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5 July 2011

State Water Resources Control Board
Division of Water Quality
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Comment on Proposed Order No. R1-2010-0029 - MITIGATED NEGATIVE DECLARATION Waiver of Waste Discharge Requirements for Nonpoint Source Discharges Related to Certain Federal Land Management Activities on U.S. Forest Service Lands

Dear Mr. Lee; et. al.,

Thank you for the opportunity to comment on this issue of greatest concern to our members. The U.S. Forest Service has failed with its Best Management Practices, regulations, and guidelines to protect riparian habitats on federal land and in the watersheds down-stream of federal lands. We cannot presume that self-regulation by this agency with a waiver of waste discharge requirements would result in protected riparian habitats.

According to Andy Sawyer, Assistant Chief Council for the State Water Resources Control Board, neither the Forest Service nor the Bureau of Land Management has ever before required a Clean Water Act 401 Certification prior to issuing a Special Use Permit for a water diversion even though 401 certification is required for a special use permit issued for an activity that may result in a point source discharge.

> "So far as I am aware, the Forest Service and BLM have never required 401 certification for a special use permit, even for activities that obviously may result in a discharge from a point source, such as resorts that include package treatment plant or projects that will include wetland fill. Similarly, I am not aware of any instance where the Fish and Wildlife Service or National Marine Fisheries Service has required a 401 certification."

It seems fairly clear that if someone is discharging a pollutant into a water of the U.S. via special use permit, they must first get a 401 permit from the state. National Forest Land and Resource Management Plans and the National Forest Management Act require the Forest Service to comply with the Clean Water Act, so it makes sense that any special use permit that may result in pollution must be conditioned on the applicant receiving a 401 certificate from the state.

In order to get the U.S. Forest Service to do what is clearly required, Sequoia ForestKeeper was forced to file a complaint in Federal District Court Eastern District of California to get rulings (See attached) that require the agency to condition their special use permit and require that a 401 certification be acquired before the agency issues a special use permit.

On Tuesday, March 14, 2011, Federal Court Judge Lawrence O'Neill struck down a U.S. Forest Service permit, which has allowed a local rancher to divert the entire flow of Fay Creek, a tributary of the South Fork Kern River, for failing to ensure compliance with the Clean Water Act. Fay Creek is located just east of Lake Isabella, near Kernville, CA.

In 2010, Sequoia ForestKeeper filed suit against the Sequoia National Forest's re-issuance of a Special Use Permit ("SUP") to Robert Sellers and Quarter Circle Five Ranch ("Sellers") in 2003. The SUP authorized Sellers to operate a water diversion at a small dam on Fay Creek located within the boundaries of the Sequoia National Forest.

The Court vacated the Sellers SUP, holding that it was re-issued contrary to the National Environmental Policy Act, the National Forest Management Act, and the Clean Water Act.

At issue was a whether the Forest Service could maintain a permit that allowed a rancher to take 100 percent of the flow of Fay Creek. The court found that the Forest Service erred in failing to consider Fay Creek a navigable water or "water of the United States." Because Fay Creek is a navigable water, it is subject to the Clean Water Act, which requires consideration of a separate "401 Certificate" or Clean Water Act Permit from the State of California before the Forest Service can allow anyone to divert any water from or discharge pollutants into Fay Creek.

The Court wrote: "Because the USFS failed to consider whether a Section 401 Certificate was required prior to re-issuing the Sellers SUP, the USFS 'failed to consider an important aspect of the problem.'. . . Under these circumstances, this Court finds that the USFS acted arbitrarily and capriciously when it issued the Sellers SUP without considering its obligations under the CWA and without applying for a Section 401 Certificate."

This was the second time the Court held that the Forest Service violated the law in granting Sellers' SUP. On December 3, 2010, Judge O'Neill ruled that the USFS violated the National Environmental Policy Act (NEPA) for "failing to consider requests to include a minimum bypass flow restriction in the SUP or to require monitoring devices to be installed." It ordered the Forest Service to "address the requests to place certain conditions on the Sellers' SUP, including the request: (1) to condition the SUP on a minimum flow requirement; (2) to require a monitoring and measuring device be placed on the diversion; and (3) to reduce the size of the pipes that divert water from Fay Creek."

Sequoia ForestKeeper believes that this is the first time a Court has held that the Forest Service must condition its issuance of a Special Use Permit on a 401 Clean Water Act Certificate before it can authorize a water diversion from an existing dam and small diversion structure on the National Forests. The Clean Water Act permit is necessary because each year the dam must be flushed of sand and other debris, which causes pollution of Fay Creek below the diversion. Moreover, the State of California, who issues these permits, requires that anyone who diverts water must maintain at least some flow in the creek at all times to protect downstream resources, including fish and streamside riparian habitat vegetation. This court ruling will ensure that Sellers will no longer be allowed to remove 100 percent of the flow of Fay Creek.

Best Management Practices of the U.S. Forest Service have already resulted in degraded riparian habitats due to point sources and non-point sources. Sequoia ForestKeeper believes no waiver should be considered because the U.S. Forest Service's Best Management Practices result in degraded riparian habitats.

Respectfully submitted,

Mr. Ara Marderosian
Executive Director
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Attachments: two – 94 - Order re MFR.pdf and 80 – Order on Cross-Motion for SJ.pdf

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SEQUOIA FORESTKEEPER,

Plaintiff,

vs.

UNITED STATES FOREST SERVICE, et al.,

Defendants.

_____/

CASE NO. CV F 09-392 LJO JLT

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (Docs. 58, 71)

INTRODUCTION

Plaintiff Sequoia Forestkeeper initiated this action to seek judicial review of defendant United States Forest Service's ("USFS's")[1] re-issuance of a Special Use Permit ("SUP") to Robert Sellers and Quarter Circle Five Ranch (collectively "Sellers") in 2003, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§701-706. The SUP authorizes Sellers to use a water diversion that diverts water flowing from Fay Creek via a dam located within the boundaries of the Sequoia National Forest for private use ("diversion"). Sequoia Forestkeeper argues that by re-issuing the SUP, the USFS violated: (1) the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321-4347, for failure to prepare an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS") despite warnings from the California Department of Fish and Game, Sequoia Forestkeeper, and downstream landowners that the SUP would result in significant harm to the environment (first cause of action); (2) NEPA, for

[1] Defendants are the United States Forest Service, Tina Terrell, in her official capacity as Forest Supervisor for the Sequoia National Forest ("Ms. Terrell"), and Abigail R Kimbell, in her official capacity as Chief of the United States Forest Service (collectively "USFS").

failure to take a "hard look" at the environmental impacts of the re-issuance; (3) the National Forest Management Act ("NFMA"), 16 U.S.C. §§1600-1687, because the SUP fails to comply with California resource and environmental law (third cause of action); and (4) NFMA, because the SUP fails to comply with Sequoia National Forest Land and Resource Management Plan ("Forest Plan"), which requires compliance with the water quality standards of the Clean Water Act, 33 U.S.C. §§1251-1387 (fourth cause of action). [2] The parties filed cross-summary judgment motions, arguing that based on the administrative record and the law, each is entitled to judgment as a matter of law. Having considered the record and the parties' arguments, this Court finds that although the USFS did not violate the NFMA substantively, it violated NEPA by failing to consider requests to include a minimum bypass flow restriction in the SUP or to require monitoring devices to be installed. Accordingly, this Court GRANTS in part and DENIES in part the parties' cross-summary judgment motions and REMANDS this action to the USFS for further consideration.

BACKGROUND

Fay Creek

Fay Creek is a tributary of the South Fork of the Kern River, located at the southern end of the Sierra Nevada Mountain Range. Fay Creek supports a variety of ecosystems and resources, including riparian habitat important to trout, wild flowers and grasses, and willow, alder, and cottonwood trees. Administrative Record ("AR") at 19. Fay Creek also serves as the primary drinking water source for many wildlife species in the area. *Id*.

Diversion

In 1890, a water diversion was created in lower Fay Creek, approximately 1/8 mile north of Quarter Circle Five Ranch owned by Sellers. The dam and diversion are located within the Sequoia National Forest, approximately 500 feet north of the Forest's southern boundary with the Quarter Circle Ranch. Since at the late Nineteenth Century, water has flowed from Fay Creek to the Sellers' ranch through this diversion. The original diversion structure was replaced approximately 30-50 years ago.

The current water diversion structure uses concrete and part of a large rock outcrop to create a

[2] Sequoia Forestkeeper withdrew its fifth and sixth causes of action in its motion for summary judgment.

small dam approximately 12 feet high and 8 feet wide. AR at 582. The dam is built in a narrow, bedrock-controlled stream channel in Fay Creek, and is tied to a natural rock outcrop that has partially dammed Fay Creek and created a small waterfall. AR at 186. The diversion "dams up the entire stream channel." AR at 145. The dam and rock outcrop have created a small pond in Fay Creek that backs up the water approximately 30 feet. Elevated piping runs from Fay Creek's small dam across a dry hillside to the Quarter Circle Five Ranch. The diversion pipe, 6-10 inches in diameter, is two feet below the top of the spillway. AR at 582. At the base of the dam is a valve which is designed to allow water to pass through the dam. AR at 129.

History of SUP and Water Permit

The water diversion structure came under the province of the USFS in 1967. In that year, the USFS granted the first SUP for operation of the dam to divert water to Quarter Circle Five Ranch. Seller's predecessor diverted water from Fay Creek from 1967 to 1973 by permission from the USFS.

In 1973, the State of California ("State") granted the owner of Quarter Circle Five Ranch a Water Diversion and Use Permit (#S008264) ("water permit"). AR at 56-58. The permit was granted under a claim of riparian right for water diverted from the creek for use on the ranch.

In 1983, the ranch, SUP, and water permit were transferred to Sellers. AR at 385-86, 388-94. The USFS re-issued an SUP to Sellers in 1989, and again in 2003. AR at 397-404, 406-15. The 2003 SUP is the subject of this action.

2003 SUP Notice and Comment

On January 28, 2002, the USFS sent out a public notice that it was considering a re-issuance of the Sellers SUP. AR at 1. The notice reads, in pertinent part:

> The Quarter Circle 5 Ranch was granted water rights from the State of California in 1973 to remove 0.129 cubic feet per second (CFS) of water from Fay Creek. The permitted area for the Quarter Circle 5 Ranch diversion covers approximately .015 acres. The decision to be made is whether there are extraordinary circumstances, or conditions associated with the proposed actions, which may significantly affect the environment. If no extraordinary circumstances are identified, a project file and Decision Memorandum will be completed as required in FSH 1905.15 chapter 31.2 (9/21/92). If extraordinary circumstances are identified, the decision will be made to prepare an environmental assessment or environmental impact statement based on the significance of the environmental effects.

Id. The USFS received public comment on the proposed re-issuance, including two comment letters in

support of the action, two letters with no comment, and four opinion letters opposed to the re-issuance of the SUP, unless conditions were included to ensure minimum flow or water quality. AR at 14-26. The USFS contends that it considered all of the public comments on the proposed action, including information provided after the public comment period had experience.

The USFS put together an interdisciplinary team to determine whether extraordinary circumstances existed to justify an EA or EIS on the re-issuance of the Sellers' SUP. AR at 143-50. All members of the interdisciplinary team concurred that extraordinary circumstances did not exist. *Id.*

In addition, the USFS reviewed information supplied by the State Department of Fish and Game. Stanley Stephens ("Mr. Stephens"), a senior biologist with the California Department of Fish and Game, wrote the USFS a letter in which he expressed concern over the Fay Creek diversion. In the December 31, 2002 letter, Mr. Stephens offered that, in his opinion, "allowing the complete de-watering of Fay Creek on the relatively short reach of national forest lands not only affects the fish, wildlife, and plants there on federal lands, but also on a much longer reach of Fay Creek downstream of the Forest boundary on private lands." AR at 124. Mr. Stephens recommended that the USFS "include language in the permit that requires the owner and operator of the dam to bypass adequate flows at all times to keep downstream resources in good condition." *Id.* Mr. Stephens also requested that the USFS study the potential adverse environmental affects of the SUP through an EIS. Mr. Stephens suggests that the USFS "incorporate criteria or conditions in the reissued Use Permit to minimize or eliminate the impacts of the diversion structure and reduction in flow." *Id.* In addition, Mr. Stephens requested the USFS to address the issue of sediment management at the Fay Creek diversion. *Id.*

The USFS responded to the State Department of Fish and Game as follows, in pertinent part:

> As you know, the diversion and a portion of the water transmission line are located on public land. We will be issuing a new special use permit to Mr. Sellers that will set forth conditions for the use of the diversion and water transmission line on National Forest System land. For example, Mr. Sellers is responsible for maintaining the structures in good repair. The Forest Service will contact Mr. Sellers to ensure that the recently discovered leakage in the water transmission line has been repaired. We do not have authority to put conditions on his water rights as your staff recommends. We are forwarding your fax and its attachments, as well as Senior Biologist/Supervisor Stanley Stephens' letter to...the State Water Resources Control Board, Division of Water Rights, Compliant Unit[.]

AR at 132-33.

Sellers' Commercial Water Sales and Neighbors' Concerns

In mid-2001, Sellers' neighbors began to express concerns to authorities over Sellers' use of Fay Creek. Sellers' neighbors saw commercial water trucks coming from Sellers' ranch, and believed that Sellers was selling commercially the water diverted from Fay Creek. Sellers' neighbors were opposed to his commercial spring water operation, and wrote to the difference State and local county officials requesting an investigation. AR at 92-98. In addition to the commercial water sales issue, the neighbors expressed concerns about the safety of the large water trucks frequently driving on the narrow road near their homes. The neighbors, *inter alia*, wrote a complaint regarding the Fay Creek diversion to the California Water Resources Control Board, claiming that the quantity of water diverted by Sellers adversely affects the public trust resources of the State. In a July 18, 2001 opinion letter, California Water Resources Control Board, Division of Water Rights, explained that it had investigated the neighbors' claims. AR at 51. The opinion letter notes that Sellers' predecessor was granted a water permit in 1973 for riparian rights to the Fay Creek water. *Id*. The opinion further notes:

> Water under this statement is used to irrigate 200 acres or less of pasture/crops/domestic gardens and for stockwatering 400 head or fewer of cattle. Water is diverted at an average rate of approximately 325 gallons per minute, with total annual use averaging 110 acre-feet. Given the conditions described herein, it is presumed that Mr. Sellers is exercising a valid riparian right to the water from Fay Creek for use on his ranch.

Id. The opinion concluded that there was insufficient evidence "to justify action against the Ranch or Mr. Sellers." *Id*. at 52. The State Water Resources Control Board referred Sellers' neighbors to the California Department of Fish and Game to gather evidence, if any, to justify a termination or modification of Sellers' water permit. *Id*.

In mid-2002, Sellers' neighbors expressed concerns to the USFS regarding its proposed re-issuance of the SUP. The Sequoia District Ranger responded to the neighbors concerns and investigated the allegation that Sellers was selling water from Fay Creek. In the investigation, the District Ranger discovered that the water Sellers was selling came from natural springs located on Sellers' property, and did not involve the Fay Creek dam diversion. AR at 113, 118-19. Accordingly, the District Ranger advised Sellers' neighbors that the USFS had no authority over water rights issued to Sellers by the State, and advised them to approve the California State Water Resources Board. AR at 100-106.

The District Ranger forwarded copies of the neighbors' correspondence to the State Water

Resources Board. The State Water Resources Board addressed the neighbors' concerns by letter:

> [The District Ranger] has indicated that the District is planning to issue the Ranch a special use permit. This permit is not related to the diversion for bottled water purposes, but would instead allow the Ranch to transport water from Fay Creek over Forest Service land, under an existing claim of water right, for the purpose of irrigation, stockwatering, and domestic use.
>
> Please be advised that the U.S. Forest Services' special use permit does not convey a legal basis upon which to divert and/or appropriate water, but grants the permittee access to and use of Forest Service land in accordance with the terms and conditions of the permit. Any diversion of water, regardless of its point of origin, must have a legal basis of right pursuant to California water law.

AR at 134-35.

2003 SUP

On February 28, 2003, Cannell Meadow District Ranger Judge Schutz issued a Decision Memorandum ("Decision Memo") recommending that the Sequoia National Forest Supervisor issue a ten-year SUP to Sellers for the Fay Creek Diversion. AR at 143. The Decision Memo reported that "[n]o extraordinary circumstances were identified during scoping as potentially having effects, which might significantly affect the environment. Input from both internal and external scoping was used in designing and modifying the proposal." AR at 147. The Decision Memo concluded that the SUP "may be categorically excluded from documentation" in an EA or EIS because it was a "continuation of minor special uses of National Forest System lands that requires less than five contiguous acres of land (FSH 1909.15 Chapter 31.2). *Id.* The Decision Memo also concluded that re-issuance of the SUP "is consistent with the Sequoia Land Management Plan, the Mediated Settlement Agreement, and Sierra Nevada Forest Plan Amendment...The project is consistent with all categories of the National Forest Management Act." *Id.* The Decision Memo recommended to re-issue the SUP. Forest Supervisor Arthur L. Gaffrey approved the Decision Memo and authorized the SUP on September 15, 2003, and the Seller's SUP was re-issued. AR at 412.

The 2003 SUP authorizes Sellers to use or occupy National Forest System lands for "water transmission and diversion of domestic and irrigation water." AR at 406. Sellers pays $30 per year for the rights granted by the SUP. *Id.*

Disputed Facts

The parties dispute whether Fay Creek flows continuously throughout the year, or whether Fay

Creek is an intermittent creek. There is evidence that in some years, water has flowed year round, whereas in most years, the creek does not flow beyond the diversion in summer months. The parties dispute whether Fay Creek may be classified as a "fishery" or a "navigable water." The amount of water diverted is also disputed. Sellers is permitted to divert 0.129 cubic feet per second (cfs), which is about one gallon per second, yet it has been estimated that as much as 325 gallons per minute (over five times as much) is diverted to Sellers, with a total annual use averaging 110 acre feet. The parties also dispute the nature of the habitat, if any, in Fay Creek beyond the diversion. The parties interpret differently the findings of multiple studies of Fay Creek, included in the administrative record. These studies include a 1987 study, 1988 study, a 1997 study, and various reports made by the interdisciplinary team the USFS put together in 2002. These disputed facts form the basis of Sequoia Forestkeeper's claims.

DISCUSSION

Sovereign Immunity and Statute of Limitations

The USFS argues that this Court lacks subject matter jurisdiction over Sequoia Forestkeeper's action, because it is barred by the statute of limitations, and therefore, the government's sovereign immunity. This Court must consider this threshold issue before addressing the merits of Sequoia Forestkeeper's claims. *Steele Co. for Citizens for a Better Env't.*, 523 U.S. 83, 94-95 (1998). In considering a motion to dismiss for lack of subject matter jurisdiction, the plaintiff, as the party seeking to invoke the court's jurisdiction, always bears the burden of establishing subject matter jurisdiction. *Tosco Corp. v. Communities for Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001). The court presumes a lack of subject matter jurisdiction until the plaintiff proves otherwise. *See Kokkonen v. Guardian Life Ins. Co. of America*, 114 S.Ct. 1673, 1675 (1994).

Sequoia Forestkeeper asserts claims against the USFS pursuant to the APA. The APA waives the federal government's sovereign immunity for suits by persons who have been "adversely affected or aggrieved" as a result of agency action. 5 U.S.C. §702. Pursuant to 28 U.S.C. 2401(a), however, suits against the United States "shall be barred unless the complaint is filed within six years after the right first accrues." This six-year statute of limitations applies to actions for judicial review under the APA. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712-13 (9th Cir. 1991).

In an APA action, the six-year statute of limitations begins when the final agency action issues.

5 U.S.C. §704; *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967). The USFS contends that the final agency action was made on February 28, 2003. Because this action was not filed until March 2, 2009, the USFS concludes that the action is untimely. For the following reasons, the USFS's statute of limitations arguments fails.

The USFS argues that the February 28, 2003 Decision Memo was the final agency action. "To determine when an agency action is final," the Court considers, inter alia, "whether its impact is sufficiently direct and immediate and has a direct effect on...day to day business." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). "An agency action is not final if it is only the ruling of a subordinate official or tentative." *Id*. at 796-97. "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id*.

Applying the applicable legal standards, the February 28, 2008 Decision Memo was not a final agency action. The February 28, 2003 Decision Memo was a "Proposed Action and Decision" to re-issue the SUP to Sellers. AR at 143. The Decision Memo was signed by the Sequoia District and provided a recommendation to re-issue the SUP. The first sentence of the Decision Memo reads: "I have decided to recommend to the Forest Supervisor that a ten-year Special-Use authorization be reissued[.]" The Decision Memo includes a "proposed action" to be implemented in the future, after approval by the Forest Supervisor. The Decision Memo contemplates that the "planned issue date for these permits is in March , 2003." Thus, the plain language of the Decision Memo makes clear that it is not a final action to have an immediate and direct impact. Indeed, the SUP was not re-issued until September 15, 2003, when the permit was approved by the Forest Supervisor. AR at 415. Thus, the February 28, 2008 Decision Memo lacked finality, because it was a proposed action, written by a "subordinate" to the Forest Supervisor, that had no immediate effect. The SUP took immediate effect once it was approved by the Forest Supervisor on September 15, 2003. Accordingly, the statute of limitations began to accrue at the time the SUP was re-issued, which was the final agency action. *See Forest Guardians v. United States Forest Serv.*, 370 F. Supp. 3d 978, 985 (D. Ariz. 2004) ("When the special use permit was issued...[plaintiff's] cause of action accrued"); *see also, Franklin v. Mass.*, 505 U.S. 788, 796-97 (1992) ("An agency action is not final if it is only the ruling of a subordinate official, or tentative[.]"). Because

the statute of limitations began to accrue on September 15, 2003, this action that was filed on March 2, 2009 is timely.

Documents Beyond Administrative Record

In its summary judgment motion, Sequoia Forestkeeper submits, and relies on, documents outside of the administrative record. Sequoia Forestkeeper submits the declarations of Michael Klinkenberg, Ara Marderosian, Harold Simolke, and Daniel Christenson. Sequoia Forestkeeper also submits several documents attached as Exhibits A through F.

Sequoia Forestkeeper does not explain how this Court can consider these extra-record documents in its motion. In an administrative review of an agency action, however, the Court generally restricts its review to the administrative record. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006). The Court reviews "the full administrative record that was before the [decision-maker] at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).; 5 U.S.C. §706. The Court "normally refuse[s] to consider evidence that was not before the agency because 'it inevitably leads the reviewing court to substitute its judgment for that of the agency.'" *Id*. (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1152, 1160 (9th Cir. 1980)). The Court may permit submission of extra-record materials only in limited circumstances, including: (1) if it is necessary to determine "whether the agency has considered all relevant factors and has explained its decision," (2) "when the agency has relied on documents not in the record," (3) "when supplementing the record is necessary to explain technical terms or complex subject matter"; or (4) where there is an allegation of bad faith. *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (citations omitted).

In its motion for summary judgment, the USFS moved to strike the documents Sequoia Forestkeeper submitted and relied on outside of the administrative record. The USFS argues that these documents are immaterial, and do not meet any of the factors required to submit extra-record information. The USFS points out that these exhibits are documents that did not exist at the time the decision was made to re-issue the Sellers SUP in 2003, and submits that Sequoia Forestkeeper cannot attempt to supplement the record seven years after the decision was made to add new information. This Court agrees. *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) ("Were the federal

courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making. Here, the risks presented by the supplemental evidence are serious[.]"). Moreover, Sequoia Forestkeeper apparently concedes that it submitted the extra-record documents without authority, as it failed to address the USFS' motion to strike in its opposition to the USFS' motion for summary judgment. Accordingly, this Court STRIKES the declarations and exhibits submitted by Sequoia Forestkeeper, and considers only the administrative record in these cross-motions for summary judgment.

Standards to Review Merits of Plaintiffs claims

Sequoia Forestkeeper asserts that the re-issuance of the SUP violated NEPA (counts one and two) and NFMA (counts three and four). Alleged violations of NEPA and NFMA are subject to juridical review under the APA. *Blue Mtn. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). This Court reviews an agency's actions pursuant to the APA under two standards. *Price Rd. Neighborhood Ass'n. v. United States DOT*, 113 F.3d 1505, 1508 (9th Cir. 1997).

For disputes that are primarily factual, this Court "shall...set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or found to be "without observance of procedure required by law." 5 U.S.C. §706(2). Although the Court's review is "searching and careful," the "standard is narrow." *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2005). The arbitrary and capricious standard is "highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (quotations and citations omitted). Under such deferential review, the Court may not substitute its judgment for that of the agency. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Thus, the Court will not vacate an agency's decision under the "arbitrary and capricious" standard unless the agency:

> has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the produce of agency expertise.

Nat'l Assn. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). On the other hand, a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id*. (quotations and citations omitted).

When a dispute is primarily legal in nature, or concerns a threshold question of law, this Court applies the more lenient "reasonableness" standard. *Ka Makani 'O Kohala Ohana Inc. v. Dept. of Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002). "[W]here an agency has decided that a particular project does not require the preparation of an EIS, without having conducted an environmental assessment, and [the court is] dealing with primarily legal issues that are based upon undisputed historical facts," then the Court applies a "reasonableness" standard. *Id*. Under this standard, the Court will uphold the agency's decision unless it is unreasonable. *Friends of the Earth v. Hintz*, 800 F.3d 822, 836 (9th Cir. 1986).

The USFS asserts that this Court should apply the more stringent "arbitrary and capricious" standard to its review of the USFS decision to re-issue the SUP. Sequoia Forestkeeper apparently concedes that this is the applicable standard, as Sequoia Forestkeeper leaves unaddressed the reasonableness standard, and argues that the USFS's decision was "arbitrary and capricious." Although this dispute is less factual than a dispute in which an EA or EIS is prepared, the "historical fact" upon which the SUP Memo Decision was based are not undisputed. The issues of this action are factual and legal in nature.; i.e., whether Fay Creek is a fishery or a navigable water, and how much water flows through the diversion. Accordingly, this Court shall apply an "arbitrary and capricious" standard to its review of factual issues, but will consider pure questions of law under the reasonableness standard.

NFMA Claims

The parties begin their arguments with Sequoia Forestkeeper's NFMA claims. In its third cause of action, Sequoia Forestkeeper argues that the SUP violates the NFMA, because it fails to comply with California resource and environmental law. In the fourth cause of action, Sequoia Forestkeeper asserts that the re-issuance of the Sellers SUP violates NFMA, because it fails to comply with the Sequoia Forest Plan, which requires compliance with the water qualify standards of the Clean Water Act, 33 U.S.C. §§1251-1387 ("CWA").

The Court reviews narrowly a challenge to a USFS decision pursuant to NFMA. In *Lands*

Council v. McNair, the Ninth Circuit clarified a federal court's review of the actions of the USFS. 537 F.3d 981, 984 (9th Cir. 2008) (en banc). As set forth above, the review pursuant to the "arbitrary and capricious" standard is narrow, and this Court shall not substitute its judgment for that of the agency. A federal court grants "the Forest Service the latitude to decide how best to demonstrate that its plans will" satisfy the goals of the forest plan and NFMA. *Id*. at 992. This Court "defer[s] to the Forest Service as to what evidence is, or is not, necessary to support" its analysis. *Id*. The Court's "proper role is simply to ensure that the Forest Service made no clear error of judgment that would render its action arbitrary and capricious." *Id*. at 993. Accordingly, this Court:

> look[s] to the evidence the Forest Service has provided to support its conclusions, along with other materials on the record, to ensure that the Service has not, for instance, relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 987 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (internal quotations omitted).

Whether USFS Violated NFMA by Failing to Specify Minimum Flows in the SUP

Pursuant to NFMA, the USFS develops a land and resource management plan, or Forest Plan, for each national forest which directs how each forest must be managed. *See* 16 U.S.C. §§1604(a); 1604(f), 1604(i); 36 C.F.R. §251.54(e)(1)(ii). After a Forest Plan is developed, "all subsequent agency action, including site-specific plans such as the [re-issuance of the SUP] must comply with the NFMA and be consistent with the government plan." *Lands Council*, 537 F.3d at 989 (citing 16 U.S.C. §1604(f)*; see also, Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 962 (9th Cir. 2002) ("[A]ll management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with the Forest Act.").

The Sequoia Forest Plan governs Fay Creek. Pursuant to the Sequoia Forest Plan, the USFS must "[p]rotect fishery streams by specifying minimum flows necessary to maintain fisheries habitat and allowing removal of no more than 50 percent of the flow at any time." AR at 245. Sequoia Forestkeeper argues that the USFS erred not to specify minimum flow requirement in the Sellers' SUP because Fay Creek is a fishery. The USFS contends that it was not required to include minimum bypass flows in the

SUP because Fay Creek is not "fishery habitat" below the dam and diversion structure.

The USFS concluded that the portion of Fay Creek below the diversion did not constitute a fishery. The parties agreed that this conclusion was based on a September 16, 2002, "Fisheries and Watershed Analysis" of the water diversion, prepared by Teresa Tharalson, Zone Fisheries Biologist, Acting Zone Hydrologist ("Fisheries Analysis). AR at 201-19. The Fisheries Analysis reviewed the past Fay Creek surveys to conclude: "Fay Creek has a permanent fishery above the diversion structure, but not below it." AR at 206. The relevant portion of the Fisheries Analysis reads:

> Fay Creek does have a fishery above the water diversion structure. This stream has been surveyed three times, usually in the upper reachers. A 1988 fishery survey found fish in Fay Creek above the water diversion structure.
>
> A 1975 fishery survey (Boyer et al., 1975) found that Fay Creek was dry below the diversion structure and there was little water in Fay Creek upstream of the Quarter Circle 5 Ranch. The surveyors wrote that they doubted that Fay Creek had a fishery in the lower reaches and that they also doubted Fay Creek could sustain a significant fishery (*ibid*.).
>
> A 1988 fishery survey found fish below True Meadow downstream past the Forest boundary, almost to the Quarter Circle 5 Ranch (Knotts, 1988). In this survey, the fish identified as being either rainbow trout, or rainbow-golden trout hybrids...were seen in the upper, middle, and lower reaches of Fay Creek. Fish identified as Sacramento suckers were seen only in the lower reaches, below a long series of natural fish barriers. The presence of trout above the natural fish barriers in Fay Creek indicates that the fish were likely stocked in the upper reaches of this stream; then these fish spread into the downstream reaches of Fay Creek.
>
> A 1997 fishery survey found trout in the upper reaches of Fay Creek from below True Meadow to where FS road 22S12 crosses Fay Creek (Tharalson, 1997). The trout were not positively identified, but they did have strong par marks on their sides and white tips on their fins; indicating that these fish were either native trout or native-introduced trout hybrids. The 1997 survey went from just below road 22S12 upstream to True Meadow and Long Meadow, so only in the upper reaches was the presence of fish in the [sic] or absence of fish in the middle and lower reaches was not documented in that survey.
>
> Fay Creek has a permanent fishery above the diversion structure, but not below it. Even if the lower reaches of Fay Creek loose [sic] much of their surface flow and the water gets over 75 F. during the summer, suckers can survive in dep bedrock pools that retain permanent surface water.

AR at 205-06. As to the effects of the diversion on "sensitive fisheries and riparian species," the Fisheries Analysis concluded: (1) there would be no effect on certain species; (2) most of the effect on certain species would have occurred in 1890 when the diversion was first built; and (3) the effects on species downstream from the diversion is unknown. As to the last conclusion, the Fisheries Analysis concluded:

> The diversion of 0.129 cubic-feet-per-second (cfs.) of surface water has lessened the amount of habitat in downstream areas for these species by the loss of downstream water in Fay Creek. The amount of habitat loss is unknown because there is no information on what this stream was like before 1890. Given the amount of water diverted (0.129 cfs.), and that there is not a defined channel all the way to the South Fork Kern River (Fay Creek flows through old alluvial deposits in its lower reaches); it is likely that without the present diversion structure that Fay Creek would not flow much further than it does presently.

AR at 207. The Fisheries Analysis also concluded that renewal of the Sellers' SUP "would have no additional effect [on] any [general] fisheries or riparian habitat in their areas because the current diversion structures have been in place for over thirty years and are currently stable." AR at 207. Acknowledging that the USFS must issue an SUP that complies with the CWA, the Fisheries Analysis provides:

> The past and current terms in the Special Use Permits for these diversion structures already address the permit-related Fisheries and Watershed issues that are within the Forest Service's jurisdiction. The permit terms already specify that the structures have to be kept in good repair, that the removal of any vegetation on Forest Service land would need prior approval, and that repair, modification, or replacement of the diversion structures on Forest Service land would need to be reviewed and approved by the Forest Service.

AR at 208.

The Sequoia Forest Plan defines "fishery habitat" as "[s]treams, lakes, and reservoirs that support fishes." The Forest Service Manual defines cold water fisheries as "aquatic habitats" that "predominantly support" particular fish species. AR at 777 (this document is submitted outside of the administrative record). "Aquatic habitat" is defined as "environments characterized by the presence of standing or flowing water." The terms "predominantly" and "support" are not defined.

Sequoia Forestkeeper argues that the USFS's conclusion that Fay Creek is a fishery above the water diversion but not below it was arbitrary and capricious. Sequoia Forestkeeper contends that "historical Forest Surveys establish Fay Creek is fishery habitat, that the Forest Service considered the lower reaches to be fishery habitat, and that there were no facts to support the Forest Service's 2002 change of heart regarding categorization of the lower reaches.

Sequoia Forestkeeper contends that this Court should not defer to the USFS's conclusion that Fay Creek does not constitute a fishery below the diversion because the facts do not support this conclusion. Sequoia Forestkeeper relies on the 1988 survey that characterizes Fay Creek as a coldwater

fishery to support its position. Sequoia Forestkeeper argues that the 1988 survey concludes that the "entire creek constitutes fishery habitat," including the lower portion of the creek downstream from the diversion. Sequoia Forestkeeper faults the 2002 Fisheries Analysis for emphasizing the 1975 survey that concluded that it is "doubtful" that Fay Creek contained "significant" fishery habitat below the diversion, and claims that the 2002 report "conspicuously omitted the fact that as a result of the of the 1988 survey the Forest Service categorized Fay Creek as a "cold-water fishery in good condition. Sequoia Forestkeeper contends that USFS's conclusion that it was not a fishery below the diversion was contrary to the facts in the record.

Sequoia Forestkeeper mischaracterizes the import and conclusions of the 1988 survey. The 1988 survey was conducted after a forest fire in the area. The objective of the survey was "to determine and assess the effects of the Fay Fire on the watershed and fisheries." AR at 152. The 1988 acknowledged that the 1975 survey concluded that Fay Creek was found to have too low a flow to support a viable fishery and served as a drainage channel. The 1988 survey explained that "from a fisheries standpoint, Fay Creek is in good condition." Significantly, however, the 1988 survey also concluded:

> In addition, there is little evidence of there ever being enough water to support a resident fishery year round. The abundance of water in 1988, can probably be linked to the lost of evapotranspirators (trees) after the Fay Fire had burned through. The lack of these natural "pumps" has increased the flow of overland water while decreasing that lost to evaporation.

AR at 153. Thus, the 1988 survey recognizes that the water flow and the conditions of the creek in 1988 were unusual. Even with the unusually high flow of water, the 1988 survey recommended that "Fay Creek be left in its present state to recover naturally" because of "the low water flows." *Id*. Moreover, the 1988 survey's conclusions do not state explicitly that it found fish below the diversion, or that it believed the area below the diversion to be a fishery. Although the 1988 survey discussed the upper, middle, and lower portions of Fay Creek, the 1988 survey does not distinguish the lower portion of the creek upstream and downstream from the diversion. In addition, the 1988 survey characterized the lower portion of Fay Creek to be "poor-habitat limited" for species reproduction, and described the stream flow condition to be "low," even in that year of abundant water. Thus, the1988 survey does not establish conclusively that in 2002 the portion of Fay Creek below the diversion constitutes a fishery, as Sequoia Forestkeeper represents.

Moreover, Sequoia Forestkeeper's argument ignores other evidence in the administrative record that supports the USFS's conclusion. Sequoia Forestkeeper focuses on the 1988 survey to the exclusion of all other evidence available to the USFS at the time it made its decision. Sequoia Forestkeeper argues that the USFS's conclusion is contrary to the facts, yet the 1974 survey considers that the Fay Creek is not a fishery and would not support an aquatic habitat.

The USFS's determination that Fay Creek was not a fishery below the diversion was supported by the administrative record. The 2002 Fisheries Analysis, prepared by a USFS Acting Zone Hydrologist, considered all of the surveys of Fay Creek. The conclusion is consistent with earlier surveys that while fish may have been present from time to time in the lower reaches of Fay Creek, the conditions, natural barriers, and low water flow of Fay Creek did not support an aquatic environment that "predominantly supports" fish year-round. In addition, letters provided to the USFS by longtime residents of Fay Creek downstream of the diversion affirmed that Fay Creek typically "goes dry around July 4th and does not start again until Labor Day or later." AR at 49, 97. Accordingly, the USFS conclusion that the area below the diversion was not a fishery was not arbitrary and capricious, as it relied on the expertise of its hydrologist/biologist and was supported by the historical data.

The Sequoia Forest Plan requires the USFS to "[p]rotect fishery streams by specifying minimum flows necessary to maintain fisheries habitat and allowing removal of no more than 50 percent of the flow at any time." The NFMA requires the USFS to comply with its Forest Plan. Because the USFS's conclusion that the portion of Fay Creek below the diversion was not a fishery, the USFS was not required to specify minimum flows in the SUP. Accordingly, the USFS did not violate the NFMA by failing to require minimum flow restrictions in the 2003 Sellers' SUP.

Whether USFS Violated NFMA by Failing to Demand a 401 Certificate

Sequoia Forestkeeper argues that the USFS violated the CWA because it issued the SUP without requiring State certification that the diversion would not impact water quality in Fay Creek. The NFMA requires the USFS to comply with the CWA, among other statutes. The Sequoia Forest Plan has a goal to "[p]rovide the technical services needed to comply with water quality goals as specified in the Clean Water Act."

Section 401 of the CWA requires every applicant for a federal license or permit which may result

in a discharge into "navigable waters" to provide the licensing or permitting federal agency with certification that the project will be in compliance with specified provisions of the CWA, including State water quality standards ("Section 401 Certificate"). No 401 Certificate was issued by the State before the 2003 SUP re-issued. Sequoia Forestkeeper argues that USFS's failure to require Sellers to obtain a Section 401 Certificate from State was arbitrary and capricious, and violated the NFMA.

The USFS points out that a Section 401 Certificate is required when a permit is issued which may result in a discharge into "navigable waters." The USFS argues that Fay Creek is not a navigable water, because it is a shallow, rock-filled creek which, in stretches below the dam, goes underground and historically runs dry for several months of the year.

The term "navigable waters" is defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). The USFS interprets this definition narrowly, suggesting that Fay Creek must be navigable-in-fact to fall within the CWA. Sequoia Forestkeeper defines the term broadly, arguing that Fay Creek is a navigable water within the meaning of the statute. Sequoia Forestkeeper fails to consider the most recent and controlling United States Supreme Court or Ninth Circuit interpretations of the term "navigable waters," and the USFS misinterprets it. Accordingly, this Court first considers the appropriate interpretation of the term "navigable water," then determines that Fay Creek does not fall within the definition.

In *Rapanos v. United States*, 547 U.S. 715 (2006) the Supreme Court interpreted the term "navigable waters" as used in the CWA in a 4-4-1 plurality opinion. The Court unanimously agreed that the term navigable waters was not to be interpreted narrowly to require navigability-in-fact. The Court further agreed, however, that the term should not be applied as liberally as Sequoia Forestkeeper implores. The USFS relies on a four justice plurality, which ruled:

> the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute.

Id. at 732 (citations omitted). This definition of "navigable water" may appear to exclude Fay Creek, because the evidence demonstrates that Fay Creek is not a "continuously flowing" body of water, and

has been described as a channel to provide drainage for rainfall. As the plurality explained, however: "By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id*. at 733 n.5. Considered further under this analysis, Fay Creek may qualify as a navigable water. Indeed, Sequoia Forestkeeper argues that even "intermittent streams" qualify as such.

As the Ninth Circuit recognized in *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) and *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), however, Justice Kennedy's opinion is the "controlling rule of law." In his opinion, Justice Kennedy held that one must establish a "significant nexus" between wetlands and navigable waters to apply the CWA to the wetlands. *See also, United States v. Gerke Excavating, Inc*., 464 F.3d 723 (7th Cir. 2007) (adopting Justice Kennedy's "significant nexus" test as the rule of law). Justice Kennedy explained that:

> wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.

547 U.S. at 780.

Sequoia Forestkeeper relies on *Moses* for its position that even an intermittent stream can constitute a navigable water of the United States. In *Moses*, the Ninth Circuit considered "whether a seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, be a water of the United States." *Id*. at 989. The Ninth Circuit recognized pre-*Rapanos* case law that ruled that "even tributaries that flow intermittently are 'waters of the United States." *Id*. (quoting *Headwaters, Inc. v. Talent Irrigation Dist*., 243 F.3d 526, 534 (9th Cir. 2001). The Ninth Circuit's holding relied on the following analysis:

> [T]here is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage . . . . Rather, as long as the tributary would flow into the navigable body of water "during significant rainfall," it is capable of spreading environmental damage and is thus a "water of the United States" under the Act.

496 F.3d at 989 (quoting *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (citations and footnote reference omitted).

The facts of *Moses* are distinguishable from the current case. The Ninth Circuit ruled that an intermittent tributary that empties into a river that is a water of the United States can be a "navigable water." The "intermittent tributary" at issue in *Moses* differs greatly from Fay:

> The man-made severance of Teton Creek at Alta, Wyoming, may have made the portion in question here dry during much of the year, but when the time of runoff comes, the Creek rises again and becomes a rampaging torrent that ultimately joins its severed lower limb and then rushes to the Teton River, the Snake River, and onward to the Columbia River and the Pacific Ocean.

496 F.3d at 991. Even in times of heavy flow, Fay Creek could not be described as"a rampaging torrent." In addition, and significantly, the creek in Moses flowed interstate to join directly navigable waters of the United States. Here, there is no evidence in the administrative record that Fay Creek joins (or would join) a navigable water downstream.

This Court finds that Fay Creek is not a "navigable water" of the United States within the meaning of the CWA under either *Moses* or *Rapanos*. In *Moses*, the Ninth Circuit found that a "seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, by a water of the United States." *Id*. at 989, 991. The Court interprets the *Moses* decision to require a seasonal, intermittent stream to empty into a river to be defined as a "navigable water" itself. The *Moses* opinion supports this Court's position, in that it recognized that an intermittent creek or tributary is a navigable water "*as long as* the tributary would flow into the navigable body of water during significant rainfall" and is "capable of spreading environmental damage" *Id*. at 989 (emphasis added). Fay Creek does not fall within this definition, however, because it does not empty into a navigable river, such as the Kern River. Similarly, and for these reasons, Fay Creek would not be considered a navigable water under Justice Kennedy's "significant nexus" test, either. Pursuant to *Rapanos*, Fay Creek would constitute a "navigable water" if "either alone or in combination with similarly situated lands in the region, [it could] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. As explained above, there is no evidence that water flowing through Fay Creek effects a body of water considered "navigable" in the traditional sense. The administrative record supports the USFS's position that Fay

Creek is not a navigable water, since its "effects on water quality are speculative or insubstantial," such that Fay Creek "fall[s] outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*[3]

Because Fay Creek is not a "navigable water" within the meaning of the CWA, the USFS did not err for failing to require Sellers to obtain a Section 401 Certificate prior to the re-issuance of the SUP in 2003. Accordingly, the USFS's failure to require the Section 401 Certificate did not violate the NFMA.

Whether USFS Violated the NFMA By Failing to Include Other Conditions in the SUP

Sequoia Forestkeeper alleges that the USFS violated the NFMA by failing to condition the SUP on compliance with other goals of the Forest Plan and the CWA, including to (1) "protect streamcources and adjacent vegetation to maintain or improve overall wildlife and fish habitat, water quality, and recreational opportunities; (2) protect downstream riparian rights; (3) protect "wildlife adaptations"; (4) ensure the "beneficial uses" for Fay Creek; and (5)"[r]equire compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law."

The USFS argues that the SUP contains conditions which are appropriate to protect and meet the Sequoia Forest Plan's goals and to require compliance with environmental laws. To protect vegetation, for example, the SUP requires Sellers to "obtain prior written approval from the authorized officer before removing or altering vegetation or other resources." AR at 410. In addition, Section III of the SUP contains the following condition to require compliance with federal, state, and local laws:

> The holder shall comply with all applicable Federal, State, and local laws, regulations, and standards, including but not limited to, the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq., the Comprehensive Environmental Response, Control, and Liability Act, 42 U.S.C. 9601 et seq., and other relevant environmental laws, ans well as public health and safety laws and other laws relating to the siting, construction, operation, and maintenance of any facility, improvement, or equipment on the property.

AR at 407. As to wildlife adaptations, the USFS argues that it examined in some detail the effect on

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[3]This Court's conclusion that Fay Creek is not a "navigable water" within the meaning of the Clean Water Act is consistent with applicable regulations. Under regulatory definitions, an intermittent stream may be a navigable water only if the "use, degradation, or destruction of which would *affect or could affect interstate or foreign commerce*." 40 C.F.R.§ 122.2(c), (e); 33 C.F.R. §328.3(a). There is no evidence that Fay Creek affects interstate or foreign commerce. In addition, these regulatory definitions must comply with the rule of law as stated by the United States Supreme Court.

wildlife of the re-issuance of the SUP through the Fisheries Analysis, Biological Analysis, and other reports, and determined that there would be no significant effect on wildlife. Moreover, the USFS points out that the above condition does require Sellers to comply with federal and State water quality standards.

The NFMA "unquestionably requires the Forest Service to 'provide for diversity of plant and animal communities...in order to meet overall multiple-use objectives.'" *Lands Council*, 537 F.3d at 992. The NFMA further requires the Forest Service to implement the goals of the applicable Forest Plan. "However, despite imposing these substantive requirements on the Forest Service, neither the NFMA and its regulations nor the [applicable] Forest Plan specify precisely how the Forest Service must demonstrate that its site-specific plans adequately provide for wildlife viability." *Id*. Because of the USFS's expertise in the area, this Court defers to its methods, and grants "the Forest Service the latitude to decide how best to demonstrate that its plan will provide for wildlife viability." *Id*.

Sequoia Forestkeeper fails to demonstrate that the USFS acted arbitrarily and capriciously by failing to condition the SUP to comply with various Forest Plan goals and environmental laws. The SUP contains a condition to require Sellers to comply with various environmental laws, including the CWA. The SUP also includes an additional protection for vegetation. The Court defers to the USFS that this condition best serves the goals of the Forest Plan, especially in light of the absence of evidence that Sellers has failed to comply with its provisions. Moreover, Fay Creek is in the MC6 (Mixed Chaparral) Management Area of the Sequoia National Forest. The MC2 has a grazing of livestock emphasis in mixed chaparral vegetation. This Court defers to the USFS's balance of the multiple uses of the forest. See, 16 U.S.C. § 528 ("it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."). Here, the water is used for, among other things, grazing of cattle on Sellers' land. Accordingly, the USFS has not violated the NFMA by failing to include further conditions in the SUP.

NEPA Claims

Introduction

"NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed action and inform the public that it has indeed considered environmental concerns

in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1153-54 (9th Cir. 2006), *abrogated on other grounds by Winter v. NRDC, Inc.*, 555 U.S. 7 (2008). NEPA is a procedural statute which "exists to ensure a process, not to mandate particular results." *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 936 (9th Cir. 2010); *see also, Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). Because the statute is procedural in nature, the reviewing court will set aside agency actions that are adopted "without observance of the procedure required by law. *Natural Res. Def. Council v. U.S. Forest Service*, 421 F.3d 797, 810 n.27 (9th Cir. 2005).

NEPA and its implementing regulations require federal agencies, including the USFS, to take a "hard look" at their actions, and to assess foreseeable environmental impacts of those actions, including direct, indirect, and cumulative impacts, in a forthright and public manner. 42 U.S.C. §4332(c)(i); 40 C.F.R. §1508.7. If a proposed agency action would "significantly affect the quality of the human environment," then NEPA requires the agency to prepare an EIS. 42 U.S.C. §4332(2)(C). If it is not clear whether an action will require preparations of an EIA, regulations direct the agency to prepare an EA to determine whether an EIA is required. 40 C.F.R. §1501.4(b).

An agency is not required to prepare an EIS or an ES when the proposed action falls within a "categorical exclusion" to NEPA's requirements. *See,* 40 C.F.R. §§1501.4(b), 1502, 1508.4, 1508.9. Categorical exclusions are "actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in [NEPA] procedures adopted by a Federal agency." 40 C.F.R. §1508.4. "By definition, then a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis required by an environment assessment need not be performed. That assessment has already been conducted as part of the creation of the exclusion." *Utah Envt'l Cong. v. Bosworth*, 443 F.3d 732, 741 (10th Cir. 2006); *Alaska Ctr. for Env't v. U.S. Forest. Serv.*, 189 F.3d 851, 853-54 (9th Cir. 1999). An agency may apply a categorical exclusion to its proposed action, however, only in the absence of extraordinary circumstances. *Bicycle Trails Council of Marin v. Babbit*, 82 F.3d 1445, 1456 (9th Cir. 1996); *Utah Envt'l Cong. v. Russell*, 518 F.3d 817, 821 (10th Cir. 2008). If "scoping indicates that extraordinary circumstances are present and it is uncertain that the proposed action may have a significant effect on the environment," then an EA must be prepared. AR at 266.

The USFS applied a categorical exclusion to its re-issuance of the Sellers' SUP. The applicable categorical exclusion is found in the Forest Service Handbook ("FSH") at 1909.15, Section 31.2.3, and excludes from NEPA's EIS or EAS analysis "[a]pproval, modification, or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land." The FSH provides "examples" of agency action that would fall into this exclusion, including "[a]pproving the continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed." *Id*. AR at 270-71.

Sequoia Forestkeeper's challenge to the re-issuance of the SUP pursuant to NEPA is three-fold: (1) the USFS did not take a "hard look" at the environmental effects of the SUP because it erroneously believed that it could not place a condition on Sellers' water rights; (2) the categorical exclusion does not apply because the diversion impacts an area larger than five acres and is not minor; and (3) extraordinary circumstances exists which requires either an EIS or EA. The USFS maintains that the re-issuance of the Sellers' SUP complied in full with NEPA. The Court considers each challenge below.

Whether USFS Violated NEPA by Concluding That It Had No Authority to Condition the SUP to Affect Sellers' Water Rights

Sequoia Forestkeeper asserts that the USFS's review of the re-issuance of the SUP was too narrow due to the USFS's conclusion that it had no authority to consider Sellers' water rights. Sequoia Forestkeeper argues that this assumption was false, and that the USFS has the authority to place conditions in its SUP that limits the unlimited water permit issued by State to Sellers. The USFS maintains that it has no right to interfere with state-granted water rights. Unjustifiably, neither party cites legal authority to support its position. Accordingly, neither party has satisfied its burden to establish it should be granted judgment as a matter of law on this issue.

Nevertheless, having considered the administrative record, applicable standards, and applicable law, this Court finds that the USFS acted arbitrarily or capriciously in its determination that it did not have the authority to condition the Sellers' SUP to maintain certain levels of water flow or to restrict the level of flow to the amount of water granted by State in its water permit.

Several parties requested the USFS to consider conditioning the SUP on minimum bypass flows. For example, in his letter to USFS, Mr. Stephens, State Department of Fish and Game Senior Biologist

wrote:

> While we recognize the Forest may not have the authority to appropriate water, I believe you can help ensure that proper bypass flows occur, such that downstream needs are met. We would encourage the inclusion of language in the permit that requires the owner and operator of the dam to bypass adequate flows at all times to keep downstream resources in good condition. I encourage you to evaluate these concerns and integrate them into your EA, EIA, and incorporate criteria or conditions in the reissued Use Permit to minimize or eliminate the impacts of the diversion structure and reduction in flow.

AR at 124.

The USFS maintained throughout its internal and external scoping process that it did not have the authority to interfere with Sellers' water rights, granted by the State, and dismissed requests to consider minimum bypass flow conditions in the SUP. In a January 28, 2003 letter to California Department of Fish and Game, the Forest Supervisor wrote:

> As you know, the diversion and a portion of the water transition line are located on public land. We will be issuing a new special use permit to Mr. Sellers that will set forth conditions for the use of the diversion and water transmission line on National Forest System land. For example, Mr. Sellers is responsible for maintaining the structures in good repair. The Forest Service will contact Mr. Sellers to ensure that the recently discovered leakage in the water transmission line has been repaired. We do not have the authority to put conditions on his water rights as your staff recommends. We are forwarding your fax and its attachments, as well as [another letter from the State Department of Fish and Game] to...the State Water Resources Control Board.

AR at 132-33. In its Decision Memo, the USFS reiterates its position that "the Forest Service cannot place any conditions in a Special-Use permit which would infringe upon a water right." AR at 143. The Decision Memo noted that USFS "received three responses following the close of the public scoping period. All three letters addressed water rights and/or the natural resources concerns that are outside the scope of this decision." AR at 146.

This action "is not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917). The SUP does not grant or alter Sellers' water rights. Section VII(E) of the SUP provides: "This authorization does not convey any legal interest in water rights as defined by applicable State law." The SUP does not allow Sellers a right to use the water that flows from Fay Creek; rather, it grants Sellers special use of the water diversion located on Forest Service lands to transmit water from Fay Creek to his private property. Sellers' water

rights were granted by State. Thus, the issue is not whether the USFS had legal authority to grant water rights, but whether it had the legal authority to condition the SUP to require minimum bypass flows.

Federal law, including the Federal Land Policy Management Act of 1976 ("FLMPA") "specifically authorizes the Forest Service to restrict such rights-of-way [granted by an SUP] to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the Forest Service defer to state water law." *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1086 (9th Cir. 2003).[4] In *Okanogan*, the Ninth Circuit rejected appellants' position that "the Forest Service does not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions deny them their vested water rights under state law." *Id*. at 1084. The Ninth Circuit found that the USFS has the authority to condition water rights-of-way granted through an SUP in several federal statutes:

> The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of the Interior and Agriculture to "grant, issue, or renew rights-of-way over" public lands for "ditches . . . for the . . . transportation . . . of water." 43 U.S.C. § 1761(a)(1). Such rights-of-way "shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment" and that will "require compliance with applicable . . . water quality standards established by or pursuant to applicable Federal or State law." *Id*. § 1765(a). In addition, the National Forest Management Act requires the Forest Service to specify guidelines for land management plans that "provide for . . . watershed, wildlife, and fish" and "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(A) & (B). The Organic Administration Act, 16 U.S.C. § 475, provides that "no national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows . . . ." The Multiple Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. § 528, provides that "it is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."

Id. at 1085. The *Okanogan* Court considered these statutes to "give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species." *Id*.; *see also*, *Diamond Bar Cattle Co. v. United States*, 168

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[4] The parties have been considering the legal issues presented in this action for almost nine years, since the initial notice for comment issued in January 2002. This action was filed nearly two years ago, and the parties have briefed these cross-summary judgment motions over the course of four months. Despite having nearly a decade to consider these issues, and four months to brief them, the parties failed to cite controlling law on the navigable waters issue, discussed *supra*, and failed to cite *any* legal authority for this central question as to whether the USFS had the legal authority to condition the SUP to limit the amount of water flowing through the diversion. The parties' failures are egregious, particularly in light of controlling, applicable law on these issues. The Court ADMONISHES both parties that failure to set forth controlling, applicable law in future motions shall result in an order to show cause why sanctions should not be imposed.

F.3d 1209 (10th Cir. 1999) (affirming district court's finding that whether "Plaintiffs own certain water rights...does not change the fact that such rights do not deprive the Forest Service of its statutory authority and responsibility to regulate the use and occupancy of National Forest System lands."). Thus, the USFS had the authority to condition the SUP on minimum passage flow restrictions. *Accord, Trout Unlimited v. USDA*, 320 F. Supp. 2d 1090, 1106 (D. Colo. 2004) ("[P]ursuant to its regulatory authority, the Forest Service could have imposed bypass flows as a condition to the renewal of" permit to use Forest Service land.); *see also, PUD No. 1 v. Washington Dep't. of Ecology*, 511 U.S. 700, 720-21 (1994) (regulatory action under federal law to require minimum stream flows does not interfere with state water allocation because it neither "reflected nor established" a water right.").

The USFS could have also considered requests to alter the diversion to limit the flow of water to the amount granted in Sellers' water permit. Sellers is permitted to divert 0.129 cubic feet per second (cfs), which is about one gallon per second. The 2002 biological, aquatic, and environmental assessments of Fay Creek assumed Sellers diverted this amount. Yet, one USFS study acknowledged that as much as 325 gallons per minute (over five times as much) is diverted to Sellers, with a total annual use averaging 110 acre feet. An alternative suggestion was to modify the diversion to have "measuring and data collection devices installed" or to install smaller pipes to monitor the water flow. AR at 63, 68. The request was made because "[m]easuring and monitoring the flow of water will allow for compliance with the State's permit." *Id*. The USFS dismissed this request without analysis or comment. Presumably, the USFS considered this to be an unauthorized interference with Sellers' water rights. As explained more fully above, however, the USFS has the federal regulatory authority to place conditions on its rights-of-way, and such an action would enforce, rather than restrict, Sellers' water rights. The USFS has included similar restrictions in other scenarios. For example, *in Idaho Watersheds Project v. Jones*, 253 Fed. Appx. 684, 686 (9th Cir. 2007), "a term of [an] easement from the Forest Service require[d]" the holders of the easement "to install both a head gate and a fish screen before further diverting water from Otter Creek." *Id*. The Forest Service included that condition, and the Ninth Circuit upheld that condition, because "the Forest Service is obligated under law to impose restrictions on easements that minimize harm to wildlife." *Id*. Accordingly, the USFS erred to conclude that it had no authority to place conditions on the SUP, and violated NEPA by failing to consider these suggestions

in its scoping period.

The USFS's erroneous conclusion that it had no authority to condition the SUP to require minimum bypass flows or other rights-of-way restrictions led to its unreasonable failure to consider the requests to do so in its scoping period. *Ka Makani 'O Kohala Ohana Inc. v. Dept. of Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002) (when a dispute is primarily legal in nature, or concerns a threshold question of law, this Court applies the more lenient "reasonableness" standard.). "To take the required 'hard look' at a proposed project's effects, an agency may not rely on incorrect assumptions or data." *Native Ecosystems Council v. United States Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005); *see also*, *Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (court will vacate agency action if agency "entirely failed to consider an important aspect of the problem"). Accordingly, this Court finds that the USFS violated NEPA by failing to consider the request during its scoping period.

Although this Court finds that the USFS *could* have placed a minimum bypass flow or water meter condition on the Sellers' SUP, this Court has no opinion as to whether it *should* have included such restrictions. As explained more fully below, this Court remands this issue to the USFS for further consideration. Specifically, the USFS shall address the requests to place certain conditions on the Sellers' SUP, including the request: (1) to condition the SUP on a minimum flow requirement; (2) to require a monitoring and measuring device be placed on the diversion; and (3) to reduce the size of the pipes that divert water from Fay Creek.

Whether USFS Violated NEPA by Applying a Categorical Exclusion to the SUP

The USFS concluded that the SUP qualified as a categorical exclusion, because it was a "continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land." The USFS concluded that it may approve the SUP where, as here, it approved "continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed." Sequoia Forestkeeper argues that this decision was arbitrary and capricious, because the SUP is not a "minor special use" and impacts more than five contiguous acres of land. For the following reasons, this Court finds that the USFS did not act arbitrarily and capriciously by applying a categorical exclusion to the re-issuance of the SUP.

The SUP fits within the acreage requirements. The USFS described the "permitted area" as "approximately 0.15 acres." AR at 143. This area includes the dam structure, the "sand box" that is part of the diversion structure, and approximately 250 feet of diversion pipe to comprise the area "affected by the permitted structure." AR at 225. Sequoia Forestkeeper argues that "the area directly and significantly impacted by the dam/river diversion far exceeds five acres because of the direct impacts it causes downstream and on Sellers' operation of his ranch." Although the SUP might impact more than five acres of land, the categorical exclusion concerns the use of more than five acres of National Forest System land. The plain language of the categorical exclusion applies to "uses of National Forest System lands that require less than five contiguous acres of land." The use at issue–use of the diversion for water transmission–requires less than five contiguous acres of land. It is undisputed that the diversion covers only an area of approximately .015 acres of National Forest System land, and does not reach beyond five acres total, including Sellers' land.

The SUP would fall outside of the categorical exclusion if the special use was not minor, or, if the proposed action was a "major Federal action." As described more fully above, NEPA does not require an environmental analysis of all proposed federal agency actions. NEPA requires the preparation of an EIS only with respect to "major Federal actions" that significantly affect the quality of the human environment. Moreover, an EIS is not necessary "where a proposed federal action would not change the status quo," *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 92 1 F.2d 232, 235 (9th Cir. 1990), and is only required if the ongoing activity rises to the level of a "major Federal action." *County of Trinity v. Andrus*, 438 F. Supp. 1368, 1388 (E.D. Cal. 1977). "By definition...a categorical exclusion does not create a significant environmental effect; consequently, the cumulative effects analysis required by an environment assessment need not be performed. That assessment has already been conducted as part of the creation of the exclusion." *Utah Envt'l Cong.*, 443 F.3d at 741. Thus, this Court need not consider whether the direct, indirect and cumulative effects create a significant environmental effect. This Court need only consider whether the SUP approves a "minor" special use or a "major federal action."

This Court finds that the USFS did not commit clear error to determine that the SUP was a "minor" special use. NEPA and its regulations do not define either a "minor" special use or a "major

Federal action." "No litmus test exists to determine what constitutes "major Federal action." *Save Barton Creek Ass'n v. Federal Highway Admin*., 950 F.2d 1129, 1134 (5th Cir. 1992). Here, the USFS was guided by the FSH, which provides that the "continued use of land where such use has not changed since authorized and no change in the physical environment or facilities are proposed" qualifies under the categorical exclusion. This Court defers to the "agency's interpretation of the meaning of its own categorical exclusion...unless plainly erroneous or inconsistent with the terms of the regulation." *Alaska Ctr. for the Env't*, 189 F.3d at 857. Here, the example was not plainly erroneous, and the re-issuance of the SUP fit the example. Thus, the proposed action satisfied the agency's interpretations of its categorical exclusion. In addition, both *Upper Snake River*, 921 F.2d 232, and *County of Trinity*, 438 F. Supp. 1368, support the USFS's conclusion that the re-issuance of the SUP would not be a "major federal action." *See, e.g., Upper Snake River*, 921 F.2d at 235 (operation of a dam, that had operated for years before NEPA was enacted was not a "major federal action" where its "operation is and has been carried on and the consequences have been no different than those in years past.").

The USFS had a reasonable basis to conclude that the SUP required fewer than five contiguous acres of land, and was for a "minor" use. Accordingly, the USFS did not act arbitrarily to conclude that the SUP qualified as a categorical exclusion. *See, Sierra Club v. Bosworth*, 510 F.3d 1016, 1022 (9th Cir. 2007) ("An agency's determination that a particular action falls within one of its own categorical exclusions is reviewed under the arbitrary and capricious standard.").

Whether USFS Violated NEPA by Finding that No Extraordinary Circumstances Exist

The USFS may apply a categorical exclusion only if there are no "extraordinary circumstances related to the proposed action." Sequoia Forestkeeper argues that extraordinary circumstances exist, because Mr. Christenson commented that Fay Creek "provides a wetland environment in an otherwise arid area." AR at 19. No other study characterized Fay Creek as a wetland. Accordingly, the USFS did not act arbitrarily and capriciously to find that there were no extraordinary circumstances. In addition, Sequoia Forestkeeper argues that the SUP allows a "complete de-watering of a stream that includes fishery habitat." Sequoia Forestkeeper also argues that the "cumulative impact" of the SUP should have been considered. The Court has addressed, and rejected, these arguments above. Although the State Department of Fish and Game opined that the SUP allowed the "complete de-watering" of Fay Creek

during certain months, the USFS conclusion that no extraordinary circumstances existed was based on the USFS experts' opinions and other evidence supported in the record. Accordingly, the USFS decision was not arbitrary and capricious.

Relief

Because the USFS failed to demonstrate that it made a "reasoned decision" to re-issue the SUP "based on all of the relevant factors and information," the re-issuance was "arbitrary and capricious." *Id*. (citing *Marsh*, 490 U.S. at 378); *see also*, 40 C.F.R. 1505.1. "When an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision." *Alaska Ctr.*, 189 F.3d at 859. "[W]hen an agency has taken action without observance of the procedure required by law, the action will be set aside." *Sierra Club*, 510 F.3d at 1023 (citing *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567-68 (9th Cir. 2000).

Sequoia Forestkeeper requests this Court to: (1) declare that the USFS's decision to approve the SUP was arbitrary, capricious, and in violation of the NFMA and NEPA; (2) vacate the SUP and remand the matter to the USFS for the preparation of an environmental analysis; (3) order the USFS to condition the SUP to protect water quality, fisheries, and downstream, instream, and riparian habitat; (4) enjoin the USFS from operating the diversion without requiring a minimum flow of 50%; (5) enjoin the USFS from operating the diversion structure without installing automatic flow control devices; and (6) order the USFS to conduct periodic (at least weekly) monitoring of the diversion and to report these results. Sequoia Forestkeeper argues that it has satisfied all of the elements required for injunctive relief.

The Court may only grant a preliminary injunction "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 375, 172 L. Ed. 2d 249 (2008). "Plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest." *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Winter*, 129 S.Ct. at 374). In considering the four factors, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 129 S.Ct. at 376 (quoting *Amoco Co. v. Vill.*

of Gambell, Alaska, 480 U.S. 531 542 (1987)); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009).

Likelihood of Success

As discussed more fully above, this Court finds that the USFS did not violate the NFMA, and did not err to find that the SUP fell within one of its categorical exclusions. This Court found that the USFS violated NEPA, however, because it failed to consider some comments based on its erroneous conclusion that it had no legal authority to place conditions that would restrict water flowing through the diversion. Accordingly, Sequoia Forestkeeper has established the likelihood of the merits on this claim only.

Irreparable Harm Absent Injunctive Relief

Sequoia Forestkeeper argues that in "the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *Sierra Club*, 510 F.3d at 1034. Indeed, "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or of long duration, *i.e.*, irreparable." *Id*. (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)). Nevertheless, a violation of NEPA "does not automatically require the issuance of an injunction." *Id*. This Court disagrees with the USFS's claim that any NEPA violation is merely a "trivial violation" pursuant to 40 C.F.R. §1500.3. As discussed more fully above, however, this Court also finds that Sequoia Forestkeeper has failed to establish that the "proposed project may significantly degrade some human environmental factor." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 737. Because the diversion has been in place since 1890, little evidence exists as to the impact, if any, that the diversion has had on that environment below it. Sequoia Forestkeeper has not established with specificity what irreparable harm would occur by allowing the diversion to continue to operate as it has for over 100 years. Accordingly, this factor disfavors injunctive relief.

Public Interest

The public interest favors injunctive relief. "[A]llowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA" and contrary to the public interest. *Sierra Club*, 510 F.3d at 1033. "The preservation of our environment, as required by NEPA and NFMA, is clearly in the public interest." *Earth Island Inst. v. U.S. Forest.*

Serv., 351 F.3d 1291, 1308 (9th Cir. 2003).

Balance of the Hardships

The purpose of a a preliminary injunction is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions of the parties until the merits of the action are ultimately determined. *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830 (1981). "Status quo" means the last uncontested status that preceded the pending controversy. *See, GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). Here, the status quo would be to allow Sellers to continue to divert water through the diversion. Water has been flowing through the diversion for over 100 years. Sequoia Forestkeeper seeks a mandatory injunction that "goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.'" *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980) (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). Although the USFS may place conditions on Sellers' use of the diversion, and may require Sellers to attach monitors or meters, or install smaller pipes, it is not clear from the record how, or whether, USFS could stop the Sellers' use of the diversion altogether and how that would affect Sellers' water rights. The clear harm that a mandatory injunction would cause the USFS is greater than the undefined and speculative harm that Sequoia Forestkeeper claims would occur absent the injunction. Accordingly, this balance of the equities tips against the issuance of the injunctive relief sought. *See, Sierra Club*, 510 F.3d 1034 (recommending injunction to be limited to those projects that have not yet been approved).

Conclusion

For the foregoing reasons, this Court REMANDS this action to the USFS for further consideration and analysis, but ORDERS that the status quo should remain while the USFS completes its supplemental scoping analysis of its re-issuance of the SUP.

ORDER

For the foregoing reasons, this Court:

1. GRANTS judgment in favor of Sequoia Forestkeeper and against the USFS on Sequoia Forestkeeper's second cause of action;

2. GRANTS judgment in favor of the USFS and against Sequoia Forestkeeper on Sequoia Forestkeeper's first, third, and fourth causes of action; and

3. REMANDS this action to the USFS for further consideration consistent with this opinion.

IT IS SO ORDERED.

Dated: December 3, 2010

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SEQUOIA FORESTKEEPER,

Plaintiff,

vs.

UNITED STATES FOREST SERVICE, et al.,

Defendants.

_____/

CASE NO. CV F 09-392 LJO JLT

ORDER ON PLAINTIFF'S RECONSIDERATION MOTION (Doc. 86)

INTRODUCTION

Plaintiff Sequoia Forestkeeper moves for reconsideration of this Court's December 3, 2010 Order on Cross-Motions for Summary Judgment ("MSJ Order"). Sequoia Forestkeeper argues that this Court made errors of fact and law to conclude that Fay Creek is not a "navigable water" or a "fishery." In addition, Sequoia Forestkeeper contends that this Court erred by refusing to consider supporting declarations attached to Sequoia Forestkeeper's motion and other documents and by denying injunctive relief. Based on a change in the controlling law and defendant United States Forest Service's ("the USFS"s) position on the law, this Court finds that reconsideration of the "navigable water" issue is warranted. Having reconsidered whether Fay Creek is a navigable water, this Court MODIFIES its MSJ Order in part and GRANTS summary judgment in favor of Sequoia Forestkeeper on this issue. This Court further GRANTS reconsideration of Sequoia Forestkeeper's request for injunctive relief, SETS

ASIDES the administrative agency action, and REMANDS this issue to the administrative agency for further proceedings. As to all other issues, this Court DENIES Sequoia Forestkeeper's reconsideration motion.

BACKGROUND

Sequoia Forestkeeper initiated this action to seek judicial review of the USFS's[1] re-issuance of a Special Use Permit ("SUP") to Robert Sellers and Quarter Circle Five Ranch (collectively "Sellers") in 2003, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§701-706. The SUP authorizes Sellers to use a water diversion that diverts water flowing from Fay Creek via a dam located within the boundaries of the Sequoia National Forest for private use ("diversion"). Sequoia Forestkeeper argued that by re-issuing the SUP, the USFS violated: (1) the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321-4347, for failure to prepare an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS") despite warnings from the California Department of Fish and Game, Sequoia Forestkeeper, and downstream landowners that the SUP would result in significant harm to the environment (first cause of action); (2) NEPA, for failure to take a "hard look" at the environmental impacts of the re-issuance; (3) the National Forest Management Act ("NFMA"), 16 U.S.C. §§1600-1687, because the SUP fails to comply with California resource and environmental law (third cause of action); and (4) NFMA, because the SUP fails to comply with Sequoia National Forest Land and Resource Management Plan ("Forest Plan"), which requires compliance with the water quality standards of the Clean Water Act, 33 U.S.C. §§1251-1387.[2]

In its MSJ Order, the Court found that the USFS violated NEPA by failing to consider requests to include a minimum bypass flow restriction in the SUP or to require monitoring devices to be installed. This Court rejected Sequoia Forestkeeper's claims on all other grounds. Accordingly, this Court granted in part and denied in part the parties' cross-summary judgment motions and remanded this action to the USFS for further consideration.

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[1] Defendants are the United States Forest Service, Tina Terrell, in her official capacity as Forest Supervisor for the Sequoia National Forest ("Ms. Terrell"), and Abigail R Kimbell, in her official capacity as Chief of the United States Forest Service (collectively "USFS").

[2] Sequoia Forestkeeper withdrew its fifth and sixth causes of action in its motion for summary judgment.

Sequoia Forestkeeper moves for reconsideration of this Court's MSJ Order on the following issues: (1) whether this Court erred in concluding that because Fay Creek was not a "navigable water," the USFS did not violate the NFMA by failing to require a Section 401 Certificate; (2) whether this Court erred in concluding that Fay Creek did not constitute a "fishery"; (3) whether this Court erred by failing to consider Sequoia Forestkeeper's extra-record evidence; and (4) whether this Court erred in denying Sequoia Forestkeeper's request for injunctive relief. In response, USFS concedes that its legal position on the law as it pertains to the "navigable water" issue has changed. In addition, the USFS contends that the administrative record is incomplete on the issue, and requests remand to allow the USFS to develop the administrative record more fully. The USFS opposes Sequoia Forestkeeper's motion on all other issues.

In reply, Sequoia Forestkeeper opposes remand of the navigable water issue, arguing that this Court must decide whether the USFS acted arbitrarily and capriciously based on the administrative record at the time it existed when the USFS made its final administrative decision. In addition, Sequoia Forestkeeper reiterates its position that this Court erred on all issues presented in its reconsideration motion.

Having considered the parties' arguments, declarations, and the administrative record, this Court found this motion suitable for a decision without a hearing, vacated the March 10, 2011 hearing on this motion pursuant to Local Rule 230(g).

STANDARD OF REVIEW

Reconsideration

The Court has discretion to reconsider and vacate a prior order. *Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir.1994); *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 396 (9th Cir.1992); *see also*, Fed. R. Civ. P. 59(e). Motions to reconsider are committed to the discretion of the trial court. *Combs v. Nick Garin Trucking*, 825 F.2d 437, 441 (D.C.Cir.1987); *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir.1983) (en banc). A motion for reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enterprises v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court

to reverse its prior decision. *Id.; see also, Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F.Supp. 656, 665 (E.D.Cal.1986), *affirmed in part and reversed in part on other grounds*, 828 F.2d 514 (9th Cir.1987). "A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

Motions for reconsideration are not the place for parties to make new arguments not raised in their original briefs. *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-6 (9th Cir.1988). Nor is reconsideration to be used to ask the court to rethink what it has already thought. *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D.Ariz.1998). "A party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *U.S. v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1131 (E.D. Cal.2001).

Review of Administrative Decision

This Court's initial review of Sequoia Forestkeeper asserted claims pursuant to NEPA (counts one and two) and NFMA (counts three and four) was limited. Alleged violations of NEPA and NFMA are subject to juridical review under the APA. *Blue Mtn. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). This Court reviews of an agency's actions pursuant to the differs, depending on whether the issue was primarily factual or primarily legal. *Price Rd. Neighborhood Ass'n. v. United States DOT*, 113 F.3d 1505, 1508 (9th Cir. 1997). After some discussion, the Court found that "[t]he issues of this action are factual and legal in nature.; i.e., whether Fay Creek is a fishery or a navigable water, and how much water flows through the diversion. Accordingly, this Court shall apply an "arbitrary and capricious" standard to its review of factual issues, but will consider pure questions of law under the reasonableness standard." MSJ Order, pg. 11.

For disputes that are primarily factual, this Court "shall...set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or found to be "without observance of procedure required by law." 5 U.S.C. §706(2). Although the Court's review is "searching and careful," the "standard is narrow." *Ocean Advocates v. United States Army Corps of*

Eng'rs, 402 F.3d 846, 859 (9th Cir. 2005). The arbitrary and capricious standard is "highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (quotations and citations omitted). Under such deferential review, the Court may not substitute its judgment for that of the agency. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Thus, the Court will not vacate an agency's decision under the "arbitrary and capricious" standard unless the agency:

> has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the produce of agency expertise.

Nat'l Assn. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). On the other hand, a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id*. (quotations and citations omitted).

When a dispute is primarily legal in nature, or concerns a threshold question of law, this Court applies the more lenient "reasonableness" standard. *Ka Makani 'O Kohala Ohana Inc. v. Dept. of Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002). Under this standard, the Court will uphold the agency's decision unless it is unreasonable. *Friends of the Earth v. Hintz*, 800 F.3d 822, 836 (9th Cir. 1986).

With these standards in mind, the Court turns to the parties' arguments.

DISCUSSION

Navigable Water Issue

Sequoia Forestkeeper argued that the USFS violated the CWA because it issued the SUP without requiring state certification that the diversion would not impact water quality in Fay Creek. The NFMA requires the USFS to comply with the CWA, among other statutes. Section 401 of the CWA requires every applicant for a federal license or permit which may result in a discharge into "navigable waters" to provide the licensing or permitting federal agency with certification that the project will be in compliance with specified provisions of the CWA, including State water quality standards ("Section 401 Certificate"). No 401 Certificate was issued by the State before the 2003 SUP re-issued. Sequoia

Forestkeeper argues that USFS's failure to require Sellers to obtain a Section 401 Certificate from the State of California was arbitrary and capricious, and violated the NFMA.

In its MSJ Order, this Court found that the USFS's failure to obtain a Section 401 Certificate did not violate the NFMA, because Fay Creek is not a "navigable water" within the meaning of the CWA. In its decision, the Court considered the reasoning of *Rapanos v. United States*, 547 U.S. 715 (2006), in which the Supreme Court interpreted the term "navigable waters" as used in the CWA in a 4-4-1 plurality opinion. The Court further considered the Ninth Circuit cases of in *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) and *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), which recognized Justice Kennedy's opinion in *Rapanos* to be the "controlling rule of law." Based upon these and other cases, this Court concluded that Justice Kennedy's "significant nexus" test was the controlling rule of law. Based on this standard, the Court found that Fay Creek was not a "navigable water" under Justice Kennedy's "significant nexus" test.

Reconsideration of this issue is warranted because there appears to be an intervening change in the controlling law. The USFS points out that a recent Ninth Circuit opinion, published after this Court's MSJ Order, makes clear that this Court may also consider the plurality opinion's interpretation of the term "navigable water":

> In *City of Healdsburg*, 496, F.3d at 999-1000, the court found that Justice Kennedy's concurrence in *Rapanos* "provides the controlling rule of law for our case." We did not, however, foreclose the argument that the Clean Water Act jurisdiction may also be established under the plurality's standard.

N. Cal. River Watch v. Wilcox, – F.3d –, 2011 WL 238292 *1 (9th Cir. 2011) (amending 620 F.3d 1075, 1089-90 (9th Cir. 2010) to include this language). Indeed, the USFS now explains that it is the position of the United States that CWA jurisdiction may be established under either of the two standards set forth in *Rapanos*. Having considered the case law, this Court agrees that both the plurality decision and Justice Kennedy's "significant nexus" test may establish CWA jurisdiction. Because this Court erroneously rejected the *Rapanos* plurality decision,[3] reconsideration on this issue is granted. Accordingly, this Court will reconsider the issue under the *Rapanos* plurality standard.

[3] In its MSJ Order, this Court found that although Fay Creek "may qualify as a navigable water" under the plurality decision in *Rapanos*, the plurality definition was not controlling. As explained herein, this conclusion was erroneous.

Whether the USFS was required to obtain a Section 401 Certificate turns on whether Fay Creek is a "navigable water" within the meaning of the CWA. The *Rapanos* plurality explained:

> the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute.

Id. at 732 (citations omitted). At first blush, this definition of "navigable water" may appear to exclude Fay Creek, because the evidence demonstrates that Fay Creek is not a "continuously flowing" body of water. As the plurality clarified, however: "By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id*. at 733 n.5.

Reconsidered under this analysis, Fay Creek qualifies as a navigable water under this definition. Fay Creek flows seasonally, not "ephemerally." The administrative record makes clear that Fay Creek is a stream that flows throughout certain seasons of the year, even in its lower stretches, drying up in the summer months. The administrative record supports Sequoia Forestkeeper's argument that Fay Creek is a "stream" that is "relatively permanent" under the *Raponos* plurality definition. In addition, Sequoia Forestkeeper correctly points out that the administrative record contains facts that Fay Creek flows into the south Kern River, since it is characterized as a "tributary" of the south Kern River. *See* AR at 152 ("The headwaters to Fay Creek start on the southern end of the Kern Plateau, and drains into the South Fork of the Kern River."); *see also*, AR at 128, 154, and Def. Answer, ¶12 (admitting that Fay Creek is a tributary of the South Fork of the Kern River). Under these facts, Fay Creek is a navigable water, requiring the USFS to explore Section 401 Certification prior to the re-issuance of the SUP.

The USFS concedes that these facts appear in the administrative record, but argues that the administrative record contains "significant factual inconsistencies" and is incomplete on this issue. USFS requests that this Court vacate this portion of its MSJ Order and remand it to allow the agency to develop the administrative record on this issue and to decide the issue in the first instance.

Sequoia Forestkeeper points out that although the USFS argues that the administrative record

contains "factual inconsistencies," the USFS fails to cite to the administrative record to support its position. In addition, Sequoia Forestkeeper opposes remand, arguing that since the administrative record is complete, this Court must consider this issue on the administrative record as it existed at the time the final administrative decision was made. This Court agrees, for the reasons explained more fully below.

The USFS was required to determine whether a Section 401 Certification was required prior to issuing the Sellers SUP. 33 U.S.C. §1341(a)(1). The USFS concedes that "it did not decide whether a Section 401 Certification [was] required" prior to its final administrative action. Having considered the administrative record, it appears that Fay Creek qualifies as a navigable water under the CWA to require a Section 401 Certificate prior to the re-issuance of the SUP. In reviewing the USFS' administrative decision, this Court:

> looks to the evidence the Forest Service has provided to support its conclusions, along with other materials on the record, to ensure that the Service has not, for instance, relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Lands Council, 537 F.3d at 987 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted). Because the USFS failed to consider whether a Section 401 Certificate was required prior to re-issuing the Sellers SUP, the USFS "failed to consider an important aspect of the problem." *Id*. Under these circumstances, this Court finds that the USFS acted arbitrarily and capriciously when it issued the Sellers SUP without considering its obligations under the CWA and without applying for a Section 401 Certificate. For these reasons, this Court MODIFIES its prior MSJ Order and judgment in part and GRANTS summary judgment in favor of Sequoia Forestkeeper and against the USFS on this issue.

Fisheries Issue

This Court ruled that the USFS did not err to conclude that the portion of Fay Creek below the diversion did not constitute a fishery. Sequoia Forestkeeper challenges this Court's conclusion on a number of grounds. For the following reasons, this Court rejects Sequoia Forestkeeper's arguments.

Sequoia Forestkeeper argues that this Court erred by failing to consider the parts of the administrative record it cited to support its position that Fay Creek is a fishery. Sequoia Forestkeeper

is mistaken, as this Court considered thoroughly all documents cited by the parties in their summary judgment papers. This Court cited and quoted at length in the MSJ Order those documents Sequoia Forestkeeper argues were ignored. Because the Court considered these documents, this Court rejects Sequoia Forestkeeper motion on this ground.

Additionally, Sequoia Forestkeeper presents no new evidence or change of controlling law on this issue. Sequoia Forestkeeper impermissibly asks this Court "to rethink what it has already thought." *Rezzonico*, 32 F.Supp.2d at 1116. For this additional reason, reconsideration is inappropriate.

Moreover, Sequoia Forestkeeper's arguments ignore the Court's standard to review an administrative order of an NFMA claim. Although the Court's review is "searching and careful," the "standard is narrow." *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2005). The arbitrary and capricious standard is "highly deferential, presuming the agency action to be valid and [requires] affirming the agency action if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (quotations and citations omitted). Under such deferential review, the Court may not substitute its judgment for that of the agency. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Despite these standards, Sequoia Forestkeeper argues that the USFS' decision that Fay Creek is not a fishery below the diversion was arbitrary and capricious, because the USFS' conclusion differed from that of other evidence in the administrative record. For example, Stanley Stephens ("Mr. Stephens"), a senior biologist with the California Department of Fish and Game, wrote the USFS a letter in which he offered his opinion that "allowing the complete de-watering of Fay Creek on the relatively short reach of national forest lands not only affects the fish, wildlife, and plants there on federal lands, but also on a much longer reach of Fay Creek downstream of the Forest boundary on private lands." AR at 124. While Mr. Stevens' letter and other evidence support Sequoia Forestkeeper's position, this Court may not substitute the USFS' opinion with its own, Sequoia Forestkeeper's, or Mr. Stephens'. Under the highly deferential standard, the Court considers whether the USFS's position was supported by a reasonable basis. As explained below, this Court did not err to find that the USFS's opinion was formed on a reasonable basis.

The USFS's determination that Fay Creek was not a fishery below the diversion was supported

by the administrative record. The 2002 Fisheries Analysis, prepared by a USFS Acting Zone Hydrologist, after considered all of the surveys of Fay Creek conducted by USFS scientists, concluded: "Fay Creek has a permanent fishery above the diversion structure, but not below it." AR at 206. That conclusion was consistent with earlier surveys that while fish may have been present from time to time in the lower reaches of Fay Creek, the conditions, natural barriers, and low water flow of Fay Creek did not support an aquatic environment that "predominantly supports" fish year-round. For example, a 1988 survey also concluded "there is little evidence of there ever being enough water to support a resident fishery year round." AR at 153. Similarly, the 1974 survey considers that the Fay Creek is not a fishery and would not support an aquatic habitat. In addition, letters provided to the USFS by longtime residents of Fay Creek downstream of the diversion affirmed that Fay Creek typically "goes dry around July 4th and does not start again until Labor Day or later." AR at 49, 97. This Court did not err to hold that the USFS conclusion that the area below the diversion was not a fishery was not arbitrary and capricious, as it relied on the expertise of its hydrologist/biologist and was supported by the historical data. Accordingly, Sequoia Forestkeeper's reconsideration motion on this issue is DENIED.

Documents Beyond Administrative Record

In its summary judgment motion, Sequoia Forestkeeper submitted, and relied on, documents outside of the administrative record. Specifically, Sequoia Forestkeeper submitted the declarations of Michael Klinkenberg, Ara Marderosian, Harold Simolke, and Daniel Christenson. Sequoia Forestkeeper also submits several documents attached as Exhibits A through F. Sequoia Forestkeeper argued that this Court could take judicial notice of these exhibits.

In its MSJ Order, this Court found Sequoia Forestkeeper's request for judicial notice of these extra-record documents to be unpersuasive. This Court noted that in an administrative review of an agency action, the Court generally restricts its review to the administrative record. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006). The Court reviews "the full administrative record that was before the [decision-maker] at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); 5 U.S.C. §706. The Court "normally refuse[s] to consider evidence that was not before the agency because 'it inevitably leads the reviewing court to substitute its judgment for that of the agency.'" *Id*. (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1152,

1160 (9th Cir. 1980)). The Court may permit submission of extra-record materials only in limited circumstances, including: (1) if it is necessary to determine "whether the agency has considered all relevant factors and has explained its decision," (2) "when the agency has relied on documents not in the record," (3) "when supplementing the record is necessary to explain technical terms or complex subject matter"; or (4) where there is an allegation of bad faith. *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (citations omitted).

Sequoia Forestkeeper argues that this Court erred by not ruling on its request for judicial notice. This Court generally does not address a request for judicial notice in its summary judgment decisions in its written orders. Omission of reference to a request for judicial notice, an argument, a document or a paper should not to be construed as this Court's not considering the request, argument, document or paper. This Court reviewed, considered and applied the evidence and matters it deemed admissible, material and appropriate for summary judgment. Although this Court did not so state in its order, this Court did consider the request for judicial notice, and implicitly rejected in part that request when it ruled to strike the extra-record evidence.[4]

As set forth above, this Court "normally refuse[s] to consider evidence that was not before the agency[.]" *Ctr. for Biological Diversity*, 450 F.3d at 943. This includes even those documents that may be judicially-noticeable. This Court agreed with the USFS that Sequoia Forestkeeper failed to establish any of the limited circumstances in which the record may be supplemented. In addition, this Court granted the USFS' motion to strike the extra-record exhibits, because the exhibits did not exist at the time decision was made to re-issue the Sellers SUP in 2003. Based on this consideration, the Court rejected Sequoia Forestkeeper's request, finding that an attempt to supplement the record seven years after the decision was made to add new information was unwarranted. *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) ("Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in

[4] In its MSJ Order, this Court wrote: "Sequoia Forestkeeper does not explain how this Court can consider these extra-record documents in this motion." *Id*. at 9. Sequoia Forestkeeper misconstrues this sentence as demonstrating that this Court did not consider its request for judicial notice. Although Sequoia Forestkeeper addressed the Fed. R. Civ. P. 201 standards, Sequoia Forestkeeper neglected to argue that these extra-record documents could be considered in the limited circumstances as outlined in *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv*., 100 F.3d 1443, 1450 (9th Cir. 1996). This absence of analysis formed the basis of this Court's comment.

effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making. Here, the risks presented by the supplemental evidence are serious[.]"). This Court continues to find that consideration of these documents that did not exist at the time of the administrative review would be inappropriate and impermissible.[5] For these reasons, this Court denies Sequoia Forestkeeper's reconsideration motion on this ground for the declarations.

Moreover, this Court considered Sequoia Forestkeeper's request for judicial notice and reconsideration motion to be improper and untimely attempts to supplement the administrative record.[6] From the time it initiated this action, Sequoia Forestkeeper had over a year to prepare objections to the administrative record and to file appropriate motions to supplement the administrative record. In this Court's scheduling order, this Court addressed the issue of supplementing the administrative record, and ordered the parties to file "any motion challenging the sufficiency of the Administrative Record will be filed on or before March 9, 2010." By joint request, the Court amended the scheduling order to allow Sequoia Forestkeeper additional time to consider the administrative record and submit objections thereto. The administrative record in this action was filed on March 10, 2011. Thereafter, Sequoia Forestkeeper again requested a motion for an extension of time to file objections to the administrative record and to supplement it. That motion was granted. On April 30, 2010, Sequoia Forestkeeper filed a Motion to Compel Supplementation of the Record. Sequoia Forestkeeper's motion included only one document; namely, Appendix 31 of the Water Quality Control Plan for the Tulare Lake Basin. Sequoia Forestkeeper failed to move to supplement the administrative record as to the various exhibits or declarations submitted

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[5] In the alternative, Sequoia Forestkeeper argues that the declarations were permissible to establish standing, although standing was not an issue before this Court.

[6] Notwithstanding these defects, this Court *sua sponte* considered whether the documents fit within the limited circumstances and were admissible, and consider admissible documents. Specifically, documents that helped this Court to understand technical terms. Sequoia Forestkeeper argues that this Court failed to take judicial notice of the provision of the Forest Plan that defines "fishery habitat," however, this Court considered the following in its MSJ Order:

> The Sequoia Forest Plan defines "fishery habitat" as "[s]treams, lakes, and reservoirs that support fishes." The Forest Service Manual defines cold water fisheries as "aquatic habitats" that "predominantly support" particular fish species. AR at 777 (this document is submitted outside of the administrative record). "Aquatic habitat" is defined as "environments characterized by the presence of standing or flowing water." The terms "predominantly" and "support" are not defined.

MSJ Order, p. 14.

with its summary judgment motion with one offending exception.[7] The request for this Court to take judicial notice of multiple extra-record documents and exhibits was untimely, failed to address the limited and specific factors related to supplementing administrative records, and was an inappropriate attempt to supplement the record through Fed. R. Civ. P. 201. Accordingly, this Court denies the request for judicial notice and reconsideration motion on the alternative grounds that it was an untimely and inappropriate request.

For these reasons, this Court denies Sequoia Forestkeeper's motion for reconsideration of this Court's refusal to consider its extra-record documents.

Relief

This Court granted in part Sequoia Forestkeeper's original summary judgment motion, finding that because the USFS failed to demonstrate that it made a "reasoned decision" to re-issue the SUP "based on all of the relevant factors and information," the re-issuance was "arbitrary and capricious." *Id.* (citing *Marsh*, 490 U.S. at 378); *see also*, 40 C.F.R. 1505.1. "When an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision." *Alaska Ctr.*, 189 F.3d at 859. "[W]hen an agency has taken action without observance of the procedure required by law, the action will be set aside." *Sierra Club*, 510 F.3d at 1023 (citing *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567-68 (9th Cir. 2000). Having found an additional basis on which the USFS acted arbitrarily and capriciously, this Court grants Sequoia Forestkeeper's motion to reconsider this Court's denial of injunctive relief. For the following reasons, this Court finds that the administrative agency action must be set aside.

The Court may only grant a preliminary injunction "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 375, 172 L. Ed. 2d 249 (2008). "Plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips

[7] This Court denied Sequoia Forestkeeper's motion to supplement the administrative record to include Appendix 31. Notwithstanding that order, and without seeking reconsideration, Sequoia Forestkeeper submits Appendix 31 as one of the exhibits it contends is appropriate for judicial notice. For the reasons contained in the order denying Sequoia Forestkeeper's motion to compel supplementation of the administrative record, that request is denied. Appendix 31, as well as other exhibits submitted by Sequoia Forestkeeper, were appropriately excluded from the record. In addition, any request related to Appendix 31 is untimely.

in their favor; and (4) a preliminary injunction is in the public interest." *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Winter*, 129 S.Ct. at 374). In considering the four factors, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 129 S.Ct. at 376 (quoting *Amoco Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531 542 (1987)); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009).

Likelihood of Success

This Court found that the USFS violated both the NFMA, in part, and NEPA, in part. Specifically, this Court found that the USFS violated NEPA, because it failed to consider some comments based on its erroneous conclusion that it had no legal authority to place conditions that would restrict water flowing through the diversion. In addition, the USFS failed to consider whether a Section 401 Certificate was required before re-issuing the Sellers SUP. Accordingly, Sequoia Forestkeeper has established the likelihood of the merits on some of its claims.

Irreparable Harm Absent Injunctive Relief

Sequoia Forestkeeper argues that in "the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *Sierra Club*, 510 F.3d at 1034. Indeed, "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or of long duration, *i.e.*, irreparable." *Id*. (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)). Nevertheless, a violation of NEPA "does not automatically require the issuance of an injunction." *Id*. This Court disagrees with the USFS's claim that any NEPA violation is merely a "trivial violation" pursuant to 40 C.F.R. §1500.3. Considered with the USFS's additional failure to seek a Section 401 certificate, the "proposed project may significantly degrade some human environmental factor." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 737. Based on these considerations, this factor favors injunctive relief.

Public Interest

The public interest favors injunctive relief. "[A]llowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA" and contrary to the public interest. *Sierra Club*, 510 F.3d at 1033. "The preservation of our environment, as

required by NEPA and NFMA, is clearly in the public interest." *Earth Island Inst. v. U.S. Forest. Serv.*, 351 F.3d 1291, 1308 (9th Cir. 2003).

Balance of the Hardships

The purpose of a a preliminary injunction is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions of the parties until the merits of the action are ultimately determined. *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830 (1981). "Status quo" means the last uncontested status that preceded the pending controversy. *See, GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). Here, the status quo would be to allow Sellers to continue to divert water through the diversion. Water has been flowing through the diversion for over 100 years. Sequoia Forestkeeper seeks a mandatory injunction that "goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.'" *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980) (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009). The balance of the equities tips against the issuance of the injunctive relief sought. *See, Sierra Club*, 510 F.3d 1034 (recommending injunction to be limited to those projects that have not yet been approved). Because of the technical issues related to interrupting a diversion that has been in place in 1890, this Court must remand this issue to the administrative agency to consider in the first instance and to fashion an appropriate remedy to address the issue raised once the SUP is vacated.

Conclusion

Sequoia Forestkeeper has established likelihood of success on the merits of its claims and on the issue of irreparable harm. In addition, the public interest favors injunctive relief. The USFS action to re-issue the Sellers SUP violated both NEPA and the NFMA. The USFS should have considered whether it had authority to place conditions on the water flow, should have considered whether a Section 401 Certificate was required, and should have applied for a Section 401 Certificate prior to re-issuing the Sellers SUP. Because the Sellers SUP was re-issued contrary to NEPA and NFMA, this Court VACATES the Sellers' SUP. Because of the complex issues related to injunctive relief, however, this Court REMANDS the issue of injunctive relief to the administrative agency.

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ORDER

For the foregoing reasons, this Court:

1. GRANTS in part and DENIES in part Sequoia Forestkeeper's reconsideration motion;
2. MODIFIES in part its MSJ Order (Doc. 80) and its December 3, 2010 judgment (Doc. 82);
3. GRANTS judgment in favor of Sequoia Forestkeeper and against the USFS on Sequoia Forestkeeper's fourth cause of action on the issue of whether the USFS acted arbitrarily and capriciously in failing to obtain a Section 401 Certificate prior to re-issuing the Sellers SUP;
4. SETS ASIDE the Sellers SUP; and
5. REMANDS this action to the administrative agency for further proceedings consistent with this opinion and order.

IT IS SO ORDERED.

Dated: March 14, 2011

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE