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

Center for Biological Diversity, et al.,  
Plaintiffs,  
v.  
Randy Moore, et al.,  
Defendants.

No. CV-22-00412-TUC-JAS (AMM)  
**REPORT AND RECOMMENDATION**

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Plaintiffs Center for Biological Diversity (“CBD”), the Maricopa Audubon Society, and the Mount Graham Coalition (collectively, “Plaintiffs”), brought this action against Defendants Randy Moore, Chief of the United States Forest Service (“USFS”), Martha Williams, Director of the United States Fish and Wildlife Service (“FWS”), Tom Vilsack, Secretary of the United States Department of Agriculture, and Deb Haaland, Secretary of the United States Department of the Interior, pursuant to the Endangered Species Act (“ESA”) and Administrative Procedure Act (“APA”).<sup>1</sup> (Doc. 1.) Plaintiffs filed a Motion for Summary Judgment (docs. 129, 130), to which Defendants responded and filed a Cross-Motion for Summary Judgment (docs. 133, 134). Plaintiffs filed a Response to Defendants’ Cross-Motion and a Reply. (Docs. 136, 137.) Defendants filed a Reply to their Cross-Motion. (Doc. 140.) The matter was referred to Magistrate Judge Angela M. Martinez for pretrial proceedings. (Doc. 128.)

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<sup>1</sup> The Defendants are sued in their official capacities as the individuals responsible for overseeing the federal agency actions challenged in this lawsuit. (Doc. 1 ¶¶ 14-17.)

## I. Introduction

This action challenges two Biological Opinions (“BiOps”) and Incidental Take Statements (“ITSs”) prepared by FWS pursuant to Section 7 of the ESA. (*See* Doc. 134 at 3.) The BiOps and ITSs evaluate the effects on the endangered Mount Graham red squirrel (“MGRS” or “the squirrel”) of the proposed actions of re-issuing Special Use Permits (“SUPs”) for two recreational sites on Mount Graham: (1) 14 summer homes, known as the “Cabins” and (2) an organizational summer camp, known as the “Camp.” (Doc. 134 at 1; doc. 130 at 9.) In Count One, Plaintiffs allege that FWS violated the ESA and the APA by determining that re-issuance of the Cabins and Camp SUPs would not jeopardize the squirrel’s survival or recovery prospects. (Doc. 1 at ¶ 85.) Specifically, Plaintiffs claim the Cabins and Camp BiOps and ITSs should be set aside and remanded for (1) failing to identify the squirrel’s survival and recovery needs, i.e., its “tipping point;” (2) incorrectly evaluating the squirrel’s population and environmental baselines; (3) failing to rely on the best available scientific evidence; and (4) failing to provide a clear trigger for re-initiating consultation. (Doc. 1 at ¶¶ 85-94.) In Count Two, Plaintiffs allege that USFS violated the ESA by relying on the Cabins BiOp to authorize the SUP for the Cabins. (Doc. 1 at ¶ 96.)

As discussed below, the Court finds that (1) the Cabins BiOp complies with the ESA and APA; (2) the Camp BiOp lacks a rational basis for its no-jeopardy finding and thus violates the ESA and APA; and (3) the ITSs for both the Cabins and Camp lack a clear standard for when take has been exceeded, and therefore violate the ESA and APA. Accordingly, the Court recommends that Plaintiffs’ Motion for Summary Judgment be granted in part and denied in part, and Defendants’ Cross-Motion for Summary Judgment be granted in part and denied in part.

## II. Procedural Background

In 2008, USFS and FWS completed a consultation and BiOp pursuant to Section 7 of the ESA for the proposed re-issuance of the SUP for the Cabins for the period from January 1, 2009, through December 1, 2028. (Doc. 134 at 14.) The 2008 BiOp concluded that continued use of the Cabins was not likely to jeopardize the squirrel’s survival. (Doc.

134 at 14.) In June 2020, Plaintiffs filed a lawsuit seeking re-initiation of the 2008 BiOp consultation for the Cabins. *See Ctr. for Biological Diversity v. Christiansen*, No. 4:20-cv-00251-BGM (D. Ariz. 2020) (docs. 19, 20). That lawsuit settled in December 2020 and USFS agreed to complete a re-initiated consultation by August 2021. (Doc. 134 at 14.) On March 31, 2021, FWS completed a renewed BiOp for the Cabins, which concluded that the Cabins' continued operation and existence through 2028 was not likely to jeopardize the squirrel's survival. (Doc. 134 at 14; doc. 122 at FS01743.) On August 9, 2021, FWS completed a BiOp for the Camp, which concluded that the Camp's continued operation and existence was not likely to jeopardize the squirrel's survival. (Doc. 134 at 14-15; doc. 123 at FS01787.) These "no-jeopardy" BiOps were amended on May 6, 2022, to incorporate additional information and further explain certain issues.<sup>2</sup> (Doc. 134 at 15; doc. 32 at FWS01221-22; FWS01161-62.) On September 13, 2022, Plaintiffs filed the instant lawsuit challenging (1) FWS's findings in the amended BiOps and (2) USFS's reliance on the Cabins BiOp. (Doc. 1.)

### 15                   **III. Factual Background**

16                   The Mount Graham red squirrel exists solely in the Pinaleno Mountains of the  
17 Coronado National Forest, in the Safford Ranger District, and was listed as an endangered  
18 species in 1987. (Doc. 130 at 12; doc. 32 at FWS01171; doc. 99 at FS01056.) In 1990,  
19 FWS designated critical habitat for the squirrel at three locations in the Pinaleno Mountains  
20 above 9,200 feet.<sup>3</sup> (Doc. 32 at FWS01171; doc. 99 at FS01056.) MGRS habitat is  
21 comprised of "mature spruce-fir and mesic mixed-conifer forest at elevations above 2,400  
22 meters [7,874 feet]." (Doc. 130 at 12; doc. 66 at FWS04365.) However, only approximately  
23 34.6 acres of spruce-fir forest remain in the Pinaleno Mountains, such that "much of MGRS  
24 critical habitat . . . no longer contains . . . dense stands of mature spruce-fir forest." (Doc.

25 \_\_\_\_\_  
26 <sup>2</sup> The amended versions BiOps are the subject of this lawsuit.

27 <sup>3</sup> In 2021, FWS stated that it would "assess potential revisions to the [squirrel's] critical  
28 habitat after a species status assessment [] and a revision of the [squirrel's] recovery plan are complete." (Doc. 130 at 13.) Revisions to the recovery plan, and thus to the critical habitat designation, have not yet been completed. (*Id.*) Thus, the 1990 designations remain in effect.

32 at FWS01171.) Therefore most, if not all, MGRS are found in lower-elevation areas outside their designated critical habitat. (Doc. 130 at 13; doc. 99 at FS01056-57; doc. 84 at FWS06379 (“Insect mortality, along with the effects of drought over the last several years, have rendered most, if not all, of the area within the boundaries of the MGRS critical habitat useless to MGRS.”).)

Human and environmental stressors have impacted the MGRS population over the last several decades. (Doc. 130 at 13-16.) In 1996, the Clark Peak Fire destroyed approximately 6,500 acres of squirrel habitat and 50 percent of middens within the burned area.<sup>4</sup> (*Id.* at 14.) The squirrel population reached approximately 550 in 2004, but that year, the Nutall-Gibson Complex Fires burned nearly 30,000 acres of the Coronado National Forest, including approximately half of the squirrel’s critical habitat. (Doc. 130 at 14-15; doc. 84 at FWS06383.) Between 2004 and 2017 the population remained relatively stable, consisting of between 200 and 350 squirrels. (Doc. 130 at 15; doc. 66 at FWS04370.) Then, in 2017, the Frye Fire burned 48,443 acres of the National Forest, including approximately 78 percent of the squirrel’s habitat. (Doc. 130 at 15; doc. 32 at FWS01169.) The Frye Fire permanently destroyed significant habitat and reduced the population to approximately 35 squirrels. (Doc. 130 at 15; doc. 66 at FWS04370, doc. 85 at FWS07360.) As of 2020, approximately 109 squirrels remain, making it the most endangered terrestrial mammal in the United States. (Doc. 130 at 12; doc. 122 at FS001752-53.)

Ongoing drought, insect outbreaks, wildfire suppression activities, competition with the non-native Abert’s squirrel, and climate change pose additional, known threats to the squirrel’s survival. (Doc. 130 at 15; doc. 84 at FWS06379; doc. 125 at FS01952-53.)

#### **IV. Legal Standard**

##### **A. Summary Judgment**

A court must grant summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

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<sup>4</sup> Middens, also referred to as “squirrel refrigerators,” are structures where squirrels cache conifer cones and fungi gathered within their territory. (Doc. 130 at 12.) As discussed below, middens are used as a proxy for estimating squirrel population.

1 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). At  
 2 summary judgment, the court’s function is not to weigh the evidence and determine the  
 3 truth but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby,*  
 4 *Inc.*, 477 U.S. 242, 248, 250 (1986). In its analysis, the court must accept the nonmovant’s  
 5 evidence and draw all inferences in the nonmovant’s favor. *Id.* at 255. The court need  
 6 consider only the cited materials, but it may consider any other materials in the record. Fed.  
 7 R. Civ. P. 56(c)(3).

8 Pure questions of law, where there is no disputed issue of fact, are appropriate for  
 9 summary judgment. *Schrader v. Idaho Dep’t of Health & Welfare*, 768 F.2d 1107, 1110  
 10 (9th Cir. 1985). “Summary judgment is a particularly appropriate tool for resolving claims  
 11 challenging agency action.” *Ctr. for Biological Diversity v. Haaland*, 562 F. Supp. 3d 68,  
 12 76 (D. Ariz. 2021) (citation omitted). In such cases the court’s role is to “determine whether  
 13 or not as a matter of law the evidence in the administrative record permitted the agency to  
 14 make the decision it did.” *Id.* (citation omitted).

### 15 **B. The Administrative Procedure Act**

16 The BiOps and accompanying ITSs are final agency actions subject to judicial  
 17 review. *Oregon Nat. Res. Council v. Allen*, 476 F.3d 1031, 1035–36 (9th Cir. 2007)  
 18 (citation omitted). Thus, the BiOps and ITSs are reviewable under the APA’s arbitrary and  
 19 capricious standard. *Id.* (citing 5 U.S.C. §§ 704, 706). Under this standard, the court must  
 20 determine “whether there is a rational connection between the facts found and the choices  
 21 made by the [federal agency] and whether it has committed a clear error of judgment.” *Id.*

22 Under the APA, an agency’s decision may be set aside if it is “arbitrary, capricious,  
 23 an abuse of discretion, or otherwise not in accordance with law.” *River Runners for*  
 24 *Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (citing 5 U.S.C. 706(2)(A)).  
 25 The standard is deferential, and the court “may not substitute its judgment for that of the  
 26 agency.” *Id.* (citation omitted). “Under the arbitrary and capricious standard, a reviewing  
 27 court must determine whether an agency’s decision was based on a consideration of the  
 28 relevant factors and whether there has been a clear error of judgment.” *Doe ex rel. Gortarez*

1 *v. Dep't of Homeland Sec.*, No. CV 09-1329-PHX-DGC, 2010 WL 3564831, at \*1 (D. Ariz.  
 2 Sept. 7, 2010) (citation omitted). “This standard is highly deferential, presuming the agency  
 3 action to be valid and affirming the agency action if a reasonable basis exists for its  
 4 decision.” *Id.* (citation omitted). Only “a rational connection between facts found and  
 5 conclusions made by defendant agencies” is required. *Friends of Santa Clara River v.*  
 6 *United States Army Corps of Engineers*, 887 F.3d 906, 920 (9th Cir. 2018) (citation and  
 7 quotation omitted). Therefore, courts will “not vacate an agency's decision unless [it] has  
 8 relied on factors which Congress has not intended it to consider, entirely failed to consider  
 9 an important aspect of the problem, offered an explanation for its decision that runs counter  
 10 to the evidence before the agency, or is so implausible that it could not be ascribed to a  
 11 difference in view or the product of agency expertise.” *Id.* (citation and quotation omitted).

### 12 **C. The Endangered Species Act**

13 Section 7(a)(2) of the ESA requires federal agencies to ensure that their actions are  
 14 not “likely to jeopardize the continued existence of” any listed endangered species or  
 15 “result in the destruction or adverse modification of habitat of such species.” 16 U.S.C. §  
 16 1536(a)(2). Agencies are required to use “the best scientific and commercial data available”  
 17 in making these determinations. *Id.* If the agency proposing the action determines that the  
 18 action may affect listed species, the agency must pursue either formal or informal  
 19 consultation with the consulting agency.<sup>5</sup> 50 C.F.R. §§ 402.13-402.14. Formal consultation  
 20 is required unless the proposed action is not likely to adversely affect listed species. 50  
 21 C.F.R. § 402.14(a). In formal consultation, the consulting agency provides the action  
 22 agency with a biological assessment that evaluates the effects of the proposed action on the  
 23 listed species and its habitat, and its current conditions. 50 C.F.R. §§ 402.12, 402.14.  
 24 Thereafter, the consulting agency prepares a BiOp for the action agency stating its expert  
 25 opinion on whether the action is likely to jeopardize any listed species. 50 C.F.R. § 402.14;  
 26 16 U.S.C. § 1536(a)(2).

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<sup>5</sup> Here, the action agency is USFS, and the consulting agency is FWS. (*See* Doc. 134 at 3.)



1 Jeopardization of a species means “to engage in an action that reasonably would be  
 2 expected, directly or indirectly, to reduce appreciably the likelihood of both the survival  
 3 and recovery of a listed species in the wild by reducing the reproduction, numbers, or  
 4 distribution of that species.” *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d  
 5 917, 930 (9th Cir. 2008) (citing 50 C.F.R. § 402.02). To “jeopardize” means to “expose to  
 6 loss or injury” or to “imperil,” and thus entails a “new risk of harm.” *Id.* at 930.  
 7 Accordingly, agency action “can only ‘jeopardize’ a species’ existence if that agency action  
 8 causes some deterioration in the species’ pre-action condition.” *Id.* “[W]here baseline  
 9 conditions already jeopardize a species, an agency may not take action that deepens the  
 10 jeopardy by causing additional harm.” *Id.*; see also *Appalachian Voices v. United States*  
 11 *Dep't of Interior*, 25 F.4th 259, 279 (4th Cir. 2022) (“[I]f a species is already speeding  
 12 toward the extinction cliff, an agency may not press on the gas.”)

13 Survival and recovery are “intertwined concepts” in an agency’s jeopardy analysis.  
 14 *Native Vill. of Chickaloon v. Nat'l Marine Fisheries Serv.*, 947 F. Supp. 2d 1031, 1063 (D.  
 15 Alaska 2013) (citing *Nat'l Wildlife Fed'n*, 524 F.3d at 932). Where a proposed action would  
 16 have “significant negative impacts” on a species, an analysis of the species’ point of  
 17 recovery is warranted. *Id.* at 1063, n. 244. However, where a proposed action would not  
 18 have significant negative impacts, this “tipping point” analysis is not required. *Id.* (no  
 19 tipping point analysis required where proposed action did not have significant negative  
 20 impact on listed species).

21 “The proper baseline analysis is not the proportional share of responsibility the  
 22 federal agency [action] bears for the decline in the species, but what jeopardy might result  
 23 from the agency’s proposed actions in the present and future human and natural contexts.”  
 24 *Pac. Coast Fed'n of Fishermen's Associations v. Gutierrez*, 606 F. Supp. 2d 1195, 1212  
 25 (E.D. Cal. 2008) (citation omitted). This standard does not prohibit an agency from taking  
 26 an action that would contribute to a *de minimis* deterioration of the condition of the species,  
 27 even if the species is already in jeopardy. *Id.* Rather, “the relevant inquiry is whether the  
 28 action effects, when added to the underlying baseline conditions . . . are cumulatively such

1 that they would cause jeopardy as that term is defined by law and agency regulation.” *Id.*  
 2 Thus, “baseline conditions must be factored into the jeopardy analysis, cumulatively with  
 3 the [] agency actions.” *Id.*

4 A court’s role is not to determine whether a BiOp’s findings mandate a jeopardy  
 5 conclusion, but rather whether the agency “articulated a rational connection between the  
 6 facts found and the conclusions made.” *Wild Fish Conservancy v. Salazar*, 628 F.3d 513,  
 7 527 (9th Cir. 2010). An agency must articulate a rational link between its findings and its  
 8 ultimate no-jeopardy conclusion. *Id.* at 528.

9 If, after consultation under Section 7(a)(2), the agency determines that the proposed  
 10 action is not likely to jeopardize the listed species, it authorizes “take” of the species  
 11 incidental to the proposed project. *Sovereign Inupiat for a Living Arctic v. Bureau of Land*  
 12 *Mgmt.*, 555 F. Supp. 3d 739, 795 (D. Alaska 2021) (citing 16 U.S.C. § 1536(b)(4)). “Take”  
 13 means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [a listed  
 14 species], or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The ESA  
 15 “does not contain an outright prohibition on take[.]” *Sovereign Inupiat for a Living Arctic*,  
 16 555 F. Supp. 3d at 795. Rather, if the consulting agency reaches a no-jeopardy  
 17 determination, “it then authorizes the taking of a species incidental to the proposed  
 18 project.” *Id.*

19 When the agency authorizes the incidental taking of a species, it must issue an ITS  
 20 with the BiOp. *Id.*; *see also* 16 U.S.C. § 1536(b)(4)(i)-(iv); 50 C.F.R. § 402.14(i)(1). An  
 21 ITS “estimates the amount of the project’s incidental take of the listed species.” *Sovereign*  
 22 *Inupiat for a Living Arctic*, 555 F. Supp. 3d at 795. Specifically, an ITS must include the  
 23 impact of the anticipated incidental taking, measures to minimize that impact, and the terms  
 24 and conditions under which those measures are implemented. 16 U.S.C. § 1536(b)(4)(i)-  
 25 (iv); 50 C.F.R. § 402.14(i)(1). “The purpose of the incidental take statement is [] to specify  
 26 the amount of take that may occur, and include triggers that indicate non-compliance with  
 27 the [ITS] and require re-consultation under Section 7 of the ESA[.]” *Sovereign Inupiat for*  
 28 *a Living Arctic*, 555 F. Supp. 3d at 795–96.



1 Ideally, the amount of take is expressed in terms of a specific number of individuals  
 2 of the listed species. *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land*  
 3 *Mgmt.*, 273 F.3d 1229, 1249 (9th Cir. 2001). However, where it is not practical to express  
 4 the amount of anticipated take or take-related impacts in terms of the number of individuals  
 5 of the listed species, a surrogate may be used to express take. 50 C.F.R. § 402.14(i)(1)(i).  
 6 Here, according to FWS, it is not practical to measure or monitor take and take-related  
 7 impacts in terms of individual squirrels because they are difficult to observe, as they are  
 8 arboreal, range widely, and are under snow for much of the year. (*Id.*) As such, the ITSs  
 9 use MGRS midden activity as a surrogate for anticipated take of MGRS. (Doc. 125 at  
 10 FS01968-69.) Middens are the focal point of a squirrel's territory and provide the main  
 11 food source for the winter; thus, MGRS are closely tied to their middens. (*Id.*) For this  
 12 reason, middens have been used as a surrogate for the annual fall census of MGRS since  
 13 1987. (*Id.*)

14 If a surrogate for take is used, the BiOp or ITS must (1) describe the causal link  
 15 between the surrogate and take of the species; (2) explain why it is not practical to express  
 16 anticipated take or monitor impact in terms of individual members of the species; and (3)  
 17 set a clear standard for determining when the level of anticipated take has been exceeded.  
 18 50 C.F.R. § 402.14(i)(1)(i). If the amount or extent of take set forth in the ITS is exceeded,  
 19 consultation must be re-initiated, and the agencies will re-analyze whether the action is  
 20 likely to jeopardize the species. 50 C.F.R. § 402.16(a); *see also Arizona Cattle Growers'*  
 21 *Ass'n*, 273 F.3d at 1249 (9th Cir. 2001).

## 22 **V. Discussion**

### 23 **A. The Cabins Biological Opinion complies with the ESA and the APA.**

24 The Cabins area has contained recreational residences for approximately 130 years;  
 25 the existing buildings date back to the early- to mid-1900s and have been modified over  
 26 time. (Doc. 125 at FS01944, 01961.) It includes 14 recreational residences and associated  
 27 utilities and outbuildings located on 25 acres. (Doc. 125 at FS01944.) MGRS have existed  
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1 in the Cabins area since at least 1996. (Doc. 125 at FS01961.) As of 2008, five middens  
2 have been identified within the Cabins area. (Doc. 125 at FS01955-56, FS01962.)

3 The Cabins BiOp authorizes the ongoing use of the Cabins at the 2008 baseline level  
4 of disturbance through expiration of the current SUP in 2028. (Doc. 125 at FS01944.)  
5 Baseline disturbances include the use and maintenance of the Cabins area between April  
6 15th and November 15th and associated noise from vehicles, equipment, pets, music, and  
7 voices. (Doc. 125 at FS01944.) No new structures or activities are authorized. (Doc. 125  
8 at FS01944.)

9 The BiOp identifies three discrete consequences that could impact MGRS as a result  
10 of re-issuing the Cabins SUP. (Doc. 125 at FS01957-64.) The first is injury or death of  
11 squirrels as a result of vehicle strikes, interactions with pets, or impacts to nesting habitat.  
12 (Doc. 99 at FS01057.) The BiOp finds that it is unlikely that MGRS will be killed by  
13 vehicle strikes within the Cabins area because the road is a narrow, winding two-track on  
14 which vehicles are not able to exceed approximately 10 miles per hour. (Doc. 125 at  
15 FS01957.) Furthermore, MGRS are more active during their mating season between  
16 November 15th and April 15th, when access to the Cabins is restricted and thus vehicular  
17 traffic significantly curtailed. (Doc. 125 at FS01958.)

18 The second identified consequence is disturbance due to noise and human presence.  
19 (Doc. 125 at FS01958.) The BiOp finds that human presence has not been found to interfere  
20 with squirrel survival, though squirrels may occupy middens for less time in areas with  
21 human disturbance. (Doc. 125 at FS01958, FS01962.) Despite the reduced midden  
22 occupancy time, MGRS continues to create and occupy middens in the Cabins area at the  
23 current level of human activity. (Doc. 125 at FS01962.) Conservation measures to reduce  
24 disturbance include maintaining a 92-foot buffer zone around middens for noisy activities  
25 or vegetation removal.<sup>6</sup> (Doc. 125 at FS01960.)

26  
27 <sup>6</sup> The BiOp notes that USFS has previously used two different-sized buffer zones around  
28 middens: a 92-foot buffer zone and a 200-foot buffer zone. (Doc. 125 at FS01960-61.) The  
BiOp finds that the 92-foot buffer zone is appropriate for the Cabins because, unlike the  
previous project where a 200-foot buffer was used, here there is no authorization for any  
vegetation removal other than for fire prevention and hazard removal. (Doc. 125 at

1           The third consequence identified in the BiOp is the alteration or removal of habitat.  
 2 (Doc. 125 at FS01962.) The maintenance and improvement of cabins and fire protection  
 3 thereof occurs only within the approximately seven acres containing the cabin footprints  
 4 and roads. (Doc. 125 at FS01962.) The remaining acres are forested and provide MGRS  
 5 habitat.<sup>7</sup> (Doc. 125 at FS01962.) The BiOp finds that any potential habitat alterations are  
 6 unlikely to affect MGRS because they will occur primarily within the seven acres that do  
 7 not provide MGRS habitat. (Doc. 125 at FS01963.) Further, any vegetation removal  
 8 outside that area will require permission from USFS and will not be allowed within 92 feet  
 9 of active middens. (Doc. 125 at FS01963.) Bi-annual monitoring of midden activity will  
 10 allow USFS to enforce the 92-foot buffer around any new middens. (Doc. 125 at FS01964.)

11           The BiOp finds that, although the seven acres of Cabin footprints could provide  
 12 habitat for one squirrel, its use does not push MGRS over the tipping point or place the  
 13 species' recovery at risk. (Doc. 125 at FS01966.) This no-jeopardy conclusion is based on  
 14 evidence that the MGRS population increased from 35 in 2017 to 109 in 2021 despite the  
 15 loss of significant habitat. (Doc. 125 at FS01966.) Furthermore, the BiOp reasons that the  
 16 presence of five middens in the Cabins area, three of which are currently occupied, shows  
 17 that MGRS continues to persist there. (Doc. 125 at FS01966-67.)

18           Upon review, the Court finds no error in the agencies' findings in and reliance on  
 19 the Cabins BiOp. Here, where the Cabins SUP allows only current levels of use and  
 20 occupancy in an area where MGRS and humans have successfully co-existed for many  
 21 years, there is no basis on which to find FWS's no-jeopardy determination arbitrary,  
 22 capricious, or otherwise illegal. Jeopardization of a species requires a "new risk of harm,"  
 23 and no such risk has been identified in connection with re-issuance of the Cabins SUP. *See*  
 24 *Nat'l Wildlife Fed'n.*, 524 F.3d at 930. The SUP does not authorize any new activity beyond  
 25 what is already occurring in the Cabins area, and any *de minimis* effect of continued use of  
 26 the Cabins is permissible. *See Pac. Coast Fed'n of Fishermen's Associations*, 606 F. Supp.

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27           FS01961, FS01964 (200-foot buffer zone appropriate for more aggressive removal of live  
 28 and dead trees)).

<sup>7</sup> These acres are considered a buffer zone. (Doc. 125 at FS01964.)

1 2d at 1212. Furthermore, the Court finds that the conservation measures set forth in the  
2 BiOp effectively minimize possible impacts.

3 Plaintiffs’ remaining arguments challenging the BiOp’s findings regarding the  
4 population and environmental baselines and the use of the best available scientific evidence  
5 lack factual and legal support. Because “the evidence in the administrative record permitted  
6 the agency to make the decision it did” as a matter of law, the Court recommends that  
7 summary judgment be denied to Plaintiffs and granted to Defendants as to the Cabins BiOp  
8 and that the Court affirm the agencies’ findings in, and reliance on, the Cabins BiOp.  
9 *Haaland*, 562 F. Supp. 3d at 76.

10 **B. The Camp Biological Opinion violates the ESA and the APA because it lacks a**  
11 **rational basis for its no-jeopardy finding.**

12 The Camp has existed since 1966 but has not been operational since 2017, and the  
13 most recent SUP expired December 31, 2008. (Doc. 130 at 18; doc. 33 at FWS01388, doc.  
14 36 at FS01783.) The Camp area includes approximately 5.9 acres of structures and utilities  
15 as well as a surrounding buffer. (Doc. 32 at FWS01163, FWS01166.) The proposed SUP  
16 allows the existing facilities to be maintained and operated for a maximum of 120  
17 individuals, with activity limited to between April 15th and November 15th of each year.  
18 (Doc. 32 at FWS01163-64.) Anticipated activities include spring maintenance and  
19 preparation, weekly events, shutdown procedures, and annual facility maintenance. (Doc.  
20 32 at FWS01180.) Fire protection by way of removing dead and flammable debris and  
21 vegetation within 30 feet of buildings will also occur. (Doc. 32 at FWS01180.) The BiOp  
22 finds that any habitat changes within the Camp area are unlikely to affect MGRS because  
23 they will occur in or near the Camp structures, which do not provide MGRS habitat. (Doc.  
24 32 at FWS01188-89.) The BiOp further finds that enforcement of a 92-foot buffer around  
25 middens, within which no habitat disturbance will occur, will minimize impacts to MGRS.  
26 (Doc. 32 at FWS01188.)

27 The BiOp identifies three discrete consequences that could impact MGRS as a result  
28 of reissuance of the Camp SUP. (Doc. 32 at FWS01182-88.) The first is injury or death as

1 a result of vehicle strikes, interactions with service animals, or removal of vegetation. (Doc.  
2 32 at FWS01182.) However, vehicle strikes are unlikely because the rough surface of the  
3 dirt road, in combination with the possible presence of children, minimizes the possibility  
4 that a vehicle would travel faster than 10 miles per hour. (Doc. 32 at FWS01182.)  
5 Furthermore, USFS intends to brief staff and campers annually on the importance of  
6 protecting MGRS in the area, which will increase awareness among Camp users and reduce  
7 the risk of harm to MGRS. (Doc. 32 at FWS01182.)

8 The second identified consequence is disturbance from human noise and presence.  
9 (Doc. 32 at FWS01183.) Conservation measures including restrictions on use between  
10 November and April, noise and lighting restrictions, educational outreach, and  
11 enforcement of a 92-foot buffer zone around active middens are designed to minimize any  
12 disturbance. (Doc. 32 at FWS01184-85.)

13 The third consequence identified in the BiOp is the alteration or removal of habitat.  
14 (Doc. 32 at FWS01187.) The maintenance and improvement of Camp structures and  
15 infrastructure and fire protection thereof occurs only within the approximately 5.9 acres  
16 containing the Camp buildings and infrastructure. (Doc. 32 at FWS01187-88.) The  
17 remaining acres are forested and provide MGRS habitat or have been burned and do not  
18 provide habitat. (Doc. 32 at FWS01187.) The BiOp finds that any potential habitat  
19 alterations are unlikely to affect MGRS because they will occur primarily within the area  
20 that does not provide MGRS habitat. (Doc. 32 at FWS01187-88.) Further, any vegetation  
21 removal outside that area will require permission from USFS and will not be allowed  
22 within 92 feet of active middens. (Doc. 32 at FWS01187-88.) Annual fall monitoring of  
23 midden activity will allow USFS to enforce the 92-foot buffer around any new middens.  
24 (Doc. 32 at FWS01187-88.)

25 The BiOp states that three middens are currently active in the Camp area. (Doc. 32  
26 at FWS01180, 01186.) Midden activity in the Camp area has been dynamic over time,  
27 apparently as a result of habitat loss from fire, though one midden has remained active for  
28 at least ten years. (Doc. 32 at FWS01186-87.) Two middens became inactive after the Frye

1 Fire in 2017, and the BiOp finds it unlikely that MGRS will reinhabit the burned areas, due  
2 to habitat loss. (Doc. 32 at FWS01186.) The BiOp finds that fire damage has affected  
3 MGRS habitat and occupancy more than the Camp’s use, and therefore human disturbance  
4 is unlikely to lead to long-term abandonment of the Camp area by MGRS that “may be  
5 habituated to human noise and presence.” (Doc. 32 at FWS01186-87.) The BiOp concludes  
6 that re-issuance of the Camp SUP will not jeopardize the continued existence of MGRS.  
7 (Doc. 32 at FWS01189, FWS01192-94.)

8 Upon review, the Court finds that the Camp BiOp’s conclusion that the level of  
9 human presence authorized in the SUP will not cause MGRS to abandon the Camp area  
10 because MGRS is habituated to that level of human presence lacks a rational basis. (*See*  
11 doc. 32 at FWS01196.) Further, the Camp BiOp fails to consider an important aspect of  
12 the proposed re-issuance of the Camp SUP, namely, that there is currently no human  
13 presence in the Camp area. *See Friends of Santa Clara River*, 887 F.3d at 920 (court will  
14 vacate agency’s decision if it has “failed to consider an important aspect of the problem”).

15 The Camp permit expired in 2008, and it has not been operational since 2017. (Doc.  
16 122 at FS01783; doc. 111 at FS01388; doc. 32 at FWS01163-64 (authorizing 120  
17 individuals to use and occupy Camp).) Despite this, the BiOp concludes that MGRS is  
18 habituated to the levels of human presence and development authorized by the proposed  
19 action. (*See* doc. 32 at FWS01189 (three active middens “created by MGRS under the  
20 existing level of development and activity being permitted by the proposed action”);  
21 FWS01193 (MGRS habituated to human presence and disturbance); FWS01196 (“[A]ny  
22 MGRS occupying middens in the Camp action area may be harassed through human  
23 presence and noise at a level and duration that currently occurs in the action area.”).)

24 The SUP would authorize up to 120 individuals to occupy the Camp area and  
25 perform activities associated with its operation. Thus, the change in the level of human  
26 presence and activity that would occur with re-issuance of the Camp SUP is significant.  
27 The BiOp does not consider or address the substantial change in the level of human  
28 presence that will occur with re-issuance of the Camp SUP, or its possible effects on



1 MGRS. It is not reasonable to assume, without any explanation or analysis, that MGRS in  
2 the Camp area would not be affected by such a significant change in the level of human  
3 presence, and the BiOp does not consider this important aspect of the problem. The Court  
4 acknowledges that the BiOp finds that MGRS survival is not negatively impacted by  
5 human presence. However, the Camp BiOp must rationally link its conclusion that re-  
6 issuance of the Camp SUP will not jeopardize MGRS with the facts in the record regarding  
7 human presence in the Camp area.<sup>8</sup> *See Wild Fish Conservancy*, 628 F.3d at 527-28.

8 Contrasting the Camp BiOp with the Cabins BiOp illustrates the discrepancy. The  
9 Cabins BiOp finds that MGRS in the Cabins area are habituated to human presence, and  
10 therefore will not be significantly negatively impacted by the proposed action, because  
11 MGRS have continuously coexisted with Cabins occupants. (*See* doc. 125 at FS01966,  
12 FS01968.) The Cabins have, in fact, been continuously occupied, and therefore the  
13 conclusion that MGRS in the Cabins area are habituated to human presence is reasonable.  
14 The Camp, in contrast, has not been operational for at least five years. Therefore, logic  
15 would dictate the opposite conclusion—MGRS in the Camp area are likely not habituated  
16 to human presence and therefore may be more affected by human presence than MGRS in  
17 areas where humans have been continuously present. Accordingly, the Camp BiOp lacks  
18 sufficient support for its findings that (1) re-issuance of the Camp SUP will result in the  
19 same level of human presence, activity, and development as current use of the Camp, and  
20 (2) MGRS in the Camp area are habituated to, and will therefore not be significantly  
21 disturbed by, human presence at the Camp. (Doc. 32 at FWS01192-93.) Because the Camp  
22 BiOp relies on these unsupported findings for its no-jeopardy determination, the no-  
23 jeopardy determination also lacks sufficient factual and legal support. (Doc. 32 at  
24 FWS01192-93; *see Wild Fish Conservancy*, 628 F.3d at 527 (ESA requires agency to  
25

26  
27 <sup>8</sup> The Court further notes that the Camp is located just three-quarters of a mile from the  
28 Cabins. (*See* doc. 134 at 10.) However, the proximity of the Camp to the Cabins does not  
absolve FWS of its obligation to rationally link its conclusions with its factual findings as  
to the Camp SUP, specifically.

1 articulate rational connection between facts and conclusions); *Friends of Santa Clara*  
 2 *River*, 887 F.3d at 920 (9th Cir. 2018) (same under APA).

3 Accordingly, the Court recommends granting Plaintiffs summary judgment as to the  
 4 Camp BiOp's no-jeopardy determination and remanding the Camp BiOp for further  
 5 consideration of whether and how the renewed human presence in the Camp, authorized  
 6 by the Camp SUP, will impact MGRS.

7 **C. The Cabins and Camp Incidental Take Statements violate the ESA because**  
 8 **they lack a clear standard for when take has been exceeded.**

9 The ITSs for the Cabins and Camp find that all squirrels will be taken in the form  
 10 of harassment due to the re-issuance of the SUPs. (Doc. 125 at FS01968; doc. 32 at  
 11 FWS01195-96.) The ITSs do not anticipate injury or death of any squirrels, however, they  
 12 anticipate that squirrels will be taken via harassment due to human presence and noise.  
 13 (Doc. 125 at FS01968; doc. 32 at FWS01196.) "Harassment," as defined in the ESA, is  
 14 "intentional or negligent actions that create the likelihood of injury to listed species to such  
 15 an extent as to significantly disrupt normal behavior patterns which include, but are not  
 16 limited to, breeding, feeding, or sheltering." (Doc. 125 at FS01967 (citing 50 C.F.R. §  
 17 17.3).) The ITSs find that harassment may occur through human presence and vehicular  
 18 and human noise, which may cause MGRS to temporarily alter their feeding or sheltering  
 19 behavior but will not likely cause them to abandon the area. (Doc. 125 at FS01968; doc.  
 20 32 at FWS01196.))

21 The ITSs set forth two ways in which take may be considered exceeded. (Doc. 125  
 22 at FS01969; doc. 32 at FWS01197.) The first is if any MGRS is found injured or killed and  
 23 the harm can be attributed to the re-issuance of the SUPs. (Doc. 125 at FS01969; doc. 32  
 24 at FWS01197.) The second is if no active middens are present over the course of two  
 25 consecutive USFS fall monitoring surveys. (Doc. 125 at FS01969; doc. 32 at FWS01197.)  
 26 This second standard is based on an analysis of historical data showing that, while one fall  
 27 season without midden activity may be due to "natural fluctuations" in squirrel population  
 28 and midden use, more than one fall season without active middens may indicate that

1 anticipated impacts have been exceeded.<sup>9</sup> (Doc. 125 at FS01969; doc. 32 at FWS01197.)  
2 The ITSs provide that, should no active middens be identified for two consecutive fall  
3 seasons, USFS and FWS will work together to determine whether the absence of middens,  
4 and therefore of MGRS, is due to extraneous factors or to the re-issuance of the Camp  
5 and/or Cabins SUPs. (Doc. 125 at FS01969-70; doc. 32 at FWS01197-98.)

6 The ESA's implementing regulations require that an ITS set a clear standard for  
7 determining when the level of anticipated take has been exceeded. *Arizona Cattle Growers'*  
8 *Ass'n*, 273 F.3d at 1251 (agency's failure to provide a clear standard for determining when  
9 level of take has been exceeded is arbitrary and capricious); *see also* 50 C.F.R. § 402.14  
10 (i)(1)(i). The determination of whether anticipated take has been exceeded cannot be  
11 "within the unfettered discretion" of the consulting agency. *Id.* at 1251. There must be a  
12 method by which a third party or the action agency can objectively determine whether take  
13 has been exceeded and can thereby "gauge [the] performance" of the consulting agency.  
14 *Id.* at 1251.

15 Here, the ITSs state that take will be considered exceeded if the agencies determine  
16 that the lack of midden activity for two consecutive fall seasons is attributable to the  
17 proposed actions. Specifically, "USFS and FWS will work together to determine whether  
18 the absence of middens (and therefore of MGRS) is due to extraneous factors or to the re-  
19 issuance of the [] SUPs." (Doc. 125 at FS01969-70; doc. 32 at FWS01197-98.) However,  
20 the ITSs contain no further information about how the agencies will decide whether  
21 excessive take is due to the proposed actions. Absent a clear standard for how that  
22 determination will be reached, the ITSs lack the objectivity necessary to avoid  
23 arbitrariness. Simply allowing the agencies to determine the cause of a lack of midden  
24 activity, without clear parameters for how that determination will be reached, allows  
25 agency discretion to an impermissible extent. As a result, the ITSs' failure to set forth a  
26 clear and objectively verifiable standard for determining whether anticipated take has been  
27

28 <sup>9</sup> As discussed above, midden activity is used as a surrogate for the amount of anticipated take of MGRS. (Doc. 125 at FS01968-69.)

exceeded due to the proposed actions is arbitrary and capricious in violation of the APA and ESA. *See Arizona Cattle Growers' Ass'n*, 273 F.3d at 1251 (agency's failure to provide clear standard for when authorized level of take was exceeded was arbitrary and capricious). Accordingly, the Court recommends granting summary judgment to Plaintiff on the issue of whether the ITSs set a clear standard for when take has been exceeded, and remanding the Cabins and Camp ITSs for FWS to provide a clear standard for when anticipated take has been exceeded due to the proposed actions. *Haaland*, 562 F. Supp. 3d at, 76 (summary judgment appropriate for resolution of purely legal questions in review of agency actions).

#### **D. The Defendants' remaining arguments lack merit.**

The Court has considered Defendants' Cross-Motion for Summary Judgment and finds that it does not resolve the issues identified for remand. Specifically, although the Cross-Motion for Summary Judgment contends that the no-jeopardy findings of both the Camp and Cabins Bi-Ops are reasonable, it does not address the critical discrepancy in the Camp Bi-Op discussed above. (*See* doc. 134 at 16-20.) Regarding the standard for determining whether take has been exceeded, Defendants attempt to add parameters to the determination process that are not actually included in the ITS, and further contend that Plaintiffs may bring a lawsuit in the future if the agencies fail to appropriately re-initiate consultation. (*See* doc. 134 at 36-37.) These arguments do not remedy the lack of specificity and clarity in the ITS; furthermore, any harm to MGRS that may result from a lack of re-initiation of consultation under the necessary circumstances can be avoided by setting forth an objective and specific standard at this juncture.

#### **VI. Recommendation**

For the reasons stated above, the Magistrate Judge **recommends** that the District Judge enter an Order **granting in part and denying in part** Plaintiffs' Motion for Summary Judgment (docs. 129, 130) and **granting in part and denying in part** Defendants' Cross-Motion for Summary Judgment (docs. 133, 134), as follows:

(1) As to Count One, Plaintiffs' Motion for Summary Judgment be **granted** with

