

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 02, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ALLIANCE FOR THE WILD
ROCKIES,

Plaintiff,

v.

JIM PENA, in his official capacity as
Regional Forester of Region Six U.S.
Forest Service; UNITED STATES
FOREST SERVICE, an agency of the
United States; and RODNEY
SMOLDON, in his official capacity as
Supervisor of the Colville National
Forest,

Defendants.

NO: 2:16-CV-294-RMP

ORDER GRANTING DEFENDANTS'
AND INTERVENING
DEFENDANTS' CROSS MOTIONS
FOR SUMMARY JUDGMENT AND
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

Plaintiff, Alliance, challenged the U.S. Forest Service's decision to approve the North Fork Mill Creek A to Z Project ("A to Z Project"), a restoration, logging, and timber sale venture in the Colville National Forest. The U.S. Forest Service contracted with a private entity, Vaagen Brothers, to perform the work. Vaagen Brothers was the only bidder for the contract. As part of the contract, Vaagen Brothers contracted with Cramer Fish Services to perform an environmental

1 assessment of the project. After reviewing the extensive briefing in this matter,
2 and considering the arguments and law, the Court concludes that the bidding
3 process that the U.S. Forest service used was open and fair, with no conflict of
4 interest among the parties. The Court further concludes that Defendants were not
5 arbitrary and capricious in their environmental analysis of the A to Z Project.
6 Therefore, the Court finds in favor of Defendants and dismisses all of Alliance's
7 claims with prejudice.

8 **BACKGROUND**

9 Before the Court are Plaintiff's Motion for Summary Judgment, ECF Nos.
10 103 & 104¹; a Cross Motion for Summary Judgment, ECF No. 106, by Defendants
11 Jim Pena, Rodney Smoldon, and the United States Forest Service (collectively,
12 "Forest Service Defendants"); and a Cross Motion for Summary Judgment, ECF
13 No. 111, by Intervening Defendants Northeast Washington Forestry Coalition,
14 Pend Oreille County, and Stevens County (collectively, "County Defendants").
15 The Court heard oral argument on August 22, 2018. Brian A. Ertz and Richard A.
16 Poulin appeared on behalf of Plaintiff Alliance for the Wild Rockies. Rudolf J.
17 Verschoor and Vanessa R. Waldref appeared on behalf of the Forest Service

18
19 ¹ Alliance originally submitted its Motion for Summary Judgment, ECF No. 103,
20 but then submitted a Praecipe, ECF No. 104. This Order will refer to the Praecipe,
21 ECF No. 104, as Plaintiff's Motion for Summary Judgment for all relevant
citations.

1 Defendants. Lawson Emmett Fite appeared on behalf of the intervening County
2 Defendants.

3 Plaintiff Alliance for the Wild Rockies (“Alliance”) sued the Forest Service
4 Defendants under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et*
5 *seq.*, to challenge the Forest Service’s decision to approve the North Fork Mill
6 Creek A to Z Project (“A to Z Project”), a restoration, logging, and timber sale
7 venture in the Colville National Forest. *See* ECF No. 100. Alliance alleges
8 violations of the National Forest Management Act (“NFMA”), 16 U.S.C. § 1600 *et*
9 *seq.*, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331 *et*
10 *seq. Id.*

11 Specifically, Alliance challenges the Forest Service Defendants’ June 13,
12 2016, Decision Notice and Finding of No Significant Impact (“DN/FONSI”)
13 approving the A to Z Project Environmental Assessment. ECF No. 104. The A to
14 Z Project is a proposed project in the Colville National Forest, which is managed in
15 accordance with the Colville National Forest Land and Resource Management Plan
16 (“Forest Plan”). AR 120866. To achieve desired future conditions identified in the
17 Forest Plan, the Forest Service works within the parameters of the Forest Plan to
18 engage in forest restoration, funded through commercial timber harvesting and
19 supporting rural community needs. *See* ECF No. 106 at 2 (citing AR 120875–79;
20 Section 347 of the Omnibus Consolidated Appropriations Act of FY 1999, as
21 amended by Sec. 323 of P.L. 108-7).

1 The Forest Service awarded a stewardship contract to Vaagen Brothers
2 Lumber to perform the A to Z Project. AR 124267. As part of the stewardship
3 contract, Vaagen Brothers provided funding for the NEPA-required Environmental
4 Analysis (“EA”) of the project. AR 124214. Consistent with the instructions in
5 the A to Z Project Contract requiring the contractor to hire a third party to perform
6 the NEPA work, Vaagen Brothers proposed using Cramer Fish Services
7 (“Cramer”) as an independent contractor to complete the NEPA analysis, and the
8 Forest Service approved Cramer’s preparation of the A to Z Project EA. *See* ECF
9 No. 87-5 at 3. Cramer assured the Forest Service that no potential conflicts of
10 interest clouded its creation of the A to Z Project EA. *Id.*; *see also* AR 024095–96
11 (describing the steps taken to prevent a conflict of interest between Cramer and
12 Vaagen Brothers).

13 On September 6, 2016, Alliance petitioned the Court for a Preliminary
14 Injunction to halt all action on the A to Z Project. ECF No. 12. After receiving
15 briefing from all parties and hearing oral argument, the Court denied Alliance’s
16 Motion for Preliminary Injunction. ECF No. 58. The Court also denied Alliance’s
17 motion seeking a stay and injunction pending appeal. *See* ECF No. 70. The Ninth
18 Circuit Court of Appeals affirmed the Court’s denial of a preliminary injunction.
19 *See Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211 (9th Cir. 2017); ECF No.
20 92.

21 The Court has subject matter jurisdiction over this matter pursuant to 28
ORDER GRANTING DEFENDANTS’ AND INTERVENING DEFENDANTS’
CROSS MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT ~ 4

1 U.S.C. § 1331 as a civil action arising under the laws of the United States because
2 Alliance alleges violations of the National Forest Management Act (“NFMA”) and
3 the National Environmental Policy Act (“NEPA”). *See* 28 U.S.C. § 1331.

4 DISCUSSION

5 *Legal Standard for Summary Judgment*

6 When parties file cross-motions for summary judgment, the Court considers
7 each motion on its own merits. *See Fair Housing Council of Riverside Cty., Inc. v.*
8 *Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). A court may grant summary
9 judgment where “there is no genuine dispute as to any material fact” of a party’s
10 prima facie case, and the moving party is entitled to judgment as a matter of law.
11 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–33
12 (1986). Because Alliance’s claims arise under the APA, resolution of its claims
13 “does not require fact finding on behalf of [the] court.” *Nw. Motorcycle Ass’n v.*
14 *U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994). The court may direct
15 that summary judgment be granted to either party based upon de novo review of the
16 administrative record. *See Or. Nat. Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d
17 1092, 1109 (9th Cir. 2010).

18 *Statutory Schemes*

19 The National Forest Management Act, 16 U.S.C. § 1600 *et seq.*, requires the
20 Forest Service to create and maintain land and resource management plans for each
21 national forest. 16 U.S.C. § 1604(a). Among other requirements, forest plans must

1 “provide for diversity of plant and animal communities” as well as “insure that
2 timber will be harvested from National Forest System lands only where . . .
3 protection is provided for streams, streambanks, shorelines, lakes, wetlands, and
4 other bodies of water from detrimental changes in water temperatures, blockages
5 of water courses, and deposits of sediment, where harvests are likely to seriously
6 and adversely affect water conditions or fish habitat.” *Id.* § 1604(g)(3)(B) &
7 (E)(iii). “After a forest plan is developed, all subsequent agency action . . . must
8 comply with NFMA and the governing forest plan.” *Ecology Ctr. v. Castaneda*,
9 574 F.3d 652, 656 (9th Cir. 2009).

10 The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, “is a
11 procedural statute intended to ensure environmentally informed decision-making
12 by federal agencies.” *Tillamook Cty. v. U.S. Army Corp. of Eng’rs*, 288 F.3d 1140,
13 1143 (9th Cir. 2002). NEPA requires agencies to take a “hard look” at the
14 environmental effects of proposed agency actions. *Klamath-Siskiyou Wildlands*
15 *Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004). However, the
16 statute does not mandate particular results. *Tillamook Cty.*, 288 F.3d at 1143.

17 NEPA’s regulations require the agency proposing the action to prepare an
18 Environmental Assessment (“EA”) which “[b]riefly provide[s] sufficient evidence
19 and analysis for determining whether to prepare an environmental impact
20 statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1). The
21 EA “[s]hall include brief discussions of the need for the proposal, of alternatives as

1 required by section 102(2)(E), of the environmental impacts of the proposed action
2 and alternatives, and a listing of agencies and persons consulted.” *Id.* § 1508.9(b).

3 “If, in light of the EA, the agency determines that its action will significantly affect
4 the environment, then an [environmental impact statement] must be prepared; if
5 not, then the agency issues a [finding of no significant impact].” *Metcalf v. Daley*,
6 214 F.3d 1135, 1142 (9th Cir. 2000).

7 *Standard of Review Under the Administrative Procedure Act*

8 The Administrative Procedure Act (“APA”) governs over NEPA and NFMA
9 claims. *Ecology Ctr.*, 574 F.3d at 656. Under the APA, agency action must be set
10 aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in
11 accordance with law” or if it is “unsupported by substantial evidence.” 5 U.S.C. §
12 706(2)(A) and (E). “Substantial evidence is more than a mere scintilla but less
13 than a preponderance; it is such relevant evidence as a reasonable mind
14 might accept as adequate to support a conclusion.” *De La Fuente v. Fed. Deposit*
15 *Ins. Corp.*, 332 F.3d 1208, 1220 (9th Cir. 2003) (citation omitted). In determining
16 whether an agency decision is arbitrary and capricious, the United States Supreme
17 Court ruled that

18 [r]eview under the arbitrary and capricious standard is deferential; we
19 will not vacate an agency's decision unless it has relied on factors which
20 Congress had not intended it to consider, entirely failed to consider an
21 important aspect of the problem, offered an explanation for its decision
that runs counter to the evidence before the agency, or is so implausible
that it could not be ascribed to a difference in view or the product of
agency expertise. We will, however, uphold a decision of less than ideal

1 clarity if the agency's path may reasonably be discerned.

2 *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)

3 (internal quotation marks and citations omitted).

4 ***Claims Regarding Selection of Third Party Organizations for A to Z Project***

5 Alliance claims the Defendants violated NFMA and NEPA in selecting third

6 parties for the A to Z Project. ECF No. 100 at 84–86. Under NFMA, Alliance

7 claims that the Defendants awarded the Project to Vaagen Brothers “without using

8 a bidding method insuring open and fair competition.” *Id.* at 85. Under NEPA,

9 Alliance claims that the Defendants’ FONSI was tainted by a conflict of interest

10 created by the decision to outsource the EA’s creation to Cramer, paid for by

11 Vaagen Brothers. ECF No. 104 at 7–8.

12 ***A. Open and Fair Bidding Competition Under NFMA***

13 Alliance argues that Defendants violated NFMA by avoiding an open and

14 fair bidding competition in awarding the A to Z Project to Vaagen Brothers. ECF

15 No. 104 at 7–8. The Defendants collectively argue that Alliance lacks standing to

16 challenge the bidding process. ECF No. 106 at 36–37, ECF No. 111 at 21–23.

17 Additionally, Defendants argue that even if Alliance has standing to challenge the

18 bidding process, the competition was open and fair and no statutory violation

19 occurred. ECF No. 106 at 37–38; ECF No. 111 at 23–24.

20 ***1. Alliance’s Standing to Challenge the Bidding Process***

21 Defendants argue that Alliance lacks standing to challenge the bidding

1 process, because Alliance was not involved in the bidding process and would not
2 have received the stewardship contract had the process been different. ECF No.
3 106 at 36–38; ECF No. 111 at 21–23. Alliance argues that it has standing because
4 the contract authorized a third party to conduct the NEPA review, which Alliance
5 claims it has a legal right to ensure, is completed in accordance with the law. ECF
6 No. 112 at 32–33.

7 Standing is defined as the presence of three elements: (1) the plaintiff has
8 suffered an injury in fact, defined as the violation of a legally protected interest that
9 is concrete, particularized, actual, and imminent; (2) the injury is fairly traceable to
10 the defendants, and not to some other third party; and (3) it is likely the injury is
11 redressable by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S.
12 555, 560–61 (1992).

13 The Ninth Circuit has recognized the “difficult standing problems” presented
14 by challenges to government bidding competitions. *Look v. United States*, 113
15 F.3d 1129, 1130 (9th Cir. 1997). In *Look*, the plaintiff challenged the fairness of a
16 bidding competition for a computer servicing contract with the United States
17 Army, claiming the Army had illegally excluded foreign firms from the
18 competition. *Id.* at 1130. The plaintiff in *Look* admitted that it would not have
19 received the contract even if the Army had fully considered the foreign firms, as
20 the plaintiff requested. *Id.* at 1131. The Ninth Circuit held that the plaintiff lacked
21 standing because, without showing there was a “substantial” chance in receiving

1 the contract had the bidding procedures been different, the plaintiff could not prove
2 that it had suffered an injury fairly traceable to the United States. *Id.*

3 Under the *Look* analysis, Alliance would not have standing, because
4 Alliance was not a bidder for the A to Z Project contract. As such, it could not
5 claim an injury for unfair bidding procedures because Alliance could not show that
6 there was a substantial chance that it would have received the bidding contract had
7 the procedures been different. *Id.* However, Alliance does not challenge the
8 bidding procedures because it wanted to be awarded the contract that was awarded
9 to Vaagen Brothers; it challenges the bidding process as part of the overall scheme
10 to award the A to Z Project contract to a private entity in violation of NEPA or
11 NFMA requirements. *See* ECF No. 104 at 9–10 (“[B]efore engaging in any NEPA
12 process, Federal Defendants granted exclusive rights to any and all future timber
13 sales in the contract area to Vaagen Bros and allowed Vaagen to select the
14 contractor that would conduct the environmental review.”). Alliance claims that it
15 is challenging the government’s action as ultra vires in this case and that the
16 bidding competition was “not in accordance with the law” under the APA, because
17 the government failed to ensure that the bidding competition was open and fair, as
18 required by NFMA. 5 U.S.C. § 706(2)(A); ECF No. 112 at 32–33. Alliance
19 claims that its injury in fact, and, therefore, its standing, comes from its procedural
20 rights to challenge government action under the APA, NMFA, and NEPA. ECF
21 No. 112 at 32–33.

1 The Ninth Circuit has held that simply claiming that “a defendant violated a
2 statutory duty does not necessarily satisfy the requirements of injury in fact in
3 article III.” *Fernandez v. Brock*, 840 F.2d 622, 630 (9th Cir. 1988). The inquiry is
4 whether the statute that was allegedly violated “creates correlative procedural
5 rights in a given plaintiff, the invasion of which is sufficient to satisfy the
6 requirement of injury in fact in article III.” *Id.* Mere statutory violations by the
7 government do not give anyone the ability to challenge the government actions;
8 only those plaintiffs with procedural rights may claim the statutory violation as an
9 injury under Article III. *Id.*

10 Alliance did not bid on the A to Z contract. It does not wish to be awarded
11 the contract and does not claim that it had a substantial chance of receiving the
12 contract. Alliance does not have standing to challenge the bidding competition
13 here because it has not suffered an injury-in-fact. *See Look*, 113 F.3d at 1131.

14 Further, neither NEPA nor the APA give Alliance standing to challenge the
15 NFMA bidding procedures. As stated above, Alliance argued in its reply brief that
16 its standing to challenge the bidding procedure on the A to Z Project contract
17 “originates in Alliance’s procedural rights under NEPA,” and when NEPA is
18 allegedly violated, “Alliance has a statutory right to challenge Defendants’ action
19 as ‘not in accordance with the law.’”² ECF No. 112 at 32 (quoting 5 U.S.C.

20 ² Alliance does not claim that its standing is because Alliance falls within the zone
21 of interest of any statute.

1 706(2)(A)). With this argument, Alliance essentially is claiming that it would have
2 the right to challenge any action as contrary to law because the APA gives it that
3 procedural right. As stated in *Fernandez*, a mere violation of a statutory duty by an
4 agency does not cause an injury to a plaintiff without some showing that the
5 particular plaintiff had a procedural right under the specific statute in question.
6 *Fernandez*, 840 F.2d at 630. NEPA and the APA do not give Alliance standing to
7 challenge the A to Z Project contract bidding competition.

8 Therefore, the Court finds that Alliance lacks standing to challenge the A to
9 Z Project bidding competition. However, in the event that a reviewing court finds
10 that Alliance does have standing to challenge the bidding competition, the Court
11 will review the merits of Alliance’s challenge to complete the record.

12 ***2. Alliance’s Challenge of the Contract Bidding Competition***

13 Alliance claims that the government’s inclusion of “massive, costly
14 services” in the A to Z bidding competition, including the requirement to fund and
15 complete the NEPA analysis, limited the bidding process to “only those companies
16 with the scale, capacity, and resources to front administrative costs of public land
17 management.” ECF No. 104 at 10. Additionally, Alliance claims that the
18 contract’s awarding of exclusive rights to all timber collected in the North Fork
19 Project Area essentially precludes any competitive bidding that would otherwise
20 happen. ECF No. 100 at 9–11. Defendants argue that the bidding was open and
21 fair, but only Vaagen Brothers submitted a bid, and Defendants have no control

1 over who does or does not submit a bid. ECF No. 106 at 36–37; ECF No. 111 at
2 23–24.

3 Stewardship contracts under NFMA are contracts with private parties “to
4 perform services to achieve land management goals for the national forests and the
5 public lands that meet local and rural community needs.” 16 U.S.C. § 6591c(b).

6 When awarding a NFMA stewardship contract, the bidding method for that
7 contract must “insure open and fair competition.” 16 U.S.C. § 472a(e)(1)(A). In
8 exchange for services under stewardship contracts, the private entity may take “the
9 value of timber or other forest products removed as an offset against the cost of
10 services received under the agreement,” with the value of the timber determined
11 “using appropriate methods of appraisal.” 16 U.S.C. § 6591c(d)(4)(A) &
12 (d)(4)(B)(i). If a solicitation for bids on a government contract results in only one
13 submitted bid, the process is still considered open and fair when the government
14 solicits for bids on a wide scale, rather than negotiating with a single company
15 from the outset of the bidding process. *See Siller Bros., Inc. v. United States*, 655
16 F.2d 1039, 1045 (Ct. Cl. 1981).

17 Defendants submitted evidence that the A to Z contract was not immediately
18 or exclusively awarded to Vaagen Brothers. The record does show that only
19 Vaagen Brothers submitted a bid for the rights to the contract. ECF No. 22 at 4.
20 Alliance offers no evidence to support that the Defendants brought the contract
21 directly to Vaagen Brothers and ignored the requirement to advertise for an open

1 and fair contract bidding competition. In contrast, Defendants' evidence states that
2 the project was advertised to the public, and that the Forest Service sought
3 competitive proposals for the rights to the A to Z Project contract. Rodney
4 Smoldon, the Forest Supervisor for the Colville National Forest, attested that the
5 Forest Service advertised the Project publicly, but only Vaagen Brothers submitted
6 a bid. ECF No. 22 at 1–4. Michael North, a Supervisory Forester in charge of
7 managing stewardship contracts concerning National Forests, attested that the
8 Project was solicited as a request for proposals. ECF No. 26 at 2. There is no
9 evidence that the Forest Service presented the A to Z Project stewardship contract
10 directly to Vaagen Brothers, which would violate NFMA. *See Siller Bros.*, 655
11 F.2d at 1045. Thus, the Court concludes that even though Vaagen Brothers was
12 the only party to submit a bid, the bidding process was open and fair.

13 Further, it is well within Defendants' authority to offer all timber sales from
14 the project in the contract to the winner of the contract, which here is Vaagen
15 Brothers. The statutory scheme allows the government to offset the costs of the
16 services performed under the contract with the value of timber and forest products
17 collected from the forest. *See* 16 U.S.C. 6591c(d)(4). Alliance cites no authority
18 stating the arrangement in question violates the NFMA bidding process in any
19 way.

20 The Court concludes that the bidding process complied with NMFA
21 requirements.

1 ***B. Conflict of Interest in Contracting NEPA Analysis to Third Parties***

2 Alliance contends that the A to Z contracting arrangement between the
3 Forest Services, Vaagen Brothers, and Cramer created an impermissible conflict of
4 interest under NEPA regulations, arguing this Court should invalidate the EA.
5 ECF No. 104 at 6–9. Defendants argue that there was no conflict of interest, and
6 any conflict of interest that might be present had no effect on the NEPA analysis.
7 ECF No. 106 at 27–36; ECF No. 11 at 12–19.

8 Under NEPA regulations promulgated by the Council on Environmental
9 Quality (“CEQ”), “[i]f an agency permits an applicant to prepare an environmental
10 assessment, the agency . . . shall make its own evaluation of the environmental
11 issues and take responsibility for the scope and content of the environmental
12 assessment.” 40 C.F.R. § 1506.5(b). Further, “any environmental impact
13 statement prepared pursuant to the requirements of NEPA shall be prepared
14 directly by or by a contractor selected by the lead agency.” *Id.* § 1506.5(c). The
15 goal of this selection process is “to avoid any conflict of interest.” *Id.* If a
16 contractor is used to prepare an EIS, they “shall execute a disclosure statement . . .
17 specifying that they have no financial or other interest in the outcome of the
18 project.” *Id.*

19 CEQ explained that the conflict of interest provisions in its NEPA
20 regulations are not meant to be interpreted broadly to invalidate several highly
21 capable and competent contractors. Guidance Regarding NEPA Regulations, 48

1 Fed. Reg. 34263, 34266 (Council on Env'tl. Quality July 28, 1983). Rather, “if the
2 contract for EIS preparation does not contain any incentive clauses or guarantees
3 of any future work on the project, it is doubtful that an inherent conflict of interest
4 will exist.” *Id.* If the agency makes a determination that no conflict of interest
5 exists, the court should defer to this finding unless the finding is not supported by
6 substantial evidence. *Cachil Dehe Band of Wintun Indians of the Colusa Indian*
7 *Cmty. v. Zinke*, 889 F.3d 584, 608 (9th Cir. 2018) (citing *Markair, Inc. v. Civil*
8 *Aeronautics Bd.*, 744 F.2d 1383, 1385 (9th Cir. 1984)).

9 Even if a conflict of interest does exist, that does not end the analysis; a
10 conflict of interest can be cured by the agency with sufficient oversight over the
11 environmental analysis. *Ass'ns Working for Aurora's Residential Env't v. Colo.*
12 *Dep't of Transp.*, 153 F.3d 1122, 1128–29 (10th Cir. 1998). “[T]he ultimate
13 question for the court is thus whether the alleged breach compromised the
14 ‘objectivity and integrity of the NEPA process.’” *Id.* (quoting *Citizens Against*
15 *Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991)). Even if an alleged
16 conflict of interest exists, the environmental analysis will not be invalidated unless
17 that conflict of interest had an actual effect on the substantive environmental work
18 done. *Id.*; *see also* 40. C.F.R. § 1500.3 (“[I]t is the Council’s intention that any
19 trivial violation of these regulations not give rise to any independent cause of
20 action.”).

21 Alliance presents several arguments in support of its conflict of interest

1 claim. First, Alliance claims that the contracting procedures here, in which the
2 Forest Service contracted out the environmental review responsibilities to Vaagen
3 Brothers, who then contracted the environmental assessment responsibilities to
4 Cramer, created an inherent conflict of interest because the arrangement precluded
5 any chance of Cramer finding a significant impact. ECF No. 104 at 9. As Alliance
6 explains, it was in Cramer's best interest not to find a significant impact, because
7 under CEQ regulations, it could not create the EIS because it was not chosen by
8 the Forest Service. *Id.* Second, Alliance argues that the Forest Service Handbook,
9 "which guides the agency's implementation of NEPA, NFMA, and other Federal
10 statutes and rules," prohibits contracting NEPA services in a stewardship contract,
11 such as the one used here for the A to Z Project. *Id.* at 7–8. Third, Alliance argues
12 that by separating the Project into North Fork and Middle/South Fork, the Forest
13 Services created an enforceable promise or guarantee of future work. ECF No. 112
14 at 25. Fourth, Alliance claims that the Forest Services' alleged oversight on the
15 environmental analysis was insufficient to cure any conflicts of interest. *Id.* at 28.

16 In response, Defendants argue that there is no actual evidence of a conflict
17 of interest among the involved parties. ECF No. 106 at 30. They argue that the
18 Forest Service Handbook does not have the force and effect of law. *Id.* Further,
19 they claim that, even if there was a conflict of interest, it was cured by the Forest
20 Service's continuous oversight of the environmental review process. *Id.* at 32–36.

21 Last, they argue that Cramer actually was picked by the Forest Service, because the

1 terms of the A to Z contract required that the Forest Service approve of any third
2 party subcontractor selected to conduct the NEPA analysis. ECF No. 115 at 13–
3 14.

4 Starting with Alliance’s first argument, there is no evidence in the record
5 that the contract arrangement here created an inherent conflict of interest. First,
6 Cramer’s selection to prepare the EA followed CEQ regulations. *See* 40 C.F.R. §
7 1506.5(b) (permitting an agency to select a third party to prepare an EA). There
8 are no express incentives or guarantees of future work noted in the contract, which
9 are the hallmarks of an express conflict of interest. *See* Guidance Regarding
10 NEPA Regulations, 48 Fed. Reg. 34263, 34266 (Council on Env’tl. Quality July 28,
11 1983); AR 124208–66. Nonetheless, Alliance insists that it was in everyone’s best
12 interest for Cramer to avoid finding a significant environmental impact because
13 Vaagen Brothers already had been awarded the 10-year stewardship contract, and a
14 finding of significant impact would mean conducting a lengthy EIS, which Cramer
15 was not authorized to make and for which Vaagen Brothers would not want to pay.
16 ECF No. 104 at 8–9. However, this argument is speculative at best. Alliance
17 admits that the current arrangement is permissible under CEQ regulations, but only
18 becomes impermissible if the project required making an EIS. *Id.* Without
19 submitting any evidence supporting that the parties purposely avoided finding a
20 significant impact, Alliance’s claim does not stand.

21 Second, the Forest Service Handbook’s guidance does not support that a

1 conflict of interest exists. The Handbook states that the Forest Service should not
2 use stewardship contracts for environmental analysis, including NEPA analysis.
3 United States Forest Service, Forest Service Handbook § 61.21 Ex. 01 3(a) (2008)
4 (“FSH”). However, the FSH does not have the force and effect of law. *W. Radio*
5 *Servs. Co., Inc. v. Espy*, 79 F.3d 896, 902 (9th Cir. 1996). As stated in *Espy*, the
6 FSH governs procedure rather than substance, and it was not created under the
7 APA or other congressional authority. *Id.* As such, the FSH policies do not
8 support the existence of a conflict of interest.

9 Alliance’s third conflict of interest argument is that splitting the A to Z
10 Project into North Fork and Middle/South Fork created a guarantee or promise of
11 future work, which created an inherent conflict of interest. This argument fails for
12 a number of reasons. First, the conflict of interest analysis, including any promises
13 of future work or employment, only applies when an EIS is created. Under the
14 CEQ regulations, the only mention of avoiding conflicts of interest comes in 40
15 C.F.R. § 1506.5(c), when the regulations discuss a third party creating an EIS. 40
16 C.F.R. § 1506.5(c). The subsection discussing EAs makes no mention of conflicts
17 of interest. *See* 40 C.F.R. § 1506.5(b). CEQ’s guidance on these regulations
18 supports this conclusion. *See* Guidance Regarding NEPA Regulations, 48 Fed.
19 Reg. 34263, 34266 (Council on Env’tl. Quality July 28, 1983) (discussing how §
20 1506.5(c), not (b), prohibits any work by a third party with guarantees of future
21 work).

1 Even though the conflict of interest portion of the CEQ regulations only
2 concern a third party creating an EIS, to any extent that they can be construed to
3 also apply to a third party creating an EA, Alliance's argument still fails. Alliance
4 does not allege that Cramer was guaranteed any future work in the A to Z Project,
5 but rather that the implication of future work existed when the project was split
6 into North Fork and Middle/South Fork. ECF No. 112 at 25–27. This does not
7 create an inherent conflict of interest, as the regulations only prohibit contracts
8 with explicit clauses that guarantee future work or incentives in the outcome of the
9 project. *See* Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34266
10 (Council on Env'tl. Quality July 28, 1983) (“if the contract for EIS preparation does
11 not contain any incentive clauses or guarantees of any future work on the project, it
12 is doubtful that an inherent conflict of interest will exist”). Alliance's claim that
13 Cramer, Vaagen Brothers, and the Forest Service all implicitly understood that
14 Cramer was guaranteed future work contingent on the outcome of the North Fork
15 EA is too speculative and unsupported to survive summary judgment.

16 Alliance's final argument is that the Forest Service's failure to oversee the
17 environmental review failed to cure the conflicts of interest in this case. Although
18 the Court finds that there was no conflict of interest, even if there was a conflict of
19 interest, the Forest Service's oversight here cured any effect a potential conflict of
20 interest would have had on the environmental review. Beginning in February of
21 2014, Cramer provided the Forest Service with biweekly progress reports on the

1 North Fork EA until it completed the EA in early 2016. *See* ECF No. 107 at 2–10.
2 During this reporting period, the Forest Service repeatedly provided feedback on
3 the EA, which Cramer implemented into the final EA and FONSI. *Id.* This is the
4 type of oversight that ensures the objectivity and integrity of the NEPA process,
5 even if a conflict of interest existed among the parties. *See Ass’ns Working for*
6 *Aurora’s Residential Env’t*, 153 F.3d at 1129.

7 Alliance maintains that the Forest Service’s oversight does not cure any
8 potential conflicts of interest because Vaagen Brothers was still involved in the
9 NEPA analysis, even though it promised not to get involved. ECF No. 112 at 29–
10 30. Even if Vaagen Brothers did go beyond the terms of the contract regarding
11 communication with Cramer on its NEPA work, there is no evidence submitted
12 that the communication violated any identified NEPA provisions or regulations.

13 Alliance did not show a conflict of interest in this case. Even if its evidence
14 had supported a conflict of interest, which the Court does not find, the Forest
15 Service’s oversight on the North Fork EA cured any potential conflict of interest.
16 Therefore, the Court finds that there was no violation of NEPA provisions or
17 regulations. Substantial evidence supports the Forest Service’s finding that there
18 was no conflict of interest issues in the A to Z Project. *See Cachil Dehe Band of*
19 *Wintun Indians*, 889 F.3d at 608 (holding agency’s determination of no conflict of
20 interest should be upheld unless the determination lacks substantial evidence to
21 support it).

1 *Separating the Mill Creek Project into Two Parts*

2 Alliance argues that Defendants avoided finding a significant environmental
3 impact by improperly separating the A to Z Project into two parts: North Fork and
4 Middle/South Fork. ECF No. 104 at 11–14. Defendants argue that the different
5 sections have independent utility and are separated in time such that a single
6 environmental analysis would be impractical. ECF No. 106 at 5–9; ECF No. 111
7 at 24–26.

8 NEPA regulations require that an agency create a single NEPA review
9 document if multiple projects are connected, cumulative, or similar. 40 C.F.R. §
10 1508.25. “Significance cannot be avoided by terming an action temporary or by
11 breaking it down into small component parts.” *Id.* § 1508.27(b)(7). To prevail on
12 a claim that an agency improperly segmented a project into multiple environmental
13 analyses, the plaintiff must show that the agency was arbitrary and capricious in
14 failing to prepare a single environmental analysis. *Kleppe v. Sierra Club*, 427 U.S.
15 390, 412 (1976). The identification of the geographic area in which an
16 environmental analysis is conducted “is a task assigned to the special competency
17 of the appropriate agencies.” *Id.* at 414.

18 When faced with a claim that an agency improperly segmented a greater
19 project into multiple smaller projects to avoid a finding of significant
20 environmental impact, the court first looks to see whether the proposed multiple
21 projects are connected. 40 C.F.R. § 1508.25. In this context, the Ninth Circuit

1 defines “connected” in the negative. *See Pac. Coast Fed. Of Fishermen’s Ass’ns v.*
2 *Blank*, 693 F.3d 1084, 1098 (9th Cir. 2012). If two projects would have occurred
3 without the other, then the projects have “independent utility,” and are not
4 considered connected. *Id.*

5 Alliance does not argue that the North and Middle/South Fork projects are
6 connected. *See* ECF No. 112 at 6–7 (stating that, while the North and
7 Middle/South Fork projects have independent utility, they still may be cumulative
8 actions). Therefore, there is no support that these actions are connected.

9 If two projects are not connected, they still must be analyzed in a joint
10 environmental analysis if they are cumulative. 40 C.F.R. § 1508.25.

11 “Cumulative” projects are those “which when viewed with other proposed actions
12 have cumulatively significant impacts and should therefore be discussed in the
13 same impact statement.” 40 C.F.R. § 1508.25(a)(2). Projects are cumulative when
14 the projects “raise substantial questions that they will result in significant
15 environmental impacts.” *Blue Mountains Biodiversity Project v. Blackwood*, 161
16 F.3d 1208, 1215 (9th Cir. 1998). Important factors to consider in determining
17 when projects are “cumulative” include whether the actions are a part of the same
18 overall project, are announced simultaneously, are reasonably foreseeable, and are
19 located in the same watershed. *Id.* If the details of one project are unknown when
20 the other project is undergoing environmental analysis, the actions are likely not
21 cumulative. *Wetlands Action Network v. U.S. Army Corps of Eng’rs*, 222 F.3d

1 1105, 1119 (9th Cir. 2000), *overruled on other grounds by Wilderness Soc. v. U.S.*
2 *Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). “NEPA does not require the
3 government to do the impractical.” *Inland Empire Pub. Lands Council v. U.S.*
4 *Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996).

5 There are some factors present in this case that weigh in favor of finding that
6 the two projects are cumulative. Similar to *Blue Mountains*, in which the Ninth
7 Circuit found that five separate timber sale projects were cumulative: the two
8 projects here are a part of the same overall project; were sold to the same
9 contractor at the same time; and are adjacent to each other in the same forest with a
10 single forest plan. *See Blue Mountains*, 161 F.3d at 1215. However, there are
11 several factors weighing in favor of analyzing the projects in separate
12 environmental review documents. The two project areas are separated by a
13 ridgeline with few overlapping roads or access points. ECF No. 114 at 3.
14 Additionally, the two project areas have different creek and stream drainage areas;
15 will proceed on different timelines; and the specifics about the Middle/South Fork
16 project, including the timber harvesting areas and other relevant information, had
17 not yet been identified when work on the North Fork project began. *Id.* at 4.
18 Requiring the Forest Service to analyze both of these projects together when key
19 components of the Middle/South Fork Project had not yet been identified asks the
20 government to do the impractical. *See Inland Empire*, 88 F.3d at 764.

21 Alliance claims that it raises substantial questions because the combined

1 projects' acreage is more than triple the size of the North Fork project; the total
2 mileage of roads is doubled by combining the two; and the combined volume of
3 timber to be harvested is unknown. ECF No. 112 at 7. However, it is unclear how
4 these facts raise substantial questions about the environmental impact that a joint
5 environmental review document would show. *Blue Mountains*, 161 F.3d at 1215.
6 Alliance's arguments do not raise "substantial questions" that a joint EA for the
7 North and Middle/South Fork Projects will result in a finding of significant
8 environmental impact. *Id.*

9 The Court does not find that Defendants acted arbitrarily or capriciously
10 when they split the Mill Creek Project into the North Fork and Middle/South Fork
11 segments, thereby treating the actions as not connected, cumulative, or similar.³
12 Defendants did not act arbitrarily, capriciously, or contrary to law when they split
13 the A to Z Project into two separate projects.

14 ***Law of the Case***

15 Defendants argue that the rest of Alliance's claims regarding sedimentation
16 and furbearers are barred by the law of the case established by the Ninth Circuit's
17 decision on Alliance's Motion for Preliminary Injunction. ECF No. 111 at 26–29.

18 _____
19 ³ Alliance does not argue that the two projects are "similar," so the Court will not
20 analyze whether the projects are similar. The Court notes that under Ninth Circuit
21 precedent cumulative or connected actions require a comprehensive environmental
analysis, but similar actions do not. *See Earth Island Inst. v. U.S. Forest Serv.*, 351
F.3d 1291, 1306 (9th Cir. 2003).

1 Alliance argues that the law of the case does not apply because the appellate
2 decision was on a motion for preliminary injunction, and generally preliminary
3 injunction decisions have no effect on the outcomes of a case. ECF No. 112 at 3.

4 The law of the case doctrine prohibits a court from “reconsider[ing] an issue
5 that has already been decided by the same court or a higher court in the same
6 case.” *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012). The doctrine
7 applies to all questions decided explicitly or implicitly. *Herrington v. Cty. of*
8 *Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993). The law of the case doctrine does not
9 apply when the first decision is clearly erroneous; there is an intervening change in
10 the law; the evidence on remand is substantially different; other changed
11 circumstances exist; or a manifest injustice would otherwise result. *United States*
12 *v. Renteria*, 557 F.3d 1003, 1006 (9th Cir. 2009). The general rule is that an
13 appellate court’s decision on a preliminary injunction motion does not constitute
14 law of the case. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of*
15 *Am. v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007). Nonetheless, any
16 decisions on pure issues of law are binding. *Id.* “A fully considered appellate
17 ruling on an issue of law made on a preliminary injunction appeal . . . does become
18 the law of the case for further proceedings in the trial court on remand and in any
19 subsequent appeal.” 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice*
20 *and Procedure* § 4478.5 (2002).

21 Here, the evidence supporting Alliance’s Motion for Summary Judgment is

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1 not substantially different from the evidence that Alliance used to support its
2 Motion for Preliminary Injunction. The Statements of Facts submitted by Alliance
3 and the Forest Defendants rely solely on the administrative record, which this court
4 and the reviewing court had access to when they previously ruled on the motion for
5 a preliminary injunction. *See* ECF Nos. 104-1 & 107. Given the lack of new
6 evidence presented to the Court, the Ninth Circuit’s ruling on the remaining claims
7 about sedimentation and furbearers constitute the law of the case.

8 Alliance claims that the current issue is a mixed question of law and fact,
9 citing *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075 n.5 (9th Cir. 2015). In
10 *Stormans*, the Ninth Circuit declined to apply the law of the case on an appeal from
11 a district court bench trial, following the Ninth Circuit’s decision to vacate the
12 district court’s order granting preliminary injunction, stating that the Ninth
13 Circuit’s review from the bench trial presented a mixed question of law and fact.

14 *Id.*

15 Because this case is a challenge to agency action under the APA, the district
16 court does not serve as the fact finder. “Rather, the court’s review is limited to the
17 administrative record,” to which the parties usually stipulate. *Nw. Motorcycle*
18 *Ass’n*, 18 F.3d at 1472. Because a complete administrative record accompanies
19 motions on administrative claims, prior rulings constitute the law of the case,
20 absent new evidence previously unconsidered by the appellate court. *See Leslie*
21 *Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir. 1995) (holding that prior

1 decisions on APA claims were binding as the law of the case). “[T]he function of
2 the district court is to determine whether or not as a matter of law the evidence in
3 the administrative record permitted the agency to make the decision it did.”

4 *Occidental Eng’g Co. v. Immigration and Naturalization Serv.*, 753 F.2d 766, 769–
5 70 (9th Cir. 1985).

6 When reviewing Alliance’s Motion for Preliminary Injunction using the
7 administrative record, the Ninth Circuit concluded that Alliance’s arguments
8 regarding the sedimentation analysis and its cumulative effects, the use of the pine
9 marten’s habitat as a proxy for its viability (“habitat as proxy” approach), and the
10 use of the pine marten as a proxy for the fisher (“proxy-on-proxy” approach), did
11 not raise serious questions as to Defendant’s compliance with NEPA and NFMA.
12 *See All. For the Wild Rockies v. Pena*, 865 F.3d 1211 (9th Cir. 2017); ECF No. 92.

13 Now, using the same administrative record and presenting the same arguments,
14 Alliance asks this Court for summary judgment, arguing that this is a mixed
15 question of law and fact. ECF No. 112 at 3. However, courts review and rule on
16 administrative claims as a matter of law. *See Occidental Eng’g Co.*, 753 F.2d at
17 769–70. The same administrative record has supplied this Court with the facts
18 needed to rule on the prior motion for preliminary injunction and the present
19 motions for summary judgment. It is the same record used by the Ninth Circuit
20 when ruling on Alliance’s appeal of the motion for preliminary injunction. The
21 evidence is not substantially different. *Renteria*, 557 F.3d at 1006. Therefore,

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1 there is no new evidence presented to this Court that was previously unconsidered
2 in the preliminary injunction phase, and the Ninth Circuit’s decision, which were
3 rulings on issues of law, are binding as the law of the case. *See Leslie Salt Co.*, 55
4 F.3d at 1393.

5 Nevertheless, the Court will analyze the rest of Alliance’s claims on the
6 merits in order to develop a full and complete record for appellate review.

7 ***Sedimentation Claims***

8 Alliance claims the EA and FONSI failed to consider the project’s overall
9 impact on the fish-bearing streams in the project area, arguing the increased
10 sediment levels will negatively impact the streams’ fish populations. ECF No. 104
11 at 14–24. Alliance specifically claims that Defendants impermissibly relied on the
12 net decrease of sediment levels to reach their conclusions, failing to address the
13 short-term effects of a rapid increase in sediment levels at the beginning of the
14 project. *Id.* Alliance also claims that the EA did not adequately address the
15 cumulative impact of the project on sediment in both the North Fork and
16 Middle/South Fork areas. *Id.* Last, Alliance claims the selection of and focus on
17 stream “hot spots” resulted in an uninformed agency decision regarding the
18 sediment level impacts. ECF No. 112 at 12–15. Defendants claim that Alliance
19 misconstrues the impact that the project will have on the sedimentation levels and
20 argue that the project will improve sediment levels in both the short and long
21 terms. ECF No. 106 at 9–15; ECF No. 111 at 29–32.

1 Starting with the overall impact argument that Alliance makes, it is true that
2 “[a] significant effect may exist even if the Federal agency believes that on balance
3 the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1). However, the agency
4 can still consider and rely on mitigation measures in finding no significant
5 environmental impact. *See Friends of the Payette v. Horseshoe Bend*
6 *Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993). “[S]o long as significant
7 measures are undertaken to ‘mitigate the project’s effects,’ they need not
8 *completely compensate* for adverse environmental impacts.” *Friends of the*
9 *Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985) (emphasis
10 in original) (quoting *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th
11 Cir. 1982)).

12 Here, Alliance is correct in saying that the project will cause both a
13 significant decrease and significant increase in sediment in the streams at different
14 times. AR 100029. However, as the Hydrology Report states, the sediment
15 reduction benefits from road restoration and maintenance occur first, before the
16 stream sediment levels are increased by logging, hauling, and burning. *Id.* This
17 means, as the EA found, that the sediment levels will be at a net decrease at all
18 times throughout the project, which supports the Defendants’ FONSI.

19 For similar reasons, the argument that Alliance makes regarding the hot spot
20 locations is without merit. Alliance argues that the five “hot spot” locations
21 chosen for monitoring for sediment impact during the A to Z Project will not

1 mitigate significant environmental impacts to several fish-bearing streams. ECF
2 No. 112 at 8. According to Alliance, the “hot spot” strategy fails to find the
3 complete impact on sediment levels in the project area. *Id.* Defendants recognized
4 in the Hydrology report that “there are other road segments where additional
5 projects could be implemented, albeit with less benefit.” AR 099888.
6 Nevertheless, these five hot spots represented the “best sediment reduction
7 opportunities” because “the targeted roads [*sic*] segments delivered large amounts
8 of sediment.” AR 100018. While Alliance may raise objections to this mitigation
9 strategy, the record shows that the hot spot strategy should help Defendants lower
10 the sediment levels in the A to Z Project area. *See Friends of the Endangered*
11 *Species*, 760 F.2d at 987. Therefore, Alliance has failed to show a significant
12 environmental impact.

13 Alliance argues that the Forest Service’s consideration of net decrease in
14 sediment levels was a factor that Congress did not intend for it to consider, as
15 evidenced by the text of 40 C.F.R. § 1508.27(b)(1). Alliance is correct in saying
16 that an agency acts arbitrarily and capriciously when it considers a factor that
17 Congress did not intend for it to consider. *See Motor Vehicle Mfrs. Ass’n of U.S.,*
18 *Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). However,
19 Alliance’s argument fails for two reasons. First, these regulations were
20 promulgated by the Council on Environmental Quality, an executive agency, and
21 not by Congress. Second, section 1508.27(b)(1) does not state that an agency

1 cannot consider overall mitigation or net benefit data, but rather that a significant
2 impact can exist even if the overall effect is a net benefit. 40 C.F.R. §
3 1508.27(b)(1). Thus, the Court concludes that the Forest Service did not act
4 arbitrarily and capriciously when relying on the sedimentation net decrease as a
5 factor in its FONSI.

6 Alliance also claims that the sedimentation analysis failed because it did not
7 address the cumulative sedimentation impact in the North Fork and Middle/South
8 Fork projects together. ECF No. 104 at 21–24. An agency must consider
9 cumulative impacts in a NEPA review. 40 C.F.R. § 1508.25(c)(3). “Cumulative
10 impact is the impact on the environment which results from the incremental impact
11 of the action when added to other past, present, and reasonably foreseeable future
12 actions regardless of what agency . . . or person undertakes such other actions.
13 Cumulative impacts can result from individually minor but collectively significant
14 actions taking place over a period of time.” 40 C.F.R. § 1508.7. To consider
15 cumulative impacts, “some quantified or detailed information is required,” and
16 mere general statements about possible effects or risks caused by the project do not
17 constitute the “hard look” that agencies must employ. *Neighbors of Cuddy*
18 *Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379–80 (9th Cir. 1998). But if the
19 determination on cumulative impact is “fully informed and well considered,” the
20 court will defer to the agency’s finding. *Ocean Advocates v. U.S. Army Corps of*
21 *Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2005).

1 The North Fork EA included an analysis on the cumulative impacts in both
2 its own project area, and the known impacts on the project area for the
3 Middle/South Fork project, even though less was known about that project when
4 the North Fork EA was being prepared. It considers sediment delivery, stream
5 flow, water quality, soil productivity, fish, special status wildlife, snags and down
6 wood, big game winter range, special status plants, dispersed recreation, and visual
7 quality. *See* AR 104563–673. All of this information meets the “quantified or
8 detailed information” required by NEPA regulations. *See Neighbors of Cuddy*
9 *Mountain*, 137 F.3d at 1379–80. Nonetheless, Alliance maintains that the
10 consideration of cumulative effects was inadequate. ECF No 112 at 22–23.

11 While Alliance may be dissatisfied with the agency’s conclusion in this case,
12 the Court will not reverse a well-informed agency decision when the decision falls
13 within the agency’s expertise and its path to that decision is reasonably discerned.
14 *Nat’l Ass’n of Home Builders*, 551 U.S. at 658. Additionally, Defendants included
15 information about the Middle/South Fork Project that was reasonably known and
16 available at the time that the EA was prepared. The Court will not require the
17 agency to do the impractical, and here, it would be impractical for Defendants to
18 include detailed information on the Middle/South Fork Project when less was
19 known about the specifics of that project at the time that the North Fork EA was
20 being prepared. *See Inland Empire*, 88 F.3d at 764.

21 The Court concludes that Alliance has failed to raise a genuine issue of
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1 material fact that Defendants’ analysis of the impact on sedimentation in the A to Z
2 Project area was arbitrary, capricious, or contrary to law.

3 ***Claims Regarding Impacts on Furbearers***

4 Alliance claims that Defendants violated NEPA and NFMA by failing to
5 take a hard look at the overall effects the A to Z Project would have on furbearers,
6 specifically the pine marten and fisher. ECF No. 104 at 24–36. Defendants argue
7 that the EA adequately addressed the impact that the project would have on
8 furbearers. ECF No. 106 at 16–26; ECF No. 111 at 32–34.

9 ***A. Monitoring of Pine Marten***

10 Alliance argues that the use of the pine marten as a proxy both for mature-
11 to-old growth habitats and the furbearer fails as a matter of law, and that the EA’s
12 attempt to address the impact on pine marten is inadequate and does not comport
13 with the Colville Forest Plan. ECF No. 104 at 30–34. Defendants argue that the
14 use of the pine marten as an indicator species is reasonable, and that the agency
15 should be given discretion in this area. ECF No. 106 at 16–20; ECF No. 111 at 33.

16 It is common practice under NFMA and NEPA to rely on certain habitats or
17 species as “proxies” for other species as a way to monitor those habitats and
18 species in fulfilling the requirements of a forest plan. *See Friends of the Wild*
19 *Swan v. Weber*, 767 F.3d 936, 949 (9th Cir. 2014). Using a species’ preferred
20 habitat as an indicator of the viability of the species itself is called the habitat as a
21 proxy approach. *The Lands Council v. McNair*, 537 F.3d 981, 996–97 (9th Cir.

1 2008), *overruled on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555
2 U.S. 7 (2008). Using a species as an indicator for another species is called the
3 proxy on proxy approach. *Friends of the Wild Swan*, 767 F.3d at 949. Proxy
4 approaches are permissible if they reasonably ensure accurate results. *Id.*; *Sporting*
5 *Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 972 (9th Cir. 2002). If the proxy results
6 do not mirror reality, the Forest Service cannot rely on proxies to monitor species
7 or habitats. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d
8 1059, 1066 (9th Cir. 2004).

9 Alliance relies heavily on one Ninth Circuit case to support its argument that
10 the pine marten monitoring strategies employed here are arbitrary and capricious.
11 In *Native Ecosystems Council v. Tidwell*, the Ninth Circuit held that the “proxy-on-
12 proxy approach’s reliability is questionable where the [management-indicator
13 species] is absent from the project area.” 599 F.3d 926, 933 (9th Cir. 2010).
14 Because the pine marten has been absent from the project area for a number of
15 years, Alliance argues that the analysis of the A to Z Project’s effect on the pine
16 marten is inadequate and must be revisited to evaluate significance. ECF No. 104
17 at 32–34.

18 However, this argument was already rejected by the Ninth Circuit. The
19 Ninth Circuit found that the Colville Forest Plan does not actually require
20 population monitoring of the pine marten. *Pena*, 865 F.3d at 1218. Additionally,
21 “absence of the management indicator species on the project site does not

1 necessarily invalidate a proxy analysis.” *Id.* at 1219. Under *Tidwell*, the Ninth
2 Circuit explained, a proxy analysis is inappropriate when (1) the management
3 indicator species is absent from the area; (2) the species is not difficult to monitor;
4 and (3) a flaw in the Forest Service’s analysis invalidated the proxy approach. *Id.*

5 Using the *Tidwell* factors, the Ninth Circuit found that, despite the pine
6 marten’s absence from the project area, the proxy analysis was still permissible
7 under NEPA and NFMA. *Id.* First, there were still some reported pine marten
8 sightings in other parts of the Colville National Forest, albeit outside the project
9 area. *Id.* Second, the EA implied that the pine marten was difficult to detect,
10 proving that it was permissible to resort to a proxy-monitoring method instead of
11 direct monitoring. *Id.* Third, Alliance was unable to show a flaw in the Forest
12 Service’s pine marten monitoring techniques or analysis that would undermine the
13 Forest Service’s decision to use a proxy monitoring approach. *Id.* For these
14 reasons, the Ninth Circuit found the pine marten proxy analysis permissible. *Id.*

15 While this Court is analyzing the merits of Alliance’s claims,
16 notwithstanding the law of the case created by the Ninth Circuit’s order on
17 Alliance’s motion for preliminary injunction, Alliance presents the same proxy
18 argument here that it did to the Ninth Circuit. ECF No. 104 at 30–34. It relies on
19 the same case, *Tidwell*, and argues again that the Forest Service’s use of the pine
20 marten as a proxy was improper and that its other monitoring efforts were
21 inadequate. *Id.*; ECF No. 112 at 33–44. The Court is not persuaded by Alliance’s

1 arguments that already were rejected by the Ninth Circuit. Therefore, the Court
2 finds that Alliance’s claims regarding the pine marten and proxy monitoring
3 approaches fail as a matter of law.

4 ***B. Impact on Fisher***

5 In some ways similar to its claims involving the pine marten, Alliance
6 argues that the EA’s analysis regarding the project’s impact on the fisher, also a
7 furbearer, was inadequate, and that the project’s impact on the fisher is unknown.
8 ECF No. 104 at 24–30. Under NFMA, Alliance claims the monitoring of the fisher
9 violates the Colville Forest Plan because the fisher’s habitat is significantly
10 different from the pine marten’s habitat. *Id.* at 24–30, 34–36. Under NEPA,
11 Alliance argues that Defendants need to take a “hard look” at the effects that the
12 project will have on the fisher. *Id.* at 26–27. Defendants contend that the fisher
13 was adequately accounted for in the EA, arguing that they have met the
14 requirements of both NEPA and NFMA. ECF No. 106 at 16–23; ECF No. 111 at
15 33–34.

16 First, Alliance’s objection to Defendants’ use of a “proxy as proxy”
17 approach to monitor fishers fails as a matter of law. This argument already was
18 rejected by the Ninth Circuit. *Pena*, 865 F.3d at 1219–20. Second, Alliance
19 argues that the pine marten is not an appropriate proxy for the fisher because the
20 fisher’s habitat is different from the pine marten’s habitat. ECF No. 104 at 25–26.

21 But as Defendants point out, the studies relied upon in the EA, and Alliance in its

1 arguments, show that the fisher and marten's preferred habitats are substantially
2 similar. ECF No. 106 at 17–18 (finding that fishers' preferred elevation and the
3 project area elevation are similar), 18–19 (finding both the fisher and the marten
4 prefer mature and old growth in trees of moderate to high elevation). And while
5 the fisher may require larger ranges than the marten altogether, this does not
6 change the two furbearers' preference for mature to old growth. The Court
7 concludes that Alliance failed to raise a genuine issue of material fact that
8 Defendants acted arbitrarily and capriciously, or failed to give a hard look to the
9 effect on the fisher.

10 Last, Alliance claims that, under the Colville Forest Plan, the fisher is a
11 species that needs to be monitored on its own, rather than using the pine marten as
12 a proxy. ECF No. 104 at 28–30. The part of the Forest Plan on which Alliance
13 relies sets out certain factors that led the Forest Service to designate species as
14 proxies for other species, like the pine marten is to the fisher. *Id.* at 28. The
15 management indicator species factors include endangered animal species; species
16 with special habitat needs; species commonly hunted or trapped; and species that
17 indicate effects on other, similar species. *Id.* However, these parts of the Forest
18 Plan do not state that species must be considered management indicator species if
19 one or more of these factors are met, but that these factors played a role in the
20 Forest Service's designation process. *Id.*

21 The Court rejects Alliance's challenge regarding the Colville Forest Plan for

1 not designating the fisher as an indicator species, because the time for challenging
2 the Colville Forest Plan has long passed. The Colville Forest Plan was adopted in
3 1988. The time for challenging the Forest Plan ended in 1994. 28 U.S.C. §
4 2401(a).

5 Alliance cites *Neighbors of Cuddy Mountain v. Alexander* to prove that it
6 does not challenge the Forest Plan in its argument that the fisher should be its own
7 management indicator species. 303 F.3d 1059 (9th Cir. 2002). In *Alexander*, the
8 plaintiffs appealed from a district court order dismissing its complaint because the
9 district court concluded that their claims were not ripe under the APA because they
10 failed to challenge final agency actions. *Id.* at 1066–67. Plaintiffs challenged a
11 timber sale on national forest land in Idaho under NFMA, NEPA, and the APA.
12 *Id.* at 1061. The Ninth Circuit reversed the district court’s ruling, finding that the
13 plaintiffs did challenge final agency action because “[w]here the Forest Service
14 generally fails to comply with NFMA and the governing Forest Plan . . . this Court
15 has power, under the APA, to review the [action] and conclude that its approval
16 was unlawful.” *Id.* at 1067.

17 *Alexander* is distinguishable and thus is not controlling. *Alexander* involved
18 a ripeness challenge by the defendants, under the doctrine articulated in *Lujan v.*
19 *Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990) stating that plaintiffs cannot challenge
20 actions for violating NFMA or a Forest Plan unless it is connected to a specific sale
21 or project. *Alexander*, 303 F.3d at 1067. Here, Alliance’s claim regarding the

1 fisher is different from the claims in *Alexander*. Alliance argues that the Forest
2 Service violated the Colville Forest Plan by failing to designate the fisher as a
3 species that needs to be monitored on its own, rather than through the pine marten
4 as an indicator species. ECF No. 104 at 28. Alliance supports its argument with
5 the factors that the Forest Service considered when identifying indicator species for
6 the Colville Forest Plan when the plan was first created. *Id.* Using these factors,
7 Alliance argues that the fisher meets the criteria to be a species monitored on its
8 own, and thus a failure to monitor the fisher on its own violates the Colville Forest
9 Plan. *Id.*

10 However, in making this argument, Alliance challenges the monitoring
11 strategies set by the Colville Forest Plan. When Defendants analyzed the potential
12 environmental impact on the fisher using the pine marten as a proxy, they followed
13 the monitoring strategies imposed by the Colville Forest Plan. To argue that
14 Defendants should have monitored the fisher on its own, using the factors the
15 Forest Service considered in creating the Forest Plan over twenty years ago, is an
16 untimely challenge to the Forest Plan. These arguments are far different than the
17 arguments the plaintiffs made in *Alexander*, in which the plaintiffs argued that the
18 Forest Service failed to follow the terms of the forest plan implicated in that case.
19 *Alexander*, 303 F.3d at 1061. Here, Alliance wants this Court to conclude that
20 Defendants acted improperly by not updating the Forest Plan based on factors the
21 Forest Service considered in creating the fisher's monitoring strategy years ago.

1 ECF No. 104 at 28. Alliance therefore challenges the Forest Plan, which is
2 untimely.

3 The Court concludes that Alliance failed to raise a genuine issue of material
4 fact that Defendants acted arbitrarily and capriciously regarding the furbearer
5 analysis under NEPA and NFMA.

6 ***Abandoned Claims***

7 Alliance did not attempt to argue or preserve other claims from its amended
8 complaint. ECF No. 100. The other claims not mentioned in this current motion
9 for summary judgment include claims regarding the effects on or involving
10 grazing; climate change; cavity excavators; northern goshawk; wolverines; big
11 game habitat; and soil productivity. *Id.* The Forest Service Defendants argue in
12 their Motion for Summary Judgment that Alliance's failure to address the above-
13 mentioned claims constitutes a waiver of those claims. ECF No. 106 at 38.

14 Alliance did not respond to the allegation that it waived these claims. *See* ECF No.
15 112.

16 When a plaintiff fails to respond to arguments in a motion for summary
17 judgment, the plaintiff is considered to have abandoned those claims. *Jenkins v.*
18 *Cty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005); *see also Grenier v.*
19 *Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995). Further, the failure to
20 respond to arguments in motions may be deemed consent to the entry of an adverse
21 order. LR 7.1(d). By failing to assert or defend its remaining claims, Alliance

1 waived the rest of its claims in its Amended Complaint.

2 **CONCLUSION**

3 The Court grants summary judgment to Defendants on all of Alliance's
4 claims. Alliance's claims are dismissed with prejudice.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment, **ECF No. 103**, is **DENIED**.

7 2. Defendants Jim Pena, Rodney Smoldon, and the United States Forest
8 Service's Cross Motion for Summary Judgment, **ECF No. 106**, is

9 **GRANTED**.

10 3. Intervening Defendants Northeast Washington Forestry Coalition, Pend
11 Oreille County, and Stevens County's Cross Motion for Summary
12 Judgment, **ECF No. 111**, is **GRANTED**.

13 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
14 Order, provide copies to counsel, **enter judgment for all Defendants**, and **close**
15 **this case**.

16 **DATED** October 2, 2018

17 *s/ Rosanna Malouf Peterson*
18 ROSANNA MALOUF PETERSON
19 United States District Judge
20
21