IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

SWAN VIEW COALITION and FRIENDS OF THE WILD SWAN,	)	CV 06-73-M-DWM
Plaintiffs,	)	
vs.	)	ORDER
CATHY BARBOULETOS, FLATHEAD NATIONAL FOREST SUPERVISOR; TOM TIDWELL, REGION ONE REGIONAL FORESTER; ABAGAIL KIMBELL, U.S. FOREST SERVICE CHIEF; and DIRK KEMPTHORNE, SECRETARY OF INTERIOR,	)	
Defendants,	)	

I. Introduction

The Swan View Coalition and Friends of the Wild Swan ("Plaintiffs") bring this action seeking judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, of actions by the United States Forest Service and the United States Fish & Wildlife Service ("Defendants") concerning motorized access management on the Flathead National Forest. The First Amended Complaint alleges that the agencies acted in violation of

the Endangered Species Act ("ESA"), 16 U.S.C. § 1533 *et seq.*, and the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et seq.* The issues resolved here are cross-motions for summary judgment on all claims and the Defendants' motion for voluntary remand of Counts VI and VII.

For the reasons that follow, it is necessary to set aside the Biological Opinion issued in conjunction with the Winter Motorized Recreation Plan for the Flathead National Forest. That is also known as Amendment 24 to the Flathead National Forest Plan. In establishing the environmental baseline from which it assessed the effects of Amendment 24 on the grizzly bear, the Fish & Wildlife Service considered the current state of actual springtime snowmobile use on the Forest, rather than the existing (although largely unenforced) rules prohibiting snowmobile use in the spring. In other words, the baseline for measurement and analysis accepts illegal use and then proceeds based on that faulty idea.

By relying upon the degraded conditions resulting from the Forest Service's refusal to enforce its own ban on spring snowmobiling, the Fish & Wildlife Service was able to bolster the alleged benefits to grizzly bears resulting from Amendment 24, when in fact the Forest Plan was changed to allow *more* spring snowmobiling than was permitted before. This manipulation of the ESA process renders the Fish & Wildlife Service's analysis and

"no jeopardy" conclusion unreliable. The Biological Opinion must be set aside, and the implementation of Amendment 24, including the opening of any portion of the Forest to spring snowmobiling, will be enjoined until the Fish & Wildlife Service has completed a Biological Opinion that complies with the ESA. This ruling is limited to the issues raised in this lawsuit.

The Defendants are entitled to summary judgment with respect to all other claims, including all of the Plaintiffs' claims related to the revised implementation schedule for Amendment 19 to the Forest Plan.

II. Factual Background

A. The Flathead National Forest Plan and Amendment 19

The Forest Service adopted the Flathead National Forest Plan on January 22, 1986. Amendment 19 Decision Notice, FWS AR-2 003196.[1] The Fish & Wildlife Service's Biological Opinion for the Forest Plan, issued in 1985 and amended in 1989, concluded that implementation of the Plan was not likely to result in

---

[1]Citations to the Fish & Wildlife Service Administrative Record are in the following format: FWS AR-(Disc Number) (Bates number).

The Administrative Record contains an incomplete verison of the 1995 Amendment 19 Biological Opinion on FWS Disc 2. The electronic copy of the document contains only the odd-numbered pages and is therefore not useful. For that reason, citations to the 1995 Amendment 19 Biological Opinion will not include the specific Bates number for the cited page, but rather the Bates number for the first page of the document followed by a specific citation to the relevant internal (non-Bates) page number(s), which have been obtained by reference to the complete copy of the 1995 Amendment 19 Biological Opinion submitted as part of the Administrative Record in CV 05-64-M-DWM, another case involving these parties.

jeopardy to the continued existence of threatened or endangered species. 1989 Forest Plan Amendments Biological Opinion, FWS AR-4 009566-009567. Among these species is the grizzly bear, listed as threatened under the ESA in 1975. 40 Fed. Reg. 31736.

Pursuant to the ESA, the Fish & Wildlife Service approved a Grizzly Bear Recovery Plan in 1982 and revised the Plan in 1993. FWS AR-4 009668. The Recovery Plan establishes five Recovery Zones, including the Northern Continental Divide Ecosystem zone, which ecompasses parts of the Flathead National Forest. Id. at 009726.[2] Land management direction is set forth in the Recovery Plan through the establishment of Management Situations. Id. at 009690. The Interagency Grizzly Bear Guidelines promulgated in 1986 define each Management Situation. 51 Fed. Reg. 42863. Grizzly population centers are designated as Management Situation 1. Id. at 42865. In those areas, "[m]anagement decisions will favor the needs of the grizzly bear when grizzly habitat and other land use values compete." Id.; see also Grizzly Bear Recovery Plan, FWS AR-4 009690 ("The needs of the grizzly bear

[2]The Northern Continental Divide Ecosystem recovery zone is divided into bear management units to facilitate habitat evaluation and population monitoring. FWS AR-1 000012. The Flathead National Forest contains 11 Bear Management Units, which are further divided into 70 bear management unit subunits measuring about 50 square miles each, or the approximate size of an adult female grizzly bear's home range. FWS AR-1 000015; FWS AR-2 003496 at 8. Amendment 19 applies to 54 of the bear management subunits; the remaining 16 subunits are not subject to Amendment 19 either because they are wilderness (13 subunits) or because they contain too little Forest land (3 subunits). Id.

will be given priority over other management considerations.").

The Forest Service added Amendment 9 to the Forest Plan on July 31, 1989. It was a programmatic amendment incorporating into the Plan the Interagency Grizzly Bear Guidelines and amending the Management Situation descriptions and direction to read exactly as published in the Guidelines. FWS AR-4 009576; Flathead National Forest Plan (Aug. 2001 version) at Amendments, p. 1 and Appendix OO.[3] The Forest Service designated 94 percent of the Flathead National Forest land within the Northern Continental Divide Ecosystem recovery zone as Management Situation 1. An additional five percent is designated as Management Situation 2. FWS AR-2 003496 at 18. These designations and the corresponding management direction are binding upon the agency.

Several parties challenged the Forest Plan in a 1989 lawsuit, which culminated in a ruling by the Ninth Circuit Court of Appeals holding that the Forest Service acted arbitrarily and capriciously in determining that the Forest Plan would not jeopardize the continued existence of listed species, including

---

[3]The Defendants failed to include a complete version of the Flathead National Forest Plan in the Administrative Record. The record contains the 1985 Forest Plan but none of the Plan's amendments. FWS AR-2 003572. The citation provided for the Forest Plan links to a 2,368-page file containing no page-numbered index, which is not helpful. The 1985 Forest Plan is buried more than 1,200 pages into the file, at FWS AR-2 004810. The Court's citations to the Forest Plan are drawn from the 2001 version of the Plan, which was obtained by reference to the Administrative Record in CV 05-64-M-DWM.

the grizzly bear. Resources Limited, Inc., v. Robertson, 35 F.3d 1300 (9th Cir. 1993). The Court of Appeals gave the Forest Service a choice between reinitiating consultation with the Fish & Wildlife Service and amending the Forest Plan to cure the deficiency. Id. at 1308. The Forest Service opted to amend the Forest Plan, and did so by implementing Amendment 19 in 1995. Amendment 19 Decision Notice, FWS AR-2 003198.

Amendment 19 established new Forest-wide standards and objectives for grizzly bear habitat management. FWS AR-2 003199. Its standards require that in each bear management subunit, "there will be no net increase in total motorized access density greater than 2 miles per square mile, no net increase in open motorized access density greater than 1 mile per square mile, and no net decrease in the amount or size of security core area." Id. The Amendment's objectives for all subunits made up of at least 75 percent National Forest Land include:

- Limitation of high density open motorized access (defined as more than 1 mile of open motorized access per square mile of Forest) to no more than 19 percent of each subunit within 5 years;

- Limitation of high density total motorized access (defined as more than 2 miles of total motorized access per square mile of Forest) to no more than 24 percent of each subunit within 5 years, and no more than 19 percent of each subunit within 10 years; and

- Establishment of security core areas that equal or exceed 60 percent of each subunit in 5 years, and 68 percent of each Subunit in 10 years.

Id. Taken together, these objectives sought to ensure that by 2005 each subunit would have no more than 19 percent open motorized access density, no more than 19 percent total motorized access density, and no less than 68 percent security core habitat. The total motorized access density objective is in effect throughout the year, while the open motorized access density and security core objectives apply only during the non-denning period for grizzly bears. FWS AR-2 003206. The Forest Service did not expect Amendment 19 to have a significant impact on snowmobile recreation because it allows for more miles of open road during the winter months. Id.[4]

Definitions and implementation direction for restricting and reclaiming roads and increasing security core areas were included in Amendment 19 through the addition to the Forest Plan of Unbound Appendix TT. FWS AR-2 003212; Amendment 19 Amended Environmental Assessment Appendix D, FWS AR-2 003480. A restricted road is defined as a road on which motorized access is restricted during the non-denning period. Such roads must be physically obstructed in such a way as to preclude use of the road by motorized vehicles. Id. Within security core areas, the

[4]The Amendment 19 Decision Notice states, "The open motorized access density and security core area objectives apply only during the non-denning period, which is generally from November 15 to March 15. Thus, snowmobiling will not be affected significantly, except in late spring." Amendment 19 Decision Notice, FWS AR-2 003206. It appears that the Forest Service transposed the start and end dates of the non-denning period, which begins on March 15 and ends on November 15. FWS AR-3 005957, 005958.

obstruction must be permanent. Id. Although restricted roads are permitted in security core areas, reclamation is the preferred treatment in those areas. Id. All restricted roads are included in the calculation of total motorized access density. FWS AR-2 003481. Roads that are restricted on a seasonal basis and open during the non-denning period are counted in open motorized access density calculations. Id.

Unlike restricted roads, reclaimed roads do not count against total motorized access density. FWS AR-2 003482. Under Amendment 19 a reclaimed road must be treated to preclude future use as a road or trail and must remain under a legal closure order until reclamation treatment is effective. FWS AR-2 003481. Reclamation may be achieved through treatments such as recontouring to original slope, placement of natural debris, or revegetation with shrubs and trees. Id. Among the minimum treatment requirements for a reclaimed road is "removal of culverts or other water passage structures that are aligned with stream channels." Id. Roads that are treated for reclamation but not yet fully reclaimed must be included in the calculation of total motorized access density. FWS AR-2 003482.

When Amendment 19 was adopted in 1995, 16 of the 40 covered subunits met the 19/19/68 standard. 2005 Amendment 19 Revised Biological Opinion, FWS AR-1 000053. By 2005, the number of subunits in compliance with the standard had risen from 16 to 18.

Id. Fifteen subunits met none of the ten-year Amendment 19 standards in 2005. FWS AR-1 at 000067, 000069, 000073, 000081, 000082. The agencies anticipated that the 19/19/68 standard for access management prescribed by Amendment 19 would not be realized for every bear management subunit. "It was understood by the Forest and the [Fish & Wildlife] Service that when [Amendment 19] Forest-wide objectives for grizzly bear security were established, the objectives may be impractical to reach for some subunits." FWS AR-1 000017.

The Forest Service wrote to the Fish & Wildlife Service on May 12, 2000, seeking an extension of the deadline for meeting Amendment 19's five-year access management objectives. FWS AR-1 000927. The Fish & Wildlife Service responded with a letter requesting more information from the Forest Service, including an explanation as to why it failed to meet the five-year objectives. FWS AR-1 000925. In its response dated March 2, 2001, the Forest Service cited a lack of funding as the primary impediment to attainment of Amendment 19's management goals. FWS AR-1 000895. The Forest Service explained that budget cuts and increased costs associated with NEPA compliance, the latter due to heightened "local resistance" to road closures, had depleted the funds available for the analysis and implementation of road management projects, resulting in fewer approved projects than were anticipated in 1995. Id. In short, the agency was underfunded

so compliance with the law was shortchanged.

The dialogue between the agencies culminated in the Forest Service's request for re-initiation of formal consultation on a revised implementation schedule for Amendment 19's access management objectives on December 2, 2004. FWS AR-1 000009. The Fish & Wildlife Service described the Forest Service's proposed action as "revis[ing] the 5- and 10-year implementation schedule proposed in [Amendment 19] to reach the open motorized access, total motorized access and security core objectives in grizzly bear subunits through 2009, or until the revision of the Forest Land and Resource Management Plan is completed, which ever comes first." FWS AR-1 000001. In its Biological Assessment on the revised implementation schedule, the Forest Service included the following elements as part of its proposed action:

- Continue to implement access management in existing decisions <u>with timeframes specified</u> in the decisions
- Continue to implement access management in other existing decisions <u>as funding allows</u>
- Additional restriction of motorized administrative use in 9 subunits

FWS AR-1 000017-000018 (emphasis in original).

The Fish & Wildlife Service acknowledged the reality that the Forest Service's proposed revised implementation schedule would not result in compliance with Amendment 19's 19/19/68 standard in all affected subunits by 2009. "The [Fish &

Wildlife] Service recognizes that by the end of 2009, based on the proposed action, all access changes required by [Amendment 19] will likely not be met. We anticipate that additional formal consultation will be required at that time, in 2010, to address the outstanding access changes required by [Amendment 19]." FWS AR-1 000002. "[A]ccess improvements prior to the end of 2009 are not likely in those subunits that were analyzed in the 1995 [Amendment 19] consultation but currently do not meet [Amendment 19] and do not have decisions authorizing changes." FWS AR-1 000018.[5]

The Fish & Wildlife Service's 2005 Amendment 19 Revised Biological Opinion concluded that the proposed revised implementation schedule would not likely jeopardize the continued existence of grizzly bears. FWS AR-1 000145. Its conclusion is based on a number of considerations, including improvements in security core, open motorized access density and total motorized access density since 1995; expected continued progress toward the 19/19/68 standard through specific improvements to be implemented in scheduled projects; the Forest Service's promise to build no new roads; the fact that re-consultation would likely occur in 2009; the requirement that the Forest Service re-initiate

[5]The implementation schedules for the West Side and Robert-Wedge Post-Fire Projects extend to 2010 and 2011, respectively, and constitute approved exceptions to the 2009 end-date for the revised implementation of Amendment 19. 2005 Revised Amendment 19 Biological Opinion, FWS AR-1 000020.

consultation if forthcoming population estimates were to contradict the assumptions underlying the opinion; the fact that mortality is attributable primarily to actions on private lands, not multiple-use federal lands; and the fact that harm to grizzly bears from ongoing fire salvage activity is expected to occur in the form of displacement, not mortality. 2005 Amendment 19 Revised Biological Opinion, FWS AR-1 000145-000151.

The Forest Service issued a Biological Assessment for aquatic species on November 20, 2003, in which it concluded that the revised implementation schedule for Amendment 19 would have no effect on the bull trout. USFS AR I-1 A-16 at 2. Based on that determination, the Forest Service did not initiate ESA consultation with regard to the bull trout.

B. Amendment 24 to the Forest Plan

In the view of the Forest Service, the Forest Plan "[did] not adequately address winter motorized access" at the time of its adoption. FWS AR-3 005955. The Associate Chief of the Forest Service directed the Regional Forester to clarify the plan with regard to motorized access, but the directive was not followed. Id. Winter motorized use expanded in the years following the adoption of the Forest Plan. As a consequence, in 1999 a lawsuit by the Montana Wilderness Association alleged that the Forest Service had illegally permitted snowmobiling in areas designated by the Forest Plan for non-motorized recreation. Id.

United States Magistrate Judge Leif B. Erickson issued Findings and Recommendations in the case in which he recommended that the Forest Service be required to close all Management Area 2A lands to motorized use. USFS AR III-6 P-3 at 1;[6] Montana Wilderness Ass'n v. Barbouletos, CV 99-142-M-DWM-LBE, Doc. No. 66 (Dec. 18, 2000). The parties then settled the case before this Court could consider or adopt Judge Erickson's recommendation. Under the settlement the parties agreed to an interim management scheme facilitated by temporary closure of certain areas of the Forest. They also agreed to pursue an amendment to the Forest Plan to address winter motorized recreation. FWS AR-3 005955.

The result is Amendment 24 to the Forest Plan, also known as the Winter Motorized Recreation Plan. USFS AR III-6 P-4 at 1. The stated purpose of Amendment 24 is to:

- Clarify management direction regarding over-snow motorized use;
- Meet the requirements of the Settlement Agreement resulting from a lawsuit challenging over-snow motorized use on the Flathead [National Forest]; and
- Determine over-snow recreation management direction related to motorized over-snow use.

USFS AR III-6 P-3 at 4. The Forest Supervisor signed a Record of Decision on November 17, 2006 establishing Amendment 24 by

[6]Citations to the Forest Service Administrative Record are in the following format: USFS AR (disc number) (document number) at (page number).

selecting Alternative 6 with minor modifications. USFS AR III-6 P-4 at 1.

Amendment 24 establishes Forest-wide management direction for snowmobile use but also contains site-specific direction in certain areas. Of the 1,269,500 non-wilderness acres on the Forest, 787,200 acres are open to snowmobiles under Amendment 24.[7] FWS AR-3 005957. Site-specific closures within the area programmatically open to snowmobiles reduce the total number of open acres to 690,900.[8] FWS AR-3 005956. Much of the acreage "open" to snowmobiles is not suitable for snowmobile use due to slope and vegetation. Id. The Forest Service has identified 63,000 acres that host the "most common use" by snowmobilers, and of those 57,200 acres remain open under Amendment 24. FWS AR-3 005956, 005957.

Amendment 24 changes Amendment 19 and Unbound Appendix TT of the Forest Plan by allowing snowmobiling to occur in the spring non-denning period in some areas. Under Amendment 19, snowmobiling was prohibited in the non-denning period on restricted roads and in security core areas, and was prohibited

---

[7]The Flathead National Forest administers 2,345,000 acres, 1,075,500 acres of which is designated wilderness where no snowmobiling is permitted. FWS AR-3 005957.

[8]Areas subject to site-specific closure within the programmatically open acreage include most of the North Fork drainage, Jewel Basin Hiking Area, Coram Experimental Forest, LeBeau Research Natural Area, and proposed wilderness areas, as well as other specific closures based on resource concerns. FWS AR-3 005957.

year-round on reclaimed roads. FWS AR-2 003480-003482; FWS AR-3 006007-006010. Under Amendment 24, snowmobiling is permitted *after* March 31 in the following areas:[9]

- Until May 31 in the Lost Johnny area
- Until May 15 in the Challenge Creek area
- Until April 30 in the Six-mile area
- Until April 15 on groomed routes in Canyon Creek

FWS AR-3 005957. To facilitate this spring snowmobiling, Amendment 24 alters the definitions of reclaimed roads, restricted roads, and security core habitat set forth in Unbound Appendix TT to incorporate the site-specific extensions of snowmobile access into the spring non-denning season. FWS AR-3 006007-006010.

The Forest Service completed its Final Environmental Impact Statement regarding these issues in December of 2003 and transmitted its final Biological Assessment and request for formal ESA consultation to the Fish & Wildlife Service on March 19, 2004. FWS AR-3 006026, 006087. The Biological Assessment contained the Forest Service's determination that the proposed action "may affect" and was "likely to adversely affect" the grizzly bear. FWS AR-3 006026. The Fish & Wildlife Service

---

[9]Amendment 24 alters the administrative dates of the grizzly bear denning period from November 15-March 15 to December 1-March 31, in order to better adhere to scientific data regarding the grizzly bear's denning patterns. FWS AR-3 005957, 005958.

issued a Biological Opinion on March 3, 2006, in which it concluded that Amendment 24 is not likely to jeopardize the continued existence of the grizzly bear. FWS AR-3 005992. To support its conclusion the Service noted that the bear population was stable or increasing despite a rise in snowmobile use on the Forest. The Service explained that Amendment 24 would reduce the amount of denning habitat open to snowmobiles, and that Amendment 24 would reduce the amount of spring snowmobiling allowed in relation to the amount actually occurring under the Forest Plan and Settlement Agreement. FWS AR-3 005992-005993.

The Amendment 24 Biological Opinion contains an incidental take statement in which the Fish & Wildlife Service states its view that Amendment 24 will result in "some low level take of grizzly bears."[10] FWS AR-3 005994. The Service expects take to occur "in the form of harm or harassment to individual female grizzly bears and/or cubs caused by premature den emergence or premature displacement from the den site area, resulting in reduced fitness of females and cubs, ultimately resulting in injury and possibly death." Id. The amount of incidental take expected is expressed using acres of habitat as a surrogate measure. FWS AR-3 005996. The incidental take statement exempts

[10]Section 9 of the ESA prohibits the "taking" of any endangered species. 16 U.S.C. § 1538(a)(1)(B). To "take" under the statute is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

all take caused by spring snowmobiling in the non-denning season, covering 52,000 acres. Id.[11]

The Amendment 24 Biological Opinion contains mandatory reasonable and prudent measures for the Forest Service to implement in order to minimize the impacts of incidental take of grizzlies caused by Amendment 24. FWS AR-3 005597. The Opinion also imposes terms and conditions that the Forest Service is required to follow to be exempt from Section 9 of the ESA regulating take. FWS AR-3 005997-005999. These include mapping and monitoring of snowmobile use and grizzly denning habitat patterns. The Forest Service must also issue annual reports and it must establish special analysis and closure protocols if an occupied den or female grizzly with cubs is detected. Id.

C. The Plaintiffs' Claims

The Amended Complaint has nine separate claims for relief. Count I is a NFMA claim against the Forest Service in which Plaintiffs argue that the Service's failure to timely implement Amendment 19's road density and security core habitat objectives constitutes a violation of the Forest Plan.

Counts II through IX are ESA challenges against Amendment 19 and Amendment 24. The Plaintiffs allege in Count II that the Fish & Wildlife Service's "no jeopardy" finding for the revised

[11]The Service has already exempted any take occurring as a result of snowmobiling during the winter denning season in the incidental take statement for Amendment 19. FWS AR-3 005996.

Amendment 19 is arbitrary and capricious because the agency ignored mortality rates, failed to follow the Grizzly Bear Recovery Plan, employed an incorrect environmental baseline, and assessed the impacts of the action on a Forest-wide basis instead of unit-by-unit. Plaintiffs levy a similar challenge against Amendment 24 in Count IX. Count III alleges that the incidental take statements in the Biological Opinions for revised Amendment 19 and Amendment 24 are invalid because the Fish & Wildlife Service failed to quantify the amount of incidental take expected. Counts IV and VIII are ESA claims against the Forest Service alleging that the Service has failed to fulfill its independent obligation to ensure that grizzly bears will not be jeopardized by Revised Amendment 19 and Amendment 24, respectively. Because Plaintiffs believe the incidental take statements for the amendments are invalid, they accuse the Forest Service in Count V of violating ESA Section 9 by engaging in unauthorized take of grizzly bears through the implementation of revised Amendment 19 and Amendment 24.

Counts VI and VII are ESA claims challenging the Forest Service's determination that the revised implementation schedule for Amendment 19 would have no effect on the bull trout and that formal ESA consultation on bull trout is unnecessary. The Defendants have since filed a motion for voluntary remand on Counts VI and VII to give the Forest Service an opportunity to

re-evaluate the "no effect" determination for bull trout in light of recent Ninth Circuit authority. The Plaintiffs did not respond to the motion. Forest Supervisor Cathy Barbouletos filed an affidavit on March 7, 2008 stating that the Forest Service has revised its determination to "may effect, likely to adversely effect" bull trout and will begin formal ESA consultation with the Fish & Wildlife Service. In light of this action by the Forest Service, the Plaintiffs' ESA claims related to the Service's failure to initiate formal consultation on the bull trout are moot. The Court therefore grants the Defendants' motion for remand of Counts VI and VII (Doc. No. 32), and Counts VI and VII are dismissed as moot.

The parties have filed cross-motions for summary judgment on all other claims.

III. Analysis

A. Standard of Review Applicable to All Claims

1. Standard of APA Review

Agency decisions can only be set aside under the APA if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (quoting 5 U.S.C. §706(2)(A), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977)). Agency action can be set aside "if the agency has relied on factors which Congress has not intended it to consider,

entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Alvarado Community Hospital v. Shalala, 155 F.3d 1115, 1122 (9th Cir. 1998). The court must ask "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment ... [The court] also must determine whether the [agency] articulated a rational connection between the facts found and the choice made. [The] review must not rubber-stamp ... administrative decisions that [the court deems] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108, 1119 (9th Cir. 2004) (internal citations and quotations omitted).

2. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Summary judgment is particularly applicable to cases involving judicial review of final agency action. Occidental Engineering Co. v.

INS, 753 F.2d 766, 770 (9th Cir. 1985) (citation omitted). Summary judgment is appropriate in this case because the issues presented address the legality of the Federal Defendants' actions based on the administrative record and do not require resolution of factual disputes.

B. Endangered Species Act (Counts II-V, VIII, IX)

1. Legal Standard

Section 7(a)(2) of the Endangered Species Act requires federal agencies to consult with the Fish & Wildlife Service or the National Marine Fisheries Services[12] to ensure that any action authorized, funded or carried out by the agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in destruction or adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). The statute and its implementing regulations establish a framework for assessing the impacts of a proposed activity on listed species. 16 U.S.C. § 1536; 50 C.F.R. Part 402.

An agency proposing an action must first determine whether the action "may affect" species listed as endangered or threatened under the ESA. 50 C.F.R. § 402.14(a). If the agency determines that the proposed action may affect listed species,

[12]The ESA consulting agency at issue in this case is the Fish & Wildlife Service.

formal consultation with the Fish & Wildlife Service is required except in certain instances. Id. The relevant exceptions in this case allow an action agency to forego formal consultation

> if, as a result of the preparation of a biological assessment under § 402.12[13] or as a result of informal consultation with the Service under § 402.13,[14] the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

50 C.F.R. § 402.14(b)(1).

Formal consultation requires the Fish & Wildlife Service to prepare a biological opinion in which the Service advises a federal agency as to whether the proposed action, whether alone or cumulatively with other actions, is likely to jeopardize the continued existence of[15] any listed species or is likely to

---

[13]50 C.F.R. § 402.12(a) states that a biological assessment "shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary."

[14]50 C.F.R. § 402.13(a) provides:

> 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.

[15]50 C.F.R. § 402.02 provides that "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood

result in the destruction or adverse modification of any critical habitat. 50 C.F.R. § 402.14(h)(3). If the Fish & Wildlife Service determines that a proposed action is likely to result in jeopardy or loss of critical habitat, the Service must set forth reasonable and prudent alternatives to the action, if any. 16 U.S.C. § 1536(b)(3)(A). If the Service determines that a proposed action will result in incidental take of listed species but that the action and associated incidental take will not violate the ESA Section 7 jeopardy standard, the Service must attach an incidental take statement to the biological opinion. 16 U.S.C. § 1536(b)(4); 50 C.F.R. 402.14(i)(1). The incidental take statement sets forth the predicted impact to listed species, the reasonable and prudent measures that are necessary to minimize take, and the terms and conditions for the implementation of those measures. Id. If the action agency complies with the terms and conditions of the incidental take statement, the expected take is exempted from the take prohibition set forth in ESA Section 9 (16 U.S.C. § 1538(a)(1)(b)). 16 U.S.C. § 1536(o)(2).

While consultation is ongoing, ESA Section 7(d) prohibits action agencies from making an "irreversible or irretrievable" commitment of resources "which has the effect of foreclosing the

---

of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."

formulation or implementation of any reasonable and prudent alternative" to the agency action. 16 U.S.C. § 1536(d). This prohibition is effective upon initiation of consultation and continues until consultation is concluded. Id.; 50 C.F.R. § 402.09.

With regard to actions over which the federal agency remains in control or with which the federal agency has discretionary involvement, re-initiation of formal consultation is required in the following instances:

> (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
>
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
>
> (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
>
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

ESA Section 7's "no jeopardy" standard does not confer upon the action agency the affirmative obligation to promote the recovery of a listed species. As the Ninth Circuit wrote in Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515 (9th Cir. 1998):

> [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.

2. The Fish & Wildlife Service's "No Jeopardy" Determinations

Plaintiffs allege that the Fish & Wildlife Service's "no jeopardy" findings expressed in the Revised Amendment 19 Biological Opinion and the Amendment 24 Biological Opinion are arbitrary and capricious for three reasons. First, Plaintiffs argue that the environmental baselines from which the Service assessed the impacts of the amendments were not established in accordance with law. Second, Plaintiffs contend that the Service's determinations that the amendments will not jeopardize grizzlies are contrary to the evidence in the administrative record. The Plaintiffs' third argument is that the Fish & Wildlife Service failed to ensure that the amendments are

consistent with the Interagency Grizzly Bear Guidelines.

a. Environmental Baseline

In preparing a biological opinion on a proposed action, the Fish & Wildlife Service is required to "evaluate the effects of the action." 50 C.F.R. § 402.14. The term "effects of the action" is defined in the ESA's implementing regulations as:

> the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

50 C.F.R. § 402.02. The Service's Section 7 Consultation Handbook adds:

> The baseline includes State, tribal, local, and private actions already affecting the species or that will occur contemporaneously with the consultation in progress. Unrelated Federal actions affecting the same species or critical habitat that have completed formal or informal consultation are also part of the environmental baseline, as are Federal and other actions within the action area that may benefit listed species or critical habitat.

Final ESA Section 7 Consultation Handbook, March 1998 at 4-22.

i. Revised Amendment 19 Environmental Baseline (Count II)

Plaintiffs argue that the environmental baseline from which the Service assessed the impact of Revised Amendment 19 is flawed

because it fails to account for improvements that would be realized upon full implementation of Amendment 19's management objectives and because the Service failed to include in the baseline approved road closures that have yet to be implemented. In establishing the environmental baselines for the Revised Amendment 19 Biological Opinion, the Fish & Wildlife Service considered the existing conditions as they are expected to be modified by specific projects that have been approved but not fully implemented. FWS AR-1 000044-000083. The Plaintiffs argue that the Fish & Wildlife Service acted arbitrarily and capriciously by defining the environmental baseline using "on-the-ground road density conditions existing at the time the [Biological Opinions] was prepared in 2005[.]" Doc. No. 46 at 12. The Plaintiffs insist that the Service should have instead evaluated the impacts from an environmental baseline that assumes Amendment 19's access management goals would be fully achieved on the original five- and ten-year implementation schedules. When viewed from this perspective, the Plaintiffs argue, it is clear that the revised implementation schedule is harmful to grizzlies because it will prolong unsatisfactory grizzly bear habitat conditions in those subunits that failed to meet the initial five- and ten-year management goals set in 1995.

This dispute is controlled by the Court's recent ruling in Swan View v. Barbouletos, et al., CV 05-64-M-DWM, Doc. No. 115

(March 31, 2008), in which the Court wrote:

> There is no legal support for the Plaintiffs' position. The language of 50 C.F.R. § 402.02 and the Consultation Handbook is clear that in setting the environmental baseline the Service must take into account the future impacts of approved federal "actions" and proposed federal "projects" that have already undergone formal consultation. Amendment 19 is not an action or a project; it is a part of the Forest Plan, which is a programmatic document that does not authorize any specific projects and does not obligate the Forest Service to undertake specific projects. The Plaintiffs do not cite a single statute, case, or regulation directing the Fish & Wildlife Service to consider programmatic planning documents in setting the environmental baseline.

Id. at 42.

Plaintiffs note that the Fish & Wildlife Service included timely compliance with Amendment 19's five- and ten-year objectives when setting the environmental baseline in the Spotted Beetle Project Biological Opinion, among others, and cry foul from the agency's "new approach" of not including timely compliance in the baseline. FWS AR-4 010104-010109; FWS AR-1 000093; Doc. No. 39 at 2. Inclusion of Amendment 19's goals in past biological opinions does not create a binding obligation to include those goals in all future biological opinions. With respect to this issue, the Fish & Wildlife Service is governed by the ESA and its implementing regulations, not by the agency's past choices in setting the environmental baseline.[16]

[16]To the extent Plaintiffs suggest that the Fish & Wildlife Service deviated from its uniform practice when it chose not to include timely compliance with Amendment 19 in the environmental

The Plaintiffs' argument is weakened further because the action under review is a *revised* implementation schedule for Amendment 19. It makes little sense to establish an environmental baseline using programmatic planning that the action agency is in the process of abandoning. In a case like this one the better approach is to discuss the effects of delayed progress toward the road density objectives in the "Effects of the Action," "Cumulative Effects," and "Conclusion" portions of the Biological Opinion, which the Fish & Wildlife Service does at FWS AR-1 000084-000151.

Plaintiffs also complain that the environmental baseline fails to include scheduled road decommissioning that the Forest Service has yet to implement. This argument is contradicted by the administrative record, which shows that the Fish & Wildlife Service acknowledged that scheduled decommissioning remains to be accomplished and discussed in detail the number of miles remaining in the "Environmental Baseline" portion of the Revised Amendment 19 Biological Opinion. FWS AR-1 000026, 000063-000074. By describing scheduled but unimplemented road decommissioning in the discussion of the environmental baseline, the agency fully complied with 50 C.F.R. § 402.02 and the Consultation Handbook.

---

baseline for Revised Amendment 19, the suggestion is wrong. For example in the 2004 Biological Opinions for the Robert-Wedge and West Side Projects, the Fish & Wildlife Service did not include compliance with Amendment 19's programmatic management goals in the environmental baselines. FWS AR-2 002396, 002553.

Nothing is cited in the administrative record in support of Plaintiffs' claim that the Forest Service has, through Revised Amendment 19, delayed scheduled decommissioning "indefinitely." Doc. No. 46 at 13. To the contrary, the Revised Amendment 19 Biological Opinion is clear that the particular projects with which Plaintiffs take issue did not at any point have specified timetables for completion. FWS AR-1 000070. The Biological Opinion acknowledges that those projects were expected to be completed in compliance with Amendment 19's original five- and ten-year objectives, and while the time for completion is extended to 2009 under Revised Amendment 19, such an extension is not "indefinite."

The Plaintiffs' argument that the environmental baseline should have included compliance with all of Amendment 19's management objectives fails. Summary judgment in favor of the Defendants is granted on this issue.

ii. Amendment 24 Environmental Baseline (Counts VIII and IX)

The Defendants concede that in establishing the environmental baseline for the Amendment 24 Biological Opinion, the Fish & Wildlife Service included existing spring snowmobiling occurring throughout the Forest. FWS AR-3 005977; Doc. No. 30 at 9. It was unlawful for the Fish & Wildlife Service to consider the existing situation, Plaintiffs argue, because the Forest Plan in effect prior to Amendment 24 did not permit snowmobiling after

the denning season. The Defendants dispute the Plaintiffs' characterization of the Forest Plan, saying that the Plan, while perhaps ambiguous, did not state a clear prohibition on spring snowmobiling. The record supports the Plaintiffs' position.

The 1995 Decision Notice for Amendment 19 states, "The open motorized access density and security core area objectives apply only during the non-denning period, which is generally from November 15 to March 15. Thus, snowmobiling will not be affected significantly, except in late spring." FWS AR-2 003206. The Defendants point to several citations to the record to show that the pre-Amendment 24 Forest Plan direction did not include prohibitions on spring snowmobiling. In a supplemental document filed with the Defendants' Opening Brief, a researcher named Rick Mace states that "The South Fork Study [from which the 19/19/68 standard was derived] did not study the relationships between grizzly bears and snowmobiling in a direct fashion." Doc. No. 30-2 at 3. From this statement the Defendants argue that Amendment 19 dealt only with wheeled motorized access and not with snowmobiles.

In support of their argument that "the [Forest Service] has never interpreted [Amendment 19] to prohibit snowmobiling," Doc. No. 41 at 8, Defendants refer to the following statements from Amendment 24's Final Environmental Impact Statement: USFS AR III-6 P-2 at 3-35 ("Although all alternatives have potential for

disturbance to individuals and habitats, it must be kept in mind that for many years snowmobiling was allowed on the Flathead National Forest to a spatial and temporal extent equal to or greater than that described in Alternative 1."); USFS AR III-6 P-2 at 3-40 ("This use after April 1 should not be considered new use, rather a restriction on use that has occurred previously."). These statements offer no support for the Defendants' position. They contain general references to past use, but it is not clear that either refers to management direction immediately preceding the enactment of Amendment 24. Furthermore, there is nothing to suggest that the statements refer to past *legal* use as opposed to illicit use resulting from the failure by the Forest Service to enforce existing restrictions.

The Defendants refer to six Snowmobile Access Information Maps issued by the Forest at various times from 1990 to 2002. The maps show that the Forest Service represented to the public that certain areas of the Forest were open to snowmobile use into the spring non-denning season. USFS AR III-7 R-19, R-23, R-24, R-25, R-26, R-27. These maps provide the only meaningful support for the inference that the pre-Amendment 24 Forest Plan allowed spring snowmobiling.

This evidence must nevertheless be weighed against the Plaintiffs' citations to the record. Those citations strongly suggest that the Forest Plan was understood to prohibit spring

snowmobiling prior to Amendment 24. In addition to the Amendment 19 Decision Notice, Plaintiffs point to the Forest Service's 2003 draft Biological Assessment for Amendment 24 provided to the Fish & Wildlife Service, in which the Forest Service stated:

> Under the proposed action, once bears emerge from dens there would be a much greater temporal and spatial overlap where grizzly bears and snowmobiles could occur than under current direction. Current Forest Plan direction as described in Alternative 1 in the [Draft Environmental Impact Statement] would end snowmobiling on March 15 thereby avoiding any temporal or spatial overlap with grizzly bears as they emerge from dens.

FWS AR-3 006154.

The Forest Service apparently then reconsidered its position, as the Final Biological Assessment submitted to the Fish & Wildlife Service was amended to read, "Under pre-settlement and current interim direction snowmobiles are allowed to travel throughout open areas on the forest as long as snow permits." FWS AR-3 006104. This change allowed the Forest Service to conclude—contrary to its earlier view—that "there would be a reduced temporal and spatial overlap where grizzly bears and snowmobiles could occur than under pre-settlement and current interim direction." Id. This "flip-flop" reasoning is not allowed.

Other citations show that the Forest Service interpreted the Forest Plan to prohibit spring snowmobiling. In describing the "No action" alternative in the Amendment 24 Final Environmental Impact Statement, the Service stated:

> Programmatic direction for season of use would remain as described in Amendment 19 to the Forest Plan. Within the portion of the Forest located in the Northern Continental Divide Ecosystem (NCDE) grizzly bear recovery area, snowmobiling would generally be allowed from November 15 to March 15, which is considered the denning season for the grizzly bear.

USFS AR III-6 P-2 at 2-10.

The Final Environmental Impact Statement also addressed a public comment complaining that the "No action" alternative provided closure dates different from those listed on Forest Service access maps. The comment reads: "Your 'No Action Alternative' is not legal under the NEPA process. The 98/99 Snowmobile Trail Map published by the FNF indicates no closure earlier than April 15 but your 'No Action Alternative' has indicated March 15 as the closure date." The Forest Service responded by stating, "The Forest Plan clearly states that motorized use in much of the NCDE must halt at the end of the denning period which it defines as March 15. The Forest has not enforced this date in the past." USFS AR III-6 P-2 at 4-24. This response by the Forest Service undermines the Defendants' reliance on snowmobile access maps as evidence of the pre-Amendment 24 management direction with regard to snowmobile closures.

The foregoing citations indicate that the Forest Service's interpretation of the Forest Plan generally considered snowmobile use to be prohibited after March 15. Defendants argue that while

the Forest Service may have offered contradictory interpretations, the Fish & Wildlife Service "never characterizes the traditional snowmobile use after March 15 as 'illegal' or contrary to the Forest Plan." Doc. No. 30 at 9. The administrative record tells a different story.

At least four times in the Amendment 24 Biological Opinion, the Fish & Wildlife Service acknowledges that the Forest Service has not enforced existing seasonal restrictions on snowmobile use. FWS AR-3 005997 ("the Forest Service has not enforced 'seasonal restrictions' of snowmobile use ... after March 15"); 005986 (same); 005990 (same); 005993 ("this population has been exposed to extended snowmobile seasons ... despite the reported requirements ... of the Forest Plan and the Settlement Agreement for an end date to snowmobiling of March 15"). It is difficult to see how the Defendants can argue that the Fish & Wildlife Service never characterized use after March 15 as contrary to the Forest Plan when the Service states in the Amendment 24 Biological Opinion, "The Forest, under current interim direction and as well as Forest Plan direction, allows snowmobile use within the NCDE recovery zone portion of the Forest from November 15 to March 15, which is considered the administrative dates for grizzly bear denning season." FWS AR-3 005976. The unmistakable implication is that the Plan does not allow snowmobile or other motorized use after March 15. This proposition is tantamount to

a statement that post-March 15 use is contrary to the Forest Plan.

The Defendants attempt to save the Amendment 24 Biological Opinion by conceding that the Forest Plan could be interpreted to prohibit spring snowmobiling, and explaining that the Forest Service enacted Amendment 24 to clarify the ambiguity. Leaving aside the question of whether the Forest Plan is ambiguous, the Defendants fail to explain why any ambiguity should be resolved to the detriment of grizzly bears in setting the environmental baseline. The ESA requires that protected species be given "the benefit of the doubt" in management decisions. Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987). By interpreting the Forest Plan to allow spring snowmobiling, the Fish & Wildlife Service enabled itself to assess the impacts of Amendment 24 against the current widespread illicit spring snowmobile use on the Forest. With this degraded landscape as a backdrop, the Service then concluded that Amendment 24 is an improvement over the environmental baseline. FWS AR-3 005983, 005984, 005985, 005989, 005990, 005993. To analogize, if the posted speed limit is sixty miles per hour, but the state has always allowed drivers to travel at seventy miles per hour, the state cannot raise the speed limit to sixty-five miles per hour and claim that the law now makes the roads more safe.

Had the Service resolved the alleged ambiguity by including

the March 15 closure date in the environmental baseline, it would have been forced to acknowledge that the 52,000 acres of Forest land that the proposed action would leave open to snowmobiling in the spring represents an increase in snowmobile use over the environmental baseline. Instead of giving the grizzly bear the benefit of the doubt, the Fish & Wildlife Service went against the weight of the evidence in the record to interpret the Forest Plan in such a way as to facilitate a conclusion that allows the agencies to claim that they have improved the situation for the grizzly by authorizing more spring snowmobiling than was authorized under the previous management direction.

The pre-Amendment 24 Forest Plan prohibited spring snowmobiling after March 15. To the extent that there can be any uncertainty about that management direction, it should have been resolved in favor of the grizzly bear in setting the environmental baseline. The Fish & Wildlife Service's use of existing degraded habitat conditions brought on by the Forest Service's refusal to enforce its own rules is contrary to the law. This failure to follow ESA statutory and regulatory procedure requires that the Fish & Wildlife Service's "no jeopardy" finding be declared unlawful and set aside.

Summary judgment is granted in favor of the Plaintiffs and against the Defendants on Counts VIII and IX. The judgment sets aside the Amendment 24 Biological Opinion because it fails to

comply with the Endangered Species Act in setting the environmental baseline. The implementation of Amendment 24, including continuing snowmobile access in the Doris-Lost Johnny area, is enjoined until the Fish & Wildlife Service issues a new Biological Opinion that complies with the ESA.

With the exception of the claims relating to the Amendment 24 incidental take statement, the Plaintiffs' remaining ESA Section 7 claims against Amendment 24 are rendered moot by the invalidity of the Amendment 24 Biological Opinion. Accordingly, the ESA Section 7 claims other than the incidental take statement claims are dismissed as moot and the arguments associated with those claims are not addressed further.

b. The Service's "No Jeopardy" Conclusion for Amendment 19's Revised Implementation Schedule (Counts II and IV)

The Plaintiffs take issue with the Fish & Wildlife Service's "no jeopardy" determination for Revised Amendment 19, claiming it is contrary to the evidence before the agency. In support of their position, Plaintiffs list the following evidence from the Revised Amendment 19 Biological Opinion, which they say undermines the Service's "no jeopardy" conclusion:

- The Biological Opinion acknowledges that roads continue to be harmful to grizzlies and that the 19/19/68 standard remains an accurate measure of the point at which harm begins to occur. FWS AR-1 000018, 000084-000092.

- Of the 40 non-wilderness subunits, only 21 are expected to meet the 19/19/68 standard by 2009, and 11 subunits could continue to feature conditions adverse to grizzly bears after 2009. FWS AR-1 000129.
- Human-caused grizzly bear mortalities reached 31 in 2004, a 30-year high. Annual female grizzly mortality and total mortality exceeded Recovery Plan criteria from 1997-2003 and from 2000-2003, respectively. FWS AR-1 000037, 000039, 000137, 000148.
- Human development is increasing on private land located near the Forest, where mortality rates are higher than on public land. FWS AR-1 000132, 000142-000143.
- Since 2000, natural conditions, including drought, wildfires and huckleberry crop failure have contributed to mortality. FWS AR-1 000092, 000137.
- Ongoing salvage logging will have some displacement effect on grizzly bears. FWS AR-1 000113,000125-000126, 000130.

The Defendants argue that the Fish & Wildlife Service relied upon the best available science in reaching its "no jeopardy" conclusion, including the following:

> (1) [The Forest Service]'s significant progress in achieving A19 standards has improved conditions for bears since A19 was adopted (FWS AR 000054-000055); (2) on-the-ground conditions for bears will improve further over current conditions pursuant to the proposed action (FWS AR 000116, 000119); (3) in addition to the BMU Subunits that meet all three A19 parameters, many BMU Subunits meet or will achieve one or more of the access

> management parameters as a result of the proposed action (FWS AR 000120, 000129, 000142); (4) mortalities can primarily be attributed to berry crop failures and to human activity on roaded-rural private lands, not multiple-use [Forest Service] lands (FWS AR 000091, 000131-000132, 000137, 000148); and (5) the bear population is stable or perhaps increasing (FWS AR 000134-000135, 000139, 000142).

Doc. No. 30 at 12.

On each of the issues raised by the Plaintiffs, there exists sufficient support for the Service's conclusion to place the matter within the agency's discretion and defeat the Plaintiffs' ESA claim. The mere fact that an agency discusses the harmful effects of roads does not render arbitrary and capricious the agency's decision to extend road conditions that are less than ideal. In fact, the Fish & Wildlife Service would leave itself open to an ESA claim if it failed to discus the impacts of road density on grizzlies. While many subunits still do not comply with the 19/19/68 standard, the Service's statement that habitat conditions have significantly improved since 1995 is accurate. The parties disagree over how to interpret mortality caused by private development and natural conditions, but there is nothing arbitrary or capricious in the Service's conclusion that those factors lessen the extent to which the mortality level can be attributed to the presence of roads on multiple-use Forest lands.

The Fish & Wildlife Service states that "it is reasonable to assume that the [Northern Continental Divide Ecosystem] grizzly bear population can sustain the levels of adverse impacts of

roads over the extended timeframes, as proposed." FWS AR-1 000147. Plaintiffs argue that this assumption is wrong in light of the Fish & Wildlife Service's statement that "[i]f [Northern Continental Divide Ecosystem] bear population levels are near Recovery Plan minimum estimates, then recent human-caused mortality levels are likely not sustainable." FWS AR-1 000150. The Biological Opinion makes clear, however, that the Fish & Wildlife Service does not believe that the Recovery Plan minimum estimate reflects reality.[17] While the Service states that the exact size of the population is unknown, FWS AR-1 000037, 000150, the most recent available information led the Service to conclude that the population is stable or increasing. FWS AR-1 000031-000043, 000134-000135, 000139, 000142, 000150. The Plaintiffs might dispute this conclusion, but the Court is not in a position to invalidate agency conclusions having plausible support in the record, as this one does. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989) (calling for deference to

---

[17]The Revised Amendment 19 Biological Opinion states:

> Although the Service is concerned with the recent number of grizzly bear mortalities in the [Northern Continental Divide Ecosystem] recovery zone, the mortality limits in the recovery plan are clearly conservative. Currently, the mathematics used to calculate sustainable mortality limits depend on field counts of females and cubs. There is no established protocol for this count, and counting effort varies considerably among years. The [Northern Continental Divide Ecosystem] is heavily forested and visual sightings of females are not easily obtained.

FWS AR-1 000041.

agency expertise where resolution of a dispute "involves primarily issues of fact").

The Fish & Wildlife Service has articulated a rational basis for its conclusion and the conclusion has adequate support in the administrative record. Summary judgment in favor of the Defendants is granted on this issue.

c. Compliance with the Interagency Grizzly Bear Guidelines (Count II)

Plaintiffs devote three sentences of their Opening Brief to their argument that the Fish & Wildlife Service failed to follow the requirements of the Interagency Grizzly Bear Guidelines in rendering its Biological Opinion on the revised implementation schedule for Amendment 19.[18] They focus on the Forest Service's statement that "increased social animosity" to road closures and the need for access to private property and recreation areas contributed to the failure to meet Amendment 19's original objectives. FWS AR-1 000217. Plaintiffs argue that the Forest Service's statement demonstrates that the challenged action fails to favor the needs of the grizzly bear when grizzly habitat and other land use values compete as required by the Guidelines. 51 Fed. Reg. 42865. The Guidelines are not binding on the Fish &

[18]As is noted above, the Guidelines and accompanying Management Situation designations are incorporated into the Forest Plan through Amendment 9 and are binding upon the Forest Service. Flathead National Forest Plan (Aug. 2001 version), at Amendments, p. 1 and Appendix OO.

Wildlife Service under the ESA.[19]

The Plaintiffs attempt to bring the Fish & Wildlife Service within the purview of the Guidelines by quoting this Court's statement in Alliance for the Wild Rockies v. United States Fish & Wildlife Service, CV 04-216-M-DWM (D. Mont. Aug. 29, 2006) (Doc. No. 59 at 15-16), that "[t]he 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." Plaintiffs do not explain why such a situation exists here, but the argument fails because even if it is assumed that the quoted statement in Alliance applies.

In Swan View Coalition v. Barbouletos, CV 03-112-M-DWM (D. Mont. Dec. 12, 2006) (Doc. No. 60), a case dealing with the Flathead National Forest Plan, this Court discussed in detail the Guidelines' requirement that management decisions favor the bear when land uses compete in Management Situation 1 areas. Id. at 47-56. The Court concluded that the directive that the needs of

[19]The Plaintiffs' claim against the Forest Service for failure to adhere to the Guidelines, apparently subsumed in Count IV of the Amended Complaint, is cast as an ESA claim. The ESA imposes no duty on the Forest Service to follow the Guidelines. Because the Guidelines are a part of the Forest Plan, NFMA imposes a duty on the Forest Service to follow the Guidelines, but Plaintiffs do not at any point raise compliance with the Guidelines as part of their Count I NFMA claim. The Court grants summary judgment in favor of the Defendants on Count IV to the extent that Count alleges that the Forest Service violated the ESA by failing to adhere to the Guidelines.

the bear prevail is not absolute and there is no requirement that those needs be promoted to the exclusion of all other uses. Id. at 52. The Court quoted the Forest Plan's provision that "[i]n Situations 1 and 2, when recreational use is determined to exceed grizzly tolerance levels as determined through biological analysis, some means of restriction or reduction of human use should be implemented." Id. (citing the Flathead National Forest Plan (Aug. 2001 version) at II-42). The Court found that "for purposes of the Forest Plan, the needs of the grizzly bear do not 'compete' with other uses, and therefore gain preference over other uses, until those uses manifest a demonstrable negative effect on grizzlies or their habitat." Id. at 52-53.

After noting that both the Forest Service and the Fish and Wildlife Service had determined that the negative effects on grizzlies of the challenged project would be minimal, and that the project would in fact improve existing conditions, the Court concluded as follows with regard to the action's compliance with the Guidelines:

> It is clear from the record in this case that, from a travel management standpoint, the Forest Service's top priority in approving the Moose Project was to find a way around the requirement that it give top priority to the needs of the grizzly bear. This becomes precariously close to political management of land use. But, the Plan does not require that the needs of the grizzly be elevated to the exclusion of all other considerations, and the Forest Service's actions, while objectionable, and perhaps disagreeable, are not so egregious that the decision must be set aside. This case presents a difficult question of

> Forest Plan interpretation: How much conflict must exist between two land uses before they can be said to "compete?" The grizzly bear is most certainly in greater danger of extinction than the snowmobiler or the huckleberry picker. If the management guidance in the Forest Plan is limited to a single proposition that decisions must favor the needs of the grizzly where uses compete, then the Forest Service has run afoul of the Plan. But the Forest Plan does not provide such a singular directive. It allows for consideration of multiple use even under these circumstances.
>
> The APA requires judicial deference and the burden is on the Plaintiffs to show that the agencies acted arbitrarily and capriciously or otherwise not in accordance with law. Under this Forest Plan, that means the Plaintiffs must show that the Forest Service chose against the grizzly's recovery when the evidence before it showed that the action would have a demonstrable negative impact on that recovery. The Plaintiffs have failed to make that showing here.

Id. at 54-55.

Plaintiffs argue in their Reply that the fact that the Fish & Wildlife Service issued an incidental take statement shows that the revised implementation schedule will have a "demonstrable negative impact" on the recovery of the grizzly bear. This argument lacks merit, as the Service also issued an incidental take statement for the Moose Project that was upheld in the Swan View case quoted above. CV 03-112-M-DWM, Doc. No. 60 at 10. The Plaintiffs have failed to establish that the evidence available to the agencies showed that the action would have a demonstrable negative effect on the grizzly. To the contrary, Revised Amendment 19 will promote the recovery of the grizzly, albeit at a slower pace than if the original implementation objectives had

been met. The Fish & Wildlife Service did not act in contravention of the Guidelines by issuing "no jeopardy" findings for the revised implementation schedule. Revised Amendment 19 is consistent with the Guidelines, and it was not arbitrary and capricious for the Fish & Wildlife Service to conclude that it will not jeopardize the continued existence of the species. Summary judgment is granted in favor of the Defendants on the validity of the Fish & Wildlife Service's "no jeopardy" determination.[20,21]

3. Failure to Quantify Incidental Take Statements (Counts II, III, V, and IX)

An incidental take statement exempts an action agency from ESA Section 9 liability for the level of take expected to occur as the result of an approved activity if the agency complies with the incidental take statement's terms and conditions. 16 U.S.C.

---

[20]Plaintiffs' argument in Count IV that the Forest Service violated its independent duty under the ESA to ensure that its actions do not jeopardize grizzly bears is predicated on the invalidity of the Fish & Wildlife Service's jeopardy determination. Because the Fish & Wildlife's determination is not arbitrary and capricious, the Forest Service has fulfilled its duty to prevent jeopardy and the Court grants summary judgment in favor of the Defendants on Count IV as it relates to Revised Amendment 19.

[21]To the extent that the Plaintiffs in Count V of their Amended Complaint allege that the Forest Service is engaged in unlawful take of grizzly bears because of the invalidity of the Revised Amendment 19 and Amendment 24 Biological Opinions, those claims fail. Plaintiffs have not shown that the Revised Amendment 19 Biological Opinion suffers from any legal defect. With regard to Amendment 24, the Plaintiffs have failed to show that any take has in fact occurred as a result of the amendment. Take will not occur on a prospective basis because the Biological Opinion is set aside and further spring snowmobiling is enjoined. Accordingly, the Court grants summary judgment in favor of the Defendants on Count V.

§ 1536(o)(2); Arizona Cattle Growers' Association v. United States Fish & Wildlife Service, 273 F.3d 1229, 1239 (9th Cir. 2001) ("ACGA"). The incidental take statement must include a "trigger" expressed in terms of the maximum level of acceptable take. When that trigger is reached, the incidental take statement's "safe harbor" function is invalidated and the parties must re-initiate consultation before the action agency can continue to be exempt from ESA Section 9 liability. ACGA, 273 F.3d at 1249. Congress has declared a preference that the anticipated level of take and the trigger be expressed as a specific number, but recognized that in some instances establishment of a numerical figure would be impossible. H.R. Rep. No. 97-567, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2827. Where a numerical value cannot practically be obtained, the Fish & Wildlife Service may express take using ecological conditions as a surrogate, provided that there is a scientifically supported link between the ecological surrogate and the take of the protected species *and* the Service has given an adequate explanation as to why numerical expression of take is impractical. ACGA, 273 F.3d 1250 (citing Final ESA Section 7 Consultation Handbook, March 1998 at 4-47 to 4-48); Oregon Natural Resources Council v. Allen, 476 F.3d 1031, 1037-1038 (9th Cir. 2007) ("ONRC").

a. Revised Amendment 19 (Counts II, III and V)

The incidental take statement in the 2005 Revised Amendment 19 Biological Opinion sets forth the Fish & Wildlife's Service's conclusion that the revised implementation will result in take of grizzly bears in the form of habituation and displacement caused by adverse habitat modification. FWS AR-1 000152. The Service does not expect the displacement effects to result in mortality of adult or subadult grizzlies, but states that mortality of cubs is possible due to displacement. Id. It is unclear whether the Service expects the habituation effects to result in mortality; the Service implies that human-caused mortality is a potential result of habituation, but states that habituation largely occurs on private lands and not in the Forest. Id. The Revised Amendment 19 Biological Opinion states that the amount of take anticipated is unquantifiable, and therefore the Service must rely upon surrogate measures of road density and security core habitat to "limit, measure and monitor the displacement impacts and resulting level of incidental take." FWS AR-1 000152-000153. The Biological Opinion states that harm to grizzlies begins to occur when road density and core habitat fall under the 19/19/68 standard.[22] Id. at 00153-00154.

The terms and conditions imposed in the Biological Opinions

[22]The 1995 Amendment 19 Biological Opinion relied upon several biological studies in establishing the 19/19/68 standards, most notably the South Fork Study (Mace and Manley 1993) at FWS AR-2 003530. 1995 Amendment 19 Biological Opinion Amended Incident Take Statement, FWS AR-2 003236-003237.

reflect this surrogate approach by requiring the Forest Service to erect physical barriers and impose administrative closures on certain roads within designated time frames; forbidding any increases in road density or reductions in core habitat without additional consultation; and imposing notification and reporting requirements upon the Forest Service, including the requirement that the Service notify the Grizzly Bear Recovery Office within 24 hours of a human-caused grizzly mortality on the Forest. FWS AR-1 000155-000157. The Forest Service must regularly report its progress toward achieving the road management objectives. Id.

The Plaintiffs argue that the Fish & Wildlife Service's use of road density and security core measurements as a surrogate for a quantified statement of anticipated take violates the ESA. According to the Plaintiffs, the Service has failed to comply with the law for the following reasons: (1) the Service has made no effort to quantify the anticipated take and has failed to explain why quantification is impossible; (2) road densities are too imprecise as a surrogate because they merely set the threshold for when take begins, but do not measure the extent of take that will occur under a particular road density; and (3) the surrogate measures provide no trigger to alert the Forest Service as to when the acceptable level of take has been exceeded.

These arguments were addressed in the opinion in Swan View, CV 05-64-M-DWM, Doc. No. 115. Road density measurements are an

adequate ecological surrogate for expressing take of grizzly bears on the Flathead National Forest. Id. at 33-39. As it did in its 1995 incidental take statement for Amendment 19, FWS AR-1 003236, the Fish & Wildlife Service has given a sufficient explanation in the 2005 Revised Amendment 19 Biological Opinion as to why incidental take cannot be quantified:

> The effects of displacement of grizzly bears from key habitats are difficult to quantify and may be measurable only as long-term effects on the species' habitat and population levels. We believe that incidental take will occur from the effects of high road densities persisting in some areas of the Forest. However, grizzly bears are individualistic and display a wide variation in their tolerance of and response to human activity and road density. The best scientific and commercial data available at this time are not sufficient to enable the Service to determine a specific amount of incidental take of grizzly bears due to displacement. The reasons for this difficulty are in part based on the lack of ongoing, intensive grizzly bear research. We lack information related to the following:
>
> - the number of grizzly bears living on the Forest;
> - the number of adult female grizzle bears whose home ranges encompass all or portions of any particular subunit or groups of subunits with high road densities;
> - the individual response of adult females whose home range encompasses areas with high road densities;
> - demographic parameters, such as survivorship and fecundity;
> - detection of loss of cubs prior to or after parturition.

FWS AR-1 000152-000153.

The Court addressed the scientific adequacy of road density as an ecological surrogate in its earlier Swan View opinion:

> The Plaintiffs' argument misunderstands the requirement that a surrogate be linked to the take of a species. They are incorrect in stating that the sub-19/19/68 standards have no scientific basis or relationship to the take of grizzlies. To the contrary, any road density and core habitat standard, regardless of the percentages used, is a measure of ecological conditions that are directly linked to grizzly bear habitat displacement. It is irrelevant whether the standard is 19/19/68 or 27/30/65, as the West Side Biological Opinion provides for the Wounded Buck Clayton Subunit. In either case, the standard measures ecological conditions that are linked to take. The 19/19/68 standard is the scientifically determined threshold beyond which road density and absence of core habitat will result in under-use of habitat by adult female grizzlies with cubs....
>
> Rather than having no basis in science, the sub-19/19/68 standards set forth in the incidental take statements for the Robert-Wedge and West Side Projects allow for the scientific conclusion that under-use of habitat will result in those subunits that are subject to site-specific amendments.

CV 05-64-M-DWM, Doc. No. 115 at 35-36 (citations omitted).

The Plaintiffs argue that the surrogate is nonetheless unacceptable because although it is able to indicate when road density will begin to result in harm to grizzlies from under-use of habitat, it is unable to indicate with precision the incremental increase in harm as road density increases. As an example, Plaintiffs argue that the road density surrogate fails to distinguish between a subunit with 31 percent core and a subunit with 61 percent core, since both are under the Amendment 19 standard of 68 percent core and are therefore labeled equally

harmful to grizzlies. Doc. No. 46 at 6-7. This argument is predicated on a faulty assumption, i.e., the road density as a surrogate cannot distinguish between differing core habitat or density values. The scientists in the employ of the Fish & Wildlife Service are no doubt able to recognize that heavily roaded areas are a greater danger to grizzlies than areas with low road density, and to take such differences into account when assessing the amount of incidental take expected in a given area. The greater accuracy demanded by the Plaintiffs could only be achieved by furnishing a numerical estimate of grizzly bears expected to be harmed or killed, which the Fish & Wildlife Service has convincingly stated it cannot do. The Plaintiffs' insistence on greater exactitude is in fact an assault on the very concept of an ecological surrogate, and for that reason the argument fails.

The Plaintiffs' argument that the incidental take statement for Revised Amendment 19 lacks a clear trigger for re-initiation of consultation is also foreclosed by the Court's reasoning in Swan View:

> Important distinctions undermine the Plaintiffs' efforts to liken the incidental take statements at issue here to the one that was rejected in ONRC. The incidental take statements contain adequate triggers in the form of deadlines for attainment of the road density and core habitat standards established for each subunit.... Implementation deadlines were used as a trigger in Amendment 19's five- and ten-year implementation schedules. As described above, Amendment 19's deadlines were effective in triggering

> re-initiation of consultation once Forest Service activities exceeded the approved level of take. In ONRC, there was no conceivable circumstance under which the project would exceed the approved level of take. Here, the Forest Service need only fail to complete the prescribed road decommissioning by the specified dates to exceed approved take and trigger re-initiation. Moreover, unlike the project in ONRC, the projects at issue here will result in improved habitat conditions for grizzly bears over the current situation. The incidental take statements in this case also contain terms and conditions that limit salvage activities in security core habitat, prohibit salvage activities during the spring post-denning period, and require the Forest Service to issue regular reports on harvest activity and progress toward the road management objectives. No such detailed terms and conditions accompanied the incidental take statement in ONRC.

CV 05-64-M-DWM, Doc. No. 115 at 37-38. With narrow exceptions, the implementation deadline for Revised Amendment 19 is the end of 2009. FWS AR-1 000001. The deadline is a clear trigger for re-initiation.[23] If one bear is killed or injured, the trigger is pulled. Summary judgment is granted in favor of the Defendants on the question of the validity of the incidental take statement for Revised Amendment 19.

b. Amendment 24 (Counts III, V and IX)

---

[23]Irrespective of the trigger, the agencies remain under an independent statutory duty to re-initiate consultation if any of the events listed in 50 C.F.R. § 402.16 occur, including if "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. 402.16(b). Given the Fish & Wildlife Service's expectation that the displacement effects of the revised implementation schedule will not result in a human-caused adult or subadult grizzly bear mortality, any such human-caused mortality due to displacement should be regarded as evidence that Amendment 19's revised implementation schedule is affecting grizzly bears to an extent not previously considered.

The Amendment 24 Biological Opinion states the Fish & Wildlife Service's expectation that snowmobile use will result in "some low level of incidental take" in the form of "harm or harassment to individual female grizzly bears and/or cubs caused by premature den emergence, or premature displacement from the den site area, resulting in reduced fitness of females and cubs, ultimately resulting in injury and possibly death." FWS AR-3 005994. The incidental take statement estimates the amount of take as all take of "female grizzly bears and/or their cubs during the spring outside of their dens...on the approximately 52,000 total acres open to snowmobiling after April 1 - including 6,700 acres of potential denning habitat." FWS AR-3 at 005996.

The Plaintiffs argue that the use of acres of habitat as a surrogate for expression of anticipated take runs afoul of ONRC. Defendants counter that ONRC does not require this Court to invalidate the incidental take statement because the court in ONRC rejected the acreage surrogate due the fact that it did not allow for the agency to perform the monitoring required by the ESA. 476 F.3d at 1040-1041. So long as the limitation on take is sufficiently clear to allow for monitoring of incidental take, Defendants argue, acreage of habitat is a permissible ecological surrogate. The Defendants say that such monitoring is mandatory under the terms and conditions of the Amendment 24 Biological Opinion, meaning the use of acreage as a surrogate is acceptable.

FWS AR-3 005997-005999.

The incidental take statement for Amendment 24 survives the Plaintiffs' challenge, but not for the reasons the Defendants rely upon. The fact that the terms and conditions require monitoring distinguishes this case from ONRC, but monitoring alone is not enough to save the acreage surrogate used here from the fate suffered by the surrogate in ONRC. Even with a robust monitoring regime, habitat acreage is an unacceptable surrogate in this case because unlike the 19/19/68 road density standard, the Defendants have not cited any supporting study or other evidence of a scientific link between acres of habitat and take of the species.

The important difference between this case and ONRC lies in the "Reinitiation Notice" included in the Amendment 24 Biological Opinion, which states, "If there is any human-caused injury or mortality attributable to snowmobiling and/or its direct and indirect activities, reinitiation of consultation would be required." FWS AR-3 006000. This notice has the practical effect of re-stating the exempted level of take in numerical terms, the level being injury or mortality to a single bear. While not included in the "Amount or Extent of Incidental Take" section of the Biological Opinion, the reinitiation notice, when combined with the monitoring requirements, means the Fish & Wildlife Service has complied with ESA Section 7 by providing a

numerical statement of authorized take, establishing the necessary monitoring regime, and setting a clear trigger for reinitiation.

Summary judgment is granted in favor of the Defendants on the validity of the incidental take statement for Amendment 24.[24]

C. National Forest Management Act (Count I)

1. Legal Standard

Forest planning and management under NFMA occurs at the forest level and at the project level. 16 U.S.C. § 1604; Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 729-30 (1998). At the forest level, the Service develops and periodically amends a forest plan, which is a broad programmatic planning document for an entire national forest. Id. The development of a forest plan takes place within a public review process conducted in accordance with NEPA. 16 U.S.C. § 1604(g)(1). A forest plan establishes the planning goals and objectives for an individual forest and sets the specific standards and guidelines for the management of forest resources, ensuring consideration of both economical and environmental factors. 16 U.S.C. § 1604(g)(1)-

[24]Plaintiffs claim in Count V of the Amended Complaint that the Forest Service is in violation of ESA Section 9 because its actions in managing roads on the Forest are resulting in unauthorized take of grizzly bears. This argument is predicated on a the Plaintiffs' position that the incidental take statements for the Revised Amendment 19 and Amendment 24 Biological Opinions are invalid. Because the incidental take statements comply with the law, Plaintiffs' argument fails and the Court grants summary judgment in favor of the Defendants on Count V to the extent the Plaintiffs' claims are predicated on the rejection of the incidental take statements.

(3).

Once a forest plan is implemented, it can be updated through revision or amendment. NFMA requires that each forest revise its forest plan periodically. 16 U.S.C. § 1604(f)(5). This periodic revision gives both the forest and the public a full opportunity to review the plan's adequacy, through the preparation of an environmental impact statement, a 90-day public comment period, and other detailed procedures. In the interval between required plan revisions, the Service can issue amendments to the forest plan, such as Amendment 19 to the Flathead National Forest Plan.

Implementation of a forest plan and any amendments occurs through site-specific projects. Idaho Conservation League v. Mumma, 956 F.2d 1508, 1512 (9th Cir. 1992). Each proposed site-specific project must (1) be consistent with the forest plan and any amendments; (2) be analyzed as required by NEPA; and (3) be approved by the responsible Service official. Idaho Conservation League, 956 F.2d at 1511-12; Inland Empire Public Lands Council v. U.S. Forest Service, 88 F.3d 754, 757 (9th Cir. 1996).

2. NFMA Claim

Plaintiffs claim that the Forest Service is acting in violation of NFMA because it has failed to adhere to the terms of Amendment 19 of its Forest Plan by not implementing the motorized access objectives within the original five- and ten-year schedule. This claim is suspect for the obvious reason that

Amendment 19 has been revised as authorized by law, 36 C.F.R. §§ 219.7, 219.8, and Forest Plan direction no longer requires compliance with the five- and ten-year implementation deadlines. Thus, the Forest Service is not currently acting in violation of its Forest Plan.

The Plaintiffs' NFMA claim is also foreclosed by the Supreme Court's ruling in Norton v. SUWA, 542 U.S. 55 (2004). The plaintiffs in SUWA alleged a NFMA violation arising from the Bureau of Land Management's failure to manage off-road vehicle use in wilderness study areas, as require by the Bureau's land use plans. The Court held that projections of a land management plan do not create legally binding obligations upon an agency:

> Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. It would be unreasonable to think that either Congress or the agency intended otherwise, since land use plans nationwide would commit the agency to actions far in the future, for which funds have not yet been appropriated.... A statement by BLM about what it plans to do, at some point, provided it has the funds and there are not more pressing priorities, cannot be plucked out of context and made a basis for suit under § 706(1).

542 U.S. at 71.

Summary judgment is granted in favor of the Defendants on Count I.

IV. Order

Based on the foregoing, IT IS HEREBY ORDERED that the

Plaintiffs' motion for summary judgment (Doc. No. 23) is GRANTED with regard to Counts VIII and IX, and DENIED in all other respects. The Defendants' motion for summary judgment (Doc. No. 29) is GRANTED on Counts I through V and DENIED on Counts VIII and IX. The Defendants' motion for voluntary remand on Counts VI and VII (Doc. No. 32) is GRANTED, and those Counts are DISMISSED as moot.

IT IS FURTHER ORDERED that the Amendment 24 Biological Opinion is set aside for failure to comply with the ESA in setting the environmental baseline. Because the Forest Service has not otherwise ensured that Amendment 24 will not result in jeopardy to grizzly bears, the implementation of Amendment 24, including continuing snowmobile access in the Doris-Lost Johnny area, is enjoined until the Fish & Wildlife Service issues a new Biological Opinion that complies with the ESA, or the Forest Service otherwise ensures that the proposed action will not violate the ESA's jeopardy provisions.

Dated this 28th day of May, 2008.

10:58 a.m.

DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT