can cause actual injury to female grizzly bears, significantly disrupting normal behavioral patterns, including breeding, feeding, or sheltering.” FWS\_037373.

This case concerns the population of grizzly bears living within the FNF. Plaintiffs allege that FWS violated the ESA by disregarding harms to grizzly bears caused by (1) unauthorized motorized use, (2) adverse impacts from unused roads, and (3) increased roadbuilding.

**i. Unauthorized Motorized Use**

In *Flathead I*, plaintiffs argued that whereas Amendment 19’s reclaimed road standard “ensured the integrity of road closures and created a substantial disincentive for new road construction in grizzly bear habitat,” the mere “blocking” required by the Revised Plan’s impassable road standard would not have the same protective effect. *Flathead I*, 545 F. Supp. 3d at 869. The court agreed, noting “science indicates that, even where ‘permanent barriers’ are used, road closures may be ineffective and use may occur or continue.” *Flathead I*, 545 F. Supp. 3d at 869. As a result, the court directed FWS to “expressly consider the role of ‘closure devices’ in road density and management”, and the agency’s “failure to consider the effect of ineffective road closures was arbitrary and capricious.” *Flathead*, 545 F. Supp. 3d at 868–99.

Here, in response to *Flathead I*, the Revised BiOp included a new section addressing illegal or unauthorized motorized use in the environmental baseline. *See* USFWS\_037323–25. Plaintiffs first suggest that because unauthorized motorized use is an effect of Forest Service action, it should have been considered in the Effects of the Action section. (Doc. 27 at 28) (citing 50 C.F.R. § 402.2) (defining “effects of the action” to include “consequence[s] caused by the proposed action if [they] would not occur but for the proposed action and [they are] reasonably certain to occur.”)). Defendants argue that because a private entity’s non-compliance with Forest Service direction is an illegal activity, unauthorized use is appropriately considered in the environmental baseline. (Doc. 30 at 18); *See* USFWS\_037323 (“action” for Section 7 consultation defined as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.”). The Court agrees. This District has clearly held that “unauthorized motorized use is not part of the ‘effects of the action’ analysis because a private entity’s non-compliance with Forest Service’s access management is an illegal activity and is, therefore, not part of the proposed ‘action’, as defined by the ESA.” *Center for Biological Diversity v. U.S. Forest Service*, 2023 WL 3052299, \*8 (D. Mont. April 24, 2023) (“*Knotty Pine*”).

The analysis does not end here, however. Because *Flathead I* determined that “closure devices” were an “important aspect of the problem”, the Revised BiOp’s analysis of unauthorized motorized use and road density remain relevant to whether FWS complied with the ESA. 545 F. Supp. 3d at 868. Relatedly, because the Revised BiOp’s no-jeopardy determination was based, in part, on the conclusion that the Revised Plan will not increase OMRD and TMRD levels above the 2011 baseline, USFWS\_037364–65, whether these road density calculations accounted for illegal motorized use is also relevant to the Court’s analysis. *See Knotty Pine*, 2023 WL 3052299, \*8 (whether agency accounted for unauthorized motorized use in TMRD and OMRD calculations is relevant to compliance with ESA).

In the Revised BiOp’s discussion of unauthorized motorized use, FWS included results from a 2020 inspection of nearly 1,200 road closure devices across the FNF. USFWS\_037324. That survey indicated road closure effectiveness varied across districts, ranging from 90 percent in the Swan Lake District to 97 percent in the Talley Lake and Spotted Bear Districts. USFWS\_037324. The average effectiveness rate for closure devices across the FNF was 92 percent. USFWS\_037324. FWS noted this result was consistent with monitoring conclusions in previous years. USFWS\_037324.



Recognizing that unauthorized use is “always possible”, the Revised BiOp nonetheless found that “the amount, location, duration, and timing of effects [to grizzly bears] resulting from such illegal use is typically not known.”

USFWS\_037324. The Revised BiOp further concluded that “illegal motorized access is expected to be spatially disparate and temporary and is not likely to collectively cause an adverse effect” because most users follow travel regulations and because FNF corrects the situation as use as soon as they are able.

USFWS\_037325. This conclusion is reiterated in the Cumulative Effects section.

*See* USFWS\_037363. Finally, the Revised BiOp found that “a change to the metrics used by the FNF to assess baseline access conditions would not occur as such use was not authorized, carried out, or funded by the Forest[.]”, and would likely only “result in short-term, temporary effects to grizzly bears as opposed to a permanent change in access conditions[.]”. USFWS\_037325.

Plaintiffs argue that the Revised BiOp’s no-jeopardy determination is foreclosed by this District’s decision in *Knotty Pine*. (Doc. 38 at 7). The Court agrees. In *Knotty Pine*, several environmental groups challenged the agencies’ approval of a timber sale project on national forest land under the ESA, National Environmental Policy Act (“NEPA”), National Forest Management Act, and the APA. 2023 WL 3052299. The project’s no-jeopardy determination rested, in part, upon the conclusion that the project “will not increase OMRD and TMRD levels

above Forest Plan standards.” *Knotty Pine*, 2023 WL 3052299, \*8. The court identified two issues with this conclusion. First, the biological opinion failed to indicate whether unauthorized use was considered for TMRD and OMRD calculations, but was ultimately excluded. *Knotty Pine*, 2023 WL 3052299, \*10. Instead, the biological opinion merely “parrot[ed] the apparently boilerplate assertion that has become familiar to the [c]ourt in recent years: because unauthorized motorized access is unpredictable, its effects on grizzly bears are unknowable.” *Knotty Pine*, 2023 WL 3052299, \*10; *see also Alliance for the Wild Rockies v. Marten*, 2023 WL 4977712 (D. Mont. Aug. 3, 2023) (applying *Knotty Pine* to forest management plan).

The second issue identified in *Knotty Pine* was the biological opinion’s reliance on “the temporally and spatially disparate (and thus purportedly unpredictable) effects of unauthorized motorized use”, which failed to consider an important aspect of the problem and ran contrary to the evidence. *Knotty Pine*, 2023 WL. 3052299, \*10. The court noted that although use of any particular road may be temporary, “the ongoing chronic problem of ineffective closures and unauthorized motorized access is permanent.” *Knotty Pine*, 2023 WL 3052299, \*10 (citing *Alliance for the Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1203 (D. Mont. 2019) (“Although Defendants are correct that certain *roads* are temporary, they fail to account for overall *increases* that are permanent.”)). In so

concluding, the court relied upon (1) the agency's monitoring reports demonstrating that a small percentage of closures were breached, (2) the acknowledgement that "some Forest users have [] and will likely continue to break the law and drive motorized vehicles where such use is illegal", and (3) agency efforts to monitor and promptly fix known problems. 2023 WL 3052299, \*10.

Here, similar to *Knotty Pine*, the Revised BiOp (1) documented an eight percent ineffectiveness rate for Forest-wide road closures in 2020, (2) recognized that "illegal use is always possible", and (3) described agency efforts to correct any identified issues. USFWS\_037324. Therefore, while specific instances of unauthorized use may indeed be temporary, the "chronic problem" of unauthorized use in the FNF is, in fact, "permanent." *Knotty Pine*, 2023 WL 3052299, \*10. This conclusion is bolstered by FWS's reliance on the 2020 road closure effectiveness survey, which the agency noted was consistent with monitoring conclusions in previous years. USFWS\_037324. As raised by Plaintiffs in oral argument, however, the first project under the Revised Plan was not approved until 2019; therefore, it is difficult to draw any conclusions as to the consistent nature unauthorized motorized use under the Revised Plan from the proffered survey.

Defendants' attempts to distinguish *Knotty Pine* fail to overcome that *Knotty Pine* and similar cases stand for the general proposition that TMRD, OMRD, and core calculations must account for unauthorized motorized use. Defendants first

argue that unlike *Knotty Pine*, where the biological opinion failed to explain its decision to not include unauthorized use in road density calculations, the Revised BiOp concluded that “a change in the metrics used by the FNF to assess baseline access conditions would not occur as such use was not authorized, carried out, or funded by the Forest.” USFWS\_037325. However, this explanation contradicts Defendants’ previous argument that unauthorized motorized use is more properly considered as part of the “environmental baseline”—which includes “past and present impacts of all Federal, State, or *private* actions and other human activities in the area[]”. (Doc. 30 at 18) (citing 50 C.F.R. § 402.02) (emphasis added).

Defendants further maintain that FWS’s conclusion regarding unauthorized use stems from two bases: (1) the increasing grizzly bear population, expanding distribution, and positive population trend in the NCDE, and (2) that unauthorized motorized use is “spatially disparate and temporal.” (Doc. 42 at 10). However, under *Flathead I*, the fact that stable bear populations also factored into FWS’s conclusion does not override the agency’s obligation to consider unauthorized motorized use in road density calculations. 545 F. Supp. 3d at 868–69 (defendants argued, unsuccessfully, that road closure ineffectiveness was not problematic due to increasing grizzly bear populations in NCDE). Moreover, the explanation that unauthorized use “is not likely to cause an adverse effect” because it is “spatially disparate and temporal” was expressly rejected in *Knotty Pine* and *Probert*.

Therefore, FWS’s reliance on the Revised Plan’s guarantee of no increase to OMRD, TMRD, or core beyond the 2011 baseline in its no-jeopardy determination falls squarely within the general rules set forth in *Knotty Pine*. USFWS\_037366.

The Revised BiOp’s reliance on the “unknown” effects and “spatially disparate and temporary” nature of unauthorized motorized use thus fails to consider an important aspect of the problem and offers an explanation that runs counter to the evidence. USFWS\_037324–25. This conclusion does not discount the Forest Service’s monitoring efforts, which are commendable and demonstrate a commitment to monitor and combat unauthorized use. These efforts do not, however, excuse FWS’s obligation to consider unauthorized use in road density calculations. The Court recognizes that this conclusion begs the question of how to incorporate a meaningful analysis of unauthorized use into road density calculations. This may, for example, take the form of a calculation based on survey results, historical trends, or data regarding unauthorized use. *See Marten*, 2023 WL 4977712, \*10 (agency accounted for ineffectiveness of roads closed without a barrier in OMRD calculations but not in TMRD). Although the specifics of this calculation remain unclear, what is clear from the caselaw is the general rule that road density calculations must include a material quantification of unauthorized motorized use.

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**ii. Impacts from Unused Roads**

Defendants argue that *Flathead I* granted summary judgment in the government's favor on all issues not expressly identified in the opinion, including the issue of unused, i.e., impassable, roads. 545 F. Supp. 3d at 886–87. Defendants maintain that because this District did not identify this as an issue to be addressed on remand, it was not part of FWS's new analysis in the Revised BiOp. (Doc. 30 at 20–21). In oral argument, counsel for Plaintiffs agreed that *Flathead I* did not address the issue.

In *Flathead I*, plaintiffs raised two primary concerns with respect to the Revised Plan's impact on grizzly bears. First, plaintiffs argued that by excluding impassable roads from road density calculations, the Revised Plan permits closed roads to remain intact in grizzly bear habitat without counting toward TMRD. (CV 19-56-M-DWM, Doc. 100 at 14–16). Plaintiffs subsequently argued that FWS failed to justify their disregard of ineffective road closures. (CV 19-56-M-DWM, Doc. 100 at 16). *Flathead I* found the 2017 BiOp insufficient only as to unauthorized motorized use; the court did not discuss the issue relating to impassable roads. *See Flathead I*, 545 F. Supp. 3d at 882 (“As discussed above, the 2017 BiOp did not consider the impact of ineffective road closures on the 2011 baseline population for grizzly bears, nor did it consider the effects of the Revised

Plan on the grizzly species as a whole.”). *Flathead I*’s reasoning is equally applicable here, and the Court sees no basis to revisit the issue.

In any event, even if the Court were to consider unused roads, the record nonetheless demonstrates that FWS satisfied its obligations. As noted above, the NCDE grizzly bear population has increased to over 1,000 individuals—well beyond the Grizzly Bear Recovery Plan’s minimum population goal of 391 grizzly bears—even though FNF never fully met the objectives contained in Amendment 19. USFWS\_037284. It is FWS’s opinion that these positive trends were largely the result of on-the-ground habitat conditions “in the attempt to fully meet Amendment 19’s objectives rather than the mere existence of the objectives themselves.” USFWS\_037284. Additionally, other factors likely contributed to these positive population trends, including forest-wide food/attractant storage orders, increased education and outreach to the public, and incident management programs. USFWS\_037284.

As in *Flathead I*, Plaintiffs again argue that by excluding impassable roads from road density calculations, the Revised Plan inverts the protections provided for by Amendment 19, which required that barriered roads count toward TMRD. (Doc. 27 at 30). FWS failed to reconcile this change, Plaintiffs maintain, with “science documenting bear ‘avoidance of high total road densities’ even where ‘roads [are] closed to public travel.’” (Doc. 27 at 30) (quoting FS-182182–83)).

This argument, however, presents a selective read on the study performed by Mace and Waller. The paragraph states in full:

Thus road density did not strongly influence bear use of habitats within established home ranges as was documented by Brody and Pelton (1989) for black bears. However, grizzly bear seasonal ranges were comprised mostly of Class 1 [ $>1$  vehicle/day] and Class 2 [1-10 vehicles/day] roads. Thus, total road density measurements within these ranges reflect either roads closed to vehicles or roads driven infrequently by humans. Interestingly, avoidance of high total road densities areas was evident for some bears, even though roads were closed to public travel.

FS-182182–83. What emerges is a spectrum of impacts: although more frequented roads have a greater impact on grizzly bear behavior, some bears still exhibit avoidance of closed roads. This spectrum is further evidenced by the study’s observation that female home range “[s]election was greatest for unroaded over types and declined as road densities increased,” FS-182182, and that some bears demonstrate “positive selection towards habitat near” closed roads or roads used by fewer than ten vehicles per day, although this was attributed in part “to bears utilizing cutting units, or avalanche chutes which often terminate near roads.” FS-182183.

Acknowledging that “[t]his new direction may not be the same as the direction contained in Amendment 19,” FWS nonetheless concluded that it will continue to support a healthy grizzly bear population that meets the objectives of the NCDE Conservation Strategy and the Grizzly Bear Recovery Plan.



USFWS\_037284. The record indicates that FWS considered the Revised Plan’s new direction in light of the best available scientific information. FWS’s conclusion is supported by the evidence and is not arbitrary and capricious.

**iii. Impacts From Increased Roadbuilding**

Plaintiffs argue that FWS failed to consider impacts to grizzly bears from increased roadbuilding “incentivized by” the Revised Plan. (Doc. 27). The Revised Plan “encourages roadbuilding”, Plaintiffs argue, “by institutionalizing relatively quick and cheap barrier closures in place of full road-treatment requirements.” (Doc. 38 at 14). These arguments find no support in the record, however, and the Court declines to engage in unsupported speculation.

**C. Bull Trout**

Bull trout are listed as a threatened species under the ESA. 64 Fed. Reg. 58,910; USFWS\_037185. Today, remnant populations of bull trout exist primarily in Washington, Oregon, Idaho, and Montana. FWS\_037185. FWS has designated creeks and watersheds within and downstream from the FNF as bull trout critical habitat. USFWS\_037183. Bull trout require clean and cold water to spawn, develop, and survive. USFWS\_014341. Roads and traffic in areas around bull trout habitat may contribute to sediment delivery in streams and waterways, which adversely affects water quality and temperature. USFWS\_037225–26. Relatedly, culverts—structures that support a road from one side to the other—can trap debris

and contribute to sedimentation of streams, thereby causing erosion and sedimentation. FS-052416.

Plaintiffs argue that the Revised BiOp failed to rationally consider impacts from (1) allowing culverts to remain on impassable roads, (2) allowing roads to remain intact on the landscape but omitted from road-density calculations, (3) facilitation of increased roadbuilding associated with the Revised Plan, and (4) unauthorized motorized use. (Doc. 27 at 33).

### **1. Culvert Removal**

In *Flathead I*, this District considered two issues relating to bull trout: culvert removal and the Culvert Monitoring Plan. 545 F. Supp. 3d at 869–71. As to the former, the court determined that FWS’s failure to adequately analyze the Revised Plan’s departure from the 1986 Plan’s culvert removal requirements was arbitrary and capricious. *Flathead I*, 545 F. Supp. 3d at 870–71. As to the latter, the court upheld the Culvert Monitoring Plan as “reasonable and responsive to the reality of the culvert situation in the Forest.” *Flathead I*, 545 F. Supp. 3d at 871.

In reaching its conclusion as to culvert removal, *Flathead I* focused on the Recovery Plan for the Coterminous United States Population of Bull Trout, promulgated by FWS in 2015 (“Recovery Plan”). FS-07013. The Recovery Plan identified sedimentation as a threat to bull trout, suggesting that “sediment impacts from roads can be addressed by,” among other options, “maintaining bridges,

culverts, and crossings; or decommissioning surplus roads and removing culverts and bridges on closed roads.” FS-017013. This District concluded that “because the 2015 conclusion that road decommissioning, which included culvert removal, was an effective sedimentation reduction measure, [FWS] has not explained its conclusion just two years later that culvert removal was not required on decommissioned roads.” *Flathead I*, 545 F. Supp. 3d at 870–71.

In response to *Flathead I*, FWS added a new section to the Revised BiOp, which included an incidental take statement as to the bull trout. *See* USFWS\_037229–32. There, FWS determined that “the Revised Forest Plan direction regarding road decommissioning has the potential to adversely affect bull trout and bull trout critical habitat” to the extent that an incidental take will occur. USFWS\_037231; USFWS\_037253. Because the exact amount of take is difficult to measure, FWS established a surrogate, which assumes a take will result from road decommissioning in bull trout watersheds that did not remove culverts. USFWS\_037255. The surrogate is accompanied by “reasonable and prudent measures” in order to reduce the amount of incidental take. USFWS\_037255. These measures require culvert removal for decommissioned roads in the Conservation Watershed Network, restoration of appropriate channel morphology, and stabilization of side slopes. USFWS\_037256.

Plaintiffs argue that this take statement is “illusory” in that it does not apply to impassable roads. (Doc. 27 at 34). Plaintiffs point to an internal email wherein a Forest Service biologist noted that the agency was not “decommissioning many roads anymore and instead [was] making new roads meet the new [Forest Plan] impassable definition” and would “not necessarily remove culverts.” FS-FNF2-191073. That biologist further observed “I’m pretty sure [limiting culvert removal to decommissioned roads was] not what the plaintiffs were getting at,” and “I’m sure we will not hear the end of this issue from plaintiffs or maybe the judge again.” FS-FNF2-191073.

Defendants are correct in that the “mere existence of internal disagreements between agency experts does not make the agency’s decision arbitrary or capricious.” *Nat’l Wildlife Fed’n v. Norton*, 306 F. Supp. 2d 920, 928 n. 15 (E.D. Cal. 2004) (citation omitted). The biologist’s email does, however, raise the question of whether *Flathead I* intended to use “decommissioned” as a term of art or rather as a catchall for road closures. *See* FS-FNF2-191074 (“Additionally, I’m not sure the judge understands the difference between decommissioned roads vs. an impassable road.”).

Indeed, when discussing the Recovery Plan—which, as noted, largely influenced this District’s decision—the court emphasized that “Amendment 19 was in effect when [FWS] published the Recovery Plan, meaning Amendment 19’s

requirement that roads be ‘reclaimed,’ which included the culvert-removal requirement, was in place.” *Flathead I*, 545 F. Supp. 3d at 870. The court continued by stating,

“[t]he Fish and Wildlife Service concluded that ‘[r]oad decommissioning reduces the long-term risk of sediment delivery to streams from roads and roadside ditches through reducing culvert failures and landslides,’ FWS-001936–37, but road decommissioning under the Revised Plan does not include mandatory culvert removal, *see* FS-052079 (defining impassable road).”

*Flathead I*, 545 F. Supp. 3d at 870.

The Court turns to the Revised BiOp for clarity. There, a decommissioned road is defined as an “[a]n unneeded road that has been stabilized and restored to a more natural state (36 CFR § 212.1). USFWS\_037230. Decommissioned roads under the Revised Plan “do not count toward total motorized route density as long as they meet the definition of impassable.” USFWS\_037230. It appears that decommissioned and reclaimed roads are related—albeit circular—road-closure options. Considering the above, the Court concludes that a fair reading of *Flathead I* indicates the court was not using “decommissioned” as a term of art, but rather as a catchall for road closure.

The question, now, is whether the Revised BiOp adequately considered the Revised Plan’s shift away from mandatory culvert removal under Amendment 19’s impassable road standard. Removal of stream-aligned culverts “is an effective method in making a barriered/decommissioned road hydrologically stable or

disconnected from adjacent water ways[]”, and culverts remaining “behind gates or berms could be at an increased risk for failure by reducing awareness of potential maintenance needs.” USFWS\_037231. In *Flathead I*, this District observed that given the connection between bull trout, habitat conservation, and culvert removal and management, the scientific evidence did not support Revised Plan’s shift away from mandatory culvert removal. *Flathead I*, 545 F. Supp. 3d at 870.

FWS’s consideration of the Culvert Monitoring Plan, Defendants argue, demonstrates that the agency adequately considered culvert removal requirements under the Revised Plan. (Doc. 30 at 31–32). Pursuant to the Culvert Monitoring Plan, the Forest Service will “monitor culvert conditions in all bull trout watersheds across the Forest.” FS-054755. Under *Flathead I*, however, the protections provided for in the Culvert Monitoring Plan—as laudable as they may be—do not excuse the Revised Plan’s abandonment of culvert removal requirements. *See Flathead I*, 545 F. Supp. 3d at 870–71 (finding that FWS violated ESA by abandoning culvert removal requirements but did not violate ESA in implementing Culvert Monitoring Plan).

Therefore, given that removal of culverts is an effective sediment-prevention method for both barriered and decommissioned roads, it is inexplicable why FWS limited its analysis to the Forest Service’s abandonment of culvert removal requirements for decommissioned roads. Indeed, the agency’s own Recovery Plan

suggests that sedimentation impacts may be addressed by “decommissioning surplus roads and removing culverts and bridges on closed roads.” FS-017013. FWS’s analysis therefore fails to consider an important part of the problem and is arbitrary and capricious.

Plaintiffs next argue that the Revised BiOp’s incidental take statement requirement also fails because of its limited geographic scope. (Doc. 27 at 35). The Revised BiOp’s incidental take statement requires removal of all stream-aligned culverts when decommissioning roads in the Conservation Watershed Network where bull trout are identified. USFWS\_037256. This area, Plaintiffs allege, excludes a significant portion of designated bull trout critical habitat and fails to consider the “uncontested science” that sedimentation also harms adult bull trout. (Docs. 27 at 35; 38 at 18) (citing USFWS\_014377).

The Conservation Watershed Network is a collection of watersheds where management emphasizes habitat conservation and restoration to support native fish and other aquatic species, and designation of these conservation watershed networks “represents the best long-term conservation strategy for native fishes and their habitats.” FS-052252–53. Consideration of “habitat patches”—defined as “contiguous stream areas believed suitable for spawning and rearing”—with known local populations of bull trout formed the basis of the Conservation Watershed Network. FS-052253.

Defendants argue that Plaintiffs miss the primary purpose of the Conservation Watershed Network, which is to protect the habitat important for bull trout spawning and rearing. (Doc. 30 at 33) (citing FS-052248–59; FS-107630; USFWS-037198). Although sedimentation does indeed harm adult bull trout, the “primary concern” with respect to increased sedimentation is that

roads may have culverts that are at a risk of failure that would result in increased sedimentation that can further degrade spawning gravels by filling the interstitial spaces with fine material and impacting embryonic survival. Increased sediment can also reduce juvenile rearing success and decrease aquatic insect production, thereby decreasing growth, by causing increased embeddedness of the substrate.

USFWS\_037231. Defendants’ assertion that sedimentation “impacts from failed culverts ... are most relevant” in the Conservation Watershed Network is not, as Plaintiffs argue, post-hoc rationalization. Limiting the incidental take statement to the Conservation Watershed Network was a reasonable response to the issue of culvert removal and sedimentation.

## **2. Sedimentation Impacts from Roads**

Plaintiffs next argue that FWS failed to consider the Revised Plan’s abandonment of Amendment 19’s road reclamation standards as they pertain to sediment distribution. Specifically, Plaintiffs allege that FWS overlooked sedimentation caused by (1) unauthorized motorized use of impassable roads, (2) increased roadbuilding, and (3) unused roads. (Doc. 27 at 36). Plaintiffs briefly



raised these same arguments in *Flathead I*, although their briefing focused primarily on culvert removal. (See 9:19-cv-56-DWM, Docs. 77 at 17–18, 24–26; 100 at 12). With respect to bull trout, *Flathead I* granted summary judgment to plaintiffs only as to the issue of culvert removal; this District did not find the 2017 BiOp insufficient as to its examination of unauthorized motorized use, increased roadbuilding, or unused roads. As above, the Court finds *Flathead I*'s reasoning persuasive and sees no basis to revisit these issues.

The Court notes that even if it were to consider the arguments, the record demonstrates FWS satisfied its obligations. Quoting the Revised BiOp, Plaintiffs argue that FWS acknowledged: (1) “[v]ehicle traffic ... contributes to sediment delivery from roads, particularly if ruts develop in the road and if traffic is heavy when the ground is more saturated,” (2) “[t]he potential for roads to have detrimental effects on aquatic resources exists as long as the road is retained,” and (3) road construction can increase stream sedimentation “due to the heavy equipment required for grading, ditch cleaning, culvert replacement, road ripping/decompaction, and the installation of water bars.” (Doc. 27 at 36) (quoting USFWS\_037226–227).

That paragraph, however, states in full:

Vehicle traffic also contributes to sediment delivery from roads, particularly if ruts develop in the road and if traffic is heavy when the ground is more saturated. Log haul during timber sales is typically done on the same road system for weeks or months at a time, and thus

the quantity and repeated nature of this traffic make it a systematic, recognizable source of sediment on forest roads.

USFWS\_027226. It is therefore apparent that the concern is in regard to heavy traffic or long-term use of logging trucks; it is not, as Plaintiffs argue, in regard to unused roads or unauthorized motorized use. Furthermore, as discussed above, Plaintiffs' concerns with respect to construction is speculative and unsupported by the record.

Finally, Plaintiffs' last argument—that the Revised Plan's direction to “not allow[] a net increase in road networks” is not mandatory and therefore fails to adequately address sedimentation impacts—was considered and rejected in *Flathead I's* NEPA discussion. *See Flathead I*, 545 F. Supp. 3d at 886. The same conclusion is warranted under the standards set forth by the ESA. Although the Forest Service acknowledged that guidelines are discretionary in nature, the purpose of the guideline must be met. FS-051886. The Forest Service further explained that the management flexibility was intended to further protections for aquatic species such as bull trout. FS-051898. Finally, while the Forest Service envisions meeting this objective without a net increase in roads in most circumstances, FS-054989, the guideline permits an increase in road length to achieve the agency's goal of sediment reduction. FS-04208. Therefore, FWS “consider[ed] the relevant factors and articulate[d] a rational connection between

the facts found and the choice made.” *Center for Biological Diversity*, 698 F.3d at 1121.

**D. Forest Service Reliance on the Revised BiOp**

Plaintiffs’ final claim is directed at the Forest Service. Plaintiffs assert that the Forest Service violated the ESA by arbitrarily relying on the Revised BiOp. (Doc. 27 at 38) (citing FS-054746–47). “Section 7 of the ESA imposes a substantive duty on the [action agency] to ensure that its actions are not likely to jeopardize grizzly bears and bull trout or adversely modify bull trout critical habitat.” *Center for Biological Diversity*, 698 F.3d at 1127. Agency reliance on a legally flawed biological opinion results in “an action based on reasoning ‘not in accordance with the law’ and [is] thus arbitrary and capricious.” *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010).

As discussed above, the Revised BiOp failed to adequately consider the impact of ineffective road closures on the 2011 baseline and on grizzly bear populations as a whole. The Revised BiOp further failed to consider that the new take statement regarding culvert removal does not apply to roads rendered impassable under the Revised Plan. Therefore, the Forest Service violated the ESA to the extent it relied on the Revised BiOp’s flawed road density determinations and culvert removal analysis.

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### **E. Remedy**

Vacatur is the presumed remedy where an agency has acted unlawfully. *All. for the Wild Rockies v. Tidwell*, 907 F.3d 1105, 1121 (9th Cir. 2018). When equity so requires, however, an underlying agency action may be “left in place while the agency reconsiders or replaces the action, or to give the agency time to follow the necessary procedures.” *All. for the Wild Rockies*, 907 F.3d at 1121. “In determining the appropriate remedy, the [c]ourt must weigh the seriousness of the agency’s errors against the disruptive consequences of vacatur.” *All. for the Wild Rockies v. Savage*, 375 F. Supp. 3d 1152–56 (D. Mont. 2019) (internal quotations and citation omitted) (*Savage II*).

Where an agency’s error “is limited in scope and severity, and vacatur would result in a disproportionate disruption to the [p]roject,” remand without vacatur may be warranted. *Savage II*, 375 F. Supp. 3d at 1156. A court “is not required to set aside every unlawful agency action” even though it has the power to do so. *Nat’l Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (citation omitted).

Plaintiffs request that the Court remand back to the agencies with vacatur. (Doc. 26 at 2). Specifically, Plaintiffs seek a targeted vacatur of the following provisions of the Revised Plan: (1) Standard FW-STD-IFS-01 to -04; (2) any associated Glossary definitions of “decommissioned road,” impassable road,” intermittent stores service/intermittent service road, closed to traffic,” temporary

road,” “secure core/grizzly bear,” and “total motorized route density;” and (3) any other provisions that replace or supersede Amendment 19 to the 1986 Land Management Plan for the Flathead National Forest. (Doc. 26 at 2–3). Plaintiffs further request that the Court vacate the following sections of the Revised BiOp: (1) Chapter I, Part E, Subparts 1 (bull trout) and 2 (grizzly bears); (2) chapter II, Biological Opinion on Bull Trout; Chapter III, Biological Opinion on Grizzly bears. (Doc. 26 at 3). In oral argument, counsel for Plaintiffs clarified that Plaintiffs now seek only a prospective vacatur of the above provisions, allowing projects currently underway to be completed.

In *Flathead I*, this District concluded that the appropriate remedy was remand without vacatur. F. Supp. 3d at 884. Given the issues before this Court are a subset of or related to those addressed in *Flathead I*, remand without vacatur is again appropriate.

### **1. Seriousness of the Errors**

In assessing the seriousness of the errors, the court “consider[s] whether vacating a faulty rule could result in possible environmental harm.” *Pollinator Stewardship Council v. EPA.*, 806 F.3d 520, 532 (9th Cir. 2015). Next, the court considers “whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency’s decision make it

unlikely that the same rule would be adopted on remand.” *Pollinator Stewardship Council*, 806 F.3d at 532. The final consideration is whether the errors are “limited in scope.” *Savage II*, 375 F. Supp. 3d at 1156.

In *Flathead I*, the court found that the first factor—potential environmental harm—weighed against vacatur, due primarily to the parties’ agreement that the Revised Plan was comparatively more protective than the 1986 Plan. 545 F. Supp. 3d at 884. Although Plaintiffs in this case seek a targeted, prospective vacatur, the first factor again weighs against this remedy. As part of their request, Plaintiffs seek to vacate “any other provisions that replace or supersede Amendment 19 to the 1986 Land Management Plan for the Flathead National Forest.” Yet unlike Amendment 19, the Revised Plan extends some land management protections into Zone 1, in recognition of the importance of grizzly bear habitat connectivity. FS-054747. Moreover, in oral argument, counsel for Defendants highlighted that because the Revised Plan is intended to work as a cohesive unit, removing specific provisions would diminish the Revised Plan’s utility.

Plaintiffs do not advance any specific arguments relating to environmental harm. Instead, Plaintiffs point out that projects approved under the Revised Plan contemplate approximately 44.4 miles of new roads to the Forest system; Defendants place this number closer to 39.7 miles. (Docs. 51-1, ¶¶ 5–6; 43, ¶¶ 8–8). Plaintiffs further argue that the survey contained in Exhibit 13 of the Second

Hammer Declaration—which documents an effectiveness rate of only 68 percent for road closures in the Swan Valley—demonstrates “significant continued problems with ineffective Forest Service road closures in the Flathead Forest.” (Doc. 38 at 21) (citing Doc. 38-1, ¶ 13). On balance, however, the potential harm of vacating several provisions of the Revised Plan outweighs Plaintiffs’ concerns regarding increased roadbuilding and unauthorized motorized use.

The second factor—whether the agency would reach a different rule on remand—weighs in favor of vacatur. In *Flathead I*, this District found it likely the agency would reach a different result upon consideration of the issues identified in the opinion. 545 F. Supp. 3d at 884. The same outcome may be true here.

However, in the event the agency reaches a different conclusion on the issues of unauthorized motorized use or culvert removal, it is nevertheless unlikely that the agency will reach a different conclusion as to the entire Plan.

Finally, the errors identified here are once again the result of a “defective analysis”—and although not minor, such errors do not “compromise the integrity of the project as a whole.” *Flathead I*, 545 F. Supp. 3d at 881 (quoting *Savage II*, 375 F. Supp. 3d at 1156). Therefore, “[w]hile it may be misleading to classify a violation of the law as anything less ‘serious,’ the error is certainly limited in scope.” *Flathead I*, 545 F. Supp. 3d at 881 (quoting *Savage II*, 375 F. Supp. 3d at 1156). The fact that the agencies’ analysis again falls short does not somehow

render these errors more “serious” than when they were addressed by this District in *Flathead I*.

## 2. Disruptive Consequences of Vacatur

The seriousness of the errors must be weighed against “the disruptive consequences of an interim change that may itself be changed.” *Pollinator Stewardship Council*, 806 F.3d at 532 (quotation marks omitted). “The [p]roject’s economic impact is relevant to the question of whether to vacate on remand.” *Savage II*, 375 F. Supp. 3d at 1175 (citing *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010)). Relevant considerations also include potential disruptive effects on the environment, local communities, and wildlife. *Savage II*, 375 F. Supp. 3d at 1175.

Here, a prospective vacatur would disrupt a total of three projects currently undergoing review. (Doc. 51-1 at 2). These projects are the Mid-Swan Project, Dry Riverside Project, and Rumbling Owl Project. (Doc. 51-1 at 2). In determining whether vacatur is warranted, the court considers impacts resulting from the delay of planned projects. *Cal. Cmty. Against Toxics v. U.S. EPA*, 688 F.3d 989, 993–94 (9th Cir. 2012) (per curiam). Defendants represented in oral argument that not only are the project contracts out, but also that the projects pose benefits in terms of fuel management in the FNF. (Doc. 33, ¶¶ 7–11).



Indeed, the purpose of the Dry Riverside Project “is to move the project area toward the desired conditions” identified in the Revised Plan by (1) “[i]mprov[ing] the diversity and resilience of terrestrial ecosystems and vegetation”, (2) “[r]emov[ing], reduc[ing], or rearrang[ing] fuels to promote a more fire resilient forest[]”, and “[p]rovid[ing] a mix of forest products to contribute to economic sustainability, providing jobs and income to local economies.” (Doc. 51-1 at 8). The purpose of the Rumbling Owl Project is to similarly provide for “hazardous fuel loading” reduction, “restore resilient forested stands”, and to “maintain previous vegetation treatments within the project area” in order to “move the area toward desired conditions” identified in the Revised Plan. (Doc. 51-1 at 12). Therefore, the Court finds that remand without vacatur is once again appropriate in light of the potential environmental and economic impacts.

#### **IV. Conclusion**

Accordingly, for the reasons set forth above,

IT IS RECOMMENDED that the parties’ cross motions for summary judgment (Docs. 26 and 29) be GRANTED in part and DENIED in part, as set forth below:

1. Plaintiffs are entitled to summary judgment on their ESA claims regarding grizzly bears insofar as FWS failed to consider the impact of

- ineffective road closures on the 2011 baseline and grizzly bear populations;
2. Plaintiffs are entitled to summary judgement on their ESA claims regarding bull trout and bull trout critical habitat insofar as FWS failed to consider the effects of allowing culverts to remain on impassable roads;
  3. Plaintiffs are entitled to summary judgment on their ESA claims insofar as the Forest Service relied on the flawed provisions of the Revised BiOp;
  4. Defendants are entitled to summary judgment on Plaintiffs' ESA claims insofar as FWS properly addressed the impacts of unused roads and increased roadbuilding on grizzly bears; and
  5. Defendants are entitled to summary judgment on Plaintiffs' ESA claims insofar as FWS properly addressed sedimentation impacts of unused roads, unauthorized motorized use, and increased roadbuilding on bull trout and bull trout critical habitat.

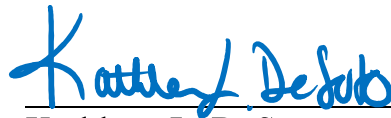
IT IS FURTHER RECOMMENDED that the provisions of the Revised BiOp that violated the ESA be REMANDED WITHOUT VACATUR to the agencies for further consideration consistent with this opinion.

IT IS FURTHER RECOMMENDED that Defendants' Motion to Strike (Doc. 47) be DENIED.

IT IS FURTHER RECOMMENDED that Plaintiffs' Motion for Leave to File Third Hammer Declaration (Doc. 51) be GRANTED.

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

DATED this 11th day of March, 2024.



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Kathleen L. DeSoto  
United States Magistrate Judge