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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WESTERN WATERSHEDS,

Plaintiff,

No. C 08-1460 PJH

v.

**ORDER GRANTING IN PART
AND DENYING IN PART MOTIONS
FOR SUMMARY JUDGMENT**

U.S. FOREST SERVICE,

Defendant.

_____ /

The parties' cross-motions for summary judgment came on for hearing before this court on January 18, 2012. Plaintiffs Western Watersheds Project, et al. ("plaintiffs"), appeared through their counsel, Warren Braunig and Lauren Rule. Defendant U.S. Forest Service ("Forest Service" or "defendant") appeared through its counsel, David B. Glazer. Intervenor California Cattlemen's Association ("CCA"), and the California Farm Bureau Federation ("California Farm Bureau"), and the Public Lands Council ("Public Lands")(collectively "intervenor") appeared through their respective counsel, William Thomas, and Jack Rice. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court GRANTS in part and DENIES in part the cross-motions for summary judgment, for the reasons stated at the hearing, and as follows.

BACKGROUND

This action concerns grazing rights. The U.S. Forest Service manages the nation's forests. As part of its management, the Forest Service issues grazing permits to cattle producers and ranchers, allowing them to graze their cattle on national forests under certain circumstances. On March 14, 2008, plaintiffs – comprised of various non-profit

1 organizations concerned with environmental and wildlife protection – filed the instant suit
 2 against defendant Forest Service, challenging the Forest Service’s alleged practice of
 3 reauthorizing livestock grazing on federal land without conducting the proper environmental
 4 review under the National Environmental Policy Act (“NEPA”).¹

5 The action arises under the 1969 National Environmental Policy Act, and the
 6 Administrative Procedures Act, although it also implicates other federal laws and
 7 regulations. See Third Amended Complaint (“TAC”), ¶ 1.

8 A. National Forest Management Act

9 The Forest Service manages the National Forests pursuant to duties and obligations
 10 established in part by the National Forest Management Act of 1976 (“NFMA”). See 16
 11 U.S.C. §§ 1600-1614. The NFMA and its implementing regulations provide for forest
 12 planning and management at two levels: the forest level, and the individual project level.
 13 See id. At the forest level, the Forest Service is required to develop a Land and Resource
 14 Management Plan (“LRMP” or “Forest Plan”), which sets forth a broad, long-term planning
 15 document for an entire National Forest, ensuring consideration of both economic and
 16 environmental factors. See 16 U.S.C. § 1604(g)(1)-(3). At the individual project level, site-
 17 specific actions – such as resource plans, grazing permits, contracts, and other instruments
 18 for use of forest lands – are approved or denied by the Forest Service consistent with the
 19 governing LRMP. See Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d
 20 754, 757 (9th Cir. 1996).

21 The governing LRMPs that are relevant here are those established for two National

22
 23 ¹ The parties have since been joined by several intervenors in the action.
 24 Originally, the court granted limited permissive intervention under Federal Rule of Civil
 25 Procedure 24(b) to the California Cattlemen’s Association (“CCA”), nine state cattlemen’s and
 26 grower’s associations, the Public Lands Council (“Public Lands”), and several Farm Bureau
 27 entities. After the Ninth Circuit issued its opinion in Wilderness Soc’y v. U.S. Forest Serv., 630
 28 F.3d 1173 (9th Cir. 2011), however, the court granted a renewed motion to intervene as of
 right, filed by the CCA, the California Farm Bureau Federation (“California Farm Bureau”), and
 Public Lands (collectively “intervenors”). The court permitted these intervenors to intervene
 in the action both as to the liabilities and the remedies phases, though it required the
 intervenors to “speak with a single voice in pressing their issues before the court.” See March
 25, 2011 Intervention Order at 2.

1 Forests: the Klamath National Forest LRMP ("Klamath LRMP"); and the Mendocino
2 National Forest LRMP ("Mendocino LRMP"). These LRMPs also incorporate direction from
3 a regional Forest Plan, the Northwest Forest Plan. The Northwest Forest Plan was
4 adopted in April 1994 to provide a regional strategy for managing the National Forests of
5 Northern California, Oregon, and Washington.

6 B. National Environmental Policy Act

7 The National Environmental Policy Act, codified at 42 U.S.C. § 4231 et seq.,
8 requires the Forest Service to balance the need for timely processed and fairly executed
9 grazing permits, against the need for environmental review. It is a procedural statute that
10 does not "mandate particular results, but simply provides the necessary process to ensure
11 that federal agencies take a hard look at the environmental consequences of their actions."
12 High Sierra Hikers Assoc. v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004); see also
13 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("If the adverse
14 environmental effects of the proposed action are adequately identified and evaluated, the
15 agency is not constrained by NEPA from deciding that other values outweigh the
16 environmental costs.").

17 To that end, NEPA requires the Forest Service to prepare a detailed environmental
18 impact statement ("EIS") for "all major Federal actions significantly affecting the quality of
19 the human environment." 42 U.S.C. § 4332(2)(c).² Prior to preparing an EIS, the agency
20 may, however, prepare an environmental assessment ("EA") as a preliminary step in
21 determining whether the environmental impact of the proposed action is sufficiently
22 significant to warrant an EIS. See 40 C.F.R. § 1508.9. An EA is a "concise public
23 document that briefly provides sufficient evidence and analysis for determining whether to
24 prepare an EIS or a finding of no significant impact." Blue Mountains Biodiversity Project v.

25
26 ² As a general matter, there is no dispute that the issuance of a livestock grazing
27 permit is an agency action that normally requires the Forest Service to prepare either an EIS
28 or EA under NEPA. Greater Yellowstone Coalition v. Bosworth, 209 F.Supp. 2d 156, 160
(D.D.C. 2002) (citing Natural Res. Defense Council v. Morton, 388 F.Supp. 829, (D.D.C. 1974),
aff'd without opinion, 527 F.2d 1386 (D.C. Cir. 1976)).

1 Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998).

2 In some cases, however, neither an EA nor an EIS is required. The Council of
3 Environmental Quality (“CEQ”), established by Congress, has promulgated NEPA
4 regulations that allow a federal agency to ensure compliance with NEPA in one of three
5 ways. See 40 C.F.R. §§ 1500-1508. As already noted, the agency retains discretion to
6 prepare an EIS, or an EA. However, the CEQ regulations establish a third option: the
7 agency need do neither, if the agency determines that the proposed action falls within an
8 established categorical exclusion (CE). The CEQ regulations specifically authorize an
9 agency to use a CE for a “category of actions which do not individually or cumulatively have
10 a significant effect on the human environment and which have been found to have no such
11 effect in procedures adopted by a Federal agency in implementation of these regulations.”
12 See 40 C.F.R. § 1508.4. “Neither an EIS nor an EA is required for actions categorically
13 excluded from NEPA review.” Id. (citing 40 C.F.R. § 1507.3(b)(2)(ii); 23 C.F.R. § 771.117).
14 The only caveat to the use of CEs is that an agency must make allowances for
15 “extraordinary circumstances in which the normally excluded action may have a significant
16 environmental effect.” See 40 C.F.R. § 1508.4. Thus, prior to relying on a CE in a
17 particular instance, an agency must determine that extraordinary circumstances do not
18 exist (if “extraordinary circumstances” exist, the proposed action requires preparation of an
19 EA or an EIS).

20 In accordance with the CEQ’s direction, the Forest Service has promulgated a series
21 of CEs under NEPA. See Alaska Ctr. for Envmt v. U.S. Forest Serv., 189 F.3d 851, 857
22 (9th Cir. 1999). In order to comply with its obligation to make allowances for “extraordinary
23 circumstances” that might have a significant environmental effect, the Forest Service’s
24 NEPA procedures identify certain “resource conditions” that “should be considered in
25 determining whether extraordinary circumstances related to a proposed action warrant
26 further analysis and documentation in an EA or an EIS.” See Forest Service Handbook,
27 1909.15, § 30.4.

28

1 C. The 2005 Appropriations Rider

2 In November 1994 the Forest Service first implemented its policy requiring that
3 NEPA analyses be conducted in connection with the reissuance of any grazing permit.
4 Greater Yellowstone, 209 F. Supp. 2d at 158. Because of the large number of grazing
5 permits issued every year, the Forest Service was unable to complete all the NEPA
6 analyses prior to reissuing the permits. Id. In response to the threat that many permits
7 would expire and not be reissued because of the lack of a NEPA analysis, Congress
8 enacted the Rescissions Act of 1995, Pub. L. No. 104-19, §§ 501-04, 109 Stat. 194
9 (1995)(“Rescissions Act”), which set forth a schedule for the Forest Service’s completion of
10 NEPA analyses and decisions, and established a temporary exemption from NEPA review
11 for those permits that were up for reissuance before the NEPA review for that allotment had
12 been completed. Id.

13 The 1995 schedule was deemed largely unworkable due to overly strict timing
14 requirements, however, and ten years later, in 2005, Congress passed the Consolidated
15 Appropriations Act of 2005, P.L. No. 108-447, § 339 (“2005 Appropriations Rider”). The
16 2005 Appropriations Rider expressly allowed the Forest Service to categorically exclude
17 (“CE”) certain grazing permit renewals in fiscal years 2005 through 2007, from
18 documentation in an EIS or EA, provided that three conditions were met:

- 19 (1) the decision continues current grazing management on the allotment;
20 (2) monitoring indicates that current grazing managements is meeting, or moving
21 satisfactorily toward, objectives in the land and resource management plan
22 (i.e., LMRP), as determined by the Secretary; and
23 (3) the decision is consistent with agency policy concerning “extraordinary
24 circumstances.”

25 If the Forest Service determines that an allotment meets the three criteria set forth in
26 the 2005 Rider, the allotment may be excluded from full NEPA review. The 2005 Rider
27 also allowed the Forest Service to issue CEs for up to 900 grazing allotments. See id.
28

1 Congress renewed the 2005 Rider for fiscal year 2008, adding the further limitation
2 that the Forest Service could not issue CEs pursuant to the 2005 Rider for any allotment
3 contained within a federally designated wilderness area. Consolidated Appropriations Act
4 of 2008, P.L. 110-161, § 421 (2008).

5 D. The Instant Action

6 In this action, plaintiffs generally contend that the Forest Service used the 2005
7 Appropriations Rider to exclude hundreds of grazing permit renewals from environmental
8 review under an EA or EIS (and NEPA). *Id.* at ¶ 6. Specifically, plaintiffs complain that
9 several of the Forest Service's categorical exclusions ("CE"s) were unlawful, since they did
10 not comply with the requisite conditions set forth in the 2005 Appropriations Rider. *See id.*

11 As a result, plaintiffs assert claims for (1) violation of the 2005 Appropriations Rider;
12 and (2) for violation of NEPA. *See* TAC, at ¶¶ 124-31. Plaintiffs seek declaratory relief
13 stating that the Forest Service is guilty of the alleged violations, and they seek an order
14 from the court reversing and setting aside the grazing decisions issued by the Forest
15 Service, requiring the Forest Service to conduct appropriate environmental analyses under
16 NEPA, and permanently enjoining the Forest Service from reauthorizing grazing under the
17 CE process provided for in the Appropriations Rider, until such time as the Forest Service
18 can demonstrate compliance with the CE process. *See id.* at Prayer for Relief.

19 In their original complaint, plaintiffs challenged 25 CE decisions involving nine
20 forests in California where the Forest Service reauthorized grazing on 46 allotments. *See*
21 Original Complaint, ¶ 5. In an Amended Complaint subsequently filed, plaintiffs challenged
22 138 CE decisions involving 25 forests throughout the entire western state region, where the
23 Forest Service reauthorized grazing on 386 allotments. Then, pursuant to a stipulation
24 entered into by the parties on August 24, 2010, plaintiffs filed the current operative Third
25 Amended Complaint, narrowing plaintiffs' challenges to 10 CE decisions covering just five
26 national forests located within California, and the reauthorization of grazing on 23
27 allotments. Subsequent to filing of the TAC, the parties have even further narrowed
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1 plaintiffs' challenges down to 7 CE decisions, covering 3 national forests – the Klamath,
2 Mendocino, and Lassen national forests.

3 For purposes of the instant motions, however, the parties have agreed that only two
4 CE decisions are at issue: the Big Ridge CE pertaining to Klamath National Forest, and the
5 Pine Mountain, York Cabin, Elk Mountain and Middle Creek CE, pertaining to the
6 Mendocino National Forest.

7 E. The Big Ridge CE

8 The Big Ridge allotment, for which the Forest Service issued a CE, is located within
9 the Marble Mountain Wilderness in the Klamath National Forest. See Klamath
10 Administrative Record (“Klamath AR”) at 00001, 04309. It encompasses roughly 12,000
11 acres, and the majority of its surface area is forested, containing little forage. Id. Sixteen
12 miles of trail run through the allotment, including a portion of the Pacific Crest Trail, as well
13 as the Kelsey Creek, Bear Creek, and Tyler Meadows trails. Klamath AR at 00353, 04309.
14 Two popular lakes, Bear Lake and Turk Lake, are within the allotment. Id. Mountain
15 meadows are found at the headwaters of streams or along riparian areas within the
16 allotment, and these meadows contain habitat or foraging areas for species that include
17 goshawks, great gray owls, willow flycatcher, Cascade frog, western pond turtle, and
18 several plant species. Klamath AR at 00028-29, 00372-82, 00388-89. In addition, rainbow
19 trout, neotropical migratory birds and elk use habitats in the allotment’s meadow and
20 riparian areas. Id. at 00230, 00412-416.

21 The Forest Service issued a decision categorically excluding the Big Ridge allotment
22 from NEPA review in September 2006. See Klamath AR at 00001.

23 F. The Mendocino CE

24 The Mendocino national forest is home to four contiguous allotments for which a CE
25 was issued: the Pine Mountain, York Cabin, Middle Creek and Elk Mountain allotments.
26 These four allotments range in size from 10,000 acres to more than 30,000 acres each,
27 and are grazed annually throughout the summer and early fall. Mendocino AR at 00001.
28

1 Numerous streams, wet meadows, and other riparian areas can be found within the
2 boundaries of the allotments, including Bucknell Creek, Benmore Creek, Deer Valley, and
3 Long Meadow. Id. at 00016-23. The perennial streams flowing through the four allotments
4 provide habitat for certain Threatened and Endangered Species, including Chinook salmon
5 and steelhead, as well as sensitive species such as the Western pond turtle. Mendocino
6 AR at 00057-58, 00719-20.

7 The Forest Service issued a decision categorically excluding the preceding four
8 allotments from NEPA review on July 5, 2007. See Mendocino AR at 00001.

9 G. The Motions for Summary Judgment

10 The parties – including the intervenors – have now filed cross-motions for summary
11 judgment. As already noted, the CE decisions at issue are limited to only two: (1) the CE
12 issued by the Forest Service for the Big Ridge allotment on the Klamath National Forest
13 (“Big Ridge CE”); and (2) the CE issued by the Forest Service for the Pine Mountain, York
14 Cabin, Middle Creek and Elk Mountain allotments in the Mendocino National Forest
15 (“Mendocino CE”).

16 The issues presented by the parties in their motions are straightforward: (1) whether
17 the Forest Service’s decision to approve the Big Ridge CE violates the second prong of the
18 2005 Appropriations Rider; (2) whether the Forest Service’s decision to approve the Big
19 Ridge CE was made in violation of the third prong of the 2005 Appropriations Rider; and (3)
20 whether the Forest Service’s decision to approve the Mendocino CE was made in violation
21 of the second prong of the 2005 Appropriations Rider.

22 **DISCUSSION**

23 A. Legal Standards

24 1. Summary Judgment

25 Summary judgment is appropriate when there is no genuine issue as to material
26 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
27 Material facts are those that might affect the outcome of the case. Anderson v. Liberty
28

1 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there
2 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

3 2. Administrative Procedures Act

4 The general review provisions of the APA, 5 U.S.C. §§ 701, et seq., apply in cases
5 asserting violations of NEPA. Native Ecosystems Council v. Dombeck, 304 F.3d 886, 891
6 (9th Cir. 2002); Hells Canyon Alliance v. U. S. Forest Serv., 227 F.3d 1170, 1176-77 (9th
7 Cir. 2000). In fact, "[t]here is no right to seek judicial review under the Administrative
8 Procedure Act in the absence of a relevant statute whose violation forms the legal basis of
9 the complaint against the governmental action." Wright & Miller, 14A Fed. Prac. & Proc.
10 Juris.3d § 3659. Arbitrary and capricious review cannot be conducted under the APA
11 independent of another statute. Oregon Natural Res. Council v. Thomas, 92 F.3d 792, 797
12 (9th Cir. 1996).

13 Under the APA, "[a] person suffering a legal wrong because of agency action, or
14 adversely affected or aggrieved by agency action within the meaning of a particular statute,
15 is entitled to judicial review thereof." 5 U.S.C. § 702. Agency action includes the "whole or
16 part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or
17 failure to act." 5 U.S.C. § 551(13). The APA applies except to the extent that a statute
18 precludes judicial review, or agency action is committed to agency discretion by law. 5
19 U.S.C. § 701(a).

20 An agency action may be set aside under the APA only if it was "arbitrary,
21 capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §
22 706(2)(A)); see Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569,
23 573 (9th Cir. 1998). The APA limits judicial review to review of "final" agency action. See 5
24 U.S.C. § 704. For an action to be "final" under the APA, it should mark the conclusion of an
25 agency's decision-making process, and should also be an action by which rights or
26 obligations have been determined or from which legal conclusions flow. Bennett v. Spear,
27 520 U.S. 154, 177 (1997).

28

1 The arbitrary and capricious standard specifically applies, as is the case here, “to an
2 agency’s determination that a particular action falls within [a] categorical exclusion[.]”
3 Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1456 (9th Cir. 1996). To determine
4 whether agency action is arbitrary or capricious, a court must consider whether the decision
5 was based on a consideration of the relevant factors and whether there has been a clear
6 error of judgment. Alaska Ctr. For Envmt v. U.S. Forest Serv., 189 F.3d 851, 859 (9th Cir.
7 1999).

8 “When an agency decides to proceed with an action in the absence of an EA or EIS,
9 the agency must adequately explain its decision.” Id. It is important that the agency be
10 able to point to “a record of decision invoking a categorical exclusion.” California v. Norton,
11 311 F.3d 1162, 1176 (9th Cir. 2002)(discussing Bicycle Trails, 82 F.3d at 1456-57). The
12 Ninth Circuit has noted the difficulty in determining whether the agency’s determination to
13 invoke a CE is arbitrary and capricious, especially in cases “where there is no
14 contemporaneous documentation to show that the agency considered the environmental
15 consequences of its action and decided to apply a categorical exclusion to the facts of a
16 particular decision.” Id.

17 B. The Big Ridge CE

18 The parties dispute whether the Forest Service’s decision to categorically exclude
19 the Big Ridge allotment from NEPA review violates two separate prongs of the 2005
20 Appropriations Rider. Specifically, the parties dispute: (1) whether the Forest Service
21 appropriately decided that monitoring of the Big Ridge allotment indicated that current
22 grazing management was meeting, or moving satisfactorily toward, objectives in the
23 applicable LRMP at the time the CE decision was made (i.e., second prong of the 2005
24 Appropriations Rider); and (2) whether the Forest Service appropriately decided that the
25 decision to categorically exclude the Big Ridge allotment was consistent with agency policy
26 concerning “extraordinary circumstances” (i.e., third prong of the 2005 Appropriations
27 Rider).

28

1 1. Whether Current Grazing Management was 'Meeting' or 'Moving Towards'
2 Applicable Objectives (Second Prong of 2005 Appropriations Rider)

3 The Big Ridge CE, issued in September 2006, concluded that “the management of
4 the [Big Ridge] allotment is shown by monitoring to be meeting or satisfactorily moving
5 toward Forest Plan objectives...”. See Klamath AR at 00003. The decision memo
6 references various annual and long term monitoring methods for condition of vegetation
7 and watersheds, including photo-point/range allotment inspection, allowable utilization
8 percentage by comparative yield or landscape appearance, stubble height measurements,
9 and rooted frequency vegetative sampling. Id. at 00006. The decision memo also notes
10 that long term and short term monitoring data had been collected for 50 years for the Big
11 Ridge allotment, and that long term monitoring data showed that “rangeland condition in the
12 allotment is at, or trending toward, desired conditions.” Id. The decision memo further
13 notes that “annual monitoring data” showed that “with minor exceptions, key areas are well
14 within allowable use standards.” Id. Although “high use” was noted in the Bear Lake
15 pasture in 2005, adaptive management actions to “minimize or eliminate conflicts with
16 recreation use in the Bear Lake area” had been developed and incorporated into the
17 allotment’s annual operating instructions documents. Klamath AR at 00006.

18 Plaintiffs here contend that the Big Ridge CE does not comply with the 2005 Rider,
19 because the actual administrative record demonstrates that current grazing management
20 was not meeting or moving towards LRMP objectives on the Big Ridge allotment, in several
21 key areas, including (a) soil/plant diversity/rangeland objectives; (b) riparian/aquatic
22 objectives; and (c) wildlife/sensitive species objectives. The Forest Service challenges
23 plaintiffs’ contention, relying on the Big Ridge CE decision memo, and asserting that its
24 underlying monitoring data demonstrates that all relevant conditions are at or trending
25 towards desired conditions overall.

26 In determining whether the Forest Service adequately relied on evidence showing
27 that current grazing on the Big Ridge allotment was (at the time the Big Ridge CE was
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1 granted in 2006) meeting or satisfactorily moving toward LRMP objectives, the court's task
 2 is to review the record with respect to each area, and determine whether the Big Ridge CE
 3 adequately explained the Forest Service's decision, and whether the agency's decision is
 4 supported by evidence in the record.³ See Alaska Ctr., 189 F.3d at 859 ("When an agency
 5 decides to proceed with an action in the absence of an EA or EIS, the agency must
 6 adequately explain its decision."); California v. Norton, 311 F.3d 1162, 1176 (9th Cir.
 7 2002)(discussing Bicycle Trails, 82 F.3d at 1456-57)(It is important that the agency be able
 8 to point to "a record of decision invoking a categorical exclusion").

9 a. soil/plant diversity/rangeland objectives

10 Any inquiry into whether current grazing was meeting or satisfactorily moving toward
 11 soil, plant diversity and/or rangeland objectives must first take into account what the LRMP
 12 objectives were in these areas. The LRMP for the Klamath National Forest contains a
 13 section setting forth the management direction applicable to the national forest. This
 14 section generally defines the forest management goals; projected outputs; the standards
 15 and guidelines for management of the forest; and contains a brief description of the
 16 management areas and their associated standards and guidelines. See Klamath AR at
 17 04457-4638. As plaintiffs correctly note, among the many standards and guidelines
 18 directed toward different resource areas, the LRMP directs the Forest Service to: determine
 19 the current ecological status of the Forest's rangelands and to use management strategies
 20 and activities necessary to achieve a satisfactory condition; determine and monitor
 21 rangeland vegetation using ecological status, vegetative condition, and apparent trend on

22
 23 ³ The parties have also submitted competing expert testimony in support of their
 24 motions. Plaintiffs have submitted the expert declarations of Jon Rhodes and Robert House,
 25 and the Forest Service proffers the expert declaration of Dave Weixelman to rebut the
 26 foregoing. To the extent plaintiffs' expert declarations address the basis for the Forest
 27 Service's CE decisions, and quibble with the data and/or material taken into account by the
 28 Forest Service in reaching its decision, the court disallows this testimony. See Asarco, Inc. v.
EPA, 616 F.2d 1153, 1160 (9th Cir. 1980)("consideration of the evidence to determine the
 correctness or wisdom of the agency's decision is not permitted, even if the court has also
 examined the administrative record"). The court considers the expert testimony only insofar
 as the declarations are useful to explain technical terms or complex evidence within the
 province of the agency's expertise.

1 areas within existing allotment suitable for grazing; and plan and implement land
2 management activities to maintain or enhance soil productivity and stability. See id. at
3 04514, 04516, 04478.⁴

4 In addition to articulating general forest management direction, the Klamath LRMP
5 also provides monitoring and evaluation requirements to be employed by the Forest
6 Service in determining whether programs and projects are meeting the forest plan direction.
7 Klamath AR at 04641. According to the monitoring regime set forth in the Klamath LRMP,
8 monitoring techniques for assessing soil objectives include “field investigation of soil cover,
9 soil compaction and organic matter on 5% of activity areas,” to be reported every 5 years.
10 Klamath AR at 04650. Monitoring objectives for range management include “determining
11 vegetative ecological condition and trend,” to be reported every 5 years. The monitoring
12 techniques for range management include field and photo observations; annual grazing
13 reports; and mapping and utilization measurements, among others. See Klamath AR at
14 04653.

15 The Forest Service contends that the Big Ridge CE is adequately supported by the
16 record, since the record reflects that both long term and short term monitoring of the
17 rangeland/soil/plant diversity resources occurred. In terms of long-term monitoring, the
18 Forest Service contends that conditions and trends were documented over the decades
19 preceding the 2006 CE decision, and include photographic documentation. Klamath AR
20 4945-5015. In terms of short-term monitoring, forage utilization data as well as
21 photographic documentation are included. Id. The Forest Service further notes that
22 monitoring reports provide information on ground cover and plant diversity, and note that
23 the incidence of bare ground has decreased since 1964. Klamath AR 266-67; Klamath AR
24 Sup. 1-33, 5, 28. To the extent that Bear Lake falls outside of allowable use standards, the

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26 ⁴ Upon the court’s request at the hearing on the present motions, the parties jointly
27 submitted a chart summarizing their respective allegations, contentions, and evidence with
28 respect to the claims and arguments at issue before the court. The court has relied upon the
parties’ characterization of the relevant LRMP objectives and standards and their cited
evidence, as stated in their joint submission, in resolving the dispute before the court.

1 Forest Service determined that this area is to be rested every third year. Klamath AR 271.

2 Plaintiffs, however, assert that the inadequacy of monitoring information in the
3 record is demonstrated by the following deficiencies: most of the long term condition and
4 trend monitoring is outdated; data from 2005 shows that two of three plots have low ground
5 cover, and that other indicators are moderate, and only one of the three plots has prior data
6 to establish any trend; there is no explanation of long term data in the record; and there is
7 no explanation of the photos in the record and what they demonstrate. See Klamath AR at
8 267-71, 04990-92, 04999-05008, 05022; Supp. AR at 1-25. While acknowledging that
9 utilization monitoring was in fact conducted on a regular basis, plaintiffs contend that this
10 monitoring did not include any information on percent of bare ground, soil compaction, or
11 plant composition and diversity. Klamath AR at 04993-95.

12 On balance, however, the court is not persuaded that the Forest Service has failed
13 to adequately support the conclusions reached in the Big Ridge CE with monitoring data.
14 Plaintiffs' objections to the record fall into the following categories: (1) they assert that the
15 annual use of forage utilization data is inappropriate; (2) they assert that the information is
16 stale, since much of the supporting evidence stems back to earlier decades; and (3) they
17 contend that much of the purportedly relevant data is unexplained. However, as already
18 noted, the LRMP monitoring plan specifically contemplates the use of utilization data (and
19 photographic documentation) as an aid in assessing range management objectives. See
20 Klamath AR at 04653. Moreover, the Forest Service's interpretation of its own LRMP,
21 particularly with regard to technical matters such as the usefulness of utilization data as a
22 general monitoring tool, is entitled to substantial deference. Forest Guardians v. U.S.
23 Forest Serv., 329 F.3d 1089, 1097, 1099 (9th Cir. 2003).

24 As for plaintiffs' claim that the Forest Service has inappropriately relied on stale
25 information, plaintiffs have correctly noted that an agency's reliance on data that is too stale
26 to carry the weight assigned to it may be arbitrary and capricious. See N. Plains Res.
27 Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1086 (9th Cir. 2011). However,
28

1 plaintiffs have given insufficient weight to the fact that, while defendant does rely on *some*
2 monitoring information that might well prove too outdated to support the Big Ridge CE if
3 relied on as the sole proof of current monitoring trends, defendant also relies on other,
4 updated data as proof of current monitoring. See Klamath AR 4945-5015 (forage utilization
5 data); 00264 (rooted frequency vegetation sampling).

6 Finally, the court's review of the record reveals that there is no fatal failure by the
7 Forest Service to explain the conclusions reached in the Big Ridge CE decision memo:
8 defendant has, at a minimum, supported its conclusions with reliable studies and data, and
9 adequately explained the reasons why it considered the underlying evidence reliable. See
10 N. Plains Res. Council, 668 F.3d at 1075.

11 In sum, the administrative record provides reasonable support for the Forest
12 Service's decision to conclude that the Big Ridge allotment was trending towards meeting
13 the LRMP objectives for soil/plant diversity/rangeland. The monitoring methods described
14 in the Big Ridge CE, and the monitoring information and data included in the record,
15 demonstrate that the Forest Service considered monitoring information that was both
16 sanctioned by the Klamath LRMP and thus tailored to meet the objectives set forth therein.
17 See Klamath AR 4650-53.

18 b. riparian/aquatic objectives

19 Plaintiffs assert that the administrative record does not contain any monitoring
20 information showing that the Big Ridge allotment – which contains several perennial and
21 intermittent streams, and two lakes – is meeting or moving toward the Aquatic
22 Conservation Strategy (“ACS”) and other riparian objectives set forth in the Klamath LRMP.
23 The Klamath LRMP contains ACS objectives that require the Forest Service to, among
24 other things, maintain and restore the physical integrity of the aquatic system, including
25 shorelines, banks and bottom configurations; and maintain and restore water quality
26 necessary to support healthy riparian, aquatic, and wetland ecosystems. Klamath AR at
27 04464. The ACS objectives also state that the Forest Service is to maintain and restore:
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1 the sediment regime under which aquatic ecosystems evolved, the specific composition
2 and structural diversity of plant communities in riparian areas and wetlands, and habitats
3 supportive of native plant and riparian-dependent species. Id.; see also Klamath AR at
4 04564.

5 The monitoring and evaluation requirements set forth in the Klamath LRMP describe
6 effectiveness monitoring for aquatic ecosystems, in which “variables to be monitored” must
7 include “important habitat requirements identified” by research and watershed analysis, and
8 which must be “quantifiable and measurable in a repeatable [] range of values...”. Klamath
9 AR at 04644. To that end, monitoring “will include aquatic, riparian and watershed
10 conditions and the processes in a watershed to determine if they achieve [ACS] objectives.”
11 Id. at 04645. Key monitoring items are defined to include: pool frequency and quality;
12 percent fine sediment; CWD (size and quantity); water temperature; width-to-depth ration;
13 and bank stability and lower bank angle. Id.; see also Klamath AR at 04653 (discussing
14 rangeland monitoring and requiring that “riparian objectives are in [annual operating
15 instructions] and [standards and guidelines] are met”).

16 Plaintiffs contend that, for the majority of riparian areas on the Big Ridge allotment,
17 the record contains none of the categories of monitoring information necessary to
18 demonstrate that current grazing management is moving or trending towards ACS
19 objectives, and that for the handful of riparian areas that do have monitoring information,
20 the monitoring shows that the riparian conditions in these areas were at risk, or poor.
21 Moreover, plaintiffs argue, the monitoring data is stale. In response, the Forest Service
22 relies upon forage utilization data as a surrogate for riparian monitoring, as well as on a
23 Watershed Specialist Report that defendant contends relies upon concrete modeling data
24 and takes into account all streams and tributaries in the affected region. And while
25 conceding that the record does include data results dating to back to the 1990s, defendant
26 notes that the record incorporates non-stale information by way of Cumulative Watershed
27 Effects analyses conducted in 2004 and 2005.

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1 To the extent plaintiffs contend that the record reflects a lack of monitoring
2 information relevant to the ACS objectives or riparian areas, the court is not persuaded that
3 this is so. The record reflects that the Forest Service relied upon annual forage utilization
4 measures in order to ensure the continued protection of riparian areas within the Big Ridge
5 allotment. See Klamath AR at 01170-81 (empirical evidence stating the use of stubble
6 height as a measurement tool for riparian areas); id. at 00087 (forage utilization had major
7 bearing on success of protecting riparian areas on Big Ridge allotment and is conducted
8 annually); id. at 00298 (“monitoring annual forage utilization and residual dry matter is a key
9 factor in determining condition of riparian areas and effects to related species and their
10 habitat”). The Forest Service also relied upon a March 2006 Watershed Report that covers
11 the Big Ridge allotment and states, among other things, that there is a “good correlation
12 between residual dry matter/utilization levels in riparian areas and stream banks
13 stability/alteration” and that monitoring of the rangeland shows “satisfactory conditions.”
14 See id. at 00289-304. In addition, defendant relies upon a Watershed Specialist Report
15 that expressly analyzes the effects of cattle grazing upon the riparian areas in the Klamath
16 National Forest – including the Big Ridge allotment – and concludes that no significant
17 effect is present and that the quality of riparian areas is maintained. See Klamath AR at
18 000289 et seq. (relying upon a watershed model that is set forth at AR 00306-52). These
19 reports and the analyses contained therein are sufficient to establish an adequate basis for
20 concluding that monitoring on the Big Ridge allotment suggested that it was meeting or
21 trending towards the relevant ACS and LRMP objectives.

22 Plaintiffs have, to be sure, correctly pointed out that for several streams, a
23 designation that water quality is “at risk” can be observed in the record. See Klamath AR at
24 00191-96. However, there is no indication that it was grazing itself that was causing this
25 designation. Moreover, these designations are also accompanied by designations
26 indicating that the effect of the proposed action would be to “maintain” the status quo. See
27 id.

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1 To the extent plaintiffs again take issue with the use of forage utilization data as a
2 proxy for riparian monitoring, the Forest Service has decreed that forage utilization is useful
3 as a measurement tool in order to monitor riparian areas, and has submitted empirical
4 studies and analysis to this effect. Thus, once again, the court defers to defendant's
5 technical knowledge and assessment in suggesting that annual forage utilization
6 measurements are acceptable forms of monitoring riparian areas.

7 Finally, to the extent plaintiffs contend that the underlying data relied upon by the
8 Forest Service is stale, defendant has relied upon analyses from the Cumulative
9 Watershed Effects Specialist Report conducted in 2005; the quantitative model analysis
10 contained in the Cumulative Watershed Effects analysis dated February 2004; and
11 watershed data dated September 2005. See Klamath AR at 00306-23, 03409-24, 00324-
12 25. Thus, defendant has relied on annual forage utilization measures and watershed
13 analyses and reports whose temporal scope is sufficiently recent – even if some portion of
14 defendant's remaining data spans back several years.

15 Accordingly, taking the watershed analyses noted above together with the forage
16 utilization data at issue, and comparing them to the LRMP statement of riparian and aquatic
17 objectives, it is not clear that the Big Ridge CE decision was arbitrary in deciding that
18 current grazing was moving towards or meeting LRMP objectives.

19 c. wildlife/sensitive species objectives

20 Finally, plaintiffs contend that the Big Ridge CE contains no data showing the Forest
21 Service surveyed the Big Ridge allotment for the presence of sensitive species or assessed
22 sensitive species habitat to determine its condition, as required by the LRMP.

23 The Klamath LRMP provides, with respect to sensitive wildlife/species, that the
24 Forest Service is to “manage for a distribution and abundance of plant and animal
25 populations that contribute to healthy, viable populations of all existing native and desirable
26 non-native species...” and to “enhance sensitive plant specific populations and habitat to
27 maintain reproducing, self-sustaining populations.” Klamath AR at 04480, 04485. To that
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1 end, “project areas should be surveyed for the presence of sensitive species before project
2 implementation. If surveys cannot be conducted, project areas should be assessed for the
3 presence and condition of sensitive species habitat.” Klamath AR at 4480. The Forest
4 Service is furthermore cautioned that “[d]isturbance to plant populations and occupied
5 habitat should be avoided during critical periods of plant growth,” and impacts to sensitive
6 species should be avoided or minimized where possible. Id. at 4485-87. Additionally,
7 streams and lakes must be managed to maintain or improve habitat for aquatic species –
8 especially threatened, endangered, and sensitive species – and the Forest Service must
9 also manage rangeland areas to provide appropriate forage and cover for deer, elk, and
10 other rangeland-dependent species. See Klamath AR at 04517.

11 The evidence in the record here demonstrates that survey information was
12 documented for sensitive wildlife species occurring in the Big Ridge allotment, with a
13 specific eye toward the impact that grazing would have on the Big Ridge allotment’s
14 sensitive species. See Klamath AR 360-404. Surveys were similarly conducted for
15 sensitive aquatic wildlife, including Chinook salmon and steelhead trout (with neither found
16 in the project area). AR 33-39. Survey information for sensitive plants was either
17 gathered, deemed not necessary, or the presence of a particular species was assumed.
18 Klamath AR 33-39, 43. In addition, the record includes detailed analyses of habitat
19 conditions for fish and wildlife species that are contained within several reports: the
20 Management Indicator Species Assessment, the Survey and Manage Report, the Wildlife
21 Biological Assessment/Evaluation, and the Fisheries Specialist Report, among others. See
22 Klamath AR at 00052-58, 0211-16, 0220-43, 00360-404.

23 Plaintiffs contend that the foregoing is insufficient to demonstrate that the monitoring
24 information in the record is sufficient with respect to sensitive species and wildlife, because
25 the record contains no monitoring information for certain habitat conditions or sensitive
26 species populations implicated by the Big Ridge allotment, including for Botrychium plants,
27 goshawk, great gray owl, willow flycatcher and Cascade frog. However, the record
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1 contains evidence that site observations and/or physical inspection of the Big Ridge
2 allotment in connection with several of the foregoing sensitive species and wildlife was, in
3 fact, considered and/or a determination made with regard to the impact of permitted
4 grazing on the sensitive species and wildlife. See, e.g., Klamath AR at 30-31 (Botrychium
5 “may” occur in meadows but unlikely to be targeted by grazing); 0371-72 (Big Ridge
6 allotment does not contain goshawk habitat); 0372 (required allotment management
7 sustains suitable prey base for great gray owl); 0392 (cattle generally unable to access
8 Cascade frog habitat).

9 All of which demonstrates that while the proposed permitted grazing might affect
10 individual sensitive species, or might have an indirect affect on habitat of sensitive species,
11 the proposed action was not likely to lead to a loss of viability for the species as a whole.
12 Klamath AR at 00004; see also Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d
13 1233, 1240 (9th Cir. 2005)(effects to individual species, distinct from a species as a whole,
14 do not rise to the level of “significance” under NEPA). The record is thus adequate to
15 support the Big Ridge CE decision, in which the Forest Service concluded that monitoring
16 information supported a finding that current grazing on the Big Ridge allotment was
17 meeting or moving toward Klamath LRMP objectives regarding sensitive species and
18 wildlife.

19 In sum, therefore, and based on all the foregoing points, the court determines that
20 the Forest Service’s decision that the second prong of the 2005 Appropriations Rider was
21 satisfied in connection with sensitive species and wildlife, was not arbitrary and capricious.

22 2. Whether Forest Service Decision Was Consistent with Agency Policy
23 Concerning “Extraordinary Circumstances” (Third Prong of 2005
Appropriations Rider)

24 Plaintiffs also contend that the Forest Service did not appropriately conclude that the
25 Big Ridge CE was consistent with agency policy concerning “extraordinary circumstances.”
26 The Forest Service’s Policy on extraordinary circumstances, which is set forth in the Forest
27 Service Handbook, requires the Forest Service to determine whether certain resource
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1 conditions are present in the action area, in order to determine whether extraordinary
2 circumstances exist. See Forest Service Handbook (“FSH”) 1909.15 § 30.4. If such
3 resource conditions are present (e.g., federally listed threatened or endangered species,
4 congressionally designated wilderness areas), the Forest Service must then assess the
5 degree of potential effect of the proposed action on these resource conditions. See id.; see
6 also 36 C.F.R. § 220.6(b)(2). If extraordinary circumstances exist that indicate that a
7 proposed action may have a significant environmental effect on one of the resource
8 conditions, the Forest Service may not categorically exclude the proposed decision from
9 NEPA analysis.

10 Here, the Big Ridge CE decision notice concludes that there “are no conditions that
11 would constitute a significant effect on an extraordinary circumstance related to the
12 proposed project.” Klamath AR at 00003. Plaintiffs contend, however, that the Big Ridge
13 CE does not comply with the 2005 Appropriations Rider, because two resource conditions
14 *did* exist, and that grazing permits have a significant environmental effect on these
15 conditions. The resource conditions present were: (a) congressionally designated
16 “wilderness” area conditions; and (b) “threatened or endangered species or designated
17 critical habitat” conditions.

18 a. wilderness area

19 Plaintiffs assert that the Big Ridge allotment is located within the Marble Mountain
20 wilderness, an area protected under the Wilderness Act. The Wilderness Act aims to
21 provide opportunities for solitude or unconfined recreation, although it does allow for
22 livestock grazing on wilderness land if grazing was established on the land prior to
23 enactment of the Act. See 16 U.S.C. § 1131(a) (Congress enacted the Wilderness Act to
24 “secure for the American people of present and future generations the benefits of an
25 enduring resource of wilderness”); id. at § 1133 (“Except as specifically provided for in this
26 chapter . . . there shall be no commercial enterprise and no permanent road within any
27 wilderness area.”); id. at § 1133(d)(4) (“[T]he grazing of livestock, where established prior
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1 to the effective date of this Act, shall be permitted to continue subject to such reasonable
2 regulations as are deemed necessary by the Secretary of Agriculture"). Wilderness Act
3 protection constitutes an "extraordinary circumstance" resource. See FSH 1909.15 §
4 31.2(3). Thus, if there is substantial evidence of adverse effects to wilderness recreation
5 use in the Big Ridge allotment, the Forest Service must perform a proper EIS or EA.

6 This is the case here, say plaintiffs. They contend that the record is replete with
7 reports of conflicts between cattle crazing and recreation use on the Big Ridge allotment,
8 which establishes the presence of adverse effects to wilderness recreation in the Big Ridge
9 allotment by virtue of the proposed grazing action. See Klamath AR 00014, 00355-57,
10 004258-59. In the year and a half prior to issuance of the 2006 Big Ridge CE, for
11 example, plaintiffs note that livestock/recreation conflicts were noted at Bear Lake, Turk
12 Lake, Paradise Lake, and hunter camps along Big Ridge. See id.

13 The Forest Service, for its part, notes that the Klamath LRMP expressly
14 acknowledges that some evidence of human influence consistent with the Wilderness Act
15 may be present due to livestock grazing, and recreational use. See Klamath AR at 004528.
16 The Forest Service then notes that here, the Big Ridge allotment represents only about 5%
17 of the total Marble Mountains Wilderness, and wilderness visitors use even a smaller
18 percentage of the allotment area. See id. at 00353. To the extent that conflicts exist within
19 these parameters between users of the forest and permitted grazing, however, the Forest
20 Service has nonetheless addressed these impacts by identifying appropriate mitigation
21 measures, which are an acceptable tool for land management. Klamath AR at 00356-57.

22 As plaintiffs point out and the Forest Service ignores, however, the high elevation
23 meadows and lakes on the Big Ridge allotment are where most of the recreation use takes
24 place, and *also* where most of the permitted grazing occurs. Klamath AR at 03950, 03970-
25 74. Indeed, plaintiffs point out that the map of livestock use levels for the Big Ridge
26 allotment shows that the main grazing pastures on the allotment are in the headwater
27 basins of Bear Creek, Stones Valley Creek, Grider Creek, Kelsey Creek, and Turk Lake,
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1 and also adjacent to the Pacific Crest Trail – the same primary areas used by
2 recreationists. See Klamath AR at 00182; cf. id. at 04309.

3 Thus, the record demonstrates that conflicts between livestock grazing and
4 wilderness recreation use are occurring on the Big Ridge allotment. Klamath AR at 00355-
5 57, 04355, 04358, 04361. Notwithstanding, as defendant notes, that Congress has
6 reaffirmed that grazing is an allowable activity in wilderness areas, the foregoing evidence
7 suggests that the Forest Service’s proposed action “may” have a significant environment
8 effect on the congressionally protected wilderness area within the Big Ridge allotment (i.e.,
9 that extraordinary circumstances exist). Based on this evidence in the record, the Forest
10 Service was required to explain why the foregoing conflicts do not adversely affect the
11 wilderness resource. See California v. Norton, 311 F.3d 1162, 1177 (9th Cir.2002) (“Where
12 there is substantial evidence in the record that exceptions to the categorical exclusion may
13 apply, the agency must at the very least explain why the action does not fall within one of
14 the exceptions.”). Yet no such explanation is found in the record. Without such reliable
15 explanation, the Forest Service’s conclusion that permitted grazing will not have any
16 significant effects on wilderness, must be found to be arbitrary and capricious.

17 To the extent, moreover, that defendant contends that it has nonetheless addressed
18 any potential impacts by identifying appropriate mitigation measures, defendant is generally
19 correct that the use of mitigation measures, or adaptive management, is a well recognized
20 and permissible tool. Theodore Roosevelt Conserv. P’ship v. Salazar, 616 F. 3d 497, 517
21 (D.C. Cir. 2010). However, defendant overlooks the corollary principle that such mitigation
22 measures, even if necessary, “are not alone sufficient to meet [N]EPA obligations to
23 determine the projected extent of the environmental harm to enumerated resources *before*
24 a project is approved.” See N. Plains Res. Council, 668 F. 3d at 1084.

25 In sum, therefore, the court concludes that the evidence in the record demonstrates
26 the presence of a “wilderness” resource condition that constitutes an “extraordinary
27 circumstance” with respect to the Big Ridge allotment, and so does not adequately support
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1 the Forest Service's conclusion that there "are no conditions that would constitute a
2 significant effect on an extraordinary circumstance related to the proposed project." See
3 Klamath AR at 00003.

4 b. sensitive species

5 Plaintiffs also contend that the Forest Service's conclusion that permitted grazing
6 would not have a significant effect on sensitive species, is unsupported by the record. The
7 presence of sensitive species is one of the resource conditions for which an agency must
8 ensure there will be no potentially significant effects from permitted grazing prior to
9 issuance of a CE. See FSH 1909 § 30.4. Plaintiffs challenge the Forest Service's
10 conclusions with respect to both sensitive plant species and sensitive wildlife species. As
11 to the former, plaintiffs note the undisputed presence of suitable habitat for six sensitive
12 plant species from the Botrychium (moonwort) genus on the Big Ridge allotment. See
13 Klamath AR at 00004. With respect to the latter, plaintiffs note the documented presence
14 of habitats for goshawks, great gray owls, willow flycatcher and cascade frog on the
15 allotment. Klamath AR at 00003-04.

16 With regard to sensitive plant species, the administrative record includes reports that
17 explain the potential habitat for the Botrychium (moonwort) genus on the Big Ridge
18 allotment, and that the Botrychium species pertaining to the genus are unlikely to be
19 adversely affected by permitted grazing, given their attributes. See Klamath AR at 00029-
20 31. The record also indicates that the Forest Service relied upon a Biological
21 Assessment/Evaluation ("BA") finalized in September 2006. See Klamath AR 00021. The
22 BA analyzed potential impacts to species listed as endangered or threatened under the
23 Endangered Species Act, as well as Forest sensitive species, and made detailed findings
24 as to several specific species. And none of the findings supported the conclusion that the
25 proposed action would *significantly* affect the environment of the species at issue. In order
26 to preclude reliance on a CE, it is the effect on a species as a whole – not just individual
27 members of that species – that must be significant. See Env't'l Prot. Info. Ctr. v. U.S.
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1 Forest Serv., 451 F. 3d 1005, 1010 (9th Cir. 2010).

2 Plaintiffs do not dispute the foregoing, but contend that the Forest Service failed to
3 adequately explain the underlying data and how it was sufficient to assess habitat for
4 sensitive plant and wildlife species, or else failed to include any data at all to assess the
5 impact of grazing on certain habitats.

6 The court, however, is not persuaded. It finds that the BA and other evidence in the
7 record adequately documents the Forest Service's consideration of the potential impact of
8 livestock grazing on sensitive plant and wildlife species; and further adequately
9 demonstrates that the potential impact of livestock grazing on sensitive plant and wildlife
10 species within the Big Ridge allotment was not sufficiently "significant" so as to constitute
11 an extraordinary circumstance and preclude a CE.

12 In sum, therefore, there is insufficient evidence submitted by plaintiffs to suggest that
13 the Forest Service's decision was arbitrary or capricious, or somehow wholly unsupported
14 by or contradicted by the record.

15 C. The Mendocino CE

16 The parties also dispute whether the Forest Service's decision to categorically
17 exclude the Elk Mountain, Middle Creek, York Cabin, and Pine Mountain allotments from
18 NEPA review violated the second prong of the 2005 Rider – i.e., whether the Forest
19 Service appropriately decided that monitoring of the Mendocino allotments indicated that
20 current grazing management was meeting, or moving satisfactorily toward, objectives in the
21 applicable LRMP. Plaintiffs specifically contend that the Mendocino CE does not comply
22 with the 2005 Rider, because the record demonstrates that current grazing management
23 was not meeting or moving towards the following LRMP objectives: (a) objectives for soil,
24 plant diversity, and rangeland; (b) riparian objectives; and (c) fisheries objectives.

25 a. soil/plant/rangeland

26 The LRMP for the Mendocino National Forest contains a section setting forth the
27 management direction applicable to the national forest, as well as a separate section
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1 setting forth specific monitoring and evaluation requirements to be employed in determining
2 whether management direction objectives are being satisfied. See Mendocino AR at
3 01272-1536, 01537-01555. As plaintiffs note, the section on management direction sets
4 forth numerous standards and guidelines for management of the Mendocino National
5 Forest, and directs the Forest Service to, among other things: manage rangeland
6 ecosystems to provide diverse and productive habitats, healthy watersheds and
7 sustainable livestock grazing; manage livestock grazing to comply with forage utilization
8 standards; and manage grazing in order to retain at least 70% effective ground cover. See
9 Mendocino AR at 01275, 01298. The Mendocino LRMP also provides the following
10 monitoring and evaluation requirements to be employed by the Forest Service in
11 determining whether rangeland programs and projects are meeting the forest plan
12 direction: annual forage utilization measurements; field inspections; and condition and trend
13 studies. See id. at AR 01547-48. Field inspections and condition studies are to be
14 performed on an annual basis, with trend studies to be completed at 5-10 year intervals.
15 Id. at AR 01548.

16 Plaintiffs correctly note here that the administrative record does not reflect the
17 existence of adequate monitoring and evaluation information with respect to LRMP
18 objectives and guidelines. Specifically, the condition and trend data submitted in
19 connection with the October 2006 report on the existing condition of the Middle Creek, Elk
20 Mountain, Pine Mountain and York Cabin allotments indicates that the most recent
21 condition and trend monitoring for Elk Mountain occurred in 1997 and 1999 – with the most
22 recent report indicating that conditions were “low” (e.g., unsatisfactory). See Mendocino
23 AR at 00046. The Pine Mountain allotment has no condition and trend data that post-dates
24 1961, the York Cabin allotment has no condition and trend data that post-dates 1958, and
25 the Middle Creek allotment has no reported condition and trend data at all. Id. (“[c]ondition
26 and trend data monitoring has been very sporadic throughout the history of all four
27 allotments”).

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1 With respect to forage utilization data, the data is decidedly mixed.⁵ While annual
2 grassland standards were met or exceeded for the Middle Creek and Pine Mountain
3 allotments for those measurements that were recorded from 2000-2006, the data also
4 shows that utilization standards were either not recorded or not met at the Horse Mountain
5 or Rabbit Glade areas of the Elk Mountain allotment from 2004 to 2006. Mendocino AR at
6 00047. Similarly, utilization standards on the York Cabin allotment were not met during the
7 last two years of monitoring in 2004 and 2006, and as plaintiffs note, were trending away
8 from forest plan standards. Id. Indeed, viewing the forage utilization data in the aggregate
9 with respect to the Elk Mountain and York Cabin allotments, the October 2006 “Existing
10 Condition” report concludes that utilization standards were met 50% of the time or less on
11 several areas over several years of monitoring. Id. at AR 00047-48.

12 Finally, the Rangeland Resource Report prepared in June 2007 in connection with
13 the Mendocino CE also notes that “photographic monitoring” has occurred in connection
14 with the Elk Mountain, Middle Creek, Pine Mountain and York Cabin allotments, but that
15 such photos exist only for “some allotments and key areas,” and have furthermore been
16 collected “only relatively recently.” As a result, the report concludes, “it is difficult to
17 determine long term landscape trends through the use of photos at this time.” Mendocino
18 AR at 00017-18.

19 The Forest Service responds to these noted deficiencies in principal by disputing
20 that condition and trend data provides an appropriate monitoring tool. Defendant asserts
21 that the Mendocino LRMP specifically directs the Forest Service to assess residual dry
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23 ⁵ At the hearing on the parties’ motions, plaintiffs’ counsel highlighted certain
24 discrepancies that exist in the underlying forage utilization data relied upon by the Forest
25 Service in preparing its Mendocino CE decision memo. Specifically, the forage utilization data
26 reported in the October 2006 “Existing Condition” report, which appears to have been re-
27 submitted in connection with a second Rangeland Resource Report issued in June 2007,
28 contains different data conclusions in connection with the Long Meadow and Horse Mountain
areas of the Elk Mountain allotment. See Mendocino AR at 00047-48; cf. id. at 00017-18. In
the absence of any credible explanation for the difference in reported data between both
reports, the court concludes that it is the first set of reported data contained within the October
2006 report that should be credited.

1 matter for annual grasslands, rather than condition and trend monitoring that is only
2 relevant or applicable to perennial species. See Mendocino AR 19-21, 46-47, 1298.
3 However, while defendant is generally correct that the Mendocino LRMP provides forest
4 management direction that provides for rangeland analysis to be assessed by RDM
5 (residual dry matter) measurement, this observation is insufficient by itself to obviate the
6 LRMP's stated monitoring and evaluation requirements – which specifically note the
7 importance of condition and trend studies, in addition to annual forage utilization
8 measurements. See id. at 01547-48. Nor does defendant otherwise rely on empirical
9 research or studies in the record that independently establish a scientific basis for the
10 Forest Service's contention that RDM measurements may act as a surrogate for condition
11 and trend studies on the four allotments at issue. Moreover, however, and significantly, it is
12 not clear that RDM measurements were, in fact, used in order to monitor all four allotments.
13 Rather, and as noted above, defendant's data reflects that RDM measurements were used
14 in conjunction with stubble height measurements, and that not all allotments were even
15 complying with all utilization standards.

16 In sum, the court concludes that the administrative record is devoid of condition and
17 trend studies that the LRMP requires to be completed at 5-10 year intervals; does not
18 reflect that forage utilization standards were satisfactorily being met for all allotments; and
19 does not include sufficient photographic documentation to determine the state of the
20 allotments' rangeland or soil conditions. See Mendocino AR at 00046-48, 0980-82. As
21 such, the court concludes that the Forest SERVICE failed to take a sufficiently 'hard look' at
22 the proposed action underlying the Mendocino CE, in violation of NEPA's requirements.
23 See Bering Strait Citizens for Responsible Dev. v. U.S. Army Corp of Eng'rs, 524 F.3d 938,
24 947 (9th Cir. 2008).

25 b. Riparian objectives

26 Plaintiffs assert that the administrative record does not contain any monitoring
27 information showing that the four Mendocino allotments – which contain a number of wet
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1 meadows, creeks, streams, and other riparian areas – are meeting or moving toward the
2 aquatic and riparian objectives set forth in the Mendocino LRMP. The Mendocino LRMP
3 sets forth aquatic and riparian objectives that require the Forest Service to “maintain and
4 improve the ecological health of riparian and aquatic ecosystems.” Mendocino AR at
5 01275. Among other things, the Mendocino LRMP sets forth standards that mandate that
6 the Forest Service: “adjust grazing practices to eliminate impacts that retard or prevent
7 attainment of aquatic conservation strategy objectives;” maintain and restore the physical
8 integrity of the aquatic system, including shorelines, banks and bottom configurations;
9 maintain and restore the sediment regime under which aquatic ecosystems evolved, and
10 the specific composition and structural diversity of plant communities in riparian areas and
11 wetlands. See Mendocino AR at 01298, 01302-03.

12 To demonstrate that its reliance on the Mendocino CE is adequately supported by
13 the record insofar as monitoring of LRMP objectives for riparian areas is concerned, the
14 Forest Service primarily relies upon: a Fisheries/Aquatic Prefield Form, and a June 2007
15 Fisheries/Aquatic Specialist Report. See Mendocino AR at 00057-59, 00061-69. The
16 Fisheries/Aquatic Specialist Report concludes that grazing and cattle use are “light to
17 nonexistent” along the majority of stream banks, that grazing does not overlap with stream
18 habitat, and that cattle do not and cannot access fish-bearing reaches of streams located in
19 steep terrain. See id. at 00064-66, 69. The Fisheries/Aquatic Prefield Form similarly
20 concludes that permitted grazing on the four allotments in question does not overlap with
21 fish or other aquatic species habitat. Id. at 00057-59.

22 As plaintiffs point out, however, the conclusions reached in the foregoing report and
23 prefield form are just that: conclusions. While the conclusions themselves appear to be
24 based on quantitative data and/or qualitative observations, no indication or reference is
25 made to such, and the record is thus devoid of any reference to any actual monitoring basis
26 for the conclusions reached by the Forest Service. Moreover, plaintiffs are further correct
27 that aside from the two documents noted above, the Forest Service points to no other
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1 independent source of specific monitoring or data in the record that evaluates, as the ACS
2 objectives set forth in the Mendocino LRMP require, the physical integrity of shorelines and
3 streambanks, or sediment regime, within the four Mendocino allotments in question.

4 All of which leaves the court unable to locate any definitive monitoring information or
5 data relied upon by the Forest Service to evaluate the conclusion on which the Mendocino
6 CE relied: that monitoring with respect to the four allotments in question demonstrated that
7 current grazing management on the allotments was meeting or satisfactorily moving toward
8 Mendocino LRMP objectives for riparian areas. The Forest Service may not rely upon
9 unsupported assertions, but rather must provide the underlying data upon which its
10 underlying experts relied – as well as an explanation for the agency’s conclusions. See
11 Western Watersheds Project v. Kraayenbrink, 632 F.3d 472, 493 (9th Cir. 2011). Since
12 defendant fails to do so here, the court concludes that the Mendocino CE’s conclusion that
13 the second prong of the 2005 Appropriations Rider was satisfied, was arbitrary and
14 capricious.

15 c. Fisheries objectives

16 Finally, plaintiffs assert that the administrative record does not contain any
17 monitoring information demonstrating that the four Mendocino allotments are meeting or
18 moving toward the Mendocino LRMP objectives for fisheries. The Mendocino LRMP tasks
19 the Forest Service with, among other things, maintaining or improving “the diversity and
20 quality of habitat needed to support viable populations of all native and desired non-native
21 wildlife and fish species...”. See Mendocino AR at 01276. The Mendocino LRMP sets forth
22 standards requiring the Forest Service to provide “medium to high quality habitat for
23 resident trout and an adromous fish species,” including the maintenance of “high water
24 quality values,” retention of stream side vegetation along perennial streams to provide 60%
25 shade during certain times, and provision of favorable habitat for bottom flora and fauna
26 communities that are sources for fish forage.... See id. at 01320. The Forest Service is
27 also required to “avoid and discourage activities that would disturb summer steelhead
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1 during periods of critical low flow or high water temperatures.” Id. at 01321.

2 For proof that the Mendocino CE is adequately supported vis-a-vis the Mendocino
3 LRMP’s objectives for fisheries, the Forest Service once again relies on the June 2007
4 Fisheries/Aquatics Specialist Report. See Mendocino AR at 00061-67. The
5 Fisheries/Aquatics Specialist Report notes that the Forest Service consulted with the
6 National Marine Fisheries Service (“NMFS”) in 1996 and 1998 regarding the possible
7 impact of grazing on protected salmon, steelhead, and their habitat – and noted the
8 possibility that some adverse effects could occur in the Pine Mountain and York Cabin
9 allotments. See id. at 00062. The report then states that “subsequent monitoring” results
10 have confirmed that the majority of grazing takes place away from these fish and their
11 habitats, and it is unlikely that the fish or their habitats are being harmed. Id. The Forest
12 Service contends that the report was in fact based upon field review, monitoring, and
13 numerous reports and analyses and consultation with other government agencies.

14 As already noted in connection with the foregoing discussion, however, the problem
15 with the Fisheries/Aquatic report is that the conclusions reached therein, although
16 referencing the fact that “subsequent monitoring” was conducted, fails to indicate actual
17 reliance on quantitative data and/or qualitative observations, or reference as much. The
18 record is thus devoid of any reference to any actual monitoring basis for the conclusions
19 reached by the Forest Service. Moreover, as plaintiffs point out, this conclusion is also
20 supported by a 1999 Forest Service study of the Upper Creek watershed that incorporates
21 two of the allotments in question. The 1999 Forest Service study found that “specific
22 information including distribution, habitat condition and trends on resident rainbow trout and
23 other fish that live within the creeks and streams of this watershed is incomplete...”. See
24 Mendocino AR at 00790.

25 In sum, for the same reasons already noted in connection with the preceding
26 discussion on riparian objectives, the court concludes that the Mendocino CE’s conclusion
27 that the second prong of the 2005 Appropriations Rider was satisfied insofar as monitoring
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1 related to the Mendocino LRMP's fisheries objectives was concerned, was arbitrary and
2 capricious.

3 D. Conclusion

4 For the foregoing reasons, the court hereby GRANTS in part and DENIES in part the
5 parties' cross-motions for summary judgment. Specifically, summary judgment is
6 GRANTED in plaintiffs' favor with respect to their contention that the record does not
7 support the Forest Service's conclusion that the Big Ridge CE was consistent with agency
8 policy concerning "extraordinary circumstances;" and with respect to whether the Forest
9 Service appropriately decided that monitoring of the Mendocino allotments indicated that
10 current grazing management was meeting, or moving satisfactorily toward, objectives in the
11 Mendocino LRMP. Defendant's cross-motion for summary judgment on the same grounds
12 is DENIED. With respect to the remaining issue – whether the record provides adequate
13 support for the Forest Service's conclusion that monitoring on the Big Ridge allotment
14 demonstrated that current grazing management was meeting, or moving satisfactorily
15 toward, objectives in the Klamath LRMP – defendant's motion for summary judgment as to
16 this ground is GRANTED, and plaintiffs' cross-motion on the same ground is DENIED.

17 In view of the court's finding that the conclusions reached by the Forest Service in
18 connection with the Big Ridge CE and Mendocino CE decision memos were arbitrary and
19 capricious in certain respects and failed to take the "hard look" required by NEPA, the
20 question of remedy is appropriate. In particular, the court questions whether entry of
21 summary judgment consistent with the foregoing ruling is sufficient by itself to dispose of
22 the matters pending before the court, or whether, in the alternative, an order remanding the
23 underlying matters to the Forest Service for further disposition consistent with the
24 foregoing, is the more appropriate course of action.

25 The court therefore instructs the parties to meet and confer, and to submit to the
26 court no later than **April 20, 2012** a stipulated form of judgment or a joint statement
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1 proposing another form of disposition.

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3 **IT IS SO ORDERED.**

4 Dated: March 30, 2012



PHYLLIS J. HAMILTON
United States District Judge

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