

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, CENTER
FOR BIOLOGICAL DIVERSITY, GRAND
CANYON TRUST, and UTAH
ENVIRONMENTAL CONGRESS,

Plaintiffs,

v.

U.S. FOREST SERVICE,

Defendant,

and

WYOMING STOCK GROWERS ASSN.,
WYOMING WOOL GROWERS ASSN., PUBLIC
LANDS COUNCIL, PETER R. ARAMBEL, and
WYOMING COUNTY COMMISSIONERS
ASSN.,

Defendant-Intervenors,

and

STATE OF WYOMING,

Defendant-Intervenor.

Case No. CV 10-612-E-EJL-REB

REPORT AND RECOMMENDATION

This case involves challenges made by Plaintiff to decisions by four different National Forests to renew grazing permits for livestock over 43 different grazing allotments, spread across various portions of the Forests. The administrative record underlying such decisions, which

becomes the record for this Court to consider in cases such as this, is therefore an array of administrative decisions and related materials. In this case there are four Forest decisions, each with their own vast administrative record. These administrative records, most over 10,000 pages in length, include maps, photographs, studies, reports, biological evaluations and assessments, among other things.

The issue raised by each of the many challenges in this case is the same. Was the agency decision to renew the otherwise expiring grazing permit exempt from the National Environmental Policy Act (NEPA) environmental review process by virtue of Congressional action taken in 2005 intended to streamline the permit renewal process.

In this decision, the Court resolves claims raised by Plaintiffs Western Watersheds Project, Center for Biological Diversity, Grand Canyon Trust and Utah Environmental Congress (collectively, "Plaintiffs"). Intervening in the case are Wyoming Stock Growers Association, Wyoming Wool Growers Association, Public Lands Council, Peter R. Arambel, and Wyoming County Commissioners Association (collectively, "Wyoming Stock Growers Intervenors") (Dkt. 46) and the State of Wyoming (Dkt. 62). Procedurally, the issues are framed by cross-motions for summary judgment.¹ These motions were referred to the undersigned by District Judge Edward J. Lodge (Dkt. 12).

¹ Plaintiffs' Motion for Summary Judgment (Dkt. 22); Defendant United States Forest Service's ("Forest Service") Motion for Summary Judgment (Dkt. 58); Defendant-Intervenors Wyoming Stock Growers' Motion for Summary Judgment (Dkt. 55); and Defendant-Intervenor State of Wyoming's Motion for Summary Judgment (Dkt. 63).

REPORT

OVERVIEW

The use and management of the myriad resources of the National Forests includes grazing by livestock. The Forest Service issues grazing permits to livestock producers and ranchers, allowing livestock to graze on portions of the National Forests under certain conditions. In this case, Plaintiffs challenge four² “categorical exclusion” decisions made by the Forest Service to reauthorize grazing on Forest Service land, which exempted such decisions from environmental review under NEPA. Below, the Court will discuss the statutory backdrop to these categorical exclusion decisions and then the decisions specifically at issue.

BACKGROUND

1. The Statutory Law

The Forest Service manages the National Forests pursuant to duties and obligations first established more than a century ago under the Forest Service Organic Administration Act of 1897, 16 U.S.C. §§ 473-482, 551. These responsibilities were remodeled by the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531, and the National Forest Management Act of 1976 (“NFMA”), 16 U.S.C. §§ 1600-1614. The Multi-Use Sustained-Yield Act of 1960 contains the Congressional policy “that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528. NFMA, in turn, requires that forest management “provide for multiple use and sustained yield of the products and services obtained therefrom . . . and [must] include coordination of outdoor

² Plaintiffs initially challenged a fifth decision made by the Fishlake National Forest. However, that decision was subsequently withdrawn and is no longer at issue. *See* Forest Service’s Motion, Dkt. 58-1, p. 2.

recreation, range, timber, watershed, wildlife and fish, and wilderness[.]” 16 U.S.C. § 1604(e)(1).

NEPA requires that major agency decisions significantly affecting the environment consider the impacts of those decisions and explore possible alternatives, before a decision is reached. 42 U.S.C. §§ 4321, *et seq.*; 40 C.F.R. § 1501.1. NEPA’s procedures ensure a “hard look” at the environmental consequences of a federal agency’s proposed action in advance of a final decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). Agency decisions governed by NEPA are reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882-83 (1990); *Laub v. U.S. Dep’t of Interior*, 342 F.3d 1080, 1087 (9th Cir. 2003).

Specific to the instant controversies, NEPA requires the Forest Service to prepare a detailed environmental impact statement (“EIS”) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(c). However, an environmental assessment (“EA”) may be prepared as a preliminary step to determine whether the environmental impact of the proposed action is significant enough to warrant the considerable task of preparing an EIS. 40 C.F.R. § 1508.9.

Regulations promulgated by the Council on Environmental Quality (“CEQ”), 40 C.F.R. §§ 1500-1508, provide guidance on NEPA implementation. *See* 42 U.S.C. §§ 4342-4347. The CEQ regulations provide for an exit route for an agency from the requirements of preparing an EA or EIS, in the form of what are known as categorical exclusions (“CEs”). CEs may be used when “a category of actions . . . do not individually or cumulatively have a significant effect on

the human environment and . . . have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . .” 40 C.F.R. § 1508.4. A significant effect exists if it is “reasonable to anticipate a cumulatively significant impact on the environment.” 40 C.F.R. § 1508.27(b)(7).

The Forest Service has invoked the use of categorical exclusion in various settings as part of the agency’s NEPA compliance procedures. *See Alaska Ctr. for the Env’t v. U.S. Forest Serv.* 189 F.3d 851, 857 (9th Cir. 1999). The Forest Service’s NEPA procedures, which are contained in regulations promulgated by the agency, list seven “resource conditions” that “should be considered in determining whether extraordinary circumstances related to [a] proposed action warrant further analysis and documentation in an Environmental Assessment or an Environmental Impact Statement.” *See Forest Service Handbook § 1909.15, Ch. 30 § 30.3 (2007)*³; 36 C.F.R. § 220.6(b). In pertinent part, the Forest Service Handbook provides:

Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or EIS are:

- (1) Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species;
- (2) Flood plains, wetlands, or municipal watersheds;
- (3) Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas;
- (4) Inventoried roadless areas or potential wilderness area;
- (5) Research natural areas;
- (6) American Indians and Alaska Native religious or cultural sites;
- and
- (7) Archaeological sites, or historic properties or areas.

³ *See Wyoming’s Reply Brief, Ex. 1 (Dkt. 75-1)*

Forest Service Handbook 1909.15, Ch. 30 § 30.3; 36 C.F.R. § 220.6(b)(1).

The Forest Service is careful to quantify and delineate the relative importance of any such discrete resource condition in its larger whole, as the Handbook goes on to say :

The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion (CE). It is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions, and if such a relationship exists, the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.

36 C.F.R. § 220.6(b)(2). This “cause-effect” relationship is of particular importance in the resource mosaic of the National Forests, and is a frequent touchstone in the various Forest decisions seeking to justify the use of the categorical exclusion in renewing a grazing permit, as will be discussed at different points in this decision.

2. History of the 2005 Rider

Generally, the Forest Service must complete an environmental analysis under NEPA before issuing or renewing grazing permits on National Forest System lands. Forest Service Handbook 2209.13, Ch. 90, § 92.3 (2005) (“a site-specific analysis of environmental effects of livestock grazing projects on affected National Forest System lands must be completed pursuant to NEPA before the grazing activity can be authorized”).

Most grazing permits on Forest Service lands are issued for ten years. 36 C.F.R. § 222.3(c). In 1995, due to a large number of expiring permits and concerns over the time and effort needed for renewal reviews, Congress enacted a series of legislative directives requiring the Forest Service to “establish and adhere to a schedule for the completion of [NEPA] analysis and decisions on all allotments within the National Forest System unit for which NEPA analysis

is needed.” The Rescissions Act of 1995, Pub. L. No. 104-19, §§ 501-04, 109 Stat. 194, 212 (July 22, 1995). Among other things, Congress sought to protect ongoing grazing permittees by requiring that any grazing permit which would otherwise expire before completion of its NEPA analysis pursuant to the Rescissions Act schedule, to be reissued “on the same terms and conditions” as the expired permit, pending NEPA compliance. Pub. L. No. 104-19, § 504(b), 109 Stat. at 212-13.

In 2003, Congress further strengthened the protections for ongoing livestock grazing with the 2003 Omnibus Appropriations Act. Pub. L. No. 108-7, § 328, 117 Stat. 11, 276 (Feb. 20, 2003). This Act provided that term grazing permits issued prior to or during fiscal year 2003 “shall continue in effect until such time as the Secretary of the Interior or the Secretary of Agriculture completes processing of [the renewed] permit . . . in compliance with all applicable laws and regulations . . .” *Id.*

Finally, in 2005, an appropriations rider was passed that entirely exempted grazing permit renewals from NEPA requirements under certain conditions. FY 2005 Consolidated Appropriations Act, Pub. L. No. 108-447 § 339 (“2005 Rider”), 118 Stat. 2809, 3103 (Dec. 8, 2004). This created what has become known as the 2005 Categorical Exclusion, and under its language, all grazing authorization decisions made during the fiscal years 2005 through 2007 were given the benefit of a NEPA categorical exclusion if three benchmarks were satisfied:

For fiscal years 2005 through 2007, a decision made by the Secretary of Agriculture to authorize grazing on an allotment shall be categorically excluded from documentation in an [Environmental Assessment] or an [Environmental Impact Statement] under [NEPA] if: (1) the decision continues current grazing management of the allotment; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan, as

determined by the Secretary; and (3) the decision is consistent with agency policy concerning extraordinary circumstances.

Id. If these three conditions are met, the decision to allow grazing upon an allotment can be excluded from full NEPA review. The total number of allotment decisions so exempted under this rider could not exceed 900. *Id.*

The 2005 Rider was extended for fiscal year 2008, after the rider had not been used for 900 allotments by the end of fiscal year 2007. FY 2008 Consolidated Appropriations Act, Pub. L. No. 110-161 § 421, 121 Stat. 1844, 2149 (Dec. 26, 2007). However, Congress further limited the availability of the categorical exclusion, by prohibiting the use of a CE for any allotment within a federally designated wilderness area.⁴ *Id.*

The Forest Service used the 2005 Rider to categorically exclude numerous grazing allotments from NEPA analysis, including the four CE decisions challenged by Plaintiffs in their motion and discussed herein.

3. The 2005 Rider Categorical Exclusion Template

As described above, the 2005 Rider allows categorical exclusions where (1) the decision continues current grazing management; (2) monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan, as determined by the Secretary; and (3) the decision is consistent with agency policy concerning extraordinary circumstances.

A. Current Grazing Management

The requirement that a CE decision must “continue current grazing management” is left

⁴ The challenged CEs were issued during fiscal year 2007 and the Court agrees with Defendant-Intervenor Wyoming that this prohibition does not apply to these decisions.

undefined in the 2005 Rider. There is, however, a definition for “current management” in the Forest Service Handbook, under the discussion of alternatives under the normal NEPA process:

Current management should also be analyzed in detail as an alternative to the proposed action if current management meets the stated purpose and need for action. This alternative should be based on the *current management actions being implemented, specifically, current management over the last 3 to 5 years.* Current management direction may be contained in an allotment management plan (sec. 94.1), annual operating instructions (AOI) (sec. 94.3), or a combination thereof. The current management alternative may also be the proposed action. This would be appropriate when current management is determined to be consistent with the land and resource management plan and has been shown to be effective in meeting resource objectives through monitoring over time.

Forest Service Handbook 2209.13, Ch. 92, § 31.⁵ (Emphasis added.)

The Handbook definition is consistent with the common-sense, ordinarily understood, meaning of such language, that is, the current management of the allotment pertains to the ongoing management of the allotment grazing resource in the three to five calendar year time period prior to and up until the time of the new grazing allotment decision. The Court is aware that management of a grazing allotment varies as to the months an allotment may be grazed, and the months that an allotment is not grazed (as part of its management), and management may also consider the particular climate and growing season factors peculiar to the particular allotment, among other things. The three to five year time frame is an adequate frame to place around the ongoing “current” management activities, for purposes of the Forest decisions

⁵ While the Forest Service Handbook may provide guidance and has the “power to persuade,” it does not have the force and effect of law. *See Wildearth Guardians v. U.S. Forest Serv.*, 668 F. Supp. 2d 1314, 1328 (D.N.M. 2009) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *See also Lands Council v. Martin*, 529 F.3d 1219, 1227-28 (9th Cir. 2008).

implementing the 2005 Rider.

B. Land and Resource Management Plan Objectives

Each forest develops a Land and Resource Management Plan (“Forest Plan”), which is a broad, long-term planning document for that National Forest. Forest Plans establish planning goals and objectives for management of forest resources, considering both economic and environmental factors. 16 U.S.C. § 1604(g)(1)-(3). “These plans operate like zoning ordinances, defining broadly the uses allowed in various forest regions, setting goals and limits on various uses . . . but do not directly compel specific actions.” *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 966 (9th Cir. 2003).

At the project level, site-specific actions must be consistent with the governing Forest Plan. *See Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 757 (9th Cir. 1996); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1511-12 (9th Cir. 1992); *see generally* 16 U.S.C. § 1604(I). Once a Forest Plan is approved, the Forest Service implements it by approving or denying site-specific actions. *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1092 (9th Cir. 2003). Site specific actions may include resource plans, permits (e.g., for grazing or mining), contracts, and other instruments for occupancy and use of forest lands. *Inland Empire*, 88 F.3d at 757. NFMA requires that the proposed site-specific actions be consistent with the governing Forest Plan; nonetheless the Forest Service’s interpretation and implementation of a Forest Plan is entitled to substantial deference. *Cf.* 16 U.S.C. § 1604(I) *with Forest Guardians*, 329 F.3d at 1097, 1099.

The second prong of the 2005 Rider requires that “current grazing management is meeting, or satisfactorily moving toward, objectives in the land and resource management plan.” Under

this prong, the parties raise the issue of whether monitoring is required on *each* allotment that is categorically excluded. The language used by Congress in the 2005 Rider is not clear on this issue. Although the threshold language of the Rider speaks of “a decision . . . to authorize grazing on *an* allotment” (emphasis added), it does not explicitly require monitoring on each allotment. Rather, the language requires that “monitoring indicates that current grazing management is meeting, or satisfactorily moving toward, objectives . . .”

There is no controlling law on this issue. Other federal district courts confronting the 2005 Rider have not explicitly spoken to it.⁶

It can be argued from such language that individual allotment monitoring is required. However, Congress could easily have made such an requirement explicit, and it did not do so. Further, to require such individual allotment monitoring in the absence of some explicit requirement in the statutory language would serve to restrict the exercise of the agency’s expertise and discretion, in a setting where otherwise Congress has given the agency full opportunity to employ its expertise and discretion. Allowing the agency more discretion in this area allows the agency to consider whether the resources and grazing of a particular allotment are sufficiently similar (in part or in whole) to a nearby allotment. Thereby allowing a reasonable reliance upon the monitoring in a nearby allotment to serve as proxy for whether objectives are being met in the allotment without specific monitoring in that particular allotment. Accordingly, the Court Court will accept evidence of monitoring conducted on similar

⁶ In an analogous case, the Forest Service found that resource conditions in an unmonitored allotment were similar to those at another, monitored, allotment due to their proximity, and relied upon the data from the similar allotment in applying the categorical exclusion. *Hells Canyon Preservation Council et al. v. Connaughton et al.*, Case No. 3:11-cv-00023-PK, Dkt. 149, p. 17, n. 5 (D. Or. Aug. 10, 2012).

allotments as evidence that objectives were being met on an allotment that was *not* monitored, so long as there was evidence that objectives were being met on the monitored allotments, with a sensible discussion of why those allotments adequately represented the non-monitored allotment, such as common land characteristics and similar grazing utilization. In such a situation, the Court may accept the expertise of the agency and consider that evidence as satisfying the rider.

C. Extraordinary Circumstances

The Forest Service's policy on extraordinary circumstances is also contained in the Forest Service Handbook 1909.15, Ch. 30 § 30.3. *See also* 36 C.F.R. § 220.6(b). In determining whether extraordinary circumstances exist, the Forest Service must consider certain resource conditions, including: "federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species" and "Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas." *Id.* "The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion (CE). It is the existence of a cause-effect relationship . . . the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist." *Id.*

ANALYSIS AND DECISION UPON CHALLENGES TO THE INDIVIDUAL FOREST CATEGORICAL EXCLUSION DECISIONS

Evidence Extraneous to the Administrative Record

Both Plaintiffs and the Forest Service take issue with declarations and exhibits filed by the other party that are not a part of the administrative record.

"Judicial review of an agency decision typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made

initially in the reviewing court.” *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). *See also Camps v. Pitts*, 411 U.S. 138, 142 (1973) (“focal point for judicial review should be the administrative record already in existence . . .”).

Administrative review decisions cannot rely upon litigation affidavits or post-hoc rationalizations for agency action. *See Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153 (9th Cir. 1998) (citing to *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971)). “[E]xplanatory materials cannot be used to offer new rationalizations for agency action.” *Alvarado Comm. Hosp. v. Shalala*, 155 F.3d 1115, 1124 (9th Cir. 1998).

There are some exceptions to this rule. For example, the district court may consider materials outside the record when “the agency has relied on documents not included in the administrative record, if supplementation of the record is necessary to explain technical terms or complex subject matter involved, or when plaintiffs make a showing of agency bad faith.” *Nat’l Audobon Soc. v. U.S. Forest Serv.*, 46 F.3d 1437, 1447, n. 9 (9th Cir. 1993).

The Forest Service challenges the declarations of Jonathan Ratner (Dkt. 22-3) and Mary O’Brien (Dkt. 22-4) as improper expert testimony. The Forest Service also contends the declarations of John Carter (Dkt. 22-6), and Ralph Maughan (Dkt. 22-7) should be stricken to the extent they are offered for any purpose other than to establish standing. The Court finds that the Ratner and O’Brien declarations are properly considered only for the issue of standing and nothing more. Specifically, the Court strikes, and will not consider for purposes apart from standing, paragraphs 11-44 of the O’Brien declaration and paragraphs 11-20 of the Carter declaration. The Court is satisfied that the entirety of the Ratner and Maughan declarations appropriately relate to establishing standing and will not strike any portion of these declarations.

The Forest Service also challenges the declaration of attorney Lauren Rule (Dkt. 23) and attached exhibits (Dkts. 23-1--7). These exhibits include: a Natural Resources Defense Council article (Ex. 1), CE decisions from other forests (Exs. 2, 3, 6 & 7), and an appeal of a record of decision (Ex. 4) and final Environmental Impact Statement in the Manti-La Sal forest (Ex. 5). The Court agrees with the Forest Service that Exhibits 1, 4 and 5 are not properly in the record of this case, and they are stricken. With respect to the CE decisions from other forests (Exs. 2, 3, 6 & 7), these are not a part of the administrative record and they are not judicial decisions which the Court might otherwise consider for any persuasive or precedential value. They will also be stricken. Additionally, the State of Wyoming takes issue with Plaintiffs' citation to materials from the Red Castle administrative record when addressing the wilderness resource condition on the Southern Wind River allotments. The Court disregarded these references to the Red Castle administrative record when examining the wilderness as an extraordinary circumstance on the Southern Wind River allotments.

Plaintiffs, in turn, challenge the Declaration of Barbara Franklin (Dkt. 89-2), contending that her declaration is exactly the sort of post-hoc explanation prohibited in a case such as this. In particular, Plaintiffs argue that Ms. Franklin is seeking solely to shore-up or otherwise justify inadequacies in the Southern Wind River CE decision on the Bridger-Teton National Forest. The Forest Service counters that Ms. Franklin's declaration explains the monitoring conducted for the Southern Wind River CE decision and assists the Court in understanding the underlying data.

The Court agrees with Plaintiffs that the majority of the Franklin Declaration is improper for the Court to consider. Ms. Franklin goes beyond simply explaining technical terms and data,

as argued by the Forest Service and the Wyoming Stock Growers Intervenors, and instead adds post-hoc explanations or justifications for the decision. The Court will strike the Franklin Declaration, with the exception of paragraphs: 1-4; 13-16; and 20. The Court finds these paragraphs explain some of the monitoring methods, give a better understanding of how the monitoring is conducted, and explain some of the documents found in the administrative record.

For the reason that such evidence is also improperly beyond the administrative record, the Court did not rely on, or take into consideration, the documents attached to Plaintiffs' reply brief (Dkts. 65-1--4).

Summary Judgment Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In cases asserting NEPA and NFMA violations, the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, apply. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005). Under the APA, agency action may be set aside where "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law" or if adopted "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

A decision is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The arbitrary and capricious standard applies “to an agency’s decision that a particular action falls within [a] categorical exclusion[.]” *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996). To determine whether an agency action is arbitrary or capricious, a court must consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Alaska Ctr. for Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999) (internal citation omitted).

“When an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision.” *Id.* It is important that the agency be able to point to a record of decision invoking a categorical exclusion. *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) (discussing *Bicycle Trails*, 82 F.3d at 1456-57.) There is an inherent difficulty in determining whether a decision to invoke a CE is arbitrary and capricious, especially in cases “where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its actions and decided to apply a categorical exclusion to the facts of a particular decision.” *Id.* However, “[o]nce the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference.” *Alaska Ctr.*, 189 F.3d at 859 (citing *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1992)).

1. Red Castle Decision

On September 30, 2007, the Uinta-Wasatch-Cache National Forest in Northern Utah issued a decision categorically excluding NEPA analysis in regard to the reauthorization of grazing on six sheep allotments (“the Red Castle Decision”). These allotments – Red Castle, East Fork Blacks Fork, Middle Fork Blacks Fork, Lyman Lake, Little West Fork Blacks Fork, and

Elizabeth Mountain No. 2 – encompass 64,093 acres. AR UWC019611-19. The Red Castle Allotment and a portion of the East Fork Blacks Fork Allotment are located within the High Uintas Wilderness Area. AR UWC014708, 013893.

A. Extraordinary Circumstances

1. Wilderness

The Wilderness Act of 1964 was enacted to provide opportunities for solitude or unconfined recreation, although it does allow for livestock grazing on wilderness land if grazing was established on the land prior to enactment of the Act. *See* 16 U.S.C. § 1131(a); § 1133(d)(4) (“[T]he grazing of livestock, where established prior to [the effective date of this Act], shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture”). Since 1964, Congress has designated additional areas to be set aside as wilderness, including the High Uintas Wilderness, created by the Utah Wilderness Act of 1984. Pub. L. No. 98-428, 98 Stat. 1657 (Sept. 28, 1984).

A Forest Service “Wilderness Evaluation” published in March 2006 looked at the effects of grazing on six allotments within the High Uintas Wilderness. Those included the Red Castle and East Fork Blacks Fork allotments. AR UWC014708-20. The evaluation indicates that the entire Red Castle allotment falls within the wilderness area, and that the potential for most conflicts occurs around Lower Red Castle Lake which receives heavy recreational use and where a significant amount of grazing occurs. AR UWC014719. Such conflicts, according to the evaluation, would be “moderately high in frequency and high in severity.” *Id.* As to the East Fork Blacks Fork allotment, recreational use was described as generally light, increasing to moderate during the hunting season. *Id.* The particular unit in this allotment with the heaviest

concentrated recreational use was grazed for 12 days. AR UWC014720. The potential for conflicts was measured as moderate in this unit, and the conflicts were characterized as “not very severe.” *Id.*

For both allotments, the evaluation stated that the resource conditions “generally” reflected desired conditions and any sites of concern were recreation-related. *Id.*

In its CE Decision, when discussing the issue of wilderness as a potential “extraordinary circumstance” under the third prong of the 2005 Rider, the Forest Service states that its decision exempting the permit from NEPA review “does not change the status quo and therefore does not create new, additional, or amplified impacts to the wilderness resource.” The Forest relies directly upon the Wilderness Evaluation in reaching that conclusion. AR UWC09614.

However, this language used in the decision misstates the proper standard for whether an extraordinary circumstance exists. Under the Forest Service Handbook (codified in the Code of Federal Regulations), it is “the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.” Forest Service Handbook 1909.15, Ch. 30 § 30.3; *see also* 36 C.F.R. § 220.6(b). It may be correct to say that the Red Castle CE does not change the status quo. However, the Forest’s Wilderness Evaluation details that in the Red Castle allotment, conflicts between grazing and recreation are “moderately high in frequency and high in severity.” In its CE Decision, the Forest Service fails to explain why such conflicts do not create an extraordinary circumstance. Instead, the Forest Service defaults to a statement that the status quo “is maintained,” which does no more than beg the question that must be answered by the Forest Service. *See California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) (“Where there is substantial evidence in the record that exceptions to the

categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions.”)

The Wilderness Evaluation unmistakably implicates the potential for an extraordinary circumstance, which, if present, precludes the use of a categorical exclusion in regard to any grazing permit issued for the Red Castle allotment. The Forest Service must do more than summarily dismiss this issue without explanation, so that there is evidence that the issue has been fully and thoughtfully considered, and a decision made consistent with the evidence before the agency, whatever that decision may be.

A. East Fork Sheep Driveway and Fisheries and Soil Reports

The East Fork Sheep Driveway (“Sheep Driveway”) historically has been used by sheep ranchers to move four bands of sheep to and from allotments in the High Uintas, including the Red Castle allotment and another located in the Ashley National Forest. AR UWC013879. The “driveway” is 28-30 miles long. Approximately 75% of the driveway is within the High Uintas Wilderness Area. *Id.*, AR UWC013881. The Forest Plan calls for the Sheep Driveway to be “managed as a driveway for as long as it is needed. Permittees take responsibility for following the driveway management plan and minimizing impacts.” AR UWC013882.

Plaintiffs contend that the trailing along the Sheep Driveway is a “connected action” to grazing and its effects must be considered in conjunction with grazing on the Red Castle allotment. Plaintiffs further argue that the record shows degradation of natural conditions along the Sheep Driveway, demonstrating the potential for significant effects to wilderness.

In March 2006, an East Fork Sheep Driveway Trailing Impacts Report was published by two Ecologists from the Ashley National Forest and a Rangeland Management Specialist from

the Uinta-Wasatch-Cache National Forest. AR UWC013879-90. The report analyzed 64 long-term studies established on or adjacent to the Sheep Driveway. AR UWC013879. The scientists concluded that the sheep trailing left “relatively low impacts along the driveway except along some moderate to steep gradient slopes where sheep trail into and out of major drainages . . .” AR UWC013880. In these areas, the report describes increased soil disturbance, reduced ground cover and active gullies. *Id.* Twenty-seven acres of the driveway were deemed to be highly impacted. *Id.* Recreation use, such as camping, backpacking, hiking and fishing, also was found to occur along or adjacent to the driveway and contributed to the negative effects noted on the driveway. AR UWC013881. One area of conflict between sheep and recreation users was identified where 1.5 miles of trail is used by both hikers and sheep herd trailing during two days of the summer season. *Id.*

Plaintiffs also point to a Fisheries Report that evaluated the impact of grazing and trailing in the East Fork Smiths Fork Drainage, where the Red Castle Allotment and a portion of the Sheep Driveway are located. AR UWC011230-UWC011248. That report described little impact to the riparian and instream habitat due to grazing, with the largest impact on these habitats coming from sheep trailing. AR UWC011243, UWC011245. However, about 3% of the riparian zone in the drainage was found to be “severely impacted” by sheep trailing. AR UWC011247.

Likewise, the Soil Scientist’s Field Report on the Red Castle allotment identified one area with poor watershed conditions, but it was a short, steep and narrow draw, thus necessarily confining sheep trailing. AR UWC011580. The recreation trail follows this same route as well. *Id.*

In a response to these reports, District Ranger Stephen Ryberg summarized that “numerous studies along the driveway . . . indicate . . . relatively low impacts from sheep trailing.” He acknowledged, however, that a “few, short segments of the driveway” have “moderate to high impacts from sheep trailing,” and some “small steep sections” have been “heavily impacted by sheep trailing.” AR UWC010352. These small sections of the driveway were looked at in detail, with a conclusion that “there is no practical alternate route to avoid these areas without causing additional resource damage.” AR UWC010352.

The record reflects definite impacts to the forest resources from sheep trailing. Such impacts are narrowly limited in both size and amount. Overall, the scientific consensus is that, and the Forest’s CE decision agrees, there is little impact on nearly the entirety of the Sheep Driveway. AR UWC013881, UWC011247, UWC011580. Relying upon the caveat that the mere presence of a degraded resource condition does not preclude a categorical exclusion, the Forest Service examined the “degree of the potential effect of a proposed action on these resource conditions.” Although the particular end conclusion as to the Sheep Driveway is not well-described in the CE Decision, there is a sufficient discussion of the particular issues and a sufficient degree of evidence in the underlying record for the Court to be satisfied that the Forest Service did consider the impacts of grazing and sheep trailing on the Sheep Driveway and determined any impacts did not amount to an extraordinary circumstance.

2. Threatened/Sensitive Species

A. Colorado Cutthroat Trout

The Sensitive species⁷ Colorado cutthroat trout occurs in numerous streams on nearly all of the allotments at issue in the Red Castle Decision⁸ and most of the population trends on these allotments are flat or down, with brook trout expanding in range and competing with the native Colorado cutthroat. The Forest Service admits in the Red Castle Decision that the grazing reauthorization “may impact individuals or habitat, [but it] will not contribute to a trend towards federal listing or cause a loss of viability to the population or species,” citing to a Biological Evaluation conducted by a wildlife biologist and aquatic biologist. AR UWC019613.

Plaintiffs challenge this assessment, relying on a 2006 fisheries report submitted to the Forest Service which shows high sediment levels in the East Fork Blacks Fork drainage, causing detriment to trout habitat. Forest Service Fish Biologist Paul Cowley discussed the report, authored by John Carter, in his 2007 Fisheries Resources Technical Report, in which Cowley said the Forest has no set standard for sediment in streams or survival rates of egg to emergence and that Carter’s sample size⁹ was too small to be meaningful. AR UWC011180-81. Cowley further says in the Technical Report that actual fish counts in the drainage are more appropriate measures of habitat health, and document viable populations in the drainages. AR UWC011182.

⁷ The Forest Service Manual defines Sensitive Species as “those plants and animal species identified by a Regional Forester for which population viability is a concern evidenced by significant current or predicted downward trend in numbers or density” and “habitat capability that would reduce a species existing distribution.” Forest Service Manual 2670.5.

⁸ The exception being the Lyman Lake Allotment.

⁹ Carter took three samples at four different sites: Burnt Fork, East Fork Black’s Fork, Middle Fork Beaver Creek, and West Fork Black’s Fork. AR UWC011181.

Cowley's Technical Report is referenced in the Biological Evaluation which is, in turn, relied on in the Red Castle Decision for the finding that while cutthroat trout habitat is present, grazing will "not likely contribute to a trend towards federal listing or cause a loss of viability to the population or species." AR UWC015977-78, UWC019613. The report concluded that "fish populations and general habitat conditions, the streams and lakes within the allotments appear to be in good condition . . . areas of impact [from livestock] are limited in number and only make up a small portion of the allotments. . . The overall trend of the cutthroat trout population in the drainage is flat." AR UWC011218.

This record reflects that the Forest Service adequately considered the potential impact of livestock grazing on Colorado cutthroat trout and determined that any impacts would not be significant; therefore, no extraordinary circumstance existed. The record could support a conclusion to the contrary, as well, but the decision is not arbitrary and capricious and is entitled to deference. *See Alaska Ctr.*, 189 F.3d at 859.

B. Canada Lynx

With respect to the threatened¹⁰ species of Canada lynx, the Forest Service states in the Red Castle Decision that grazing "may affect, but is not likely to adversely affect" the species. AR UWC019613. This conclusion draws upon a 2007 Biological Assessment, which reports that only "potential suitable habitat" exists for the Canada lynx within these allotments. AR UWC015970. Plaintiffs contend that grazing may change the structure and/or composition of native plant communities in the challenged allotments, thus impairing the habitat and

¹⁰ Threatened is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

populations of the snowshoe hare, a prey species of the Canada lynx. *See* AR UWC015719.

There is no identifiable discussion of how grazing may impact the Canada lynx and its habitat in the Red Castle Decision record. However, the 2003 Revised Forest Plan describes that although the Canada lynx was once present in the Forest, none have been sighted in recent years and that the “probability is very low” that the lynx exists in the forest. AR UWC009517. The CE Decision, and the record, on this subject would be improved by a particularized discussion of the subject, even if such a discussion is cryptic in nature because of the equally cryptic facts available. Nonetheless, the Court does not find evidence that the Forest Service “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation 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.” *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The evidence in the record indicates that lynx are most likely no longer present in this Forest and therefore there would be no effect on the species. Accordingly, the Forest Service’s conclusion that continued grazing “is not likely to adversely affect” the species does not run counter to the evidence before it and the decision is not arbitrary and capricious.

B. Forest Plan Objectives

Plaintiffs contend that desired conditions, standards, and guidelines set forth in the High Uintas Management Plan, which amended the Uinta-Wasatch-Cache Forest Plan, are not being met. AR UWC014713, UWC008808-11. These include the desired conditions of a “predominantly unmodified natural environment . . . outstanding opportunities for solitude . . .” as well as standards and guidelines with respect to erosion class characteristics and that grazing

should be managed to protect wilderness, soil and water resources. AR UWC014711-19, UWC008808-11.

Plaintiffs do not specify how these standards and guidelines are not being met. However, Plaintiffs also assert that many of the goals and guidelines for ground cover, water quality, and soil productivity are not being met. *See* AR UWC011241-28 (trailing on Sheep Driveway inconsistent with forest-wide subgoals 2a, 2b, 2d, 2e, 2h, 2i, 3n, desired future conditions, and Eastern Uinta Area guidelines 6, 9, 74), UWC011581-82 (trailing on Sheep Driveway in Red Castle and Hessie Lake allotments not meeting Eastern Uinta standard S7 for ground cover or guideline G9 for soil).

Plaintiffs' arguments on these issues implicate the second prong of the 2005 Rider, which requires that monitoring indicate that current grazing management is meeting, or satisfactorily moving towards, objectives in the land and resource management plan, as determined by the Secretary. Pub. L. No. 108-447 § 339. In analyzing this prong in the Red Castle Decision, the Forest Service concludes that such objectives are being met. AR UWC019612. These forest standards set the percent utilization of key grass or grass like vegetation (S24) and the maximum forage utilization standards (stubble height) for low to mid elevation greenline¹¹ species in Class I, II, and III riparian areas (S25). AR UWC008593. Objectives are measured against research information contained in the 2007 Specialist Report for Vegetation Resources. AR UWC019612; UWC014031-106. This report analyzed monitoring data from 273 long-term

¹¹ This is a term not defined in the materials in the record. The Court has located a definition from outside the record, which appears to the Court to be the same as that intended by the Forest Service, which defines greenline as "the first perennial vegetation that forms a lineal grouping of community types on or near the water's edge." Winward, Alma H. 2000. Monitoring the vegetation resources in riparian areas. Gen. Tech. Rep. RMRS-GTR-47. Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station.

studies permanently established among each of the allotments within the project area. AR UWC014032. Based on these studies, the Rangeland Management Specialist determined that “the plant communities are in satisfactory condition with stable trends or are trending toward desired condition.” AR UWC014034.

Moreover, while Plaintiffs do not point directly to which “objectives” for watershed condition, soils, or fish habitat they claim are not being met, the assessments and reports from Wildlife Biologists, Soil Scientists, Ecologists, and Wilderness and Trails Manager overwhelmingly conclude that the allotments are at or trending towards desired conditions, and Forest Plan standards and guidelines are being met. AR UWC013882, UWC014720, UWC015967, UWC014939, UWC015974. Any exceptions, as described in these reports, are “highly localized” or small areas. *See* AR UWC014720, UWC011580.

This technical scientific information was before the Forest Service when it reached its Red Castle Decision. It supports the Forest’s conclusion that, as a whole, Forest Plan objectives were being met or satisfactorily moved towards. The Court is at its “most deferential” with respect to an agency’s determination in areas of technical expertise. *See The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) *overruled on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

2. Southern Wind River Decision

On September 27, 2007, the Bridger-Teton National Forest categorically excluded 14 allotments from NEPA analysis. These allotments are the Little Sandy, Upper Dutch Joe, Temple Creek, Bunion, Dad’s Lake, Washakie-Francis Lake, East Fork, Muddy Canyon, Mt. Geike, Cross Lake, Pyramid Lake, Sheep Creek, South Fork, and Raid-Rainbow Allotments (hereinafter “Southern Wind River Allotments”). AR BT013027-32. All are contiguous on the

western front of the Wind River Range in Western Wyoming. AR BT013034. The allotments cover 92,456 acres, of which 87% falls within the Congressionally designated Bridger Wilderness. AR BT013030.

A. Forest Plan Objectives

The Forest Service concludes in the Southern Wind River Decision that “[m]onitoring data indicates that current grazing management is meeting, or satisfactorily moving toward, objectives in the Land Management Plan” and cites to several sources of data. AR BT013029. The analysis is primarily contained in one paragraph:

Based on information collected through monitoring, the vegetative health and trend of upland and riparian plant communities have generally improved throughout the project area as would be expected with a dramatic decrease in sheep numbers and improved management. The improvement in the vegetative communities is expressed through diversity in plant composition and increased ground cover especially along the historic Fremont Sheep Driveway. In addition, wildlife, watershed, fisheries and archeologist specialists’ reports indicated few impacts to these resources from continued grazing.

Id.

Plaintiffs contend that the Southern Wind River Decision fails to meet this second prong of the 2005 Rider in several areas, including range condition and vegetation, soil, riparian areas, and fish and wildlife habitat.

1. Range Condition and Vegetation

The Bridger-Teton National Forest Plan contains (1) Land and Resource Management Goals and Objectives; (2) Forest-wide Resource Management Prescriptions, Standards and Guidelines; (3) Desired Future Conditions; and (4) Management Area Descriptions, Standards and Guidelines. AR BT007806-09. For example, goal 4.7 is that “grazing use of the National

Forest sustains or improves overall range, soils, water, wildlife, and recreation values or experiences.” AR BT07930. Objectives listed for achieving that goal are to “retain or improve forage and overall range condition;” and “[r]etain or enhance riparian vegetation, stream-channel stability, sensitive soils, and water quality where livestock are present.” *Id.*¹²

The Forest Plan also details various monitoring techniques in support of different resources, such as wilderness, fisheries, and wildlife. AR BT Supp. pp. 329-335. The amount of monitoring for the various resources is prioritized in a manner contingent upon annual funding. Priority 1 monitoring is required, while Priorities 2 and 3 monitoring are optional.¹³ AR BT008136. The Forest Service Handbook for Region 4 also provides monitoring methods for rangeland health and functionality,¹⁴ vegetative and ground cover trends, and long-term condition and trend determinations. AR BT008225-94.

Plaintiffs claim that the Forest Service did not complete the necessary monitoring to comply with objectives for range condition and vegetation. Plaintiffs contend the Forest Service only assessed ground cover and not plant composition, non-native species, and the condition and

¹² Plaintiffs also point to several Resource Management Prescriptions, including the Vegetation Range Prescriptions calling for forage to be provided on a sustained-yield basis that protects rangeland values, wildlife habitat and meets other resource needs, as well as range being managed to maintain and enhance range and watershed condition while providing forage for livestock and wildlife; and the Soil, Water and Air Prescription calling for soil, water and air values to be protected to retain pristine wilderness characteristics. AR BT007937-39, BT007999.

¹³ For example, there is a Priority 1 monitoring requirement for Vegetation Range which states: “Benchmark studies will be established to determine trend in range condition and the objectives of the AMP [Allotment Management Plan] are being met. There will be one benchmark area for each grazing unit of each allotment.” AR BT Supp. p. 331.

¹⁴ The Handbook states that four criteria should be considered for upland rangeland health: non-native invasive plant species, ground cover, shrub cover and species composition. Forest Service Handbook, Intermountain Region (Region 4) 2209.21 § 22.1; AR BT008225-40.

trend of shrubs and forbs as required. The Forest Service counters that the second prong does not require any particular type of methodology or monitoring, but rather such decisions are left to the agency, and that the monitoring data which has been done by the Forest Service shows that the second prong is satisfied.

Plaintiffs' argument on this issue implicates the monitoring described in the Forest Service manuals and handbooks. Forest Service manuals and handbooks do not have the "force and effect of law" but instead serve as non-binding guidelines. *Western Radio Services Co. Inc. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996). To the extent that Plaintiffs contend that the Forest Service was *required* to evaluate the four criteria found in the Forest Service Handbook, the Court disagrees. Nonetheless, and even though a court must be at its most deferential when reviewing scientific judgments and technical analyses within the agency's expertise, the agency must support its conclusions with studies that it deems reliable and "explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable." *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008). That burden is not met in regard to the Southern Wind River Decision as to the monitoring prong of the 2005 Rider.

The Southern Wind River Decision states that monitoring within the Forest indicates "the vegetative health and trend of upland and riparian plant communities have generally improved . . . as expressed through diversity in plant composition and increased ground cover . . ." AR BT013029. These same conclusions are found in the Range and Rangeland Report of Rangeland Specialist Barbara Franklin. AR BT009267-74. Ms. Franklin looked at data from 2210 Range Management Analysis and Planning Files (nested frequency plots; photo points back to 1915; some Parker 3-Steps back to 1955), Allotment Management Plans (1982 and 1987), the Bridger-East Ecological Unit Inventory (1997), and 75 long term trend plots re-sampled in 2006. AR

BT009272. The 75 long-term trend plots that were re-sampled were assessed for percentages of basal vegetation, litter and bare ground. AR BT009018, 009026, 009049, 009105, 009112, 009118, 009142, 009231, 009244, 009263, 009335, 009366, 009405. In support of these percentages, Cover by Lifeform Transect forms¹⁵ were completed where the observer conducted a count of grasses, forbs, shrubs, litter, moss/lichen, rock and bare ground on each plot. Notes taken by the observer often included which species of grasses and forbs were seen. *See, e.g.*, AR BT009120. Based on these observations, the Rangeland Specialist concluded that basal vegetation, litter and bare ground were well within established guidelines and the average percentage of bare ground was well below 30%, an objective in the Allotment Management Plan. AR BT009273.

There is data to support the Rangeland Specialist's conclusion that the percentage of ground cover exceeds 70% on each allotment, but there is no discussion of how that percentage leads to the conclusion that the range and vegetation are satisfactorily meeting or moving towards objectives such as "enhancing diversity of plant communities" and "sustaining or improving overall range condition." The Rangeland Specialist also fails to address plant composition in her report, a detail that begs a more complete discussion when the fact of the percentage of ground cover becomes the linchpin of the decision that range condition and vegetation objectives are satisfactory.

Moreover, there is no discussion otherwise in the report, or elsewhere in the administrative record, of why heavy reliance on ground cover indicates that objectives are being met. The 2005

¹⁵ Cover by Life Forms are an estimation of the relative amounts of different life forms on a site. 100 readings are taken per transect and the number of grasses (including grass-like species such as sedges), forbs, shrubs, litter, moss/lichen, rock, and bare ground are recorded. Franklin Decl., Dkt. 89-2, ¶ 20.

Rider requirement does not compel the Forest Service to assess each of the four criteria listed in the Forest Service Handbook for upland rangeland health. However, the Forest Service must provide an explanation for its conclusion that the objectives are being met, or being satisfactorily moved toward, particularly when the Forest Service relies on a method or data other than the monitoring described in the Forest Plan. *See Western Watersheds v. Forest Service*, 2012 WL 1094356, *11 (N.D. Cal. March 30, 2012).

To the extent that the Forest Service claims such an explanation is provided in the Declaration of Barbara Franklin (Dkt. 89-2) the substantive portions of that declaration have been stricken, as discussed above. As the District Court in the Northern District of California has ruled, the Forest Service must support its conclusions with reliable studies and data *and* adequately explain why the underlying evidence is reliable. 2012 WL 1094356, *9. Here, the Range and Rangeland Report¹⁶ is bereft of analysis explaining why the percentage of ground cover is reliable evidence that rangeland condition is being sustained or improved or how diversity of plant communities is being enhanced. It is certainly possible that the evidence exists to support the Forest Service's conclusions on this particular prong of the 2005 Rider, but not on the present record. Therefore, the Court finds this aspect of the decision arbitrary and capricious.¹⁷

¹⁶ The Range and Rangeland Report is minimal at best. While it contains detailed background information about the history of sheep grazing on the Bridger-Teton National Forest, there is little discussion of the actual data that was collected and no substantive analysis in terms of how the data collected indicates Forest Plan objectives are being met.

¹⁷ The Court appreciates, as the Wyoming Stock Growers point out, that the Forest Service must be "realistic in terms of what should be done and what can be done within the constraints of need, time, and personnel," but that does not excuse the Forest Service from satisfying the requirements of the 2005 Rider and finding such support for doing so in the administrative record.

2. Soil

Plaintiffs assert that the 2006 and 2007 Soil Reports, which describe soil conditions at some monitoring locations as impaired or unsatisfactory, evidence a failure to meet Forest Plan objectives to improve overall range conditions and protect pristine wilderness character. AR BT007930, BT007999.

Soil conditions were monitored at 61 locations in 2006 and 2007. AR BT012752-53. Not all of the allotments were visited during these field investigations because “the project area is so large and difficult to access.” Instead, “allotments representative of current grazing practices were visited.” *Id.* Areas with the highest use by sheep or areas of concern were sampled. *Id.* Based on such monitoring, the Soil Scientist concluded in the Soils Report that Forest Plan standards and guidelines were being met, as the percentage of detrimentally disturbed soils was within acceptable limits, *i.e.*, less than 15%.¹⁸ AR BT012752-55.

The Soils Report contains data and discussion for the majority of the allotments but not all of them. AR BT012754-62. In the Soils Report, the Soil Scientist made recommendations to improve soil in five locations by either resting the allotment or using alternative routes. AR BT 012755-60. Each area containing detrimentally disturbed soils was less than five acres. AR BT012755. It was reported that the areas of detrimentally disturbed soil were not caused solely by grazing. *See, e.g.*, AR BT012756 (erosion unlikely to be caused by sheep grazing), BT012758 (recreation use is also heavy in area and contributes to erosion).

The record demonstrates that the Forest Service considered the soil data and concluded that Forest Plan standards and guidelines were being met. AR BT012755. The Soils Report explains

¹⁸ This standard is set forth in the Forest Service Handbook 2509.18 - R4 Supplement 2003. AR BT012752.

that although there are areas of detrimentally disturbed soils in the allotments monitored, the percentage is within acceptable limits. *Id.* However, there was not monitoring data for *each* allotment. AR BT012752. In its discussion of the second prong of the rider at the outset of this Report and Recommendation, the Court stated that monitoring data from some allotments could reasonably serve as a proxy for a non-monitored allotment, if certain conditions were met and the Forest Service provided a rationale for doing so. Those conditions do not exist here. It is explained in the Soils Report that not all allotments were visited because the project area is “large and difficult to access” and that “allotments representative of current grazing practices were visited.” AR BT012752. There is no rationale provided or expertise applied in assessing why these monitored allotments accurately represented the unmonitored allotments, as distinct from “allotments representative of current grazing practices.” The Forest Service provides no explanation or rationale as to why the monitoring data that exists leads to the conclusion that objectives are being met on allotments that were not monitored. It would be improper for the Court to accept the Forest Service’s conclusion as to these unmonitored allotments when there is no rationale provided, just as it would be improper for the Court to reject the Forest Service’s conclusion if an adequate rationale was provided.

3. Riparian Areas

With respect to riparian areas, the Forest Service concluded in the Southern Wind River Decision that monitoring demonstrates that “the vegetative health and trend of upland and riparian plant communities have generally improved throughout the project area as would be expected with a dramatic decrease in sheep numbers and improved management.” AR BT013029. Specifically, the Rangeland Specialist stated in the Range and Rangeland Report that “impacts to riparian and wetland areas are minimal as is typical with herded operations.”

AR BT009268. The report summarizes research literature regarding the effect of cattle grazing on riparian areas, which recommend a four-to-six inch stubble height next to streams. AR BT009273. The Rangeland Specialist concludes that sheep do not impact streams because sheep do not “like to get their feet wet” and avoid wet streamside areas. Thus, typical streamside stubble heights are in excess of four inches. AR BT009274. Impacts to willow show an upward trend and the percentage of bare ground in upland areas is well within guidelines, which has a positive impact on riparian areas. *Id.* As documented in the Soils Report, the riparian areas of several of the assessed allotments are in good condition, with some bank tramping in one allotment. AR BT012749-62. Similarly, the photos of riparian areas on ten of the allotments shows many to be in “good condition,” but with trampling and bank damage in some spots. AR BT012780-94.

Even though there is more information in the record concerning the riparian resource, and the effect of grazing upon that resource, the same missing link exists for this aspect of the CE Decision as with the vegetation and soil conditions. That is, the Forest Service acknowledges that there has not been monitoring done on each of the 14 allotments, but does not adequately explain why the monitoring that has been done on some allotments can be relied upon to conclude that the Forest Plan objectives are being met, or satisfactorily moved toward, on each of the allotments. The need for such an explanation, and adequate scientific explanation, is even more apparent for the riparian resources, as the allotments contain extensive riparian resources and cover nearly 93,000 acres. The Forest Service must explain how it came to the conclusion that the objectives for riparian areas were being met. *See Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008). Without data or analysis to support the conclusions that objectives are being met on each allotment categorically excluded, particularly when conclusions are being

drawn about individual allotments based upon monitoring done on other allotments, the decision does not satisfy the second prong of the rider. The Court recognizes that, particularly for a forest such as the Bridger-Teton National Forest, with permits challenged on 14 allotments, covering wide expanses of forest land, the monitoring prong of the 2005 Rider is a large task. However, the need for such monitoring is required of the Forest in order to meet its other responsibilities, and Congress made no allowance for loosening the rules of the 2005 Rider for the National Forests that might have a more difficult chore than other Forests of demonstrating that the 2005 Categorical Exclusion was appropriately applied to its grazing decisions.

4. Wildlife, Fish and Sensitive Species

The Bridger-Teton Forest Plan sets objectives for fish and wildlife habitat to “[p]rovide suitable and adequate habitat to support the game and fish populations . . .” and “[p]rotect . . . [s]ensitive plant and animal species and provide suitable and adequate amounts of habitat to ensure that activities do not cause (1) long-term or further decline in population numbers or habitat supporting these populations, and (2) trends toward federal listing.” AR BT007924, BT007928. The Plan contains monitoring protocols for four management indicator species (“MIS”) for various habitats, such as the monitoring of cutthroat trout for riparian habitat and boreal toads and chorus frogs for wetland habitat. AR BT013474-78.

The Forest Service concludes in the Southern Wind River Decision that “wildlife, watershed, fisheries and archeologist specialists’ reports indicated few impacts to these resources from continued grazing.” AR BT013029. In turn, the administrative record contains a Management Indicator Species Report, a Fisheries Specialist Report, and a Biological Evaluation for Sensitive Species. The Biological Evaluation (BE) assessed the possible effects of continued grazing on the Southern Wind River allotments on 19 sensitive wildlife and fish species, 10 of

which have habitat present in the allotments. AR BT009927-36. Significantly, there is no monitoring data specifically cited in the BE although it purports to be based on the best current data and scientific information available. AR BT009930. For many of the sensitive species (wolverine, fisher, boreal owl, flammulated owl, great gray owl, goshawk and three-toed woodpecker), a decision of “no impact” was made because their habitats are not likely to overlap with the livestock grazing areas. AR BT009931-33. For the grizzly bear, a conclusion was drawn that there is a low likelihood that grizzly bears are present in the allotments, although they may inhabit the allotments in the future and the final decision was that continued grazing “may impact individuals or habitat, but will not likely contribute to a trend toward federal listing or cause a loss of viability to the population or species” (MIHN). AR BT009931. The same conclusion was drawn for the spotted frog even though the BE noted that over-grazing of riparian areas has been a cause for amphibian declines, but the number of frogs at grazed and ungrazed sites are found to be no different. AR BT009933. For Colorado River cutthroat trout, the BE identified one stream and one lake containing the species, and concluded that overall vegetation trend data showed that these allotments are stable or in an upward trend for desirable species and/or ground cover. AR BT009934. Continued grazing was determined not to threaten overall structure or composition of riparian areas, and impacts to the Colorado River cutthroat trout should be minimal. *Id.* For black and purple sedge, the BE described only two known occurrences of this species in the allotments. Potential impacts were identified as “moderate” due to trampling, but because sheep avoid wet areas, it was determined that continued grazing “may impact individuals or habitat, but will not likely contribute to a trend toward federal listing or cause a loss of viability to the population or species.” *Id.* The same determination and same reasoning was applied to the pink agoseris. AR BT009934-35.

Fish habitat conditions were described as “poor to excellent,” in the Fisheries Specialist Report, based on surveys conducted in 2007. AR BT008860. Upland conditions were improving and stream banks met the 90% stability guideline. AR BT008860. Habitat and population monitoring indicated that livestock grazing alone was not having a negative impact on fisheries but grazing combined with other factors may limit cutthroat trout production. AR BT008861. The report identified no effect to Threatened and Endangered species. AR BT008861-62. For Sensitive and Management Indicator Species, the determination was that continued grazing may impact “individuals but it was not likely to cause a trend towards federal listing or impair the viability of local populations.” AR BT008862-63.

The Management Indicator Species (MIS) Report assessed grazing effects on 13 MIS located within the Southern Wind River allotments. AR BT009815-26. The MIS Report contains findings of either “no effect” or “may impact individuals or habitat but will not likely cause a loss of viability to the populations or species.” AR BT009818. The “no effect” conclusions for moose and pine marten were based on the fact that the habitats for these MIS and sheep do not overlap. AR BT009820-21. For elk, mule deer, and bighorn sheep, the MIS Report assessed their populations and concluded that although there would be some displacement and competition for forage, it would be low due to preference for different forage species. AR BT009818-21. The elk populations were noted to be above objectives, while mule deer and bighorn sheep were not. *Id.* For mule deer, the downward trend in herd numbers was found to be due to winter range conditions. AR BT009819. With respect to bighorn sheep, the report noted that no “core”¹⁹ herds are found on these allotments and overall the risk of disease

¹⁹ The designation of a “core” herd comes from the Wyoming Game and Fish Department (WGFD). A core herd is a population that has never been extirpated or repopulated

transmission was minimal. AR BT009820. However, the report stated that one core herd, the Whiskey Mountain herd, may occupy these allotments in the future and that the Temple Creek herd, which is a non-core herd, would be at risk of disease transmission due to its close proximity to sheep grazing on these allotments. *Id.*

A similar conclusion was drawn for the Brewer's sparrow. The report found that Brewer's sparrow habitat exists in only one allotment, and while there could be impacts to nests and nesting habitat, continued livestock grazing would not contribute to a long-term loss of habitat or viability for the species. AR 009821-22. For the amphibians (boreal toads and boreal chorus frogs), the report concluded that because sheep graze in uplands instead of riparian areas and Forest Plan standards and guidelines will be met, the impact to amphibian habitat should be minimal. AR BT009822. The same reasoning and analysis was applied to rainbow trout. AR BT009823. Lastly, for aspen, the report identified 1,370 acres of aspen on the Southern Wind River allotments. AR BT009823. The report forecasted direct effects upon aspen from continued grazing, including removal of plant cover, alteration of plant community, and potential alteration of wildlife habitat associated with aspens. AR BT009824. However, the report concluded this impact will be to individual aspen plants only, and not cause a loss of viability for the population as a whole. *Id.*

On the Southern Wind River record, the court is persuaded that the Forest Service has adequately considered the effects of grazing on Threatened and Endangered Species, Sensitive Species, and Management Indicator Species and documented its consideration in the administrative record. While there may be disagreement from other quarters as to the Forest

and receives management emphasis by WGFD. AR BT009820.

Service's ultimate determination, or a preference for more data in support of the Forest Service's conclusions, the analysis and conclusion reached by the Forest Service is not an arbitrary and capricious decision. The reports thoroughly address each species, the locations of the species or their habitats on the allotments and the potential impacts to the species due to continued livestock grazing. The Court has carefully scrutinized the record because, with respect to certain species, the Forest Service has applied a broad brush analysis²⁰ in concluding that the species would not be affected by continued grazing. The Court has examined the reasoning provided by the Forest Service's experts in their reports and gives discretion to the expertise of the agency in its determination when it has considered the relevant factors. Further, the issues raised by borrowing monitoring data or observations from one allotment to apply to a different allotment are of a different nature and not so pronounced when considered in the context of species management as conducted in this Forest.

B. Extraordinary Circumstances

1. Wilderness

Eighty-seven percent of Southern Wind River allotments fall within the Congressionally designated Bridger Wilderness. AR BT013030. *See* 16 U.S.C. § 1131; Pub. L. No. 98-550

²⁰ For example, the Forest Service Biologist concluded that there would not be a loss of viability for boreal chorus frogs because "forest plan standards and guidelines for livestock grazing will be met," "sheep primarily graze in uplands instead of riparian areas" and "overall vegetation trend data indicates that these allotments are stable or in an upward trend for desirable species or ground cover". AR BT009822. The Court recognizes a possibility for tension where it has found that the Forest Service has not shown success toward meeting Forest Plan objectives for the riparian areas of the Forest, thus undermining the rationale provided by the Forest Service in finding the boreal chorus frog will not be adversely impacted. The Forest Service may be well served, when revisiting whether the objectives for riparian areas are being met, to look at the impact on the boreal chorus frog as well. The Court highlights this one example, while there may be more in the decision and record.

§ 201(a)(10), 98 Stat. 2807 (Oct. 30, 1984). The Wilderness Act aims to provide opportunities for solitude or unconfined recreation, although it does allow for livestock grazing on wilderness land if grazing was established on the land prior to enactment of the Act. *See* 16 U.S.C.

§ 1131(a); § 1133(d)(4) (“[T]he grazing of livestock, where established prior to [the effective date of this Act], shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture”). The Bridger Wilderness was designated as such by the Wilderness Act of 1964 and later expanded by the 1984 Wyoming Wilderness Act. 16 U.S.C. § 1131; Pub. L. No. 98-550, § 201(a)(10).

The third prong of the 2005 Rider requires that the categorical exclusion decision be consistent with the policy on extraordinary circumstances set forth in the Forest Service Handbook and codified in the Code of Federal Regulations. This requires that certain resource conditions, such as wilderness, must be considered, although: “[t]he mere presence of one or more of these resources conditions does not preclude use of a categorical exclusion (CE). It is the existence of a cause-effect relationship . . . the degree of the potential effect of a proposed action on these resource conditions that determines whether extraordinary circumstances exist.” 36 C.F.R. § 220.6(b).

The Forest Service states summarily in the Southern Wind River decision that continued grazing “will have no adverse impacts on wilderness character,” “is consistent with the Wilderness Act (1964)” and “is consistent with the clarification outlined in the Congressional Grazing Guidelines (1996).” AR BT013030.

Despite the obvious importance of the wilderness extraordinary circumstance consideration, given the nearly total embrace of the Bridger Wilderness around the Southern Wind River allotments, the CE Decision is remarkably sparse in its discussion of the wilderness as an

extraordinary circumstance. The administrative record is also practically devoid of any discussion of the impact of grazing on the wilderness resource. There is one e-mail from Gary Hayward to Barbara Franklin which states: “As we discussed earlier, pertaining to the Southern Winds Sheep Grazing Complex, no extraordinary circumstances exists [sic], from a recreation/wilderness standpoint.”²¹ AR BT009535. There is a March 2004 letter referenced in the Southern Wind River Decision in the wilderness section. AR BT013030. This letter merely provides a clarification of “Management Prescription 6A” from the Bridger-Teton Land and Resource Management Plan. AR BT008347-48. It concludes that livestock grazing is permitted within “DFC 6A” areas, but has no discussion of how grazing affects wilderness. *Id.*

The Forest Service cites to other documents in the record for evidence that it adequately considered whether wilderness was an extraordinary circumstance. One of these is the 1995 Bridger Wilderness Action Plan which discusses concerns that exist between recreation and grazing, existing conditions and action items for these concerns. AR BT013091-94. While the Action Plan does note conflicts between grazing and recreation, there is no description of where these conflicts occur, the severity of the conflicts, or their significance. *Id.* The Action Plan is for the entire Bridger Wilderness and has no specificity to the allotments within the Southern Wind River decision. Further, the Action Plan was published in 1995, 12 years prior to the decision at issue. There is specific mention that it “is not a NEPA document;” but rather that it “seeks to analyze the difference between existing conditions and desired future conditions and schedule actions to guide management.” AR BT013045. The only recent document in the

²¹ The State of Wyoming argues that the fact that the “recreation specialist chose to discuss his findings with the district range specialist in person does not create an extraordinary circumstance.” *See* Wyoming’s Motion, Dkt. 63.1, pp. 18-19. Indeed this is true but the Court is limited to the record before it in making its decision.

administrative record pointed to by the Forest Service is the Range and Rangeland Report, which references wilderness-wide standards and guidelines. AR BT009267-74. These guidelines focus on vegetation, forage improvement, weed control, and habitat diversity but do not address any other wilderness concerns, such as recreation. *Id.*

To invoke a categorical exclusion, an agency must show it considered the relevant factors and if it has done so, then its decision is entitled to deference. *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th Cir. 1999). Here, the Forest Service has not shown that all the relevant factors, specifically the effects on wilderness and whether they are significant, have been considered. There is a conclusion in the decision memo, an e-mail stating there is not an extraordinary circumstance from a wilderness/recreation standpoint, and very little else in the administrative record to demonstrate that this resource condition was appropriately considered by the Forest Service. Although the fact of the nearly complete footprint (87%) of the allotments' acreage in the Bridger Wilderness is not by itself an "extraordinary circumstance," the record must show that the Forest Service considered the potential effect of grazing upon the allotments on the wilderness resource, and why it did or did not amount to an extraordinary circumstance. If the Forest Service did so consider such impacts here, it did not explain how it did so in the manner and degree that the law requires.

2. Forest Service Sensitive Species

Included among the "resource conditions" in the Forest Service's policy on extraordinary circumstances are "Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species." 36 C.F.R. § 220.6(b). The Southern Wind River Decision states:

No threatened, endangered or proposed wildlife species have

been observed in the project area. Although there is a low probability that the Canada lynx may occur in the project area, there will be no reduction in lynx habitat as a result of this project. The project area is not within the Greater Yellowstone Gray Wolf Recovery Area and any wolves are considered an experimental, nonessential population.

The Wildlife Biologist made the following determination in the Biological Assessment for the project: “not likely to jeopardize the continued existence of the species” (Gray wolf) and “no effect” on Canada lynx.

AR BT013030.

Plaintiffs take issue with the decision’s lack of discussion of Forest Service sensitive species, specifically the Columbia spotted frog and black and purple sedge and pink agoseris. The Court concludes that the Forest Service sufficiently considered the effects of grazing on Sensitive Species, as discussed in detail above. While the Forest Service does not specifically address the Sensitive Species in the decision memo, the record does. A Biological Evaluation (BE) for Sensitive Species was prepared by a wildlife biologist in 2007. AR BT009927-36. For the specific species Plaintiffs take issue with, the Columbia spotted frog and plant species black and purple sedge and pink agoseris, the Wildlife Biologist concluded: “may impact individuals or habitat, but will not likely contribute to a trend toward federal listing or cause a loss of viability to the population or species.” AR BT009930. As to the Columbia spotted frog, while suitable habitat is present in the allotments, no frogs have been found. AR BT009933. With respect to black and purple sedge, there are only two known occurrences of this plant species in these allotments. AR BT009934. Because sedge is usually found in wet meadows and streamsides and sheep tend to avoid wet areas, the impact would not cause a loss of viability. *Id.* Pink agoseris was similarly analyzed, as there is only one location of the species within the allotments. AR BT009934-35. Hence, the Court finds that Forest Service properly considered

these species and its determination that no extraordinary circumstances exist with respect to them is entitled to deference.

3. South Soda Sheep Decision

On January 31, 2007, the Caribou-Targhee National Forest issued a decision categorically excluding 20 allotments from NEPA analysis. AR CT034540. These allotments cover approximately 132,000 acres located in Caribou and Bear Lake Counties, Idaho. *Id.* The allotments consist of Bear Canyon, Diamond/Boulder, Fossil Canyon, Henry Cutoff, Kendall Canyon, Lander Creek, Lanes Creek, Lower Bacon Creek, Maybe Canyon, North Sulphur, Pole-Draney, Sage Creek, Sheep Creek/Henry/Olson, Slug Creek, South Sulphur, Timber Creek, Webster Creek, White Creek, and Yellowjacket Allotments. *Id.*

A. Current Grazing Management

The first prong of the 2005 Rider states that a categorical exclusion may be used if the decision “continues current grazing management.” Pub. L. No. 108-447 § 339. Plaintiffs contend that the South Soda Sheep CE reauthorized grazing at higher levels than the prior three to five years for many of the allotments. They submit that many of the allotments had reduced grazing use or non-use several times within the five years preceding the CE decision, therefore a reauthorization of full permit numbers is not continuing “current grazing management.”

As discussed supra, the 2005 Rider does not define “current grazing management” but the Court may look to the Forest Service Handbook for guidance on that phrase. *See Lands Council v. Martin*, 529 F.3d 1219, 1227-28 (9th Cir. 2008). The Handbook defines “current management” in its discussion of alternatives under the normal NEPA process. It states: “[t]his alternative should be based on the current management actions being implemented, specifically, current management over the last 3 to 5 years. Current management direction may be contained

in an allotment management plan (AMP) (sec. 94.1), annual operating instructions (AOI) (sec. 94.3), or a combination thereof.” Forest Service Handbook 2209.13, Ch. 92, § 31.

The Forest Service contends that current grazing management involves more than just permitted or authorized livestock numbers. Rather, it encompasses an entire adaptive management strategy which includes specific utilization standards that determine when livestock are moved, the grazing system (deferred rotational grazing, rest rotation, etc.) as well as specific restrictions in the AOI or AMP. The Forest Service argues that “actual use” each year will fluctuate up to the “permitted use” number in each given year depending on resource conditions. The “permitted use” number does not dictate what the “actual use” will be each year.

The Court agrees. The South Soda Sheep CE continues the same utilization standards and adaptive management strategies included in the current grazing permits, AMP, and AOIs. AR CT034541. Doing so allows the Forest Service the flexibility to adjust the actual number of livestock allowed for grazing depending upon changing conditions influenced by weather or unexpected monitoring results. *Id.* Each permit states that the numbers authorized or season may be adjusted to respond to resource needs or other management needs, meaning that the permitted number will not necessarily be the number actually grazing, and there may be years of reduced use and non-use as occurred in the five years prior to the CE. *See, e.g.*, AR CT033760.

The South Soda Sheep CE decision incorporates current grazing management direction from the grazing permits, including adaptive management, and AOIs. AR CT034541. That is consistent with the grazing management that occurred over the three to five years prior to the CE decision. The first prong of the rider is satisfied.

B. Forest Plan Objectives

Monitoring data for the allotments, according to the South Soda Sheep decision, “indicates

that current grazing management is meeting, or satisfactorily moving toward, objectives in the Forest Plan. Eight long-term upland sites and three long-term riparian sites within the project area have been monitored to determine long-term vegetative health and trend. Properly Functioning Condition assessments were conducted on [26] perennial streams . . . Riparian and upland forage utilization standards under the new Forest Plan Standards have been met within the project area.” AR CT034544.

1. Upland Range Areas

The Revised Forest Plan for the Caribou National Forest contains objectives and standards for various biological elements of the forest. Under vegetation, goals include: (1) non-forested ecosystems are maintained within their historic range of variability and/or are restored through time with emphasis on aspen, aspen-conifer, mixed conifer, big sagebrush, mountain brush and tall forbs; (2) sagebrush steppe and mountain shrub habitats are moving toward a balance of age, canopy cover, and size class on a watershed or landscape scale that is within their [historic range of variability]; (3) sites capable of tall forb dominance are maintained in a stable or upward trend as measured by tall forb indicator species; (4) biodiversity is maintained or enhanced by managing a diverse array of habitats tied to natural process occurrence and distribution of plant communities. AR CT036594-95.

For soils, guidelines include: (1) maintain ground cover, macrobiotic crusts, and fine organic matter that would protect the soil from erosion in excess of soil loss tolerance limits and provide nutrient cycling; (2) detrimental soil disturbance such as compaction, erosion, puddling, displacement, and severely burned soils caused by management practices should be limited or mitigated to meet long-term soil productivity goals. AR CT036591. For plant species diversity, goals, standards and guidelines include: (1) provide habitat capable of (a) supporting populations

of native plant species and their pollinators; (b) contributing to recovery of federally listed species; and (c) supporting plant biodiversity to meet social needs, biological diversity, and ecological and functional integrity; (2) rare and unique plant communities are maintained or restored; (3) projects and activities shall be managed to avoid adverse impacts to sensitive plant species that would result in a trend toward federal listing or loss of viability; (4) maintain, and where possible, increase unique or difficult-to-replace elements such as areas of high species diversity aspen, riparian, tall forbs, rare plant communities, etc. AR CT036599.

In the South Soda Sheep project area, eight long-term sites are used to assess rangeland health by monitoring non-native invasive species, ground cover, shrub cover, and species composition. AR CT023943-44. Of the eight sites monitored, six were found to be “functioning” in overall rangeland health, one site was “non-functioning” and another was “functional-at-risk.” *Id.*

A Soil Report looked at the percentage of soil cover on nine allotments in the South Soda Sheep project area. AR CT026220-26. These assessments were done between 2001 and 2006. *Id.* The report concluded that “ground cover is adequate with a stable or improving trend.” AR CT-26226. The report also estimated soil disturbance on all of the allotments at well below the 15% Regional Guideline. AR CT026223.

While it appears that the data indicates that objectives are being met or satisfactorily moved towards for the allotments on which data was collected, there is not evidence in the administrative record that the decision was based on monitoring data for *each* allotment contained in the decision. The South Soda Sheep Decision reauthorizes grazing on 20 allotments. Upland range data exists for eight allotments and soil data for nine allotments. AR CT023943-44; AR CT026220-26. As discussed above, if the Forest Service intends to rely on

data from a few allotments to justify its finding that objectives are being met for *all* of the categorically excluded allotments, it must detail its reasoning for finding such. For example, if the allotments have similar land characteristics and grazing utilization and evidence exists of those similarities, there could be justification for extrapolating the data from one allotment to another. The Forest Service has not provided such reasoning in the South Soda Sheep record and accordingly the Court finds the decision to be arbitrary and capricious.

2. Riparian Areas

Watershed and riparian objectives for this Forest include: (1) maintain or restore water quality to a degree that provides for stable and productive riparian and aquatic ecosystems within the capability of the system; (2) focus maintenance and restoration efforts, within disturbed watersheds that have the greatest potential for restoration of hydrologic function, riparian, water quality and aquatic values; (3) aquatic habitat provides for species viability of all native and desired nonnative vertebrate species on the Forest; (4) native and desired nonnative communities in riparian zones are productive and diverse; (5) instream flows support healthy riparian and aquatic habitats, the stability and effective function of stream channels and the ability to route flood discharges. AR CT036592-93; CT036670. Desired future conditions for riparian areas include: “Riparian areas have a range of vegetative structural stages that are at, or moving toward, a properly functioning condition, have features necessary to promote stable stream channels, provide diverse habitat conditions for both aquatic and terrestrial wildlife species.” AR CT036592.

Plaintiffs and the Forest Service take opposing views of the evidence in the administrative record regarding whether Forest Plan objectives are being met, or satisfactorily moving towards, for riparian areas in the South Soda Sheep allotments.

The first piece of evidence is a Hydrology Report. AR CT023957-75. The Hydrology Report looked at the Proper Functioning Condition (PFC) of streams to analyze potential grazing effects upon adjacent wetlands and floodplains. AR CT023959. Representative riparian areas in each allotment were analyzed. *Id.* The various ratings, specifically whether riparian areas were rated as either Non-Functional or Functioning at Risk with a downward trend, indicate whether the current grazing management system was causing an ongoing degradation of riparian conditions. *Id.* The Hydrology Report elaborates on the Proper Functioning Condition ratings, stating: “PFC is the desired condition for meeting Forest Plan standards and guidelines. However, if an area is rated Functioning at Risk²² with an upward trend, it is considered to be heading toward the desired condition and is therefore being managed in a manner that does not require changes in management at present.” AR CT023971.

The Hydrology Report concludes:

As shown in table 3-5, all of the riparian areas analyzed within the project area were either in Proper Functioning Condition or Functioning at Risk with an upward trend . . . No riparian areas in the project area were in a downward trend or Non Functioning. Therefore, all riparian areas analyzed are meeting Forest Plan standards and guidelines under their current grazing management plans . . . While there are streams with impaired beneficial uses in the project area, analysis of each of these areas shows that factors other than sheep grazing are responsible.

(AR CT023961). This conclusion, however, misstates the data in Table 3-5. AR CT023973.

²² Within the Functioning at Risk rating, there are three subclasses: High, Moderate, and Low. Functioning at Risk - High indicates that the stream is mostly functioning properly, but there are minor problems within the watershed that makes the stream susceptible to further degradation. Functioning at Risk - Moderate indicates that the stream is Functioning at Risk, but is mid-scale, with a moderate risk of degradation. Functioning at Risk - Low indicates a stream has risk factors for further degradation present in the watershed that could easily cause the system to be degraded to Non Functioning. AR CT023971.

Table 3-5 shows fourteen stream riparian areas that are Functioning at Risk with no trend and two Functioning at Risk with a downward trend. AR CT023973. Based on the other statements in the report, the fact that two riparian areas had a downward trend indicates an ongoing degradation of riparian conditions. *See* AR CT023959. Further, the fact that there are 16 Functioning at Risk streams with either no trend or a downward trend indicates that Forest Plan standards and guidelines were not being met or moved towards. *See* AR CT023971 (stating Proper Functioning Condition is the desired condition but Functioning at Risk with an upward trend is considered to be heading toward the desired condition).

The Forest Service contends that of the two Functioning at Risk streams with downward trends, one (lower portion of Sage Creek) is outside the project area, and the other (Trail Creek) has only one-fourth of a mile in the project area and the downward trend is entirely attributed to sediment from Archery Range Road, not grazing. *See* Forest Service's Reply Brief, Dkt. 73, p. 24 (citing AR CT023583-84, CT040775-84). The Court has reviewed those portions of the administrative record cited by the Forest Service in support of these contentions and does not find the statements that these streams are outside the project area. The Court must base its review on the record, not by arguments contained in briefing, to determine whether the agency's decision was arbitrary and capricious. *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 963 (9th Cir. 2005); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 n. 7 (9th Cir. 2004).

Additionally relied on by both parties is the Yellowstone Cutthroat Trout (YCT) Biological Evaluation²³ (AR CT033718-58), which examines existing aquatic habitat on the 20 allotments

²³ Most of the information contained in the YCT Biological Evaluation is also contained in the Fish and Amphibians Report (AR CT023456-98).

within the South Soda Sheep project area. Several such streams are Yellowstone cutthroat trout stronghold streams. (AR CT033718). When discussing compliance with Forest Standards and Guidelines, the YCT Biological Evaluation finds:

Some of the streams within the analysis allotments are not meeting desired future conditions set for AIZs [Aquatic Influence Zones] in the Revised Forest Plan. Riparian Condition Indicators (RCIs), specifically the Pfankuch channel stability index, and PFC ratings for some stream sections within the analysis allotments are not meeting set values . . . [I]t was determined that 18 stream segments within the project area have some degree of issues relating to channel instability and riparian function. These streams have deficient RCI values and are not currently meeting desired future conditions for AIZs.

AR CT033749-50. This finding is qualified, however, as the BE goes on to say that many of the localized impacts from sheep grazing are “expected to decrease at these locations” and that “grazing impacts” are “expected to improve through implementation of the recommended project design features listed above [Grazing Implementation Guide and Annual Operating Instructions].” AR CT033752.

The monitoring data does not indicate that Forest Plan objectives for riparian areas are being met. There is evidence that streams are not in properly functioning condition and there is channel instability. The Court finds the South Soda Sheep decision on this issue to be arbitrary and capricious as it is, in material measure, inconsistent with the very scientific evidence it purports to rely upon. The Hydrology Report misstates the data it is analyzing and reaches an unreliable conclusion. The YCT Biological Evaluation concludes unequivocally that desired future conditions are not being met and that several stream segments have issues relating to channel instability and riparian function. These findings are overlooked or ignored in the South Soda Sheep decision. Even if such impacts are “expected” to decrease and the overall condition

of these areas is “expected” to improve, the 2005 Rider requires that monitoring indicate *current* grazing management is satisfying Forest Plan objectives, not future grazing management.

Accordingly, the Court finds this aspect of the decision to be arbitrary and capricious because the agency has offered an explanation that runs counter to the evidence before it.

3. Wildlife

The Revised Forest Plan seeks to ensure that “vegetation composition and structure is adequate to sustain wildlife species occurring on the Forest” and “wildlife biodiversity is maintained or enhanced by managing for vegetation and plant communities within their historical range of variability.” AR CT036601. The Forest Service must also “assess impacts to habitat and populations” for Columbian Sharp-tailed Grouse and Sage Grouse. AR CT036602.

A Biological Evaluation (BE) was prepared for all sensitive wildlife and plant species for the South Soda Sheep allotments. AR CT028037-59. The BE examined whether Forest Plan standards and guidelines were being met for Columbian sharp-tailed grouse and greater sage grouse. AR CT028044-49. For both species, it was determined grouse and vegetation standards and guidelines would be met to support viable populations and that the project “may impact individuals or habitat, but will not likely contribute to a trend towards federal listing or cause a loss of viability to the population or species.” *Id.* It was concluded that grouse occupancy and production within the project area would continue. *Id.* In reaching these conclusions, the BE relies on several surveys and other sources of data. *Id.*

Plaintiffs take issue with the monitoring of amphibians. Although they do not specify, the only sensitive species amphibian is the Columbia spotted frog which is included in the Biological Evaluation. AR CT028051. In the BE, a “no impacts” determination was made based on the fact that the species is not found in the project area. *Id.*

The Court finds that the Forest Service did not act arbitrarily and capriciously when determining that the goals and objectives for wildlife were being met or moving towards. The Biological Evaluation demonstrates that the Forest Service considered the effects the project would have on sensitive species, including Columbian sharp-tailed grouse, sage grouse and the Columbia spotted frog.

C. Extraordinary Circumstances

1. Threatened/Sensitive Species

Plaintiffs argue that the South Soda Sheep Decision wrongly determined that there were no extraordinary circumstances present for Threatened and Sensitive species, particularly, Yellowstone cutthroat trout, Canada lynx, Columbian sharp-tailed grouse, greater sage grouse, goshawk and great gray owl. With respect to federal listed threatened or endangered species and Forest Service sensitive species, the Forest Service stated in the South Soda Sheep Decision:

The Wildlife Biologist made the following determinations in the Biological Assessment of the Project: 'Not likely to jeopardize the continued existence' of the gray wolf (NLJCE) and 'no effect' for the Canada lynx and bald eagle. The USFWS has concluded that a determination of NLJCE for the gray wolf will be treated the same as a determination of 'no effect' and a letter of concurrence is not needed. The effects on Forest Service Sensitive Species have been documented in a Biological Evaluation (located in the project record) and states that grazing would either have 'no impact' or 'may impact individuals or habitat, but will not likely contribute to a loss of viability to the population or species or cause a trend towards federal listing.'

AR CT034544.

The Court has discussed the Forest Service's determination in respect to the Columbian sharp-tailed grouse and greater sage grouse in the previous section. The Court finds that the Forest Service adequately considered the effects that the decision to reauthorize grazing would

have on the Columbian sharp-tailed grouse and greater sage grouse and no extraordinary circumstances exist based on these species.

Another threatened species, the Canada lynx, was considered by a Wildlife Biologist. AR CT026616-21. That biologist's Biological Assessment (BA) determined there would be no effect on Canada lynx. *Id.* The BA noted that disturbances to habitat connectivity would be small or site specific with short term duration. AR CT026620. With respect to lynx prey, the BA noted that shrub-steep habitats are "able to achieve mid-seral conditions with current livestock grazing levels" and "communities/patterns/habitats are expected to be maintained . . .". *Id.* The BA determined that all standards and guidelines in the Lynx Conservation Assessment and Strategy²⁴ could be achieved and that suitable habitat for prey species would be provided. AR CT026621. The "no effect" conclusion was drawn because there are not "any barriers to lynx movement and livestock grazing would maintain prey species." *Id.*

For northern goshawk, the Biological Evaluation (BE) found that prey would be available for goshawks and "goshawks have been productive in the past, are currently productive, and goshawk productivity is expected in the future . . ." AR CT028043. In sum, the BE determined that although grazing reauthorization "may impact individuals or habitat" it "will not likely contribute to a trend towards federal listing or cause a loss of viability to the population or species." *Id.*

A similar determination was made as to the great gray owl. The BE noted that occurrence of the great gray owl was not expected in the project area, but regardless suitable habitat would

²⁴ The Lynx Conservation Assessment and Strategy (LCAS) was published by the Forest Service in August 2000 and developed to provide a consistent and effective approach to conserve Canada lynx on federal lands in the United States. AR CT0027379-85.

be maintained because grazing would not impact large trees. AR CT028049. Livestock grazing would have indirect impacts by reducing vegetation of prey species but prey would still be available. *Id.* The BE concluded that the project “may impact individuals or habitat, but will not likely contribute to a trend towards federal listing or cause a loss of viability to the population or species.” *Id.*

A separate Biological Evaluation was prepared for the Yellowstone cutthroat trout (YCT BE). (AR CT033718-58). Eight YCT stronghold streams were identified that had issues relating to channel instability or riparian function. AR CT033750. Another ten YCT stronghold streams did not have any data and therefore channel stability and riparian function could not be ascertained. AR CT033750-51. The YCT BE opines that the channel stability and proper functioning condition assessment values of the streams “do not quantify or directly interpret impacts associated with sheep grazing.” AR CT033749; AR CT033751. However, the YCT BE also states that “some of the stream summaries did document specific impacts to aquatic resource from sheep grazing,” including trampled stream banks, reduced bank stability from vegetation removal, increased sediment levels, and altered channel morphology. AR CT033751. It is then discussed how these impacts “are expected to decrease” at these locations because the impacts occurred before the implementation of the Grazing Implementation Guide (GIG) and current grazing standards. AR CT033752. A warning is sounded, however, that although “the use of adaptive management and AOI modifications are expected to decrease the grazing related impacts to riparian and aquatic habitat, [they] are not expected to eliminate them.” AR CT033753. It was ultimately concluded that the project “may impact individuals or habitat, but will not likely contribute to a trend towards federal listing or loss of viability to the population or species.” *Id.*

On that record, the Forest Service adequately assessed whether extraordinary circumstances existed with respect to these Threatened and Sensitive species. For the Columbia sharp-tailed grouse, greater sage grouse, Canada lynx, northern goshawk and great gray owl, the applicable Biological Assessment or Biological Evaluation examined whether the species occurred in the area, whether its habitat and population would be affected, as well as whether it would have an effect on their prey species. The Court finds that the Forest Service did not act arbitrarily and capriciously in its determination that no extraordinary circumstances existed with respect to these species. The Forest Service carefully looked at each species and decided the potential effect did not arise to an extraordinary circumstance.

More concerning for the Court was the consideration of the Yellowstone cutthroat trout (YCT). There is data indicating that YCT stronghold streams are not meeting expected trends or values for channel stability and riparian function. While not all these negative findings are associated with grazing, some streams had problems that are directly attributable to grazing. There is no data on several YCT stronghold streams. AR CT0033750-51. However, distinct from the second prong's monitoring requirements, the "extraordinary circumstances" prong calls for a different assessment and the shortage of monitoring data is not as crucial. Where the agency has adequately considered the relevant factors as it has done so here, the Court defers to its expertise. The Forest Service provided a thorough look at the YCT as evidenced in the YCT BE which looked at direct, indirect and cumulative effects and determined that the degree of the potential effect does not amount to an extraordinary circumstance. Accordingly, the Court finds its decision in that regard is supportable.

2. Cultural Resources

Plaintiffs contend that the Forest Service did not adequately address the effect this decision

would have on cultural resources because it conducted only one survey on one of the twenty allotments (Fossil Canyon). The Forest Service states in the South Soda Sheep Decision: “The Forest Archaeologist has assessed the potential effects to historic properties that may result from reissuance of grazing permits. Based upon a review of the project area, a determination was made that there will be no effect to archaeological sites or historic properties.” AR CT034545.

The administrative record includes an e-mail from a Forest Archaeologist stating:

A review of the Caribou-Targhee National Forest’s cultural resources site and survey atlas and files was conducted in order to determine potential effects on cultural sites from livestock grazing use on the 21 South Soda Sheep allotments on the Soda Springs Ranger District. Approximately 1000 acres of the allotment areas were sample surveyed and 3 sites were located and recorded with no effects from grazing use observed. After the sample survey and review of these allotments it appears that there will be ‘no effect’ on any known archaeological or historic properties as a result of authorizing continued grazing in those areas.

AR CT023278.

The administrative record contains evidence of a recent archaeological survey (AR CT023279-82), as well as past surveys (AR CT040509), and the Forest Archaeologist determined that there would be no effect on known archaeological or historic properties (AR CT023278). This determination was later concurred with by the State Historic Preservation Officer in a Determination of Significance and Effect in 2010. AR CT034996-97. It is not the mere presence of a resource condition that determines whether an extraordinary circumstance exists, instead it is the degree of a potential effect on a resource condition. The Forest Service considered the impact on archaeological and historic properties when making its decision to reauthorize grazing on the South Soda Sheep allotments. It did not ignore an important aspect of the problem nor does its decision appear to be implausible or a clear error of judgment.

Accordingly, the Court finds its determination is supportable.

4. South Skyline Decision

On September 30, 2007, the Manti-La Sal National Forest issued a decision memo categorically excluding three allotments, South Skyline, Booth Canyon and Potter Canyon, from NEPA analysis (“the South Skyline decision”). AR ML002385-95. These adjacent allotments are located along the eastern ridge of Skyline Drive on the Wasatch Plateau in central Utah.

A. Forest Plan Objectives

Plaintiffs contends that the South Skyline decision violated the second prong of the 2005 Rider because the Forest Service did not conduct monitoring to show that grazing was meeting or satisfactorily moving towards Forest Plan objectives for upland range, riparian areas, and wildlife. The Forest Service states in the South Skyline Decision that “these allotments either meet or are moving towards the desired future conditions for range management outlined in the Forest Plan[.]” and “[m]onitoring indicates that current grazing management is meeting, or moving toward, objectives in the land and resource management plan.” AR ML002388.

1. Upland Range and Vegetation

Range condition goals in the Manti-La Sal National Forest Plan seek to maintain upward or stable trends in vegetation and soil condition and control noxious weeds and poisonous plants in cooperation with Forest users and State and local agencies. AR ML000100. Desired future conditions include maintaining and improving endangered, threatened, and sensitive plant species populations and their habitats. AR ML000108. Desired future conditions include maintaining subalpine forb grasslands in a healthy, vigorous condition to preclude invasion by less desirable species, and maintaining and diversifying vegetative cover within riparian component ecosystems. AR ML000105. The Land Forest Plan also includes forest-wide

directions to maintain or improve soil productivity and watershed qualities within the ecological site capabilities, control livestock and big-game grazing so plant cover is not reduced to less than the amount needed for soil and watershed protection, and maintain soil erosion losses at or below soil loss tolerance values. Further, the Forest seeks to rehabilitate disturbed areas, design continuing mitigation or rest rotation practices to insure that vegetative ground cover exceeds 80 percent of adjacent similar undisturbed sites, and minimize adverse, man-caused impacts to the soil resource. AR ML000129-130.

The Wasatch Plateau Technical Report for Watershed and Soils sets the *minimum* effective ground cover for all vegetation types as 50%, and the *desired* ground cover as greater than 50% for most vegetation types.²⁵ AR ML001823, 1827. Data from long-term trend studies on the South Skyline allotments show measurements falling well short of those measures, with bare ground well over 50% at several sites. At least six analysis sites on the specific South Skyline²⁶ allotment had bare ground that well exceeded 50%, most of these having at least 70% bare ground. AR ML002096, ML002110, ML002123, ML002158, ML002167, ML002171.

The South Skyline NFMA²⁷ analysis indicates that six out of the nine study sites showed either a stable or upward trend, but failed to take into account that the percentage of bare ground

²⁵ The desired condition for ground cover varies with the vegetation type. To meet or surpass desired condition, aspen should have no more than 10% bare ground, tall forb lands should have no more than 40%, grasslands should have no more than 50%, conifer should have no more than 20% and big mountain sagebrush and mountain brush should have no more than 30% bare ground. AR ML001823.

²⁶ The South Skyline allotment was previously divided into the Jordan-Staker, Seeley Canyon and Lake Rolfson allotments. AR ML001823.

²⁷ NFMA stands for National Forest Management Act.

at many of these sites is well over the 50% mark.²⁸ AR ML000868. Additionally, the Technical Report for Watershed and Soils places the Jordan-Staker portion of the South Skyline allotment in the “high” level of concern for soil management, meaning it may not meet the Forest Plan and/or Regional guidelines and is a high priority for changes in management directions. AR ML001828. The Seeley Canyon portion received a moderate rating, indicating that it probably met Forest Plan and Regional guidelines but trends in erosion index ratings or percent bare ground are a concern. *Id.* Additionally, at least one site in the South Skyline allotment had an erosion index rating indicating unacceptable soil loss. AR ML002171; ML001827.

Similar to South Skyline, Potter Canyon’s analysis site had bare ground exceeding 70%. Potter Canyon, like Seeley Canyon, received a moderate rating for level of concern for soil management. AR ML002339, ML001828. Nonetheless, the NFMA Analysis concluded that overall “the allotment appears to be improving” even though it still “lacks good forb species, species diversity and ground cover.” AR ML000832.

In contrast, Booth Canyon’s percentage of bare ground was well below 50%, with only 23.5% bare ground and received a “low” level of concern rating for soil management, meaning it met Forest Plan and Regional guidelines. AR ML002287, ML001828. The upper portions of Booth Canyon’s allotment “lack ground cover, vegetative diversity, good vegetative species” but there are also “signs of improvement.” AR ML000870.

The monitoring data reveals many areas of these allotments that are *not* meeting Forest Plan objectives, particularly ground cover and soil objectives like “control . . . grazing so plant cover

²⁸ For example, a study done on the Jordan Canyon Watershed indicated that the percentage of bare ground dropped from 85% in 1971 to 70.4% in 1998. AR ML002171. While this does indeed show an upward trend, the amount of bare ground remains well over the acceptable level.

is not reduced to less than the amount needed for soil and watershed protection” and “maintain soil erosion losses” and “rehabilitate areas that are eroding excessively.” This is evidenced by several study sites showing that the percentage of bare ground is well over the desired condition as well as soil management concern ratings which indicate that only one of the three allotments meets Forest Plan and Regional guidelines without any concerns. AR ML002096, ML002110, ML002123, ML002158, ML002167, ML002171, ML002339, ML001828. The Technical Report makes clear that the percent bare ground was greater than desired and not meeting desired conditions for the South Skyline and Potter Canyon allotments. AR ML001825-26. Hence, the Court finds that the conclusion drawn by the Forest Service, that the Forest Plan objectives were being met or satisfactorily moving towards for upland range areas in South Skyline and Potter Canyon allotments is not supported by the administrative record, runs counter to the very evidence it relies upon, and is arbitrary and capricious. However, the record reflects that the objectives were being met for the Booth Canyon allotment, as discussed above, and that aspect of the decision is not arbitrary and capricious.

2. Riparian Areas

Riparian areas in the Manti-La Sal National Forest are to be managed under the Forest Plan

to:

protect and enhance riparian areas including dependent resources; maintain satisfactory watershed conditions; protect soil and water productivity so that neither will be significantly or permanently impaired; give preferential consideration to riparian area dependent resources in cases of unresolvable resource conflicts; provide for proper stocking and livestock distribution to protect riparian ecosystems; avoid trailing livestock along the length of riparian areas except where existing stock driveways occur and relocate them outside riparian unit if possible and when necessary to achieve riparian area goals; minimize significant soil compaction and disturbance in riparian ecosystems; and maintain or enhance the long-term productivity of soils within the riparian

ecosystem.

AR ML000101, ML000129, ML000169, ML000171.

The NFMA analyses, discussed above in the rangeland section, also address riparian areas. The 2007 NFMA Analysis of the South Skyline allotment references results from a 1997 inventory. AR ML000858. This 1997 inventory found that Lake Creek had stable and well-vegetated stream banks, with 70-100% stability. *Id.*; AR ML001947. Sheep impacts to riparian vegetation were described as light to moderate. AR ML000858. For Staker Creek, stream banks were found to 85-100% stable, with moderate sheep impacts to riparian vegetation. AR ML000859. Seeley Creek had 85-95% bank stability with vegetation varying from 15% to 85%. *Id.* Jordan Creek, which did not have an inventory conducted in 1997, had similar conditions to Seeley Creek based upon an employee's personal observations. *Id.* Photos taken in 2005 for Seeley Creek indicated no signs of trailing, stream bank stability at 95-100% and greenline²⁹ at 95-100% intact. AR ML002217-18. Photos of springs in Rolfson Canyon taken in 2005 show greenline 100% intact and no sign of disturbance from sheep. AR ML002221. Additional photos of Rolfson Creek showed no signs of trailing, greenline 100% intact, and stream bank stability at 100%. AR ML002223.

The NFMA Analysis of the Potter Canyon allotment summarized the findings of a 1992 inventory. AR ML000833. The Potter Canyon stream had stable banks at higher elevations with some impacts due to sheep watering and crossing. *Id.* The 1992 report discusses eight riparian complexes on Potter Canyon. AR ML001881-85. Many were noted to have "moderately high"

²⁹ *See, supra*, note 11.

or similar impacts from sheep grazing and very unstable banks.³⁰ *Id.* The banks of Booths Creek were 70% unstable. Livestock grazing impacts were light to moderate. AR ML000833.

However, an observation of the creek in 1998 found the stream to be stable and well-vegetated.

Id. Like the South Skyline allotments, there are a few photos of riparian areas in Potter Canyon.

AR ML002363-65. One photo taken in 2003 showed a creek's greenline was 100% intact. AR

ML002363. In 2005 photos, livestock trailing on one portion of Potters Canyon Creek was

visible and the greenline along a perennial stream was intact. AR ML002365, ML002368.

Lastly, the NFMA Analysis of the Booth Canyon allotment also discusses a 1992 inventory conducted on three streams. AR ML000871. Light to moderate impacts were noted on the Booth Canyon stream. *Id.* Bennetts Canyon Stream had moderate to heavy sheep impacts in some areas, and riparian vegetation was sparse. *Id.* The grazing impacts on Paradise Creek were light to moderate and banks were mainly stable. *Id.* The 1992 inventory report expands upon the above summarization of Booth Canyon stream, finding that channel banks are steep and 75-85% unstable. AR ML001885-87.

The Court finds that the record supports the Forest Service's decision with respect to the South Skyline allotment. The older data from the 1997 riparian inventory which indicated favorable riparian conditions in conjunction with the newer photographic data evincing the same sufficiently demonstrates that objectives are being met on this allotment.

With respect to Potter Canyon and Booth Canyon, the record does not support the Forest Service's conclusion that objectives are being met as to riparian areas. The only data in the record on Booth Canyon is from 1992, 15 years prior to the CE decision in 2007. An agency's

³⁰ Riparian complexes 1, 2, 3, 5, 6, 7, and 8 either have "severe impacts," "moderately high impacts" or sheep impacts have "increased" or "continued." AR ML001881-85.

reliance on data that is too stale to carry the weight assigned to it may be arbitrary and capricious. *See N. Plains Res. Council, Inc. v. Surface Trans. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011) (in NEPA analysis of railroad line construction, the court found that most recent data relied on was stale as it was at least ten years old). The data from 1992 is far too remote from the date of the CE decision to be reliable and relevant. Further, the data from 1992 does not create a positive picture of the riparian conditions in Booth Canyon, noting heavy impacts from sheep grazing on one stream and unable stable banks on another. This is not evidence that riparian ecosystems are being “protected” or “enhanced” as called for by the Forest Plan. While there is one note from an observation made of Booth Canyon in August 2002 stating “riparian areas are well veg [sic],” that note is far too flimsy to satisfy the monitoring requirements of the 2005 Rider.³¹ AR ML002291. A district court in the Northern District of California has held that older data in conjunction with newer information may suffice. *Western Watersheds v. U.S. Forest Serv.*, 2012 WL 1094356, *9 (N.D. Cal. March 30, 2012) (discussing the second prong of the 2005 Rider at issue here). While there is *some* more recent data from photographs depicting the riparian conditions on Potter Canyon, the Court finds that this data along with the data from 1992 which indicated that riparian areas were not in great condition,³² does not support the conclusion that conditions upon this allotment met or were moving towards Forest Plan objectives.

³¹ There are photographs taken in 2005 of Booth Canyon allotment, however, these do not depict or describe the riparian conditions found. AR ML 002293-97.

³² Many riparian complexes on Potter Canyon had either “severe impacts,” “moderately high impacts” or impacts were noted to have “increased” or “continued.” Unstable banks were also noted. AR ML001881-85.

3. Fish and Wildlife

Management plan goals and objectives for fish and wildlife include: maintain or improve wildlife habitat diversity; maintain or improve fisheries habitat; protect, maintain and/or improve habitat for threatened or endangered and sensitive plants and animals; provide habitat for viable populations of the existing vertebrate and invertebrate species found on the Forest; habitat would be surveyed and appropriate action taken and habitats for sensitive species would be managed to reduce the potential of these species becoming threatened or endangered. AR ML000100, ML000107. Management Indicator Species (MIS) include deer and elk, golden eagle, northern goshawk,³³ macroinvertebrates, and Albert squirrel. AR ML000116-17. The Forest Plan also calls for monitoring MIS population trends. AR ML000204-05.

Plaintiffs contend there has been inadequate habitat monitoring data for MIS, specifically northern goshawk, elk, and deer. *See* Pla's Brief, Dkt 22-2, p. 46. Plaintiffs argue that merely claiming that utilization standards will be met does not show how the habitat needs of each of these species will be met, nor does the Forest Service have utilization monitoring data to show that grazing is consistently meeting those standards. *Id.*

For all three of these species (elk, deer, and northern goshawk), the Wildlife Resources Report found no direct impacts from grazing other than temporary displacement or avoidance of sheep by elk and deer. AR ML002037-44. The report predicts competition between elk and sheep for forage and space during the summer range, but states that proper use of the allotment would extend availability of high quality grass into late summer and autumn for elk use. AR ML002037-38. The report also concludes that grazing would not impact elk calving habitat or

³³ The original MIS blue grouse was replaced by northern goshawk in a 2003 amendment to the Forest Plan. AR ML000736-87.

foraging habitat and that the elk calf-cow ratio has remained consistent from 1999 to 2003. AR ML002038. With respect to deer, the report similarly found that proper use will mitigate any impacts to their foraging habitat, especially since deer have less dietary overlap with sheep than do elk. AR ML002041. Additionally, no decrease has been found in fawn to doe ratios due to livestock grazing. *Id.*

Lastly, for the northern goshawk, the Wildlife Resources Report found there could be indirect impacts on foraging habitat in higher elevations, but proper livestock herding techniques should mitigate any impacts. AR ML002044. The report also found that the monitoring requirement is satisfied because there has never been a decline in territory occupancy greater than 10%, over a three-year period. AR ML002043-44.

The Forest Plan requires population trend monitoring, which is discussed in the Wildlife Resources Report. AR ML000204-05, ML002037-43. The population data for elk, deer, and goshawk indicate that populations are remaining stable. AR ML002037-43. There is monitoring data to support the Forest Service's conclusion that deer, elk, and goshawk populations are being maintained under current grazing management and that Forest Plan objectives are being satisfied in this regard.

In 2006, the Forest Plan was amended to update the method used for monitoring macroinvertebrates. AR ML000788-800. The 2006 Forest Plan Amendment does say (in the parenthetical next to "Macroinvertebrates") that such monitoring is for "baseline stations or as needed for select project activities." AR ML000800, ML000808. In the description of Macroinvertebrates as a MIS, the Plan says that "[t]hese [aquatic] habitats can be monitored for macroinvertebrates on a priority basis as needed to determine the specific effects of any one project or activity, as well as the effects of general Forest land management, on the aquatic

resources.” AR ML000800, ML000808.

No surveys have been conducted for macroinvertebrates. *See* AR ML002035. The Forest Service contends the reason for this is there are no baseline monitoring sites within the allotments and that macroinvertebrate monitoring is an optional monitoring technique for selected projects.

Both Plaintiffs’ argument and the Forest Service’s response on this issue were attenuated and poorly defined. However, from what the Court could glean from these arguments and its review of the record, the Court finds the Forest Service has not acted arbitrarily and capriciously on this issue. The Court will accept the Forest Service’s statement that there are no baseline monitoring sites on the allotments, and Plaintiffs have not identified any such sites. Secondly, to the extent the Forest Plan does not require particular methods of monitoring but, instead, identifies methods of monitoring that could be used, it is left to the discretion of the Forest Service on when and which methods will be used. If the Forest Service did abdicate its responsibility to monitor and did nothing, this would fall short of what is required under the 2005 Rider. However, the record does not show that the Forest Service shirked its responsibility but instead used its discretion in not monitoring macroinvertebrates. In that context, its decision is not arbitrary and capricious.

CONCLUSION AND REMEDY

The great majority of the analyses done, and decisions made, by the Forest Service in connection with the Categorical Exclusion decisions at issue in this case, withstand judicial scrutiny. However, there are some issues raised by the decisions from each Forest that call into question the propriety of using the categorical exclusion for these grazing permit decisions. The Court has particularized its findings as to those infirmities insofar as it has been possible to do.

That task has been complicated by the fact that in two of the CE decisions – Southern Wind River on the Bridger-Teton National Forest and South Soda Sheep CE on the Caribou-Targhee National Forest – the Forest Service grouped together a large number of allotments in its CE decision. Such an approach has sensible efficiencies as a general matter. But, such an approach also means that one or more allotments caught in the need for further review and action by the Forest Service might not have been so affected had the relevant CE decision been more detailed as to the particular allotments. However, where the Forest Service did not include such additional detail by allotment, and it is not otherwise readily apparent from the administrative record, then the Forest Service created its own dilemma. The Court cannot go through the record and parse out the data allotment by allotment if that has not been done by the Forest Service in its own work and administrative decision, or is not otherwise readily apparent from the record.

Based upon the findings contained in this Report and Recommendation, there are particular aspects of the CE decisions made by each National Forest involved in this case that must be revisited in light of the requirements of the 2005 Rider. They are summarized as follows:

Uinta-Wasatch-Cache National Forest	Wilderness as an extraordinary circumstance under prong 3 of the 2005 Rider
Bridger-Teton National Forest	Range conditions under prong 2 of the 2005 Rider
	Soil conditions under prong 2 of the 2005 Rider
	Riparian conditions under prong 2 of the 2004 Rider
	Wilderness as an extraordinary circumstance under prong 3 of the 2005 Rider
Caribou-Targhee National Forest	Upland range conditions under prong 2 of the 2005 Rider

	Riparian conditions under prong 2 of the 2005 Rider
Manti-La Sal National Forest	Upland range conditions on South Skyline and Potter Canyon allotments under prong 2 of the 2005 Rider
	Riparian conditions on Booth Canyon and Potter Canyon allotments under prong 2 of the 2005 Rider

Typically, when a Court overturns an agency decision, it is deemed invalid, and the agency (and parties affected by the agency's decision) return to the pre-decision status quo. *See, Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). What that "pre-decision status quo" might be in this case, however, is not easily determined. The CE decisions at issue here resulted in the renewal of grazing permits which in some, or perhaps all, instances would now be expired but for the decision of the Forest Service to renew the permits. Hence, one possible status quo would be that any right to continue grazing on the allotments has expired, and thus grazing is no longer allowed. However, even if an EA or EIS had been conducted as to any of the particular grazing decisions, the Court cannot say with certainty that the permit would not have been issued. Similarly, the basis for the Court returning these decisions to the Forests largely stems from inadequate explanations and expert justifications for the certain particulars of the CE decisions. However, if the required steps had been taken and explained, the permits might still have been issued. Hence, another possible status quo is that the grazing permits would still have been issued, and grazing would be ongoing under the particular permit conditions.

Plaintiffs' Complaint seeks a judgment of the Court that the Defendant Forest Service has violated the 2005 Rider. The effect of this Report and Recommendation, if adopted by Judge Lodge, does just that. However, Plaintiffs also request that the Court reverse and set aside the

grazing permit decisions, and declare that the Forest Service violated NEPA. Those steps would be premature. Instead, the Court finds and recommends that the appropriate status quo in this setting is that formed by the status of the grazing rights as a result of the issuance of the new or renewed permit connected to the CE decision in each particular Forest.

The Court is mindful that Plaintiffs would contend that such a ruling arguably gives the Forest Service an opportunity to remodel a prior decision solely to cloak the decision in a manner intended to withstand judicial review, without making a genuine re-examination of the factual record, and the decisions made upon that record. However, the Court's deference to the agency's expertise includes an expectation of the Court that the Forest Service will conduct its work and make its decisions in good faith, and the Court will presume that such a standard will govern the work to be done and decisions to be made by the Forest Service following this decision. If that work or those decisions are still subject to question under the 2005 Rider or for some other reason, Plaintiffs or others can bring a new challenge. At that juncture, if the Court is persuaded that such a challenge is well-made, then the remedy implemented by the Court will almost certainly be more directly focused upon termination of the grazing permits.

The Court recommends that the Forest Service be ordered to make its decision as to whether to initiate a NEPA compliance process, or issue a new CE decision, pertaining to each of the allotments at issue in this case, according to the following timetable.³⁴ The Forest Service shall take one of the following actions: (1) the Forest Service withdraws its CE decision, sets the earliest possible time-frame for complying with NEPA as part of its ultimate decision as to whether grazing should be authorized, and completes the NEPA process by July 31, 2013, to be

³⁴ The Court would consider a different timetable, upon a stipulation of the parties as to any such different timetable.

followed by a new decision on the grazing permit no later than September 30, 2013; or (2) by July 31, 2013, the Forest Service issues a new CE decision, to include specific and appropriate response to the areas of the prior CE decision found to have fallen short of the 2005 Rider requirements.

In the intervening time period, the current status quo shall be maintained -- that is, grazing can continue under the terms of the currently existing permit.

RECOMMENDATION

For the foregoing reasons, it is hereby recommended that:

- 1) Plaintiffs' Motion for Summary Judgment (Dkt. 22) be **GRANTED IN PART and DENIED IN PART;**
- 2) Forest Service's Motion for Summary Judgment (Dkt. 58) be **GRANTED IN PART and DENIED IN PART;**
- 3) Defendant-Intervenor Wyoming Stock Growers, et al.'s Motion for Summary Judgment (Dkt. 55) be **GRANTED IN PART and DENIED IN PART;** and
- 4) Defendant-Intervenor State of Wyoming's Motion for Summary Judgment (Dkt. 63) be **GRANTED IN PART and DENIED IN PART.**

Pursuant to District of Idaho Local Civil Rule 72.1(b)(2), a party objecting to a Magistrate Judge's recommended disposition "must serve and file specific, written objections, not to exceed twenty pages . . . within fourteen (14) days . . . , unless the magistrate or district judge sets a different time period." Additionally, the other party "may serve and file a response, not to exceed ten pages, to another party's objections within fourteen (14) days after being served a copy thereof."



DATED: **February 14, 2013**

A handwritten signature in black ink, appearing to read "Ronald E. Bush".

Honorable Ronald E. Bush
U. S. Magistrate Judge