

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MARKETA ITH,

Plaintiff,

vs.

UNITED STATES FOREST SERVICE,

Defendant.

Case No. 3:07-cv-0150-RRB

ORDER REGARDING
CROSS-MOTIONS FOR
SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is Plaintiff Marketa Ith ("Plaintiff") with a Motion for Summary Judgment at **Docket 26**, with regard to her claims under the Appeals Reform Act ("ARA"), 16 U.S.C. § 1612 and the National Environmental Policy Act ("NEPA"), 40 C.F.R. § 1502.9. Defendant United States Forest Service ("Defendant") opposes at **Docket 30** with its own Cross Motion for Summary Judgment.

II. BACKGROUND

Glen Ith, Plaintiff's deceased husband who initially filed this action, was a Forest Service wildlife biologist working in the Tongass National Forest, which is located in Southeast Alaska. The Scott Peak Project Area is located on Kupreanof Island

in the Tongass National Forest. The Forest Service identified the area for a potential logging project in 2000. A notice of intent to prepare an Environmental Impact Statement ("EIS") was published on November 29, 2002.

In his job as a Forest Service biologist, Mr. Ith was asked by the Defendant to prepare a wildlife report for the Scott Peak timber sale. He completed his report on May 2, 2005. Mr. Ith's report concluded that the Scott Peak project would adversely affect important habitat for deer and other wildlife species. Mr. Ith was later removed from the agency's interdisciplinary team working on the Scott Peak project.

A separate Wildlife Resource Report was completed on September 21, 2005, by a different Forest Service wildlife biologist, Kris Rutledge. That report states:

References, analysis, and data in this document were compiled by two Wildlife Biologists. The first, Glen Ith was the Resource Specialist originally assigned to the Scott Peak Project. He worked on the project until early May 2005 and compiled much of the draft information at that time the assignment was given to Kris Rutledge.¹

Ms. Rutledge acknowledged that in producing her version of the report, she used "pertinent information provided in a draft

¹ September 21, 2005 Wildlife Resource Report, Scott Peak Administrative Record ("AR") 504, at 5.

Wildlife Report by Glen Ith to help develop my analyses.”² On November 25, 2005, the Forest Service completed the final EIS and signed the initial Record of Decision (“ROD”) for the Scott Peak timber sale.³

On March 2, 2006, Mr. Ith filed an administrative appeal of the Scott Peak sale, alleging that the Forest Service had violated the NEPA by failing to disclose or address credible science that contradicts its proposed course of action, failing to adequately analyze the cumulative impacts of the Scott Peak project, and failing to sufficiently analyze adverse impacts to deer, marten, goshawk, and old-growth habitat.⁴ Particularly, Mr. Ith challenged the Forest Service’s failure to disclose or respond to the data in his report, stating:

As a Forest Service biologist, I was asked to prepare a wildlife report for the Scott Peak project, and this report explains in detail how the project will adversely impact important habitat for deer and other wildlife species. The Forest Service, however, apparently did not like the conclusions of this report and therefore ignored and failed to disclose key findings in the report during the NEPA process for the Scott Peak project.⁵

² AR 635.

³ ROD Signature Pages, AR 578.

⁴ Ith Appeal, AR 689.

⁵ AR 689 at 3.

An Informal Appeal Disposition meeting was held on March 15, 2006. The first issue addressed in the appeal was the "[f]ailure to disclose credible science, in particular failure to use Glen's wildlife resource report and its conclusions."⁶ During that meeting, Forrest Cole, the Forest Supervisor who signed the Scott Peak Record of Decision ("ROD"), stated "that he had not read Glen's wildlife resource report that was referenced in the appeal, so he doesn't know exactly what's in it."⁷ The notes conclude: "Forrest ended the meeting by saying that he has reviewed the EIS, read the appeal and listened carefully to Glen's concerns. Forrest said that he has not read or heard any new information that would make him reconsider his decision with respect to the issues, with the exception of Issue B [cumulative effects analysis]."⁸

In his April 14, 2006, ruling on the appeal, the Appeals Deciding Officer ("ADO") ruled against Mr. Ith on most of the issues, but determined that the EIS ought to be revised to discuss the cumulative effects of potential road construction in the project area, an issue that Mr. Ith had raised in his appeal.⁹ On

⁶ March 15, 2006, Informal Appeal Disposition Meeting Notes, AR 668, at 1.

⁷ AR 668 at 3.

⁸ AR 668 at 8.

⁹ AR 908 at 13-14.

September 20, 2006, the Forest Service issued a new Record of Decision for the Scott Peak timber sale which addressed the cumulative effects issue, relying on the same 2005 EIS as the initial Record of Decision.¹⁰ The Forest Service again approved the timber sale, although with some adjustments.

Mr. Ith appealed this second decision on January 21, 2007. As with his earlier appeal, Mr. Ith argued that the Forest Service's failure to disclose or address the findings and conclusions of his May 2005 draft wildlife report violated NEPA. In this second appeal, Mr. Ith specifically requested the following relief:

The Draft Scott Peak Timber Harvest Wildlife and Resource Report (Ith 2005), dated 5/02/05 is being sent to the Regional Forester. Please consider important conclusions made in the report that were later eliminated in a future version of the resource report placed in the planning record. Justify reasons as to why key conclusions are not pertinent to the current Scott Peak EIS.¹¹

The Appeals Reviewing Officer ("ARO") for the second appeal concluded that Mr. Ith had not complied with the appeals regulations and that his January 21, 2007, appeal would not be

¹⁰ AR 735.

¹¹ AR 930 at 5-6.

reviewed by the agency.¹² Recommendation from Appeals Reviewing Officer, AR 941. Specifically, the ARO determined that Mr. Ith's use of the wildlife report that he had prepared for the Scott Peak project within his administrative appeal was "inappropriate," and that Mr. Ith had not complied with 36 C.F.R. § 215.13(d).³¹³

The Appeals Deciding Officer ("ADO") agreed that Mr. Ith "used information that was not available to the general public, in violation of 36 C.F.R. 215.13(d)."¹⁴ The ADO also based the decision not to review Ith's second appeal on "the ethics rules at 5 C.F.R. 2635.101(14) [which] require an employee to avoid the appearance of violating the ethics rules."¹⁵

Mr. Ith then filed the present action, alleging that Defendant had violated the ARA by rejecting his appeal, and that Defendant violated the NEPA when it "failed to disclose, address, or respond to the findings and conclusions contained in Mr. Ith's draft report, because the report constitutes responsible, opposing scientific opinion which must be considered pursuant to NEPA's

¹² Recommendation from Appeals Reviewing Officer, AR 941.

¹³ AR 941 at 10.

¹⁴ Letter from Appeals Deciding Officer, AR 943.

¹⁵ Id.

requirements.”¹⁶ Mr. Ith was replaced by his wife as Plaintiff in this action upon his untimely death.

III. STANDARDS OF REVIEW

A. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.¹⁷ The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.¹⁸ Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.¹⁹ All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.²⁰ However, the nonmoving party may not rest upon mere allegations or denials, but

¹⁶ Docket 26 at 2.

¹⁷ Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

¹⁸ Id. at 323-325.

¹⁹ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

²⁰ Id. at 255.

must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.²¹

B. Judicial Review of Agency Action

The Court's review of Defendant's compliance with the Appeals Reform Act (ARA) and the National Environmental Policy Act (NEPA) arises under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. "A district court reviewing an agency decision pursuant to § 706 is not required to resolve any facts; rather, the court 'is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'"²² Therefore, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency [based on the record before it at the time] could reasonably have found the facts [and reached the decision] that it did."²³

²¹ Id. at 248-49.

²² Lands Council, Idaho Sporting Cong. Inc. v. Vaught, 198 F. Supp. 2d 1211, 1221 (E.D. Wash. 2002), quoting Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985).

²³ Id.

The Ninth Circuit has held that "the standard of review under 5 U.S.C. § 706(2) presumes the agency action to be valid."²⁴ The Court's review under the APA is limited to determining whether, as a matter of law, the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁵

When the Forest Service acts pursuant to the authority delegated to it by Congress under the Appeals Reform Act, 16 U.S.C. § 1612, its decisions are "entitled to deference" and "must be upheld 'unless they are arbitrary, capricious, or manifestly contrary to statute.'"²⁶

For review of an agency decision under the NEPA, rather than applying the "arbitrary and capricious standard," the Court must apply a "'rule of reason that asks whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'"²⁷ Under this standard, once

²⁴ Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1441 (9th Cir. 1990).

²⁵ Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 376 (1989).

²⁶ Earth Island Institute v. Pengilly, 376 F.Supp.2d 994 E.D. Cal., 2005, quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844(1984).

²⁷ Oregon Natural Resources Council v. Lowe, 109 F.3d 521, (continued...)

a Court is "'satisfied that a proposing agency has taken a hard look at a decision's environmental consequences, the review is at an end.'"²⁸

IV. DISCUSSION

As both parties' motions for summary judgment are properly based on the administrative record before the Court, there is no genuine issue of material fact, and summary judgment on the legal issues is appropriate. The Court must separately analyze whether Defendant's actions were permitted under the ARA and the NEPA.

A. Defendant's Actions Did Not Violate the ARA

The ARA, 16 U.S.C. § 1612, requires that the Secretary of Agriculture "establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs."²⁹ Pursuant to this authority, the Forest

²⁷ (...continued)
527 (9th Cir. 1997), quoting Idaho Conservation League v. Mumma,
956 F.2d 1508, 1519 (9th Cir.1992) (citations omitted).

²⁸ Id.

²⁹ 16 U.S.C. § 1612(a).

Service has established regulations for the administrative appeal of a resource management plan, codified at 36 CFR § 216.1 et seq.

The Forest Service regulations permit a Forest Service employee to appeal a decision, but provides that the employee "shall not incorporate information unavailable to the public, i.e. Federal agency documents that are exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552(b))."³⁰ It was on the basis of this regulation that Mr. Ith's second administrative appeal was denied, due to his incorporation of his draft wildlife report in the appeal.

Plaintiff does not challenge the validity under ARA of the Forest Service regulations themselves, but argues rather that Mr. Ith's appeal did not violate the regulations. Plaintiff asserts that the draft wildlife report was not exempt from disclosure under the Freedom of Information Act ("FOIA").³¹

Under the FOIA, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from

³⁰ 36 C.F.R. § 215.13(d).

³¹ Docket 26 at 15.

disclosure to the public.³² Plaintiff offers several reasons why this exemption does not apply to Mr. Ith's draft report.

First, Plaintiff argues that the Forest Service has a duty under NEPA regulations, 40 C.F.R. § 1506.6(f), to make "environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), *without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action.*"³³ According to Plaintiff, "Mr. Ith's wildlife report is precisely the type of 'underlying document' within the meaning of NEPA's regulations that must be made 'available to the public.'"³⁴

Plaintiff's reliance on 40 C.F.R. § 1506.6(f) is inapposite. That is because "disclosure under NEPA is coextensive with that of FOIA".³⁵ Section 1506.6 applies only to "inter-agency

³² 5 U.S.C. § 552(b)(5).

³³ 40 C.F.R. § 1506.6(f) (emphasis added).

³⁴ Docket 26 at 15.

³⁵ Greenpeace v. National Marine Fisheries Service, No. C98-492Z, 2000 WL 343906, slip op. at 1, n. 1 (W.D. Wash. Feb. 24, 2000) (order granting in part motion for reconsideration).

memoranda."³⁶ Mr. Ith's draft wildlife report is an "intra-agency communication," and therefore § 1506.6 does not apply.³⁷

The Court also does not accept Plaintiff's argument that because the draft wildlife report is part of the "planning record," it is not subject to the FOIA exemption found in 5 U.S.C. § 552(b)(5).³⁸ Plaintiff bases this contention on a Region Ten supplement to the Forest Service Handbook, which states, "The Planning Record must be complete, indexed, and available for public review when the decision document is sent to the [Regional Forester] for signature, according to section 06.1 of this supplement."³⁹

Defendant has conceded that the draft wildlife report is part of the "administrative record" (which includes the planning record).⁴⁰ However, the same "section 06.1" of the supplement to the Forest Service Handbook upon which Plaintiff relies provides that "Planning Records are subject to public availability *according to*

³⁶ 40 C.F.R. § 1506.6(f).

³⁷ State of Mo. ex rel. Shorr v. U.S. Army Corps of Engineers, 147 F.3d 708 (8th Cir. 1998) (internal memo regarding "draft biological opinion" not subject to disclosure under § 1506.6 because it was not an interagency memorandum).

³⁸ Docket 26 at 16.

³⁹ Docket 27, Exhibit B, p. 4.

⁴⁰ Docket 31 at 21, n. 6.

the requirements of the Freedom of Information Act of 1974, as amended, and implementing regulations."⁴¹ Therefore, if the wildlife report is not subject to disclosure under the FOIA, then it is not "subject to public availability" as part of the planning record. The Court notes by way of comparison that while a "draft EIS" is unquestionably part of the planning record,⁴² such a document has been held to be exempt from disclosure under the FOIA where it satisfies the requirements of § 552(b)(5).⁴³

The proper inquiry, then, is whether the draft report is exempt from FOIA disclosure under 5 U.S.C. § 552(b)(5). The Court holds that it is. The § 552(b)(5) exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" extends to documents protected by the "deliberative process privilege".⁴⁴ The Ninth Circuit has held that "[t]o qualify for exemption 5 under the 'deliberative process' privilege, a document must be both (1) 'predecisional' or 'antecedent to the adoption of

⁴¹ Docket 27, Exhibit B, p. 16, emphasis added.

⁴² Docket 27, Exhibit B, p. 10.

⁴³ See National Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114 (9th Cir. 1988).

⁴⁴ National Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1116-17.

agency policy and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'"⁴⁵

There is no question that the draft wildlife report is "predecisional" in that it preceded the issuance of the EIS. The remaining question, then, is whether it is "deliberative" in nature. Specifically, the Court must determine whether the draft report is "part of the *deliberative process*" and whether it contains "[o]pinions on facts and [the] consequences of those facts" rather than merely the facts themselves.⁴⁶ The privilege covers "all 'recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency'".⁴⁷ "[E]xpressions of expert opinion and professional judgment" are privileged if they "relate to the exercise of policy-oriented judgment."⁴⁸

The Court has reviewed Mr. Ith's draft report and concludes that it contains material both factual and deliberative.

⁴⁵ 861 F.2d at 1117.

⁴⁶ 861 F.2d at 1118, 1120 (*italics in original*).

⁴⁷ 861 F.2d at 1118, quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir.1980).

⁴⁸ Greenpeace v. National Marine Fisheries Service, 198 F.R.D. 540, 544. (W.D. Wash. 2000).

In addition to the data which Mr. Ith assembled and which served as the partial basis for Ms. Rutledge's report, it also contains his own personal opinions about the Scott Peak timber sale and its likely impact on wildlife. The report also gives suggestions as to what specific measures the Forest Service should undertake to mitigate those environmental consequences. These portions of the report represent the "personal opinions of the writer rather than the policy of the agency."⁴⁹ Therefore, they fall within the "deliberative process" privilege and could not properly be incorporated into Mr. Ith's appeal.

Had Mr. Ith "merely referenced the draft version of his own report" in the second appeal as Plaintiff argues,⁵⁰ he might not have violated the Forest Service regulation prohibiting him from "incorporat[ing] [...] Federal agency documents that are exempt from disclosure" under the FOIA.⁵¹ He might likewise have complied with the regulations by incorporating only the facts from his report, which would arguably have been subject to disclosure under the FOIA.

⁴⁹ Id.

⁵⁰ Docket 26 at 17.

⁵¹ 36 C.F.R. § 215.13(d).

However, Mr. Ith did not merely refer to the report, but rather sent it to the Regional Forester with the explicit request that the reviewing officer "consider important conclusions made in the report" and "[j]ustify reasons as to why key conclusions are not pertinent to the current Scott Peak EIS."⁵² It was impossible to grant the relief requested in the second appeal without reviewing the report, particularly its "conclusions," in its entirety. The entire report was effectively incorporated into the appeal, including the portions subject to the deliberative process privilege and exempt from disclosure under the FOIA.

The fact that Mr. Ith sent the report to the Alaska Department of Fish and Game, which subsequently disclosed the report pursuant to the FOIA, does not affect the Court's analysis. Because federal agencies "often need to rely on the 'opinions and recommendations of temporary consultants,'" courts have held that "those consultations constitute 'an integral part of [the agency's] deliberative process' and are thus 'intra-agency' in character."⁵³ The Court finds this reasoning persuasive. A contrary holding would

⁵² AR 930, pp. 5-6.

⁵³ General Elec. Co. v. U.S. E.P.A., 18 F. Supp. 2d 138, 141 (D. Mass. 1998); see also Citizens for Responsibility v. U.S. Dep't of Homeland Sec., 514 F. Supp. 2d 36, 44-45 (D.D.C. 2007) "[W]hen an agency solicits opinions from and recommendations by temporary, outside consultants, those materials are considered 'intra-agency' for FOIA purposes."

force federal agencies to choose between maintaining their deliberative process privilege or obtaining proper expert opinions from outside sources.

Therefore, leaving aside the question of whether Mr. Ith acted on the Forest Service's behalf when he sent the report to the Department of Fish and Game, his disclosure did not waive the FOIA privilege because it was part of a solicitation of "peer review" by an outside consultant.⁵⁴ The Department of Fish and Game's subsequent disclosure of the report to Plaintiff's counsel is irrelevant because the Department cannot waive the privilege on the government's behalf.

The fact that the document might be publicly available at the present date is irrelevant since, as Defendant notes, "[t]he issue before the Court is whether the agency's decision not to consider the appeal was proper based on the record before it in March 2007."⁵⁵ The Forest Service regulations explicitly prohibit the incorporation of materials exempt from disclosure under the FOIA.⁵⁶ If a plaintiff could make an end-run around the regulation

⁵⁴ Docket 1 at p. 4.

⁵⁵ Docket 31 at 23.

⁵⁶ 36 C.F.R. § 215.13(d).

by obtaining the document through other channels and disclosing it to the public, the regulation would be of no effect.

It was not arbitrary and capricious for the Forest Service to reject Mr. Ith's second appeal after addressing his first one. Plaintiff believes that there is no difference between merely referring to the wildlife report, as Mr. Ith did in his first appeal,⁵⁷ and sending along a copy of the report, as Mr. Ith did in his second appeal.⁵⁸ The Court disagrees based on its conclusion, stated above, that Mr. Ith's sending of the report, along with his request *that it be reviewed as part of the appeal* constitutes a successful incorporation of the document. No such incorporation occurred with the first appeal.

Finally, Plaintiff's reliance upon Envtl. Prot. Info. Ctr. v. Blackwell, 389 F. Supp. 2d 1174 (N.D. Cal. 2004), to show that Defendant acted in an arbitrary and capricious manner is misplaced. The mere fact that the Forest Service has made some wildlife reports publicly available and not others is hardly proof that it has acted in an arbitrary and capricious manner. Mr. Ith's report contained many of his own opinions which were contrary to the final EIS, and, unlike the report in Envtl. Prot. Info. Ctr. v.

⁵⁷ AR 689.

⁵⁸ AR 930.

Blackwell, the Forest Service did not rely directly upon his conclusions in making its decision. Moreover, the court in Envtl. Prot. Info. Ctr. v. Blackwell did not even address any assertion of privilege under the FOIA Exemption 5. It simply cannot be the case that if any wildlife report is subject to FOIA disclosure then all must be.

Because Mr. Ith's second appeal improperly incorporated his entire report, substantial portions of which were subject to privilege under the FOIA, dismissal of the appeal was proper under the Forest Service regulation found in 36 C.F.R. § 215.13(d). At the very least, the manner in which Defendant applied the regulations to Mr. Ith's appeal was not "arbitrary and capricious." Defendant is therefore entitled to summary judgment on Plaintiff's ARA claim.

B. Defendant's Actions Did Not Violate the NEPA

As stated above, the Court's inquiry under the NEPA turns on whether Defendant "has taken a hard look at a decision's environmental consequences."⁵⁹ Specifically, to comply with NEPA under 40 C.F.R. § 1502.9, the Forest Service must "respond to comments" on the draft EIS and "discuss at appropriate points in

⁵⁹ Oregon Natural Resources Council v. Lowe, 109 F.3d 521, 527 (9th Cir. 1997), quoting Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir.1992) (citations omitted).

the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."⁶⁰

The Court begins its analysis by noting that it is not "a proper role" for federal court to act as a "panel of scientists."⁶¹ The role of the Court under the NEPA is not to "instruct[] the Forest Service how to [...] choose[] among scientific studies" or force it to "explain every possible scientific uncertainty" in an EIS.⁶² As the Ninth Circuit recently held, "to require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose."⁶³

The Court holds that Defendant gave the requisite "hard look" to the environmental consequences of the Scott Peak timber sale. As Defendant notes, Vol 1, chapter 3 of the Final EIS contains extensive discussion of the cumulative effects of each

⁶⁰ 40 C.F.R. § 1502.9(b).

⁶¹ The Lands Council v. McNair, 537 F.3d 981, 988 (9th Cir. 2008).

⁶² Id.

⁶³ Id.

alternative timber sale plan on virtually every aspect of the environment.⁶⁴ That includes detailed discussion of the effects of the sale on the Queen Charlotte Goshawk⁶⁵ and on the issue of old growth habitat fragmentation and how it would affect wildlife habitats.⁶⁶ The entire EIS consists of two volumes totaling 710 pages in all.

Moreover, the Forest Service addressed public comments on the EIS, including Mr. Ith's comments, in the EIS. Mr. Ith's comment letter discussed substantially the same concerns which he raised in both appeals and in his NEPA claim.⁶⁷ In the EIS, Defendant responded to Mr. Ith's comments in a substantive and judicious manner.⁶⁸

Defendant then addressed the merits of Mr. Ith's first appeal of the decision, first in an informal meeting,⁶⁹ and later in a formal ruling.⁷⁰ From the notes of the meeting and the

⁶⁴ Docket 31 at 12.

⁶⁵ Scott Peak EIS, Vol. I, 3-76--3-77.

⁶⁶ Scott Peak EIS, Vol. I, 3-17--3-41.

⁶⁷ Scott Peak EIS, Vol. II, C-94--C-98.

⁶⁸ Scott Peak EIS, Vol. II, C-94--C-102.

⁶⁹ AR 668.

⁷⁰ AR 908.

subsequent ruling on the appeal, it is readily apparent to the Court that the Forest Service carefully evaluated Mr. Ith's concerns. To the extent that his claims were found to be meritorious, they were addressed in the revised Record of Decision issued in September 2006.⁷¹

The preceding facts demonstrate that Defendant took a "hard look" at the environmental effects of its decision. Furthermore, Defendant took care to address opposing views, both in the EIS and the revised Record of Decision. The Court does not agree with Plaintiff that the Scott Peak EIS "completely ignores" Mr. Ith's wildlife report.⁷² As Plaintiff herself notes, much of the data from Mr. Ith's report was integrated into Ms. Rutledge's report, upon which the EIS was based. As the Court has stated above, the EIS addresses many of the concerns which Mr. Ith brought up in his wildlife report. Furthermore, the revised Record of Decision addresses those issues in Mr. Ith's first appeal that Defendant deemed to be of merit.

⁷¹ AR 735 at ROD-7 ("The additional analysis completed on the Scott Peak Project Area did not identify any cumulatively significant impacts to any resources. While there are some minor differences in the total potential acres that would be disturbed, the conclusion remains the same as presented in the Scott Peak FEIS - the Scott Peak timber sale would not cause any cumulatively significant impacts because timber harvest is proposed only along the existing road system.").

⁷² Docket 26 at 19.

Defendant is entitled to deference with regard to what constitutes a "responsible opposing view" which must be responded to in a final EIS. Ms. Rutledge has stated her opinion that Mr. Ith's report "was incomplete, contained several errors" and "was written using an emotionally laden undertones (sic)".⁷³ The Court will not weigh the scientific validity of Ms. Rutledge's and the Forest Service's opinions with those of Mr. Ith. To do so would be to "take sides in a battle of the experts," which is inappropriate for a court engaged in review of an agency decision under NEPA.⁷⁴ Plaintiff has cited "no case in which a court has required that an agency disclose and discuss each of the contrary views of lower-level employees assisting in the preparation of an EIS."⁷⁵

Defendant complied with the NEPA by taking a "hard look" at the environmental consequences of the Scott Peak timber sale, and by addressing "responsible opposing view[s]" in the EIS and final Record of Decision. Therefore, Defendant is entitled to summary judgment on Plaintiff's NEPA claim.

⁷³ Docket 31, Ex. 1.

⁷⁴ Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1244 (9th Cir. 2005), quoting National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001).

⁷⁵ Sierra Club v. U.S. DOT, 664 F. Supp. 1324, 1338 (N.D. Cal. 1987).

V. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment at **Docket 26** is **DENIED**, and Defendant's Cross Motion for Summary Judgment at **Docket 30** is **GRANTED**.

IT IS SO ORDERED.

ENTERED this 14th day of November, 2008.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE