**NEPA – CUMULATIVE EFFECT OF PAST PROJECTS ANALYSIS: Why the U.S. Forest Service will prevail in Friends of the Wild Swan v. Garcia at the Ninth Circuit Court of Appeals – *Friends of the Wild Swan v. Garcia*, Docket #: 14-35463 (2014)**

I. INTRODUCTION

Friends of the Wild Swan v. Austin[[1]](#footnote-1) (“*Friends”)* is an ongoing challenge by a small alliance of conservation groups[[2]](#footnote-2) to a U.S. Forest Service (Forest Service) decision to proceed with a timber management proposal called the Colt Summit Restoration and Fuel Reduction Project (Colt Summit Project). The groups allege that the Forest Service’s proposed project fails to meet National Environmental Policy Act[[3]](#footnote-3) (NEPA) standards because the Forest Service’s environmental analysis[[4]](#footnote-4) (EA) of the project area was insufficient. Without a sufficient analysis, the groups claim the public and the courts will not be able to determine if species like the lynx, listed under the Endangered Species Act[[5]](#footnote-5) (ESA), will be adequately protected. The environmental groups raised a variety of challenges against the Forest Service and U.S. Fish and Wildlife Service, of which, only a NEPA challenge claiming that the Forest Service failed to sufficiently conduct a cumulative effects analysis on lynx withstood summary judgment.[[6]](#footnote-6) The U.S. District Court of Montana held that “the Service did not adequately analyze the Project's cumulative effects on lynx when it overlooked past projects or actions,” and imposed a temporary injunction until a supplemental EA sufficiently addressed the cumulative impact of past projects on lynx.[[7]](#footnote-7) Over two-years later, the court dissolved the injunction.[[8]](#footnote-8) Currently, the environmental groups are appealing the lower court’s ruling to the Ninth Circuit Court of Appeals (9th Circuit) in *Friends of the Wild Swan v. Garcia.*[[9]](#footnote-9)

On appeal, the Forest Service will prevail in *Friends* at the 9th Circuit because the District Court failed to follow 9th Circuit cumulative effects of past actions precedent. This note will begin by discussing the relevant historic and legal background necessary to understand the *Friends* controversy. It will then analyze the court’s opinion, arguing that the district court erred by: (a) relying on distinguishable 9th Circuit precedent, which led the court to (b) incorrectly focus its analysis on a narrow section of the EA instead of the whole record, thereby (c) compromising its ability to recognize the sufficiency of the Forest Service’s characterization of its aggregate analysis in the cumulative effects on lynx section of the EA. Finally, this note will conclude with a summary of the reasons the District Court erred, and why those errors will lead the 9th Circuit to deny the environmental groups plea for the court to impose a permanent injunction on the project.

II. BACKGROUND

A. The Colt Summit Project

The Colt Summit Project was developed by the Seeley Lake District of the Lolo National Forest to (1) restore forest health by increasing species diversity and stand heterogeneity (which restores habitat for grizzly bears and other species), (2) restore grizzly bear, bull trout, and aquatic and riparian habitat on Colt Creek by retiring roads and rerouting the primary access, and (3) reduce hazardous fuels in the wildland-urban interface.[[10]](#footnote-10) The project is located approximately ten-miles north of Seeley Lake, Montana; and the vegetation treatment area straddles Highway 83 in the Seeley-Swan wildland urban interface. [[11]](#footnote-11) It was developed in concert with the Southwest Crown of the Continent Collaboration, whose 2010 proposal to restore forested lands and create rural jobs in Montana won significant funding for the next decade from a new federal program, the Collaborative Forest Landscape Restoration Program, of which the Colt Summit Project is a part.[[12]](#footnote-12) The project garnered additional support from the Montana Fish Wildlife and Parks and United States Fish and Wildlife Service; agencies responsible for managing the recovery of grizzly bear, Canada lynx, and other wildlife in the project area.”[[13]](#footnote-13)

After making minor revision in response to public comments, the Lolo National Forest Supervisor signed a Decision Notice and Finding of No Significant Impact (FONSI) for the Colt Summit project in March of 2011.[[14]](#footnote-14) One month after the decision, the conservation groups timely raised administrative appeals.[[15]](#footnote-15) After reviewing the appeals, the Forest Service’s Northern Region Appeal Deciding Officer (ADO) recommended that the original decision be affirmed.[[16]](#footnote-16) Shortly thereafter, the Lolo National Forest Supervisor issued a second Decision Notice and Finding of No Significant Impact for the project affirming her original decision.[[17]](#footnote-17) Three days later, the conservation groups filed a complaint in the Federal District Court of Montana in Missoula. [[18]](#footnote-18)

B. Legal Context

*1. The Endangered Species Act*

The court imposed an injunction on the grounds that the USFS failed to sufficiently perform a procedural NEPA review of the effects of the Colt Summit Project on lynx.[[19]](#footnote-19) However, the Forest Service’s procedural duty under NEPA is triggered by substantive protection given the lynx by the ESA.[[20]](#footnote-20) The ESA achieves conservation for species like the lynx in two relevant ways. First, section 4 of the Act enables the Secretary of the Interior (Secretary) to list a species due to the destruction, modification, or curtailment of its habitat or range.[[21]](#footnote-21) Once listed, the Secretary can then issue regulations to conserve the species; and designate any habitat that is considered critical to the species survival.[[22]](#footnote-22) To implement the critical habitat designation, the Secretary must develop recovery plans for the conservation and survival of the listed species.[[23]](#footnote-23) The recovery plan must incorporate a description of geographically precise management actions needed to assure the conservation and survival of the species.”[[24]](#footnote-24)

The Canada Lynx is listed as threatened[[25]](#footnote-25) and critical habitat has been designated to aid in its recovery.[[26]](#footnote-26) Federal wildlife biologists use the Lynx Conservation and Assessment Strategy (“LCAS”) to assess the viability of conservation measures for lynx on federal lands.[[27]](#footnote-27) The Forest Service’s Northern Rockies Lynx Amendment (“Lynx Amendment”) uses the LCAS to guide its actions in critical lynx habitat by incorporating the Lynx Amendment in its Land and Resource Management Plans.[[28]](#footnote-28) The Colt Summit Project was specifically designed to conform to the Lynx Amendment.[[29]](#footnote-29)

Second, section 7 of the ESA requires “interagency cooperation,”[[30]](#footnote-30) to ensure that proposed actions are not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction of habitat that is critical for a species’ continued existence.[[31]](#footnote-31) The Forest Service satisfies this requirement by consulting with the Secretary when the action has the potential to affect a listed species.[[32]](#footnote-32) If the Secretary determines such species may be affected by the proposed action, the agency must conduct a biological assessment to evaluate the likelihood it will be affected.[[33]](#footnote-33) The biological assessment can then be incorporated into the agency’s EA to comply with section 102 of NEPA.[[34]](#footnote-34)

*2. The National Environmental Policy Act*

NEPA requires that federal agencies give environmental factors appropriate consideration by forcing them to comply with specific procedures before undertaking major actions that have the potential to significantly impact the human environment.[[35]](#footnote-35) To determine whether an action is significant, agencies often prepare an EA.[[36]](#footnote-36) An EA is a “concise public document” that allows an agency to analyze the environmental impacts of the proposal, the majority of which, result in a FONSI. [[37]](#footnote-37)

Among other NEPA considerations, an EA must include a cumulative effects analysis.[[38]](#footnote-38) Cumulative effects are defined as “the impact upon the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions … [that] can result from individually minor but collectively significant actions taking place over a period of time.”[[39]](#footnote-39) Effects include the cumulative “ecological” effects of an action.[[40]](#footnote-40) An agency must, therefore, analyze the ecological effects of a proposed action in concert with other past actions that occurred within the proposed cumulative effects analysis area.[[41]](#footnote-41) To decide whether the Forest Service sufficiently analyzed the cumulative effects of past projects on lynx, the *Friends* court relied heavily on the following 9th Circuit decisions.[[42]](#footnote-42)

a. Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of Interior

Plaintiffs in *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of Interior* (“*Te-Moak”*)alleged that the Department of the Interior violated NEPA by approving an amendment to a mining project without sufficient analysis.[[43]](#footnote-43) The original proposal was permitted to disturb fifty acres of land within the project area. The proposed amendment allowed disturbance of two hundred fifty acres.[[44]](#footnote-44) In response, the Bureau of Land Management (“BLM”) prepared an EA that the plaintiffs subsequently challenged. [[45]](#footnote-45) The district court granted the BLM’s motion for summary judgment, holding that they had complied with NEPA.[[46]](#footnote-46) On appeal, plaintiffs alleged that the BLM did not sufficiently analyze the cumulative impacts the amendment would have on tribal lands.[[47]](#footnote-47)

The 9th Circuit began by discussing the cumulative effects precedent under NEPA.[[48]](#footnote-48) It first stated that an EA’s cumulative effects analysis “must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between projects are thought to have impacted the environment.”[[49]](#footnote-49) It then stated, “general statements about ‘possible effects’ and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.”[[50]](#footnote-50) The court concluded by stating “Some quantified or detailed information is required. Without such information neither the courts, nor the public … can be assured that the [agency] provided the hard look that it is required to provide.”[[51]](#footnote-51)

Applying its discussion to the facts of the case, the *Te-Moak* court explored the Cultural Resources, and Native American Religious Concerns sections of the EA.[[52]](#footnote-52) There, it found that the BLM’s analysis “did not adequately address the [cumulative effects of the] reasonably foreseeable mining activities of the … project” in those sections[[53]](#footnote-53) It based its rationale on the fact that the two sections “focus [ ] on the effects of the amendment, rather than the [reasonably foreseeable] combined impacts resulting from the activities of the amendment with other projects.”[[54]](#footnote-54) The court held that the “BLM’s analysis of the [reasonably foreseeable] cumulative impacts of the … project was insufficient and therefore violated NEPA.”[[55]](#footnote-55)

b. Center for Environmental Law and Policy v. United States Bureau of Reclamation

One year later, the court was faced with deciding a cumulative effects challenge of a different nature. Confronting multiple water demands in the Columbia River Basin, the Bureau Reclamation developed strategies to increase water supplies.[[56]](#footnote-56) To comply with NEPA, the bureau prepared an EA for the project that included a section reviewing the project's cumulative effects.[[57]](#footnote-57) The *Center for Environmental Law and Policy* (“*CELP”*) challenged the sufficiency of the review, alleging the bureau’s insufficient analysis of the past cumulative effects.[[58]](#footnote-58) However, in light of the “long collaborative process between [various] stakeholders” the district court held that the EA “thoroughly account[ed] for [the] history of development in the region and the project’s cumulative impacts thereto.”[[59]](#footnote-59) On appeal, the plaintiffs characterized the EA as deficient because its discussion of the cumulative effect of past actions was conclusory.[[60]](#footnote-60)

On appeal, the 9th circuit began by discussing the existing cumulative effects precedent under NEPA.[[61]](#footnote-61) The court recognized that, “consideration of cumulative impacts requires some quantified or detailed information that results in a useful analysis, even when the agency is preparing an EA and not an EIS.”[[62]](#footnote-62) It then noted that, “general statements about possible effects and some risk do not constitute a hard look absent a justification why more definitive information could not be provided.”[[63]](#footnote-63) The court concluded its review by clarifying that an agency “may, however, characterize the cumulative effects of past actions in the aggregate without enumerating every past project that has affected an area.”[[64]](#footnote-64) This “aggregate” standard – cited in *CELP* but not *Te-Moak* – derives from the 9th Circuit’s controversial en banc opinion in *Lands Council v. Powell*.

The issue in *Lands Council* was whether the Forest Service had sufficiently described past timber harvest projects to allow the public and the courts to adequately review its EIS. [[65]](#footnote-65) The court found that the EIS only “generally describe[d] past timber harvests … in the project area.”[[66]](#footnote-66) It then noted that the EIS contained no discussion of the “environmental impact from past projects on an *individual* basis …” that might inform the analysis.[[67]](#footnote-67) The court held that an adequate cumulative effects discussion must include “the time, type, place, and scale of past timber harvests … in sufficient detail.”[[68]](#footnote-68) Subsequently, the CEQ issued a guidance memorandum in response to the decision stating that an agency can “conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions.”[[69]](#footnote-69)

Shortly thereafter, the 9th Circuit was presented with a case that fell within the new CEQ guidance memorandum in *League of Wilderness Defenders v. U.S. Forest Service* (“*LOWD*”).[[70]](#footnote-70) Plaintiffs in *LOWD* challenged the CEQ guidance memorandum, alleging that the Forest Service did not adequately discuss the cumulative effects of past actions in its EIS because it “only mention[ed] *one* … past timber sale … and otherwise *generally* state[d] that timber harvest occurred in the past.”[[71]](#footnote-71) The Forest Service maintained “agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions.”[[72]](#footnote-72) The court held that the CEQ memorandum was entitled to deference[[73]](#footnote-73) and, as a result … the Forest Service may aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7.[[74]](#footnote-74)

The court also stressed that the plaintiffs had incorrectly interpreted the *Lands Council* decision to mean that an adequate cumulative effects analysis requires “a complete cataloguing of all prior timber sales in all cases … .”[[75]](#footnote-75) Instead, the court stated that *Lands Council* only reaffirmed the general rule that “NEPA requires adequate cataloguing of *relevant* past projects in the area” which, “comports with … NEPA’s purpose of ‘concentrating on the issues that are truly significant to the action in question.’”[[76]](#footnote-76) The *LOWD* court concluded that the “Forest Service is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate.”[[77]](#footnote-77)

The *CELP* court specifically applied the *LOWD* jurisprudence to the cumulative effect of the *past* projects at issue. [[78]](#footnote-78) The court quickly recognized that the section of the EA addressing cumulative effects never rose above “vague generalities,” however, it went on to state that “[t]he perfunctory discussion in the ‘Cumulative Impacts’ section … is not reflective of Reclamation's overall approach.”[[79]](#footnote-79) The analysis of “various effects *in other portions of the EA* displays sensitivity to, and consideration of, the multitude of changes previously wrought by mankind on the Columbia River Basin.”[[80]](#footnote-80)

To support its rationale, the court exhaustively examined other parts of the EA for evidence that the Bureau of Reclamation analyzed the cumulative effect of past projects.[[81]](#footnote-81) It found that “[t]he record include[d] extensive evidence that the [bureau] considered the relevant prior actions and took the requisite hard look before approving the drawdown project.”[[82]](#footnote-82) In doing so, the court announced three new guidelines to consider when reviewing aggregate past cumulative effects analyses. .[[83]](#footnote-83) First, does the analysis explain both “the existing condition of the area” and “what the effects of the project would be”?[[84]](#footnote-84) Second, does is discuss the past projects “necessary to describe the cumulative effect of all past actions combined”?[[85]](#footnote-85) And finally, does it “rely on quantified or detailed in formation” to “assess the impact of the … project against the … aggregate of all past projects” If *the record* demonstrates an agency has fulfilled the guidelines, then the court concluded that it would “impermissibly elevate form over substance to hold that Reclamation must replicate its entire analysis under the heading of cumulative effects.”[[86]](#footnote-86)

III. Analysis

The *Friends* courtincorrectly granted plaintiff’s motion for summary judgment regarding the Forest Service’s analysis of the cumulative effects of past actions on lynx.[[87]](#footnote-87) A party is entitled to summary judgment if it can demonstrate “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”[[88]](#footnote-88) The issue is thus purely legal: did the district court correctly apply the law? Courts must uphold an agency's action “unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”[[89]](#footnote-89) Review is “limited to the question of whether the agency took a ‘hard look’ at the proposed action as required by a strict reading of NEPA's procedural requirements.”[[90]](#footnote-90) Therefore, the court must defer to any agency decision that is “fully informed and well-considered,” but must not overlook “a clear error of judgment.”[[91]](#footnote-91)

In *Friends,* the court began its review of whether the Forest Service’s sufficiently analyzed the cumulative effect of past projects on lynx by relying on the statement from *CELP* that an agency must “analyze the incremental impact of the proposed project when added to other past, present and reasonably foreseeable actions within the selected geographic area.”[[92]](#footnote-92) Then, again drawing from *CELP*, the court states “consideration of cumulative impacts requires some quantified or detailed information that results in a useful analysis, even when an agency is preparing an EA and not an EIS.”[[93]](#footnote-93) Curiously, the court then abandons *CELP*’s guidance, and begins to rely instead to *Te-Moak*’s statement that “An EA’s analysis of cumulative impact must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects are thought to have impacted the environment.”[[94]](#footnote-94) Finally, as an apparent afterthought, the court draws once again from *CELP* by stating “An agency may, however, characterize the cumulative effects of past actions in the aggregate without enumerating every past project that has affected an area.”[[95]](#footnote-95)

Choosing to state the law in this manner caused the District Court to err in three ways. First, *Te-Moak* is distinguishable from the 9th Circuit’s cumulative effect of past projects precedent because, unlike *CELP*, *Te-Moak* considers the cumulative impact of *foreseeable*, rather than *past* actions. Second, choosing to follow *Te-Moak* blinded the court to the fact that it must look to the whole record when determining if an agency has sufficiently analyzed the cumulative effect of past projects. Finally, failing to look to the whole record compromised the court’s ability to understand the Forest Service’s characterization of its aggregate analysis of the cumulative effects of past actions on lynx. The following analysis addresses each argument in turn.

A. The district court incorrectly relied on 9th Circuit precedent requiring a detailed catalog of reasonably foreseeable projects, whereas past projects are at issue in Friends.

The *Friends* court relied on *Te-Moak* for the proposition that “[a]n EA's analysis of cumulative impacts ‘*must* give a sufficiently detailed catalogue of past, present, and future projects … .’”[[96]](#footnote-96) Then, as an apparent afterthought, the court states that an agency “may, however, characterize the cumulative effects of past actions in the aggregate … .”[[97]](#footnote-97) What is curious about the court’s choice of authority; however, is why it chose to state the *Te-Moak* standard at all. After all, in *Te-Moak* the issue was the cumulative effect of reasonably foreseeable projects, not the cumulative effect of past projects. In addition, if an agency *must* give a sufficiently detailed catalogue of past projects, how *may* it at the same time choose to characterize the cumulative effects of past actions in the aggregate? A logical answer to these questions lies in the court’s decision not to recognize that “general statements about possible effects and some risk do not constitute a hard look absent a justification why more definitive information could not be provided” – a statement recognized in both the *CELP* and *Te-Moak* courts, but not in *Friends.[[98]](#footnote-98)*

Taken together, and restated for clarity, the *CELP* court’s declaration of the law recognizes that “general statements about possible effects and some risk do not constitute a hard look absent a justification why more definitive information could not be provided … however, [an agency may] characterize the cumulative effects of past actions in the aggregate without enumerating every past project that has affected an area.”[[99]](#footnote-99) But unlike *CELP*, the *Te-Moak* court does *not* then state that an agency “may, [with ‘justification why more definitive information could not be provided’] characterize the cumulative effects of past actions in the aggregate without enumerating every past project that has affected an area.”[[100]](#footnote-100) Rather, the Te-Moak opinion chooses to conclude where *CELP* began*,* stating “Some quantified or detailed information is required.”[[101]](#footnote-101) The reason the *Te-Moak* court did not state the aggregate standard is because it had no need to. As demonstrated *supra*, it was reviewing an agency’s analysis of the cumulative effect of reasonably foreseeable projects, of which, a detailed catalog is easily compiled.[[102]](#footnote-102)

In contrast, the *Friends* court was reviewing the Forest Service’s analysis of the cumulative effect of past projects, of which, compiling a detailed catalog is often frustratingly difficult.[[103]](#footnote-103) As noted supra, the CEQ disagreed so strongly with “detailed catalogue” standard that it issued a guidance memorandum stating that an agency can focus on the “current aggregate effects of past actions without delving into the historical details of individual past actions.”[[104]](#footnote-104) The CEQ’s aggregation standard was upheld in the *LOWD*, and as such, over-ruled the detailed catalog standard when the court is reviewing the cumulative effect of past projects.[[105]](#footnote-105) Therefore, when the *CELP* opinion states that an agency “may, however, aggregate” its cumulative effect of past projects analysis, it is squarely on point.[[106]](#footnote-106) The context of the “may, however” language is not to be interpreted to mean that the court has a choice between the aggregate standard, and the long over-ruled detailed catalogue standard.[[107]](#footnote-107) The language must be read in the context of the preceding sentence in *CELP* that, “general statements … do not constitute a hard look absent a justification why more definitive information could not be provided.”[[108]](#footnote-108) In other words, an agency cannot make “general,” or, aggregated statements, without justifying why it cannot provide definitive information about past projects. If the agency does provide justification why it cannot provide definitive information, it “may, however” perform an aggregate analysis of the cumulative effect of past projects.

A reasonable explanation for the court’s error is that it did not recognize the importance of the statement of law in both *CELP* and *Te-Moak* that, “general statements about possible effects and some risk do not constitute a hard look absent a justification why more definitive information could not be provided” and eliminated it because it believed it to be mere surplussage.[[109]](#footnote-109) But the language is critical. Without it courts would not be on alert for indications by an agency that is does not have the “definitive information” necessary to provide a detailed catalogue of all the past projects.[[110]](#footnote-110) Without the definitive information, the CEQ and associated 9th Circuit precedent make clear that the agency’s alternative is to aggregate the past cumulative effects through analysis of the existing conditions of the land.[[111]](#footnote-111) Thus, armed with the knowledge that an agency has provided “justification” for conducting an aggregate cumulative effect of past projects analysis; a court must conclude that it is bound to follow the process laid out in *CELP* for reviewing the adequacy of an of an agency’s cumulative effect of past projects analysis.[[112]](#footnote-112) A court cannot, as was the practice in *Friends*, simply omit settled 9th Circuit precedent and decide to first review an EA using the distinguishable detailed catalogue standard from *Te-Moak*, then, “in the alternative,” review it under *CELP’s* aggregation standard.[[113]](#footnote-113) As will be shown, doing so compounded the negative impact of an already errant opinion.

B. Failing to correctly follow 9th Circuit precedent blinded the Friends court to the fact that it must look to the whole record when determining if an agency has sufficiently analyzed the cumulative effect of past projects.

The second error the *Friends* court committed was a product of its first. If the court had recognized that *CELP*, not *Te-Moak*, provided the best statement of the controlling cumulative effect of past projects case law, then it would also have recognized that it cannot confine its review to the section on cumulative effects when reviewing the sufficiency of an agency’s past cumulative effects analysis.[[114]](#footnote-114) As in *Friends* the *CELP* court naturally began its review of whether or not the agency had conducted a sufficient past cumulative effects analysis by investigating the section of the EA titled cumulative effects.[[115]](#footnote-115) There, it found only three paragraphs that “deal with past projects,” and not one rising above “vague generalities.”[[116]](#footnote-116) Such “superficial analysis,” the court noted, was a “far cry from the requirement … .” [[117]](#footnote-117) However, it also noted that the three paragraphs were not the “sum of the analysis.”[[118]](#footnote-118) Delving further, the court found that the “record included extensive evidence that [the agency] considered relevant prior actions …” because “various effects in other portions of the EA display sensitivity to, and consideration of, the multitude of changes previously wrought by mankind … .”[[119]](#footnote-119) In holding that the EA’s discussion of the cumulative effects of past projects satisfies NEPA’s requirements, the court stated that although the “evidence is not presented in the cumulative effects section of the EA … it would impermissibly elevate form over substance to hold that [an agency] must replicate its entire analysis under the heading of cumulative effects.”[[120]](#footnote-120)

The *CELP* court’s explanation for the rule is straightforward. The rule will avoid “impermissibly elevat[ing] form over substance” because only after “other portions” of the record have been analyzed, can a court conclude whether or not an agency has taken the “requisite hard look before approving the project.”[[121]](#footnote-121) This is based on a solid rationale. For example, in *Alaska Department of Environmental Conservation v. EPA* the Supreme Court stated, “Even when an agency explains its decision with ‘less than ideal clarity,’ a reviewing court will not upset the decision on that account ‘if the agency's path may reasonably be discerned.’”[[122]](#footnote-122) The 9th Circuit did not specifically cite the foregoing case in *CELP*; however, the cases it did cite are strikingly similar.[[123]](#footnote-123) In *Ecology Ctr*., *v.* *Casteneda*, the 9th Circuit held that a Forest Service EIS adequately discussed past cumulative effects because, even though “the cumulative effects section referred generally to past and proposed activities, other parts of the EIS gave extensive history about past actions in the area.” [[124]](#footnote-124) And in *Environmental Protection Information Center v. U.S. Forest Service*, the 9th Circuit found a Forest Service EA sufficient because it was based on a model that “pervaded” the record.[[125]](#footnote-125)

In contrast, the *Friends* opinion readily reveals that the court focused only on the section of the EA pertaining to the cumulative effects on lynx.[[126]](#footnote-126) Compounding its error, the court attempted to apply *Te-Moak’s* “detailed catalogue” standard to the narrow section.[[127]](#footnote-127) For example, the court plainly states “the cumulative effects analysis for lynx” section -- a three paragraph *characterization* of the Forest Service’s analysis on page sixty-six of the EA -- did not discuss or mention “any past projects or actions.”[[128]](#footnote-128) As presumptive evidence of this fact, the court notes that “in the EA, the Forest Service discusses how it recently acquired 640 acres of land owned by Plum Creek Timber Company (PCTC) [and] [i]t discusses the impact of snowmobile activity in the area.”[[129]](#footnote-129) And while the courts statement claims that it found this information “in the EA,” suggesting that the court looked beyond the narrow confines of the three paragraphs characterizing the cumulative effects on lynx, in fact, the information comes from page sixty-six of the EA.[[130]](#footnote-130) Finally, reinforcing the fact that it is errantly applying the detailed catalogue standard from *Te-Moak*, the court concludes by stating that it can find“no discussion of past projects or activities,” in the cumulative effects on lynx section of the EA.[[131]](#footnote-131)

Only after concluding its futile search for a detailed catalogue of past projects in the three-paragraph section of the EA, does the court turn a cursory eye to reviewing the Forest Service’s aggregate analysis.[[132]](#footnote-132) However, this attempt too, was doomed to failure from the beginning for two reasons. First, as noted supra, the court omitted the statement of law in both *CELP* and *Te-Moak* that generalized statements – such as those characterizing the cumulative effects of past actions in the aggregate -- do not constitute the “hard look” required by the agency “absent a justification why more definitive information” could not be found.[[133]](#footnote-133) Second, the court failed to look to the whole record as required by *CELP*.[[134]](#footnote-134) As will be shown in the following section, the combination of these errors compromised the courts ability to understand that the three-paragraph section of the EA it reviewed, was indeed, a fully informed and well considered “characterize[ation of] the aggregate cumulative effect of past projects on lynx.”[[135]](#footnote-135)

C. Failing to follow 9th Circuit precedent resulted in the courts inability to recognize the adequacy of the Forest Service’s characterization of its aggregate cumulative effect of past projects analysis on lynx*.*

The *Friends* court did not recognize the adequacy of the Forest Service’s characterization of its aggregate cumulative effects of past actions on lynx for two reasons. First, it failed to recognize that an agency lacking information about past projects can provide justification why it is proper to conduct an aggregate cumulative effects of past projects analysis.[[136]](#footnote-136) As noted *supra*, once an agency has justified its aggregate analysis the court is bound to follow the process laid out in *CELP* for reviewing its adequacy.[[137]](#footnote-137) Second, not following *CELP’s* direction tolook to “other portions” of the record blinded the court to the definitive information necessary to understand the agency’s discussion of the relevant facts in its three-paragraph section in the EA devoted to the cumulative effects on lynx.[[138]](#footnote-138) The result was that the *Friends* court was effectively unable to intelligibly review the Forest Service’s three-paragraph characterization of its aggregate analysis of the cumulative effects of past projects on lynx. Evidence of this fact is demonstrated when the court’s opinion segues from its errant detailed catalogue review, to its legitimate review of the Forest Service’s aggregate analysis.[[139]](#footnote-139)

In *Friends,* court states “even assuming there were no projects” to catalogue in detail, “the Forest Service must still characterize the cumulative effects of past actions in the aggregate.”[[140]](#footnote-140) Without recognizing the Forest Service’s characterization for what it was, and without providing any measure of how to assess whether or not Forest Service had in fact sufficiently c*haracterized* the aggregate effect of the past projects at all, the court incorrectly assumed that it did not exist.[[141]](#footnote-141) Once again, however, the 9th Circuit precedent that the *Friends* court chose ignore includes a rule that is on point.[[142]](#footnote-142) The *CELP* court provides guidelines “indicative of the manner” in which the adequacy of an agency’s aggregate past cumulative effects analysis can be judged.[[143]](#footnote-143) First, does the analysis explain both “the existing condition of the area” and “what the effects of the project would be”?[[144]](#footnote-144) Second, does is discuss the past projects “necessary to describe the cumulative effect of all past actions combined”?[[145]](#footnote-145) And finally, does it “rely on quantified or detailed in formation” to “assess the impact of the … project against the … aggregate of all past projects”?[[146]](#footnote-146) If the *Friends* court had followed the processes set out in *CELP*, it would have found detailed information throughout EA that would have allowed to readily comprehend that the the Forest Service’s characterization of its aggregate cumulative effects analysis was sufficient. A review of the EA in light of *CELP’s* guidance demonstrates why.

First, *CELP* recognizes that agency lacking information about past projects can provide justification why it is proper to conduct an aggregate cumulative effect of past projects analysis.[[147]](#footnote-147) Because the Forest Service chose to explain the cumulative impact that the Colt Summit Project would have on lynx by aggregating the cumulative effects of past actions to explain the existing conditions of the land, it was careful to provide a rationale for doing so in two portions of the EA[[148]](#footnote-148). In the section of the EA titled “Cumulative Effects on Lynx,” the Forest Service states, “Detailed data [on PCTC land] is not available in regard to suitability as lynx habitat.”[[149]](#footnote-149) And in the preface to Appendix D the Forest Service also states, “These tables, though comprehensive, may have some unintended omissions due to lack of records or knowledge.”[[150]](#footnote-150) These statements are intended provide justification regarding why the agency is conducting an aggregate analysis. But the court had no way to identify the fact that the Forest Service had “justified” its choice to utilize an aggregate approach to analyzing the cumulative effect of past actions on lynx because it omitted the sufficient justification analysis cited by both the 9th Circuit *CELP* and *Te-Moak* courts. [[151]](#footnote-151) This explanation also provides evidence indicating why the court persisted in its attempt to analyze the EA through the sufficiently detailed catalog standard in *Te-Moak.*[[152]](#footnote-152)Perhaps, if the court had followed *CELP’s* instruction to look at other portions of the EA, it would have discovered the justification by the Forest Service and avoided both unfortunate outcomes.

Second, because the court did not follow *CELP’s* direction tolook to “other portions” of the record it was blind to the information the Forest Service provided in other sections of the EA that were essential to understanding the agency’s three-paragraph characterization of its aggregate analysis.[[153]](#footnote-153) Relying on information drawn solely from that narrow section, the court intimates that the Forest service only discussed the acquisition of 640 acres of PCTC land and the impact of snowmobile activity in the area.[[154]](#footnote-154) However, the court’s claim tells only as much of the story as it is able to glean from one page of a very large book. That page, read in conjunction with the rest of the EA, tells a very different story than that understood by the *Friends* court. If the court had looked to other parts of the EA it would have recognized that the Forest Service did “characterize” the cumulative effects of past projects on lynx under the sub-heading “Cumulative Effects on Lynx.”[[155]](#footnote-155)

For example, under the heading “Cumulative Effects on Lynx” the Forest Service begins by explaining why the Clearwater LAU is the appropriate cumulative effects analysis area.[[156]](#footnote-156) It then states that the land within this area is comprised of both federal and private ownership.[[157]](#footnote-157) It then qualifies this statement by recognizing that 640 acres of previously private PCTC land has recently come under federal ownership.[[158]](#footnote-158) Importantly, it then states “[d]etailed data is not available on former PCTC lands in regard to suitability as lynx habitat” in accordance with the law.[[159]](#footnote-159) This statement is important because the EA then states:

The management practices on these lands in recent years have created a large amount of early successional habitat, some of which would qualify as unsuitable. Some PCTC stands in young age classes have been treated with precommercial thinning as well. Conversely, Federal lands are comprised primarily of older stands, with stands in the 0 to 45-year range being patchily distributed. It is likely that the character of the recently acquired PCTC lands will change in the foreseeable future. These lands, now under Federal management, will likely experience a net increase in suitable lynx habitat. Stand age will likely increase on these lands as well. There is no longer a risk of these lands being converted to small private lots due to Federal ownership, removing a considerable threat to lynx.[[160]](#footnote-160)

It is challenging to believe that the *Friends* court understand this analysis if it had not looked to other portions of the record for context, specifically, Table 9 and Appendix D.

On page sixty-two of the EA the Forest Service explicitly states a “list of past and present activities” is “provided in Appendix D.”[[161]](#footnote-161) There, Table D-1 indicates the past activities considered in the cumulative effects analysis.[[162]](#footnote-162) It describes over eighteen activities with the potential to cumulatively affect the project.[[163]](#footnote-163) Most relevant for the cumulative effect of past projects on lynx analysis are the “Timber Harvest” and the “Land Exchange” categories.[[164]](#footnote-164) The Timber Harvest category refers the reader to Tables D-2, and D-3 that document the acreage of three harvest types and site preparation activities that have occurred on federal land in the project area reaching 70 years into the past.[[165]](#footnote-165) The Land Exchange category documents how the Forest Service has recently acquired approximately 640 acres of land within the project area from Plum Creek Timber Company (PCTC) whose past management activities created a large amount of “early successional stage” timber.[[166]](#footnote-166) It notes there that the PCTC land comprises less than 15% of the project area.[[167]](#footnote-167)

Next, the portion of Chapter 3 devoted specifically to analysis of the direct, indirect and cumulative effects on lynx – 3.6.4 Alternative B Proposed Action – begins by noting that vegetation management will occur on 7% of the Clearwater Lynx Analysis Unit (LAU).[[168]](#footnote-168) The section then indicates, “Existing conditions for lynx within the Clearwater LAU are within accepted tolerance ranges as described in the Lynx Amendment and meet all lynx management standards and guidelines (“Table 9”).”[[169]](#footnote-169) Table 9 shows that the impact from the project is negligible in comparison to the acceptable ranges established by the Lynx Amendment.[[170]](#footnote-170) More importantly, Table 9 demonstrates that the Forest Service analyzed the contributions of past actions to the existing conditions and how the proposed project would cumulatively effect those conditions.[[171]](#footnote-171)

The detailed information and analysis contained in Appendix D, and Table 9, reveals that the Forest Service did provide a “discussion of past projects or activities” that the court explicitly claims it did not.[[172]](#footnote-172) It is also apparent that the Forest Service did so by aggregating the existing conditions of past actions in concert with the proposed project.[[173]](#footnote-173) Given such a wealth of detailed information and analysis specifically regarding the cumulative effects of past projects on lynx, it is evident the court did not look beyond the narrow section of the EA that “characterize[s] the cumulative effects of past actions [on lynx] in the aggregate.”[[174]](#footnote-174) The court’s opinion explicitly asserts that the Forest Service did not do this.[[175]](#footnote-175) The “other parts” of the record, however, contradict that assertion.[[176]](#footnote-176)

Finally, if the court had reviewed the entire record in light of the three-step guidelines announced in CELP to help a court determine if an agency’s aggregate cumulative effects analysis is adequate, it would have concluded that the Forest Service had committed no clear error that prevented it from taking a hard look at the cumulative effects of past actions on lynx.[[177]](#footnote-177) Pursuant to the first guidelines,the Forest Service relied on quantified information in Table 9 and Appendix D to explain the existing condition of the land, and the cumulative effect the aggregated past projects would have in conjunction with the current project, upon the existing condition.[[178]](#footnote-178) The agency mentions only the past projects necessary to characterize the cumulative impact of all past actions combined in order to assess the impact of the project against the risk of those past combined projects.[[179]](#footnote-179) And finally, the agency characterizes this information under the heading “Cumulative Effects on Lynx” to conclude that the project will not increase the risk to lynx.[[180]](#footnote-180) More accurately; however, due to the fully informed and well-considered process the Forest Service is not remiss when it states that the proposed project may in fact have beneficial effects on lynx recovery.[[181]](#footnote-181)

IV. CONCLUSION

The *Friends* court erred on three levels. First, *Te-Moak* is distinguishable from the 9th Circuit’s cumulative effect of past projects precedent because, unlike *CELP*, *Te-Moak* considers the cumulative impact of *foreseeable*, rather than *past* actions.[[182]](#footnote-182) Second, choosing to follow *Te-Moak* blinded the court to the fact that it must look to the whole record when determining if an agency has sufficiently analyzed the cumulative effect of past projects as required by *CELP*.[[183]](#footnote-183) Finally, failing to look to the whole record compromised the court’s ability to understand the Forest Service’s characterization of its aggregate analysis of the cumulative effects of past actions on lynx. If the court followed *CELP*, it would have discovered that the Forest Service did in fact sufficiently characterize the cumulative effects of past actions on lynx.[[184]](#footnote-184)

In the District Courts “view, the [Forest] Service did not adequately analyze the Project's cumulative effects on lynx when it overlooked past projects or actions.”[[185]](#footnote-185) It is reasonable to assume then, that 9th Circuit will find this view a good place to begin its inquiry into whether or not the Forest service took the “hard look”[[186]](#footnote-186) required to show that it did not decide “arbitrarily”[[187]](#footnote-187) that the cumulative effects of past projects would not significantly impact the lynx. The court will not easily be led astray from it own precedent in *CELP.* There it will find what the District Court did not – guidelines for determining the sufficiency of an agency aggregate cumulative effects analysis[[188]](#footnote-188) Looking to the whole record, then, the court will first ask, does the analysis explain both “the existing condition of the area” and “what the effects of the project would be”?[[189]](#footnote-189) It may inquire if it discusses the past projects “necessary to describe the cumulative effect of all past actions combined”?[[190]](#footnote-190) And finally, it should inquire whether the EA “rel[ies] on quantified or detailed in formation” to “assess the impact of the … project against the … aggregate of all past projects”?[[191]](#footnote-191) Should the court do so, it will discover more than sufficient evidence in the record to determine that Forest Service sufficiently analyzed the cumulative effects of past projects on lynx, and that it is free to proceed with the Colt Summit Project.

1. 875 F.Supp.2d 1199 (2012) [Hereinafter FRIENDS]. What was originally Friends of the Wild Swan, et al. v. Austin, et al.*,* 875 F.Supp.2d 1199 (2012), will be contested in the Ninth Circuit *Court* of Appeals as Friends of the Wild Swan, et al. v. Garcia, et al., Docket **#:** 14-35463. Appellants opening brief was submitted on 10/08/2014.  [↑](#footnote-ref-1)
2. The environmental advocacy groups are: Friends of the Wild Swan, a nonprofit organization; Alliance for the Wild Rockies a nonprofit organization; Montana Ecosystems Defense Council a nonprofit organization; and Native Ecosystems Council a nonprofit organization. [↑](#footnote-ref-2)
3. 42 U.S.C. §§ 4321-4370 (1970). [↑](#footnote-ref-3)
4. 40 C.F.R. §§ 1501.3-1501.4 (1979). [↑](#footnote-ref-4)
5. 16 U.S.C. §§ 1531-1544 (1973). [↑](#footnote-ref-5)
6. *See* FRIENDS at 1203. [↑](#footnote-ref-6)
7. *Id*. at 1212. [↑](#footnote-ref-7)
8. *See* Friends of the Wild Swan v. United States Forest Service, 2014 WL 1347987. No. CV 11-125-M-DWM. [↑](#footnote-ref-8)
9. *See* Friends of the Wild Swan v. Garcia at,https: https://ecf.ca9.uscourts.gov/cmecf/servlet/TransportRoom?servlet=CaseSummary.jsp&caseNum=14-35463&incOrigDkt=Y&incDktEntries=Y. Docket **#:** 14-35463. Last accessed Oct. 28, 2014. [↑](#footnote-ref-9)
10. Lolo National Forest, U.S. Dept. of Agriculture, Forest Service, Colt Summit Restoration and Fuels Reduction Project, Environmental Assessment, Doc# A-1, p. 3 (December 2010) [hereinafter EA], *available at* http://1.usa.gov/19a69iP [↑](#footnote-ref-10)
11. *Id*. [↑](#footnote-ref-11)
12. Lolo National Forest, U.S. Dept. of Agriculture, Forest Service, Colt Summit Restoration and Fuels Reduction Project, Decision Notice – Affirmation of Prior Decision, Doc# T-128, 86 (January 2013), *available at* http://1.usa.gov/19a69iP [hereinafter AFFIRMATION]. [↑](#footnote-ref-12)
13. *Id*. [↑](#footnote-ref-13)
14. *See* AFFIRMATION at 87. [↑](#footnote-ref-14)
15. *Id*. [↑](#footnote-ref-15)
16. *See* AFFIRMATION at 88. [↑](#footnote-ref-16)
17. *Id*. [↑](#footnote-ref-17)
18. *See* AFFIRMATION at 89. [↑](#footnote-ref-18)
19. *See generally,* FRIENDS at note 1. [↑](#footnote-ref-19)
20. *See* 50 C.F.R § 17.11(h) (2000), and 50 C.F.R § 17.95 (2000). [↑](#footnote-ref-20)
21. 16 U.S.C § 1533(a)(1)(A) (1973). [↑](#footnote-ref-21)
22. 16 U.S.C § 1533(a)(3) (1973). [↑](#footnote-ref-22)
23. 16 U.S.C § 1533(f)(1) (1973). [↑](#footnote-ref-23)
24. 16 U.S.C § 1533(f)(1)(B)(i) (1973). [↑](#footnote-ref-24)
25. 50 C.F.R § 17.11(h) (2000). [↑](#footnote-ref-25)
26. 50 C.F.R § 17.95 (2000). [↑](#footnote-ref-26)
27. *See generally* Bill Ruediger, et al. *Canada Lynx Conservation and Assessment Strategy*, USDA Forest Service, USDI Fish and Wildlife Service, USDI Bureau of Land Management, and USDI National Park Service, Forest Service Publication #R1-00-53 (2000), *available at* http://www.fs.fed.us/r1/planning/lynx/lynx.html (The measures include vegetation management techniques that maintain dense understory conditions for prey, minimize snow compaction, and maintain connectivity between habitat areas). [↑](#footnote-ref-27)
28. *Id.* [↑](#footnote-ref-28)
29. *See generally* EA at note 10. [↑](#footnote-ref-29)
30. 16 U.S.C. § 1536 (1973). [↑](#footnote-ref-30)
31. 16 U.S.C. § 1536(a)(2) (1973). [↑](#footnote-ref-31)
32. 16 U.S.C. § 1536(a)(3) (1973). [↑](#footnote-ref-32)
33. 16 U.S.C. § 1536(c)(1) (1973). [↑](#footnote-ref-33)
34. *Id*. [↑](#footnote-ref-34)
35. 42 U.S.C. § 4332 (1970). [↑](#footnote-ref-35)
36. 40 C.F.R. § 1501.3 (1978). [↑](#footnote-ref-36)
37. 40 C.F.R. § 1500.2(b) (1978). [↑](#footnote-ref-37)
38. 40 C.F.R. § 1508.7 (1978). [↑](#footnote-ref-38)
39. *Id*. [↑](#footnote-ref-39)
40. 40 C.F.R. § 1508.8 (1978). [↑](#footnote-ref-40)
41. *See* Courtney Schultz, *History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation In the U.S. Forest Service Case Law*, 27 J. Envtl. L. & Litig. 125, 134 (2012). [↑](#footnote-ref-41)
42. *See generally* FRIENDS at note 1. [↑](#footnote-ref-42)
43. Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of Interior, 608 F.3d 592, 597 (9thCir. 2010).[hereinafter, TE-MOAK]. [↑](#footnote-ref-43)
44. *Id*. [↑](#footnote-ref-44)
45. *Id*. [↑](#footnote-ref-45)
46. *Id*. [↑](#footnote-ref-46)
47. TE-MOAK, 608 F.3d at 598. [↑](#footnote-ref-47)
48. *Id*. at 599. [↑](#footnote-ref-48)
49. *See* TE-MOAK, 608 F.3d at 603 (quoting Lands Council v. Powell 395 F.3d 1019,1028 (9thCir. 2005)). [↑](#footnote-ref-49)
50. *Id*. (quoting Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1732, 1738 (9thCir. 1998)). [↑](#footnote-ref-50)
51. *Id*. (quoting Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1732, 1739 (9thCir. 1998)). [↑](#footnote-ref-51)
52. *Id*. at 604. [↑](#footnote-ref-52)
53. *Id*. [↑](#footnote-ref-53)
54. *Id*. [↑](#footnote-ref-54)
55. *See* TE-MOAK, 608 F.3d at 606. [↑](#footnote-ref-55)
56. Center for Environmental Law and Policy v. United States Bureau of Reclamation 655 F.3d 1000, 1003 (9thCir. 2011) [hereinafter, CELP]. [↑](#footnote-ref-56)
57. *Id*. at 1004 [↑](#footnote-ref-57)
58. *Id*. at 1004-1005. [↑](#footnote-ref-58)
59. *Id*. at 1007. [↑](#footnote-ref-59)
60. *Id*. [↑](#footnote-ref-60)
61. *Id*. [↑](#footnote-ref-61)
62. *See* CELP, 655 F.3d at 1007. [↑](#footnote-ref-62)
63. *Id*. [↑](#footnote-ref-63)
64. *Id*. [↑](#footnote-ref-64)
65. Lands Council v. Powell*,* 395 F.3d 1019, 1028 (9th Cir.2005) [hereinafter LANDS COUNCIL]. [↑](#footnote-ref-65)
66. *Id*. [↑](#footnote-ref-66)
67. *Id*. (emphasis added). [↑](#footnote-ref-67)
68. *Id*. at 1028. [↑](#footnote-ref-68)
69. Council on Environmental Quality, Executive Office of the President, *Guidance on the Consideration of Past Cumulative Effects Analysis* (June 2005)[hereinafter GUIDANCE MEMORANDUM] *available at* http://1.usa.gov/1bt7cdi. [↑](#footnote-ref-69)
70. League of Wilderness Defenders Blue Mountains Biodiversity Project v. US Forest Service, 549 F.3d 1211 (9thCir. 2008) [hereinafter, LOWD] (clarifying that “to the extent that 40 C.F.R. § 1508.7 does not explicitly provide otherwise, the Forest Service is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate. It is not for this court to tell the Forest Service what *specific* evidence to include, nor how *specifically* to present it.”)(Emphasis in the original). [↑](#footnote-ref-70)
71. *Id*. at 1216. [↑](#footnote-ref-71)
72. *Id*. [↑](#footnote-ref-72)
73. LOWD, 549 F.3d at 1217 (explaining that “an agency is entitled to deference when it interprets its own regulations even though the agency offered the interpretation for the first time as a litigation position.”). [↑](#footnote-ref-73)
74. *Id*. at 1218. [↑](#footnote-ref-74)
75. *Id*. [↑](#footnote-ref-75)
76. *Id*. (quoting, 40 CFR 1500.1(b) (1978)). [↑](#footnote-ref-76)
77. *Id*. [↑](#footnote-ref-77)
78. *See generally* CELP. [↑](#footnote-ref-78)
79. CELP at 1008. [↑](#footnote-ref-79)
80. *Id*. (Emphasis added). [↑](#footnote-ref-80)
81. *Id*. [↑](#footnote-ref-81)
82. *Id*. [↑](#footnote-ref-82)
83. CELP at 1008. [↑](#footnote-ref-83)
84. *Id*. [↑](#footnote-ref-84)
85. *Id*. [↑](#footnote-ref-85)
86. *Id*. at 1009. [↑](#footnote-ref-86)
87. FRIENDS, 875 F.Supp.2d at 1221. [↑](#footnote-ref-87)
88. Fed. R. Civ. P. 56(a). [↑](#footnote-ref-88)
89. CELP, 655 F.3d at 1005 (quoting 5 U.S.C. § 706(2)(A)). [↑](#footnote-ref-89)
90. *Id*. (quoting Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*,* 524 F.3d 938, 947 (9thCir. 2008)). [↑](#footnote-ref-90)
91. *Id*.(quoting Blue Mountains Biodiversity Project v. Blackwood*,* 161 F.3d 1208, 1211 (9thCir.1998)). [↑](#footnote-ref-91)
92. FRIENDS, 875 F.Supp.2d at 1220. [↑](#footnote-ref-92)
93. *Id*. [↑](#footnote-ref-93)
94. *Id*. [↑](#footnote-ref-94)
95. *Id*. [↑](#footnote-ref-95)
96. *See* FRIENDS, 875 F.Supp.2d at 1220 (citing TE-MOAK,608 F.3d at 603)(quoting Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir.2005))(Emphasis added). [↑](#footnote-ref-96)
97. *See* FRIENDS, 875 F.Supp.2d at 1220 (citing CELP 655 F.3d at 1007). [↑](#footnote-ref-97)
98. *See* FRIENDS, 875 F.Supp.2d at 1220 (failing to cite CELP, 655 F.3d at 1007; and TE-MOAK, 608 F.3d at 603). [↑](#footnote-ref-98)
99. CELP, 655 F.3d at 1007. [↑](#footnote-ref-99)
100. TE-MOAK, 608 F.3d at 603. [↑](#footnote-ref-100)
101. *Id*. [↑](#footnote-ref-101)
102. *See* TE-MOAK, note 54. [↑](#footnote-ref-102)
103. *See generally* FRIENDS at 1220. [↑](#footnote-ref-103)
104. *See* GUIDANCE MEMORANDUM at note 69. [↑](#footnote-ref-104)
105. *See* LOWD at note 70. [↑](#footnote-ref-105)
106. *See* CELP at note 63. [↑](#footnote-ref-106)
107. *See* FRIENDS at note 93. [↑](#footnote-ref-107)
108. *See* CELP at note 62. [↑](#footnote-ref-108)
109. *See* FRIENDS at note 96. [↑](#footnote-ref-109)
110. *See* GUIDANCE MEMORANDUM at note 69. [↑](#footnote-ref-110)
111. *See* GUIDANCE MEMORANDUM at note 69, *and see* LOWD at note 70. [↑](#footnote-ref-111)
112. *See* CELP at note 63. [↑](#footnote-ref-112)
113. *See generally* FRIENDS at 1220. [↑](#footnote-ref-113)
114. *Id*. [↑](#footnote-ref-114)
115. *See* CELP at 1008. [↑](#footnote-ref-115)
116. *Id*. [↑](#footnote-ref-116)
117. *Id*. [↑](#footnote-ref-117)
118. *See* CELP at 1008. [↑](#footnote-ref-118)
119. *Id*. [↑](#footnote-ref-119)
120. *See* CELP at 1009. [↑](#footnote-ref-120)
121. *Id*. [↑](#footnote-ref-121)
122. 540 U.S. 461, 497 (citing, Bowman Transp., Inc. v. Arkansas—Best Freight System, Inc., 419 U.S. 281, 286 (1974)). [↑](#footnote-ref-122)
123. *See* CELP at 1009. [↑](#footnote-ref-123)
124. 574 F.3d 652, 667 (9thCir. 2009). [↑](#footnote-ref-124)
125. 451 F.3d 1005, 1014 (9thCir. 2006). [↑](#footnote-ref-125)
126. *See generally* FRIENDS at 1220. [↑](#footnote-ref-126)
127. *See generally* FRIENDS at 1220. [↑](#footnote-ref-127)
128. FRIENDS at 1220. [↑](#footnote-ref-128)
129. *Id.* [↑](#footnote-ref-129)
130. FRIENDS at 1220 (note that the court cites to the same pages in the EA). [↑](#footnote-ref-130)
131. *Id.* [↑](#footnote-ref-131)
132. *Id.* [↑](#footnote-ref-132)
133. *See* FRIENDS at note 96. [↑](#footnote-ref-133)
134. *See* CELP at 1008. [↑](#footnote-ref-134)
135. FRIENDS at 1220. [↑](#footnote-ref-135)
136. *See* FRIENDS at note 96. [↑](#footnote-ref-136)
137. *See* CELP at note 62. [↑](#footnote-ref-137)
138. *See* CELP at 1008. [↑](#footnote-ref-138)
139. *See generally* FRIENDS at 1220. [↑](#footnote-ref-139)
140. FRIENDS at 1220. [↑](#footnote-ref-140)
141. *Id*. [↑](#footnote-ref-141)
142. *See generally* CELP at 1008. [↑](#footnote-ref-142)
143. CELP at 1008. [↑](#footnote-ref-143)
144. *Id*. [↑](#footnote-ref-144)
145. *Id*. [↑](#footnote-ref-145)
146. *Id*. [↑](#footnote-ref-146)
147. *See* CELP at note 63. [↑](#footnote-ref-147)
148. *See generally*, EA at note 10. [↑](#footnote-ref-148)
149. *See* EA at note 13, p. 62. [↑](#footnote-ref-149)
150. *Id*. at 110. [↑](#footnote-ref-150)
151. *See* FRIENDS at note 96. [↑](#footnote-ref-151)
152. *See generally* FRIENDS at 1220. [↑](#footnote-ref-152)
153. *Id*. [↑](#footnote-ref-153)
154. *See* FRIENDS, 875 F.Supp.2d at 1220. [↑](#footnote-ref-154)
155. *See* EA note 13 at p.62. [↑](#footnote-ref-155)
156. *Id*. [↑](#footnote-ref-156)
157. *Id*. [↑](#footnote-ref-157)
158. *Id*. [↑](#footnote-ref-158)
159. CELP, 655 F.3d at 1007; TE-MOAK, 608 F.3d at 603 (explaining that general statements do not constitute a hard look absent sufficient justification why more definitive information could not be provided). [↑](#footnote-ref-159)
160. EA at note 13, p. 62. [↑](#footnote-ref-160)
161. *Id*. [↑](#footnote-ref-161)
162. *See* EA note 13 at p.110. [↑](#footnote-ref-162)
163. *Id*. [↑](#footnote-ref-163)
164. *Id*. [↑](#footnote-ref-164)
165. *See* EA note 13 at pp.113-14. [↑](#footnote-ref-165)
166. *Id*. [↑](#footnote-ref-166)
167. *Id*. [↑](#footnote-ref-167)
168. *See* EA at note 13 at pp. 60-61 (The LAU demarcates the acceptable ranges within which a Forest Service project can affect lynx critical habitat). [↑](#footnote-ref-168)
169. *See* EA at note 13 , pp. 60-61 (Table 9 is divided into three parts: Standards; Pre-Treatment Compliance; and Post-Treatment Compliance. The first relevant standard (“VEG S1”) states that “If more than 30% of the lynx habitat in an LAU is currently in a stand initiation structural stage that does not yet provide winter snowshoe hare habitat, no additional habitat may be regenerated by vegetation management projects.” The second standard (“VEG S2”) states “Timber management projects shall not regenerate more than 15% of lynx habitat on NFS lands within a LAU within a 10-year period.” The Pre-Treatment Compliance category represents the existing condition of the habitat under consideration by the Forest Service biologist. The Post-Treatment Compliance category represents the effect that the Forest Service project would have upon the existing condition (Pre-Treatment) of the land. The VEG S1 category indicates that approximately 2% of the LAU presently exists in the stand initiation stage. Post-Treatment, approximately 3% of lynx habitat would exist in the stand initiation stage. The VEG S2 category indicates that approximately 1% of the LAU exists in the regeneration stage. Post-Treatment, approximately 3% of lynx habitat would exist in the regeneration stage). [↑](#footnote-ref-169)
170. *Id*. [↑](#footnote-ref-170)
171. *Id*. [↑](#footnote-ref-171)
172. FRIENDS, 875 F.Supp.2d at 1220. [↑](#footnote-ref-172)
173. *Id*. [↑](#footnote-ref-173)
174. *Id*. [↑](#footnote-ref-174)
175. *Id*. [↑](#footnote-ref-175)
176. *See* EA at note 13, pp. 60-61, 110-13. [↑](#footnote-ref-176)
177. *See* FRIENDS, 875 F.Supp.2d at 1220. [↑](#footnote-ref-177)
178. *See* EA at note 13, p. 62. [↑](#footnote-ref-178)
179. *Id*. [↑](#footnote-ref-179)
180. *Id*. [↑](#footnote-ref-180)
181. *Id*. [↑](#footnote-ref-181)
182. *See* TE-MOAK, 608 F.3d at 603. [↑](#footnote-ref-182)
183. *See* CELP, 655 F.3d at 1008. [↑](#footnote-ref-183)
184. *See generally* EA at note 13. [↑](#footnote-ref-184)
185. FRIENDS at 1212. [↑](#footnote-ref-185)
186. Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 947 (9thCir. 2008). [↑](#footnote-ref-186)
187. 5 U.S.C. § 706(2)(A) (1966). [↑](#footnote-ref-187)
188. CELP, 655 F.3d at 1008. [↑](#footnote-ref-188)
189. *Id*. [↑](#footnote-ref-189)
190. *Id*. [↑](#footnote-ref-190)
191. *Id*. [↑](#footnote-ref-191)