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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

WildEarth Guardians, et al.,
Plaintiffs,
v.
Heather Provencio, et al.,
Defendants.

No. CV-16-08010-PCT-SMM
ORDER

Pending before the Court is Plaintiffs WildEarth Guardians, Grand Canyon Wildlands Council, Wildlands Network, and Sierra Club’s (collectively, “Plaintiffs”) motion for summary judgment and memorandum of points and authorities in support. (Docs. 44-45.) Plaintiffs filed a statement of facts and declarations in support of their motion. (Docs. 46-48.) Federal Defendants Heather Provencio and United States Forest Service (collectively, “Defendants”) filed a cross-motion for summary judgment and a response in opposition to Plaintiffs’ motion, and a statement of facts in support. (Docs. 49-51.) Plaintiffs filed a reply to Defendants’ cross motion and response (Docs. 65, 66), to which Defendants filed a reply (Doc. 72).

Also pending before the Court is Intervenor-Defendant Safari Club International’s cross-motion for summary judgment (Doc. 52-53) and Intervenor-Defendant State of Arizona’s cross-motion for partial-summary judgment (Doc. 55). Intervenor Defendants filed statements of facts in support of their motions. (Docs. 54, 56-57.) Plaintiffs filed one response in opposition to Intervenor-Defendants’ motions (Doc. 70), to which Intervenor-

1 Defendants filed separate replies (Docs. 74, 75). The Court also granted Rocky Mountain
2 Elk Foundation leave to file an Amicus Curiae Brief in support of Defendants. (Doc. 80.)

3 The matter being fully briefed, the Court now issues the following ruling.¹

4 **I. BACKGROUND²**

5 **A. The Kaibab National Forest**

6 The Kaibab National Forest (“KNF”) is located in northern Arizona and consists
7 of three ranger districts: the North Kaibab Ranger District (“NKRDR”), the Tusayan
8 Ranger District (“TRD”), and the Williams Ranger District (“WRD”).

9 The NKRDR encompasses approximately 655,078 acres in Coconino and Mohave
10 Counties in North Central Arizona and is bounded on the south by the North Rim of the
11 Grand Canyon National Park and on the remaining sides by Bureau of Land Management
12 areas. (AR 13949.) The TRD encompasses 331,427 acres of National Forest and is
13 located just south of the South Rim of Grand Canyon National Park. (AR 26021.) The
14 TRD borders the Navajo Indian Reservation to the east, and the Havasupai Indian
15 Reservation and Arizona State and private land to the west and south. (*Id.*) The TRD is
16 not contiguous with other National Forest System lands. (*Id.*) The WRD encompasses
17 560,305 acres of National Forest and surrounds the town of Williams, approximately 35
18 miles west of the city of Flagstaff and approximately 60 miles south of Grand Canyon
19 National Park. (AR 40831.) The WRD lies predominantly in Coconino County; however,
20 a small section of the district is located in Yavapai County on the west side. (*Id.*) The
21 WRD is bordered by the Coconino National Forest to the east and southeast, State and
22 Private lands on the north and west sides, and the Prescott National Forest on the south
23 and southwest sides. (*Id.*)

24
25 ¹ The parties’ request for oral argument is denied because the parties have had an
26 adequate opportunity to present their written arguments, and oral argument will not aid
the Court’s decision. See *Lake at Las Vegas Investors Grp., Inc. v. Pac Malibu Dev.*, 933
F.2d, 724, 729 (9th Cir. 1991).

27 ² The Administrative Record in this case consists of more than 41,000 pages.
28 Citations to the Administrative Record are noted as “AR” followed by the applicable
Bates number. Citations to the Supplemental Administrative Record are noted as “S”
followed by the applicable Bates number.

1 All three ranger districts provide opportunities for recreational activities, including
2 hiking, hunting, and camping. (AR 13973-13974; 26054-26055; 40861-40864.) The
3 ranger districts are also home to a number of plant and animal species, including some
4 threatened and endangered species. (AR 14009-14031; 26128-26158; 26098-26115;
5 40903-40923; 40933-40960.) The ranger districts are also home to numerous cultural
6 resources. On the NKR D, for example, heritage or cultural resources include remains of
7 “limited activity sites such as hunting and gathering camps, prehistoric agricultural areas,
8 rock art, and historic resource extraction areas; habitation sites including pueblos,
9 prehistoric residential camps, and historic cabins; linear features like roads, trails, and
10 fences; and special use sites including traditional cultural properties of significance to
11 area tribes.” (AR 14032.) On the TRD, archaeologists have identified 1,770 cultural
12 resources, recorded 379 sites with above ground masonry architecture, and documented
13 259 historic period sites that include cabins, mines, mining camps, railroad grades and
14 camps, line shacks, water storage features, an airport hangar, sweat lodges, hogans, and
15 pinyon nut gathering camps. (AR 26158.) Cultural resources on the WRD include
16 “prehistoric artifacts scatters, ancestral puebloan sites with masonry structures,
17 prehistoric agricultural areas, cultural sensitive sites such as Traditional Cultural Places,
18 historic cabins, logging railroad grades and camps, Civilian Conservation Corp camps...,
19 [and] historic Forest Service administration buildings.” (AR 40960.)

20 **B. The Travel Management Projects**

21 The NKR D, TRD, and WRD undertook projects to designate a system of roads on
22 each ranger district. (AR 13952, 26023, 40835.) The goal of each project was to improve
23 the management of motorized vehicle use on each ranger district in accordance with the
24 2005 Travel Management Rule (discussed *infra*). (AR 13947, 26020, 40830.) These
25 travel management projects resulted in the publication of Motor Vehicle Use Maps
26 showing those roads designated for motor vehicle use. (*Id.*) Motor vehicle use off the
27 designated road system is prohibited unless authorized by permit, permitted by local
28 decision, or allowed by the Travel Management Rule. (*Id.*)

1 Each ranger district developed an Environmental Assessment presenting the
2 results of the analysis of the direct, indirect, and cumulative environmental effects of the
3 proposed action and alternatives to the proposed action (discussed *infra*). (AR 13942,
4 26041, 40823.) The decisions implementing the chosen actions for each ranger district
5 were documented in Decision Notices signed by the Kaibab National Forest Supervisor
6 and Findings of No Significant Impacts. (AR 14236, 25876, 41266.)

7 **C. National Historic Preservation Act Obligations**

8 The Forest Service's National Historic Preservation Act obligations for each
9 ranger district's travel management decisions are guided by the First Amended
10 Programmatic Agreement Regarding Historic Property Protection and Responsibilities
11 between Region 3 of the Forest Service, the Advisory Council on Historic Preservation,
12 and the States of Arizona, New Mexico, Texas, and Oklahoma. (S00233-322). Pursuant
13 to the Programmatic Agreement, the parties developed the Standard Consultation
14 Protocol for Travel Management Route Designation, found in Appendix I to the
15 Agreement. (S00300-08.) The Protocol outlines the process for compliance with Section
16 106 of the NHPA for travel management, listing the activities for which further Section
17 106 is required, and those activities which are exempt. (S00301-02.) The NHPA, the
18 Programmatic Agreement, and the Protocol are described in greater detail *infra*.

19 **D. The Present Action**

20 Plaintiffs commenced this action in January 2016 alleging violations of the
21 National Environmental Policy Act ("NEPA"); Executive Order 11644, as amended by
22 Executive Order 11989; the National Historic Preservation Act ("NHPA"); and certain
23 "implementing regulations established pursuant to these federal statutes and executive
24 orders," including the Travel Management Rule ("TMR"). (Doc. 1 at ¶ 1.) Defendants are
25 Heather Provencio, Forest Supervisor for the Kaibab National Forest, and the United
26 States Forest Service ("Forest Service"). (*Id.* at ¶ 13-14.)

27 Plaintiff WildEarth Guardians is a nonprofit conservation organization that
28 "works[s] to protect the natural and cultural features of landscapes within national forests

1 and other public lands, including their wildlife and historic properties.” (Id. at ¶ 6.)
2 Plaintiff Grand Canyon Wildlands Council is a nonprofit conservation organization
3 whose mission is to “create and apply a dynamic conservation area network that ensures
4 the existence, health, and sustainability of all native species and natural ecosystems in the
5 Grand Canyon ecoregion.” (Id. at ¶ 7.) Plaintiff Wildlands Network is a nonprofit
6 conservation organization that “reconnects wildlife habitats in North America so that
7 animals can live in and move safely through the landscape,” “collaborates with partner
8 groups to create wildlife corridors at a large enough scale to meet the needs of wolves,
9 mountain lions, and other native carnivores,” and “engages with federal agency staff, and
10 federal and state policymakers to ensure that...public lands are appropriately managed
11 and...laws and public policies are effectively and correctly implemented and enforced to
12 protect conservation values.” (Id. at ¶ 8.) Plaintiff Sierra Club is a nonprofit grassroots
13 organization whose mission is to “explore, enjoy, and protect the wild places of the Earth,
14 to practice and promote responsible uses of the Earth’s ecosystems and resources, to
15 educate and enlist humanity in the protection and restoration of the quality of the natural
16 and human environment, and to use all lawful means to carry out those objectives.” (Id. at
17 ¶ 9.)

18 **II. LEGAL STANDARD**

19 Administrative Procedure Act

20 Plaintiffs’ claims are brought under the Administrative Procedure Act (“APA”), 5
21 U.S.C. §§ 701-706 (2012). (Doc. 1 at ¶¶ 1-3.) Under the APA, a reviewing court may
22 overturn a final agency action if the action is “arbitrary, capricious, an abuse of
23 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Agency
24 action is arbitrary and capricious if:

25 the agency has relied on factors which Congress has not intended it to
26 consider, entirely failed to consider an important aspect of the problem,
27 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.

28 Great Old Broads for Wilderness v. Kimbell, 709 F. 3d 836, 846 (9th Cir. 2013) (quoting

1 City of Sausalito v. O’Neill, 386 F.3d 1186, 1206 (9th Cir. 2004)). This standard is
2 “highly deferential, presuming the agency action to be valid and affirming the agency
3 action if a reasonable basis exists for its decision.” Northwest Ecosystem Alliance v. U.S.
4 Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007) (internal quotations and
5 further citation omitted); see also O’Neill, 386 F.3d at 1206 (“[A reviewing court] must
6 uphold agency decisions so long as the agenc[y] ha[s] considered the relevant factors and
7 articulated a rational connection between the factors found and the choices made.”)
8 (internal quotations and further citation omitted). The APA does not allow a court to
9 overturn an agency action simply because the court disagrees with the action. See River
10 Runners for Wilderness v. Martin, 593 F.3d 1064, 1070 (9th Cir. 2010).

11 Summary judgment is an appropriate vehicle for resolving challenges to agency
12 action under the APA. See Northwest Motorcycle Ass’n v. U.S. Dept. of Agriculture, 18
13 F.3d 1468, 1471-72 (9th Cir. 1994). And, where a case involves review of a final agency
14 determination under the APA, resolution of the matter does not require fact finding by the
15 reviewing court because the parties stipulate to the administrative record. Id.

16 **III. DISCUSSION**

17 Plaintiffs move for summary judgment on the grounds that the Forest Service
18 violated the Travel Management Rule, the National Environmental Policy Act, and the
19 National Historic Preservation Act. (Doc. 45 at 6, 15, 45.)

20 **TRAVEL MANAGEMENT RULE**

21 In 2005, the Department of Agriculture revised its regulations regarding travel
22 management on National Forest System lands in order to “clarify policy related to motor
23 vehicle use, including the use of off-highway vehicles.” Travel Management; Designated
24 Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68264-01, 2005 WL 2986693
25 (Nov. 9, 2005) (codified at 36 C.F.R. §§ 212, 251, 261, 295). The TMR “prohibit[s] the
26 use of motor vehicles off the designated system, as well as use of motor vehicles on
27 routes and in areas...not consistent with the designations.” Id. Importantly, the rule is
28 consistent with Executive Orders 11644 and 11989, which direct federal agencies to

1 ensure that “the use of off-road vehicles on public lands will be controlled and directed so
2 as to protect the resources of those lands, to promote the safety of all users of those lands,
3 and to minimize conflicts among the various uses of those lands.” Id.

4 Motor vehicle use on a National Forest System road, on a National Forest System
5 trail, and in an area on National Forest System land is prohibited unless that road, trail, or
6 area is specifically designated for motor vehicle use. 36 C.F.R. § 212.51(a); § 261.13.
7 Exempt from this prohibition are certain vehicles and uses, such as limited administrative
8 use by the Forest Service, law enforcement responses to violations of law, and the
9 authorized use of any combat or combat support vehicle for national defense purposes. §
10 212.51(a)(4),(6)-(7). A notable exception to the general prohibition – and at issue here –
11 is the motorized big game retrieval (“MBGR”) exception. § 212.51(b).

12 The MBGR exception provides that “the responsible official may include in the
13 designation [of routes] the limited use of motor vehicles within a specified distance of
14 certain forest roads or trails where motor vehicle use is allowed, and if appropriate within
15 specified time periods” for the purpose of retrieving a downed big game animal. Id.
16 Although “route” is not defined in § 212.1, Definitions, it appears in the definition of
17 “road” and in the definition of “trail”:

18 **Road.** A motor vehicle *route* over 50 inches wide, unless identified and
19 managed as a trail.

20 **Trail.** A *route* 50 inches or less in width or a *route* over 50 inches wide that
21 is identified and managed as a trail.

22 § 212.1 (emphasis added). Based on the plain language of these definitions, it is clear that
23 the MBGR exception applies following the designation of roads or trails (i.e., routes) for
24 motor vehicle use. The use of “roads or trails” following the use of “routes” in the
25 MBGR exception lends further support to this conclusion.

26 The TMR contains general and specific criteria for the Forest Service to consider
27 when designating trails, areas, and roads for motor vehicle use. § 212.55 (a)-(c). The
28 general criteria apply to trails, areas, and roads, and require that

//

1 the responsible official shall consider effects on National Forest System
2 natural and cultural resources, public safety, provision of recreational
3 opportunities, access needs, conflicts among uses of National Forest
4 System lands, the need for maintenance and administration of roads, trails,
and areas that would arise if the uses under consideration are designated;
and the availability of resources for that maintenance and administration.

5 § 212.55(a). The specific criteria apply to trails and areas, and roads, respectively. §
6 212.55(b)-(c). When designating trails or areas, the responsible official must consider
7 effects on, with the objective of minimizing, a number of things, such as damage to soil,
8 harassment of wildlife, and significant disruption of wildlife habitats. See 36 C.F.R.
9 212.55(b)(1)-(5). When designating roads, the responsible official must consider
10 “[s]peed, volume, composition, and distribution of traffic on roads,” and “[c]ompatibility
11 of vehicle class with road geometry and road surfacing.” §§ 212.55 (c)(1)-(2).

12 Plaintiffs raise two TMR arguments. First, Plaintiffs argue that the Forest Service
13 violated the TMR because it failed to “limit and sparingly apply” the MBGR exception
14 by allowing “extensive” cross-country off-road motorized vehicle use for the purpose of
15 big game retrieval, and second, that the Forest Service violated the TMR by failing to
16 consider, or failing to sufficiently consider, the minimization criteria set forth in §
17 212.55(b). (Doc. 45 at 8, 11.) The Court will examine these arguments in reverse order.

18 **A. 36 C.F.R. § 212.55(b) Minimization Criteria**

19 Plaintiffs allege that the Forest Service violated the TMR by failing to consider, or
20 failing to sufficiently consider, the minimization criteria set forth in § 212.55(b). (Doc. 45
21 at 11-12.) Section 212.55(b) lists the specific criteria which a responsible official must
22 consider when designating trails or areas for motor vehicle use, such as damage to soil,
23 harassment of wildlife, and significant disruption of wildlife. § 212.55(b)(1)-(5).

24 Plaintiffs assert that the Forest Service was obligated to consider the minimization
25 criteria since it designated areas for MBGR on each ranger district (Doc. 45 at 14), but
26 did not, and admits so, because it claims to have designated roads, not areas on the TRD
27 and NKRD (id. at 11, citing AR 26330, AR 14829). In support of their assertion that the
28 Forest Service designated areas and therefore was obligated to consider the minimization

1 criteria, Plaintiffs point to the maps of the TRD and NKRD, and argue that the places
2 where MBGR is authorized on each ranger district map constitute “areas” (*id.* at 14,
3 citing AR 25901, 41253) and the fact that the Forest Service referred to locations on the
4 Forest where MBGR is authorized as “areas” (*id.* at 14, citing AR 26034, 13960, 3704).
5 Plaintiffs further assert that the Forest Service “maintained that it complied” with the
6 minimization criteria for the WRD (*id.* at 12, citing AR 41091, 41436-37, 40838), but did
7 not provide an adequate explanation as to how it do so, instead offering only “conclusory
8 statements that impacts to resources are minimized and that mitigation measures will
9 minimize impacts” (*id.*, citing AR 40856, 40898-99, 40969, 40986).

10 As a preliminary matter, the Court finds that the Forest Service has not
11 “maintained that it complied” with the minimization criteria of § 212.55(b) for the WRD.
12 Plaintiffs’ citations to the record in support of the assertion do not, in fact, support it.
13 First, the quotation taken from AR 41091 is taken out of context. When quoted in full:

14 The Forest Service disagrees because by completing the EA and reviewing
15 the project record the responsible official has complied with all of 36 CFR
16 part 212.55 and Executive Order 11664. The minimum road system for the
17 WRD was identified in the TAP (2010), and the recommendations were
18 incorporated and analyzed in the EA under Alternatives 2 & 3. Additional
alternatives were considered but eliminated from detailed study that would
close and provide a substantially reduced road system (Section 2.7). The
environmental consequences of implementing Alt. 1-4 are disclosed in
Chapter 3 of the EA.

19 (AR 41091.) The repeated mentions of “road system” indicate that the Forest Service was
20 likely referring to compliance with § 212.55(c), not § 212.55(b). Moreover, the statement
21 that the responsible official has “complied with *all* of 36 CFR part 212.55” necessarily
22 means that he complied with either § 212.55(a) and (b), *or* § 212.55(a) and (c) –
23 depending on whether he designated trails or areas, or roads.

24 Neither does the quotation taken from AR 40838 support the assertion that Forest
25 Service “maintained that it complied” with the criteria set forth in § 212.55(b). The quote
26 is also taken out of context. The quote appears under the heading “Motorized Trails and
27 Areas” and under the sub-heading “Desired Condition.” The “Desired Condition” sub-
28 heading focuses on *trails*. Thus, the statement that the transportation system is “within

1 the District's ability to manage (operate and maintain) and provides a variety of users
2 with a safe and diverse experience while minimizing resource impacts (36 C.F.R. §
3 212.55(b))" is consistent with the regulation requiring the Forest Service to consider the
4 minimization criteria if it designates trails (or areas). (AR 40837-38.)

5 Finally, the quotation from AR 41436-37 is an excerpt from the Forest Service's
6 response to the contention that "none of the alternatives comply" with § 212.55(a) or (b).
7 Although the response to the contention lists the minimization criteria of § 212.55(b) and
8 then cites the WRD's Environmental Assessment ("EA"), Decision Notice ("DN") and
9 Finding of No Significant Impact ("FONSI") in support of its ultimate finding (that "the
10 project meets the requirements of TMR for consideration of effects on natural and
11 cultural resources, soils, watersheds, vegetation, wildlife and habitat"), nowhere in the
12 DN or FONSI is § 212.55(b) mentioned, much less its minimization criteria explicitly
13 considered. In the EA, § 212.55(b) is discussed as detailed in the preceding paragraph
14 (AR 40837-38). For these reasons, the Court finds that that the Forest Service has not
15 "maintained" to have complied with the criteria of § 212.55(b).

16 The Court now turns to Plaintiffs' charge that the Forest Service violated the TMR
17 by failing to consider the minimization criteria of § 212.55(b).

18 Plaintiffs summarily argue that the Forest Service designated *areas* for MBGR on
19 each ranger district and therefore was required to apply the minimization criteria of §
20 212.55(b). (Doc. 45 at 11-14.) The Forest Service urges the Court to reject Plaintiffs'
21 argument that the ranger districts' authorization of MBGR constitutes a "*de facto*
22 designation of a discrete 'area' that falls within the definition of 'area' in the TMR..."
23 (Doc. 49-1 at 28.) The Forest Service argues that the regulations do not treat MBGR as
24 designation of an area, but rather "as a narrow exception to the closure of the
25 administrative unit to motor vehicle use..." (Doc. 49-1 at 28.) In support, the Forest
26 Service cites the preamble to the Forest Service's final rule, which provides: "[o]n some
27 units, it may be possible to administer motor vehicle use associated with dispersed
28 camping or big game retrieval through a permit system, *rather than as a component of a*

1 *designation*” (*id.* at 28, citing 70 Fed. Reg. at 68285) and the Forest Service Manual,
2 which states that “[m]otor vehicle use in an *area* may not be restricted by type of activity,
3 only by vehicle class and, if appropriate time of year” (*id.* at 29, citing AR 4525-26). As
4 to the latter citation, the Forest Service notes that MBGR on each ranger district is
5 restricted to a specific activity – retrieval of a particular animal. (*Id.* at 30.)

6 The Court agrees with the Forest Service’s characterization of MBGR as a
7 “component of a designation” and finds that MBGR is a component of *trail* and *road* –
8 not *area* – designations. As explained *supra*, the plain language of the MBGR exception
9 makes clear that where the responsible official designates *roads* or *trails* (i.e., routes) for
10 motor vehicle use, he or she may then apply the MBGR exception. Accordingly,
11 Plaintiffs’ argument – that the Forest Service designated *areas* for MBGR on each ranger
12 district and therefore was required to apply the minimization criteria of § 212.55(b) –
13 simply fails.

14 The Court thus rejects Plaintiffs’ argument that the Forest Service violated the
15 TMR by failing to apply the minimization criteria of § 212.55(b).

16 **B. Motorized Big Game Retrieval Exception: 36 C.F.R. § 212.51(b)**

17 Plaintiffs also allege that the Forest Service violated the TMR because it failed to
18 “limit and sparingly apply” the MBGR exception by allowing “extensive” cross-country
19 off-road motorized vehicle use for the purpose of big game retrieval. (Doc. 45 at 8-9,
20 citing AR 25878, AR 14241, AR 41268). In response, the Forest Service contends that
21 the AR “demonstrates that the one-mile MBGR exceptions on the[] three districts allow
22 for limited exceptions to the general prohibition on cross-country motor vehicle use” and
23 that the Forest Service gave “careful consideration to limiting the exception in order to
24 allow reasonable opportunity to retrieve downed big game animals, while minimizing the
25 level of use and potential effects” and that as such, the MBGR exceptions are
26 “comfortably within the Forest Service’s authority under the TMR.” (Doc. 49-1 at 21.)
27 The Court agrees.

28 As stated *supra*, the MBGR exception provides that “the responsible official may

1 include in the designation [of routes] the *limited use* of motor vehicles within a specified
2 distance of *certain* forest roads or trails where motor vehicle use is allowed, and if
3 appropriate within specified time periods” for the purpose of retrieving a downed big
4 game animal. § 212.51(b). For the following reasons, the Court finds that the Forest
5 Service has adhered to the directives of § 212.51(b).

6 First, the Forest System has imposed a number of limitations on the use of motor
7 vehicles in each of the ranger districts for the purpose of retrieving a downed big game
8 animal. For example, on the NKRD, MBGR is limited in the following ways: (1) only
9 legally harvested bison or elk may be retrieved; (2) MBGR of legally harvested bison or
10 elk is only allowed during seasons designated by the Arizona Game and Fish Department
11 (“AZGFD”), and for 24 hours following each season; (3) only one vehicle (one trip in
12 and one trip out) is allowed for MBGR per harvested animal; (4) hunters are required to
13 use the most direct and least ground disturbing route in and out of the area to accomplish
14 the retrieval; (5) MBGR is not allowed in any existing off-road travel restricted area, or
15 when conditions are such that travel would cause negative resource impacts. (AR 14241.)
16 Notably, these limitations are a significant departure from the previous policy which did
17 not limit the number of trips for MBGR, did not limit the type of species which could be
18 retrieved by motor vehicle, did not limit the distance traveled from system roads, and had
19 no restrictions on seasons or weather conditions and no requirement for use of a direct
20 route. (AR 14248.)

21 Similar to the NKRD, the TRD and WRD impose the following limitations on
22 MBGR: (1) only legally harvested elk may be retrieved; (2) MBGR of legally harvested
23 elk is only allowed during seasons designated by the AZGFD, and for 24 hours following
24 each season; (3) only one vehicle (one trip in and one trip out) is allowed for MBGR per
25 harvested animal; (4) hunters are required to use the most direct and least ground
26 disturbing route in and out of the area to accomplish the retrieval; (5) MBGR is not
27 allowed in any existing off-road travel restricted area, or when conditions are such that
28 travel would cause negative resource impacts; and (6) motorized vehicles would not be

1 permitted to cross riparian areas, streams and rivers except at hardened crossings or
2 crossings with existing culverts. (AR 25878, 41269.) On the TRD, these limitations were
3 a significant departure from the previous policy which did not limit the number of trips
4 for MBGR, did not limit the type of species which could be retrieved by motor vehicle,
5 did not limit the distance traveled from system roads, and had no restrictions on seasons
6 or weather conditions and no requirement for use of a direct route. (AR 25884.)

7 Not only has the Forest Service placed limitations on the use of motor vehicles in
8 each ranger district, but it has also applied mitigation measures to “ensure environmental
9 effects remain at acceptable levels.” (AR 14243, 25879). Mitigation measures on the
10 NKRD include: (1) prohibiting MBGR when it results in damage to natural and cultural
11 resources and/or compromises the ability of the Forest Service to meet management
12 objectives; and (2) providing motor vehicle operators information and ethics guidance at
13 portals located at main access points on the District, on the Motor Vehicle Use Maps, and
14 in printed materials developed about travel management on the KNF. (AR 14243.)
15 Among the mitigation measures on the TRD and WRD are: (1) prohibiting the use of
16 motor vehicles, including for the purpose of retrieving a legally taken elk, when it results
17 in damage to natural and cultural resources and/or compromises the ability of the Forest
18 Service to meet management objectives; and (2) implementing the Wet Weather Roads
19 Policy when soil moisture conditions and the potential for road and resource damage
20 exist. (AR 25879, 41270.)

21 In addition to these limitations and mitigation measures, the Forest Service
22 monitors those areas where MBGR is authorized “to assess for damage to natural and
23 cultural resources and/or frequently occurring actions that compromise the ability of the
24 Forest Service to meet management objectives.” (AR 14243, 25880, 41270.) If damage to
25 soil or vegetation is discovered, the Forest Service “will take the necessary action” to
26 move the areas/corridors into compliance with the Forest Plan, which may include
27 temporary or permanent closure to motorized vehicle use. (Id.)

28 The Court finds that the aforementioned limitations on MBGR, the mitigation

1 measures to contain the environmental effects on MBGR, and the monitoring of MBGR
2 demonstrate that the Forest Service has authorized the *limited* use of motor vehicles for
3 the purpose of retrieving downed big game animals on the NKRD, TRD, and WRD.

4 Moreover, the record supports the Forest Service's decision to authorize MBGR
5 on the three ranger districts. (AR 13942, 26014, 40822.) Each Environmental Assessment
6 shows that off-road motor vehicle use for up to one mile off of every open NKRD, TRD,
7 or WRD road would have no significant impact on ranger district resources.

8 For example, big game harvest data published by the AZGFD led the Forest
9 Service to reasonably conclude that corresponding levels of cross-country motor vehicle
10 use would have no significant impact on the NKRD's resources. (AR 13986, 13988-89,
11 14036, 14020.) In 2009, the estimated number of bison retrieved by motor vehicle was
12 34, and the estimated number of elk retrieved by motor vehicle was zero. (AR 13956).
13 The selected alternative allows for MBGR of bison and elk only, and does not allow for
14 the MBGR of mule deer on the NKRD because mule deer is a far more popular game
15 species on the NKRD – in 2009, it was estimated that 918 mule deer were harvested by
16 motor vehicle. (AR 13956.) Thus, the relatively small number of motor vehicle retrievals
17 of bison and elk, combined with the aforementioned limitations, mitigation measures, and
18 monitoring by the Forest Service, support the Forest Service's decision to authorize
19 MBGR for bison and elk retrieval on the NKRD and show that it was neither arbitrary
20 nor capricious.

21 On the TRD and WRD, a seemingly large number of elk is expected to be
22 retrieved by motor vehicle on an annual basis (414 in the TRD, 695 in the WRD). (AR
23 26026, 40840). However, a very small percentage of each district is expected to be
24 actually impacted by MBGR (0.06% of the TRD, or 200 acres, and 0.625% of the WRD,
25 or 350 acres), and currently, most motorized big game retrievals in the TRD and WRD
26 use one trip with a vehicle and leave "very little or no evidence" that the trip occurred.
27 (AR 26160, 26026, 40962, 40839). These facts, combined with the aforementioned
28 limitations, mitigation measures, and monitoring by the Forest Service, support the Forest

1 Service's decision to authorize MBGR of elk on the TRD and WRD and show that the
2 decision was neither arbitrary nor capricious.

3 In the end, Plaintiffs have only identified dissatisfaction with the ultimate
4 decisions made by the Forest Service in authorizing MBGR in the three ranger districts.
5 Indeed, their argument consists of statements without any basis in law or fact, such as the
6 "nearly unlimited spatial allowance for [MBGR], in and of itself, violates the [TMR],"
7 and "the amount and extent of anticipated effects from [MBGR] is irrelevant for
8 determining whether...the Forest Service complied with the TMR..." (Doc. 65 at 6.)

9 A reviewing court "must uphold agency decisions so long as the agenc[y] ha[s]
10 considered the relevant factors and articulated a rational connection between the factors
11 found and the choices made." O'Neill, 386 F.3d at 1206 (internal quotations and further
12 citation omitted). This the Forest Service has done. Accordingly, the Court will uphold
13 the Forest Service's decision to allow for the limited use of motor vehicles within one
14 mile of all designated system roads (except where prohibited) in the NKRD, WRD, and
15 TRD in order to retrieve a downed big game animal, and will grant summary judgment in
16 favor of the Forest Service on the TMR claim.

17 NATIONAL ENVIRONMENTAL POLICY ACT

18 NEPA is a "procedural statute that requires the Federal agencies to assess the
19 environmental consequences of their actions before those actions are undertaken."
20 Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 993
21 (9th Cir. 2004). Under NEPA, federal agencies must prepare a "detailed statement" of
22 environmental consequences for "major Federal actions significantly affecting the quality
23 of the human environment" 42 U.S.C. § 4332(C). A "detailed statement" is known as an
24 environmental impact statement ("EIS").

25 The EIS requirement serves two important purposes. First, "it ensures that the
26 agency, in reaching its decision, will have available, and will carefully consider, detailed
27 information concerning significant environmental impacts." Robertson v. Methow Valley
28 Citizens Council, 490 U.S. 332, 349 (1989). Second, "it guarantees that the relevant

1 information will be made available to the larger audience that may also play a role in both
2 the decisionmaking process and the implementation of that decision.” Id.

3 A federal agency may prepare an Environmental Assessment (“EA”) to decide
4 whether the environmental impact of a proposed action warrants preparation of an EIS.
5 40 C.F.R. § 1508.9. An EA is a “concise public document” that “briefly provide[s]
6 sufficient evidence and analysis for determining whether to prepare an environmental
7 impact statement or a finding of no significant impact.” § 1508.9(a). An EA must include
8 “brief discussions...of the environmental impacts of the proposed action and alternatives,
9 and a listing of agencies and persons consulted.” § 1508.9(b). If an agency determines
10 that an EIS is not required, it must issue a FONSI, briefly describing why the action “will
11 not have a significant effect on the human environment...” § 1508.13.

12 In reviewing an agency decision not to prepare an EIS, a court inquires whether
13 the “responsible agency has reasonably concluded that the project will have no significant
14 adverse environmental consequences.” Save the Yaak Committee v. Block, 840 F.2d 714,
15 717 (9th Cir. 1988) (quoting San Francisco v. United States, 615 F.2d 498, 500 (9th Cir.
16 1980). “If substantial questions are raised regarding whether the proposed action *may*
17 have a significant effect upon the human environment, a decision not to prepare an EIS is
18 unreasonable.” Save the Yaak, 840 F.2d at 717 (further citation omitted) (emphasis in
19 original). In addition, “an agency’s decision not to prepare an EIS will be considered
20 unreasonable if the agency fails to supply a convincing statement of reasons of why
21 potential effects are insignificant.” Id. (internal quotations and further citation omitted).
22 To be certain, “the statement of reasons is crucial to determining whether the agency took
23 a ‘hard look’ at the potential environmental impact of a project.” Id.

24 Plaintiffs raise two NEPA arguments. First, Plaintiffs contend that the Forest
25 Service violated the NEPA by failing to take a “hard look” at “several categories of
26 environmental effects.” (Doc. 45 at 19.) Second, Plaintiffs contend that the Forest Service
27 violated the NEPA by declining to prepare an EIS for each travel management plan
28 “despite the presence of several significance factors indicating possible significant

1 environmental consequences of the proposed actions.” (Id. at 33.)

2 **A. Whether the Forest Service Took a “Hard Look”**

3 Plaintiffs argue that the Forest Service failed to take a “hard look” at the effects of:
4 MBGR on each ranger district; closing routes on each ranger district; and past, present,
5 and future motorized use on each ranger district. (Doc. 45 at 19.) The Court will address
6 each argument in turn.

7 **1. Effects of MBGR**

8 Plaintiffs argue the Forest Service failed to analyze, or failed to adequately
9 analyze, the effects of MBGR with regard to wet conditions, erodible soils, invasive
10 weeds, tire tracks, animal habitat, and hunter noncompliance. (Doc. 45 at 19-23.) For
11 the following reasons, the Court rejects the argument.

12 Regarding wet conditions, Plaintiffs dispute the Forest Service’s conclusion that
13 MBGR “will result in short term negative effects to some recreation settings on just a few
14 hundred acres per district per year” and contend that each ranger district’s EA and
15 DN/FONSI “ignore[] the fact that nearly the entire forest is going to be open to
16 motorized cross-country travel, placing far more than a few hundred acres at risk for
17 continued damage each year.” (Id. at 20 (emphasis added).)

18 The record does not support Plaintiffs’ contention. First, it is an exaggeration to
19 say the “entire forest is going to be open to motorized cross-country travel” when each
20 ranger district’s proposed action prohibits unrestricted cross-country motor vehicle use,
21 with the exception of dispersed camping and MBGR (AR 26063-65, 13985, 40880-82),
22 and limits MBGR to certain seasons (AR 14241, 25878, 41269). Second, the EAs make
23 clear that MBGR, on an annual basis, is anticipated to impact only .0099% of the acreage
24 on the NKRD, 0.06% of the TRD, and 0.0625% of the WRD. (AR 14042-43, 26160,
25 40962.) The EAs provide the methodology behind these estimates. (Id.; 40 C.F.R. §
26 1502.24 (requiring that agencies “identify any methodologies used” and “make explicit
27 reference by footnote to the scientific and other sources relied upon for conclusions in the
28 statement”).) The estimates are based on the actual number of big game harvests retrieved

1 on an annual basis, multiplied by estimated tire width, then multiplied by the maximum
2 number of miles (two) a hunter may travel to retrieve a downed big game animal, and
3 then again multiplied by the number of tire tracks created (two). (AR 14042-43, 26160,
4 40962.) Plaintiffs present no compelling argument or evidence that this methodology
5 violates the NEPA. Third, each ranger district's proposed action provides options for the
6 Forest Service in the event of wet conditions. For example, under the TRD and WRD's
7 proposed actions, the Forest Service may implement the Wet Weather Roads Policy when
8 soil moisture conditions and the potential for road and resource damage exist. (AR
9 25879, 41270.) And, in all of the ranger districts, the Forest Service monitors those areas
10 where MBGR is authorized, and may temporarily or permanently close roads if damage
11 is discovered. (AR 14243, 25880, 41270.)

12 Based on the foregoing, the Court has no reason to find that the Forest Service
13 "ignored" the effects of MBGR with regard to wet conditions. To the contrary, the Court
14 finds that the Forest Service adequately analyzed the effects of MBGR with regard to wet
15 conditions and provided convincing reasons why the potential effects of MBGR on wet
16 conditions would be insignificant.

17 Regarding erodible soils, Plaintiffs argue the NKRD EA is insufficient because it
18 did not undertake a site-specific analysis despite the fact that "highly erodible soils are
19 found on more than 233,900 acres in the [NKRD]" and "[off road vehicle] use is highly
20 discouraged on over 244,573 acres." (Doc. 45 at 20.) Plaintiffs do not say why additional
21 analysis beyond that which was conducted by the Forest Service is required. Defendants
22 contend that their analysis, conducted on a district-wide scale, was appropriate. (Doc. 49-
23 1 at 33-34.)

24 The Court agrees with Defendants. Given the fact that "[t]he effects to soils by
25 motorized uses on native surface routes *are directly related to the impact caused by the*
26 *vehicle footprint* on the ground" (AR 13997), and the fact that the cross-country
27 motorized travel prohibition and MBGR limitations apply across the NKRD, it was not
28 unreasonable for the Forest Service to conduct a district-wide analysis. And, the Court

1 finds that the Forest Service properly considered the impacts on soil by motorized uses in
2 its EA. (AR 13991-14009.) Accordingly, the Court finds that the Forest Service satisfied
3 NEPA's "hard look" requirement with respect to the impact the NKRD's MBGR
4 allowance may have upon soils.

5 Regarding invasive weed dispersion, Plaintiffs argue that "there is *no analysis* of
6 the impacts of continued use of cross-country travel throughout nearly the entire forest on
7 the spread or management of invasive species other than the statement that the action
8 alternatives 'would reduce the introduction and spread of exotic weeds by hunters.'" (Doc. 45 at 20-21 (emphasis added).) There is simply no support for this statement.

9
10 The Forest Service conducted an adequate analysis of the potential effect of the
11 MBGR alternatives on the introduction of new species. (AR 26117-28, 14015-18, 40923-
12 33.) For example, each ranger district's EA discusses the general effects of invasive
13 exotic weeds and the various ways that those weeds may be introduced or spread. (AR
14 26117-19, 14015-17, 40923-24.) Each ranger district's EA recognizes that motorized
15 vehicle is a common, if not the most common, cause of weed introduction and spread.
16 (AR 26117, 14015, 40923.) Each ranger district's EA also describes the direct and
17 indirect effects on invasive exotic weeds accompanying each alternative. (AR 26117-28;
18 14017-18; 40926-33.) Based on all of this, the Court finds that the Forest Service did
19 consider the effect of MBGR on the introduction of new species, and their consideration
20 and discussion of the issue meets NEPA's "hard look" requirement.

21 Regarding tire tracks, Plaintiffs argue that the impacts analysis for each ranger
22 district fails to consider "any impacts to any resources beyond the direct impact of the
23 tires coming in contact with the ground" such as noise and human access. (Doc. 45 at 21.)
24 For the second time, Plaintiffs present no compelling argument or evidence that the
25 Forest Service's methodology (discussed *supra*) violates the NEPA.

26 Regarding animal habitat, Plaintiffs argue that the TRD's EA and DN/FONSI did
27 not analyze the impacts on mule deer, elk, pronghorn, or wild turkey associated with
28 MBGR, and dispute the NKRD and WRD's finding that the impacts on mule deer, white-

1 tailed deer, and elk associated with MBGR are “less than” or “reduced” from the no
2 action alternative. (Id. at 21.) Plaintiffs’ only support for their argument is the fact that
3 these species’ habitats occur within certain areas within the ranger districts. (Id.)
4 Defendants argue the record shows that the Forest Service did discuss the potential
5 impacts on these species, and point to the “Wildlife” subsections in each ranger district’s
6 EA. (Doc. 49-1 at 36.) Defendants further argue that these subsections show support for
7 the Forest Service’s decision that by prohibiting cross-country motor vehicle use, the
8 quality of these species’ habitats would improve. (Id.) The Court agrees.

9 First, contrary to Plaintiffs’ argument, the record shows that the Forest Service did
10 analyze the impacts on mule deer, elk, and pronghorn associated with MBGR on the
11 TRD. (AR 26108-26112.) The Forest Service did not analyze the impacts on wild turkey
12 because only elk, mule deer, and pronghorn were found to have the potential of being
13 affected by implementation of the activities associated with proposed project. (AR
14 26107.)

15 Second, the record supports the finding that the impacts on mule deer and elk in
16 the WRD and mule deer in the NKRD would be reduced under a cross-country motor
17 vehicle use prohibition. The EA for the WRD acknowledges that elk are affected by
18 human disturbance associated with motorized travel. (AR 40952.) Under the selected
19 alternative, the open road system would be reduced and motorized cross-country travel
20 restricted, resulting in, predictably, “reduced motorized access to the district for hunters
21 to shoot elk and reduced levels of human disturbance associated with motorized travel”
22 and thus, “increased habitat quality for elk.” (AR 40953.) Additionally, MBGR would be
23 restricted to the fall, outside of the spring elk calving season. (Id.) Similarly, the EA
24 acknowledges that mule deer are affected by human disturbance associated with
25 motorized travel. (AR 40954.) The current system allows for “widespread motorized
26 access across the district for hunters to shoot mule deer” but under the selected
27 alternative, 130 of the 420 existing open roads would be closed and MBGR (of elk)
28 would occur during the fall, outside of the spring mule deer fawning season. (Id.) The

1 Forest Service reasonably concluded that the reduced open road system and restrictions
2 on motorized cross-country travel would result in reduced motorized access to the district
3 for mule deer hunters, and reduced levels of human disturbance associated with
4 motorized travel, and ultimately increased habitat quality for mule deer. (*Id.*)

5 The EA for the NKRD also supports the Forest Service's conclusion that the
6 impacts on mule deer in the ranger district would be reduced. As discussed *supra*, the
7 previous policy did not limit the type of species which could be retrieved by motor
8 vehicle, did not limit the distance traveled from system roads, and had no restrictions on
9 seasons or weather conditions and no requirement for use of a direct route. (AR 14248.)
10 Under the selected alternative, however, only legally harvested bison or elk may be
11 retrieved by motorized vehicle; MBGR of legally harvested bison or elk is allowed only
12 during seasons designated by the AZGFD, and for 24 hours following each season; only
13 one vehicle (one trip in and one trip out) is allowed for MBGR per harvested animal;
14 hunters are required to use the most direct and least ground disturbing route in and out of
15 the area to accomplish the retrieval; and MBGR is not allowed in any existing off-road
16 travel restricted area, or when conditions are such that travel would cause negative
17 resource impacts. (AR 14241.) It was not unreasonable for the Forest Service to conclude
18 that these limitations would reduce the impacts on mule deer.

19 For these reasons, the Court finds that Plaintiffs' argument fails. The Forest
20 Service took the requisite "hard look" at the impact of the travel management plans on
21 wildlife.

22 Lastly, Plaintiffs argue that "the realities of a lack of compliance by hunters *were*
23 *not identified or analyzed* in the EA and DN/FONSI." (Doc. 45 at 22 (emphasis added).)
24 According to Plaintiffs, such "realities" include the ability for hunters to drive off-road
25 vehicles to nearly every part of the forest and the unknown number of hunters who have
26 and will participate in MBGR. (*Id.*) The argument lacks merit. First, the Forest Service
27 reasonably anticipated the number of hunters who will participate in MBGR based upon
28 historical data collected by the AZGFD. (AR 13956, 26026, 40839-40.) Second, as

1 Defendants correctly point out (Doc. 49-1 at 36.), NEPA does not require that the Forest
2 Service address *every* uncertainty. WildEarth Guardians v. Montana Snowmobile Ass’n,
3 790 F.3d 920, 928-29 (9th Cir. 2015). In this case, the Forest Service’s discussion of
4 enforcing the travel management plans for each ranger district adequately addresses the
5 issue of hunter noncompliance. (AR 13977, 26040, 26058, 40857, 40869-70.)

6 In sum, the Court finds that the Forest Service has provided a convincing
7 statement of reasons as to why the potential effects of MBGR under the Travel
8 Management Plans would have no significant impact with regard to wet conditions,
9 erodible soils, invasive weeds, tire tracks, animal habitat, and hunter noncompliance.
10 Accordingly, the Court finds that the Forest Service has taken the necessary “hard look”
11 under NEPA.

12 **2. Effects of Closing Routes**

13 Plaintiffs next argue that Defendants violated the NEPA by failing to disclose and
14 analyze the effects of those routes the Forest Service has not designated, and the effects
15 of those roads closed across the three ranger districts. (Doc. 45 at 23.) The argument is
16 unpersuasive.

17 Plaintiffs rely on a series of cases, none of which support their argument. Plaintiffs
18 cite Wilderness Soc. v. U.S. Forest Service, 850 F. Supp. 2d 1144 (D. Idaho 2012) for the
19 proposition that the Forest Service must take a “hard look” at the impact of those existing
20 routes it is *not* designating. (*Id.*) Wilderness, however, stands for the proposition that the
21 Forest Service must take a “hard look” at the impact of existing, non-system routes that it
22 *is* designating. Wilderness, 850 F. Supp. 2d at 1157-58.

23 Plaintiffs also cite Sierra Club v. Bosworth, 352 F. Supp. 2d 909 (D. Minn. 2005)
24 and Sierra Club v. U.S. Forest Service, 857 F. Supp. 2d 1167 (D. Utah 2012), in support
25 of the assertion that the Forest Service should have analyzed the impacts from illegal use
26 of those routes not designated or closed roads. (Doc. 45 at 24.) As Defendants correctly
27 point out, however, Bosworth and Sierra Club are readily distinguishable from this case.
28 (Doc. 45-1 at 38.)

1 In Bosworth, the Forest Service constructed temporary and system roads as part of
2 a timber harvest project, and planned to decommission the temporary roads after the
3 harvest. Bosworth, 352 F. Supp. 2d at 913-14, 924. The district court found that the EA
4 contained virtually no analysis of any illegal use of the roads post-decommission –
5 despite the small number of enforcement officers in the forest, the “questionable efficacy
6 of road closures through use of berms and gates,” and the fact that the Forest Service
7 conceded the occurrence of illegal use. Id. at 924. Based on all of this, the district court
8 found that Forest Service had not provided sufficient analysis to support its statement that
9 the new roads would not result in any cumulative adverse effects. Id. at 924-25. Here, the
10 Forest Service is not constructing new roads and decommissioning those roads at a later
11 time. Therefore, Bosworth is not analogous, and not helpful, to Plaintiffs’ case.

12 Sierra Club is similarly unhelpful. There, the Forest Service assumed that under
13 each Travel Plan alternative, trails that would not be open for motorized use would be
14 closed and rehabilitated, and further assumed that efforts to close the routes would be
15 effective, despite acknowledging that illegal use would continue. Sierra Club, 857 F.
16 Supp. 2d at 1174. The district court found that the Forest Service failed to provide
17 support for these assumptions, and therefore found that it had failed to take the requisite
18 “hard look” at the impact of its decision on the use and creation of illegal motorized
19 routes. Id. at 1174-75. Here, the Forest Service has made no such assumptions.

20 Lacking any legal or factual support for their argument, Plaintiffs’ argument fails.

21 Moreover, the Court agrees with Defendants (Doc. 49-1 at 37) that evaluating the
22 effects of closing roads to motor vehicles but not obliterating them is outside the purpose
23 and need of the travel management projects. See Friends of Southeast’s Future v.
24 Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998) (explaining that agencies are afforded
25 “considerable discretion” in defining the purpose and need of a project). The purpose of
26 each action was to “improve the management of motorized vehicle use” on the KNF in
27 accordance with the TMR. (AR 13952, 26023, 40835.) The actions were needed to:
28 amend the KNF plan to prohibit motor vehicle use off the designated system of roads,

1 trails, and areas, with some exceptions; reduce adverse resource impacts caused by roads
2 and motorized cross country travel in order to maintain and restore the health of
3 ecosystems and watersheds; and specify the appropriate uses of motor vehicles on the
4 designated road systems. (*Id.*) Clearly, the focus of the actions is on those routes where
5 motorized vehicle use is allowed, and, an evaluation of routes where motorized vehicle
6 use is not allowed would be only tangentially related to purpose and need for the actions.
7 See *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012). (“We
8 do not require the agency to compile an exhaustive examination of each and every
9 tangential event that potentially could impact the local environment. Such a task is
10 impossible, and never-ending.”) (internal quotations and further citation omitted).
11 Accordingly, the Court finds no NEPA violation.

12 **3. Effects of Motorized Use**

13 Plaintiffs next allege that the EAs are inadequate because they fail to properly
14 consider the cumulative impacts of motorized vehicle use. (Doc. 45 at 25.) As part of its
15 assessment of environmental impacts of an agency action, a proper NEPA analysis must
16 include an analysis of the action’s cumulative impact. *City of Carmel v. Dep’t of Transp.*,
17 123 F.3d 1142, 1160 (9th Cir. 1997) (citing 40 C.F.R. § 1502.16). A cumulative impact is
18 defined as “the impact on the environment which results from the incremental impact of
19 the action when added to other past, present, and reasonably foreseeable future
20 actions...” 40 C.F.R. § 1508.7. “Cumulative impacts can result from individually minor
21 but collectively significant actions taking place over a period of time.” *Id.*

22 Plaintiffs’ argument is confusing, unclear, and thus unhelpful, on this matter. In
23 the end, Court managed to extract two major allegations: (1) the Forest Service’s
24 cumulative impacts analysis is deficient with respect to the impacts from illegal
25 motorized vehicle use (Doc. 45 at 25); and (2) the Forest Service’s cumulative impacts
26 analysis is deficient because the Forest Service did not incorporate analysis from the
27 effects of the existing travel system (*id.* at 25-31).

28 As to the latter allegation, Defendants summarily argue that the cumulative

1 impacts analysis of the effects of the existing travel system is not deficient, and their
2 conclusion of no cumulative impact was reasonable. (Doc. 49-1 at 39-44.) In support,
3 Defendants point to several places in the administrative record where they analyzed the
4 current and ongoing impacts of motorize use on natural resources: the “Existing
5 Conditions” sections (AR 40835; 26023; 13952) of each EA, which outline current
6 activities in the forest, including motorized use, and the impacts of those activities; and
7 the chapters entitled “Environmental Effects” (AR 13972, 26046, 40861), which
8 summarize the existing conditions of forest resources and disclose the potential effects of
9 implementing each alternative. (Doc. 49-1 at 40.)

10 Defendants also argue that where the Forest Service has proposed a travel
11 designation decision that would result in a *net reduction* of motor vehicle use in a forest,
12 the Forest Service properly incorporates the baseline effects of previous motor vehicle
13 use into its cumulative effects analysis. (*Id.* (citing cases).) In the end, Defendants argue,
14 “the Forest Service incorporated the combined effects of past motor vehicle use into its
15 baseline, determined that the effect of the proposed decisions would be a net reduction in
16 motor vehicle use, performed a detailed impacts analysis, and concluded that there would
17 be no significant impact” and that under NEPA, this conclusion is sufficient. (Doc. 49-1
18 at 40.) The Court agrees.

19 The Forest Service reasonably concluded that no cumulative impact would result
20 from the net reduction of routes available for motorized use in each ranger district. In
21 upholding these conclusions, the Court follows a line of other district courts which have
22 upheld the Forest Service’s no cumulative impact conclusion where the proposed action
23 led to net fewer routes available for motorized use. See Central Sierra Environmental
24 Resource Center v. U.S. Forest Service, 916 F. Supp. 2d 1078, 1094 (E.D. Cal. 2013);
25 Klamath-Siskiyou Wildlands Center v. Graham, 899 F. Supp. 2d 948, 962 (E.D. Cal.
26 2013); Idaho Conservation League v. Guzman, 766 F. Supp. 2d 1056, 1065-66 (D. Idaho
27 2011).

28 As to the former allegation, Plaintiffs do not explain how the cumulative impacts

1 analysis is deficient with respect to illegal motorized vehicle use; instead, they rely on a
2 previous argument (Doc. 45 at 25 (citing Doc. 45 at 24)) which the Court already rejected
3 in the previous section.

4 Thus, the Court finds no NEPA violation on the grounds that Defendants failed to
5 take a “hard look.”

6 **B. Whether the Travel Management Plans Will Have or May Have a**
7 **Significant Effect on the Environment**

8 Plaintiffs next contend that the Forest Service violated the NEPA by declining to
9 prepare an EIS for each travel management plan “despite the presence of several
10 significance factors indicating possible significant environmental consequences of the
11 proposed actions.” (Doc. 45 at 33.)

12 “An EIS must be prepared if substantial questions are raised as to whether a
13 project...may cause significant degradation of some human environmental factor.” Blue
14 Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)
15 (internal quotations and further citation omitted). “Thus, to prevail on a claim that a
16 federal agency violated its statutory duty to prepare an EIS, a plaintiff need not show that
17 significant effects will in fact occur.” Id. “It is enough for the plaintiff to raise substantial
18 questions whether a project may have a significant effect on the environment.” Id.

19 Whether effects are “significant” depends on both “context” and “intensity.” 40
20 C.F.R. § 1508.27. “Context” refers to the “setting” of the proposed action, and “intensity”
21 refers to the “severity of the impact.” Id. A project’s “intensity” is evaluated based on ten
22 factors:

- 23
- 24 (1) Impacts that may be both beneficial and adverse. A significant effect
25 may exist even if the Federal agency believes that on balance the effect
26 will be beneficial.
 - 27 (2) The degree to which the proposed action affects public health or safety.
 - 28 (3) Unique characteristics of the geographic area such as proximity to
historic or cultural resources, park lands, prime farmlands, wetlands,
wild and scenic rivers, or ecologically critical areas.
 - (4) The degree to which the effects on the quality of the human

1 environment are likely to be highly controversial.

- 2 (5) The degree to which the possible effects on the human environment are
3 highly uncertain or involve unique or unknown risks.
- 4 (6) The degree to which the action may establish a precedent for future
5 actions with significant effects or represents a decision in principle
6 about a future consideration.
- 7 (7) Whether the action is related to other actions with individually
8 insignificant but cumulatively significant impacts. Significance exists if
9 it is reasonable to anticipate a cumulatively significant impact on the
10 environment. Significance cannot be avoided by terming an action
11 temporary or by breaking it down into small component parts.
- 12 (8) The degree to which the action may adversely affect districts, sites,
13 highways, structures, or objects listed in or eligible for listing in the
14 National Register of Historic Places or may cause loss or destruction of
15 significant scientific, cultural, or historical resources.
- 16 (9) The degree to which the action may adversely affect an endangered or
17 threatened species or its habitat that has been determined to be critical
18 under the Endangered Species Act of 1973.
- 19 (10) Whether the action threatens a violation of Federal, State, or local
20 law or requirements imposed for the protection of the environment.

21 § 1508.27(b). Here, Plaintiffs again contend in a conclusory manner that the NKRD,
22 TRD, and WRD travel management plans implicate a number of these factors. (Doc. 45
23 at 33-42.)

24 **1. Beneficial and Adverse Impacts, Cumulatively Significant Impacts**

25 Plaintiffs refer the Court to other arguments in their memorandum in support of
26 their contention that the proposed actions for each ranger district are significant under §
27 1508.27(b)(1) and § 1508.27(b)(7). (See Doc. 45 at 33-34.) The Court addresses these
28 arguments and disposes of them elsewhere in this Order, and thus finds that Plaintiffs
have failed to raise substantial questions under these factors that would trigger the need
for an EIS.

2. Unique Characteristics of the Geographic Area

Under § 1508.27(b)(3), the Forest Service must consider the unique characteristics
of the project area, such as proximity to park lands and ecologically critical areas.
Plaintiffs argue that the Forest Service did not adequately consider the effect of the travel

1 management plans on: (1) the spreading of exotic plants from the TRD and the NKRD to
2 Grand Canyon National Park (“GCNP”); (2) illegal motorized vehicle use in each ranger
3 district, which could affect GCNP (TRD), the Havasupai Indian Reservation (TRD), Red
4 Butte and Coconino Rim areas (TRD), and designated wilderness areas (TRD, WRD,
5 NKRD); and (3) the Mexican spotted owl (“MSO”) habitat and its designated critical
6 habitat (WRD and NKRD), and the MSO Protected Activity Centers (“PAC”) (WRD).
7 (Doc. 45 at 34-37.) The Forest Service argues that it evaluated each selected alternative’s
8 potential impact on the unique characteristics of the KNF, and determined that there
9 would be no significant impacts. (Doc. 49-1 at 45.) The record supports the Forest
10 Service’s conclusion.

11 *Spreading of Exotic Plants*

12 In the TRD’s EA, the Forest Service analyzed the potential impact of MBGR on
13 the spreading of exotic plants, and concluded that the proposed action will actually
14 reduce the spread of exotic plants. (AR 26123.) The Forest Service acknowledged the
15 possibility that exotic plants might enter the GCNP through the KNF and identified a way
16 by which this possibility might be reduced: by reducing the road density along the
17 boundary between the GCNP and the KNF. (AR 26121.) Effectuating this, the proposed
18 action converts 20% of NFS roads to administrative use (and prohibits most motorized
19 cross-country vehicles except for administrative purposes or by permit), thus reducing the
20 spread of existing noxious and invasive exotic weeds and the introduction of new weeds.
21 (AR 26122-26123.) Although motorized cross country travel by Forest Service
22 employees, contractors, and permittees in support of land management projects would be
23 allowed, the Forest Service cites various best management practices and mitigation
24 measures to minimize the likelihood of exotic plants spreading, such as the requirement
25 that loggers, miners, and utility crews wash their heavy equipment before entering the
26 Forest. (AR 26121.)

27 Similarly, in the NKRD’s EA, the Forest Service analyzed the impact of MBGR
28 on the spreading of noxious and invasive weeds. (AR 14015-17.) The Forest Service

1 acknowledged that “one of the many dispersal mechanisms in which invasive species are
2 spread is via roads and forest visitors.” (AR 14015.) Under the proposed action, the
3 number of roads that can be traveled is reduced by 376 miles, thereby lowering the
4 amount of invasive species seed introduced or spread across the NKRD. (AR 14017.)
5 Moreover, under the proposed action, MBGR where authorized is expected to lead to a
6 “small increase in the potential for invasive species spread and disturbance” since MBGR
7 is limited to the retrieval of certain species, at certain times, and under certain conditions.
8 (AR 14017.) Also, the Forest Service notes that it continuously surveys the NKRD to
9 control and eradicate new infestations before they have the opportunity to spread, which,
10 according to the Forest Service, has proven a successful strategy in “eradicating or
11 reducing potentially serious noxious species threats.” (AR 14015.)

12 Plaintiffs’ singular and conclusory statement that exotic plants might spread from
13 the TRD or the NKRD to GCNP does not raise substantial questions that would trigger
14 the need for an EIS. In any event, the Forest Service did consider the unique
15 characteristics of the GCNP in its noxious and invasive weed analyses, and supplied a
16 convincing statement of reasons as to why no significant impact would result.

17 *Illegal Motorized Vehicle Use*

18 Plaintiffs argue that the Forest Service did not consider the effect of the travel
19 management plans on the unique characteristics of the ranger districts, in particular, the
20 effect of illegal motorized use. Other than a suggestion from the National Park Service
21 (“NPS”) that the Forest Service implement a one-mile buffer zone between the TRD and
22 the GCNP, and Plaintiffs’ observation that illegal motorized vehicle use may occur, and
23 does occur, on each ranger district, Plaintiffs offer no real argument, and cite to no facts,
24 to support the argument. (Doc. 45 at 35-36.)

25 Not only did the Forest Service explain the reason for their decision not to
26 implement a buffer zone (because management actions need to extend to the boundary
27 line) (AR 24100), but it also explained that it would work to limit the effects of illegal
28 motorized vehicle use by prohibiting cross-country travel, limiting MBGR, and working

1 closely with AZGFD “to monitor and enforce illegal cross-country travel associated
2 within hunting activities.” (Id.) And, under the proposed action, prohibiting cross-country
3 motorized vehicle use would serve to “restrict creation of unauthorized routes through the
4 forest and...reduce the negative effects that result from cross country motorized travel”
5 (AR 26064, 26066), and the cumulative effects of illegal motorized vehicle use due to the
6 allowances for MBGR would be “minor and...not likely to impede the attainment of the
7 Forest Plan scenic integrity objectives” (AR 26073-74).

8 Expounding on their observation that illegal motorized vehicle use may occur and
9 does occur in each ranger district, Plaintiffs present hypothetical illegal motorized vehicle
10 use situations, and point out that each ranger district has experienced impacts from illegal
11 motorized vehicle use despite being “closed” to motorized vehicle use. (Doc. 45 at 36.)
12 Given the extraordinary number of roads over which the Forest Service has jurisdiction
13 across these three ranger districts – 3,343 miles of roads in the NKRD (AR 13953), 709
14 miles of roads in the TRD (AR 26024), and 1,500 miles of roads in the WRD (AR 40836)
15 – it is not surprising that illegal vehicle motorized use occurs even if roads are “closed” to
16 motorized vehicle use. The fact that some illegal motorized vehicle use occurs, without
17 more, proves nothing.

18 Importantly, each ranger district’s EA discusses illegal motorized vehicle use, and
19 the record shows that such effects would not be significant. Under the proposed action for
20 the TRD, motorized cross country travel (which has the “greatest negative effects on
21 scenic quality and integrity”) would be prohibited, which led the Forest Service to
22 reasonably conclude that this would “restrict [the] creation of unauthorized routes
23 through the forest,” “reduce the negative effects that result from cross country motorized
24 travel,” and “reduce the potential for illegal riding on the non-motorized trail system...”
25 (AR 26063-65.) Notably, the proposed action does not change the current policy
26 prohibiting all motorized travel in the Coconino Rim and Red Butte areas. (AR 26063.)

27 Similarly, under the proposed action for the WRD, motorized cross country travel
28 would be prohibited, which led the Forest Service to reasonably conclude that there

1 would be a great reduction of “noise, dust and unwanted motorized intrusions.” (AR
2 40880-82.) The prohibition would also result in “negative” effects to motorized
3 recreationists because they would be restricted to designated systems of forest roads, and
4 result in “positive effects” to “vegetation cover, natural settings provided adjacent to the
5 designated road system, improved scenic quality, and greater sense of isolation.” (AR
6 40883.) Also, the limitations on MBGR in the WRD would ensure only short term
7 negative effects on the ranger district. (AR 40882-83.)

8 Finally, under the proposed action for the NKRD, the quantity of forest roads open
9 to motorized travel would be reduced by 20%, and motorized cross-country travel would
10 be prohibited. (AR 13985.) This prohibition, the Forest Service reasonably concluded,
11 would “restrict creation of unauthorized routes through the forest and would greatly
12 reduce the effects of linear routes and contrast with the surrounding landscape that result
13 from repeated cross-country motorized travel” and over time, improve the district’s visual
14 integrity. (*Id.*) Also, MBGR would result in only short term effects, such as vegetation
15 trampling, but no effects to visual quality. (AR 13986.)

16 Contrary to Plaintiffs’ claim, the administrative record shows that the Forest
17 Service considered illegal motorized use in each district and supports the Forest Service’s
18 conclusion that the effects would not be significant. Plaintiffs conveniently overlook the
19 Forest Service’s discussion on the issue, and its stated plans to reduce the number of
20 illegal motorized vehicle use incidents and its associated effects. In the end, Plaintiffs fail
21 to raise serious questions regarding illegal motorized use under the travel management
22 plans.

23 *Mexican Spotted Owl*

24 Plaintiffs dispute the Forest Service’s determination that the travel management
25 plans would have no significant impact on the Mexican spotted owl (“MSO”) habitat,
26 MSO critical habitat, and MSO PAC in the WRD and NKRD. (Doc. 45 at 36-37.)
27 Plaintiffs cite to various parts of the administrative record where the Forest Service
28 discusses potential negative impacts on MSO, and to the U.S. Fish and Wildlife Service’s

1 (FWS) recommendations and warnings to the Forest Service on the issue. (Id. at 36-37,
2 40-42.) Plaintiffs argue that “[b]ecause the effects of the [WRD and NKRD] travel
3 management plans ‘may effect’ Mexican spotted owls and their critical habitat,
4 substantial questions have been raised as to whether or not the two travel management
5 plans will have significant impacts on the owl and its critical habitat, thereby requiring an
6 EIS for each ranger district.” (Id. at 40-41.)

7 Under Plaintiffs’ theory, any information in an EA or NEPA documents that
8 admits impacts on the MSO and its habitat would trigger preparation of an EIS. “NEPA
9 permits a federal agency to disclose such impacts without automatically triggering the
10 ‘substantial questions’ threshold.” Native Ecosystems Council v. U.S. Forest Serv., 428
11 F.3d 1233, 1240 (9th Cir. 2005). Not only have Plaintiffs failed to raise substantial
12 questions on the MSO issue, the Forest Service’s analyses support its determination that
13 the travel management plans would have no significant impact on the MSO.

14 The WRD’s EA recognizes that roads and motorized travel have potential negative
15 direct and indirect effects on wildlife (such as habitat loss, fragmentation, the potential
16 for animals to be killed or injured as a result of being hit or run over by motor vehicles,
17 and human disturbance or harassment of animals facilitated by motorized travel). (AR
18 40933.) The proposed action, however, would result in an increase in the MSO’s habitat
19 quality and would have “primarily beneficial” effects. (AR 40937.) Supporting this
20 conclusion are the following facts: the closure of 1 mile of the 1.8 miles of currently open
21 roads intersecting PACs on the WRD; a 62-mile decrease in the WRD designated road
22 system; and a substantial restriction of motorized cross-country travel. (AR 40936-37.)
23 The restriction of motorized cross-country travel is “substantial” because it would
24 prohibit all motorized cross-country travel except for MBGR of elk. (AR 40934.)
25 Currently, most motorized cross-country travel occurring on the WRD is for purposes
26 other than big game retrieval. (Id.) And, under the proposed action, motorized big game
27 retrievals “would be dispersed spatially across the district” and occur between September
28 and December – outside the spring and summer breeding/nesting season. (AR 40934.)

1 The Biological Assessment and the Wildlife Report and Biological Evaluation support
2 these conclusions. (AR 40528-40532, 40746-40750.)

3 Importantly, the FWS concurred with the Forest Service that the WRD's proposed
4 action would affect, but was not likely to adversely affect, the MSO in the WRD,
5 specifically finding that the proposed action would not alter key habitat components of
6 MSO habitat or primary constituent elements of MSO critical habitat. (AR 40798-99.)
7 The FWS also found that "[r]eductions of cross-country motorized travel and what will
8 be the designated road system should decrease the current effects of motorized vehicle
9 traffic to MSO and their critical habitat." (AR 40798-99.)

10 Similarly, the EA for the NKRD recognizes that "[m]any of the direct and indirect
11 effects of roads on wildlife are negative" but that "there is an opportunity to reduce
12 impacts to wildlife by restricting cross-country travel and reducing the density of open
13 roads on the district" – opportunities the proposed action seizes. (AR 14018.) The
14 proposed action reduces the designated road system by 20% and prohibits cross-country
15 travel (with the exception of authorized motorized travel for camping and retrieval of big
16 game), resulting in "fewer impacts to habitat of spotted owl small mammal prey" and
17 "some level of increased quality of spotted owl foraging habitat within designated
18 Critical Habitat." (AR 14022.) The Biological Evaluation and Wildlife Report support
19 these conclusions. (AR 13689-90; 13804-05.) The restrictions placed upon MBGR limit
20 the impact on MSO by allowing MBGR of elk and bison only, and limiting the distance
21 traveled, number of trips, and seasons for retrieving. (AR 14020.) While the
22 concentration in camping corridors "may increase disturbance to MSO habitat," the
23 potential for disturbance will be decreased because only 1.7 miles of roads will be used
24 for corridor camping, and the roads are located in open, grassy areas. (AR 14022.)

25 For these reasons, the Court finds that Plaintiffs fail to raise substantial questions
26 on the MSO issue, and the record supports the Forest Service's determination that the
27 travel management plans will have no significant impact on the MSO.

28 **3. Highly Controversial**

1 The Forest Service must consider “[t]he degree to which the effects...are likely to
2 be highly controversial.” § 1508.27(b)(4). A controversy exists where there is “a
3 substantial dispute [about] the size, nature, or effect of the major Federal action rather
4 than the existence of opposition to a use.” Blue Mountains, 161 F.3d at 1212 (quoting
5 Greenpeace Action v. Franklin, 14 F.3d 1324, 1335 (9th Cir. 1992)).

6 Plaintiffs argue that a “significant controversy exists as to the amount and type of
7 motorized recreation that would be allowed across the three ranger districts” because
8 “thousands” of comments were submitted during the NEPA process, “many of them
9 protesting the Forest Service[’]s proposed action and excessive allowance of motorized
10 big game retrieval.” (Doc. 45 at 38.) Based on the sheer number of comments submitted,
11 Plaintiffs urge the Court to find that a controversy exists: “[i]f approximately 385
12 negative comments on a federal action are sufficient to demonstrate a controversy such
13 that an EIS is required...surely the significantly greater volume of negative comment
14 here also demonstrates the controversial nature of the [ranger districts]...” (Id., citing
15 National Parks & Conversation Ass’n v. Babbitt, 241 F.3d 722 (9th Cir. 2001).) The
16 Forest Service argues that none of the comments cast serious doubt upon the
17 reasonableness of the Forest Service’s conclusions, and that Plaintiffs offer no facts
18 contradicting the Forest Service’s conclusions that no substantiated controversy exists.

19 The Court rejects Plaintiffs’ argument. As stated *supra*, a proposal is highly
20 controversial where there is “a substantial dispute [about] the size, nature, or effect of the
21 major Federal action *rather than the existence of opposition to a use.*” Blue Mountains,
22 161 F.3d at 1212 (9th Cir. 1998) (quoting Greenpeace, 14 F.3d at 1335) (emphasis
23 added). Plaintiffs do not argue that the proposed actions are highly controversial because
24 there is a substantial dispute about the size, nature, or effect of the actions; they argue that
25 the proposed actions are highly controversial because there is opposition, as evidenced by
26 the number of comments submitted. Indeed, Plaintiffs rely heavily on Babbitt, 241 F.3d
27 722 (9th Cir. 2001) abrogated by Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139
28 (2010), but the case only undermines their argument. In Babbitt, the Court stated that

1 “[*more important*]” than the number of negative comments received was the fact that the
2 comments “cast[ed] substantial doubt on the adequacy of the Park Service’s methodology
3 and data.” Babbitt, 241 F.3d at 736 (emphasis added). Plaintiffs here fail to explain how
4 the comments cast substantial doubt on the adequacy of the Forest Service’s methodology
5 and data.

6 Accordingly, the Court finds that the number of comments received by the Forest
7 Service, without more, does not raise substantial questions that would trigger the need for
8 an EIS.

9 **4. Highly Uncertain or Unique or Unknown Risks**

10 The Forest Service must also consider “[t]he degree to which the possible
11 effects...are highly uncertain or involve unique or unknown risks.” § 1508.27(b)(5). An
12 EIS is not required anytime there is *some* uncertainty, but only if the effects of the project
13 are *highly* uncertain. Environmental Prot. Info. Ctr. v. United States Forest Serv., 451
14 F.3d 1005, 1011 (9th Cir. 2006) (further citation omitted) (emphasis added).

15 Plaintiffs argue that uncertainty and unknown risks exist because there is “simply
16 no way for the Forest Service to know exactly where effects [of MBGR] will be realized
17 and what those effects will look like” because “it is unknown how many hunters will kill
18 a big game animal, where on each forest those animals will be killed, what type of
19 vehicle they will use to retrieve the carcass, whether any noxious weeds are present in the
20 area that may be spread, and what route those hunters will take to reach the carcass.”
21 (Doc. 45 at 38-39.)

22 The Forest Service contends that NEPA regulations do not require a reviewing
23 agency to eliminate “all uncertainty” prior to issuing a FONSI, and further contends that
24 there is very little uncertainty as to the potential effects of the proposed decisions. (Doc.
25 49-1 at 49). The Forest Service points to the fact that cross-country travel motor vehicle
26 use would be prohibited under the proposed actions – a significant departure from
27 previous policies, under which unrestricted cross-country vehicle use for any purpose was
28 allowed. (Id.)

1 Plaintiffs' argument lacks merit. Contrary to what Plaintiffs assert, the Forest
2 Service has an estimated number of big game animals that will be killed and then
3 retrieved by motorized vehicle an annual basis, and knows the general areas and locations
4 where these animals are killed, because the AZGFD tracks this information on an annual
5 basis. (AR 13956, 26026, 40839-40.) Additionally, the Forest Service analyzed the
6 spread of noxious weeds and implemented measures to reduce the chances of such
7 spreading occurring ((*see supra*). Based on the foregoing, the Court finds that Plaintiffs
8 have failed to show that the projects' effects are highly uncertain. The Court further finds
9 that the record supports the Forest Service's determination that the proposed decisions
10 would result in only some uncertainty.

11 **5. Precedent for Future Actions**

12 Under § 1508.27(b)(6), the Forest Service must consider "the degree to which the
13 action may establish a precedent for future actions with significant effects or represents a
14 decision in principle about a future consideration." Plaintiffs argue that the proposed
15 actions, in particular MBGR under the proposed actions, create precedent because "other
16 National Forests intend to adopt decisions" mirroring the KNF. (Doc. 45 at 40.) In
17 support, Plaintiffs cite a statement by a Prescott National Forest ("PNF") spokeswoman
18 ("We'll try to match [the Kaibab National Forest] as best as we can") and an alleged
19 statement from Coconino National Forest ("CNF") NEPA documents ("the CNF will
20 defer to the neighboring Kaibab National Forest's policy for MBGR in units shared with
21 the Williams Ranger District, regardless of how the Coconino proposes to apply the
22 Travel Management Rule for MBGR."). (*Id.*, citing AR 26303, 26326.)

23 These statements prove nothing. The PNF spokeswoman simply said that the PNF
24 will *try* to match the KNF, and the alleged statement from the CNF's NEPA documents
25 strongly suggests that the CNF will apply the TMR for MBGR *differently* in its Forest.
26 Therefore, the Court finds Plaintiffs have failed to raise serious questions regarding the
27 precedential effect of the Forest Service's decisions in the KNF as to trigger the need for
28 an EIS.

1 **6. Cultural or Historical Resources**

2 Under § 1508.27(b)(8), the Forest Service must consider “the degree to which the
3 action may adversely affect districts, sites, highways, structures, or objects listed in or
4 eligible for listing in the National Register of Historic Places or may cause loss or
5 destruction of significant...cultural[] or historical resources.” Plaintiffs argue that the
6 travel management plans “contemplate significant adverse impacts to sites listed in or
7 eligible for listing in the National Register of Historic Places or the loss or destruction of
8 significant cultural resources” and direct the Court to their NHPA argument. (Doc. 45 at
9 40.) As discussed *infra*, however, the travel management plans did not violate the NHPA
10 and therefore did not adversely affect, or cause the loss or destruction of, significant
11 cultural or historical resources.

12 **7. Threatened Species or Its Habitat**

13 Under § 1508.27(b)(9), the Forest Service must consider “[t]he degree to which
14 the action may adversely affect an endangered or threatened species or its habitat...”
15 Plaintiffs contend that the travel management plans effects are likely to adversely affect
16 the MSO and its habitat. (Doc. 45 at 40-42.) For reasons already discussed in this Order,
17 however, the Court finds that record supports the Forest Service’s determination that the
18 travel management plans will have no significant impact on the MSO or its habitat.

19 **8. Violation of Federal Law**

20 Under § 1508.27(b)(10), the Forest Service must consider “[w]hether the action
21 threatens a violation of Federal, State, or local law or requirements imposed for the
22 protection of the environment.” Plaintiffs argue that the travel management plans for each
23 ranger district “contemplate violations of the travel management rule, Executive Order
24 11644, and the National Historic Preservation Act.” (Doc. 45 at 42.) As discussed *supra*
25 and *infra*, however, the travel management plans did not violate the TMR or the NHPA
26 and therefore did not threaten a violation of federal law.

27 “If substantial questions are raised regarding whether the proposed action *may*
28 have a significant effect upon the human environment, a decision not to prepare an EIS is

1 unreasonable.” Save the Yaak, 840 F.2d at 717 (further citation omitted). Plaintiffs have
2 failed to raise substantial questions under any of the factors that inform Court’s inquiry.
3 Moreover, Defendants have supplied convincing reasons why certain effects would not
4 be significant. Accordingly, the Court finds no NEPA violation as alleged by Plaintiffs.

5 Having found no NEPA violation on any basis asserted by Plaintiffs, the Court
6 will grant summary judgment in favor of Defendants on the NEPA claim.

7 NATIONAL HISTORIC PRESERVATION ACT

8 A. Threshold Matter – Standing

9 Defendants argue that Plaintiffs lack standing to bring their NHPA claim. (Doc.
10 49-1 at 18-20.) Specifically, Defendants argue that Plaintiffs do not satisfy the first
11 element of the Article III standing test: injury in fact. (Doc. 49-1 at 18, Doc. 72 at 9.)

12 “[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has
13 suffered an injury in fact that is (a) concrete and particularized and (b) actual or
14 imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the
15 challenged action of the defendant; and (3) it is likely, as opposed to merely speculative,
16 that the injury will be redressed by a favorable decision.” Friends of the Earth, Inc. v.
17 Laidlaw Env’tl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (internal quotations and
18 further citation omitted).

19 As to the first element, Plaintiffs assert that they have suffered a procedural injury
20 in fact. (Doc. 65 at 2.) In support, Plaintiffs submitted the Declarations of Joseph
21 Shannon on behalf of the Sierra Club, Kim Crumbo on behalf of Grand Canyon
22 Wildlands Council, and Andrew Laurenzi on behalf of WildEarth Guardians. (Docs. 47-
23 48, 69.) Plaintiffs also submitted a supplemental declaration of Crumbo. (Doc. 68.)

24 To show a cognizable procedural injury in fact, a plaintiff must allege “that (1) the
25 [agency] violated certain procedural rules; (2) these rules protect [a plaintiff’s] concrete
26 interests; and (3) it is reasonably probable that the challenged action will threaten their
27 concrete interests.” O’Neill, 386 F.3d at 1197 (further citation omitted). A “concrete”
28 interest includes an aesthetic or recreational interest. Id.

1 Here, Plaintiffs allege concrete aesthetic interests in the enjoyment of the Kaibab
2 National Forest. For example, in Kim Crumbo’s supplemental Declaration, he states that
3 he explores, by hiking or four-wheel driving, the ranger districts for both recreational and
4 professional purposes. (Doc. 68 at ¶¶ 8-10.) In Andrew Laurenzi’s Declaration, he states
5 the he regularly visits all three ranger districts to hike and to observe wildlife, biological
6 features, archaeological, and culturally significant sites. (Doc. 69 at ¶ 4.) In Joseph
7 Shannon’s Declaration, he states that he is avid recreationist in the WRD. (Doc. 48 at ¶¶
8 1-2, 8-11.) Plaintiffs also point to Section 106 of the NHPA (54 U.S.C. § 306108), which
9 requires the Government to “take into account the effect of [an] undertaking on any
10 historic property,” and to “afford the Council [on Historic Preservation] a reasonable
11 opportunity to comment regard to the undertaking,” and allege that the Forest Service did
12 not satisfy these requirements. (Doc. 1 at ¶¶ 207-08.) It is reasonably probable that the
13 Forest Service’s alleged failure to satisfy these requirements threatens Plaintiffs concrete
14 interests since the requirements are designed to protect historic property,³ and Plaintiffs
15 regularly venture onto the ranger districts in part to enjoy the historic property of each
16 ranger district. (See Doc. 68 at ¶¶ 25-27, Doc. 69 at ¶¶ 9, 12.) Accordingly, Plaintiffs
17 satisfy the first element of Article III standing. See Friends of the Earth, 528 U.S. at 183
18 (“[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use
19 the affected area and are persons for whom the aesthetic and recreational values of the
20 area will be lessened by the challenged activity.”) (internal quotations and further citation
21 omitted).

22 “A showing of procedural injury lessens a plaintiff’s burden on the last two prongs
23 of the Article III standing inquiry, causation and redressability.” Salmon Spawning &
24 Recovery Alliance v. Gutierrez, 545 F. 3d 1220, 1226 (9th Cir. 2008). Indeed,
25 “[p]laintiffs alleging procedural injury must show only that they have a procedural right

26
27 ³ “The fundamental purpose of the NHPA is to ensure the preservation of
28 historical resources.” Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of
Interior, 608 F.3d 592, 609 (9th Cir. 2010) (citing 16 U.S.C. § 470a(d)(1)(A)).

1 that, if exercised, *could* protect their concrete interests.” *Id.* (internal quotations and
2 further citation omitted).). Although Defendants do not challenge the second and third
3 elements of the Article III standing test, the Court concludes that the harm of which
4 Plaintiffs complain is fairly traceable to the Forest Service’s conduct, and further
5 concludes that the relief requested – that the Court order the Forest Service to follow
6 certain NHPA procedures (Doc. 65 at 5) – could remedy the harm. See Pit River Tribe v.
7 U.S. Forest Service, 469 F.3d 768, 779 (9th Cir. 2006) (“The procedural injury would be
8 redressed if the [agencies] followed proper procedures.”) (quoting Beeman v. TDI
9 Managed Care Servs., Inc., 449 F.3d 1035, 1040 (9th Cir.2006)). Accordingly, Plaintiffs
10 have satisfied the second and third elements of Article III standing, and have standing to
11 bring their NHPA claim.

12 **B. Alleged Violations of the NHPA**

13 Under the NHPA, it is the policy of the federal government to “foster conditions
14 under which our modern society and our prehistoric and historic resources can exist in
15 productive harmony and fulfill the social, economic, and other requirements of present
16 and future generations” and to “administer federally owned, administered, or controlled
17 historic property in a spirit of stewardship for the inspiration and benefit of present and
18 future generations.” 54 U.S.C. § 300101(1),(3) (2012).⁴ Under the NHPA, “historic
19 property” means

20 any prehistoric or historic district, site, building, structure, or object
21 included in or eligible for inclusion in, the National Register of History
22 Places maintained by the Secretary of the Interior. This term includes
23 artifacts, records, and remains that are related to and located within such
properties. The term includes properties of traditional religious and cultural
importance to an Indian tribe or Native Hawaiian organization and that
meet the National Register criteria.

24 Section 106⁵ of the NHPA requires federal agencies to “take into account the
25 effect of [an] undertaking on any historic property. § 306108.⁶ The federal agency must
26 also afford the Federal Advisory Council on Historic Preservation (“Advisory Council”)⁷

27 ⁴ Formerly cited as 16 U.S.C. § 470-1.

28 ⁵ “Section 106” refers to 16 U.S.C. § 470f, now cited as 54 U.S.C. § 306108.

⁶ Formerly cited as 16 U.S.C. § 470f.

⁷ The Advisory Council promulgates the regulations necessary to implement

1 “a reasonable opportunity to comment with regard to the undertaking. Id. Similar to
2 NEPA, “[s]ection 106 of NHPA is a ‘stop, look, and listen’ provision that requires each
3 federal agency to consider the effects of its programs.” Muckleshoot Indian Tribe v. U.S.
4 Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999). In its entirety, the section 106 review
5 process requires an agency to

6 make a reasonable and good faith effort to identify historic properties;
7 determine whether identified properties are eligible for listing on the
8 National Register ...; assess the effects of the undertaking on any eligible
9 historic properties found; determine whether the effect will be adverse;
10 and avoid or mitigate any adverse effects. The [agency] must confer with
11 the State Historic Preservation Officer (“SHPO”) and seek the approval of
12 the Advisory Council on Historic Preservation (“Council”).

13 Te-Moak Tribe, 608 F.3d at 607 (further citation omitted).

14 The Advisory Council and the federal agency “may negotiate a programmatic
15 agreement to govern the implementation of a particular program or the resolution of
16 adverse effects from certain complex project situations or multiple undertakings” on
17 historic property. 36 C.F.R. § 800.14(b). Programmatic agreements are appropriate under
18 certain circumstances, such as when effects on historic properties are similar and
19 repetitive or are multi-State or regional in scope, or when effects on historic properties
20 cannot be fully determined prior to approval of an undertaking. § 800.14 (b)(1)(i),(ii).
21 Significantly, “[c]ompliance with the procedures established by an approved
22 programmatic agreement satisfies the agency’s section 106 responsibilities for all
23 individual undertakings of the program covered by the agreement...” § 800.14(b)(2)(iii).
24 When the Advisory Council signs a programmatic agreement, “that clos[es] the record
25 for purposes of NHPA § 106.” Snoqualmie Indian Tribe v. F.E.R.C., 545 F.3d 1207,
26 1216 (9th Cir. 2008) (citing § 800.14(b)(2)(iii)).

27 Plaintiffs advance two NHPA arguments. First, they argue that the Forest
28 Service’s reliance on Exemption Q of their Programmatic Agreement for the WRD and
29 TRD was improper, and second, they argue that the Forest Service’s “no effect” MBGR

section 106. See 54 U.S.C. § 304108(a).

1 determination for the NKRD was improper. (Doc. 45 at 44.) The Court will address each
2 argument in turn.

3 **1. Reliance on Exemption Q**

4 The Region 3 First Amended Programmatic Agreement (“PA”) exempts a number
5 of Forest Service activities “from further review and consultation” where the Forest
6 Service and the State Historic Preservation Officers (SHPOs) of Arizona, New Mexico,
7 Oklahoma, and Texas have agreed that the activities “have predictable effects and a very
8 low likelihood of affecting historic properties.” (S00249-50.)⁸ Among the activities
9 exempted under the PA are those “not involving ground or surface disturbance (e.g.
10 timber stand improvement and precommercial thinning by hand).” (S00250.) This
11 exemption is known as Exemption Q. (Id.)

12 Plaintiffs dispute Defendants’ decision to exempt MBGR “from further review and
13 consultation” under Exemption Q. (Doc. 45 at 42-46.) Plaintiffs argue that MBGR is an
14 activity that involves ground and surface disturbance, and the Forest Service even admits
15 this in its TRD and WRD EAs. (Id. at 45-46.) Since Exemption Q only exempts those
16 activities not involving ground or surface disturbance, the Forest Service’s decision to
17 exempt MBGR was arbitrary and capricious. (Id. at 46.) In response, Defendants contend
18 that the Forest Service analyzed the expected surface impacts from MBGR as proposed,
19 and concluded that the likely ground disturbance from MBGR across the ranger districts
20 “was so minimal that it would not adversely affect cultural resources.” (Doc. 49-1 at 53.)
21 Defendants also point out that the Arizona SHPO concurred with its findings regarding
22 cultural resource surveys and effects. (Id.)

23 The record supports the Forest Service’s findings that MBGR under the proposed
24 actions would result in only minimal surface impacts and have a very low likelihood of
25 affecting cultural resources. The findings satisfy the definition of “Exemption” (“those
26 undertakings, which because of their nature and scope, have predictable effects and a

27
28 ⁸ The Programmatic Agreement defines “exemption” as “those undertakings,
which because of their nature and scope, have predictable effects and a very low
likelihood of affecting historic properties...” (S00253.)

1 very low likelihood of affecting historic properties...”). (S00253.)

2 In the TRD, archaeologists evaluated all of the proposed alternatives in
3 relationship to the protocols under the PA. (AR 26159.) Recognizing that potential
4 effects from MBGR may “lead to undesirable effects on cultural resources,”
5 archaeologists evaluated the effects in depth. (*Id.*) Ultimately, they decided that no
6 adverse effects on cultural resources in the TRD were expected due to the fact that only
7 an estimated 414 motorized big game harvests will potentially impact approximately 200
8 acres per year (or 0.06% of the TRD) and the fact that hunters may only travel off road
9 when conditions are suitable. (AR 26160.)

10 Similarly, in the WRD, archaeologists evaluated all of the proposed alternatives in
11 relationship to the protocols under the PA. (AR 40961.) And, as they did in the TRD
12 analysis, they acknowledged that potential effects from MBGR may “lead to undesirable
13 effects on cultural resources,” and therefore evaluated the effects in depth. (40961-62.) In
14 the end, they found that no adverse effects on cultural resources in the WRD are expected
15 due to the fact that there are only an estimated 695 motorized big game harvests
16 potentially impacting approximately 350 acres per year (or 0.0625% of the WRD) and the
17 fact that hunters may only travel off road when conditions are suitable. (AR 40962-63.)

18 Based on the archaeologists’ findings, it was not unreasonable for the Forest
19 Service to conclude that MBGR on the TRD and WRD would have minimal surface
20 impacts and a very low likelihood of affecting cultural resources.⁹ *See O’Neill*, 386 F. 3d
21 at 1206 (“When a court reviews agency action involving primarily issues of fact, and
22 where analysis of the relevant documents requires a high level of expertise, [the
23 reviewing court] must defer to the informed discretion of the responsible federal
24 agencies.”) (quoting *Sierra Club v. U.S. EPA*, 346 F. 3d 955, 961 (9th Cir. 2003).
25 Therefore, the Court finds that the Forest Service’s decision to exempt MBGR under
26 Exemption Q was not arbitrary or capricious.

27 **2. No Effect Determination**

28 ⁹ *See also* MBGR impacts analyses, *supra* pages 11-15, 17-19, 28-29, 35-36.

1 Plaintiff final argument is as follows: “[a]lthough the North Kaibab Ranger
2 District does not assert that NHPA compliance is not required under Programmatic
3 Agreement Exemption Q, its no adverse effect from motorized big game retrieval, AR
4 14832-33, is also arbitrary and capricious for the same reasons as the no adverse effect
5 determinations for the Williams and Tusayan Ranger Districts.” (Doc. 45 at 46.) This
6 singular, conclusory statement constitutes Plaintiffs’ entire argument on this issue.
7 Plaintiffs rely on previous arguments challenging the Forest Service’s conclusion that
8 MBGR would have insignificant impacts on the ranger districts. Having already rejected
9 these arguments, however, the Court need not address them again.

10 In the end, the Court finds no NHPA violation on the grounds asserted by
11 Plaintiffs. The Forest Service’s reliance on Exemption Q was not improper. Accordingly,
12 the Court will grant summary judgment in favor of the Forest Service on the NHPA
13 claim.

14 **IV. CONCLUSION**


15 Based on the foregoing,

16 **IT IS HEREBY ORDERED** denying Plaintiffs’ motion for summary judgment.
17 (Doc. 44.)

18 **IT IS FURTHER ORDERED** granting Defendants’ cross-motion for summary
19 judgment. (Doc. 49.) The Clerk of Court shall enter judgment in favor of Defendants and
20 terminate this case.

21 **IT IS FURTHER ORDERED** denying as moot Intervenor-Defendant Safari
22 Club International’s cross-motion for summary judgment (Doc. 52) and Intervenor-
23 Defendant State of Arizona’s cross-motion for partial-summary judgment (Doc. 55).

24 Dated this 26th day of September, 2017.

25
26 
27 Honorable Stephen M. McNamee
28 Senior United States District Judge