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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTER FOR SIERRA NEVADA
CONSERVATION, et al.,

NO. CIV. S-02-325 LKK/JFM

Plaintiffs,

v.

O R D E R

JOHN BERRY, et al.,

Defendants.

_____ /

AND RELATED CROSS-CLAIMS AND PARTIES
IN INTERVENTION.

_____ /

The case before the Court is a challenge to several related actions by the United States Forest Service ("USFS") concerning off-road vehicle¹ ("ORV") management in the Eldorado National Forest ("Eldorado").

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¹ "[O]ff road vehicle' means any motorized vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, marsh, swampland, or other natural terrain" Executive Order 11644, as amended, § 2(3).

1 The Center for Sierra Nevada Conservation ("CSNC"), the Center
2 for Biological Diversity ("CBD"), and the California Wilderness
3 Coalition ("CWC"), (collectively "plaintiffs"), bring suit against
4 the United States Forest Service, an agency of the U.S. Department
5 of Agriculture, John Berry, in his official capacity as Forest
6 Supervisor for the Eldorado, and Jack Blackwell, in his official
7 capacity as Regional Forester for Region Five (collectively "Forest
8 Service" or "Defendants"). The "Friends of the Rubicon" and other
9 ORV riders' organizations intervened as defendants and also bring
10 claims against the Forest Service. Both the plaintiffs and
11 defendant-intervenors seek declaratory and injunctive relief
12 pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C.
13 §§ 4331 *et seq.*, the National Forest Management Act (NFMA), 16
14 U.S.C. §§ 1600 *et seq.*, the Administrative Procedure Act (APA), 5
15 U.S.C. §§ 500 *et seq.*, Executive Order 11644, as amended, as well
16 as Federal Regulations.

17 The Eldorado National Forest, located in the heart of the
18 Sierra Nevada mountain range, is situated in central California,
19 east of Sacramento and west of Lake Tahoe. The Forest contains
20 over 786,000 acres of forest of diverse topography, soil type and
21 vegetation. It provides habitat, *inter alia*, for numerous
22 endangered, threatened, and sensitive wildlife species, including
23 the Bald Eagle, California Spotted Owl, Sierra Nevada Red Fox,
24 Foothill yellow-legged frog, Mule deer, and assorted species of
25 trout. Extremely diverse soils and vegetation types are found in
26 Eldorado. The Forest is also increasingly occupied by

1 recreationists, including off-road motorists who use the Forest's
2 hundreds of miles of roads and trails open to ORV use.
3 Non-motorized recreation activities include hiking, horseback
4 riding, mountain bike riding, hunting, and fishing.

5 The plaintiffs allege that the Forest Service is failing its
6 legal obligations to manage the inherent conflict between these
7 recreational uses and land and resource management in a way that
8 upholds environmental values and minimizes damage to the Forest.
9 They allege that the recreational use of Eldorado is in large part
10 responsible for resource damage and "systemic blight."

11 Specifically, plaintiffs allege, *inter alia*, that defendants
12 violated NEPA and the ADA by (1) failing to adequately analyze
13 cumulative impacts to biological resources in its Rock Creek
14 Recreational Trails Plan Environmental Impact Statement ("EIS"),
15 (2) failing to conduct a forest-wide environmental review for the
16 1990 Eldorado National Forest Off Highway Vehicle and Trail
17 Management Plan ("1990 ORV Plan"), and (3) issuing categorical
18 exclusions to exempt off-road vehicle trail maintenance and other
19 ORV activities from required environmental review.

20 The intervenor-defendants, on the other hand, complain that
21 the Forest Service is unreasonably limiting ORV and other
22 recreational use in Eldorado. They contend that the Forest Service
23 violated NEPA analysis by failing to conduct site-specific analyses
24 when it designated ORV trails across the entire Eldorado. They
25 also allege that the Forest Service's Rock Creek Recreational
26 Trails Plan is unsupported by the administrative record in

1 violation of NEPA.

2 All parties have moved for summary judgment.² I decide the
3 motion based on the papers and pleadings filed herein and after
4 oral argument.

5 **I.**

6 **BACKGROUND**

7 In 1972, President Nixon issued an executive order directing
8 federal land management agencies to establish policies and develop
9 procedures "that will ensure that the use of off-road vehicles on
10 public lands will be controlled and directed so as to protect the
11 resources of those lands, to promote the safety of all users of
12 those lands, and to minimize conflict among the various uses of
13 those lands." Executive Order 11644 (Feb. 9, 1972). President
14 Carter amended this executive order, stating that:

15 the respective agency head shall, whenever he determines
16 that the use of off-road vehicles will cause or is
17 causing considerable adverse effects on the soil,
18 vegetation, wildlife, wildlife habitat or cultural or
19 historical resources of particular areas or trails of
20 the public lands, immediately close such areas and
trails to the type of off-road vehicle causing such
effects, until such time as he determines that such
adverse effects have been eliminated and that measures
have been implemented to prevent future recurrence.

21 Executive Order 11989 (May 25, 1977).

22 Implementing the direction of these Executive Orders, the
23 Forest Service promulgated regulations which developed procedures
24 for the designation of ORV routes and the development of ORV

25
26 ² The Plaintiffs move for summary judgment on their first, third,
fourth, and sixth claims.

1 management plans. 36 C.F.R. § 295.2. It also issued an
2 "Environmental Policy and Procedures Handbook" ("Handbook") and
3 Forest Service Manual with directives to assist officials
4 implementing ORV planning.³

5 II

6 UNDISPUTED FACTS

7 A. THE 1977 ORV PLAN FOR ELDORADO NATIONAL FOREST

8 In 1977, the Forest Service created an ORV plan for Eldorado.
9 The Plan created different areas where ORV use was (1) completely
10 prohibited, (2) limited to designated routes, and (3) completely
11 unlimited. Defs' SUF 4 (citing AR Vol. 2 at 310).

12 B. THE 1989 LAND RESOURCE MANAGEMENT PLAN

13 In 1989, the Forest Service adopted a Land and Resource
14 Management Plan (LRMP) for Eldorado. Defs' SUF 5; Intervenor's SUF
15 6; Pls' SUF 5. The purpose of the LRMP was to establish standards
16 and guidelines for a range of activities such as timber harvest,
17 mining, recreation, and grazing, as well as management goals for
18 resources such as fish and wildlife habitat and water quality.
19 Defs' SUF 5. The LRMP established Management Areas that either
20 prohibited or permitted various activities. Defs' SUF 5.

21 The LRMP limited ORV travel to designated routes and areas,

22
23 ³ Both are found in the Administrative Record (AR). See Defs'
24 Statement of Undisputed Facts (SUF) 3, citing AR Vol. 1 at 1-19
25 (Forest Service Manual), AR Vol.1 at 58-210 (Forest Service
26 Handbook). The provisions of the Forest Service Handbook, which
are published in the Federal Register prior to adoption, are
treated by federal courts as enforceable regulations of the
Service. 57 Fed. Reg. 43180-43212; Rhodes v. Johnson, 153 F.3d
785, 788 (7th Cir. 1998).

1 effectively establishing a "closed unless designated open" policy.
2 Defs' SUF 6; AR Vol. 7 248 at 4-82 to 4-84. The LRMP thus reversed
3 the 1977 ORV Plan's "open unless designated closed" policy. Defs'
4 SUF 6 (citing AR Vol. 2 at 310); Intervenors' SUF 6. In addition,
5 the LRMP established that ORV trails and open roads in deer winter
6 range and fawning areas would be limited to 2.5 miles per square
7 mile. Defs' SUF 6, AR Vol. 7 at 248; 4-84; Intervenors' SUF 8.

8 The LRMP provides that the 1977 Off Road Vehicle and Travel
9 Plan expired on December 31, 1989. Pls' SUF 7. Because the 1977
10 ORV Plan would have no force or effect after that date, the LRMP's
11 Forest-wide Standards and Guidelines expressly required the
12 adoption of an ORV travel management plan for Eldorado by 1990.
13 Pls' SUF 6; Intervenors' SUF 9. It further established that,
14 "[a]fter 1/1/90[,] only those routes designated in the new forest
15 O[R]V and Trail Management Plan will be open for greensticker ORV
16 use." P's SUF 8.

17 **C. THE 1990 ORV PLAN**

18 In 1990 the Forest Service created an ORV management plan for
19 the Eldorado after conducting an inventory of the existing system
20 of trails, roads, and tracks being used by ORVs. Defs' SUF 7
21 (citing AR Vol. 3 at 4); Intervenors' SUF 13. The 1990 plan called
22 for the closing of unlimited ORV areas, thus restricting ORV use
23 to designated areas. Defs' SUF 8; Intervenors' SUF 13. The
24 existing system of roads and trails became the designated route
25 system. Defs' SUF 8 (citing AR Vol. 3 at 4,9). The Forest Service
26 did not conduct a separate NEPA analysis for the 1990 ORV Plan, but

1 instead "tiered"⁴ the analysis of the 1989 LRMP. Intervenor's' SUF
2 14.

3 **D. ADMINISTRATIVE CHALLENGE TO 1989 LRMP**

4 Both CSNC and the ORV users filed administrative appeals to
5 challenge the adoption of the 1989 LRMP. Defs' SUF 10 (citing AR
6 Vol. 6 at 997) (CSNC Appeal); AR Vol. 6 at 919 (ORV Users Appeal);
7 Intervenor's' SUF 10; Pls' SUF 9. Defendants assert, and plaintiffs
8 deny, that CSNC's administrative appeal was denied in its entirety.
9 Defs' SUF 10 (citing AR Vol. 6 1036). The Forest Chief granted in
10 part the ORV users' appeal, concluding that the 1990 ORV Plan had
11 not adequately addressed the site specific impacts associated with
12 restricting OHV use to designated routes. Defs' SUF 10 (citing AR
13 Vol. 6 at 971); Intervenor's' SUF 15. That decision directed the
14 Forest Supervisor to prepare a supplemental analysis of the
15 environmental consequences of restricting ORV not later than
16 November of 1995. The 1990 ORV Plan remained effective in the
17 interim. Defs' SUF 10. The Forest Service admits that it has not
18 completed a forest-wide NEPA analysis for the 1990 ORV Plan. Pls'
19 SUF 12.

20 The Forest Service asserts, and plaintiffs deny, that it has
21 pursued a three-step process to carry out the Chief's instructions,

22
23 ⁴ "Tiering" is described at 40 C.F.R. § 1508.28 as "refer[ring]
24 to the coverage of general matters in broader environmental impact
25 statements (such as national program or policy statements) with
26 subsequent narrower statements or environmental analyses (such as
regional or basinwide program statements or ultimately
site-specific statements) incorporating by reference the general
discussions and concentrating solely on the issues specific to the
statement subsequently prepared."

1 examining conditions at a landscape or watershed scale rather than
2 conducting a forest-wide analysis. Defs' SUF 15. In any event,
3 the Forest Service has proceeded with inventories of existing roads
4 and trails, identified landscape areas to be analyzed, and prepared
5 a Plan to Project analyses for the 1990 ORV Plan. Defs' SUF
6 17 (citing Lubetkin Decl. at ¶ 8). To keep an accurate inventory
7 of roads and trails, the Forest Service is developing a
8 Geographical Information System ("GIS") database that will provide
9 necessary information to complete the landscape analyses. Id.
10 (citing Lubetkin Decl. at ¶ 9). In the interim, Eldorado District
11 Rangers have identified areas where resource damage has occurred
12 by virtue of ORV use and have implemented administrative closures.
13 Defs' SUF 16 (citing AR Vol. 21 at 2830, 2853, 2890).

14 During 2002, the Forest Service began two Landscape and Roads
15 Analyses covering portions of Eldorado where there is substantial
16 ORV use. These analyses provided an inventory of existing resource
17 conditions within the Middle Fork and North Fork of the Consumnes
18 Watersheds. Defs' SUF 18 (citing Lubetkin Decl. at ¶ 11). This
19 inventory will ultimately provide the basis for completing a NEPA
20 analysis for designated route systems for the Elkins Flat and Gold
21 Note areas within these watersheds. Id. The Elkins Flat, Gold
22 Note, and Rock Creek areas are the three principal areas in the ENF
23 where single track (motorcycle) ORV recreation occurs. Defendants
24 assert that upon completion of these analyses, the Service will
25 have examined the principal areas of motorcycle OHV use. Id.

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1 The Eldorado Forest Leadership Team issued a statement of "Off
2 Highway Vehicle Management Issues" on September 11, 2001,
3 describing the current situation relative to "resource protection"
4 in the Forest as "ongoing resource damage from vehicles traveling
5 off of roads and trails." Pls' SUF 20 (citing AR Vol. 10 at 1183).
6 That statement acknowledges the Chief of the Forest Service's 1995
7 order that a NEPA analysis must be undertaken relative to the 1990
8 ORV Trails Plan, but that, as of 2001, the Forest Service had yet
9 to "[d]etermine a time frame or emphasis on completing site
10 specific NEPA (sic) for a designated route system." Pls' SUF 21
11 (citing AR Vol. 10 at 1183-1184).

12 **E. THE 1988 ROCK CREEK TRAILS PLAN**

13 The Rock Creek area of Eldorado includes approximately 23,610
14 acres. Under the 1977 OHV Plan, the Rock Creek area was open to
15 ORV use, not limited to trails and subject only to seasonal
16 closures for wet weather conditions. Defs' SUF 21 (citing AR V. 14
17 at 1-3). During the mid-1980s, the Service became concerned about
18 the 1977 Plan's effect on resources, and met with ORV users,
19 environmental organizations, and local residents to prepare an
20 environmental assessment ("EA") to consider the impact of a new
21 Rock Creek ORV plan. Defs' SUF 21 (citing AR Vol. 14 at 1-4). On
22 October 6, 1988, after preparing a Rock Creek EA, the Forest
23 Service issued a finding of no significant impact ("FONSI") and a
24 decision notice adopting a Rock Creek Recreational Trails Plan
25 ("1988 Rock Creek plan") that included seasonal closures of
26 ////

1 critical deer winter range⁵ to ORV and mountain bike use, and wet
2 weather closures of trails to ORV use. Defs' SUF 21 (citing AR Vol.
3 14 at 1-4); Pls' SUF 1, 2.

4 The 1988 Rock Creek Plan identifies specific routes within the
5 forest on which the use of vehicles traveling off National Forest
6 System roads is allowed, restricted, or prohibited. Pls' SUF 52
7 (citing AR Vol. 14 at 1-7). Its revised Draft EIS explains that
8 "[t]he proposed action is to design a trail system for the Rock
9 Creek Area, determine the uses that can occur on each trail in the
10 system, and develop measures to protect natural resources in the
11 area." Pls' SUF 53 (citing AR Vol. 14 at 1-1).

12 The 1988 Rock Creek Plan designates 111.75 miles of roads and
13 trails for ORV use and provides for construction of 17.4 miles of
14 new motorized routes within the Rock Creek area of the Georgetown
15 Ranger District. Pls' SUF 54 (citing AR Vol. 12 at 3-21 to 3-22,
16 Table 3-6).

17 Plaintiffs assert, and defendants deny, that the 1988 Rock
18 Creek Plan opens three-quarters of a 10,000-acre critical winter
19 mule deer range to winter ORV use. Pls' SUF 55 (citing AR Vol. 12
20 at 3-22 to 3-23, Map 3-3). The Pacific mule deer herd is located
21 on the western slope of the Sierra Nevada mountains. Defs' SUF 41
22

23 ⁵ Critical winter range is defined as "those portions of the
24 winter range that provide the most optimum habitat conditions for
25 deer and play a vital role in sustaining the deer herd." Defs' SUF
26 41 (citing AR Vol. 14 at 4-63). Critical winter range is,
generally, ridge tops and south facing slopes that contain early-
seral plant communities (i.e. non-forested), and provide areas of
cover during storms. Id.

1 (citing Exh. 1 to Defs' Br. in Supp. of Summ. J. at 2). The
2 Pacific herd occupies areas ranging from Union Valley Reservoir in
3 the summer to Rock Creek and Poho Ridge areas in the winter. Id.
4 (citing AR Vol. 14 at 4-64). The 23,610 acre Rock Creek analysis
5 area is within the herd's winter range, with a portion of it
6 designated as critical winter range. Id. (citing AR Vol. 14 at 4-
7 63). The Pacific deer herd winter range is approximately 117,000
8 acres, and of the approximately 41,500 acres of critical winter
9 range, about 9,900 acres are within the Rock Creek analysis area.
10 Id.

11 Following administrative appeals, ORV users and the CSNC sued
12 the Forest Service in this District, challenging the Forest
13 Service's failure to prepare an EIS for the 1988 Rock Creek Plan
14 pursuant to NEPA. Pls' SUF 3; Defs' SUF 23. On September 25, 1989,
15 this court ruled that the 1988 Rock Creek EA was inadequate, that
16 the Forest Service FONSI was not supported by the record, and that
17 the Forest Service should have prepared an EIS. Pls' SUF 4; Defs'
18 SUF 24.

19 In October 1997, the Forest Service issued a Revised Draft EIS
20 analyzing environmental impacts associated with formally
21 designating an ORV trail system for the Rock Creek area. Pls' SUF
22 16; Defs' SUF 31 (citing AR Vol. 15 at 32). The Rock Creek EIS
23 focused on issues which the court had found raised substantial
24 questions, such as noise, wildlife and its habitat, and soils and
25 vegetation. Defs' SUF 32 (citing AR Vol. 14 at 1-4). The Rock
26 Creek EIS examined the environmental impacts of six alternatives

1 for the management of the Rock Creek recreational trail system, and
2 compared the various alternatives. Defs' SUF 32.

3 The revised Draft EIS contains a "no action" alternative
4 (Alternative 1) and five "action" alternatives for designating ORV
5 routes in the Rock Creek Area of the forest. AR Vol. 16 at 1717-
6 1738. According to the Record of Decision ("ROD"), Alternatives
7 2 and 5 "provide the greatest protection to natural resources."

8 **1. Alternative 1**

9 Alternative one was a "no action" alternative, under which
10 135.55 miles of trails would be available for ORV use and no new
11 trail construction would occur. Defs' SUF 33. This choice would
12 continue existing closures of trails in critical deer winter range
13 and in the western portion of Rock Creek from November 1 to May 1
14 and to OHV traffic during wet weather. Id.

15 **2. Alternative 2**

16 Alternative 2 would eliminate OHV use entirely in the Rock
17 Creek area and provide the fewest acres of wildlife habitat
18 disturbance, the lowest vehicle emissions, the least noise impacts,
19 the lowest risk of petroleum spills, and the lowest risk of fire.
20 The roads in the area would still be open to non-ORV use, subject
21 to wet season restrictions on equestrian and mountain bike use.
22 Defs' SUF 34.

23 **3. Alternative 3**

24 Alternative 3 responded to concerns raised by ORV users,
25 providing the maximum trail mileage allowed under the LRMP's trail
26 density standard. This alternative would provide 129.7 miles of

1 roads and trails for OHV use with the construction of 25.35 miles
2 of new trail. To satisfy the LRMP road density standard, a total
3 of 29.75 miles of roads would be closed. Under this choice, there
4 would be no closures in critical deer herd areas. Defs' SUF 35.

5 **4. Alternative 4**

6 This plan would designate certain areas exclusively for non-
7 ORV use. Defs' SUF 36. A total of 9.9 miles of designated ORV
8 trails and 4.95 miles of closed roads designated for ORV use would
9 be closed, as well as 30.2 miles of non-system trails. Id. Two
10 staging areas located within critical deer herd range would be
11 closed from February 1 to May 1, but roads and trails would remain
12 open. Id. Further, 37 miles of trail for ORV use and 49.25 miles
13 of road designated for OHV use would be available. Id.

14 **5. Alternative 5**

15 Alternative 5 provides for the most protection of Forest
16 resources, having the lowest erosion and sediment delivery to
17 streams, and the least disturbance to deer and other wildlife on
18 the critical winter deer range from November 10 to May 1 of each
19 year. Def' SUF 37. The 1988 Rock Creek Plan ROD states that, under
20 Alternative 5, "resource protection is optimized" and "minimal
21 levels of multiple use recreation" is allowed. Alternative 5
22 allows for 70 miles of roads and trails for ORV use in the Rock
23 Creek area.

24 **6. Alternative 6**

25 On May 21, 1999, the ENF filed its ROD adopting the Rock Creek
26 Recreational Trails Project EIS and approving Alternative 6 - the

1 "Carrying Capacity" alternative - as the designated trail system
2 for the Rock Creek Area. Defs' SUF 38; Pls' SUF 17. According to
3 the Forest Service, alternative 6 provides a balance between
4 resource protection and opportunities for ORV recreation.

5 Under alternative 6, the southern portion of the deer winter
6 range would be closed to mechanized uses from November 10 to May
7 1, and the existing seasonal closures in the northern portions of
8 the critical deer winter range would be lifted. Defs' SUF 39.

9 Deer habitat improvement projects would be implemented in both
10 portions of the critical deer winter range and deer use would be
11 monitored over a five-year period, at which time these practices
12 will be revisited. Id. (citing AR Vol. 14 at 3-22 to 3-24).

13 On July 6, 1999, CSNC filed a notice of appeal with the USFS
14 Regional Office challenging, among other things, the adequacy of
15 the Rock Creek EIS. Pls' SUF 18. Specifically, the appeal
16 challenged the Service's asserted failure to adequately analyze the
17 project's cumulative, forest-wide impacts on the Pacific Deer Herd.
18 Pls' SUF 36 (citing AR Vol. 12 at 1713-1714).

19 **F. CATEGORICAL EXCLUSIONS**

20 The plaintiffs challenge two categorical exclusions employed
21 by the defendants.

22 **1. Trail Maintenance**

23 Plaintiffs contend, and defendants deny, that the maintenance
24 activities permitted under the Forest's Fiscal Year (FY) 2001 and
25 2002 Categorical Exclusions ("CE") are not properly subject to such
26 classification because, inter alia, they occur in areas where

1 threatened, endangered, and sensitive (TES) animals are present.

2 Pls' SUF 67.

3 The Biological Evaluations ("BEs") for the FY 2001 and the FY
4 2002 ORV trail maintenance projects acknowledge that:

5 [u]pon consideration of the TES wildlife species
6 potentially occurring on the Eldorado National Forest,
7 the project has the potential to effect habitat or
8 individuals of the bald eagle, California spotted owl,
9 northern goshawk, California red-legged frog, foothill
and mountain yellow-legged frogs, northwestern pond
turtle, American marten, Pacific fisher, and Sierra
Nevada red fox.

10 Pls' SUF 70. The FY 2001 and FY 2002 BEs also acknowledge the
11 "potential for disturbance to individual dens" of American martin,
12 Pacific fisher, and Sierra Nevada red fox, and that "it is possible
13 that individuals may be disturbed by maintenance activities
14" Pls' SUF 74.

15 **2. Enduro Permit**

16 In October 2001, the Forest Service issued a five-year,
17 special use permit to the Polka Dot Motorcycle Club to conduct a
18 49er Enduro under a "minor use" categorical exclusion. Pls' SUF
19 75. The permit allowed for the annual participation of up to 550
20 motorcycle riders and an undisclosed additional number of
21 spectators and event organizers. Pls' SUF 77. A minimum of six
22 chemical toilets are required to be installed for, and removed
23 after, the 49er Enduro. Pls' SUF 79. The 49er Enduro is conducted
24 on a trail system that is located within four watersheds: Middle
25 Dry Creek, Dogtown Creek, McKinney Creek, and Upper Steely Fork
26 Cosumnes Watersheds. Pls' SUF 80. The 49er Enduro permit allows

1 five, recurring, annual group events. Pls' SUF 84.

2 **III.**

3 **MOTIONS TO STRIKE**

4 Before addressing the substantive motions, the court must
5 address two evidentiary issues. First, plaintiffs move to
6 supplement the administrative record by supplying various pages
7 which were apparently inadvertently excluded from the
8 administrative record. (Motion of May 12, 2004). There is no
9 opposition to this motion and it is granted. Second, plaintiffs
10 move to strike several documents tendered by the defendant. Below,
11 I address that motion.

12 On March 14, 2003, defendants filed the Agency's
13 Administrative Record and in July of 2003, filed an opposition to
14 plaintiffs' motion for summary judgment. Attached to the
15 Opposition is correspondence dated July 2003, which purports to
16 excuse defendants of the duty to conduct a forest-wide
17 environmental review by May 1997, as directed by the Forest Chief.
18 Also attached to the opposition brief is the declaration of Charis
19 Parker, dated July 2003, which supports defendants' position that
20 it was not deficient in considering the cumulative effects of
21 grazing on the forest. Plaintiff has moved to strike these
22 documents pursuant to Fed. R. Civ. P. 12(f) which authorizes the
23 striking from a pleading of "any redundant, immaterial,
24 impertinent, or scandalous matter."

25 **A. PARKER DECLARATION**

26 Plaintiffs complain that the defendants conducted a deficient

1 cumulative effects analysis in the EIS for the 1988 Rock Creek
2 Plan.⁶ They allege that the EIS completely failed to consider the
3 cumulative impacts related to grazing allotments in the Pacific
4 Deer Herd's range, despite the fact that, according to them, the
5 Pacific Deer Herd Management Plan specifically identifies, and
6 therefore evidences, Eldorado's grazing allotments as a factor that
7 has had adverse effects on the Herd. Pls' Br. in Supp. of Mot. for
8 Summ. J. at 19 (citing AR Vol. 12 at 1714a-1714b). They further
9 contend that the EIS failed to examine cumulative impacts of
10 similar activities in other parts of the Forest, including forest-
11 wide ORV use.

12 To support its opposition to plaintiffs' allegations, the
13 Forest Service filed the Declaration of Charis Parker, a Forest
14 Service Wildlife Biologist. Parker's declaration purportedly shows
15 that the Forest Service adequately considered the cumulative
16 effects of the 1988 Rock Creek Plan on the Pacific Deer Herd. In
17 order to rely on the Parker declaration, however, defendants must
18 overcome plaintiffs' motion to strike the declaration based on
19 their contention that it is an inadmissible *post hoc*
20 rationalization.⁷

21 ////

23 ⁶ An EIS for a proposed project must discuss, among other things,
24 "[c]umulative actions, which when viewed with other proposed
25 actions have cumulatively significant impacts" 40 C.F.R.
26 § 1508.25(a)(2).

⁷ The declaration was signed by Parker on July 8, 2003 and filed
with the court on July 14, 2003.

1 Generally, judicial review of agency actions is limited to the
2 administrative record, defined as the documents that were "in
3 existence at the time of the [agency's] decision . . ." Southwest
4 Center for Biological Diversity v. U.S. Forest Service, 100 F.3d
5 1443, 1450 (9th Cir. 1996). As explained by this court just three
6 years ago, "agency documents prepared during and in response to
7 litigation are generally excluded from this review." Environmental
8 Council of Sacramento v. Slater ("ECOS"), 184 F.Supp.2d 1016, 1028
9 (E.D. Cal. 2000) (citing Kunaknana v. Clark, 742 F.2d 1145, 1149
10 (9th Cir. 1984) and Overton Park, 401 U.S. at 419-420); see also
11 ASARCO, 616 F.2d at 1158-61.

12 The rationale for the evidentiary rule is found in the
13 substantive law governing APA claims. An agency's action "'must
14 be upheld, if at all, on the basis articulated by the agency
15 itself' at the time of the decision . . ." Anacostia Watershed
16 Society v. Babbitt, 871 F.Supp. 475, 486 (D.D.C. 1994) (quoting
17 Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins.
18 Co., 463 U.S. 29, 50 (1983)). Thus, the agency may not use post-
19 decision information as new rationalization for sustaining an
20 agency's decision. Rybachek v. U.S. E.P.A., 904 F.2d 1276 (9th Cir.
21 1990).

22 The rule is not inflexible, however. The Ninth Circuit has
23 recognized certain exceptions which allow a reviewing court to go
24 beyond the administrative record. First, extra record material may
25 be considered if "it is necessary to determine whether the agency
26 has considered all relevant factors and has explained its

1 decision"; second, when "the agency has relied on documents not in
2 the record"; third, when "supplementing the record is necessary to
3 explain technical terms or complex subject matter"; and fourth,
4 when "the plaintiffs make a showing of agency bad faith."
5 Northcoast Environmental Center v. Glickman, 136 F.3d 660, 665 (9th
6 Cir. 1998) (quoting Southwest Center, 100 F.3d at 1447). The record
7 may also be augmented where the original record fails to explain
8 agency action in such a way as to frustrate judicial review.
9 Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir.
10 1988). "The burden is on the party seeking to introduce the extra
11 record materials [to establish admissibility]." Sierra Club v.
12 Dombeck, 161 F. Supp. 2d 1052, 1063 (D. Ariz. 2001) (citing Animal
13 Defense Council, 840 F.2d at 1436).

14 Here, the defendants seek to justify consideration of the
15 Parker declaration premised on two of the above exceptions. First,
16 they assert that the declaration explains technical issues. They
17 also contend that the declaration provides the court with grazing
18 information that allows effective judicial review.

19 I cannot agree that the Parker declaration explains complex
20 or technical subject matter. Rather, much of the declaration
21 simply points to sections of the Pacific Deer Herd Management Plan
22 that supports defendants' position and is argumentative rather than
23 informative. Because the declaration's contents can be "extracted
24 from the record," striking the declaration is warranted.

25 Southwest Center, 100 F.3d at 1451.

26 ////

1 The government's second position is also without merit. The
2 declaration does not explain that the Forest Service relied on
3 documents not in the record, or that it considered other relevant
4 factors. The declaration merely asserts that since the time the
5 Rock Creek EIS was prepared, there has been very little livestock
6 grazing on Eldorado within the deer herd's range, and that at the
7 time of the Rock Creek decision, there was only one active
8 grazing allotment in the entire range of the Pacific deer herd.
9 Parker Declaration at ¶ 6.

10 Plaintiffs' motion to strike will be granted.

11 **B. MOTION TO STRIKE EXHIBITS 5 AND 6**

12 Plaintiffs' second motion to strike relates to their claim
13 that the defendants violated NEPA when they failed to conduct a
14 forest-wide environmental review for the 1990 ORV Plan. In
15 particular, they contend that defendants failed to comply with the
16 Forest Chief's order, issued after a formal hearing, requiring that
17 the ENF complete the environmental analysis by no later than May
18 of 1997.

19 In defense, defendants seek to introduce correspondence
20 exchanged between the Regional Forester, Jack A. Blackwell, and the
21 Deputy Chief for the National Forest System, Tom L. Thompson. The
22 letters purport to show that the Deputy Chief approves of the
23 Forest Supervisor's decision to conduct site-specific analysis
24 based on priority areas, rather than a forest-wide analysis.

25 The parties do not dispute the characterization of plaintiffs'
26 claim as one for a failure to act pursuant to § 706(1) of the APA.

1 That provision allows a reviewing court to “compel agency action
2 unlawfully withheld or unreasonably delayed.” They disagree,
3 however, on the appropriate standard to determine whether extra
4 record materials may be considered by the court in resolving such
5 a claim.

6 The Ninth Circuit has held that judicial review of failure to
7 act claims can properly consider documents created after the
8 pendency of litigation. In San Francisco Baykeeper v. Whitman, 297
9 F.3d 877 (9th Cir. 2002), the plaintiffs argued, as plaintiffs do
10 here, that the court should have disregarded a document which they
11 “describe[d] as a ‘post-hoc staff memorandum’ [intended] to beef
12 up EPA’s arguments.” Id. at 886. The Circuit rejected the
13 plaintiffs’ contention, holding that while, usually, “judicial
14 review of agency action is based on a set administrative record[,]
15 . . . when a court considers a claim that an agency has failed to
16 act in violation of a legal obligation, ‘review is not limited to
17 the record as it existed at any single point in time, because there
18 is no final agency action to demarcate the limits of the record.’”
19 Id. (quoting Friends of the Clearwater v. Dombeck, 222 F.3d 52, 560
20 (9th Cir. 2000), and citing Independence Mining Co. v. Babbit, 105
21 F.3d 502, 511 (9th Cir. 1997)).

22 The plaintiffs contend that San Francisco Baykeeper is
23 distinguishable. They argue that the court’s conclusion regarding
24 extra record evidence is limited to ‘unreasonable delay’ cases, and
25 not to ‘unlawfully withheld’ claims such as the one before the
26 court. I cannot agree.

1 The BayKeeper court's analysis referred to failure to act
2 claims in general, and did not make the distinction plaintiffs
3 urge. The court explained that the reason for the rule allowing
4 extra record evidence "is that when a court is asked to review
5 agency inaction before the agency has made a final decision, there
6 is often no official statement of the agency's justification for
7 its actions or inactions. As this case concerns agency inaction,
8 there can be no final action that closes the administrative record
9 or explains the agency's actions or inactions." San Francisco
10 Baykeeper, 297 F.3d at 886. Similarly, in Friends of the
11 Clearwater v. Dombeck, 222 F.3d 52, 560 (9th Cir. 2000), the court
12 explained that the challenge in that case was one to "'compel
13 agency action unlawfully withheld or unreasonably delayed.'" It
14 then held that "[i]n such cases review is not limited to the
15 record." See also Northcoast Environmental Center v. Glickman, 136
16 F.3d 660, 665 (9th Cir. 1998) ("Judicial review of agency action is
17 generally limited to review of the administrative record. However,
18 where the issue is alleged agency inaction, . . . the scope of review
19 . . . is broader.") (citation omitted).

20 I conclude that the correspondence between the Regional
21 Forester and the Chief should be accepted as part of the record.⁸

22
23 ⁸ To say that the exhibits will be admitted, says nothing about
24 their persuasive effect. Given their character, and the timing of
25 their creation, they appear to be no more than litigation support
26 documents. Indeed, it seems unlikely that the Deputy Chief's
rubber stamping of the Regional Forester's approach could supersede
the 1995 Order. Moreover, the doctrine permitting admission of
post-complaint documents is predicated upon the on-going nature of
a failure to act complaint (see n.6). Here, merely obtaining

1 IV.

2 THE CATEGORICAL EXCLUSIONS

3 Plaintiffs challenge the Forest Service's decisions to
4 categorically exclude from NEPA review its annual off-road vehicle
5 trail maintenance projects, and its issuance of a five-year special
6 use permit authorizing an annual motorcycle event. I address these
7 challenges seriatim.

8 NEPA requires all federal agencies to prepare a detailed EIS
9 for "major federal actions significantly affecting the quality of
10 the human environment." 42 U.S.C. § 4332(2)(C). Under the Council
11 of Environmental Quality's regulations implementing NEPA ("CEQ
12 Regulations"), an agency must prepare an environmental assessment
13 ("EA"), a brief preliminary evaluation, to determine whether a
14 proposed action may have a significant effect on the environment,
15 thus requiring the preparation of an EIS. 40 C.F.R.

16 § 1508.9(a)(1).⁹ If the agency determines that the project will
17 have no significant environmental effects, the agency may then
18 issue a FONSI, rather than prepare an EIS for the project. Id.; 40
19 C.F.R. § 1508.13.

20 ////

21 _____
22 approval from the Deputy Chief in no way appears to alter the
23 pertinent facts, i.e. that the order was obtained after a formal
hearing.

24 ⁹ The CEQ regulations are binding on all federal agencies and
25 provide formal guidance to the courts for interpreting NEPA
requirements. 43 Fed.Reg. 55,978 (1978). The CEQ's regulations
26 are entitled to substantial deference by the courts. Andrus v.
Sierra Club, 442 U.S. 347, 358 (1979).

1 In some situations, however, neither an EA nor an EIS is
2 required, and federal agencies may instead invoke a "categorical
3 exclusion" ("CE") from NEPA analysis. 40 C.F.R. § 1508.4.

4 A "categorical exclusion" is defined by the CEQ Regulations as:

5 a category of actions which do not individually or
6 cumulatively have a significant effect on the human
7 environment and which have been found to have no such
8 effect in procedures adopted by a Federal agency in
9 implementation of these regulations and for which,
10 therefore, neither an environmental assessment nor an
11 environmental impact statement is required.

12 40 C.F.R. § 1508.4. The CEQ Regulations require that agencies
13 adopt procedures to implement NEPA, including "specific criteria
14 for and identification of" actions that qualify for CEs. 40 C.F.R.
15 § 1507.3 (b) (2) (ii). Under the regulations, if a proposed activity
16 fits within a categorical exclusion, no further NEPA review is
17 necessary unless "extraordinary circumstances" related to the
18 proposed action exist. 40 C.F.R. §§ 1507.3, 1508.4. Extraordinary
19 circumstances are those "in which a normally excluded action may
20 have a significant environmental effect." Id. The Forest Service
21 has developed and published its criteria for categorically excluded
22 activities in chapter 30, part 1905.15, of its Handbook. Exh. 1 to
23 Pls' Br. in Supp. of Mot. for Summ. J.¹⁰ As required by the CEQ
24 Regulations, the Handbook specifically lists categorically-excluded
25 activities under NEPA, and sets forth detailed procedures that must

26 ¹⁰ The Forest Service's adoption of the revised Handbook was
published on September 18, 1992 at 57 Federal Register 43180-01.
The "specific comments" therein state that "[t]he Forest Service
Manual (1950) sets forth Forest Service management objectives,
policy, and responsibility and broad agency standards for meeting
the requirements of the National Environmental Policy Act."

1 be followed in order to appropriately invoke the use of any
2 identified CE. 40 C.F.R. §§ 1507.3, 1508.4.

3 **A. ORV TRAIL MAINTENANCE**

4 **1. Justiciability**

5 Defendants first argue that the court may not review their
6 decision to categorically exclude ORV trail maintenance for the
7 years 2001 and 2002 under the APA. They do not contend that such
8 decisions can never be judicially reviewed, nor could they, as the
9 Ninth Circuit routinely reviews Categorical Exclusion decisions as
10 final agency decisions under the APA. See Jones v. Gordon, 792
11 F.2d 821, 827-29 (9th Cir. 1986) (applying the standard for
12 reviewing a decision not to prepare an EIS to a categorical
13 exclusion decision); Bicycle Trails Council of Marin v. Babbitt,
14 82 F.3d 1445, 1456, n. 6 (9th Cir. 1996) ("[s]ince the same ultimate
15 decision underlies both the decision not to prepare an EIS and the
16 decision that an action falls within a categorical exclusion--that
17 the underlying action is not a major federal action having a
18 significant impact on the environment--it seems that the same
19 standard of review--arbitrary and capricious--would apply."); see
20 also West v. Secretary of Dept. of Transp., 206 F.3d 920 (9th Cir.
21 2000). Rather, the defendants maintain that the decisions
22 regarding maintenance of existing ORV trails and routes cannot be
23 reviewed, held unlawful, or be set aside pursuant to section 706(2)
24 of the APA because the challenged decisions did not involve final
25 agency action. Essentially, according to them, the maintenance
26 projects did not trigger NEPA compliance in the first place. They

1 attempt to analogize this case to Montana Wilderness Assn., Inc.
2 v. U.S. Forest Service, which held that "routine maintenance work
3 lacks the qualities that constitute reviewable final agency
4 action." 314 F.3d 1146, 1150 (9th Cir. 2003), vacated and remanded
5 other grounds, Montana Wilderness Ass'n, Inc. v. U.S. Forest
6 Service, 2004 WL 1660569 (9th Cir. 2004)). I cannot agree.

7 In Montana Wilderness Assn., plaintiffs challenged the Forest
8 Service's failure to maintain certain forest areas so as to
9 preserve their wilderness character in accordance with a
10 Congressional statute. The district court ruled against the
11 Service but the Ninth Circuit reversed, concluding that the
12 "maintenance activities implement[ed] [the Forest Service's] travel
13 management forest plans . ." and could therefore not "mark the
14 consummation of [its] decision making process." Id. at 1150. As
15 I now explain, Montana Wilderness is easily distinguished from the
16 matter at bar.

17 Unlike Montana Wilderness, the plaintiffs here do not simply
18 "demand a general judicial review of the [Service's] day-to-day
19 operations." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 899
20 (1990); see Norton v. Southern Utah Wilderness Alliance, 124 S.Ct.
21 2373 (2004) (SUWA). As the plaintiffs explain, they are not
22 challenging routine trail maintenance per se. Rather, they attack
23 the Forest Service's issuance of NEPA categorical exclusions, which
24 they claim are final orders. Pls' Complaint at 29-31. I agree.

25 In the instant context, an "order" is defined as "a final
26 disposition . . . in a matter other than rule making". 5 U.S.C.

1 § 551(6). An agency action is final when, “[f]irst, the action
2 . . . mark[s] the consummation of the agency's decision making
3 process; and second, the action [is one] by which rights or
4 obligations have been determined or from which legal consequences
5 flow.” Montana Wilderness Assn., 314 F.3d at 1150 (internal
6 citations and quotations omitted). The plaintiffs maintain that
7 the ENF’s issuance of the categorical exclusions for the 2000 and
8 2001 trail maintenance projects meet these definitions. I agree.

9 As noted, the Forest Service has developed and published its
10 criteria for categorically-excluded activities in its Handbook.
11 The Handbook sets forth detailed procedures that must be followed
12 in order to appropriately invoke the use of any identified CE. 40
13 C.F.R. §§ 1507.3, 1508.4. The Handbook instructs that the Service
14 must “scope” (undertake a case-by-case analysis) all proposed
15 actions to identify whether “extraordinary circumstances” exist,
16 “including those that would appear to be categorically excluded,”
17 before invoking a CE. Handbook 1909.15, ch. 30, §30.3(3). “If
18 scoping indicates that extraordinary circumstances are present, and
19 it is uncertain that the proposed action may have a significant
20 effect on the environment, [the Service must] prepare an EA. If
21 scoping indicates that the proposed action may have a significant
22 environmental effect, [the Forest Service must] prepare an EIS.”
23 Id. Certain categories of actions must be documented in a decision
24 memo, while others are excluded. § 31.

25 The administrative record contains two separate Biological
26 Reviews relating to the categorical exclusion for ORV area

1 maintenance for the years 2001 and 2002. The July 20, 2000 review
2 explains that "th[e] biological evaluation analyzes the potential
3 effects of the proposed FY 2001 Routine [ORV] Route Maintenance on
4 proposed, threatened, endangered, and sensitive (TES) wildlife
5 species in accordance with direction in Forest Service Manual
6 2670." AR Vol. 12 at 1461. Accompanying the document is a memo
7 from Chuck Mitchell, a Soil Scientist/Watershed Program Leader,
8 concluding that the "OHV trail maintenance activities can be
9 categorically excluded." Id. at 1465. The review, dated October
10 1, 2001, provides similar conclusions about the 2002 ORV
11 maintenance activities. The documents reflect that the ENF
12 consummated a decisionmaking process, thus meeting the first prong
13 of the "final agency action" analysis. The issued CEs also meet
14 the second prong for final agency action because they established
15 the ENF's right to proceed with the trail maintenance activities.
16 Thus, contrary to the actions challenged in Montana Wilderness
17 Assn., the actions at bar are final agency actions that are subject
18 to this court's review.

19 **B. NEPA VIOLATIONS**

20 Plaintiffs allege that the Forest Service violated NEPA when
21 it issued the Categorical Exclusions for ORV area maintenance for
22 two years despite the documented presence of "extraordinary
23 circumstances" which triggered the requirement for further NEPA
24 review. See 40 C.F.R. §§ 1507.3, 1508.4.

25 Pursuant to the Forest Service's Handbook, "[a] proposed
26 action may be categorically excluded from documentation in an

1 environmental impact statement (EIS) or environmental assessment
2 (EA) only if the proposed action" is within a listed category "and
3 there are no extraordinary circumstances related to the proposed
4 action." Handbook at ch. 30, § 30.3(1). Extraordinary
5 circumstances include both the presence of steep slopes or highly
6 erosive soils and threatened and endangered species or their
7 critical habitat. Id. at §30.3(2) (a)-(b).

8 As noted, scoping is required for actions which might be
9 categorically excluded. Id. at Ch. 30 §30.3(3). The purpose of
10 such scoping includes determining the nature and complexity of the
11 proposed action, identifying environmental issues related to the
12 proposed action, and assessing "the nature, characteristics, and
13 significance of the effects of a proposed action and its
14 alternatives on the human environment." Id. Ch. 10, § 10.2.

15 **C. THE MAINTENANCE PROJECTS¹¹**

16 According to the Biological Review of the 2001 ORV route
17 maintenance program, specific areas were identified based upon the
18 level of ORV use and were evaluated for threatened and endangered
19 wildlife. AR Vol. 12 at 1461. The Review asserts that "[in]
20 general, this project will result in no direct, indirect or

21 ¹¹ These categorical exclusions were prepared in association with
22 the Forest Service's application to the State of California for
23 funds to supplement Forest Service maintenance work. AR Vol. 12
24 at 1467 (FY 2001 CE); AR Vol. 12 at 1515 (FY 2002 CE). The
25 maintenance work consisted of routine grading, reshaping, and
26 repair of surfaces and drainage structures of roads and OHV routes,
clearing brush and fallen debris from existing routes, placing or
replacing barriers and signs along ORV routes, and maintaining
existing recreation facilities (site policing, cleaning, toilet
maintenance etc.). Id.

1 cumulative effects to TES habitats” Id.

2 In discussing the California spotted owl, the Review provides
3 that the project “will not substantially affect habitat quality or
4 quantity for spotted owls ” Id. at 1462. It acknowledges
5 that “[i]t is possible that maintenance activities could result in
6 disturbance to individual[] owls,” but that, because “[t]he planned
7 maintenance that occurs within a spotted owl Protected Activity
8 Center¹² or within 1/4 mile of the activity center will be
9 coordinated with the unit biologist who may require a limited
10 operating period for mechanized equipment use, . . . [i]t is
11 expected that[,] with this site-specific evaluation near . . .
12 activity centers[,] [t]he risk of disturbance will be reduced
13” Id.

14 Regarding the northern goshawk, the Biological Review
15 acknowledges that disturbance during the breeding season could
16 result in some cases of nesting failure, but it asserts that it was
17 not possible to know those site-specific effects because the level
18 of disturbance is dependent upon the specific maintenance proposed.
19 Again, the Forest Service provides that maintenance occurring
20 within a goshawk management area or within a 1/4 of a mile thereof
21 would be coordinated with the unit biologist and that site-specific
22 requirements would reduce the risk of disturbance. AR Vol. 12 at
23 1462-1463.

24
25 ¹² Plaintiffs describe Protected Activity Centers (PAC)s as 300
26 acres of habitat surrounding each known owl site identified in the
Forest between 1987 and 1992.

1 In discussing the northwestern pond turtle, the author of the
2 Review states that "there are no known conflict areas where O[R]V
3 maintenance would be likely to contribute[] to [their] mortality,"
4 although nests placed along the road or trail could be "damaged or
5 destroyed." Id. at 1463. It then concludes that "the incidental
6 loss of occasional northwestern pond turtle individuals or nests
7 would not be expected to lead to a trend toward federal listing or
8 a loss of species viability across the Forest due to the limited
9 scope of the project sites." Id.

10 There is "the potential" that some maintenance work can affect
11 the mountain yellow-legged frog, especially during the egg mass
12 period. Id. But, "[p]lanned activities that involve work within
13 streams or at pools during this period will have a site-specific
14 review to determine the presence of habitat or TES amphibians and
15 will be designed to minimize or avoid adverse effects on any
16 individuals found through amendment to [the] biological
17 evaluation." Id.

18 The Biological Review for the 2002 fiscal year, dated October
19 1, 2001, is similar to the 2001 FY Review. Id. at 1505. This
20 review also specifies that "unit biologist[s] will review specific
21 trail maintenance projects and will amend this BE to include site-
22 specific measures, . . . if needed." Id.

23 The Forest Service invoked CEs for "repair and maintenance of
24 roads, trails and landline boundaries" and "repair and maintenance
25 of recreation sites and facilities," for both projects. See
26 Handbook ch. 30. at §31.1b(4), (5). Defendants maintain that the

1 trail maintenance work was appropriately categorically excluded
2 because it does not individually or cumulatively have a significant
3 impact on the human environment. According to defendants, they
4 sufficiently examined all the issues complained of by CSNC in this
5 action and reached a conclusion that the circumstances do not
6 preclude the use of categorical exclusions.

7 Plaintiffs contend that the Forest Service's actions were
8 arbitrary and capricious because their own Biological Reviews
9 indicate that certain species may be adversely affected. This
10 being so, they argue, the Forest Service was required to conduct
11 an EA or EIS because the correct standard under NEPA is whether
12 extraordinary circumstances are present and there exists the
13 possibility that they will be affected by the proposed project.
14 They argue that the very presence of extraordinary circumstances
15 precluded the Service from making a finding of "no impact," and
16 thus justifying a categorical exclusion. I cannot agree.

17 "An agency satisfies NEPA if it applies its categorical
18 exclusions and determines that neither an EA nor an EIS is
19 required, so long as the application of the exclusions to the facts
20 of the particular action is not arbitrary and capricious. Under
21 that standard, the Forest Service's decision must not be disturbed
22 unless it was "a clear error of judgment." Marsh v. Oregon Natural
23 Resources Council, 490 U.S. 360, 378 (1989).

24 First, plaintiffs' contention that the very presence of the
25 species described above and the finding that they may be affected
26 required further analysis is based on a flawed reading. The Forest

1 Service's Handbook establishes two requisites to conducting an EA
2 or EIS, first, the presence of extraordinary circumstances and
3 second, uncertainty that the proposed action may have a significant
4 effect on the environment. Forest Service Handbook, Ch. 30
5 1909.15, §30.3(3). In the matter at bar, the Service's Biological
6 Reviews candidly discuss the presence of extraordinary
7 circumstances, but then explain why the maintenance projects will
8 not have significant effects.¹³ The mere presence of factors that
9 may constitute extraordinary circumstances does not preclude the
10 use of categorical exclusions where the agency has made a showing
11 that the proposed project will not actually have an adverse impact
12 on the environment. See Southwest Center, 100 F.3d at 1449. (even
13 though there was evidence that proposed maintenance may affect the
14 Mexican Spotted Owl, "[t]he gaps and imperfections in the Forest
15 Service's analysis . . . [did] not rise to the level of an
16 arbitrary and capricious decision."). As in this case, the
17 plaintiffs in Southwest Center argued that the presence of
18 threatened and endangered species or their critical habitat
19 constituted extraordinary circumstances precluding CE. The court
20 responded that "an agency may issue a categorical exclusion even
21 where threatened or endangered species are present if the agency
22 determines that the project will not impact negatively on the
23 species." Id. at 1450 (citing Pyramid Lake Paiute Tribe v. U.S.

24

25 ¹³ They further explain that they will be supplemented when those
26 extraordinary circumstances are encountered during the maintenance
activities.

1 Dep't of the Navy, 898 F.2d 1410, 1414-16, 1420 (9th Cir. 1990)).
2 Compare California v. Norton, 311 F.3d 1162, 1177 (9th Cir.
3 2002) (Department of Interior could not grant categorical exclusion
4 where there was substantial evidence in the record that an
5 exception may apply and the Department did not document or explain
6 its decision).

7 In sum, the court concludes that the Service satisfied its
8 duty before concluding that a CE was appropriate.

9 **C. ENDURO RACE**

10 Plaintiffs also challenge a special use permit granted by the
11 Service for the 49er Enduro race on the grounds that it does not
12 fit within any categorical exclusion. Defendants submit that this
13 issue is moot because the Service revoked the permit. See Exh.4
14 to Defs' Br. in Supp. of Mot. for Summ. J. (letter from Kathryn
15 Hardy to Mr. William Fain of the Polka Dot Motorcycle Club (May 29,
16 2003)).

17 While voluntary withdrawal of the permit might not preclude
18 adjudication, given that the Service is proceeding to consider a
19 request for a single event permit, it seems clear that the issues
20 tendered by the original approval of the five year permit are
21 moot.¹⁴

22
23 ¹⁴ Although the Service is now processing a request for a one-
24 year, single event permit, the categorical exclusion category being
25 considered by the Service is different from the one used for the
26 withdrawn five-year permit. Moreover, unlike the withdrawn
decision, the Service asserts that it has sent a scoping letter to
interested parties, including the plaintiffs, regarding the
issuance of the permit. It would be premature for the court to
rule on this issue since the permit may never be issued.

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VII.

ROCK CREEK EIS

In their third cause of action, plaintiffs challenge the adequacy of the EIS for the 1999 Rock Creek Plan, asserting that it failed to consider the environmental effects of the Rock Creek Trails ORV project in conjunction with the environmental effects of other projects. Specifically, they contend that the Service violated NEPA's EIS requirements by limiting the geographical scope of its cumulative impacts analysis to the Rock Creek plan area, and refusing to consider the cumulative impacts of the ORV use in the Rock Creek area with ORV use in other parts of the Forest. They also contend that the Service failed to consider the cumulative impacts of opening the Pacific Deer Herd's winter range to ORV use, in combination with the ongoing administration of five commercial grazing allotments within the Herd's range. Finally, they argue that the Service failed to take a "hard look" at "other activities" in assessing the proposed project's cumulative effect. After reviewing the applicable standards, I examine the various grounds tendered by plaintiff.

NEPA "ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Pursuant to the statute, "[a]n agency must candidly disclose in its EIS the risks posed by its proposed

1 action. Otherwise, the EIS cannot serve its purpose of informing
2 the decisionmaker and the public before the decision to proceed is
3 made." Friends of the Earth v. Hall, 693 F.Supp. 904, 937 (W.D.
4 Wash. 1988) (emphasis in original). An EIS must also inform the
5 decisionmaker of the full range of responsible opinions on
6 environmental effects. See Citizens Against Toxic Sprays, Inc. v.
7 Bergland, 428 F.Supp. 908, 922 (D. Or. 1977).

8 There are two circumstances in which NEPA requires an
9 environmental impact statement to include conduct which is not part
10 of the federal agency's proposed action. First, NEPA requires a
11 review of "cumulative impacts . . . [involving] the impact on the
12 environment which results from the incremental impact of the action
13 when added to other past, present, and reasonably foreseeable
14 future actions." 40 C.F.R. § 1508.7. Nonetheless, in considering
15 whether cumulative impacts can be studied, "NEPA does not require
16 the government to do the impractical." Wetland Action Network v.
17 U.S. Army Corps of Engineers, 222 F.3d 1105, 1119 (9th Cir. 2000)
18 (quoting Blue Mountain Biodiversity Project v. Thomas, 161 F.3d
19 1208, 1215 (9th Cir. 1998)).

20 Second, NEPA requires review of "connected actions," meaning
21 those actions that automatically trigger each other or are
22 interdependent parts of a larger action. See 40 C.F.R.
23 § 1508.25(a)(1)(I) and (iii). Connected actions must be considered
24 together in a single EIS. See Save the Yaak Committee v. Block, 840
25 F.2d 714, 718 (9th Cir. 1988) (quoting Thomas v. Peterson, 753 F.2d
26 754, 758 (9th Cir. 1985)) (internal quotation marks omitted).

1 Again, judicial review of final agency actions under NEPA is
2 governed by the APA, which directs a reviewing court to affirm a
3 final agency action unless that action is "arbitrary, capricious,
4 an abuse of discretion, or otherwise not in accordance with law."
5 5 U.S.C. § 706(2); Citizens to Preserve Overton Park, Inc. v.
6 Volpe, 401 U.S. 402 (1971). The court applies a rule of reason in
7 reviewing the adequacy of an EIS. The reviewing court must make
8 "a pragmatic judgment whether the EIS's form, content and
9 preparation foster both decision making and informed public
10 participation[,]" California v. Block, 690 F.2d 753, 761 (9th Cir.
11 1982) (citing Warm Springs Dam Task Force v. Gribble, 565 F.2d 549,
12 552 (9th Cir. 1977)), and determines "whether . . . [the] EIS
13 contains a 'reasonably thorough discussion of the significant
14 aspects of the probable environmental consequences.'" Id. (quoting
15 Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).
16 In short, NEPA requires the agency to take a "hard look" at the
17 environmental consequences of its proposed action. Kleppe v.
18 Sierra Club, 427 U.S. 390, 410 n. 21 (1976).

19 While the court must assure that the agency has followed
20 NEPA's procedural command, it is not empowered to substitute its
21 judgment for that of the agency. Rather, it is to determine
22 whether "the decision was based on a consideration of the relevant
23 factors and whether there has been a clear error of judgment." Id.
24 at 416.

25 **A. CHARACTERIZATION OF THE CLAIM**

26 Defendants assert that plaintiffs' claim is actually a

1 "challenge[] [to] the geographical area over which the Forest
2 Service examined impacts to deer." Defs' Br. in Supp. of Mot. for
3 Summ. J. If this is true, then the court's role is quite limited.
4 The Ninth Circuit has held that challenges alleging that the
5 geographical scope of an analysis is too small is not a cumulative
6 impacts challenge under NEPA, and that the Forest Service is
7 entitled to deference in its determination regarding the
8 geographical scope of the NEPA analysis area. Inland Empire Public
9 Lands Council v. U.S. Forest Service, 88 F.3d 754, 764 (9th Cir.
10 1996). As I explain below, I cannot agree with defendants'
11 characterization.

12 Plaintiffs do not argue that the analysis in the EIS failed
13 to consider the project's direct effects on species outside the
14 project area. Rather, plaintiffs have charged that the EIS failed
15 to analyze the cumulative effects of other activities -
16 specifically, grazing and ORV use in other parts of the forest
17 (i.e., the environmental effects of other, past, present and future
18 projects) - in combination with the proposed Rock Creek
19 Recreational Trails Plan. Put directly, Inland Empire is
20 inapposite because plaintiffs' challenge is a cumulative effects
21 challenge and thus properly before this court.

22 **B. SCOPE OF EIS ANALYSIS**

23 The Forest Service first asserts that the Rock Creek Trails
24 Plan EIS contained a sufficient analysis of the cumulative effects
25 on the Pacific Deer Herd. They admit that "[t]he RDEIS . . .
26 analysis for the Pacific Deer Herd critical winter range covers

1 only a portion of the herd and a portion of the winter range," AR
2 Vol. 15 at 255, and, effectively, that the analysis is limited to
3 the Rock Creek area itself. Defendants reason that "[t]he Rock
4 Creek EIS explained that the main use of the Rock Creek area by the
5 Pacific deer herd occurs during the winter months, from November
6 through April." AR Vol. 14 at 4-68. Thus, they assert, the
7 analysis appropriately focused on the impacts that occur in the
8 Rock Creek area during the winter months. Indeed, in ruling on
9 CSNC's administrative appeal, the Service's Hearing Officer
10 approved of the Revised Draft EIS's limited focus on the "project
11 area." See AR Vol. 16 at 1874.

12 Contrary to the defendants' contention, environmental
13 assessments which fail to analyze the cumulative impacts of the
14 project at issue in light of other actions outside the main project
15 area are inadequate. See Save the Yaak Committee v. Block, 840 F.2d
16 714, 720-21 (9th Cir. 1988) (Forest Service failed to analyze the
17 cumulative impacts of the proposed project where there were plans
18 to improve other portions of the same road); Washington Trails
19 Association v. United States Forest Service, 935 F.Supp. 1117,
20 1122-23 (W.D. Wash. 1996) (NEPA analysis of a proposed ORV trail
21 plan for one area of a national forest must consider cumulative
22 impacts associated with ORV use in other areas of the forest,
23 including connecting trails linking the various areas together);
24 NRDC v. Hodel, 865 F.2d 288, 297-300 (D.C. Cir. 1988) (EIS analyzing
25 certain off-shore oil and gas leases failed to adequately analyze
26 the proposed project's cumulative impacts where it focused only on

1 impacts "within the Planning Area" and failed to address cumulative
2 impacts to affected migratory species throughout their range). In
3 sum, the Hearing Officer's conclusion that NEPA cumulative effects
4 analysis was adequate was in error.

5 **C. "OTHER ACTIVITIES"**

6 In analyzing the Project's cumulative impacts on the Pacific
7 Deer Herd, the Revised Draft EIS simply states that two proposed
8 timber sales within the Rock Creek area are expected to reduce
9 hiding cover for the Pacific Deer Herd in the project area, and
10 that plans to provide habitat for spotted owl and goshawks in the
11 project area increase the importance of prime forage and cover
12 habitat for the deer. AR Vol. 14 at 4-75 to 4-76. The Revised
13 Draft EIS then dismisses all "other activities" that might
14 contribute to cumulative impacts to the Pacific Deer Herd, with no
15 meaningful discussion or analysis.¹⁵ The conclusion is
16 insufficient. "Perfunctory references do not constitute analysis
17 useful to a decisionmaker in deciding whether, or how, to alter the
18 program to lessen the cumulative environmental impacts." NRDC v.

19 ¹⁵ It reads in totality:

20
21 Other activities within the analysis area that typically
22 occur (mining, fuelwood gathering, personal use and
23 commercial forest product collection) do not affect
24 large areas and are not seen as providing more than
25 minor disturbance. The fuelwood gathering that occurs
26 in the area takes place mostly near main roads that are
exempt from the closure, but does not occur from January
through March. These activities are not likely to
result in a continuous source of physiological stress to
wintering deer.

AR Vol. 14 at 4-76.

1 Hodel, 865 F.2d 288, 299 (D.C. Cir. 1988). The EIS falls short
2 of the required NEPA analysis because it does not describe either
3 the extent or intensity of the other activities, thus making it is
4 impossible for either the decisionmaker or the public to evaluate
5 the Service's conclusion.

6 **D. GRAZING**

7 Plaintiffs contend that the Forest Service should have
8 analyzed the cumulative effects of opening up the northern portions
9 of the critical deer winter range to ORV use in combination with
10 grazing activities outside of the Rock Creek Area. According to
11 plaintiffs, the EIS failed to mention or analyze at all the
12 cumulative impacts related to the Forest Service's grazing
13 allotments in the Pacific Deer Herd's range. This contention is
14 well-taken.

15 There is evidence in the record that grazing activities in the
16 Forest have damaged important Pacific Deer Herd fawning and
17 foraging areas through trampling and increased stream erosion,
18 leading to adverse changes in vegetative composition. Fed. Defs'
19 Br. in Supp. of Mot. for Summ. J., Exh. 1 at 20. The decrease of
20 meadows associated with fawning activities is partly responsible
21 for fawn mortality. Id. at 35-36. The record also indicates that
22 "[g]rasses and forbs that usually provide important forage for deer
23 in spring are lacking in all habitat types . . ." Id., Exh. 2 at
24 4-21. Further, the "Rock Creek Off-Road Vehicle Deer Study"
25 provides that "forage conditions on the winter range were
26 considered poor." Id. at 7-3. Given the above, it is possible that

1 opening up the northern portions of the critical deer winter range
2 to ORV use, when viewed in combination with grazing activities,
3 would significantly affect foraging opportunities, nutritional
4 issues, and mortality rates of the deer. Accordingly, adequate
5 discussion of the cumulative effect is required.

6 The defendants attempt to refute the plaintiffs' contentions
7 by asserting that the Rock Creek EIS adequately discussed grazing
8 activities. They first direct the court to sections of the RDEIS
9 and the FEIS, which, according to them, support their conclusion
10 that the grazing allotments have not been overgrazed. As I
11 explain, those sections undermine the defendants' contention and
12 instead evidence the EIS's failure in addressing the cumulative
13 impacts on the Pacific Deer Herd.

14 The defendants assert that, since 1994, the Old Pino allotment
15 has been the only active grazing allotment within the Pacific deer
16 herd range, and that the FEIS concluded that this allotment had not
17 been overgrazed. Defs' Br. in Supp. of Mot. for Summ. J. at 46.
18 The record does not support this conclusion. While the RDEIS does
19 contain a small section discussing grazing, it does not at all
20 address the effects of grazing on the Pacific Deer Herd's fawning,
21 much less the cumulative effects of the grazing and opening up
22 critical winter range to ORV use. See AR Vol. 14 at 4-196. That
23 section explains that, out of the 165 head of cattle which graze
24 within the Old Pino allotment, 50 graze within the Rock Creek Area.

25 The discussion in the referred to section is, at best, quite
26 cryptic. Thus, although the section briefly discusses the effect

1 of livestock grazing, it cannot even be determined whether,
2 whatever analysis was done, the Forest Service limited its study
3 to the grazing occurring within the Rock Creek area, and not
4 throughout the entire allotment. Put directly, there is nothing
5 in the RDEIS to support the defendants' position.

6 The defendants also point to the FEIS which, in response to
7 a public comment, states that "[t]he effects of grazing within the
8 Rock Creek area are fully disclosed on pages 4-189 through 4-191
9 of the RDEIS[,] [and that] [a]nnual range monitoring results show
10 that the Old Pino allotment has not been overgrazed by the
11 permitted cattle." AR Vol. 15 at 303. A review of the cited pages
12 of the RDEIS, however, does not reveal any discussion concerning
13 grazing or deer fawning. The Forest Service cannot satisfy its
14 NEPA obligations by making conclusory statement in the FEIS. The
15 defendants also state that they were not required to examine
16 grazing activities in depth because only a total of 18 cattle graze
17 within the Rock Creek area, thereby minimizing the potential
18 impacts on fawning. Defendants' contention is unsupported by
19 anything in the record.¹⁶ As the Ninth Circuit has explained, "a

20
21 ¹⁶ The defendants attempt to save the Rock Creek EIS by submitting
22 a declaration from Charis Parker, a Wildlife Biologist, that
23 purportedly explains the FEIS's cursory conclusion regarding the
24 grazing activities. As explained, however, Parker's declaration
25 has been stricken from the record. Further, even if the
26 declaration was properly before the court, it would not affect the
outcome of this analysis. Parker's declaration mostly provides
background information on cattle grazing activities, rather than
an analysis of the quality of the vegetation as it relates to
fawning. See Decl. of Charis Parker ("Parker Decl."). Parker
asserts that any potential impacts on fawning are minimized because
only a total of 18 cattle graze within the Rock Creek area. Parker

1 proper consideration of the cumulative impacts of a project
2 requires some quantified or detailed information; . . . general
3 statements about possible effects . . . do not constitute a hard
4 look absent a justification regarding why more definite information
5 could not be provided." Klamath-Siskiyou Wildlands Center v.
6 Bureau of Land Management, 387 F.3d 989, 993 (9th Cir. 2004)
7 (internal quotation marks and citations omitted). The record
8 simply does not show that the Forest Service met these
9 requirements. Defendants were required, but failed, to examine if
10 and how grazing outside the Rock Creek area, in combination with
11 opening part of the critical deer winter range to ORV use, will
12 cumulatively affect foraging activities. Defendants should
13 supplement the Rock Creek Trails Plan EIS accordingly.

14 **E. ORV USE OUTSIDE ROCK CREEK AREA**

15 Defendants admit that the Rock Creek Plan EIS limited its
16 analysis of the effects of ORV use within the Rock Creek area.
17 Plaintiffs allege that such a study should have also examined the

18 _____
19 Decl. This position is flawed for several reasons. First,
20 Parker's declaration, created on July of 2003, is not a substitute
21 for the required EIS analysis, since the public was unable to
22 review the information prior to the Forest Service's approval of
23 the FEIS. NEPA requires that the EIS "set forth sufficient
24 information for the general public to make an informed evaluation,
25 . . . and for the decisionmaker to consider fully the environmental
26 factors involved and to make a reasoned decision after balancing
the risks of harm to the environment against the benefits to be
derived from the proposed action." Sierra Club v. U.S. Army Corps
of Engineers, 701 F.2d 1011, 1029 (2nd Cir. 1983). Second,
Parker's assertions regarding current grazing activities is
unsupported by evidence. Lastly, and more importantly, it is
irrelevant whether there are only 18 cattle grazing within the Rock
Creek area, since defendants were required to study the cumulative
effects of grazing outside the Rock Creek area.

1 cumulative effects of ORV use outside of the Rock Creek area. It
2 is unclear from their briefs, however, as to what kind of analysis
3 is required and for what purposes. The court should not have to
4 speculate as to what plaintiffs contend regarding this issue.

5 **VIII.**

6 **1990 ORV Plan**

7 Both the plaintiffs and the defendant-intervenors contend that
8 the Forest Service has failed to conduct an EIS prior to the
9 adoption of the 1990 ORV Plan in violation of NEPA. I examine this
10 contention below.

11 **A. 1990 ORV MANAGEMENT PLAN**

12 As discussed above, in 1990, the Forest Service created an ORV
13 management plan for the Eldorado which closed unlimited ORV areas
14 and restricted all ORV travel to designated routes and areas.
15 Defs' SUF 8. The ORV Plan effectively established a "closed unless
16 designated open" policy, reversing the 1977 ORV Plan's "open unless
17 designated closed" policy. Defs' SUF 6 (citing AR Vol. 2 at 310);
18 Intervenors' SUF 6. After conducting an inventory of the existing
19 system of trails, roads, and tracks being used by ORVs, Defs' SUF
20 7, Intervenors' SUF 13, the existing roads and trails became the
21 designated route system. Defs' SUF 8.¹⁷

22 The Forest Service concedes that it has never conducted a
23 forest-wide environmental analysis of the 1990 Forest ORV Plan
24 prior to its adoption to determine the environmental impacts

25 ¹⁷ The 1990 ORV plan also creates a five year plan to create and
26 establish new routes or changes in trail use.

1 associated with restricting all ORV use to designated only
2 trails.¹⁸ Instead, the Forest Service tiered the ORV Plan to the
3 EIS completed for the 1989 LRMP. Intervenor's' SUF 14.

4 **B. THE FOREST SERVICES' APPEALS DECISIONS**

5 In a 1995 decision of an appeal by both the CSNC and ORV
6 users, the Chief of the Forest Service ("Chief") agreed with the
7 ORV Users' contention that the Forest Service failed to complete
8 an adequate NEPA analysis before issuing the 1990 ORV Plan. The
9 Chief ruled that the Forest Service had not considered the site
10 specific impacts associated with restricting ORV use to designated
11 routes and directed the Forest Service to complete the required
12 NEPA analysis by November of 1997. AR Vol. 6 at 981.

13 Specifically, the Chief ruled that the LRMP EIS is an
14 inadequate substitute for an independent ORV Plan EIS because:

15 [T]here was insufficient environmental disclosure to
16 implement a policy of ORV closures on the Forest when
17 the 1990 ORV Plan was completed. This site-specific
18 analysis is required at the point when an irretrievable
19 commitment of resources is made. (Sierra Club v.
Hathaway, 579 F.2d 1162,1168 (9th Cir. 1978)).
Implementation with the 1990 ORV Plan was premature
without site-specific rationale on the need for and
effects of a closed, unless designated as open policy.

20 AR Vol. 6 at 984. Accordingly, the Chief directed the Forest
21 Supervisor "to supplement the ORV Plan with environmental analysis
22 that addresses reasonable alternatives to the proposed action,
23 including the No Action alternative, for ORV use in General Forest

24
25 ¹⁸ Only one of the ENF's sixteen (16) ORV areas - the Rock Creek
26 ORV area - has ever been subject to environmental analysis under
NEPA. As discussed supra, the adequacy of that the Rock Creek EIS
is also under challenge.

1 management areas." Id. at 983-84.

2 A similar conclusion was reached in response to the appeal of
3 the California Department of Fish and Game ("CDFG").¹⁹ There, the
4 Chief concluded that:

5 The new ORV Plan incorporated the environmental analysis
6 of the Forest Plan, but no further NEPA documentation
7 was conducted. Because the designation of open travel
8 routes or closed areas is a site-specific decision, the
9 effects and rationale for that decision must be
10 disclosed at the time there is an irretrievable
11 commitment of resources and cannot be deferred. Sierra
12 Club v. Hathaway, 579 F.2d. 1162, 1168 (9th Cir. 1978)
13 . . . However, we find no site-specific analysis to
14 implement the 1990 ORV Plan. Therefore, the Regional
15 Forester (through the Forest Supervisor) is directed to
16 disclose the environmental consequences of the decision
17 in the ORV Plan to restrict use to designated routes in
18 General Forest areas. In particular, the environmental
19 effects of increased concentration of use on open trails
20 and the effect on visitor experiences should be
21 addressed.

22 The plaintiffs and the defendant-intervenors contend that the
23 1990 ORV changes have and are being implemented without the
24 required environmental analysis.

25 **C. CHARACTERIZATION OF PLAINTIFFS' CLAIM**

26 Plaintiffs and defendants engage in an extended discussion
concerning the characterization of the Forest Chief's decision and
the applicable standard of review. Plaintiffs contend that the
Forest Service's failure to complete the required NEPA analysis for
the 1990 ORV Plan is action 'unlawfully withheld' pursuant to
§ 706(1) of the APA. Accordingly, they seek enforcement of the
Chief's 1995 Order. The federal defendants, on the other hand,

¹⁹ Plaintiffs incorporated the CDFG's appeal in their own appeal.
AR Vol. 6 at 998.

1 maintain that this cause of action can only be characterized as one
2 for action "unreasonably delayed," and that the court must
3 therefore cautiously apply a balancing test and determine the
4 reasonableness of its actions before compelling it to act.

5 As defendants assert, "unreasonably delayed" APA claims are
6 subject to review under the six-factor test announced in
7 Telecommunications Research & Action v. F.C.C., 750 F.2d 70, 79-80
8 (D.C.Cir. 1984) ("TRAC"); Independence Min. Co., Inc. v. Babbitt,
9 105 F.3d 502, 507 (9th Cir. 1997 ("[C]ourts generally apply the
10 so-called TRAC factors in deciding whether to order relief in
11 claims of agency delay brought under the APA."). Whether action
12 is "unlawfully withheld" or "unreasonably delayed" turns on whether
13 there is a Congressionally-mandated deadline for agency action.
14 Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999); and
15 see Biodiversity Legal Foundation v. Badgley, 309 F.3d 1166, n.11
16 (9th Cir. 2002). If the agency's delay is not sufficiently
17 unreasonable, the reviewing court may not provide the challenging
18 party the requested relief.

19 Here, the defendants argue that the claim grounded on the
20 Chief's decisions can only be brought as one for unreasonably
21 delayed action. As such, they assert, an application of the TRAC
22 factor shows that the Forest Services' current environmental
23 analysis of the ORV Plan reasonably complies with the Chief's
24 orders. The defendants' position is premised on the notion that
25 a finding of a deadline or timetable on the Chief's 1995 Order
26 would be improper, because, they assert, the 1997 deadline is not

1 congressionally mandated and therefore unenforceable. Because, as
2 explained below, the court rests its decision on the statutory
3 requisites of NEPA, and not on the Chief's decision, I need not
4 address this issue.²⁰

5 The plaintiffs and defendant-intervenors also contend that the
6 federal defendants' failure to complete an independent or
7 supplemental EIS prior to the adoption of the 1990 ORV Plan is a
8 violation of its statutory duty under NEPA. As I held some twenty
9 four years ago, a failure to provide an adequate EIS prior to
10 undertaking a major federal action is a substantive violation of
11 NEPA. California v. Bergland, 483 F.Supp. 465 (E.D. Cal. 1980),
12 aff'd in pertinent part, California v. Block, 690 F.2d 753 (9th
13 Cir. 1982). Therefore, if the NEPA EIS mandate is violated, the
14 statute is violated as a matter of its substance, i.e. it is not
15 action delayed or withheld, but action contrary to law within the
16 meaning of the APA. Accordingly, the proper question to be
17 examined is whether the Forest Service undertook a major federal
18 action, and if so, whether it issued a proper EIS before doing
19 so.²¹

20
21 ²⁰ I pause briefly to note that a federal agency may make rules
22 both through a formal promulgation process, and through
23 administrative adjudication. See Cmty. Hosp. of Monterey Peninsula
24 v. Thompson, 323 F.3d 782, 790 (9th Cir. 2003). If the appeals
25 proceedings in this case were adversary in nature, then the Chief's
26 order has the effect of a Rule, and an administrative agency is
bound by its own rules until changed. See generally Ruangswang v.
INS, 591 F.2d 39, 43 (9th Cir. 1978).

²¹ Although the characterization of the NEPA claim is inapposite,
given that the framework tendered by the parties is a plausible
means of addressing the question, I briefly address the dispute

1 **D. THE 1990 ORV PLAN'S ENVIRONMENTAL ASSESSMENT**

2 NEPA and the CEQ's implementing regulations require that an
3 agency analyze the consequences of a proposed action and subject
4 that analysis to public scrutiny before any decision is made to go
5 forward with any proposed "major federal action." 42 U.S.C.

6 §§ 4332(c) et seq. Being that "[p]roper timing is one of NEPA's
7 central themes," Save the Yaak, 840 F.2d at 718, the CEQ

8 Regulations provide that "NEPA procedures must insure that
9 environmental information is available to public officials and
10 citizens before decisions are made and before actions are taken."

11 40 CFR § 1500.1(b). Federal agencies are prohibited from making
12 "any irreversible and irretrievable commitment of resources" before
13 completing NEPA review. Conner v. Burford, 848 F.2d 1441, 1446

14 _____
15 here. As noted in the text, Congress has mandated a sequence
16 requiring an EIS before the government acts. In this sense, there
17 is a Congressionally-mandated deadline, and the TRAC balancing test
18 is inapplicable. Biodiversity Legal Foundation v. Badgley, 309
19 F.3d 1166, n.11 (9th Cir. 2002) (TRAC factors were not applicable
20 where Congress had provided a deadline for any agency's
21 performance.) Congress need not impose a specific calendar date
22 for a "deadline" to exist, rather it may require action measured
23 by some future event. Southern Utah Wilderness Alliance v. Norton
24 ("SUWA"), 301 F.3d 1217 (10th Cir. 2002) (vacated and remanded on
25 other grounds, Norton v. SUWA, 124 S.Ct. 2373, n. 5 (2004)). The
26 NEPA statutory scheme provides a deadline in no less certain terms
although not identifying a specific date. Id. at 1226 n.5. Put
differently, while Congress did not provide a specific calendar
date, it did provide a mandatory chronological arrangement,
instructing that a NEPA analysis must be completed before
committing resources. Congress therefore created a condition
precedent, and the Service's failure to follow the chronological
scheme invalidates the Forest Service's action without fulfilling
that condition. Accordingly, plaintiffs' challenge to the
Service's alleged failure to complete a NEPA analysis before
adopting the 1990 ORV Plan would properly be characterized as
unlawfully withheld action.

1 (9th Cir. 1988). Until an agency completes the NEPA review
2 process, it cannot lawfully take any action concerning a proposal
3 that may have a significant, adverse environmental impact, or
4 otherwise limit the choice of reasonable alternatives. 40 C.F.R.
5 §§ 1506.1 et seq.

6 The defendants do not argue that the 1990 ORV Plan was not a
7 major federal action, nor could they. The 1990 ORV Plan describes
8 the changes made therein as "major," in that "O[R]V restriction to
9 designated roads and trails was expanded from the high country to
10 the whole Forest." AR Vol. 3 at 2. "Generally, the duty to prepare
11 an environmental statement is triggered when there is a proposal
12 to change the status quo," as happened here. California v.
13 Bergland, 483 F.Supp. at 477 (citing Committee for Auto
14 Responsibility v. Solomon, 603 F.2d 992, 1002-3 (D.C. Cir. 1979)).
15 Thus, the issue is not whether the Forest Service was at all
16 required to conduct an environmental statement, but whether the
17 assessment was adequate.

18 As noted, the Forest Service tiered the 1990 ORV Plan to the
19 LRMP's EIS. The LRMP is a plan that establishes standards and
20 guidelines for the management of the Eldorado National Forest. See
21 16 U.S.C. § 1604. Such land use plans are "not ordinarily the
22 medium for affirmative decisions that implement the agency's
23 projections," rather, they guide the development of future, more
24 detailed plans. Norton v. SUWA, 124 S.Ct. 2373, 2382 (2004). The
25 LRMP FEIS did not analyze the programmatic environmental impacts
26 of a designated-route-only ORV trail system in Eldorado, nor did

1 it analyze the environmental impacts of any particular ORV routes
2 in the Forest or of permitting travel off of designated routes.

3 While the LRMP's EIS does discuss the general impacts of the
4 proposed 1990 ORV plan, it does not account for the specific
5 impacts of the plan's actual implementation. As determined by the
6 Forest Chief, the analysis of the proposed ORV plan may have been
7 adequate for the LRMP itself, since, at that point, the closure of
8 ORV areas and designation of trails had not yet occurred. As the
9 Ninth Circuit has explained, "[w]hen a programmatic EIS has
10 . . . been prepared, . . . site-specific impacts need not be fully
11 evaluated until a 'critical decision' has been made to act on site
12 development." California v. Block, 690 F.2d 753, 768 (9th Cir.
13 1982) (citing Sierra Club v. Hathaway, 579 F.2d 1162, 1168 (9th Cir.
14 1978)).

15 When the Forest Service implemented the directive of the LRMP
16 by creating the 1990 ORV Plan, however, it was required to either
17 create a new EIS or supplement the LRMP's programmatic EIS to
18 account for the ORV Plan's specific requirements and procedures.
19 The 1990 ORV plan contains a concrete plan and makes an
20 irreversible and irretrievable commitment of resources throughout
21 the Eldorado. Therefore, the Forest Service's duty under NEPA was
22 not satisfied by tiering the ORV Plan to the LRMP's EIS.

23 The defendants maintain that they are currently "examin[ing]
24 conditions at a landscape or watershed scale, rather than
25 attempting a single, Forest-wide analysis" because

26 ////

1 [t]he site-specific analysis required prior to
2 prohibiting OHV use on roads and trails in General
3 Forest management areas cannot be done in a single,
4 forest-wide NEPA analysis. The approach the Forest has
5 been taking, to conduct site-specific analysis and
6 decisionmaking on priority areas like Rock Creek
7

8 AR Vol. 10 at 1103. They contend that this approach satisfies
9 their statutory duty.²²

10 While this court appreciates the Forest Service's daunting
11 task of conducting a forest-wide environmental assessment and
12 respects its stated goal of conducting evaluations by priority
13 areas, these practicalities do not mitigate its failure to comply
14 with NEPA. The Forest Service wishes to proceed by conducting
15 "watershed" area evaluations, however, it has created and
16 implemented a forest-wide ORV Plan. The federal defendants, of
17 course, had the choice of carrying out the LRMP's directives by
18 creating priority, watershed-wide ORV Plans, as it did with the
19 Rock Creek Trails Plan. It did not choose this route, however, and
20 instead implemented a Forest-wide plan.

21 It is well-known that "the nature and scope of [a] proposed
22 action will determine the extent of detail, analysis, and

23 ²² The defendants describe their NEPA analysis as a three-step
24 process for site-specific consideration of designating OHV routes
25 while addressing associated resource concerns on the Eldorado.
26 First, the Forest Service addressed ongoing resource damage
resulting from ORV use on existing routes or travel off of existing
routes through the development of closure orders. AR Vol. 10 at
1113-1114. Next, the Forest Service initiated "Plan to Project"
analyses to identify opportunities and possible management
practices to reach a desired condition for an area as established
in the LRMP. *Id.*; AR Vol. 2 at 242. The Forest Service then
conducts site-specific NEPA environmental analyses to designate OHV
routes. AR Vol. at 1113.

1 information an adequate statement must contain.” California v.
2 Bergland, 483 F.Supp. at 473) (citing Atlanta Coalition v. Atlanta
3 Regional Comm., 599 F.2d 1333, 1344 (5th Cir. 1979)). Here, the
4 forest-wide scope of the ORV plan dictated that the environmental
5 analysis required likewise be forest-wide. Further, it is
6 essential to a meaningful environmental analysis that such analysis
7 be conducted before the plan’s adoption, because, as noted, NEPA
8 does not permit an irretrievable commitment of resources to be
9 implemented beforehand. Here, closures of ORV use areas and trail
10 designations were allowed forest-wide, thereby triggering the duty
11 to conduct specific analysis. Accordingly, the 1990 ORV Plan was
12 adopted and is operating in violation of NEPA.

13 IX.

14 DESIGNATION OF ORV TRAILS IN THE ROCK CREEK AREA

15 Plaintiffs also challenge the adoption of the Rock Creek
16 Trails Plan on the grounds that the Forest Service failed to
17 designate ORV routes in accordance with minimization criteria
18 found in the Forest Service regulations and in Executive Order
19 11644. They aver that the Forest Service selected an action
20 alternative that balanced concerns of environmental protection
21 with recreational uses, rather than selecting an alternative
22 that would have minimized adverse environmental impacts, as
23 assertedly required by federal law. Thus, plaintiffs aver that
24 the Forest Service decision was arbitrary and capricious and
25 that this court should set the defendants’ action aside pursuant
26 to § 706(2) of the APA. I now examine that claim.

1 Executive Order 11644 directs various "agency heads" to
2 create regulations to govern the designation of ORV use. The
3 Order sets forth various environmental criteria to be employed
4 in determining the designation of ORV areas and trails. Exec.
5 Order No. 11644 Section 3(a).

6 Implementing Executive Orders 11644, the Forest Service's
7 regulation concerning the designation of roads and trails for
8 ORV use provides that such designation shall be made according
9 to the following:

10 (1) Areas and trails shall be located to minimize
11 damage to soil, watershed, vegetation, or other
resources of the public lands.

12 (2) Areas and trails shall be located to minimize
13 harassment of wildlife or significant disruption of
wildlife habitat.

14 (3) Areas and trails shall be located to minimize
15 conflicts between off-road vehicle use and other
16 existing or proposed recreational uses of the same or
17 neighboring public lands, and to ensure the
compatibility of such uses with existing conditions in
populated areas, taking into account noise and other
factors.

18 36 C.F.R. § 295.2(b)(1)-(3).

19 The Rock Creek Trails Plan Revised Draft EIS contained a
20 "No Action" alternative (Alternative 1) and five "action"
21 alternatives (Alternatives 2 through 6) for designating ORV
22 routes in the Rock Creek Area of the Forest. The Revised Draft
23 EIS identifies Alternative 6 - the "Carrying Capacity"
24 alternative - as the Service's preferred alternative for
25 designating ORV trails in the Rock Creek Area. On May 21, 1999,
26 the ENF signed a Record of Decision ("ROD") adopting Alternative

1 6 as the designated ORV trail plan for the Rock Creek Area.
2 Plaintiffs maintain that the decision to adopt Alternative 6
3 violated the agency's mandatory duty to select off-road vehicle
4 routes that "minimize" impacts to the environment.²³

5 Plaintiffs point out that the Rock Creek Trails Plan ROD
6 acknowledged that Alternative 2 and 5 minimized environmental
7 impacts while still providing for ORV recreation. Pls' Br. in
8 Supp. of Mot. for Summ. J. at 25.²⁴ The Forest Service admitted
9 that under Alternative 5 "resource protection is optimized,"
10 "while allowing minimal levels of multiple use recreation." AR
11 Vol. 16 at 1735. The ROD explains the Forest Service's decision
12 in selecting Alternative 6 as "one of balance," acknowledging
13 that, although "some aspects of Alternative 6, when compared to
14 other Action Alternatives, may pose some greater risk for short-

15
16 ²³ Plaintiffs seek to support their position by citing to two
17 cases ruling that agency route designation criteria was
18 inconsistent with the criteria required by Executive Order No.
19 11644. See National Wildlife Federation v. Morton, 393 F.Supp.
20 1286, 1295(D.C. Cir. 1975); American Motorcyclist Ass'n v. Watt,
21 543 F.Supp. 789(C.D. Cal. 1982). Those cases are inapposite,
22 however. There, the courts determined that the federal agencies
23 failed to comply with a mandatory procedural requirement - adopting
24 regulations and criteria as directed by the Order. Here,
25 plaintiffs do not allege that the Forest Services's regulations or
26 criteria are inconsistent, nor that the defendants in any way
misstepped procedurally. Rather, plaintiffs contend that the
substantive outcome, the actual designation of ORV trails, is
inconsistent with the minimization criteria.

23 ²⁴ The ROD states that "Alternative Two provides for . . . the
24 fewest acres of wildlife habitat disturbed, the lowest vehicle
25 emissions, the least noise impacts, the lowest risk of petroleum
26 spills, and the lowest risk of fire. Alternative Five provides for
the lowest erosion and sediment delivery to streams, and the least
disturbance to deer and other wildlife on the critical winter deer
range from November 10 to May 1 each year." AR Vol. 16 at 1737.

1 term, limited, human-caused environmental effects to certain
2 resources." AR Vol. 16 at 1730. I cannot agree with plaintiffs'
3 contention that the defendants unlawfully employed a balancing
4 approach rather than adhering to the mandate that environmental
5 damage must be minimized.

6 While it is certainly true that Executive Order 11644
7 created a policy striking a balance in favor of resource
8 protection, it also mandated that "[o]ff-road vehicle management
9 plans shall . . . provide for diverse use and benefits of the
10 National Forests" 36 CFR § 295.2(b).²⁵ Therefore, while
11 minimizing environmental damage "is mandatory as to the object
12 to be achieved, . . . it leaves [the Forest Service] a great deal
13 of discretion to decide how to achieve it." SUWA, 124 S.Ct. at
14 2375. The Forest Service asserts that Alternative 6 locates ORV
15 trails in a manner that minimizes resource damage, harassment to
16 wildlife, and conflicts with other recreationalist or adjacent
17 property owners, and that it is consistent with the Forest
18 Service's management direction and practices. Reviewing courts
19 must be mindful that they may not substitute their own judgment
20 for that of the federal agency and may overturn its decision
21 only if it was arbitrary or capricious. In this case, it does
22 not appear that the standard has been breached in adopting
23 Alternative 6 for the Rock Creek Trails Plan.

24
25 ²⁵ Plaintiffs' position, given full application, would mean that
26 the Forest Service would always run afoul of the Executive Order
whenever it designated more than one ORV trail. Clearly, such a
reading is inconsistent with the test.

1 X.

2 ADEQUACY OF ALTERNATIVES IN THE ROCK CREEK TRAIL PLAN

3 The ORV user defendant-intervenors allege that the
4 alternatives to the Rock Creek Trails Plan proposed by the
5 Forest Service were impermissibly narrow under NEPA because it
6 failed to consider an alternative with motorized trail density
7 greater than 2.5 miles.²⁶

8 NEPA "requires agencies to study, develop, and describe
9 appropriate alternatives to recommended courses of action in any
10 proposal which involves unresolved conflicts concerning
11 alternative uses of available resources." Surfrider Foundation
12 v. Dalton, 989 F.Supp. 1309, 1325 (S.D. Cal. 1998), aff'd, 196
13 F.3d 1057 (9th Cir. 1999) (quoting 42 U.S.C. § 4332(2)(E)
14 (internal quotation marks omitted)). The discussion of
15 alternatives to the proposed action "is the heart of the
16 environmental impacts statement." 40 C.F.R. § 1502.14. In
17 examining alternatives, the agency should "[r]igorously explore
18 and objectively evaluate all reasonable alternatives, and for
19 alternatives which were eliminated from detailed study, briefly
20 discuss the reasons for their having been eliminated." Id.
21 Agencies are under "no obligation to consider every possible
22 alternative to a proposed action, . . . [or] alternatives that

23 _____
24 ²⁶ I do not pause here to consider whether the intervenors, whose
25 purpose is to seek plans that have a more significant impact upon
26 the environment, have standing to object under NEPA, which was
passed by virtue of "[g]rowing public concern with the
environmental effect of governmental action". California v.
Bergland, 483 F.Supp. 465, 469 (E.D. Cal. 1980).

1 are unlikely to be implemented or . . . inconsistent with its
2 basic policy objectives." Seattle Audubon Soc. v. Moseley, 80
3 F.3d 1401, 1404 (9th Cir. 1996) (citations omitted).

4 As I now explain, the ORV users' claims cannot lie. First,
5 the administrative record evidences that the Forest Service did
6 examine the proper trail road density and that studies concluded
7 that "exceeding the [2.5] mileage limitations would result in
8 adverse effects to the wintering deer" in the Rock Creek area.
9 AR Vol. 14 at 3-38. The federal defendants cite to various
10 studies from where the Forest Service derived the 2.5
11 limitation. The ORV users do not dispute that the Forest
12 Service studied the trail density limitation, but instead point
13 to specific statements from authors of two studies relied upon
14 by the Forest Service to dispute the Forest Service's ultimate
15 conclusion. As the federal defendants assert, however, where an
16 agency has made a reasoned choice as to the appropriate
17 scientific methodology, courts generally defer to that decision.
18 See Friends of Endangered Species, Inc. v. Janzen, 760 F.2d 976,
19 986 (9th Cir. 1985) ("NEPA does not require [a court to] decide
20 whether an [EIS] is based on the best scientific methodology
21 available, nor does NEPA require [it] to resolve disagreements
22 among various scientists as to methodology."); Friends of
23 Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1129-30
24 (8th Cir. 1999).

25 More pertinently, "NEPA imposes procedural requirements,
26 but not substantive outcomes, on agency action." Marsh v. Or.

1 Nat'l Res. Council, 490 U.S. 360, 371 (1989). The goal of NEPA
2 is to contribute to the preservation and enhancement of the
3 natural environment. The Ninth Circuit has explained that
4 "[t]he NEPA alternatives requirement must be interpreted less
5 stringently when the proposed agency action has a primary and
6 central purpose to conserve and protect the natural environment,
7 rather than to harm it." Kootenai Tribe of Idaho v. Veneman, 313
8 F.3d 1094, 1120 (9th Cir. 2002). Here, "it was not the original
9 purpose of Congress in NEPA that government agencies in
10 advancing conservation of the environment must consider
11 alternatives less restrictive of [ORV recreational] interests."
12 Id. The record shows that the Forest Service procedurally
13 complied with NEPA by studying the effects of trail densities on
14 the natural resources with the Rock Creek area. Those studies
15 further sufficiently support the Forest Services's 2.5 mile
16 trail limitation conclusion. Nothing more is required.²⁷

17 **XI.**

18 **CONCLUSION**

19 Accordingly, the court hereby makes the following ORDERS:

20 1. Plaintiffs' motion to supplement the administrative
21 record is GRANTED.

22 2. Plaintiffs' motion to strike is GRANTED IN PART, and
23 DENIED IN PART, as detailed above.

24 ²⁷ For these same reasons, the defendant-intervenors' claims that
25 the Forest Service impermissibly restricted recreationists' riding
26 opportunities by limiting the number of trails and the trails'
density to 2.5 miles per square mile have no merit.

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3. The parties' cross-motions for summary judgment are GRANTED IN PART and DENIED IN PART as detailed above.

4. The parties shall file briefs regarding the remedy within ten (10) day of the effective date of this order. The briefs shall not exceed fifteen (15) pages.

5. This matter is set for a hearing regarding the remedies on April 11, 2005 at 10:00 a.m. in Courtroom No. 4.

IT IS SO ORDERED.

DATED: February 15, 2005.

/s/Lawrence K. Karlton

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT