Not Reported in F.Supp., 1995 WL 382369 (N.D.Cal.)
(Cite as: 1995 WL 382369 (N.D.Cal.))

United States District Court, N.D. California.
HIGH SIERRA HIKERS ASSOCIATION, Plaintiff,
v.
Roger KENNEDY, as Director of the National Park Service; Stanley T. Albright, as Regional Director for the Western Region of the National Park Service; Lou Albert, as Deputy Regional Director for the Western Region of the National Park Service; Debbie Bird, as Acting Superintendent of the Sequoia and Kings Canyon National Parks, Defendants.

No. C–94–3570 CW.
June 14, 1995.

Charles M. O'Connor, U.S. Attys. Office, San Frnacisco, CA.

William Alsup, Morrison & Foerster, San Francisco, CA

Sean M. Mahoney, Morrison & Foerster, San Francisco, CA.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

WILKEN, District Judge.

***1** Plaintiff's and Defendants' cross motions for summary judgment were heard by this Court on May 26, 1995. Having considered the papers filed by the parties and oral argument on the motions, and good cause appearing, the Court hereby GRANTS summary judgment in favor of Plaintiff, DENIES summary judgment in favor of Defendants, and issues a permanent injunction against Defendants, for the reasons stated below.

I. Statement of Facts and Procedural History

Plaintiff in this action claims that the National Park Service ("NPS") violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321–4370, by implementing a policy increasing the allowable number of stock animals per party in wilderness areas of Sequoia and Kings Canyon National Parks ("SEKI") without preparing an Environmental Impact Statement. Plaintiff further claims that the policy violates the Wilderness Act, 16 U.S.C. §§ 1131–36.

The Administrative Record shows as follows. Use of stock animals in this wilderness area predates both the establishment of the Sequoia and Kings Canyon National Parks and designation of the parks as wilderness areas. However, in 1966, due to the environmental damage caused by stock animals, SEKI imposed a limitation on the number of stock animals of 20 per group.

In its 1971 Master Plan, SEKI adopted an objective of limiting use of stock animals to "lower elevations and around developed areas where [they] can be stabled and fed without open grazing on park lands," and, as conditions permit, phasing out stock use in higher elevations. This objective was adopted "because of the damage resulting from livestock foraging for food and resultant trampling of soils, possible pollution of water, and conflict with foot travelers." However, the objective was never implemented.

The government reversed its position in 1983, declaring in its Environmental Assessment for Stock Use and Meadow Management Plan ("1983 EA") that it recognized as "appropriate" the "use of pack and saddle stock for traveling in the backcountry." The 1983 EA considered the options of eliminating the use of stock animals or continuing to allow stock animals, limited to groups of no more than 20 except as approved on a case-by-case basis for a specific itinerary by the Superintendent, with various alternative regulations to mitigate the resulting environmental damage. It did not consider the alternative of raising the limit of 20 stock animals per group, except to note in the discussion of the rejected alternative of requiring stock animals to carry their own feed that this alternative "might" make it "possible" to allow increased numbers "in selected areas under prescribed conditions."

***2** The 1983 EA articulated the adverse environmental effects of the use of stock by describing the benefits which would result from its elimination as follows:

> Continued direct effects of grazing and trampling by pack and saddle stock upon the composition, vigor, density and cover of vegetation; upon the erodability of surface soil; upon stream banks and stream habitats, and upon water quality in forage areas would be eliminated. Direct influences of pack and saddle stock to trails and camps would also be terminated. The subtle and insidious influences to meadow ecosystems that have resulted from long term stock use would probably begin to be mitigated. Secondary influences such as the local encroachment of conifers into mountain meadows and their subsequent effects upon the local composition, density and distribution of wildlife and avifauna may occur with the elimination of grazing.
>
> The ecological or aesthetic influences of pack and saddle stock that adversely affect the wilderness experience of other visitors would be eliminated. The source of visitor complaints regarding these effects would be removed.

The 1983 EA's "preferred alternative" was the 1983 Stock Use and Meadow Management Plan ("SUMMP"), which was incorporated into the EA. The SUMMP imposed various restrictions to mitigate the ecological damage recognized to be inherent in stock use, including prohibiting the use of certain stock (llamas) in current and projected ranges of the Sierra Nevada bighorn sheep due to the possibility that llamas could infect the sheep with disease. The SUMMP specified that even a remote probability of harm to the bighorn sheep must be avoided by adopting a "conservative posture," because to "jeopardize, even remotely, the integrity of such a limited and magnificent resource is incongruent with the mission of the National Park Service."

The 1983 SUMMP stated that "increased influence" of stock animals "by grazing and trampling upon any and all park meadows" would be "unacceptable except as the result of direct management design." It further specified that it "is unacceptable for increased influences to occur without planned, justifiable, documented management design."

In 1984, SEKI issued an EA in support of a Backcountry Management Plan ("BMP"). The 1984 EA recognized the harms of the continued use of stock animals, even though restricted, as follows:

> Stock churn trail tread material, keeping the soil loose and susceptible to erosion from water runoff, which can make the trails deeper and wider. Stock use in meadows causes mechanical damage to soils. Both wet and dry soils are susceptible to damage from trampling by stock. Some of the more popular meadows used by stock have developed trail networks which have further progressed into erosion channels. In heavily impacted areas of trails and meadows there are increases in soil and vegetation temperature and decreases in relative humidity (Hecht, 1976). Trampling effects on soils have the secondary impacts of reducing plant density and changing composition which may affect the activities and populations of small mammals and birds (Duffey, 1967). Stock use in campsites generally leaves behind manure and urine that leaves the site less attractive for subsequent users. Trampling can cause damage to roots of trees, and shrubs where animals are tied for any length of time....
>
> ***3** Associated with the soils impact described above vegetation is affected adversely in areas of stock use. Trail areas are generally denuded of any vegetation and camp areas have much reduced plant densities ... and fewer species of plants. Stock use reduces plant foliage volume and density and affects species composition through trampling and grazing.... Stock use on very wet trails cuts deeply or results in widening or multiplying trails. Deeply cut trails in meadows may cause unnatural drainage, drying, and incursion by trees....
>
> The reduction of soil and vegetative productivity in grazing and camping areas as described above correspondingly reduces the available habitat for native animals and birds. As the animals and birds that feed directly on vegetation are displaced the secondary feeders are also displaced.

The 1984 EA noted that unlimited use, where the numbers of people and stock per group were not restricted, would cause the impacts to natural resources to "increase dramatically." Impact to soils would "be greatly intensified over much more extensive areas," and impact to vegetation, wildlife and water quality would be "*much* more intensive and extensive" (emphasis in original).

In 1986, the 1983 SUMMP was revised, apparently without a new EA, and the BMP analyzed in the 1984 EA was adopted. The 1986 SUMMP and BMP characterized the use of stock animals as a historically and culturally significant traditional use. The 1986 SUMMP noted that the Master Plan would be changed to reflect this new view of stock animal use when it was revised in 1987. It does not appear from the Record that the anticipated 1987 revision of the Master Plan took place, however.

The 1986 SUMMP acknowledged the following "distinctive effects on park resources" of use of stock animals:

> —Removal of vegetation which may affect plant vigor, reproduction, and ultimately, density and composition. Some of the vegetation otherwise would be consumed by native herbivores. Grazing displaces native grazers by disturbance. These effects may reduce or eliminate native animals from local areas.
>
> —Trampling of vegetation and underlying soils, particularly wet meadows. Trampling reduces water quality by muddying, damages plants, and can produce significant detrimental erosional effects such as damage to streambanks and changes to meadow drainage patterns.
>
> —Impacts such as deposition of stock urine and feces on trails, in streams, near camps, trampling of streambanks and other fragile soils, grazed appearance of forage areas, etc.

The goals of the 1986 SUMMP included allowing the use of stock animals "to the extent possible" while minimizing their impact, and establishing controls to protect forage areas from "further induced change in plant composition, density, cover and/or vigor, and from increasing adverse effects to soils and associated sod that may lead to deteriorated productivity or unnatural erosion, and to allow recovery where necessary."

***4** The 1986 SUMMP specified a number of management tools and techniques to meet its protective goals. These included continuation of a limit of 20 head per stock party, which the SUMMP noted was originally implemented in response to a finding that many popular meadows were in worse condition in 1959 than in 1941 and were continuing to deteriorate. In addition, supplemental limits of 15 stock animals per party were set for particular areas to prevent excessive grazing. Additional management tools included procedures for setting opening dates for all forage areas to prevent unacceptable mechanical disturbance to surface soil and vegetation, continuation of then "current levels and patterns/timing of [grazing] use," closure of certain meadows to grazing to preserve a sample of meadows in pristine condition, and closure of Sierra bighorn ewe and lamb ranges to all stock and foot travel.

The 1986 SUMMP provided for the granting of temporary variances with respect to some restrictions, including the number of stock animals per group, "on a case-by-case basis, to accommodate special visitor needs where effects on park resources would be within acceptable limits." Finally, the SUMMP contained a plan for monitoring of actual stock use, of species composition in paired meadows, of soil condition such as amount of bare ground and erosion, and of "general changes" demonstrated through photographic records.

In 1990, SEKI joined with other agencies managing federal lands in the Sierra Nevada mountains to propose that a standard maximum party size for both humans and stock be set throughout the region for administrative convenience. This group of agencies is referred to as the Central and Southern Sierra Interagency Wilderness Managers Group ("Wilderness Managers Group"). On April 22, 1991, the Wilderness Managers Group issued a Federal Register notice requesting public comments on its proposal to establish a uniform limit of up to 15 people and up to 25 stock animals per group. For SEKI, this represented an increase of five to its pre-existing limit of 20 stock animals, and a decrease of ten to its limit of people per group.

Seventy-six percent of those commenting on the Wilderness Managers Group proposal advocated that the stock animal limit not exceed 20 per group due to damage to trails, campsites and meadows, excessive manure on trails and campsites, and excessive noise. The Wilderness Managers Group adopted the proposal. In its responses to the public comments opposing a stock limit of over 20, the Wilderness Managers

Group opined that “25 head of stock is the minimum needed to service an equestrian party of 15.” It noted that “there may also be resource impacts in certain areas,” but specified that such environmental impacts and any proposed mitigation would be addressed in the appropriate wilderness management plans.

The Park Service at SEKI originally intended to address the group size limitation issue as one component of a full revised Wilderness Management Plan. While the stock group limit issue was pending in that context, Plaintiff HSHA submitted written opposition and further demanded assurances that the stock limit increase would not be implemented prior to completion of the environmental review process.

***5** SEKI Superintendent Thomas Ritter responded to HSHA's demand on March 24, 1992, as follows:

> We do not plan to change the allowable maximum number of stock from 20 to 25 until 1993, subsequent to approval and implementation of the Wilderness Management Plan. Existing standards and policies will remain in effect until that time. You should note, however, that Section 4.4 of the Stock Use and Meadow Management Plan provides for temporary variances, including numbers of stock per trip. In recent years, such exemptions have been granted when necessary to accommodate special needs and when effects on Park resources would be within acceptable limits. We will continue to grant those exemptions during the coming summer consistent with existing policy.

In order to test whether the adjoining national forests were informing the public that the SEKI limit of 20 stock animals was still in effect, a member of HSHA wrote to each of the districts of the adjoining forests to inquire about a wilderness permit for a stock group of 25 to travel from the forest into SEKI. One forest district forwarded the inquiry to SEKI, which granted a variance for the group although one had not been requested. HSHA then wrote to Ritter, on July 3, 1992, inquiring what criteria are used to evaluate when a variance was “necessary to accommodate special needs” and when “effects on Park resources would be within acceptable limits.” The letter charged that “the only criterion for determining whether a party gets a variance to the stock limit is that they inquire about obtaining a wilderness permit.” In addition, on July 9, 1992, HSHA wrote a letter to all wilderness rangers of SEKI, making the same charge.

On July 19, 1992, in response to HSHA's July 9 letter, District Ranger Randy Coffman wrote a memo to all SEKI wilderness rangers stating as follows:

> There has been one variance approved this summer by my office and that was the one “contrived” by the HSHA. The letter requesting that variance is on file, as is the criteria used for granting it. Stop by when you are in the front country if you'd like to see them. Contrary to the HSHA statement that “the only criterion for determining whether a party gets a variance to the stock limit is that they inquire about obtaining a wilderness permit,” we have established local interim criteria and it is applied with all variance applications. In 1993 the criteria for granting a variance for stock parties greater than 25 will be standardized.

The Administrative Record does not appear to contain the local interim criteria referred to in this memorandum.

After determining that the Wilderness Management Plan would require a substantial amount of time, SEKI decided to separate out the stock group size issue and address it in a separate EA. That EA was issued by SEKI on May 5, 1993. It specified the reasons for adopting the Wilderness Managers Group proposal as follows:

> Consistency [with neighboring wilderness units] in group size is desirable from an administrative stand-point [sic] and for the convenience of visitors when crossing political boundaries. Wilderness rangers receive the brunt of criticism when backcountry travelers are blocked from crossing these boundaries by differing party size restrictions. Staff and visitors alike believe that group and stock limits vary unreasonably in a similar environment managed for generally common values. A requirement to obtain a “variance” to the existing regulation is viewed as an additional bureaucratic hoop for visitors to jump through for no apparent reason.

***6** The 1993 EA considered three alternatives: the proposed new policy; reduction in group size to 15 people but maintenance of the stock limit of 20;

and a no-action alternative. In considering these three alternatives, the 1993 EA did not attempt to analyze the impacts of larger groups of stock animals in the backcountry, but instead referred to the "comprehensive description of the impacts" of stock animals in the EAs supporting the 1986 BMP and 1986 SUMMP. The 1993 EA determined that the increase in stock group size "would result in no significant deviation from the impact on park resources that currently exists under these plans" based on the following two findings.

First, the 1993 EA found that the policy would result in little or no change in actual use patterns. This finding is based in part on the fact that variances allowing more than 20 stock animals were almost always granted upon request during the period of 1987 through 1991, for an average of 9.2 parties per year. The EA also states that "[i]n 1992, employing the new criteria for variances, 2 exceptions were granted; 3 requests to exceed 20 animals were denied on the basis of the updated criteria for decision-making."

The finding that the policy would result in little or no change in actual use patterns is further based on the following statistics: the average number of stock per group in SEKI has been 9.9 for commercial trips and 5.8 for private groups; and over the previous five years, an average of 15.2 stock parties per year, representing 4.6% of total stock parties, used 19 or 20 animals.

Second, the 1993 EA noted that as an ongoing component of the meadow monitoring program, grazing capacity limits would continue to be established for all meadows visited by stock based on residual biomass.[FN1] The EA found that these capacity limits enable management to control grazing regardless of the number of stock per party.

The 1993 EA concluded that "there are no significant distinctions between the three Alternatives in terms of environmental consequences," since "resource protection policies documented in the parks' Stock Use and Meadow Management Plan and Backcountry Plan are not based on party size," but on "total annual numbers of people and stock and their cumulative impact on resources." In addition, the SEKI Superintendent retained the discretion to make revisions to group size limits in certain areas where necessary to protect resources.

Appended to the EA is an "Impact/Mitigation Matrix." It states with respect to the impact of increased grazing in meadows due to increased group size that:

> Mitigation of any long-term effects of increased grazing is provided for in the 1986 SUMMP. A more timely response to grazing impacts will be achieved through the meadow monitoring program currently under development. Meadows will be managed based on grazing capacities and residual biomass levels not group size.

With respect to the increased impacts to trails and camp areas, the Matrix states that "an increase in the impacts to these areas may occur but are not significant as a percentage of total use." Finally, with respect to the objections of the majority of backcountry users to the increased group size, the Matrix states that "the increase in the number of parties [exceeding 20 animals] will be insignificant."

***7** The 1993 EA was released for public comment on May 12, 1993. Twenty-three individuals, 20 of whom were members of Plaintiff High Sierra Hikers Association ("HSHA"), and 8 organizations, including HSHA, submitted comments. Ninety-three per cent of the comments opposed the increase from 20 to 25 stock animals per group. Some of these comments criticized the EA as inadequate, challenged the assumption that the increase in size limits would not lead to increased use, requested evaluation of the alternative of reducing the number of stock animals per group, opined that the increase would be detrimental to the environment of the backcountry, and requested that a full environmental impact statement ("EIS") be prepared prior to implementing the new policy.

On April 18, 1994, NPS Acting Regional Director Lou Albert approved a Finding of No Significant Impact ("FONSI"), on the basis of the 1993 EA, the public comments and agency responses thereto, and "the ability of the mitigation measures to reduce or eliminate adverse impacts." The FONSI acknowledges that it is "unknown as to whether the number of large parties (over 20 head of stock) will increase as a result of this measure." However, it represents that:

> In the [adjoining] Inyo and Sierra National Forests where historically, the maximum group size for stock has been unlimited, less than ten commercial groups travel with 20 head of stock or greater annually. Many of those are the same groups that traveled into both of the national parks [under variances] because they started on U.S. Forest Service lands. This gives the NPS some indication that the increase in numbers of stock is likely to be small if any.

The Administrative Record contains no documentation supporting this representation.

The stock limit increase took effect in June, 1994. Plaintiff obtained documents regarding this action under the Freedom of Information Act on August 24, 1994, and filed this action for declaratory and injunctive relief on October 11, 1994.

II. Legal Standards

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, or when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288–89 (9th Cir.1987). Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir.1991).

***8** NEPA requires the preparation of an Environmental Impact Statement ("EIS") for all major actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(c). Specific factors to be considered in determining whether the impact is significant include the unique characteristics of the affected geographic area, the degree to which the effects are likely to be highly controversial, the degree to which the possible effects are highly uncertain or involve unique or unknown risks, and the degree to which the action may affect an endangered or threatened species or its habitat that has been determined critical under the Endangered Species Act of 1973. 40 C.F.R. § 1508.27(b)(3), (4), (5), (9).

Review of an agency's determination to adopt a FONSI instead of preparing an EIS is governed by the arbitrary and capricious standard. *Greenpeace Action v. Franklin*, 982 F.2d 1324, 1331 (9th Cir.1992), citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989). The Ninth Circuit describes this standard as follows:

> This standard requires us to ensure that an agency has taken the requisite "hard look" at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is "founded on a reasoned evaluation of the relevant factors." *Marsh*, 490 U.S. at 373–374 (quoting *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). This inquiry into the facts is to be searching and careful. *Overton Park*, 401 U.S. at 416. But "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378. Once we are satisfied that an agency's exercise of discretion is truly informed, "we must defer to 'th[at] informed discretion.' " *Id.* at 377 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

Greenpeace, 14 F.3d at 1332. The *Greenpeace* court further explained the inquiry as follows:

> An agency must prepare an EIS if "substantial questions are raised as to whether a project ... *may* cause significant degradation of some human environmental factor." *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir.1988) (internal quotations omitted). "The plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS *must* be prepared." *Id.*

14 F.3d at 1332 (emphasis in original). However, where the EA acknowledges the potential harmful impact and provides for mitigation measures, the issue becomes whether the "mitigating measures formed such an adequate buffer against" the potential impact that "any possible [impact] would be too minor to warrant an impact statement." *Id.* Where the criticisms of the mitigation measures "merely represent a difference of scientific opinion," and the agency's conclusions "are clearly based on substantial—though not [necessarily] dispositive—scientific data, and not on mere speculation," the decision not to prepare an EIS will not be set aside. *Id.* at 1333. Further, " 'so long as significant measures are undertaken to mitigate the project's effects, they need not completely compensate for adverse environmental impacts.' " *Id.* at 1335, quoting *Friends of Endangered Species, Inc. v. Jantzen,* 760 F.2d 976, 987 (9th Cir.1985) (internal citation omitted). On the other hand, where the EA reveals that the agency failed "to address 'certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS,' the decision may be set aside. *Greenpeace,* 14 F.3d at 1333, quoting *Foundation for North American Wild Sheep v. USDA,* 681 F.2d 1172, 1178 (9th Cir.1982).

***9** The *Greenpeace* court also examined the role of the factor of public controversy. It stated that a federal action is deemed "controversial if 'a substantial dispute exists as to [its] size, nature or effect.' " 14 F.3d at 1333, quoting *Wild Sheep,* 681 F.2d at 1182. However, a plaintiff may not establish the existence of a controversy *post hoc* through affidavits of its experts "when at the time of the [agency's] action, there existed no substantial dispute that should have alerted the [agency] to the concerns that [plaintiff] now raises." *Greenpeace,* 14 F.3d at 1334.

III. Discussion

A. Cross Motions on NEPA Claims

An analysis of whether the decision not to prepare an EIS was arbitrary and capricious must begin with the 1993 EA upon which the decision was primarily based and the 1994 FONSI in which the decision was set forth. Both contain two major findings: that the stock limit increase would result in little or no change in actual use patterns; and that the impact of any change would be sufficiently mitigated. Each of the findings is badly flawed, as stated below.

1. Finding of Little or No Change in Actual Use

The finding that the proposed increase in the stock limit would result in little or no change in actual stock use is inconsistent with the premise on which the proposal is itself based. The EA explicitly states that the proposal is premised in part on the existence of stock parties exceeding 20 animals who have been "blocked" from entering the park by the pre-existing policy. Since an express purpose of the proposal is to permit such previously blocked parties to enter, it is arbitrary and capricious to assume that they will not in fact enter.

In addition, the finding is based on the fact that variances to exceed 20 animals had been liberally granted in the past, resulting in an average of 9.2 parties per year exceeding 20 animals. However, the EA admits that this liberal variance policy terminated in 1992 when it came under the scrutiny of the HSHA. In that year, "updated criteria" for determining whether or not to grant variances for groups exceeding 20 stock animals, tardily implementing the restrictions called for in the 1986 SUMMP, were established. The result was that there were more denials than decisions to grant variances, and only two variances were in fact granted. Thus, even if the stock limit increase was not likely to increase usage significantly as compared to 1991, the same could not be said for 1992. The EA is silent, however, as to the likely change from 1992 usage. Furthermore, the EA contains no discussion of the nature of, or the reason for, the updated criteria from which it retreated. The criteria implemented restrictions required by the 1986 SUMMP resource protection policies on which the 1993 EA expressly relies. Yet there was no reasoned evaluation of the implications of eliminating those protective criteria for parties of 21 to 25 animals.

***10** Furthermore, some of the statistical information on which SEKI relied in determining that little or no change in actual use would result was of no relevance to that issue. In particular, the average party size under the 20 stock animal limit gives no indication of the potential for larger parties under a 25 stock animal limit.

The fact that an average of 15.2 parties per year used 19 or 20 animals is more to the point; an infer-

ence may be drawn that these parties might have taken advantage of the higher limit to use parties in excess of 20. However, the EA does not draw that inference, nor does it analyze the result of an additional 15 parties per year using more than 20 animals.

Other statistical data relevant to the issue of potential for higher use would be data relating to the number of stock parties of greater than 20 animals in other national parks and forests in the region, since such parties might be drawn to SEKI by the increased stock limit. In preparing the EA, SEKI failed to gather any such data, although reliable data must have been readily available, through the Wilderness Managers Group or otherwise.

In comments to the EA, Plaintiff HSHA pointed out the omission of this relevant data. However, even then, SEKI did not take the appropriate step of gathering reliable data in response to these comments. Instead, according to his deposition testimony, District Ranger Randy Coffman telephoned two rangers in the adjoining Inyo and Sierra National Forests, asked for their estimates of the average number of parties exceeding 20 animals, and relied on the unsubstantiated estimates given in those conversations. Based on the information thus obtained, the FONSI made an express finding that in Inyo and Sierra National Forests, fewer than ten groups per year exceed 20 stock animals.

The FONSI did not mention a message apparently transmitted to Ranger Coffman by the Inyo National Forest ranger, Dick Warren, subsequent to the telephone inquiry. That message stated that in the White Mountain District, one of the four districts of the Inyo Forest, there were 36 groups with more than 20 stock animals in 1992.[FN2] That statistic did not include Inyo's other districts or the Sierra National Forest.

Defendants maintain that the statistic reported in this message is not necessarily inconsistent with a lower number representing an average over a number of years. This may be true. There may have been no large stock parties that year in other districts of the Inyo National Forest or the Sierra National Forest, and there may have been much lower usage in the years prior to 1992. However, this is the "mere speculation" warned against in *Greenpeace*, 14 F.3d at 1333, not the "substantial scientific data" to which courts defer. *Id.* At a minimum, the White Mountain data calls the unsubstantiated averages upon which SEKI relied into serious question.

Finally, the EA failed to consider the possibility that additional large stock parties might be attracted to SEKI by the increased stock limit. Clearly, SEKI did not take a "hard look" at the question of whether substantial increased use could result from the increased stock limit. It avoided making "a truly informed decision whether or not to prepare an EIS" by avoiding collection of relevant facts and avoiding analysis of relevant factors.

***11** Defendants attempt to remedy the deficiencies of their NEPA compliance by bolstering the record with statistics for the 1994 season in which the stock limit increase was implemented. They are unable, however, to provide precise statistics for groups of between 21 and 25 stock animals. The estimate of SEKI Plant Ecologist Charles Schelz that the number of such groups was "approximately 9 to 11" supports Defendants' argument that the actual number of large groups would not increase as compared to 1991, when the variance policy was extremely liberal. However, as compared to 1992, in which the updated criteria were implemented, there is approximately a 500% increase in large parties. Nor do the first year statistics necessarily provide a realistic picture of the potential for increase in numbers of large parties, since the new policy went into effect almost simultaneously with the opening of the 1994 season, when many visitors would have already planned their 1994 trips.

2. Finding of Mitigation

The 1993 EA and 1994 FONSI made a finding of adequate mitigation of any adverse effects of the stock limit increase through existing resource protection policies documented in the 1986 SUMMP and BMP, continuation of the residual biomass monitoring program then under development, and the Superintendent's continuing discretion to modify group numbers upon determination that such modification was necessary. This finding is also flawed.

The 1993 EA states that the "resource protection policies" set forth in the 1986 SUMMP and BMP "are not based on party size," but on "total annual numbers of people and stock." This statement is inaccurate. The SUMMP and BMP combine policies

based on party size with policies based on other factors, such as the total annual numbers. The longstanding policy of limiting the number of stock animals to 20 per group was itself a resource protection policy. Notably, the 1983 EA supporting the SUMMP discussed whether it would be "possible" to allow increased numbers of animals per party "in selected areas under prescribed conditions," but only if the animals carried their own feed, a restriction not even considered in the 1993 EA.

Another example of resource protection policies based on party size are the supplemental limits of 15 stock animals per party in particular areas imposed in the 1986 SUMMP. It is noteworthy that the decrease in stock party size imposed in these supplemental limits, designed for the special protection of particular areas, is precisely the same as the amount of the increase in stock party size at issue here; in each case, the difference is five animals, or 25% of the pre-existing limit of 20 animals. Thus the record clearly demonstrates that this difference in group size is a difference of significant consequence.

The 1993 EA specifies that the SUMMP policies unrelated to party size on which it relies provide mitigation only against "long-term effects of increased grazing," and implies that "a more timely response to grazing impacts" is also required. This admission is substantiated by the deposition testimony of SEKI's former range conservationist, Michael Neuman, who testified that existing management tools permitted unacceptable impacts on the natural resources, even with the 20 stock animal limit in place.

***12** In particular, Neuman testified that opening dates for forage areas were too early, in that he had observed hoofprints in meadows which were still wet and boggy; such hoofprints can destroy vegetative cover, alter the vegetation of the meadow, and cause soil erosion. There is no soil strength monitoring program in place to determine scientifically when the meadows should be opened. In addition, Neuman testified that there is a fairly long list of meadows which have been overgrazed; overgrazing has the potential to alter meadow species composition and to disrupt the life cycles of other organisms that depend on meadows for part or all their existence, and interferes with biogeochemical cycling through the meadow. The monitoring programs in place to detect overgrazing are too limited to provide adequate protection. The species composition monitoring program is only able to monitor five of the thousands of meadows in SEKI, and the program can only detect long-term damage after it already occurred. The photography monitoring project also can only detect long-term damage already inflicted. For these reasons, Neuman testified, "the procedures documented in the stock use meadow management plan were found to be inadequate to drive management decisions."

The 1993 EA relies on the residual biomass monitoring program which was then under development by Neuman for "more timely" preventive monitoring. However, at the time the EA was issued, a description of that program had not yet been released to the public, and thus was not subject to comment. Reliance for mitigation on a program not yet publicly disclosed defeats a primary purpose of NEPA, to promote fully informed decisions through public discussion of the issues. *See* *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir.1987). Further, as the EA itself acknowledges, the program was still "under development." Neuman testified that as of the end of the 1994 season, the program had been implemented only on a "test basis," and that management standards had not been set. Therefore, the program was not yet "being used to drive management decisions." Similarly, the 1994 Residual Biomass Monitoring report submitted by Defendants admits that "several additional years of monitoring will be necessary for us to begin to understand the productivity patterns and the relationships between residual biomass and grazing." [FN3] Thus, SEKI knew that its residual biomass monitoring program was not currently capable of providing the timely preventive monitoring which the EA represented it would provide.

The mitigation measures recited by the EA were thus known to SEKI to be inadequate to inform management decisions, even with the 20 stock animal limit in place. Yet the EA fails to discuss the shortcomings of the measures or the implications of applying these inadequate measures to a higher stock animal limit.

Even if the pre-existing mitigation measures had proven to be adequate to inform management decisions regarding meadow protection, it would be un-

reasonable simply to apply some of the pre-existing mitigation measures and change the stock animal limit mitigation measure without analysis of the implications of that change. Where the pre-existing mitigation measures are already known to be inadequate to inform such management decisions, increasing the stock animal limit without analysis is arbitrary and capricious.

***13** The Court notes that the 1983 SUMMP explicitly found that "increased influence" of stock animals "by grazing and trampling upon any and all park meadows" would be "unacceptable except as the result of direct management design," and that it would be "unacceptable for increased influences to occur without planned, justifiable, documented management design." The 1993 EA does not reflect the existence of such a "planned, justifiable, documented management design."

Finally, the mitigation measure consisting of the Superintendent's continued discretion to modify group numbers could only be exercised in a meaningful fashion if there were management tools in place capable of informing his discretion. Furthermore, the evidence demonstrates that SEKI management's discretion may be too heavily impacted by political factors to have a predictable ability to protect the environment. For example, the 1994 Report of the Stock Use and Meadow Management Program submitted by Defendants admits that the meadow opening dates are inadequate to protect against unacceptable environmental impact, and that they were "unfortunately" set as "a conscious compromise between resource protection and political expediency." Similarly, Neuman testified that he did not want the packers to learn that he was checking up on their reporting of stock use because he "did not want to face the political backlash that the packers might generate."

SEKI contends that its mitigation methods are legally adequate since such measures "need not completely compensate for adverse environmental effects." *Greenpeace,* 14 F.3d at 1335. However, adequate mitigation must consist of "significant measures ... to mitigate the project's effects." *Id.* (internal quotations omitted). Here the "project" consisted solely of the removal of a measure designed to mitigate against the environmental harm cause by stock animals. No additional mitigation measure was implemented to offset the removal of this mitigation measure. Thus, the record does not demonstrate the existence of "significant measures to mitigate the project's effects."

The 1993 EA failed even to consider whether any additional mitigation should be provided beyond that already in place (and in development) at the time. This is in contrast to the 1983 EA, which specifically considered such mitigation measures as requiring stock to carry its own feed. Thus, it cannot be said that the EA took the requisite "hard look" at whether the proposed mitigation measures would render any environmental impact so minor as not to require preparation of an EIS.

3. Failure to Consider Impact on Threatened Species

Plaintiff contends that the 1993 EA and 1994 FONSI were also defective in that they failed to consider the impact of the stock limit increase on the Sierra Nevada bighorn sheep, the Yosemite toad, and the mountain yellow-legged frog. Plaintiff submits expert declarations relating potential harms to each species.

***14** Defendants argue that Plaintiff waived the issues of the potential impacts on the Yosemite toad and mountain yellow-legged frog by failing to address them in the public comment process for the EA. Although the Court recognizes that laches and waiver "must be invoked sparingly in environmental cases," *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir.1982), here there is nothing in the Administrative Record which should have alerted SEKI to these issues. None of the public comment submitted to SEKI addressed the potential impact on these species. There is no acknowledgement of potential impact of stock use on these species in SEKI's prior NEPA compliance and planning documents. Finally, neither species has been determined to be "critical" under the Endangered Species Act so as to trigger an automatic duty under 40 C.F.R. § 1508.27(b)(9) to consider impact upon them. Accordingly, SEKI's failure to address this issue does not render the 1993 EA or 1994 FONSI defective.[FN4]

Defendants argue that the issue of impact on the Sierra Nevada bighorn sheep was also waived, because it was not adequately raised by comments referring generally to "native herbivores." The Court disagrees. Plaintiff expressly raised the issue of stock animal grazing in "competition with native herbi-

vores," even prior to the EA. This alone should have been sufficient to alert SEKI of the issue of grazing competition with the native Sierra Nevada bighorn sheep. In addition, SEKI had previously acknowledged in its SUMMP that it has a duty to provide special protection to the bighorn sheep, for to "jeopardize, even remotely, the integrity of such a limited and magnificent resource is incongruent with the mission of the National Park Service."

In light of this acknowledged duty and the comments of Plaintiff, the EA was required to address the potential impact on the bighorn sheep. This is particularly true in light of the fact that the bighorn sheep population had declined since the last NEPA review was undertaken. The Declaration of Dr. Wehausen submitted by Plaintiff asserts that the diminished population can now "ill afford any ... loss of nutrient intake from ... displacement from high quality feeding sites, or competition from packstock for available forage at such sites." However, neither the EA nor the FONSI mentioned the bighorn sheep.

Defendants seek to overcome the deficiencies of their NEPA documents with evidence that they did consider the potential impact on the bighorn sheep. In particular, Coffman testified that in the process of preparing the EA, he "communicated with" SEKI scientist Dave Grayber about bighorn sheep, though he did not document the conversation in the Administrative Record or refer in the EA to any information he obtained. Coffman further testified that it was his understanding that the number of bighorn sheep in SEKI has been declining, but that he does not "know enough about [the extent of the decline] to know how to characterize it." This does not demonstrate that an informed decision-maker took a "hard look" at the issue of the possible impact on the diminished population of bighorn sheep. Nor is the declaration of Grayber provided to document what consideration, if any, he gave to the decline in the bighorn sheep population in advising Coffman.

***15** Defendants further provide the declaration of William Bancroft, Chief of the Science and Natural Resources Management Division of SEKI, who reviewed the EA for potential impact on the bighorn sheep, *inter alia*. However, Bancroft's declaration demonstrates that he took into account only studies which were 10 to 16 years old, and only the issues of disruption and disease. He did not take into account more recent evidence of the declining population of the bighorn sheep or address the factor of grazing competition.

Finally, Defendants provide the declarations of National Biological Service scientists Leslie Chow and Peggy Moore. Neither indicates that they were consulted in the NEPA process, so their declarations are accordingly irrelevant to whether SEKI gave the required "hard look" in that process.

Both Chow and Moore state that stock party size is unlikely to affect displacement from feeding sites: Chow notes that a bighorn sheep would be displaced by as few as three to five horses, and any increase beyond this threshold would be insignificant; and Moore notes that displacement occurs when any animals, regardless of group size, enter an area within 300 to 500 meters of a forage site. Further, Chow declares that "although concern over a potential increase in forage competition between horses and bighorn may be warranted," Chow does not believe that increase in stock party size "would have a significant impact on the Mount Baxter herd, particularly if regulations closing ewe-lamb foraging areas within Woods Lake Basin were strictly observed and actively enforced."

Even if these discussions had been included in the EA, they would be insufficient to complete the requisite "hard look," since they raise the issue of whether the Woods Lake Basin closure is in fact "strictly observed and actively enforced." Such strict enforcement is clearly an important mitigation measure with respect to the bighorn sheep, but there is no discussion of such enforcement in the EA or FONSI. Plaintiffs contend and provide evidence that the regulations are in fact not actively enforced. Thus, the EA and FONSI are defective in failing to consider these issues.

4. Public Controversy

An additional factor supporting the need for an EIS is the existence of public controversy. The Administrative Record demonstrates that the increased stock limit was highly controversial from the moment it was proposed. The Wilderness Managers Group's proposal of a standardized 25 stock animal limit, SEKI's draft wilderness management plan incorporating the stock limit increase and SEKI's 1993 EA supporting the increase all generated substantial opposi-

tion. While much of the public comment merely expressed opposition to the proposed increase itself, some of the objecting comments explicitly addressed the "size, nature or effect" of the increase and called into question SEKI's representations regarding those issues. Thus the proposed stock limit increase was controversial within the meaning of *Greenpeace*. 14 F.3d at 1333.

***16** The decision to increase the stock limit without preparing an EIS generated controversy not only among the public, but also among the policy-making staff of SEKI. Former SEKI range conservationist Michael Neuman testified that SEKI's NEPA compliance officer, Bill Tweed, believed that the wilderness management plan should be supported by a full EIS, and that Tweed, among others, opposed removal of the stock limit increase from that wilderness management plan.

In addition, the efficacy of the proposed mitigation measures were subjects of controversy. Thus, sufficient controversy existed to weigh in favor of preparing an EIS.

.5 Conclusion

For the reasons stated above, the Court concludes that the 1993 EA was inadequate to inform the decision whether to prepare an EIS, and that the decision not to prepare an EIS was arbitrary and capricious. In light of this holding, the Court will order Defendants, pending preparation of an EIS, to reinstate the pre-existing limit of 20 stock animals per party, with variances considered under the updated criteria which went into effect in 1992.

The Court does not agree with Plaintiff on its additional contentions, however, which are summarized here for clarity of the Court's holding. First, it was not necessary that the EA consider decreasing the stock limit at SEKI. That alternative would not have furthered the administrative goal of standardizing party size restrictions throughout the region. *See* *Laguna Greenbelt Inc. v. United States Department of Transportation*, 42 F.3d 517, 524 (9th Cir.1994) (the range of alternatives need not extend beyond those reasonably related to the purposes of the project.) Second, the Court does not find that the statistics regarding stock use within SEKI during the period of 1987–91, relied upon by Defendants in the 1993 EA, were so untrustworthy as to preclude such reliance. Third, as discussed above, failure to consider the impact on the Yosemite toad or mountain yellow-legged frog did not violate the requirements of NEPA. Finally, as noted above, Plaintiffs have not demonstrated bad faith on the part of the SEKI officials involved in the NEPA process.

B. Defendants' Motion on Wilderness Act Claim

Defendants move for summary judgment that the stock limit increase does not violate the Wilderness Act. That Act specifies that its purposes are "within and supplemental to" the purposes for which national parks, *inter alia*, are established and administered. 16 U.S.C. § 1133(a). Specifically, nothing in the Act modifies the statutory authority for the creation of the national parks, and the designation of any park as a wilderness area "shall in no manner lower the standards evolved for the use and preservation of such park." § 1133(a)(3).

Under the Wilderness Act, each agency administering an area designated as wilderness "shall be responsible for preserving the wilderness character of the area." § 1133(b). Except as specifically provided for in the Act, "there shall be no commercial enterprise" within any wilderness area. § 1133(c). Special provision is made for commercial services "to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes" of wilderness areas. § 1133(d)(5).

***17** Defendants contend that an agency's continuation of a pre-existing use in a wilderness does not violate its duties under the Wilderness Act. *Minnesota Public Research Group v. Butz*, 541 F.2d 1292 (8th Cir.1976), *cert. denied sub nom* *Minnesota Public Research Group v. Secretary of Agriculture*, 430 U.S. 922 (1977). However, the action contested here is not a mere continuation of an existing use, but rather an increase of that use. Defendant has not shown that increase of the stock limit to 25 animals per group is "necessary" for continued recreational use of stock animals. In light of the longstanding limit of 20 animals per group, there is evidence that the increase was not "necessary" to that purpose. Therefore, Defendants have failed to show that they are entitled to judgment as a matter of law.

IV. Order

For the reasons stated above, it is hereby ordered as follows:

1. Defendants' motion for summary judgment is DENIED.

2. Plaintiff's motion for summary judgment on its NEPA claim is GRANTED. Declaratory judgment shall be entered in favor of Plaintiff on the NEPA claim.

3. Defendants are enjoined to reinstate the limit of 20 stock animals per party and the 1992 criteria for approving variances pending preparation of an EIS.

4. Upon Plaintiff's representation that it does not wish to pursue its Wilderness Protection Act claim pending the preparation of an EIS, that claim is dismissed without prejudice.

5. The clerk shall close the file.

IT IS SO ORDERED.

DECLARATORY JUDGMENT
June 15, 1995

For the reasons set forth in the Order on Cross Motions for Summary Judgment and Permanent Injunction filed on June 14, 1995, the Court hereby ENTERS DECLARATORY JUDGMENT in favor of Plaintiff High Sierra Hikers Association and against Defendants Roger Kennedy, as Director of the National Park Service, Stanley T. Albright, as Regional Director for the Western Region of the National Park Service, Lou Albert, as Deputy Regional Director for the Western Region of the National Park Service, and Debbie Bird, as Acting Superintendent of the Sequoia and Kings Canyon National Parks. Defendants are enjoined to reinstate the limit of 20 stock animals per party and the 1992 criteria for approving variances pending preparation of an EIS. Each party shall bear their own costs of action.

FN1. “Residual biomass” refers to a protocol for monitoring vegetation in the meadows to determine whether overgrazing has occurred.

FN2. According to Defendants, the existence of that message was not known to Coffman or SEKI, although it was located in a notebook maintained by Coffman to gather information relating to group size issues related to the 1993 EA. The Court does not base its decision upon any finding of bad faith, since there are disputed issues of fact on that issue.

FN3. The report further demonstrates that only 25 meadows were monitored in 1994; this is fewer than half of the meadows known by SEKI to be “heavily grazed” (i.e. grazed to 76–100% of estimated capacity).

FN4. This does not mean, however, that these issues should not be addressed in the EIS.

N.D.Cal.,1995.
High Sierra Hikers Ass'n v. Kennedy
Not Reported in F.Supp., 1995 WL 382369 (N.D.Cal.)

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