NEPA – CUMULATIVE EFFECTS OF PAST ACTIONS: WHY THE U.S. FOREST SERVICE WILL PREVAIL AT THE NINTH CIRCUIT COURT OF APPEALS IN FRIENDS OF THE WILD SWAN V. GARCIA

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INTRODUCTION

Friends of the Wild Swan v. United States Forest Service[1] (*Friends)* is an ongoing challenge by a small alliance of conservation groups[2] to a U.S. Forest Service decision to proceed with a timber management proposal—the Colt Summit Restoration and Fuel Reduction Project (Colt Summit Project).[3] The groups allege that the Forest Service's proposed project fails to meet the National Environmental Policy Act[4] (NEPA) standards because the Forest Service's environmental assessment (EA)[5] of the project area was insufficient.[6] Without a sufficient analysis, the groups claim the public and courts will not be able to determine if species such as lynx, listed under the Endangered Species Act[7] (ESA), will be adequately protected.[8] The environmental groups raised a variety of challenges against the Forest Service and the 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 survival.[9] The U.S District Court for the District of Montana held that "the Service did not adequately analyze the Project's cumulative effects on lynx when it overlooked past projects or actions."[10] The court imposed a temporary injunction until a supplemental EA sufficiently addressed the cumulative impact of past projects regarding lynx.[11] Two years later, the court dissolved the injunction.[12] Currently, the environmental groups are appealing the lower court's ruling to the Ninth Circuit Court of Appeals in *Friends of the Wild Swan v. Garcia.*[13]

On appeal, the Forest Service will prevail in *Friends* at the Ninth Circuit because the lower court failed to follow the Ninth Circuit cumulative effects of past actions precedent. This note will defend that assertion by discussing the relevant historic and legal backgrounds necessary to understand the *Friends* controversy. It will analyze the lower court's opinion, arguing that the district court erred by: (1) relying on distinguishable Ninth Circuit precedent; (2) incorrectly focusing its analysis on a narrow section of the EA instead of the entire record; and (3) compromising its ability to recognize the sufficiency of the Forest Service's aggregate analysis characterization of 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 Ninth Circuit to deny the environmental groups' plea to impose a permanent injunction on the project.

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[1] Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199 (D. Mont. 2012), *appeal docketed sub nom.* Friends of the Wild Swan v. Garcia, No. 14-35463 (9th Cir. May 30, 2014) (appellant's opening brief submitted Oct. 8, 2014).

[2] Friends of the Wild Swan; Alliance for the Wild Rockies; Montana Ecosystems Defense Council; and Native Ecosystems Council. All groups listed are nonprofit organizations.

[3] *Friends*, 875 F. Supp. 2d 1199.

[4] 42 U.S.C. §§ 4321–4370 (2012).

[5] 40 C.F.R. §§ 1501.3–1501.4 (2015).

[6] *Friends* of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199, 1203 (D. Mont. 2012).

[7] 16 U.S.C. §§ 1531–1544 (2012).

[8] *Friends*, 875 F. Supp. 2d at 1203.

[9] *Id.*

[10] *Id*. at 1212

[11] *Id.* at 1220–21.

[12] *See* Friends of the Wild Swan v. United States Forest Serv., No. CV 11-125-M-DWM, 2014 WL 1347987, at *7 (D. Mont. April 4, 2014) (order dissolving preliminary injunction).

[13] General Docket United States Court of Appeals for the Ninth Circuit, Friends of the Wild Swan v. Garcia, No. 14-35463 (9th Cir. May 30, 2014).

I. BACKGROUND

A. The Colt Summit Project

The Colt Summit Project was developed by the Seeley Lake District of the Lolo National Forest "to restore forest health by increasing species diversity and stand heterogeneity (which restores habitat for grizzly bears and other species); restore grizzly bear, bull trout, and aquatic and riparian habitat on Colt Creek by decommissioning [roads] and rerouting the primary access; and reduce hazardous fuels in the wildland-urban interface."[14] The project is located approximately ten miles north of Seeley Lake, Montana, and the vegetation treatment area straddles U.S. Highway 83 in the Seeley-Swan Wildland Urban Interface. [15] It was developed in concert with the Southwest Crown Collaborative, whose 2010 proposal to restore forested lands and create rural jobs in Montana received funding from the Collaborative Forest Landscape Restoration Program, of which the Colt Summit Project is a part.[16] The project garnered additional support from the Montana Department of Fish, Wildlife, and Parks and the U.S. Fish and Wildlife Service—agencies responsible for managing the recovery of grizzly bear, Canada lynx, and other wildlife in the project area.[17]

After making minor revisions 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 2011.[18] One month after the decision, the conservation groups raised timely administrative appeals.[19] After reviewing the appeals, the Forest Service's Northern Region Appeal Deciding Officer (ADO) recommended the original decision be affirmed.[20] Shortly thereafter, the Lolo National Forest supervisor issued a second Decision Notice and FONSI for the project—affirming her original decision.[21] Three days later, the conservation groups filed a complaint in the federal District Court for the District of Montana, Missoula Division.[22]

B. Legal Context

1. The Endangered Species Act

The court imposed a preliminary injunction on the grounds that the Forest Service failed to sufficiently perform a procedural review under NEPA of the effects of the Colt Summit Project on lynx.[23] However, the Forest Service's procedural duty under NEPA is triggered by substantive protection given the lynx by the ESA.[24] The ESA achieves its conservation goal for species like the lynx in two relevant ways.

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[14] FOREST SERV., U.S. DEP'T OF AGRIC., A-1, ENVIRONMENTAL ASSESSMENT: COLT SUMMIT RESTORATION AND FUELS REDUCTION PROJECT 7 (Dec. 2010) [hereinafter FOREST SERV. A-1], *available at* http://goo.gl/JMO2zq.
[15] FOREST SERV. A-1, *supra* note 14, at 3.
[16] FOREST SERV. A-1, *supra* note 14, at 3.
[17] FOREST SERV., U.S. DEP'T OF AGRIC., T-128, COLT SUMMIT RESTORATION AND FUELS REDUCTION PROJECT: DECISION NOTICE – AFFIRMATION OF PRIOR DECISION 2 (Jan. 2013) [hereinafter FOREST SERV. T-128], *available at* http://goo.gl/D66pwN.
[18] FOREST SERV. T-128, *supra* note 17, at 1.
[19] FOREST SERV. T-128, *supra* note 17, at 2.
[20] FOREST SERV. T-128, *supra* note 17, at 2.
[21] FOREST SERV. T-128, *supra* note 17, at 2–3.
[22] FOREST SERV. T-128, *supra* note 17, at 3.
[23] *See generally* Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199 (D. Mont. 2012), *appeal docketed sub nom.* Friends of the Wild Swan v. Garcia, No. 14-35463 (9th Cir. May 30, 2014).
[24] 50 C.F.R. § 17.11(h) (2015); *see generally* 50 C.F.R. § 17.95 (2015).

First, Section 4 of the ESA enables the Secretary of the Interior (Secretary) to add a species to the endangered species list if destruction, modification, or curtailment of its habitat or range occurs.[25] Once listed, the Secretary can begin the rulemaking process to promulgate regulations to conserve the species and designate any habitat that is considered critical to the species' survival as protected.[26] In order to implement the critical habitat designation, the Secretary must develop recovery plans for the conservation and survival of the listed species.[27] The recovery plan must incorporate a description of geographically precise management actions needed to assure the conservation and survival of the species.[28]

The Canada lynx is currently listed as threatened,[29] and a critical habitat has been designated to aid in its recovery.[30] Federal wildlife biologists use the Lynx Conservation and Assessment Strategy (LCAS) to assess the viability of conservation measures for lynx on federal lands.[31] 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.[32] The Colt Summit Project was specifically designed to conform to the Lynx Amendment.[33]

Second, Section 7 of the ESA requires interagency cooperation[34] to ensure proposed actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction" of habitat that is critical for a species' continued existence.[35] The Forest Service satisfies this requirement by consulting with the Secretary when the action has the potential to affect a listed species.[36] If the Secretary determines such species may be affected by the proposed action, the agency must conduct a biological assessment to evaluate the likelihood of a negative effect.[37] The biological assessment can then be incorporated into the agency's EA to comply with section 102 of NEPA.[38]

2. The National Environmental Policy Act

NEPA requires federal agencies to 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.[39] To determine whether an action is significant, agencies often prepare an EA.[40] An EA is a concise public document that allows an

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[25] 16 U.S.C. § 1533(a)(1)(A) (2012).
[26] 16 U.S.C. § 1533(a)(3) (2012).
[27] 16 U.S.C. § 1533(f)(1) (2012).
[28] 16 U.S.C. § 1533(f)(1)(B)(i) (2012).
[29] 50 C.F.R. § 17.11(h) (2015).
[30] 50 C.F.R. § 17.95(a) (2015) (Canada Lynx).
[31] FOREST SERV., U.S. DEP'T OF AGRIC., R1-13-19, CANADA LYNX CONSERVATION ASSESSMENT AND STRATEGY 1, (3d ed. 2013) (the measures include vegetation management techniques that maintain dense understory conditions for prey, minimize snow compaction, and maintain connectivity between habitat areas) [hereinafter FOREST SERV. R1-13-19], *available at* http://www.fs.fed.us/biology/resources/pubs/wildlife/LCAS_revisedAugust2013.pdf.
[32] FOREST SERV. R1-13-19, *supra* note 31, at 2.
[33] FOREST SERV. A-1, *supra* note 14, at 61.
[34] 16 U.S.C. § 1536 (2012).
[35] 16 U.S.C. § 1536(a)(2) (2012).
[36] 16 U.S.C. § 1536(a)(3) (2012).
[37] 16 U.S.C. § 1536(c)(1) (2012).
[38] *Id*.
[39] 42 U.S.C. § 4332(C) (2012).
[40] 40 C.F.R. § 1501.3 (2014).

agency to analyze environmental impacts of proposals, the majority of which result in a FONSI.[41]

Among other NEPA considerations, an EA must include a cumulative effects analysis.[42] Cumulative effects are defined as "impact[s] upon the environment which result[] 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."[43] Effects include cumulative ecological effects of an action.[44] 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.[45] To decide whether the Forest Service sufficiently analyzed the cumulative effects of past projects on lynx, the *Friends* court relied heavily on the following Ninth Circuit decisions.[46]

i. Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of Interior[47]

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.[48] The original proposal was permitted to allow disturbance of fifty acres of land within the project area.[49] The proposed amendment allowed disturbance of two hundred fifty acres.[50] In response, the Bureau of Land Management (BLM) prepared an EA that the plaintiffs subsequently challenged.[51] The district court granted the BLM's motion for summary judgment, holding that they had complied with NEPA.[52] On appeal, the plaintiffs alleged that the BLM did not sufficiently analyze the cumulative impacts the amendment would have on tribal lands.[53]

The Ninth Circuit began by discussing the cumulative effects precedent under NEPA.[54] 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 the projects are thought to have impacted the environment."[55] It then stated that "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."[56] The

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[41] 40 C.F.R. § 1508.9 (2014).
[42] 40 C.F.R. § 1508.7 (2014).
[43] *Id*.
[44] 40 C.F.R. § 1508.8 (2014).
[45] *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).
[46] *See generally* Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199 (D. Mont. 2012)
[47] Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592 (9th Cir. 2010).
[48] *Id.* at 598.
[49] *Id.* at 596.
[50] *Id*.
[51] *Id*. at 598.
[52] *Id*.
[53] Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 599 (9th Cir. 2010).
[54] *Id*.
[55] *Id.* at 603 (quoting Lands Council v. Forester of Region One of U.S. Forest Serv., 395 F.3d 1019, 1028 (9th Cir. 2004)).
[56] *Id*. (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1378 (9th Cir. 1998)).

court concluded by stating that "[s]ome 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."[57]

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.[58] There, it found the BLM's analysis "did not adequately address the [cumulative effects of the] reasonably foreseeable mining activities of the . . . project" in those sections.[59] 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."[60] The court held that the "BLM's analysis of the [reasonably foreseeable] cumulative impacts of the . . . project was insufficient and therefore violated NEPA."[61]

ii. Center for Environmental Law and Policy v. United States Bureau of Reclamation[62]

One year later, the Ninth Circuit was faced with deciding a cumulative effects challenge of a different nature in *Center for Environmental Law and Policy v. United States Bureau of Reclamation* (*Center*). Confronting multiple water demands in the Columbia River Basin, the Bureau of Reclamation (BoR) developed strategies to increase water supplies.[63] To comply with NEPA, the bureau prepared an EA for the project that included a section reviewing the project's cumulative effects.[64] The Center for Environmental Law and Policy challenged the sufficiency of the review, alleging the bureau's insufficient analysis of past cumulative effects.[65] 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."[66] On appeal, the plaintiffs characterized the EA as deficient because its discussion of cumulative effects of past actions was conclusory.[67]

On appeal, the Ninth Circuit began by discussing the existing cumulative effects precedent under NEPA.[68] 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 [environmental impact statement] EIS."[69] 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."[70] The court concluded its review by clarifying that an agency "may, however, characterize the cumulative effects of past

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[57] *Id*. (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998)).
[58] *Id*. at 604.
[59] Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 603 (9th Cir. 2010).
[60] *Id*.
[61] *Id.* at 606.
[62] Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011).
[63] *Id.* at 1003.
[64] *Id*. at 1004.
[65] *Id*. at 1004–05.
[66] *Id*.
[67] *Id*. at 1005.
[68] Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1007–08 (9th Cir. 2011).
[69] *Id.* at 1007 (quoting Kern v. Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002)).
[70] *Id*.

actions in the aggregate without enumerating every past project that has affected an area."[71] This aggregate standard—cited in *Center*, but not *Te-Moak*—arises from the Ninth Circuit's controversial *en banc* opinion in *Lands Council v. Forester of Region One of U.S. Forest Service* (*Lands*).

The issue in *Lands* was whether the Forest Service had sufficiently described past timber-harvest projects to allow the public and courts an adequate review of its environmental impact statement (EIS). [72] The court found the EIS only "generally describe[d] past timber harvests . . . in the project area."[73] It then noted the EIS contained no discussion of "environmental impact from past projects on an *individual* basis" that might inform the analysis (emphasis added).[74] The court held that an adequate cumulative effects discussion must include "time, type, place, and scale of past timber harvests . . . in sufficient detail."[75] Subsequently, the Council on Environmental Quality (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."[76]

Shortly thereafter, the Ninth Circuit was presented with a case that fell within the new CEQ guidance memorandum—*League of Wilderness Defenders – Blue Mountains Biodiversity Project v. United States Forest Service* (*League*).[77] Plaintiffs in *League* 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."[78] The Forest Service maintained that "agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions."[79] The court held that the CEQ memorandum was entitled to deference[80] and, as a result, the Forest Service may aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7.[81]

The court also stressed that the plaintiffs had incorrectly interpreted the *Lands* decision to mean that an adequate cumulative effects analysis requires "a complete cataloguing of all prior timber sales in all cases . . . ."[82] Instead, the court stated that *Lands* only reaffirmed the general

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[71] *Id*.
[72] Lands Council v. Forester of Region One of U.S. Forest Serv., 395 F.3d 1019, 1028 (9th Cir. 2004).
[73] *Id*. at 1027.
[74] *Id*.
[75] *Id*. at 1028.
[76] COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, GUIDANCE ON THE CONSIDERATION OF PAST CUMULATIVE EFFECTS ANALYSIS 2 (2005), [hereinafter GUIDANCE MEMORANDUM], *available at* http://1.usa.gov/1bt7cdi.
[77] League of Wilderness Defenders v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008) (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 original).
[78] *Id*. at 1216.
[79] *Id.* (citing Department of Transportation v. Public Citizen, 541 U.S. 752 (2004)).
[80] *Id.* at 1217 (explaining that an agency receives deference when interpreting its own regulations, even though the interpretation was given the first time as a litigation position).
[81] *Id*. at 1218.
[82] *Id*.

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.'"[83] The *League* court concluded that the "Forest Service is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate."[84]

The *Center* court specifically applied the *League* jurisprudence to the cumulative effect of the *past* projects at issue.[85] 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:

> The perfunctory discussion in the Cumulative Impacts section … is not reflective of Reclamation's overall approach. 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.[86]

To support its rationale, the court exhaustively examined other parts of the EA for evidence that the BoR analyzed the cumulative effect of past projects.[87] It found that "[t]he record include[d] extensive evidence that [BoR] considered the relevant prior actions and took the requisite hard look before approving the drawdown project."[88] Therefore, in announcing a new rule, the court held that the aggregate past cumulative effects analysis: (1) explained the area's existing conditions and the project's effects, by (2) indicating the past projects needed to characterize the cumulative impact of all past actions necessary to compare the effect of the project, against the risk from the aggregate of all past projects, by (3) utilizing quantified or detailed information to determine that the project will not exacerbate the risk.[89] The court concluded by stating that it would "impermissibly elevate form over substance to hold that Reclamation must replicate its entire analysis under the heading of cumulative effects."[90]

II. ANALYSIS

The *Friends* court incorrectly granted plaintiff's motion for summary judgment regarding the Forest Service's analysis of the cumulative effects of past actions on lynx.[91] 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."[92] 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.'"[93] Review is "limited to the question of whether the agency took a 'hard look' at the proposed

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[83] League of Wilderness Defenders v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008) (quoting 40 C.F.R. § 1500.1(b) (2014)).
[84] *Id*.
[85] *See generally* Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1008 (9th Cir. 2011)..
[86] *Id*. (emphasis added).
[87] *Id*. at 1008–09.
[88] *Id*. at 1009 (citing Ecology Ctr. v. Castaneda, 574 F.3d 652, 667 (9th Cir. 2009)).
[89] *Id*. at 1007.
[90] *Id*. at 1009.
[91] Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199, 1219 (D. Mont. 2012).
[92] FED. R. CIV. P. 56(a).
[93] Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1005 (9th Cir. 2011). (quoting 5 U.S.C. § 706(2)(A)).

action as required by a strict reading of NEPA's procedural requirements."[94] 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."[95]

In *Friends,* the court began its review of whether the Forest Service sufficiently analyzed the cumulative effect of past projects on lynx by relying on the statement from *Center* that an agency must "analyze the incremental impact of the proposed project when added to past, present, and reasonably foreseeable actions within the selected geographic area."[96] Then, again drawing from *Center*, the court stated that "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."[97] Curiously, the court then abandons *Center's* guidance and begins to rely instead on *Te-Moak*'s statement that "[a]n 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."[98] Finally, as an apparent afterthought, the court draws once again from *Center* by stating "[a]n agency may, however, characterize the cumulative effects of past actions in the aggregate without enumerating every past project that has affected an area."[99]

Choosing to state the law in this manner caused the district court to err in three ways. First, *Te-Moak* is distinguishable from the Ninth Circuit's cumulative effect of past projects precedent because, unlike *CELP*, *Te-Moak* considers the cumulative impact of *foreseeable*, rather than *past*, actions.[100] 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 Ninth 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 . . . .'"[101] Then, the court states that an agency "may, however, characterize the cumulative effects of past actions in the aggregate . . . ."[102] What is curious about the court's choice of authority, however, is why it chose to state the *Te-Moak* standard at all. In *Te-Moak*, the issue was the cumulative effect of reasonably foreseeable projects, not the cumulative effect of past projects. Additionally, if an agency *must* give a sufficiently detailed catalogue of past

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[94] *Id*. (quoting Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*,* 524 F.3d 938, 947 (9th Cir. 2008)).
[95] *Id*. (quoting Blue Mountains Biodiversity Project v. Blackwood*,* 161 F.3d 1208, 1211 (9th Cir. 1998)).
[96] *Friends*, 875 F. Supp. 2d at 1220.
[97] *Id*.
[98] *Id*.
[99] *Id*. (quoting *Center*, 655 F.3d 1000 at 1007).
[100] *Te-Moak*, 608 F.3d at 603.
[101] *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)).
[102] *See id.*, (citing *Center*, 655 F.3d at 1007).

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 *Center* and *Te-Moak* courts, but not in *Friends*.[103]

The *Center* court summarizes the difference between its position and that of the *Te-Moak* court, stating:

> 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 . . . however, [an agency may] characterize the cumulative effects of past actions in the aggregate without enumerating every past project that has affected an area.[104]

However, unlike *Center*, 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."[105] Rather, the *Te-Moak* opinion chooses to conclude where *Center* began, stating "[s]ome quantified or detailed information is required."[106] The *Te-Moak* court had no need to state the aggregate standard. As demonstrated above, it was reviewing an agency's analysis of the cumulative effect of reasonably foreseeable projects, of which a detailed catalog is easily compiled.[107]

In contrast, the *Friends* court was reviewing the Forest Service's analysis of the cumulative effect of past projects, which is more difficult to do because compiling a "detailed catalog" of past actions is often impossible due to gaps in recordkeeping, for example.[108] As noted, the CEQ disagreed so strongly with the "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."[109] The CEQ's aggregation standard was upheld in *League*, and as such, overruled the detailed catalog standard when the court is reviewing the cumulative effect of past projects.[110] Therefore, when the *Center* opinion states that an agency "may, however, characterize" its cumulative effect of past projects analysis, it is squarely on point with *League*.[111] 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 overruled detailed catalogue standard.[112] The language must be read in the context of the

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[103] *See id.*, (where the court fails to cite Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1007 (9th Cir. 2011); *see also Te-Moak*, 608 F.3d at 603).

[104] *Center*, 655 F.3d at 1007.

[105] *Id.*

[106] *Te-Moak*, 608 F.3d at 603 (quoting Neighbors of Cuddy Mt. v. United States Forest Serv., 137 F.3d at 1379).

[107] *See Te-Moak*, 608 F.3d at 603.

[108] *See generally* Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199, 1220 (D. Mont. 2012).

[109] *See* GUIDANCE MEMORANDUM, *supra* note 76, at 2.

[110] *See* League of Wilderness Defenders v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008).

[111] *See* Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1007 (9th Cir. 2011).

[112] *See Friends*, 875 F. Supp. 2d at 1220.

preceding sentence in *Center* noting that, "general statements . . . do not constitute a hard look absent a justification regarding why more definitive information could not be provided."[113]

In other words, an agency cannot make general or aggregated statements without justifying why it cannot provide definitive information about past projects. If an agency does provide justification why it cannot provide definitive information, it may 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 *Center* 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 surplusage.[114] However, the language is critical. Without it, courts would not be on alert for indications by an agency that is does not have definitive information necessary to provide a detailed catalogue of all past projects.[115] Without the definitive information, the CEQ and associated Ninth Circuit precedent makes clear the agency's alternative is to aggregate past cumulative effects through analysis of the existing land conditions.[116] Thus, armed with 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 *Center* for reviewing the adequacy of an agency's cumulative effect of past projects analysis.[117] A court cannot (as in *Friends*) simply omit settled Ninth 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 the *Center* aggregation standard.[118] Doing so would compound the negative impact of an already errant opinion.

B. By Failing to Correctly Follow Ninth Circuit Precedent, the Friends *Court Was Blinded to the Fact it Must Look to the Entire Record When Determining if an Agency Has Sufficiently Analyzed Cumulative Effects of Past Projects.*

The second error the *Friends* court committed was a product of the first. If the court recognized that *Center*, rather than *Te-Moak*, provided the best statement of controlling cumulative effects of past projects case law, then it would have also recognized it could not confine review to cumulative effects when reviewing sufficiency of an agency's past cumulative effects analysis.[119] As in *Friends*, the *Center* court naturally began its review of whether the agency had conducted sufficient past cumulative effects analysis by investigating the section of the EA titled *Cumulative Effects*.[120] In this section, it found only three paragraphs that were concerned with past projects, with not one "rising above vague generalities."[121] Such superficial analysis, the court noted, was a "far cry from the requirement . . . ." [122] However, the court also

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[113] *See Center*, 655 F.3d at 1007.
[114] *Friends,* 875 F. Supp. 2d at 1220.
[115] *See* GUIDANCE MEMORANDUM*, supra* note 76, at 2.
[116] *See* GUIDANCE MEMORANDUM*, supra* note 76, at 2; *see also* League of Wilderness Defenders v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008).
[117] *See Center*, 655 F.3d at 1007.
[118] *See generally Friends*, 875 F. Supp. 2d at 1220.
[119] *Id.*
[120] *Center*, 655 F.3d at 1008.
[121] *Id.*
[122] *Id.*

noted the three paragraphs were not the totality of the analysis.[123] Delving further, the court found the "record include[d] extensive evidence that [the agency] considered the relevant prior. . . actions" because "various effects in other portions of the EA displays sensitivity to, and consideration of, the multitude of changes previously wrought by mankind . . . ."[124] In holding the EA's discussion of cumulative effects of past projects satisfied 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."[125]

The *Center* 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."[126] This explanation is based upon a solid rationale. For example, in *Alaska Department of Environmental Conservation v. EPA*, the Supreme Court stated that "[e]ven 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.'"[127] The Ninth Circuit did not specifically cite the foregoing case in *Center*; however, the cases it did cite are strikingly similar.[128] In *Ecology Center v. Castaneda*, the Ninth Circuit held a Forest Service EIS adequately discussed past cumulative effects because, even though "the cumulative effects section . . . refer[red] generally to past and proposed activities, other parts of the EIS g[a]ve extensive history about past actions in the area[.]"[129] And in *Environmental Protection Information Center v. U.S. Forest Service*, the Ninth Circuit found a Forest Service EA sufficient because it was based on a model that pervaded the record.[130]

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.[131] Compounding its error, the court attempted to apply *Te-Moak's* "detailed catalogue" standard to the narrow section.[132] Thus, the court plainly states the *Cumulative Effects Analysis on 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."[133] As presumptive evidence of this fact, the court notes that "[i]n the EA, the Forest Service discusses how it recently acquired 640 acres of land owned by Plum Creek Timber Company [(PCTC)], and it discusses the impact of snowmobile activity in the area."[134] While the court's statement claims that it found this information "in the EA"—

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[123] *Id.*
[124] *Id.*
[125] Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1009 (9th Cir. 2011).
[126] *Id.*
[127] Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 497 (2004) (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)).
[128] *See Center*, 655 F.3d at 1009.
[129] Ecology Ctr. v. Castaneda, 574 F.3d 652, 667 (9th Cir. 2009).
[130] Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1014 (9th Cir. 2006).
[131] *See generally* Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199, 1220 (D. Mont. 2012) (the court made no mention in the opinion that it looked for evidence of cumulative effects analyses in any other section of the EA).
[132] Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (quoting Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir. 2004)).
[133] *Friends*, 875 F. Supp. 2d at 1220.
[134] *Id.*

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-two of the EA.[135] 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.[136]

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.[137] However, this attempt was also doomed to fail from the beginning for two reasons. First, as noted in Section II.A above, the court failed to state in both *Center* and *Te-Moak* that the cumulative effects of past actions in the aggregate did not constitute the "hard look" required by the agency "absent a justification why more definitive information" could not be found.[138] Second, the court failed to look to the entire record as required by *Center*.[139] As will be shown in the following section, the combination of these errors compromised the court's ability to understand that the three-paragraph section of the EA it reviewed was indeed a fully informed and well-considered "characteriz[ation of] the cumulative effects of past actions in the aggregate."[140]

C. Failing to Follow Ninth Circuit Precedent Resulted in the Court's Inability to Recognize Adequacy of the Forest Service's Characterization of Aggregate Cumulative Effect of Past Projects Analysis on Lynx.

The *Friends* court did not recognize the adequacy of the Forest Service's characterization of the aggregate cumulative effects of past actions on lynx for two reasons. First, it failed to recognize that an agency lacking information about past projects could provide justification for why it is proper to conduct aggregate cumulative effects of past projects analysis.[141] As noted in Section II.A above, once an agency has justified its aggregate analysis, the court is bound to follow the process laid out in *Center* for reviewing its adequacy.[142] Second, not following *Center's* direction to look 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 the three-paragraph section of the EA devoted to cumulative effects on lynx.[143] The result was that the *Friends* court was effectively unable to make an intelligent review of the Forest Service's three-paragraph characterization of the aggregate analysis of the cumulative effects of past projects on lynx. Evidence of this is demonstrated where the court's opinion segues from errant detailed catalogue review to legitimate review of the Forest Service's aggregate analysis.[144] In *Friends*, the court states that "even assuming there were no projects" to catalogue in detail, "the Forest

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[135] *Id.* (note that the court cites to "page" FS000066 OF FOREST SERV. A-1, which is page 62 due pagination shifts in printing).
[136] *Id.*
[137] *Id.*
[138] *See Friends*, 875 F. Supp. 2d at 1220 (failing to cite Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1007 (9th Cir. 2011); *see also* Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 603 (9th Cir. 2010)).
[139] *See Center*, 655 F.3d at 1008.
[140] Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199, 1220 (D. Mont. 2012).
[141] *See id.* (failing to cite *Center*, 655 F.3d at 1007, and *Te-Moak*, 608 F.3d at 603).
[142] *See Center*, 655 F.3d at 1007.
[143] *See id.* at 1008.
[144] *See Friends*, 875 F. Supp. 2d at 1220.

Service must still characterize the cumulative effects of past actions in the aggregate."[145]

Without recognizing the Forest Service's characterization for what it was, and without providing any measure of how to assess whether or not the Forest Service had in fact sufficiently c*haracterized* the aggregate effect of the past projects at all, the court incorrectly assumed that the analysis did not exist.[146] Once again, however, the Ninth Circuit precedent that the *Friends* court chose to ignore includes a rule that is on point.[147] The *Center* court provides guidelines "indicative of the manner" in which the adequacy of an agency's aggregate past cumulative effects analysis can be judged.[148] First, does the analysis explain both "the existing condition of the area" and "what the effects of the project would be?"[149] Second, does it discuss the past projects "necessary to describe the cumulative effect of all past actions combined?"[150] And finally, does it "rely on quantified or detailed information" to "assess the impact of the . . . project against the . . . aggregate of all past projects?"[151] If the *Friends* court had followed the processes set out in *Center*, it would have found detailed information throughout the EA that would have allowed it to readily comprehend that the Forest Service's characterization of its aggregate cumulative effects analysis was sufficient. A review of the EA in light of *Center's* guidance demonstrates why.

First, *Center* recognizes that an agency lacking information about past projects can provide justification for why it is proper to conduct an aggregate cumulative effect of past projects analysis.[152] 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.[153] In the sub-section of the EA titled *Cumulative Effects*, regarding the Canada lynx, the Forest Service states, "Detailed data [on PCTC land] is not available in regard to suitability as lynx habitat."[154] And in the preface to Appendix D, the Forest Service also states, "[t]hese tables, though comprehensive, may have some unintended omissions due to lack of records or knowledge."[155] These statements are intended to provide justification regarding why the agency is conducting an aggregate analysis. But the court had no way to identify 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 Ninth Circuit *Center* and *Te-Moak* courts.[156] This explanation also provides evidence indicating why the court persisted in its attempt to analyze the EA through the sufficiently detailed catalogue standard in *Te-Moak.*[157] Perhaps if the court had followed *Center's* direction to look at other portions of the EA, it would have discovered the justification

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[145] *Id.*
[146] *Id*.
[147] *See generally Center*, 655 F.3d at 1008.
[148] *Id.* at 1008.
[149] *Id*. (quoting Ecology Ctr. v. Castaneda, 574 F.3d 652, 667 (9th Cir. 2009),
[150] *Id*. (quoting League of Wilderness Defenders-Blue Mts. Biodiversity Project v. Allen, 615 F.3d 1122, 1135 (9th Cir. 2010).
[151] *Id*. at 1008.
[152] *See Center*, 655 F.3d at 1007.
[153] *See generally* FOREST SERV. A-1, *supra* note 14, at 62 and 110.
[154] *See* FOREST SERV. A-1, *supra* note 14, at 62 (Section 6.6.4 *Alternative B – Proposed Action, Direct, Indirect, and Cumulative Effects, Canada Lynx (Threatened), Cumulative Effects*).
[155] *See* FOREST SERV. A-1*, supra* note 14, at 110.
[156] *See* Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199, 1220 (D. Mont. 2012).
[157] *Friends*, 875 F. Supp. 2d at 1220.

by the Forest Service and avoided both unfortunate outcomes.

Second, because the court did not follow *Center's* direction to look 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.[158] 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.[159] 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*.[160]

For example, under the sub-heading *Cumulative Effects*, the Forest Service begins by explaining why the Clearwater Lynx Analysis Unit (LAU) is the appropriate cumulative effects analysis area.[161] The EA then states that the land within this area is comprised of both federal and private ownership.[162] Next, the EA qualifies this statement by recognizing that 640 acres of previously private PCTC land has recently come under federal ownership.[163] Importantly, the EA then states, "[d]etailed data is not available on former PCTC lands in regard to suitability as lynx habitat" in accordance with the law.[164] This statement is important because the EA further 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.[165]

It is challenging to believe that the *Friends* court understands 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."[166] There, Table D-1 indicates the past activities considered in the cumulative effects analysis.[167] It describes over eighteen activities with the

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[158] *Id*.
[159] *See id.* at 1220.
[160] *See* FOREST SERV. A-1, *supra* note 14, at 62.
[161] *See* FOREST SERV. A-1, *supra* note 14, at 62.
[162] *See* FOREST SERV. A-1, *supra* note 14, at 62.
[163] *See* FOREST SERV. A-1, *supra* note 14, at 62.
[164] *See* FOREST SERV. A-1, *supra* note 14, at 62.
[165] FOREST SERV. A-1, *supra* note 14, at 62.
[166] *See* FOREST SERV. A-1, *supra* note 14, at 39.
[167] *See* FOREST SERV. A-1, *supra* note 14, at 111.

potential to cumulatively affect the project.[168] Most relevant for the cumulative effect of past projects on lynx analysis are the "Timber Harvest" and "Land Exchange" categories.[169] The Timber Harvest category refers the reader to Tables D-2 and D-4. Those two tables document the acreage of the three harvest types and site preparation activities that have occurred on the federal land in the project area for the past 70 years.[170] The Land Exchange category documents how the Forest Service has recently acquired approximately 640 acres of land within the project area from PCTC, whose past management activities created a large amount of "early successional stage" timber.[171] It notes that the PCTC land comprises less than 15% of the project area.[172]

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 LAU.[173] The section then indicates "[e]xisting 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')."[174] Table 9 shows the impact from the project is negligible in comparison to the acceptable ranges established by the Lynx Amendment.[175] 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 affect those conditions.[176]

The detailed information and analysis contained in Appendix D and Table 9 reveal the Forest Service did provide a "discussion of past projects or activities" that the court explicitly claims it did not.[177] It is also apparent that the Forest Service did so by aggregating the existing conditions of past actions in concert with the proposed project.[178] 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."[179] The court's opinion explicitly asserts that the Forest Service did not do this.[180] The "other parts" of the record, however,

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[168] *See* FOREST SERV. A-1, *supra* note 14, at 110.
[169] *See* FOREST SERV. A-1, *supra* note 14, at 110.
[170] *See* FOREST SERV. A-1, *supra* note 14, at 113–14.
[171] *See* FOREST SERV. A-1, *supra* note 14, at 113–14.
[172] *See* FOREST SERV. A-1, *supra* note 14, at 113–14.
[173] *See* FOREST SERV. A-1, *supra* note 14, at 59 (LAU demarcates the acceptable ranges within which a Forest Service project can affect the critical habitat of lynx).
[174] *See* FOREST SERV. A-1*, supra* note 14, at 59–60 (Table 9 is divided into three parts: Standards; Pre-Treatment Compliance; and Post-Treatment Compliance. The first relevant standard (VEG S1) states that "[i]f 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 "[t]imber 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. In 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. In Post-Treatment, approximately 3% of lynx habitat would exist in the regeneration stage).
[175] *See* FOREST SERV. A-1, *supra* note 14, at 60.
[176] *See* FOREST SERV. A-1, *supra* note 14, at 60.
[177] Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199, 1220 (D. Mont. 2012).
[178] *Contra Friends*, 875 F. Supp. 2d at 1220.
[179] *Contra Friends*, 875 F. Supp. 2d at 1220.
[180] *Contra Friends*, 875 F. Supp. 2d at 1220.

contradict that assertion.[181]

Finally, if the court had reviewed the entire record in light of the three-step guidelines announced in *Center*, it would have concluded that the Forest Service had committed no clear error that prevented taking a hard look at the cumulative effects of past actions on lynx.[182] 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 and current project would have upon the existing condition.[183] The U.S. Forest Service mentions only the past projects necessary to characterize the cumulative impact of all past actions, as opposed to a detailed catalogue of all past projects, in order to assess the impact of the current project against the risk of those past combined projects.[184] And finally, the agency characterizes this information under the heading *Cumulative Effects* to conclude that the project will not increase the risk to lynx.[185] 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.[186]

III. CONCLUSION

The *Friends* court erred on three levels. First, *Te-Moak* is distinguishable from the Ninth Circuit's cumulative effect of past projects precedent because, unlike *Center*, *Te-Moak* considers the cumulative impact of *foreseeable* rather than *past* actions.[187] Second, choosing to follow *Te-Moak* blinded the court to the fact that it must look to the whole record when determining whether an agency has sufficiently analyzed the cumulative effect of past projects as required by *Center*.[188] 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 *Center*, it would have discovered that the Forest Service did in fact sufficiently characterize the cumulative effects of past actions on lynx.[189]

It is reasonable to assume that the Ninth Circuit will find this view a good place to begin its inquiry into whether or not the Forest Service took the "hard look"[190] required to show that it did not decide "arbitrarily"[191] that the cumulative effects of past projects would not significantly impact the lynx. The Court will not easily be led astray from its own precedent in *Center.* In Center the court will find what the District Court did not—guidelines for determining the sufficiency of an agency aggregate cumulative effects analysis[192] Looking to the whole record, the Court will ask does the analysis explain both "the existing condition of the area" and "what

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[181] *See* FOREST SERV. A-1, *supra* note 14, at 60–61; 110–13.
[182] *See Friends*, 875 F. Supp. 2d at 1220.
[183] *See generally* FOREST SERV. A-1, *supra* note 14, at 60.
[184] *See* FOREST SERV. A-1, *supra* note 14, at 60.
[185] *See* FOREST SERV. A-1, *supra* note 14, at 60.
[186] *See* FOREST SERV. A-1, *supra* note 14, at 59–60.
[187] *See* Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior, 608 F.3d 592, 603 (9th Cir. 2010).
[188] *See Center*, 655 F.3d at 1008.
[189] *See generally* FOREST SERV. A-1, *supra* note 14); *see also* Friends of the Wild Swan v. United States Forest Serv., 875 F. Supp. 2d 1199, 1212 (D. Mont. 2012).
[190] Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 947 (9th Cir. 2008).
[191] 5 U.S.C. § 706(2)(A) (2012).
[192] Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1008 (9th Cir. 2011).

the effects of the project would be?"[193] The Court may also inquire into the past projects "necessary to describe the cumulative effect of all past actions combined."[194] And finally, it should inquire whether the EA "rel[ies] on quantified or detailed information" to "assess the impact of the … project against the … aggregate of all past projects?"[195] Should the Court undertake the suggested inquiries, it will discover more than enough 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.

[193] *Id*.
[194] *Id*.
[195] *Id*.