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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

HIGH SIERRA HIKERS ASSOCIATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, *et al.*,

Defendants.

Case No: 3:09-cv-04621-RS

**DEFENDANTS' REPLY IN SUPPORT
OF CROSS-MOTION FOR SUMMARY
JUDGMENT**

Date: December 1, 2011
Time: 1:30 PM
Court: Courtroom 3, 17th Floor
Judge: Hon. Richard Seeborg

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1 **I. INTRODUCTION AND SUMMARY OF DEFENDANTS' POSITION**

2 The National Park Service (NPS) motion for summary judgment (MSJ) (Doc. 86) demonstrated
 3 that the 2007 General Management Plan (GMP) for Sequoia and Kings Canyon National Parks (SEKI)
 4 provides general guidance to manage lands within the two parks for many purposes, only one of which
 5 relates to stock use. The High Sierra Hikers Association (HSHA) Reply (Doc. 88) ignores many essential
 6 purposes of the GMP and asks the court to jettison the entire GMP because it does not contain a
 7 specialized "finding of necessity" regarding commercial stock use in wilderness. Regardless of how the
 8 court rules on the stock use issues in this litigation, the GMP must be retained because it provides SEKI
 9 with essential guidance on many other resources and issues of concern affecting park management.

10 Nothing in the Wilderness Act, 16 U.S.C. §§ 1133(d)(5), requires the necessity finding to be
 11 included in a programmatic planning document like the GMP, and there is no Wilderness Act violation
 12 with regard to the GMP. SEKI has commenced preparation of a Wilderness Stewardship Plan (WSP)
 13 to address a broad range of issues, including stock use, and the WSP will include a specialized finding
 14 of necessity for authorization of commercial use in wilderness. Doc. 86-2. HSHA recognizes that the
 15 WSP is the appropriate forum for comments on stock use, as it submitted a 44-page scoping comment
 16 letter on the WSP. Doc. 86-3. With respect to Commercial Use Authorizations (CUAs), the NPS advised
 17 the court that it has not issued the Wilderness Act specialized finding for annual permits or concession
 18 contract extensions. On that issue alone, the NPS concedes that it has not complied with the Wilderness
 19 Act, HSHA is entitled to summary judgment, and further briefing is required to determine any remedy.

20 The NPS does *not* agree with HSHA's contention that either the GMP or CUAs were issued in
 21 violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-32. SEKI prepared
 22 Environmental Assessments (EAs) for earlier plans for stock use, along with the Environmental Impact
 23 Statement (EIS) for the GMP and categorical exclusions issued for the CUAs in 2009, which provide
 24 sufficient NEPA analysis. The EIS for the WSP, now underway, will update earlier plans and tier from
 25 the GMP to provide additional NEPA impact analysis, including all scientific information and studies.¹

26
 27 ¹ HSHA's Reply does not mention the Organic Act claim, so the court should enter final judgment for
 28 the NPS on this count. NPS MSJ at 25. HSHA's Reply does raise contentions not presented (or only
 fleetingly mentioned) in its opening brief. HSHA now claims that the court should set aside and enjoin

II. DISCUSSION

A. The NPS is Entitled to Partial Summary Judgment on the Wilderness Act Claims

1. The GMP Does Not Violate the Wilderness Act

HSHA asserts that the GMP permits commercial stock use in SEKI and that its failure to include a necessity determination under Section 4(d)(6) violates the Wilderness Act.² Reply at 4. This claim is patently wrong because the GMP is neither a permit nor a contract. HSHA accuses the NPS of engaging in “semantics” by differentiating between the GMP’s programmatic direction regarding stock use levels and the CUAs, which are the legally operative documents that permit pack stations to operate in SEKI. This may appear as semantics to HSHA, but the distinction is critical because a commercial pack station operator who guides clients in SEKI without a valid CUA or concession contract would be subject to criminal sanction under 36 C.F.R. § 5.3.³ Because the GMP does not authorize an operator to conduct business in SEKI, it is not an implementation document and need not include a Section 4(d)(6) finding.

As the NPS explained, a specialized finding required under Section 4(d)(6) is not appropriate in a programmatic document like the GMP. NPS MSJ at 8-9. By contrast, the WSP will be an implementation level document, and the NPS has committed in the WSP to addressing site-specific, implementation-level issues related to stock use such as: day and overnight use; wilderness permitting; proper food storage; party size; campsites; meadow management; and trail maintenance. The WSP will include a Section 4(d)(6) analysis regarding commercial use in wilderness, and it also will reevaluate existing wilderness-related plans and guidance, including the 1986 Backcountry Management Plan

stock use by NPS for administrative purposes and private (non-commercial) stock use, in addition to commercial stock use. While HSHA briefly referred to these issues in its Complaint, it failed to address them in its opening brief and should be precluded from raising them in its reply. Finally, HSHA filed a Request for Judicial Notice (Doc. 90). The NPS objects to Exhibit 125, a page from a private organization website, which HSHA failed to include in its motion to augment the Administrative Record.

² HSHA asserts that the NPS must complete a “Needs Assessment.” Reply at 3:27. That is exclusively a U.S. Forest Service term, however, and the Wilderness Act does not require this nomenclature. The NPS does not intend to call its WSP determination a “Needs Assessment.”

³ “[E]ngaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited.” 36 C.F.R. § 5.3.

1 (BMP) and 1986 Stock Use and Meadow Management Plan (SUMMP). Doc. 86-2 at 2. The court
2 should enter summary judgment in favor of the NPS on HSHA's Wilderness Act claim as to the GMP.

3 **2. The NPS Does Not Allow Unnecessary Commercial Use in Wilderness**

4 Despite HSHA's assertion, the NPS did not "concede" that it allows unnecessary commercial
5 stock use in the Mt. Whitney area or unnecessary gear in violation of the Wilderness Act. Reply at 5:11
6 and 6:6. NPS clearly disputed those allegations, which lack credible evidence. NPS MSJ at 10-11.⁴
7 HSHA refers to Ex. 124 for the proposition that there are "many" trailheads leading to Mt. Whitney that
8 allow excess commercial use. But only one such trailhead, Cottonwood Lakes, is in the Mt. Whitney
9 area, and these quotas are part of the court's injunction in *Moore* and cannot be relitigated here. Ex. 125,
10 a website advertisement cited by HSHA as "proof" of quota evasion, is an unauthenticated, extra-record
11 document lacking any probative value. HSHA refers to Ex. 26, Reply at 6 n.5, a 1996 USFS email that
12 significantly pre-dates the regime under which USFS permits are now issued following this court's
13 injunction in *Moore*. That email does not support the proposition that quota evasions occur today.

14 Nor has the NPS violated the Act by allowing "unnecessary" gear to be used in wilderness.
15 HSHA relies on the court's opinion in *HSHA v. Weingardt*, 521 F.Supp. 1065, 1079 (N.D. Cal. 2007),
16 to assert that commercial stock use by able-bodied hikers to transport certain types of gear necessarily
17 violates Section 4(d)(6) of the Act. Reply at 6:3-5 and 17-19. *Weingardt* cannot fairly be read in that
18 manner, as that court reviewed a USFS "Needs Assessment," and the court's findings relate to that
19 specific document. The court stated that it was arbitrary for the Needs Assessment to "count all persons
20 with equipment too heavy or bulky to carry on foot" as in need of commercial stock. 521 F.Supp.2d at
21 1078. The court never ruled that heavy gear or drop-off trips *per se* violate the Act, as HSHA now urges.
22 In fact, the court specifically recognized that "many may need stock support to make an initial ascent."

23
24 ⁴ HSHA relies on Ex. 124, a listing of U.S. Forest Service (USFS) trailhead quotas, as proof that
25 Whitney quotas are being "circumvented." Reply at 5:17-23. These quotas derive from HSHA's earlier
26 lawsuit against the USFS. Magistrate Judge LaPorte ordered the USFS to revert to quotas established
27 in its 2001 Wilderness Plan, as modified by the court's 2008 injunction, *High Sierra Hikers Ass'n v.*
28 *Moore*, 561 F.Supp.2d 1107 (N.D. Cal. 2008) (*HSHA*). These quotas, including trails with "separate
quotas" for stock, *see* Reply at 5:19, are part of an existing court order, and HSHA cannot ask this court
to modify the 2008 injunction against the USFS, which is not a party to this case. The NPS has no
authority to modify trailhead quotas on Forest Service lands.

1 *Id.* at 1079. Thus, *Weingardt* does not say that equipment is unnecessary in all cases and must be banned,
 2 only that it should not be used to determine the “need” to justify commercial services. Notably, the
 3 injunctive relief subsequently issued in *Moore* did not require the USFS to ban the equipment at issue.
 4 Thus, HSHA has not shown that the GMP violates the Wilderness Act by failing categorically to prohibit
 5 the types of gear to which HSHA objects.

6 **3. The WSP Will Determine Whether Commercial Stock Use is Necessary**

7 Despite HSHA’s repeated objections to alleged unnecessary use around Mt. Whitney and alleged
 8 unnecessary use of “heavy gear,” the court need not reach or decide either issue at this time. HSHA and
 9 the NPS agree that further briefing on the specific elements of remedy is appropriate. Until the court
 10 receives and considers additional briefing on the requirements for injunctive relief,⁵ it would be
 11 premature to issue any decree regarding types or levels of stock use. HSHA may raise implementation
 12 concerns in the WSP process, which will evaluate day-use and overnight stock use levels, party size,
 13 wilderness permits, and whether commercial use is necessary in wilderness. Doc. 86-2. HSHA also can
 14 contest future NPS decisions if it disagrees with the alternative selected through the WSP process.

15 **B. The NPS Complied with the National Environmental Policy Act**

16 **1. The GMP Did Not Make Final Decisions Requiring Additional Analysis**

17 In its Reply, HSHA argues that the NPS made decisions that required additional analysis under
 18 NEPA. A review of the actual decision in the ROD shows, to the contrary, that this contention has no
 19 merit. As an initial matter, HSHA raised an issue in its Reply that simply does not exist, *i.e.*, that the
 20 NPS already has limited the scope of the WSP. There is no such restriction, and the WSP will address
 21 designated wilderness within SEKI (93.3% of the parks) and other areas managed as wilderness (3.5%)
 22 which together comprise 96.8% of SEKI. The WSP will reevaluate and supersede the SUMMP and BMP
 23 to address actions that affect wilderness or land managed as wilderness. Doc. 86-2.

24
 25 ⁵ An injunction is “not a matter of right, even if irreparable injury might otherwise result.” *Winter v.*
 26 *Natural Resources Defense Council*, 555 U.S. 7, 20 (2008), citing *Nken v. Holder*, 129 S. Ct. 1749, 1756
 27 (2009). To secure injunctive relief, a plaintiff must prove: (1) likely success on the merits; (2) likely
 28 irreparable harm absent relief; (3) the balance of hardships in its favor; and (4) the public interest favoring
 an injunction. *Id.*

1 The NPS decision in the ROD and GMP was a programmatic decision to continue stock use up
 2 to current levels and under current policies, which include the SUMMP and BMP. GMP 20356. The
 3 NPS repeatedly stated that stock-related issues, including the appropriate level of stock use in the parks,
 4 will be addressed further in the implementation level WSP. The ROD explicitly states that the GMP is
 5 a “programmatic plan” that “provides conceptual guidance for park managers” and that addresses
 6 facilities “that the parks may wish to consider at some point in the future.” GMP 21661. The ROD,
 7 however, does not authorize “new structures nor any new commercial activities,” and future site-specific
 8 authorization of facilities must comply with NEPA. *Id.* Because the GMP did not make site-specific
 9 decision, the analysis in the GMP is more than adequate.

10 HSHA asserts that the GMP made decisions that constrain future choices by committing NPS to
 11 the *expansion* of stock use at five specific locations. Reply at 8:16-9:1. HSHA also contends that the
 12 “NPS has long promised that any site-specific NEPA document will not revisit the GMP’s decision to
 13 construct new stock facilities: it will be limited to deciding the best location and specific plan for such
 14 facilities.” Reply at 9:9-24. To the contrary, the ROD states that the NPS will consider “an option of
 15 having no pack station in the area” with regard to the Wolverton Pack Station.⁶ HSHA cites Exhibits
 16 100-103, which all date from before the ROD and cannot contravene the language of the later decision
 17 document, which states that the WSP will consider an option of not replacing Wolverton.

18 Any allegation that future site-specific decisions “will be constrained” by the GMP with regard
 19 to constructing new stock facilities (Reply at 10:27-11:4) likewise is flatly wrong. First, the GMP and
 20 ROD expressly left open any decision about future stock facilities. Second, the portion of the GMP that
 21 HSHA quoted actually states that the GMP “will directly affect the content,” but that does not “constrain”

22
 23 ⁶ The GMP statement on the Wolverton Pack Station that HSHA cites actually states:

24 Examine four locations (Dorst/Halstead/Cabin Creek, Wuksachi, Lodgepole, and Wolverton) to
 25 find a single suitable site for a commercial pack station/day ride operation to replace the
 26 Wolverton pack station. Use the following criteria: convenience for visitors and operators; no
 27 major, adverse resource impacts; and reasonable development/operation costs for the government
 28 and the operator. Conduct an economic/ business feasibility analysis of operations. If
economically feasible, prepare a site analysis and physical plan for the most suitable site.
 GMP 20400; 20402, 20406, 20410) (underlining added). This language unquestionably is precatory and
 cannot be construed as a final decision, authorization, or approval. *See Bennett v. Spear*, 520 U.S. 154,
 177-78 (1997) (outlining two requirements for agency action to be considered “final”).

1 a decision that remains subject to further review, analysis, and public input. The ROD, as the operative
 2 document, states that the “GMP does not address site specific design and location attributes for such
 3 facilities [stock support] With the exception of the Wolverton Pack Station, all of the actions
 4 identified by HSHA will be further analyzed in the EIS accompanying the [WSP] the NPS disputes
 5 the claim by the HSHA that this will result in an increase in stock use in the parks.” GMP 21677.

6 The GMP does not obligate the NPS to perform any stock-related project listed by HSHA. *See*
 7 *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004) (BLM statement “about what it plans
 8 to do, at some point, provided it has the funds and there are not more pressing priorities, cannot be
 9 plucked out of context and made a basis for suit under § 706(1)”). The Supreme Court rejected the idea
 10 that monitoring objectives in a land use plan could establish binding commitments that were enforceable
 11 under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06. *Id.* The Court found that “allowing
 12 general enforcement of plan terms would lead to pervasive interference with BLM's own ordering of
 13 priorities.” *Id.* Projects such as possible trailhead improvements in Ash Mountain/Foothills may never
 14 materialize beyond discussions in the GMP and WSP, and the ROD states that “all of the actions
 15 identified by HSHA will be further analyzed in the EIS that will accompany the [WSP].” GMP 21677.⁷

16 *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 (9th Cir. 2003) (*Friends*), supports the NPS
 17 position because the GMP references cited by HSHA qualify as management “visions,” not binding site-
 18 specific actions. *Id.* at 800-01 (“NEPA requires a full evaluation of site-specific impacts only when a
 19 “critical decision” has been made to act on site development -- i.e., when “the agency proposes to make
 20 an irreversible and irretrievable commitment of the availability of resources to a project at a particular
 21 site.”) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)). The WSP will determine which
 22 areas are suitable for stock use; the GMP only “constrains” the NPS to the extent that stock use cannot
 23 exceed 2007 use levels and new commercial services cannot be authorized.⁸

24
 25 ⁷ HSHA is mistaken that four new locations are proposed for Mineral King. The pack station has been
 26 closed since 2003 (same outfitter as Wolverton), and it would be difficult to find a suitable location in
 the Mineral King Basin. The Wolverton EA process was curtailed, and issues potential pack stations in
 Wolverton and Mineral King will be addressed by implementation level plans.

27 ⁸ HSHA’s attempt to analogize specific stock uses mentioned in the GMP to the USFS programmatic
 28 document in *Block* is unpersuasive. The 1982 opinion in *Block* must be read in light of *Friends*, 348 F.3d
 at 800, and *Block* was based on 1973 CEQ guidance that was superseded by the current regulations. *See*

2. The EIS for the GMP Adequately Considered Reasonable Alternatives

According to HSHA, the GMP is deficient because it did not provide a detailed assessment of two specific alternatives, banning grazing throughout SEKI and banning stock use in sensitive high-elevation areas. Reply at 13:2-3. HSHA contends that the NPS erred in deferring analysis of these proposals to the WSP process and submits that the “GMP’s decision to permit stock use and grazing park-wide dramatically affects the park and its users as a whole today—and on an ongoing basis.” Reply at 15:3-6. This contention misses the mark. An agency has wide discretion in defining the purpose and scope of its environmental review. *Westlands Water Dist. v. United States Dept. of the Interior*, 376 F.3d 853, 871 (9th Cir. 2004). This is especially so for a GMP involving a programmatic-level EIS. *Friends*, 348 F.3d at 800-01. Here, the GMP was prepared to “provide management direction to establish and achieve a vision” for the parks, and the alternatives were based on management prescriptions to achieve desired future conditions, applied to geographic areas or zones. GMP 20243-20244. The GMP described each alternative according to its broad impacts assessed across large geographic zones: Parkwide, Wild and Scenic Rivers; Backcountry; Kings Canyon National Park (Cedar Grove, Floor of Kings Canyon, Grant Grove); and Sequoia National Park (Dorst/Halstead Meadow/Cabin Creek, Wuksachi, Lodgepole, Wolverton, Giant Forest, Crystal Cave, Ash Mountain/Foothills, Mineral King, Dillonwood). GMP 20247-20252. The GMP and EIS did not break down alternatives into the discrete topics raised by HSHA, including banning grazing park-wide or stock use at different elevation levels because those stock-related issues, while important, are too detailed for treatment in a programmatic plan and would have required reconfiguring the GMP to examine issues at the level of individual meadows. The WSP planning effort will evaluate these issues with regard to specific meadows. Tiering of this nature is encouraged under NEPA, the CEQ regulations, 40 C.F.R. § 1508.28, and Ninth Circuit case precedent.⁹

Wyo. v. U.S. Dep’t of Agric., 2011 WL 5022755, * 32, 33 & n.34 (10th Cir. Oct. 21, 2011). *Block* is instructive for the proposition that, while NEPA requires an agency to evaluate the consequences of its action at an early stage in the project’s planning process, that requirement is tempered by (1) “the statutory command that [a reviewing court] focus upon a proposal’s parameters as the agency defines them,” and (2) “the preference to defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project’s probable environmental consequences.” *Block*, 690 F.2d at 761. ⁹ The cases HSHA cites, Reply at 14, stand for the unremarkable proposition that an agency cannot unduly restrict alternatives, but nothing in any case cited compels an agency to alter NEPA planning to address impacts at a site-specific level when that exceeds the scope of the proposed general plan.

1 HSHA states that the GMP already prescribes certain stock activities, including a decision to
 2 retain the stock corral at Grant Grove (Ex. 2 at 20394). Reply at 15. To the contrary, the GMP did not
 3 “prescribe” stock activities, although it did retain the existing stock corral at Grant Grove. GMP 20394.
 4 That facility is operated under a concession contract to provide saddle stock tours (not packstock use),
 5 but completely in the frontcountry portion of Kings Canyon National Park within the Grant Grove
 6 developed area. This concession contract has been authorized under yearly extensions since 2001. CUA
 7 3956, CUA 3967-3975. Before making any decision on whether a long-term (ten-year) concession
 8 contract is appropriate, the NPS will conduct an environmental analysis under NEPA.

9 3. The EIS Adequately Assessed All Environmental Impacts

10 Alleging that the EIS did not sufficiently assess environmental impacts of the general guidance
 11 for SEKI adopted in the GMP, HSHA again contends, mistakenly, that “NPS made a critical decision to
 12 allow and expand a variety of stock use.” Reply at 16:12-15.¹⁰ As shown above, the GMP made no such
 13 decision. Accordingly, there is no requirement under NEPA, CEQ regulations, or cases cited by HSHA
 14 for the GMP EIS to provide the detailed level of assessment of stock use impacts that HSHA demands.¹¹
 15 The EIS being prepared for the WSP will address those issues in far greater detail through a properly
 16 tiered NEPA process. HSHA next repeats five specific objections to the contents of the EIS, none of
 17 which has merit for the reasons set out below.

18
 19
 20 ¹⁰ Contrary to HSHA’s repeated but misguided claim that NPS “concedes” various points, the NPS
 21 clearly described the CEQ regulation that an agency discuss available mitigation measures. NPS MSJ
 22 at 14-17; *see* 40 C.F.R. § 1502.16; *Robertson v. Methow Valley Citizens’ Council*, 490 U.S. 332, 351
 23 (1989) (*Robertson*); *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps*
of Engineers, 524 F.3d 938, 955-956 (9th Cir. 2008). The NPS “conceded” no error, but cited examples
 of appropriate mitigation in the EIS and showed how those measures can avoid or minimize impacts.

24 ¹¹ HSHA cites 40 C.F.R. § 1502.24, asserting that the EIS is flawed because it did not have “*explicit*
 25 *reference by footnote*” to scientific studies relied on in preparing the EIS. Reply at 17:4-8 (italics by
 26 HSHA). This is simply attempting to “fly-speck” an EIS, which the courts consistently reject. *Churchill*
 27 *Co. v. Norton*, 276 F.3d 1060, 1081-82 (9th Cir. 2001), *amended*, 282 F.3d 1055 (2002). HSHA cites no
 28 case – and defendants are not aware of any – where a court found an EIS flawed because it did not
 include footnotes to scientific studies supporting the EIS. The regulation is concerned with “professional
 integrity, including scientific integrity, of the discussions and analyses” in an EIS. The NPS readily
 satisfied its NEPA obligation by incorporating relevant scientific research into the EIS.

1 **a. The EIS Discussion of Mitigation Measures is More Than Sufficient**

2 HSHA notes that the EIS does not contain a “detailed discussion” of mitigation measures in the
 3 GMP. Reply at 17:15-16. The level of detail required, however, reflects the scope of the NEPA
 4 document at issue. “The purpose of a [GMP] is to provide management direction to establish and achieve
 5 a vision for what [SEKI] should be, including desired future conditions for natural and cultural resources,
 6 as well as for visitor experiences.” GMP 20243. For a programmatic EIS, mitigation measures may be
 7 included in the description of alternatives and in the environmental consequences discussion. GMP
 8 20942, citing 40 C.F.R. §§ 1502.14(g), 1502.16(h). The NPS has done exactly that here. Recognizing
 9 that pack stock can impact park resources, SEKI “managers have employed actions . . . to monitor and
 10 mitigate these impacts. Mitigation efforts include controlling access based on soil moisture conditions,
 11 restricting use numbers, timing use and closing meadows to grazing, improving trails (maintenance,
 12 rerouting away from moist areas, and hardening), requesting use of weed-free feed, and continuing
 13 ongoing education efforts to encourage minimum impact practices.” GMP 20928-20929. The ensuing
 14 EIS discussion explains how results from residual biomass monitoring are used in conjunction with other
 15 monitoring tools to evaluate and assess meadow conditions and make timely decisions on whether to
 16 close areas or institute restrictions. GMP 20929. For a more detailed discussion of monitoring and
 17 mitigation methods, the GMP points to the SUMMP and associated EA. GMP 20668-20669. The 1999
 18 Resources Management Plan supplemented the SUMMP and provided additional guidance to achieve
 19 desired future conditions in park meadows. GMP 38173-38174. Unlike an EIS for a site-specific
 20 project, which requires a more detailed discussion of mitigation, *Robertson*, 390 U.S. at 351-52, the EIS
 21 for the GMP appropriately focuses more broadly on impacts and mitigation, which, as clearly stated in
 22 the GMP, will be explored in more detail in the implementation level WSP.

23 The NPS explained how the 2003 Management Directive (MD) 9 provides a clearly articulated
 24 and flexible process for managers to adjust meadow opening dates based on field conditions, grant
 25 exceptions to length of stay limits, and close wilderness meadows mid-season, among other measures.
 26 GMP 36285-36286. MD 38 also demonstrates that SEKI had an active weed prevention program in place
 27 when the ROD was signed. GMP 36403-36418. These are the types of adaptive management techniques
 28 that reflect a science-based approach to protecting park resources, notwithstanding HSHA’s incessant

1 effort to belittle the process as reactive.¹² This system was in effect when the NPS prepared the EIS and
 2 adopted the GMP. HSHA's litany of site-specific objections, Reply at 18-19, reinforces the inescapable
 3 fact that these concerns are appropriate for analysis in a properly tailored plan that addresses stock use
 4 issues, which is precisely what the WSP will provide.

5 **b. The EIS Adequately Discusses Water Resource Impacts**

6 HSHA erroneously submits that the "NPS does not contest that it failed to discuss measures to
 7 mitigate the impacts of stock use on water resources." Reply at 20:2-3. That statement ignores the entire
 8 discussion in the NPS MSJ at 17-19, which identified the 1989 SEKI Water Resources Management Plan,
 9 GMP 28440-28463, and 2005 Water Resources Information and Issues Overview Report, GMP 31162-
 10 31323, along with a detailed response to studies by Dr. Robert Derlet. The EIS considered the Derlet
 11 studies, responding to comments regarding "water impacts of stock use" by noting the following points:
 12 (1) SEKI managers share the "concern that visitor and management activities do not contaminate or
 13 otherwise impair pristine park waters;" (2) SEKI receives occasional "reports of stock discharges into
 14 streams and lakes, but water quality is excellent when compared to the standards" in the Central Valley
 15 Regional Water Quality Control Board plan; (3) earlier reports indicated that stock may cause impacts
 16 to water quality, "but the impact was not detectable;" (4) recent studies including Dr. Derlet's 2004 report
 17 "failed to show any detectable correlation between increased water-borne pathogens and high-use stock
 18 areas," (5) water quality monitoring will be included in a new program that includes SEKI, and (6)
 19 concerns over stock and soil disturbance "will be thoroughly analyzed during development" of the WSP.
 20 GMP 20929. HSHA again refers to more recent Derlet studies, but the NPS addressed them in detail.
 21 NPS MSJ at 18. In any case, NEPA does not require an EIS to include the most recent or "best available
 22 scientific evidence." *Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (*en banc*), citing
 23 *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985). Even so, the 2006
 24 Derlet study, noting that areas of stock use are "at risk" of contamination, does not show that SEKI acted

25
 26 ¹² HSHA's Reply cites Ex. 105, but that end-of season report incorrectly characterized the basis for
 27 closing selected lake basins along the John Muir Trail. The statement did not refer specifically to the
 28 Rae Lakes Basin, which SEKI closed to grazing by pack and saddle stock in 1961 (allowing limited use
 by walking parties with burros or mules) and closed to all grazing in 1986. Those actions preceded MD
 9 and clearly did not follow that 2003 document, contrary to HSHA's claim.

1 arbitrarily and capriciously in issuing the GMP, while committing to examine water quality studies in
2 greater detail in the WSP, the appropriate stage for this level of analysis.

3 **c. The EIS Adequately Considered Impacts to Native Animal Species**

4 HSHA repeats the misguided charge that the U.S. Fish and Wildlife Service (FWS) “found that
5 the GMP does not provide sufficient information to evaluate impacts” on protected wildlife species.
6 Reply at 20:18-24. To the contrary, as the NPS explained, that comment pertained to the draft GMP in
7 2004, but subsequent consultations between NPS and FWS under section 7 of the Endangered Species
8 Act (ESA), 16 U.S.C. § 1536, completed in November 2004, resulted in an agreement that SEKI will
9 complete site-specific data collection at the project or implementation plan level to determine if projects
10 would result in an adverse effect to listed species pursuant to ESA § 7. GMP 20637. Tiered consultation
11 complies with NPS obligations under the ESA as well as NEPA. GMP 20915-16.

12 HSHA asserts that the GMP did not provide a sufficiently detailed mitigation plan for the
13 endangered Sierra Nevada bighorn sheep. Reply at 20:25-26. This contention lacks merit. First, NEPA
14 does not require a programmatic planning document like the GMP to include specific mitigation
15 measures for each listed species. *Friends*, 348 F.3d at 800-801. Second, the NPS determined that the
16 GMP preferred alternative would not result in adverse effects to Sierra Nevada bighorn sheep, so there
17 was no need to develop a specific monitoring and mitigation plan. GMP 9152. Third, the NPS wildlife
18 biologist determined that the primary threats to bighorn sheep in and near SEKI result not from the
19 selected alternative, but from mountain lion predation, production of less-fit lambs from wintering in
20 high elevations, losses to avalanches, and domestic sheep presence in USFS lands. GMP 9152. Fourth,
21 sheep populations appear to be expanding within SEKI. GMP 20915. Fifth, SEKI managers can enact
22 controls on recreational pursuits and take other steps at any time if necessary to protect the bighorn sheep
23 populations, per NPS Management Policies (2006). GMP 36181. For example, if recreational use were
24 to increase in a manner that could disturb sheep, then site-specific restrictions would be imposed. GMP
25 20643. Finally, pursuant to the agreement with FWS in the GMP, the NPS is developing a research plan
26 to study bighorn sheep. One aspect of the study is to determine if recreational activities (including
27 backpacking and stock use) adversely affect bighorn sheep within SEKI. That research will help to
28 inform alternatives in the WSP.

1 HSHA reiterates its claim that the EIS did not provide sufficient detail regarding impacts of the
 2 GMP on the mountain yellow-legged frog and the Yosemite toad, noting that the Ninth Circuit cited
 3 stock use as a contributing factor for declines in frog and toad populations on USFS lands. Reply at 21,
 4 citing *HSHA v. Blackwell*, 390 F.3d 630, 642 n.5 (9th Cir. 2004). The GMP evaluated effects to those
 5 species and determined that the frog and toad would not be adversely affected in SEKI from the selected
 6 alternative. GMP 20643.¹³ HSHA (Reply at 21:26-28) discounts NPS's reference in the GMP to a study
 7 from 2000 that found that the GMP alternative "would not have much impact on the frog," but HSHA's
 8 comment makes no sense relative to stock use. That reference to introduction of a new species is non-
 9 native trout, widely recognized as the primary reason for decline of this species, GMP 9153, but that
 10 threat is unrelated to stock use. The GMP's selected alternative would not reestablish the fish stocking
 11 program, which already had been terminated, and ongoing programs to restore frog populations continue.

12 Finally, HSHA alleges (Reply at 21:16-24) that the EIS did not analyze adequately the potential
 13 impact of the chytrid fungus, which can destroy frog populations in infected areas and submits that stock
 14 hoofs could carry the fungus into the area. The document cited, however, GMP SAR 6408-6409, was
 15 not from a scientist or NPS biologist, but a field ranger with no scientific basis to make this statement.
 16 Biologists recognize numerous vectors for transmitting chytrid fungus, but the research is not complete,
 17 and there is no extant research to support speculation that stock act as a vector for chytrid fungus. None
 18 of HSHA's efforts to derail the EIS based on impacts to sensitive species has merit.

19 **d. The NPS Reasonably Addressed the Issue of Invasive Weeds**

20 NPS demonstrated that SEKI examined potential impacts of non-native weeds and took steps to
 21 limit those impacts. NPS MSJ at 22-23. Ignoring the fact that the documents on which it relied (HSHA
 22 Ex. 70-72) have little or no bearing on SEKI's ecosystems, HSHA persists in erroneously claiming that
 23 NPS did little more than identify potential mitigation measures without proving that they were effective.
 24 Reply at 22. To the contrary, the EIS disclosed that grazing by stock in wilderness meadows "provides

25 ¹³ HSHA errs in suggesting that the NPS has not identified or taken appropriate mitigation to protect
 26 amphibian species. SEKI closed a portion of the Sixty Lakes Basin to stock use in 2001 as a known frog
 27 breeding area. This shows successful stock use management, as the unique characteristics of the Sixty
 28 Lakes Basin support one of the parks' largest remaining populations of frog, and ongoing research
 identified the area as an important breeding site. Evidence indicated that trampling could impact a
 specific egg-laying habitat, and the NPS closed the area to stock use. That closure continues today.

1 a potential vector for the introduction of exotic plant species into new areas,” GMP 20508, while pointing
 2 out that the spread of exotic species from seeds affecting local plant populations would impact only very
 3 limited areas of SEKI, GMP 20603, and that impacts from the Preferred Alternative “would likely to be
 4 negligible to minor. . . .” GMP 20604. To address the concern, the EIS identified “removing invasive
 5 plants” as a management prescription to mitigate this impact. GMP 20321.¹⁴ While the NPS continues
 6 to train staff and improve mitigation efforts, nothing in NEPA or CEQ regulations requires an agency
 7 to mitigate all adverse impacts, *see Robertson, supra*, and the candid disclosure of the concern presented
 8 by invasive plants, along with NPS’s active program to educate the public and work aggressively to
 9 remove such plants, satisfies its NEPA obligation.

10 **e. There is No NEPA Violation With Regard to Aesthetic Impacts**

11 The NPS explained that one goal of the Wilderness Act is to provide opportunities for solitude
 12 and unconfined recreation. NPS MSJ at 23. Aesthetic enjoyment, however, inherently is subjective, with
 13 people differing in their personal opinions as to what constitutes solitude in a primitive wilderness area,
 14 as the NPS explained in the GMP, responding to comments both from HSHA members who exclusively
 15 prefer hiking opportunities, GMP 16983-16993, and others who favor exploring remote areas by
 16 packstock. GMP 20960-20985. HSHA complains that only limited trails in SEKI are permanently
 17 closed to stock, Reply at 23:5-9, but considerations regarding access and prohibitions for specific trail
 18 use are precisely the type of issue that is appropriate for analysis and decision in the WSP process.
 19 HSHA objects that the GMP’s recognition of adverse impacts of stock use in the EIS is too “conclusory,”
 20 but NPS’s clear recognition that continuing stock use would cause “minor, adverse, long-term impacts
 21 to some backcountry hikers,” GMP 20762, is the appropriate general impact assessment that belongs in
 22 a programmatic plan and EIS. HSHA’s reliance on *Robertson*, 490 U.S. at 350-51, to demand a more

23 ¹⁴ HSHA mistakenly claims that NPS presented no evidence that mitigation measures were effective.
 24 Reply at 22:10. The paper on Velvet Grass in the Kern Canyon that NPS cited, CUA 2267-2268, clearly
 25 explained the threat from this invasive plant and noted that the grass was removed in 2005 in Upper
 26 Funston Meadow. That document also shows that SEKI commenced a coordinated effort in 2006-2007
 27 to control velvet grass through hand pulling, along with treating patches with a proven safe herbicide in
 28 an effort “to stop the spread of this invasive weed while controlling the established populations.” CUA
 2267. The NPS also announced that, because SEKI’s wilderness “is one of the most pristine ‘weedless’
 wildlands in California,” SEKI managers adopted “special grazing restrictions” in 2008 to limit the
 potential transport of seeds through stock. *Id.*

1 detailed discussion of mitigation measures in the GMP is misplaced. Unlike the GMP, which the NPS
 2 issued to provide guidance to SEKI managers on a general and programmatic scale, *Robertson* involved
 3 a site-specific development project where the USFS made a “decision to issue a special use permit
 4 authorizing the development of a major destination Alpine ski resort” in the North Cascade Mountains
 5 in Washington State. *Id.* at 337. The Supreme Court unanimously held that NEPA does not require
 6 “that a complete mitigation plan be actually formulated and adopted,” *id.* at 352, and the Ninth Circuit
 7 subsequently made clear that the level of detail required in an EIS depends on the scope of the plan or
 8 decision at issue, with less detail required for a programmatic EIS. *Friends*, 348 F.3d at 800-01. Nothing
 9 in NEPA requires the detailed mitigation plan in the GMP that HSHA suggests.¹⁵ The EIS for the GMP
 10 made this clear, stating that the “issue of stock use in high elevation areas of these parks will be
 11 thoroughly considered and analyzed in the future [WSP]. . . . Management prescriptions allow stock use
 12 in all backcountry zones, but not in every location. . . . The establishment of stock-free areas and foot
 13 travel-only trails is an issue of detail that will be analyzed in a future [WSP].” GMP 20927.

14 4. NPS Complied with NEPA in Issuing the Annual CUA Permits

15 HSHA ignores NPS’s demonstration that NEPA compliance for the CUAs has three components:
 16 the EAs for the SUMMP and BMP; the EIS for the GMP; and the categorical exclusions (CE) in 2009.
 17 HSHA merely restates its unfounded allegations that the EAs are “outdated,” the EIS is too general, and
 18 the CE is not available for the CUAs. This attack is devoid of merit. First, the fact that the SUMMP and
 19 BMP have been in existence for many years does not undermine the validity of their analysis or
 20 compliance with NEPA. HSHA failed to present any substantive basis to set aside those EAs.¹⁶

21 ¹⁵ HSHA takes issue with NPS’s demonstration that stock use declined significantly since 1989,
 22 suggesting that stock use in 2006 was lower only because it was a wet year. Reply at 23 n.14. This latest
 23 attempt to cherry-pick one set of numbers does not undermine the evidence showing notable overall
 24 declines in stock use over the past 20 years, regardless of weather and ground conditions. Overall annual
 25 stock use from 1987-1991 averaged 12,097 stock-use nights, whereas use from 2002-2006 (the last five
 years before the GMP and ROD were signed) averaged 7,574 stock-use nights, a drop of more than 40
 percent. GMP 38880, GMP 38930.

26 ¹⁶ HSHA again refers to a court ruling in an earlier lawsuit against SEKI, *High Sierra Hikers Ass’n v.*
 27 *Kennedy*, 1995 WL 382369 (N.D. Cal. Jun. 14, 1995), *vacated*, 1996 WL 421435 (N.D. Cal. Apr. 5,
 28 1996), without conceding that the court’s vacated order cannot be cited for any purpose, even “for
 uncontested factual background,” as HSHA now disingenuously claims.

Statements by SEKI staff that these plans need to be updated, alluded to by HSHA, do not undermine NEPA compliance for the plans, but instead demonstrate the goal to produce a new WSP in light of the programmatic direction of the GMP. *See* Doc. 86-2 at 2 (the “WSP will reevaluate existing wilderness-related plans and guidance, such as the 1986 [BMP] and the 1986 [SUMMP]”). Second, contrary to HSHA’s claim, the EIS for the GMP quite clearly did assess stock use impacts under the programmatic direction in the GMP and based on stock use as analyzed and managed pursuant to the SUMMP and BMP.¹⁷ Finally, the CEs issued with the 2009 CUAs expressly fall within NPS’s process for NEPA compliance because the CUAs involved “no construction or potential for new environmental impact” that was not already reviewed under the EAs or the EIS. HSHA has failed to demonstrate any violation of NEPA with regard to the Packer Permits or, for that matter, the GMP.

III. CONCLUSION

The court should grant the defendants’ motion for summary judgment with respect to (1) all NEPA claims, (2) the Wilderness Act claim for the GMP, and (3) the NPS Organic Act claim. The court should grant HSHA’s motion for summary judgment, in part, on the Wilderness Act claim for the CUAs, but deny HSHA’s motion in all other respects, with briefing to follow on the appropriate remedy for the Wilderness Act CUA claim.

Dated: November 17, 2011

Respectfully submitted,

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¹⁷ HSHA’s only support for its allegation that the NPS “admitted” that the GMP did not assess stock use is a reference to a July 2006 memo from the SEKI Superintendent that actually states that the upcoming WSP will “address grazing, monitoring and capacity-related issues for stock,” not that the GMP failed to discuss or assess stock use. *See* HSHA Ex. 40 at 3268.

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2011, I electronically filed the "Defendants' Reply in Support of Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment" with the Clerk of the Court using the ECF system, which automatically will send email notification to the following attorneys of record:

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