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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Plaintiffs, v. BUREAU OF LAND MANAGEMENT, *et al.*, Defendants,	Case No: CV 03-2509-SI **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Date: September 15, 2005 Time: 3:00 p.m. Courtroom: 10, 19th Floor

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Acronyms

APA	Administrative Procedure Act
BLM	Bureau of Land Management
BO	Biological Opinion
CDCA	California Desert Conservation Area
CEQ	Council on Environmental Quality
DEIS	Draft Environmental Impact Statement
DFG	California Department of Fish and Game
DR	Decision Record
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEA	Final Economic Analysis
FLPMA	Federal Land Policy Management Act
FONSI	Finding of No Significant Impact
FWS	U.S. Fish and Wildlife Service
HMP	Algodones Dunes Wildlife Habitat Management Plan
IMA	Interim Management Alternative
ISDRA	Imperial Sand Dunes Recreation Area
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
ORV	Off-Road Vehicle (interchangeable with OHV: Off-highway Vehicle)
PMV	Peirson's Milk-Vetch
RAMP	Imperial Sand Dunes Recreation Area Management Plan
ROD	Record of Decision

I. INTRODUCTION

Federal Defendants respectfully submit the following Memorandum of Points and Authorities in support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' July 8, 2005, Motion for Summary Judgment.

Plaintiffs filed an eight count Second Amended Complaint on June 3, 2005, against the Bureau of Land Management ("BLM") and U.S. Fish and Wildlife Service ("FWS" or "Service"), alleging violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq*., the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq*., the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1785, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, with respect to the designation of critical habitat for the Peirson's milk-vetch on August 4, 2004, the issuance of a Biological Opinion regarding management of the Imperial Sand Dunes Recreation Area ("ISDRA") pursuant to the 2003 ISDRA Recreation Area Management Plan ("RAMP") on January 25, 2005, and the issuance of the Record of Decision ("ROD") for the ISDRA RAMP on March 24, 2005.[1] Contrary to Plaintiffs' assertions, all three of these challenged agency decisions are fully and adequately supported by the underlying administrative records, and should be upheld by the Court.

The Algodones Dunes are part of the Imperial Sand Dunes Recreation Area, which, at the direction of Congress, is administered by BLM pursuant to a comprehensive, long-range plan based on the concepts of multiple use, sustained yield, and maintenance of environmental quality. This requires a balancing of competing interests and the application of agency expertise. Here, FWS and BLM have provided appropriate protections for the Peirson's milk-vetch and desert tortoise, now and in the future, while preserving reasonable recreational and other uses of the land. Their

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[1] Claims one and two of the Second Amended Complaint challenge the validity of FWS's June 17, 2002, desert tortoise biological opinion, and were the subject of the Court's August 3, 2004, Order on the parties' partial motions for summary judgment (see also January 3, 2005, Order granting in part and denying in part Motion to Alter Judgment). Claim three challenges the April 3, 2003, Peirson's milk-vetch and desert tortoise BO, which has been superseded by the January 2005 BO. Claim three is therefore moot. Accordingly, Plaintiffs' July 8, 2005, motion for summary judgment and Federal Defendants' August 5, 2005, cross-motion for summary judgment address claims four through eight of the Second Amended Complaint.

decisions are entitled to deference and summary judgment in favor of Federal Defendants is appropriate.

II. BACKGROUND

A. STATUTORY FRAMEWORK

1. The Endangered Species Act.

Pursuant to Section 7(a)(2) of the ESA, each federal agency must, in consultation with the FWS or the National Marine Fisheries Service ("NMFS") (collectively, the "Services"),[2] insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species[3] or result in the destruction or adverse modification of the designated "critical habitat" of the species. 16 U.S.C. § 1536(a)(2).[4] To assist action agencies in complying with this provision, ESA § 7 and the implementing regulations set out a detailed consultation process for determining the biological impacts of a proposed activity. Id.; 50 C.F.R. Part 402.

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[2]Whether the action agency consults with FWS or NMFS depends on the type of species involved. FWS has responsibility for terrestrial species and non-marine fish species, and NMFS has responsibility for marine fish species, including anadromous fishes. See 50 C.F.R. § 402.01. In this case, all of the species fall under the jurisdiction of the FWS, and consultation took place between FWS and BLM.

[3]An "endangered species" is a "species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened species" is a "species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. at § 1532(20).

[4]The designation of "critical habitat" may include specific areas found "within" the geographic area occupied by the species which contain "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," 16 U.S.C. § 1532(5)(A)(i), and/or specific areas "outside" the geographic area occupied by the species upon a determination by FWS that "such areas are essential for the conservation of the species," 16 U.S.C. § 1532(5)(A)(ii). The Secretary is required to designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The Secretary may exclude any area from critical habitat if she determines that the benefits of exclusion outweigh the benefits of inclusion, unless she determines that the failure to designate the area as critical habitat will result in the extinction of the species. Id.

In brief, an agency proposing an action must first determine whether the action "may affect" species listed as threatened or endangered under the ESA. 50 C.F.R. § 402.14. If a determination is made that the action "may affect" listed species, the action agency must pursue some form of consultation. If the action agency determines that the action is likely to adversely affect a listed species, "formal consultation" must be undertaken. 50 C.F.R. §§ 402.13-402.14.

Formal consultation procedures require that the Service prepare a biological opinion including a conclusion as to whether the proposed action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of designated critical habitat. 50 C.F.R. § 402.14. If the action is likely to jeopardize the continued existence of a listed species or adversely modify critical habitat, then the Service will set forth reasonable and prudent alternatives ("RPA")[5] to the action, if any. 16 U.S.C. § 1536(b)(3)(A).

If the Service finds that either the proposed action or the action as modified by an RPA is not likely to jeopardize the continued existence of a listed fish or wildlife species or result in the destruction or adverse modification of critical habitat of a listed fish or wildlife species, but the action will result in take of a listed wildlife or fish species, it is required to issue an incidental take statement. 16 U.S.C. § 1536(b)(4). That statement will contain terms and conditions deemed necessary or appropriate to minimize the "take" of the listed wildlife or fish species.[6] Any taking in compliance with the terms and conditions of an incidental take statement are exempt from liability under ESA section 9. 16 U.S.C. § 1536(o)(2).

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[5]RPAs are "alternative actions . . . that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." 50 C.F.R. § 402.02. They must be "consistent with the intended purpose of the action," able to be "implemented consistent with the scope of the Federal agency's legal authority and jurisdiction," and "economically and technologically feasible." Id.

[6]Section 9 of the ESA prohibits any person from "taking" a listed wildlife or fish species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19); see also 50 C.F.R. § 17.3 and 50 C.F.R. § 222.102 (further defining "harm" for species under both FWS and NMFS jurisdiction). Though certain acts harmful to plants are proscribed under ESA section 9(a)(2)(B), "take" of plants is not prohibited under the Act and incidental take statements do not include plants. 16 U.S.C. § 1538(a)(2)(B).

2. The National Environmental Policy Act.

In enacting NEPA, Congress was concerned with the potential impacts of major federal actions on the physical environment. See Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772-73 (1983). NEPA's mandate to the agencies is "essentially procedural . . . It is to insure a fully informed and well-considered decision . . . ." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (internal citations omitted). "NEPA itself does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

NEPA requires a comprehensive Environmental Impact Statement ("EIS") for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The Council on Environmental Quality's regulations implementing NEPA provide guidance as to the nature and content of an EIS. See 40 C.F.R. Part 1502. The regulations direct agencies to "focus on significant environmental issues and alternatives" in an EIS that is "concise, clear, and to the point . . . ." 40 C.F.R. § 1502.1. In an EIS, agencies are required to describe "the environment of the area(s) to be affected or created by the alternatives under consideration." 40 C.F.R. § 1502.15.

Not every federal action or proposal requires preparation of an EIS. Where the environmental impacts of an action are less than significant, an agency may comply with NEPA through preparation of an environmental assessment ("EA") and a finding of no significant impact ("FONSI"). See 40 C.F.R. §§ 1501.3; 1501.4(c), (e); 1508.9.

3. The Federal Land Policy and Management Act.

The Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1785, provides a means for Congress to "exercise its constitutional authority to . . . designate Federal lands for specified purposes," and states that it is the policy of the United States that "management [of public lands] be on the basis of multiple use and sustained yield unless otherwise specified by law." 43 U.S.C. § 1701(a)(4) & (7).[7] The public lands are to be "managed in a manner that will

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[7] The term "multiple use" means the utilization of the public lands in planned fashion, such that "the public lands and their various resource values . . . are utilized in the combination that will best meet the present and future needs of the American people . . . ." 43 U.S.C. § 1702(c). The term "sustained yield" means the

protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use." 43 U.S.C. § 1701(a)(8). Specifically, FLPMA directs the Secretary to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by her under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." 43 U.S.C. § 1732(a). In managing the public lands, the Secretary shall take any action necessary to prevent unnecessary or undue degradation of the lands. 43 U.S.C. § 1732(b). The requirement to protect against undue degradation does not equate to a proscription of off-highway vehicle ("OHV")[8] use, because to do so would negate the Congressional mandate that OHV use is to be provided on public land where appropriate. See Sierra Club v. Clark, 774 F.2d 1406, 1410 (9th Cir. 1985).

Through FLPMA, Congress created the 25 million acre California Desert Conservation Area ("CDCA"). See 43 U.S.C. § 1781. About 10 million acres of the CDCA are administered by the U.S. Bureau of Land Management ("BLM"). Congress recognized that the California desert ecosystem is fragile and that its environment and its resources, including certain rare and endangered species of wildlife and plants, are seriously threatened, but maintained that "the use of all California desert resources can and should be provided for in a multiple use and sustained yield management plan to conserve these resources for future generations, and to provide present and future use and enjoyment, particularly outdoor recreation uses, including the use, where appropriate, of off-road recreational vehicles." 43 U.S.C. § 1781(a)(4); see also ROD p.10, ROD AR Sec.2 at 08107 (quoting Public Law 94-579 Section 601(a)(4)). Congress directed BLM to prepare and implement

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achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use. 43 U.S.C. § 1702(h).

[8] Also referred to as off-road vehicles, or ORVs.

a comprehensive, long-range plan for the management, use, development and protection of the public lands within the CDCA. Id. § 1781(d). Congress required BLM to base the plan on the concepts of multiple use, sustained yield, and maintenance of environmental quality. Id. BLM completed the CDCA Plan in 1980. The CDCA Plan establishes four multiple-use classes (Controlled (C), Limited Use (L), Moderate Use (M), and Intensive Use (I)), multiple-use class guidelines, and plan elements for specific resources or activities such as motorized-vehicle access, recreation, and vegetation. See ROD AR Sec.2 at 09149-50.

The Recreational Area Management Plan for the Imperial Sand Dunes Recreational Management Plan was developed in accordance with the CDCA Plan and amends portions of the CDCA Plan pertaining to recreation management in the ISDRA.

B. FACTUAL AND PROCEDURAL BACKGROUND[9]

1. The Imperial Sand Dunes Recreation Area.

The ISDRA[10] is located within the CDCA in Imperial County, in southeastern California, approximately 25 miles west of the Colorado River and immediately north of the border between the United States and Mexico. ROD AR Sec.2 at 9596.[11] Access to the ISDRA is provided

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[9] Judicial review of Plaintiffs' claims is limited to the administrative record, and the Court should determine agency compliance with the law solely on the record on which the decision at issue was made. 5 U.S.C. § 706; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971). An extensive administrative record has been produced by the Federal Defendants which sets forth the undisputed facts in this case. As the Ninth Circuit has explained, in conducting review of agency action, "there are no disputed facts that the district court must resolve . . . . [T]he function of the district 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 . . . . [S]ummary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." Occidental Eng'g Co. v. INS, 753 F.2d 766, 769-70 (9th Cir. 1985).

[10] The dunes in this area are commonly referred to as the Imperial Dunes, Algodones Dunes, and/or Glamis Dunes.

[11] Consistent with the format of the references to the Administrative Record utilized by Plaintiffs in their summary judgment memorandum, cites to the FWS administrative record for the January 25, 2005, Biological Opinion are referred to as "BO AR [document no. and page no.]"; cites to the FWS administrative record for the August 4, 2004, critical habitat designation for the Peirson's milk-vetch are referred to as "CH AR [document no. and page no.]"; cites to the BLM administrative record for the March 25, 2005, Record of Decision are referred to as "ROD AR [section no. and page no.]"; and cites to the

primarily by State Route (SR)-78 in the north, and Interstate (I)-8 in the south. The ISDRA comprises approximately 167,000 acres of land in California, covering an area more than 40 miles long and averaging 5 miles in width. Of the total acreage of the ISDRA, approximately 159,000 acres are managed by BLM, 7,000 acres are privately owned, and 900 acres are owned by the State of California. In addition, the one-mile wide area around the ISDRA boundary within the planning area for the RAMP includes approximately 48,300 acres of BLM managed land, approximately 1,800 acres of military managed land, and approximately 9,100 acres of privately owned land. Approximately 16 percent of the Dune system was designated as the North Algodones Dunes Wilderness in 1994.

The ISDRA is recognized as a world-class OHV recreation area because of the outstanding opportunities it presents for OHV recreational activities. It is one of the most popular OHV areas in the western United States, as evidenced by over 1.4 million OHV visitors per year at the ISDRA. ROD AR Sec.2 at 9610.

2. Peirson's Milk-Vetch and Desert Tortoise.

The ISDRA provides unique habitat for several endemic and sensitive plant, insect, and animal species, including Peirson's milk-vetch and desert tortoise.

The Peirson's milk-vetch (*Astragalus magdalene* var. *peirsonii*) is a stout, short-lived perennial reaching 20 to 70 cm (8 to 27 in) high. The stems and leaves are covered with fine silky hairs and the leaves are 5 to 15 cm (2 to 6 in) long, with 3 to 13 small oblong leaflets. The flowers are dull purple, arranged in 10- to 17- flowered racemes and the resulting pods are 2 to 3.5 cm (0.8 to 1.4 in) long, inflated, with a triangular beak. FWS designated Peirson's milk-vetch as a threatened species in 1998. 63 Fed. Reg. 53,596 (Oct. 6, 1998). At the time of listing, FWS identified OHV use as the greatest threat to the Peirson's milk-vetch. Id. at 53,600. On August 4, 2004, FWS designated critical habitat for the Peirson's milk-vetch. 69 Fed. Reg. 47330 (Aug. 4, 2004).

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documents added to the administrative record pursuant to the July 8, 2005, Order approving the parties' stipulation to supplement the administrative record are referred to as "ROD SAR [exhibit letter and page no.]."

Peirson's milk-vetch grows on the slopes and hollows of windblown dunes in the Colorado and Sonoran deserts. The plant is known to exist in the Imperial Sand Dunes and known to occur in the Gran Desierto in Sonora, Mexico. Although it has been reported in Borrego Valley, San Diego County, California, it has not been observed there for several decades. 63 Fed. Reg. at 53,599.

The only location where the Peirson's milk-vetch is currently known to occur within the United States is the Imperial Sand Dunes, which supports between 75 and 80 percent of the world's known colonies of the species. 63 Fed. Reg. at 53,600. The milk-vetch is associated with psammophytic (on sandy soil) scrub habitat within these dunes. The plant is generally scattered throughout the dune complex with a higher abundance of the plant along the central and western aspect of the Imperial Sand Dunes. Approximately 20-25 percent of the known colonies of Peirson's milk-vetch occur in the North Algodones wilderness area. Id.

The desert tortoise (*Gopherus agassizii*) is a large, herbivorous reptile, with adults measuring up to 15 inches in shell length, found in portions of the California, Arizona, Nevada, and Utah deserts, as well as in Sonora and Sinaloa, Mexico. BO AR Doc #697 at 12368. The Mojave population of the desert tortoise, which is found to the west and the north of the Colorado River in the Mojave Desert of California, Nevada, Arizona, and southwestern Utah, and in the Colorado Desert in California, was listed as a threatened species in 1990. 55 Fed. Reg. 12,178 (Apr. 2, 1990). The Recovery Plan for the desert tortoise, written in 1994, is the basis and key strategy for recovering and delisting the desert tortoise. BO AR Doc #697 at 12370. The plan divides the range of desert tortoise into six distinct population segments or recovery units and recommends the establishment of 14 desert wildlife management areas throughout the recovery units. Id. The ISDRA lies within the Eastern Colorado Recovery Unit, which is one of four recovery units for desert tortoise that occur in the CDCA, and is 6 miles away from the closest DWMA, or desert tortoise conservation area. Id. at 12380. Desert tortoise densities in the ISDRA appear to be very low based on the rarity of desert tortoise sign and desert tortoise sightings. Id. at 12380-81. In fact, Fall 2002 surveys conducted in the ISDRA, although not exhaustive, yielded few observations of desert tortoise sign and no observations of live desert tortoises. Id.

3. Management of the Imperial Sand Dunes Recreation Area.

The first ISDRA-specific RAMP was developed in 1972. The initial RAMP was revised in 1987, and provided BLM managers guidance to implement the CDCA Plan of 1980. ROD AR Sec.1 at AR 04272; ROD AR Sec.2 at 09139 & 09611. The 1987 RAMP included management prescriptions for recreation opportunities, safety/emergency services/visitor protection, resource protection, protection of wilderness suitability, public contact and interpretation, facility development, operations and maintenance, concessions and vendors, access easements and land acquisitions, and compatibility of land uses. ROD AR Sec.2 at 09151. Because of budgetary considerations and environmental factors, portions of the 1987 RAMP were not implemented. Id.

In 1994, Congress formally established 26,202 acres in the ISDRA as the North Algodones Dunes Wilderness Area through the enactment of the California Desert Protection Act ("CDPA") of 1994, Pub. L. 103-433. ROD AR Sec.2 at 09150-51. Prior to the enactment of the CDPA, it was proposed in Congress that additional areas in the South Algodones Dunes should also be designated as a Wilderness Study Area. Id. at 09151. However, such a proposal did not pass, and the proposed area in the South Algodones Dunes was dropped "to allow vehicle use." Id.

In March 2000, the Center for Biological Diversity, the Sierra Club, and Public Employees for Environmental Responsibility filed a complaint alleging that BLM was in violation of Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), because it had failed to enter into formal consultation with FWS on the effects of the adoption of the CDCA Plan, as amended, on threatened and endangered species. Center for Biological Diversity v. BLM, Case No. C-00-0927 WHA-JCS (N.D. Cal.). Several groups of recreationists in the CDCA Area were granted status as Defendant-Intervenors in the action, and a number of other parties participated as amicus. After extensive Court-supervised settlement negotiations, Plaintiffs, Defendants, and Defendant-Intervenors entered into a series of agreements to establish interim actions to be taken to provide temporary protection for endangered and threatened species pending completion of consultation between BLM and FWS on the CDCA Plan. ROD AR Sec.3 at 15997. Pursuant to the stipulations, BLM temporarily closed five areas in the ISDRA, totaling approximately 49,000 acres, to OHV and other recreational use to protect the Peirson's milk-vetch, and temporarily closed to camping a 25,600 acre area east of Glamis and the

1 Union Pacific Railroad to protect the desert tortoise. BO AR Doc #128. These closures were to
2 remain in place until BLM signed the decision document implementing the new RAMP for the
3 ISDRA. The decision document, the Record of Decision, was signed by BLM on March 24, 2005.[12]
4 On March 29, 2002, BLM released a draft RAMP and accompanying Draft Environmental
5 Impact Statement for the Dunes. The public comment period for the draft EIS/RAMP was open for
6 90 days from March 29, 2002 through June 28, 2002. ROD AR Sec.2 at 09488. Six public meetings
7 were held to explain the EIS and RAMP to the public and BLM received over 7,000 comments, out
8 of which over 1000 unique issues were identified and considered by BLM. Id.
9 BLM consulted with FWS for this project pursuant to section 7 of the ESA to determine
10 impacts to the Peirson's milk-vetch and desert tortoise, the only listed species that are known to
11 occur, or to have the potential to occur, in the ISDRA. ROD AR Sec.2 at 09489. FWS issued a
12 Biological Opinion dated April 3, 2003, on BLM's preferred alternative management direction for
13 the RAMP. BO AR Doc #466. BLM completed the final revisions to the preferred alternative and
14 released a final EIS and proposed RAMP in May 2003. ROD AR Sec.2 at 9125 & 9596.
15 On August 5, 2003, FWS published a draft determination of critical habitat for the Peirson's
16 milk-vetch within the Algodones Dunes. See 68 Fed. Reg. 46,143. Due to the need to clarify the
17 scope of the April 3, 2003 BO and to respond to the proposed critical habitat designation for the
18 Peirson's milk-vetch, BLM reinitiated consultation with FWS. FWS published a final critical
19 habitat designation for Peirson's milk-vetch on August 4, 2004, which became effective on
20 September 3, 2004. 69 Fed. Reg. 47,329. On January 25, 2005, FWS issued a new BO for the
21 proposed RAMP, which concluded that the CDCA Plan as amended by the ISDRA RAMP and
22 subsequent revisions agreed upon during the consultation process, is not likely to jeopardize the
23 continued existence of Peirson's milk-vetch or desert tortoise over the 10- to 15-year length of the
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26 [12] Pursuant to the Court's March 23, 2005, Order for Managing Remaining Claims, the Temporary Closure
27 of Approximately 49,300 Acres to Motorized Vehicle Use of Five Selected Areas in the Imperial Sand Dunes Recreation Management Area published by BLM in the Federal Register on October 22, 2001, 66
28 Fed. Reg. 53,431-02, remains in effect until the Court rules on the merits of Plaintiffs' challenge to the Record of Decision and Biological Opinion. See DN 131.

ISDRA RAMP, nor is it likely to destroy or adversely modify critical habitat for the Peirson's milk-vetch over the 10- to 15-year length of the ISDRA RAMP. BO AR Doc #697 at 12396.[13]

On March 24, 2005, BLM issued the Record of Decision approving, with minor modifications, the Proposed Imperial Sand Dunes Recreation Area Management Plan and Proposed Amendment to the CDCA Plan. ROD AR Sec.2 at 08098.

III. STANDARD AND SCOPE OF REVIEW

Challenges to final agency actions taken pursuant to the ESA and NEPA are subject to the review provisions of the Administrative Procedure Act. Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 953 (9th Cir. 2003). Under this standard the court must determine whether agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Pyramid Lake Paiute Tribe v. Dep't of Navy, 898 F.2d 1410, 1413 (9th Cir. 1990). This standard is a narrow one whereby "[t]he court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, 401 U.S. at 416. The court should not determine whether it would have decided an issue differently; instead, it is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id.; see also Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989); Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 105 (1983). "The relevant inquiry is whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." Pyramid Lake Paiute Tribe, 898 F.2d at 1414 (internal citations omitted). The U.S. Supreme Court has summarized the inquiry as follows:

> [A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. . . . The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983).

Moreover, when examining agency scientific findings, as opposed to simple findings of fact, "a reviewing court must generally be at its most deferential." Baltimore Gas & Elec., 462 U.S. at

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[13] Adverse modification to desert tortoise critical habitat was not addressed in the BO because there is no desert tortoise critical habitat in the action area. See BO AR Doc#697 at 12393.

103; Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993). "We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir.) (*en banc*), cert. denied, 426 U.S. 941 (1976); Central Arizona Water Conservation Dist. v. EPA, 990 F.2d 1531, 1540 (9th Cir. 1993) (court is to "defer to the agency's interpretation of equivocal evidence, so long as it is reasonable") (citations omitted). Accordingly, the proper standard of review in administrative record review cases accords significant deference to the judgment of agency decision makers, particularly where, as here, the decision requires agency expertise.

Finally, although this case is brought before the Court on the parties' cross-motions for summary judgment, this procedural posture does not relieve the Plaintiffs of their burdens of proof and persuasion. Agency action is entitled to a presumption of regularity. Citizens to Preserve Overton Park, 401 U.S. at 415. It is Plaintiffs' burden to prove and demonstrate to the Court the particular manner in which the actions taken by the Federal Defendants are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Arizona Cattle Growers' Ass'n v. United States Fish & Wildlife Serv., 273 F.3d 1229, 1235-36 (9th Cir. 2001). If Plaintiffs fail to meet their burden, their motion for summary judgment must be denied, and summary judgment must be entered for the Defendants.

IV. ARGUMENT

A. FWS'S JANUARY 25, 2005, BIOLOGICAL OPINION FULLY COMPLIED WITH THE ESA AND APA.

1. The Record Supports FWS's Conclusions.

a. Plaintiffs' Mischaracterize FWS's Review of the RAMP.

Plaintiffs' attempts to demonstrate that the final BO's "no jeopardy" conclusion impermissibly contradicted earlier findings by FWS staff mischaracterize the administrative record and are ultimately unavailing. Contrary to Plaintiffs' allegations, FWS did not "change course" or take an action "inconsistent" with any "prior positions." See Pl. Br. at p. 12 ln. 18, p. 13 ln. 2, and p. 23 ln. 12. The FWS deliberations referred to by Plaintiffs constitute an internal "early alert" by

FWS staff to FWS management as to potential concerns with the RAMP. The RAMP was ultimately modified to adequately address FWS's concerns, and the "no jeopardy" conclusion followed. Thus, the consultation process proceeded normally and appropriately, and Plaintiffs' attempts to insinuate otherwise should be rejected by the Court.

BLM began regular communications with FWS on the CDCA Plan, as amended by the interim measures and proposed ISDRA RAMP, in early 2001. See, e.g., BO AR Doc #165 & 238. Predictably, a series of back-and-forth verbal, written, and electronic communications took place between BLM and FWS staff members during the process of reviewing the RAMP and developing the BO. At no time did these communications constitute a "determination" or "decision" by FWS to issue a "jeopardy" BO. See BO AR Doc #266 at 07487 ("no decisions have been made . . . this is a CNO manager decision"); Doc #268 (no decision reached yet by FWS); Doc #270 (FWS is "considering and evaluating" its opinion); Doc #271 (FWS's "Carlsbad [Field] Office is considering issuing a jeopardy opinion"); Doc #277 at 07675 (internal FWS email from FWS staff member who had "not had a chance to read BO or early alert from Carlsbad"); Doc #295 (internal FWS "Early Alert" prepared for California State Director re: possible jeopardy opinion). To the contrary, the early alert itself states that there had not yet been coordination and development between FWS and BLM, and the alert represented an internal preliminary indication from FWS staff only. BO AR Doc#697 at 07784-85.

The administrative record provides ample evidence of extensive communications between FWS and BLM staff members after the early alert to develop plan modifications that will ensure the milk-vetch is adequately protected. See, e.g., BO AR Doc #304 (planning to work together to refine the dunes-wide monitoring/management plan); Doc #308 (discussions to alter RAMP monitoring plan); Doc #310 (draft changes to monitoring plan); Doc #316 (summary of meeting between agencies); Doc #322 (FWS suggestions); Doc #326 (BLM proposed changes); Doc #346 (discussing monitoring tests); Doc #357 (FWS comments on monitoring plan); Doc #364 (FWS is "diligently working with the BLM to identify a mechanism that will prevent an appreciable decline in the numbers, distribution, and reproduction of [the desert tortoise and Peirson's milk-vetch]."); Doc #370 (discussing monitoring protocol); Doc #381 (cost comparison of BLM and FWS proposals);

Doc #385 (revised project description); Doc #389 (further revisions); Doc #394 (same); Doc #395 (transmitting revised project description and monitoring implementation schedule); Doc #434 (BLM comments on FWS draft BO). There were biological disagreements between FWS and BLM biologists, but, as the documents referenced above demonstrate, the agencies worked together to reach a mutually acceptable solution. While Plaintiffs have highlighted two instances in the record where there were political/policy comments expressing interest in the BO process, see Pl. Br. at 13, the record makes clear that "political pressure" is not what "ultimately prevailed" and "led to a 'no jeopardy' finding." See, e.g., BO AR Doc #316. The record does not show any evidence of FWS staff "caving in" to political pressure. To the contrary, it demonstrates a natural, iterative, back-and-forth process between the agencies, which ultimately resulted in a compromise, but satisfactory, solution.

The coordination that took place in this case between FWS and BLM is consistent with, and envisioned by, the consultation regulations. See, e.g., 50 C.F.R. § 402.13(b) (during informal consultation FWS may suggest project modifications to avoid the likelihood of adverse effects to listed species or critical habitat); 50 C.F.R. § 402.14(g)(5) (during formal consultation FWS will discuss its review process, the basis for any findings, and any reasonable and prudent alternatives that can be taken to avoid a section 7(a)(2) violation). Furthermore, the statements highlighted by Plaintiffs were made by lower-level FWS employees during the early stages of the consultation process, and do not represent the official views or position of the agency. As the District Court from the Western District of Washington succinctly stated, "[u]ltimately, the issue is simply whether the agency acted reasonably in arriving at its decision." Confederated Tribes and Bands of the Yakama Nation v. McDonald, No. CY-02-3079-AAM, 2003 WL 1955763, *17 (E.D. Wash. Jan. 24, 2003) (unpublished); see also National Wildlife Fed'n v. United States Army Corps of Eng'rs, 384 F.3d 1163, 1174 (9th Cir. 2004) (inappropriate to fault agency based on e-mail from staff employee because it was informal in nature and did not represent the official position of the agency). In the end, the Court's review must focus on the reasons stated in the biological opinion for FWS's "no jeopardy" conclusions and the evidence in the record to support the decision. When that review is

undertaken, it is evident that the agency's determination here was based on a thorough and reasoned analysis amply supported by the record.

b. The Listing Rule and 12-Month Finding Are Not Inconsistent With the BO's "No Jeopardy" Determination.

Next, Plaintiffs argue that the August 7, 1998, Final Rule determining threatened status for the Peirson's milk-vetch,[14] see BO AR Doc #96, and the June 4, 2004, 12-month petition finding on a petition to de-list the Peirson's milk-vetch, see BO AR Doc #633, somehow preclude FWS's determination that the ISDRA RAMP is not likely to jeopardize the continued existence of the milk-vetch or to result in the destruction or adverse modification of the species' critical habitat. Plaintiffs' logic and reasoning is in error.

Plaintiffs fail to recognize the significant difference in the findings, in 1998 and 2004, that existing regulatory mechanisms, as a whole, are insufficient to avoid listing or to justify removing the Peirson's milk-vetch from the threatened species list, thereby denying or removing all of the ESA's protections from the species, and the finding in 2005 that the specific action on which BLM consulted (the ISDRA RAMP) is not likely to cause jeopardy to the survival of the species or destruction/adverse modification of its critical habitat. Were a finding of inadequate regulatory mechanisms during the listing process (as part of the 5 factor analysis set forth at 16 U.S.C. § 1533(a)(1)) to always equal jeopardy when consultations take place on future management actions, then the consultation process would be rendered obsolete. That cannot be what Congress intended, or how the statute should be read.

Furthermore, Plaintiffs' selective quotations mask what was actually stated by FWS in the 2004 12-month finding. At that time, FWS acknowledged that the RAMP proposed significant measures to help protect the Peirson's milk-vetch:

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[14] Plaintiffs misleadingly characterize the 1998 listing rule and 2004 12-month petition finding as finding "that the species was threatened with extinction." Pl. Br. at 14. What FWS found was that the status of the Peirson's milk-vetch warranted listing as a threatened species, which means that it is a "species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §1532(20). Species classified as endangered species are those that are "in danger of extinction throughout all or a significant portion of [their] range." 16 U.S.C. § 1532(6). Thus, the milk-vetch is not in imminent danger of extinction, as Plaintiffs imply.

> To help protect the plant, BLM has an adaptive management and monitoring strategy in place. This will provide corrective measures should existing management be found to cause excessive, unacceptable impact to the plant. The majority of OHV users are responsible recreationists on the dunes and avoid vegetated sites. However, there may be significant damage to populations of *A. m.* var. *peirsonii* and its habitat, especially closer to the staging areas. This would be the result of the focus of increased OHV activity in a smaller area. . . . As stated in the final listing rule, "While this taxon remains vulnerable to the OHV use occurring over most of its dune habitat, the Service believes that the dispersed nature of its colonies and the wilderness designation reduce the potential for immediate extinction."

BO AR Doc #633 at 11114 (citations omitted). Given this acknowledgment, it was clearly not arbitrary for FWS to determine that the monitoring and management measures incorporated into the ISDRA RAMP were sufficient to avoid a "jeopardy" or "adverse modification" opinion.

c. The Information In The 2005 BO is Not Inconsistent With the BO's "No Jeopardy" Conclusion.

Plaintiffs construct their argument that the 2005 BO "contains significant information undermining the ultimate 'no jeopardy' conclusion" on a misleading set of selectively-chosen excerpts that present only half of the FWS's findings. Pl. Br. at 16-17. When the FWS's additional findings, which indicate that the adverse impacts from OHV use will be lessened and limited by the ISDRA RAMP, are considered, as they must be, then the ultimate "no jeopardy" conclusion is reasonable and consistent with the rest of the BO.

For example, when quoting from a discussion of future impacts of the RAMP, Plaintiffs conveniently insert an ellipsis in the middle of their excerpt to avoid reiterating the BO's qualifying statement: "However, BLM management likely will prevent such a decline in the North Algodones Dunes Wilderness Management Area and AMA." BO AR Doc #697 at 12388. That same paragraph goes on to explain why physical damage to milk-vetch throughout the Dunes will be minimized:

> However, BLM's efforts aimed at visitor education will lessen this effect. Moreover, though continued and intensified OHV use likely will reduce, to some degree, Peirson's milk-vetch abundance, numbers, and distribution outside the North Algodones Dunes Wilderness Management Area and AMA, we anticipate that BLM's high precision monitoring and adaptive management process will identify and reverse any significant adverse effects to the species or population as a whole.

Id. Plaintiffs present the same distorted half-view of the BO's findings in their other selective quotations. See id. at 12391 ("However, BLM's efforts aimed at visitor education will lessen this adverse effect. Moreover, the magnitude of adverse effects would be limited by the proposed intensive monitoring and adaptive management program and immediate management changes that

would occur should degradation, exceeding the specified threshold, take place."); id. at 12396 ("[H]owever, a monitoring plan and an interim population threshold for each management area will be identified that will necessitate management measures, which will include closures if necessary, pursuant to 43 CFR § 8341.2, should reproductive Peirson's milk-vetch plants in any management area decline to or below the determined threshold. This limit would ensure the conservation of the species."). At most, Plaintiffs' arguments establish that the FWS fully considered all the potential adverse impacts of the action, but found that they did not rise to the level of causing jeopardy to the species as a whole. The ESA envisions and requires just such a thorough and complete analysis, and the BO complies with the statute.

2. The BO Provides a Rational Connection Between the Facts Found and FWS's "No Jeopardy" Conclusion.

Contrary to Plaintiffs' contentions, the BO does provide a rational connection between the anticipated impacts to the Peirson's milk-vetch during implementation of the ISDRA RAMP and FWS's conclusion that the RAMP is not likely to jeopardize the continued existence of the milk-vetch. Although FWS recognized and considered all of the potential adverse impacts to the milk-vetch from OHV activities, the Service reasonably concluded that the incorporation in the RAMP of public education efforts, an intensive monitoring and research plan and program, interim population thresholds for each management area that will trigger immediate management changes should degradation exceed the specified threshold, continued closure of the wilderness management area to motorized vehicles, and a comprehensive adaptive management program will ensure the conservation of the species.

In fact, throughout the 'Effects of the Action' section of the BO (BO AR Doc #697 at 12376-96), FWS provides analysis showing the "rational connection." For example, at the bottom of page 46 (12388), continuing on page 47 (12389), FWS explains why the 50% threshold in the monitoring and adaptive management program is reasonable and provides sufficient protection for the species. On page 47 (12389), FWS explains how the restrictions in the Adaptive Management Area lessen OHV impacts. In the overflow paragraph on page 49 (12391), FWS explains how the educational, monitoring, and adaptive management programs included in BLM's proposed action reduce the

magnitude of adverse effects from the recreational uses allowed under the RAMP. On pages 50-51 (12392-93), FWS explains why identified potential habitat impacts will not significantly impair the conservation function of the primary constituent elements of critical habitat over the life of the project. And in the summary on pages 53-54 (12395-96), FWS explains why the proposed action will have a negligible effect, overall, on the tortoise. Overall, FWS's conclusions are reasonable and entitled to deference.

Plaintiffs' attempts to analogize this case to Idaho Rivers United v. National Marine Fisheries Serv., No. C94-1576R, 1995 WL 877502 (W.D. Wash. Nov. 9, 1995) (unpublished), is unavailing. Unlike the agency in Idaho Rivers, here FWS did not argue that the RAMP would not adversely affect the milk-vetch. In fact, FWS analyzed the potential adverse effects of OHV use and made reasonable conclusions regarding the magnitude and significance of the effects in light of the management measures incorporated into the RAMP. A rational connection was reasonably drawn, and the BO should be upheld.

a. The Record Supports the "No Jeopardy" Conclusion.

Relying on Center for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1152-54 (D. Ariz. 2002), Plaintiffs contend that the monitoring measures incorporated into the RAMP are not sufficient to ensure against jeopardy to the Peirson's milk-vetch. Pl. Br. at 18-19.

The situation here is distinguishable from the facts in Rumsfeld, and the record shows that FWS was justified in issuing its "no jeopardy" conclusion. In that case, the Service relied on the Army's future development and implementation of plans to maintain protected species and habitats in rendering a "no jeopardy" opinion. Rumsfeld, 198 F. Supp. 2d at 1151. The court held there was no factual or rational basis for this opinion because the mitigation measures which were anticipated to be incorporated into the future management plans were not identified and included in the BO. Id. at 1154. Several differences exist in the facts of this case, including the following: 1) the 2005 BO does not require BLM to develop a plan – the plan (the ISDRA RAMP) is complete and is part of the project description; 2) there is no delay in implementation, as there was in Rumsfeld – the more intensive data collection in the first few years is intended to aid in the continuing adaptive management process; 3) BLM does not need to coordinate with outside entities; and 4) there is more

to the monitoring program here than "assessing progress" – specific responsive measures are identified, there is active coordination with the FWS, and if there is disagreement between the agencies regarding the appropriate response, the area in question will be closed. The facts in this case more closely parallel the facts in California Native Plant Soc'y v. Norton, No. 01CV1742 DMS (JMA), 2004 WL 1118537 at *11 (S.D. Cal. Feb. 10, 2004) (unpublished) (upholding BO that relied on management plan finalized and implemented prior to completion of BO, where management plan sets out specific mitigation measures for natural resource conservation), and Swan View Coalition v. Turner, 824 F.Supp. 923, 932 (D. Mont. 1992) (upholding BO that relied on future ESA evaluations at the development stages of specific projects because BO included standards and guidelines to protect species and habitat).

Furthermore, contrary to Plaintiffs' offhand and unsupported assertion that the 2005 BO relies on "a monitoring mechanism and nothing more," Pl. Br. at 19, there is substantially more to the RAMP than monitoring and annual meetings to assess impacts. See BO AR Doc#697 at 12360-64. The RAMP incorporates a comprehensive program that includes data collection, monitoring, ISDRA-wide adaptive management, restrictions in the Adaptive Management Area, and enhanced user information and education. Id. BLM made the commitment that proactive measures will occur if certain threshold conditions are not met, thus ensuring the effectiveness of this program. Accordingly, the record in this case supports FWS's "no jeopardy" determination and demonstrates FWS's and BLM's compliance with the ESA.

b. The Monitoring Plan and Interim Population Thresholds Support FWS's Determinations.

The monitoring plan and interim population thresholds developed by BLM and FWS and incorporated into the RAMP support FWS's "no jeopardy" determination. As noted above, Plaintiffs have mischaracterized the proposed action, suggesting that the monitoring plan is the only measure in the RAMP that protects the milk-vetch. Aside from that problem, Plaintiffs are also mistaken in their suggestion that the monitoring plan does not insure against jeopardy to the species.

The RAMP requires implementation of an annual review process to ensure that a no jeopardy/no adverse modification standard is maintained throughout the ISDRA. BO AR Doc#697

at 12362. If Peirson's milk-vetch distribution or abundance in any particular management area significantly declines, then BLM would take immediate measures to remedy the situation. "Significantly declined" is defined as declining to the mutually agreed upon threshold past which additional actions may be deemed necessary to continue to support the conservation of the species. Id. In 2004-05, the threshold will be defined as 50 percent of the reproductive plants as measured in a comparable rainfall year. Id.[15] In order to permit BLM and FWS to choose the most appropriate response to each situation as it arises, BLM has committed to take measures that may include, but are not limited to: 1) education of OHV users regarding avoiding the plant; 2) implementation of permitting or other method to minimize use in sensitive areas; 3) self-policing by OHV users to keep users out of sensitive areas; 4) partial closure of sensitive areas; and 5) complete closure of areas. Id. Plaintiffs argue that these measures are voluntary and will not be effective, but Plaintiffs miss a crucial point. If BLM and FWS are not able to come to an agreement as to the appropriate response, "BLM will ensure the protection of the species and associated critical habitat under its FLPMA authorities by closing the relevant portions of the management areas in question," and the areas will remain closed until a reinitiated consultation is completed. Id. Thus, the RAMP adequately insures against jeopardy.

FWS fully and adequately explained why the 50% threshold level was chosen:

> Although the 50 percent management threshold is based on the ability to detect the change, rather than physiological or ecological characteristics of the species, the selection of this parameter is validated by the ongoing presence of a seed bank; even if a population has experienced a 50 percent decline, we anticipate that germination of seeds present in the soil would allow the population to rebound if disturbance was minimized.

BO AR Doc#697 at 12389. The record supports FWS's assumption that a persistent seed bank will ensure recovery of the species if there appear to be significant adverse effects to the adult Peirson's milk-vetch population. BO AR Doc#218 (re: virtual certainty of persistent seed bank); Doc #269 (seed bank study).

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[15] Throughout their brief, Plaintiffs appear to imply, erroneously, that the BO permits a 50% decline in the Peirson's milk-vetch population. The 50% threshold (which is subject to change based on the yearly analysis of monitoring data) actually applies to each management area independently, not to the entire range. BO AR Doc#697 at 12363. In addition, it should be noted that the 50% threshold is related to reproductive individuals, and does not include the available seed bank or milk-vetch seedlings.

Plaintiffs also argue that the BO's reliance on the RAMP's monitoring measures is flawed because there is no assurance that these measures will be carried out by BLM. Pl. Br. 21-23. However, the BO notes that "BLM has reiterated its commitment to monitoring and research related to Peirson's milk-vetch and human-related impacts, and has committed to fund these efforts in the amount needed for them to be scientifically credible." BO AR Doc #697 at 12363. The required monitoring did take place in 2004, prior to completion of the BO. Id.; see also BO AR Doc #681; ROD AR Sec.1 at 66-129. The fact that BLM had begun implementing part of the proposed process prior to finalization of the BO demonstrates that it was reasonable for FWS to believe BLM would implement its stated commitments.[16]

Moreover, the management measures incorporated into the RAMP are sufficiently certain to occur and protective of the species so as to distinguish this case from other cases, such as Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987), Northwest Envtl. Advocates v. EPA, 268 F. Supp. 2d 1255 (D. Or. 2003), and National Wildlife Fed'n v. National Marine Fisheries Serv., 254 F. Supp. 2d 1196 (D. Or. 2003). Here, a detailed plan was included in the proposed action to allow BLM and FWS to immediately respond through adaptive management if monitoring data indicate action is needed to maintain viable populations. The data collection and monitoring will aid in gathering needed information regarding OHV impacts. The 50% measure is a reasonable threshold to further ensure no jeopardy to the species. The adaptive management principles that are incorporated into the Plan will provide FWS and BLM the necessary flexibility to respond to constantly changing information and circumstances and to adequately address the conservation needs of the listed species. Accordingly, Plaintiffs' criticisms of the monitoring plan and the interim population thresholds are without merit.[17]

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[16] BLM's 2004 monitoring of all seven management areas that support Peirson's milk-vetch followed pilot monitoring the agency conducted in 2003 in the Wilderness and Gecko management areas of the Algodones Dunes. ROD AR Sec.1 at 00350.

[17] Plaintiffs' statement, at page 23, footnote 10 of their brief, that "[i]n addition to the monitoring, BLM's only other 'mitigation' is the Adaptive Management Area," is not accurate. As noted previously in this brief, the RAMP includes data collection, monitoring, ISDRA-wide adaptive management, restrictions in the AMA, and enhanced user education. Pages 47-49 (12389-91) of the BO analyze BLM's proposed

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c. The "Draft Jeopardy Opinion, Conservation Recommendations, and Expert Comments" To Which Plaintiffs Refer Do Not Undermine the BO.

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Plaintiffs' attempts to undermine the BO by highlighting a draft "jeopardy" BO produced early in the consultation process by FWS, the conservation recommendations in the BO, and expert comments that disagree with the BO's conclusions are unavailing. The 2005 BO's conclusions are not arbitrary and capricious, and the administrative record, when considered as a whole, supports those conclusions.

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Plaintiffs are correct that FWS has an obligation to use the best scientific and commercial data available in formulating its biological opinion. See 50 C.F.R. § 402.14(g)(8); Pacific Coast Fed'n of Fishermen's Ass'ns v. National Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001). An agency has wide latitude to determine what is "the best scientific and commercial data available." Kandra v. United States, 145 F.Supp.2d 1192, 1208 (D. Or. 2001). It is presumed that an agency has used the best data available unless those challenging the agency action can identify relevant data not considered by the agency. Id.; Friends of Endangered Species v. Jantzen, 760 F.2d 976, 985 (9th Cir. 1985). Simply disagreeing with the conclusions reached by FWS is not enough to render the decision arbitrary and capricious. See Aluminum Co. v. Bonneville Power Admin., 175 F.3d 1156, 1162 (9th Cir. 1999) (holding biological opinion was not arbitrary and capricious where differing scientific views were resolved through expert choices and plans for further studies). Where different alternatives are available, the Secretary is not required to choose the best alternative or to explain why one alternative was chosen over another. Southwest Center for Biological Diversity v. United States Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998).

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Here, Plaintiffs point to documents in the record indicating that early in the consultation, FWS staff biologists in the FWS field office had concerns about the impacts of the RAMP on Peirson's milk-vetch and prepared an "early alert" to notify more senior agency decision makers about the potential problems in the consultation. See BO AR Doc#295 (August 2002 Early Alert).

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adaptive management program. Within the AMA, the Service acknowledges that 525 vehicles per day could, in theory, impact the entire AMA, but then explains how such intensive impacts will be avoided. BO AR Doc#697 at 12389.

The early alert contained recommendations from the FWS about reasonable and prudent measures that could avoid jeopardy, but made clear that at that time, FWS staff members had not coordinated with BLM to develop plan modifications or discussed the FWS field office staff's proposed reasonable and prudent alternatives with BLM. Id. at 07784-85. In other words, these staff recommendations were given very early in the process, and were not based on the final compromise action analyzed in the January 2005 BO. As noted above, after the early alert, FWS and BLM staff worked together over a period of several months to refine the monitoring plan and develop management measures that would avoid jeopardy to the species, and ultimately produced a scientifically sound compromise solution. See § IV(A)(1)(a), supra. In contrast to Defenders of Wildlife v. Babbitt, 958 F.Supp. 670, 676, 681-85 (D.D.C. 1997), FWS biologists were active in the production of the BO in this case and their recommendations and work was incorporated into the final agency decision.

Plaintiffs also refer to the BO's "Conservation Recommendations" and argue that they implicitly acknowledge some inadequacy in the RAMP because they recommend that BLM consider designating a large closed area in the central/southern portion of the Algodones Dunes as an Area of Critical Environmental Concern or Special Area, in order to afford additional protection to Peirson's milk-vetch and simplify the management and monitoring program. Put simply, this argument does not make sense. An action agency need not choose the most protective measures to ensure that its action does not jeopardize the continued existence of the species. Southwest Ctr. for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 523 (9th Cir. 1998) ("The agency decision need not be ideal . . . so long as the agency gave at least minimal consideration to the relevant facts contained in the record.") (internal quotations omitted). Were Plaintiffs' argument to be taken to its logical extreme, then any time the FWS made Conservation Recommendations (which it typically does in a BO), that would mean the biological opinion was inadequate. This cannot be, and is not, the case. As the BO makes clear, conservation recommendations "are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information." BO AR

Doc#697 at 12401. FWS was simply recommending additional protective measures that could be taken, but were not necessary to avoid jeopardy to the species.

3. The Conclusion That the RAMP Was Not Likely to Result in the Destruction or Adverse Modification of Critical Habitat Is Adequately Supported.

Plaintiffs argue that FWS's conclusion in the 2005 BO that the RAMP is not likely to adversely modify Peirson's milk-vetch critical habitat is flawed, because the conclusion allegedly fails to meet the standard articulated in Gifford Pinchot Task Force v. United States Fish & Wildlife Serv., 378 F.3d 1059, amended on other grounds, 387 F.3d 968 (9th Cir. 2004) ("GP Task Force"), and is not adequately explained or supported in the BO. Once again, Plaintiffs' argument is based on a partial, misleading reading of the BO, and ignores extensive analysis by FWS that is directly on-point. In this case, as the BO and record demonstrate, FWS complied with the holding of GP Task Force and rationally explained its ultimate "no adverse modification" conclusion.

As the administrative record demonstrates, FWS re-analyzed the effects of the ISDRA RAMP after the GP Task Force decision and modified its analysis to comply with the Court's directives. See, e.g., BO AR Doc #649; Doc #653 (FWS preliminary guidance for completing critical habitat analyses in light of GP Task Force); Doc #652 (draft addressing preliminary guidance); Doc #665 (Memorandum from Director of FWS re: application of the "destruction or adverse modification" standard in light of recent litigation); Doc #689 (noting that revised critical habitat section of BO conforms with FWS's national adverse modification guidance). This is confirmed by statements in the BO, and evidenced in FWS's conclusions. See BO AR Doc #697 at 12367 ("This biological opinion does not rely on the regulatory definition of 'destruction or adverse modification' of critical habitat at 50 CFR § 402.02. Instead, we have relied upon the statutory provisions of the ESA to complete the following analysis with respect to critical habitat."); id. at 12398 ("the activities are not likely to appreciably diminish the value and function of the critical habitat for the conservation of the Peirson's milk-vetch").

The BO explains that critical habitat for Peirson's milk-vetch consists of one unit divided into two Subunits, 1A and 1B. See BO AR Doc#697 at 12367. Subunit 1A, located north of SR-78, includes 14,544 acres of federal land and encompasses portions of the Mammoth Wash and North

Algodones Dunes Wilderness Management Areas within the ISDRA. Id. Subunit 1B, located south of SR-78 and north of I-8, totals 5,355 acres and encompasses a portion of the Ogilby Management Area. Id. The North Algodones Dunes Wilderness Area lands are managed as semi-primitive, non-motorized recreational settings, have low visitation, and no facilities. Id. at 12378. Within the Mammoth Wash Management Area, lands are managed for semi-primitive, motorized recreation and low to moderate visitation. Id. No facilities are within this management area, and OHV use is focused more on family-oriented touring and exploring than intensive free play. Id. Ogilby Management Area is managed for roaded, natural recreation, and includes moderate to high visitation in some portions of the management area. Id. Recreation activities in this area include camping and OHV touring and free play. Id. Twenty-five percent of this management area is designated as critical habitat. Id.

In the "Effects of the Action" section, FWS thoroughly analyzed the impacts of the RAMP on Peirson's milk-vetch critical habitat. See BO AR Doc#697 at 12391-93. Significantly, FWS noted that critical habitat is only designated in areas of no to moderate use, and that no critical habitat areas will receive heavy OHV use. Id. at 12392. Little degradation is anticipated in Subunit 1A given the limited to no OHV use in Mammoth Wash Management Area and North Algodones Dunes Wilderness. Id. at 12393. Moreover, despite moderate OHV activity proposed for the Ogilby Management Area, any potential long-term adverse effects from OHV use are not expected to be detectible nor measurable within designated critical habitat over the 15 years of the proposed action. Id.[18] As FWS noted:

> [A]ctions under the RAMP over the next 15 years would not appreciably diminish the value for conservation in both the short and long-term because the OHV use in Ogilby Management Area is moderate and can be regulated through FLPMA measure[s] directing BLM to take immediate measures to protect the resource should a degradation of primary constituent elements be observed. This measure is assured by the implementation of the Recreation Opportunity Spectrum classification directing use in the management areas (keeping Ogilby Management Area as moderate and not high use), the monitoring program,

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[18] BLM's ongoing monitoring shows that the density of Peirson's milk-vetch was highest in the Ogilby Management Area (45.1 plants/hectare), an area open to OHV use, and lowest in the Wilderness Management Area (0.5 plants/hectare), an area closed to OHV use. ROD AR Sec.1 at 00102. The density of Peirson's milk-vetch in the Ogilby Management Area was approximately four times the density in the Wilderness Area during the spring 2004. ROD AR Sec.1 at 00070.

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> and the commitment by BLM to take appropriate measures should there be any appreciable diminishment of the conservation role and value of the dune structure.

Id. at 12392.

Thus, far from making "no effort" to explain why the RAMP would not adversely modify critical habitat, the BO is quite thorough and complete. Three times in the course of two paragraphs, Plaintiffs quote half of a sentence in the BO's "Conclusion" section, and pass it off as the FWS's findings. Pl. Br. at 26. Plaintiffs have chosen to ignore the remainder of FWS's conclusion, which rationally explains how it reached the no adverse modification conclusion:

> [H]owever, a monitoring plan and an interim population threshold for each management area will be identified that will necessitate management measures, which will include closures if necessary, . . . should the monitoring data indicate that the conservation function of the primary constituent elements of any designated critical habitat is being impaired. . . . Since changes in species abundance are likely to occur if critical habitat is adversely affected, monitoring the population abundance would allow us to assess the ongoing status of the primary constituent elements of the critical habitat.

BO AR Doc#697 at 12397; see also id. at 12398 (noting low OHV use in critical habitat areas, and the process incorporated into the opinion to minimize any unanticipated degradation that could take place). Thus, the BO's "no adverse modification" conclusion is consistent with Ninth Circuit case law and should be upheld by the Court.

4. The BO's Incidental Take Statement Complies With the ESA.

The last area of the 2005 BO challenged by Plaintiffs is the Incidental Take Statement ("ITS"), set forth at BO AR Doc #697 at 12398-12401. If FWS finds that a proposed action, or an action as modified by an RPA, is not likely to jeopardize the continued existence of a listed species, but FWS determines that the proposed action is likely to result in the incidental taking of a listed wildlife or fish species that does not rise to the level of jeopardy, then an ITS is issued. 16 U.S.C. § 1536 (b)(4);[19] Arizona Cattle Growers' Ass'n, 273 F.3d at 1239. Any taking which is subject to an ITS, and in compliance with the terms and conditions of the statement, is not a prohibited taking under the ESA. 16 U.S.C. § 1536(o)(2). As relevant here, the ITS itself must: (1) specify the impact, *i.e.*, the amount or extent, of such incidental taking on the species; (2) specify reasonable

[19] "Incidental take" is defined as "takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant." 50 C.F.R. § 402.02.

1 and prudent measures considered necessary or appropriate to minimize such impact; and (3) set forth
2 the terms and conditions (including, but not limited to, reporting requirements) that must be
3 complied with by the Federal agency or any applicant to implement the reasonable and prudent
4 measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). In this case, the ITS for the desert tortoise
5 was sufficient to comply with the requirements of the ESA.

6 **a. The Amount or Extent of Take.**

7 Plaintiffs argue that the 2005 BO is flawed because it does not quantify, with a specific
8 number, the amount of anticipated tortoise take. Pl. Br. at 27. However, contrary to Plaintiffs'
9 insinuations, FWS is not required to provide an exact number of desert tortoise that may be
10 incidentally taken by the proposed activity, where take cannot be quantified numerically. See, e.g.,
11 Pacific Northwest Generating Co-op. v. Brown, 822 F.Supp. 1479, 1510 (D. Or. 1993) ("Plaintiffs'
12 claim that the incidental take statements are facially invalid for failing to identify specific impacts
13 (i.e. an anticipated number of listed species to be harvested) is belied by clear legislative history
14 which demonstrates that Congress fully anticipated that there would be occasions when impacts
15 would have to be estimated."), aff'd 38 F.3d 1058 (9th Cir. 1994)). Moreover, the "trigger" set forth
16 in an ITS that, when reached, results in an unacceptable level of incidental take, thereby requiring
17 the parties to reinitiate consultation, need not be a specific number. See 50 C.F.R. § 402.16; Arizona
18 Cattle Growers' Ass'n, 273 F.3d at 1249 ("We have never held that a numerical limit is required.").
19 The linking of the level of permissible take to a set of conditions is permissible, so long as no
20 numerical value could be practically obtained, the conditions are rationally linked to the take of the
21 protected species, and the conditions are not overly vague or subjective. Id. at 1249-50.

22 In this case, the ITS needs to be viewed in the context of tortoise distribution. Pages 38-39
23 of the BO (12380-81) describe the status of the tortoise within the ISDRA. By all accounts,
24 sightings of live tortoises or their sign within the ISDRA are extremely rare. BO AR Doc #697 at
25 12380. Furthermore, barriers between the more abundant desert tortoise populations to the east and
26 the ISDRA reduce the potential for tortoise movement into the ISDRA. Id. at 12381. Therefore,
27 it was not possible for FWS to quantify the actual number of tortoises that may be taken, but take
28 was anticipated at very low numbers. The impact of that taking was considered negligible to the

tortoise overall, even considering the large acreage figure used in the ITS. Id. at 12395. The ITS requires that BLM monitor and report take across the CDCA, and that BLM contact FWS immediately if a desert tortoise is killed or injured. Id. at 12400-01. For every report of a killed or injured desert tortoise, FWS and BLM are required to review the surrounding circumstances and determine whether additional protective measures are required. Id. at 12401. If BLM and FWS subsequently discover that a significant number of tortoises are being taken, BLM would be required to reinitiate consultation. Id. at 12399. This management scheme is consistent with the ESA and controlling Ninth Circuit law.

b. Terms and Conditions.

Plaintiffs also allege that the ITS is arbitrary and capricious because there is not a term and condition set forth at page 59 (12401) of the BO that relates directly to reasonable and prudent measure #3, which requires that BLM minimize the potential for incidental take of desert tortoise during recreational use. Pl. Br. 28-29. Plaintiffs' reading of the ITS is overly narrow. As the BO notes in the Effects section, anticipated impacts to desert tortoise from recreational use are minor, and may not even be measurable, given the apparent low densities of the species in the area. See BO AR Doc #697 at 12394-95. Furthermore, the BO explains that the proposed RAMP already contained measures adequate to minimize the potential for incidental take of desert tortoise from recreational OHV use. Id. at 12395 (noting benefits of education program). Overall, the global population of desert tortoise is not likely to be affected by the RAMP. Id. This is in contrast to the measures outlined in terms and condition 3.1, which add measures that are not already included in the proposed action. See id. at 12401.

B. BLM FULLY COMPLIED WITH SECTION 7 OF THE ESA.

For the reasons set forth above, FWS's January 2005 BO was not legally or factually flawed, and fully complied with the ESA and APA. As such, BLM was justified in relying on it to ensure that the CDCA Plan, as amended by the ISDRA RAMP and revisions agreed upon during the consultation process, was not likely to jeopardize the continued existence of Peirson's milk-vetch or desert tortoise or destroy or adversely modify the Peirson's milk-vetch's critical habitat.

An agency may rely on the FWS's determination that an action is not likely to cause jeopardy or adverse modification as long as the agency's reliance is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1459 (9th Cir. 1984); Aluminum Co. v. Bonneville Power Admin., 175 F.3d 1156, 1160 (9th Cir. 1999). In order to overcome the deferential APA standard of review, a plaintiff must point to "'new' information – i.e., information the [FWS] did not take into account–which challenges the opinion's conclusions." Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990); Stop H-3, 740 F.2d at 1459-60. This standard holds true even when the information relied upon by the Service in issuing its opinion can be characterized as "weak." Stop H-3, 740 F.2d at 1460. Here, Plaintiffs do not present any "new" evidence, basing their argument that BLM erred on their allegations that FWS's BOs were flawed. FWS based its BOs on "the best available scientific data and . . . grounded its decision[s] in a consideration of the relevant factors," thereby complying with its duties under the ESA, and BLM was entitled to rely on the results of FWS's analysis.

C. FWS'S AUGUST 4, 2004, FINAL DESIGNATION OF CRITICAL HABITAT FOR THE PEIRSON'S MILK-VETCH FULLY COMPLIED WITH THE ESA AND APA.

On August 5, 2003, FWS published a proposed rule designating approximately 52,780 acres of critical habitat for the Peirson's milk-vetch. 68 Fed. Reg. 46143 (Aug. 5, 2003). FWS subsequently retained an economics firm to perform a comprehensive analysis of the economic impact of the proposed designation. On April 6, 2004, FWS announced the availability of the draft economic analysis and solicited comments from the public. 69 Fed. Reg. 18016 (April 6, 2004).

On August 4, 2004, FWS published the final critical habitat designation. 69 Fed. Reg. 47330 (Aug. 4, 2004). Pursuant to ESA Section 4(b)(2), FWS excluded portions of proposed unit 1B (totaling 28,978 acres) and all of proposed unit 1C (totaling 1,490 acres) from the final designation after concluding, based on the final economic analysis, that the benefits of exclusion outweighed the benefits of inclusion, and that exclusion would not result in the extinction of the species. Id. at 47343-45.

1 In their Fifth Claim For Relief, Plaintiffs allege that the final critical habitat designation is
2 unlawful because: (a) FWS improperly excluded the relevant areas on the basis of a flawed
3 economic analysis and without adequately considering the benefits of inclusion; and (b) as a result
4 of the exclusions, the final rule departed so drastically from the proposal that it violated the notice
5 and comment requirements of the ESA and the APA.

6 As demonstrated below, Plaintiffs' allegations lacks merit. Indeed, their arguments amount
7 to little more than a disagreement with FWS's reasoned judgment and ignore the principle that
8 "[r]egulations are presumed to be valid, and therefore review is deferential to the agency." Ranchers
9 Cattlemen Action Legal Fund v. U.S. Dep't of Agric., ___ F.3d ___, 2005 WL 1731761, *9 (9th
10 Cir.). Such deference is especially appropriate in this case because FWS's decision to exclude areas
11 pursuant to ESA Section 4(b)(2) "is reviewable only for abuse of discretion." Bennett v. Spear, 520
12 U.S. 154, 172 (1997). "There is an abuse of discretion when an agency's decision is based on an
13 erroneous conclusion of law or when the record contains no evidence on which it could have
14 rationally based that decision." Mendenhall v. Nat'l Transp. Safety Bd., 92 F.3d 871, 874 (9th Cir.
15 1996). FWS plainly did not abuse its discretion because it rationally determined, after thoroughly
16 considering the record and the comprehensive economic analysis, that the minimal benefits of
17 designating the relevant areas as critical habitat were outweighed by the risk that the designation
18 could lead to restrictions on OHV use, which could have a significant economic impact on an area
19 that depends on revenue from OHV recreation in the ISDRA.

20 Moreover, because the final rule is plainly a logical outgrowth of the proposal, FWS fully
21 complied with the notice and comment requirements of the APA and the ESA. Therefore, Federal
22 Defendants are entitled to summary judgment in their favor on Plaintiffs' Fifth Claim For Relief.

23 **1. FWS Reasonably Concluded That The Potential**
24 **Benefits Of Inclusion Were Minimal.**

25 FWS began its Section 4(b)(2) analysis by evaluating the potential regulatory benefits of
26 including the relevant areas in the final critical habitat designation. CH AR Doc# 430 at 8685-86.
27 FWS determined that the primary benefit would be that any federal action potentially affecting the
28 areas would trigger a consultation with FWS pursuant to ESA Section 7. See 50 C.F.R. § 402.14(a)

1 (consultation process triggered by any action that "may affect listed species or critical habitat").
2 The consultation process would give FWS and the action agency an opportunity "to identify ways
3 to implement the proposed project while minimizing or avoiding any adverse effect to the species
4 or critical habitat." CH AR Doc# 430 at 8688.
5 However, the relevant areas in proposed units 1B and 1C are occupied by the Peirson's milk-
6 vetch. CH AR Doc# 430 at 8685-86. Consequently, any federal action that "may affect" those areas
7 also "may affect" the species, thus triggering the consultation process – and the opportunity to
8 minimize or avoid adverse effects – even without the critical habitat designation. Id. Therefore,
9 FWS reasonably concluded that designating the areas as critical habitat would not produce
10 significant regulatory benefits. Id.
11 Plaintiffs contend that FWS's analysis is flawed because it "parrots" the regulatory definition
12 of "destruction or adverse modification" declared unlawful in Gifford Pinchot Task Force v. FWS,
13 378 F.3d 1059 (9th Cir. 2004). Pl. Br. 30-32. However, Plaintiffs' assumption that FWS relied on
14 the regulatory definition of "destruction or adverse modification" is not supported by the record.
15 The regulations implementing ESA Section 7 provide that after the action agency determines
16 that its action "may affect listed species or critical habitat," 50 C.F.R. § 402.14(a), the action agency
17 must formally consult with FWS unless the action agency and FWS concur, during informal
18 consultation or as a result of a biological assessment, that the proposed action "is not likely to
19 adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(b). Informal consultation
20 gives FWS an opportunity to suggest project modifications that the action agency can implement
21 to avoid the likelihood of adversely affecting listed species or critical habitat. 50 C.F.R. § 402.14(b).
22 However, if the likelihood of adverse effects cannot be avoided and formal consultation ensues,
23 FWS is required to formulate a biological opinion as to "whether the action is likely to jeopardize
24 the continued existence of a listed species or result in the destruction or adverse modification of
25 critical habitat." 50 C.F.R. § 402.14(h)(3) (emphasis added). Thus, as a practical matter, the
26 "adverse modification" standard becomes the focus during formal consultation if it is determined
27 through informal consultation that the likelihood of adverse effects cannot be avoided.
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In this particular case, the record indicates that FWS and BLM anticipated that most actions affecting the proposed critical habitat could be addressed through informal consultation. For example, "[w]ith the exception of the formal consultation on the management of the ISDRA, past consultation activity for the Peirson's milk-vetch has been informal." CH AR Doc# 418 at 8468-69 (¶¶ 144, 146). Similarly, "[w]hile BLM is expected to consult with [FWS] on the [RAMP] in the future, the agency indicates that many projects occurring on their lands would not occur within the proposed [critical habitat]," and that most activities that affecting the proposed critical habitat will be addressed with "minimal consultation efforts." Id. at 8431 (¶ 61), 8484 (¶ 179).

As stated above, the informal consultation process will give FWS and the action agency a full opportunity to minimize or avoid adverse effects upon the occupied areas, and these benefits will exist even without the critical habitat designation. Therefore, Plaintiffs have failed to demonstrate that the regulatory definition of "destruction or adverse modification" caused FWS to materially understate the regulatory benefits of designating the areas as critical habitat.

2. FWS Reasonably Concluded That The Potential Benefits Of Exclusion Were Significant.

After considering the minimal benefits of inclusion, FWS reasonably relied upon the final economic analysis ("FEA") in determining that the potential benefits of excluding the relevant areas from the final critical habitat designation were substantial.

a. The FEA Reasonably Estimated The Economic Impact Of The Temporary Closure.

The FEA first estimated the economic impact of past management actions relating to the milk-vetch. In particular, the FEA focused on the impact of BLM's closure of a portion the ISDRA to OHV use in 2000 that resulted from this lawsuit. CH AR Doc# 418, 8465 (¶ 133). The FEA measured the economic impact in terms of "efficiency effects" and "distributional effects." "Efficiency effects" represent "the opportunity cost of resources used or benefits foregone by society as a result of the regulations" protecting milk-vetch habitat. Id. at 8426 (¶ 44). "Distributional effects" refer to the regional economic impact of the restrictions in terms of shifts in employment, tax revenue, and local and regional economic output. Id. at 8404 (¶ 5), 8428-29 (¶¶ 49-53).

The FEA estimated that the past efficiency effects totaled $24.59 million and consisted primarily of "consumer surplus value" lost as result of the temporary closure. Id. at 8409.[20] Based on economic valuation studies, the FEA determined that the consumer surplus value of an OHV trip in the ISDRA was $132. Id. at 8471-74 (¶¶ 155-158). Based on information provided by the OHV community, the FEA estimated that the temporary closure reduced OHV visitation at the ISDRA by 15 percent between 2001 and 2004. Id. at 8467 (¶ 141), 8469-71 (¶¶ 149-150, 154). By multiplying the number of lost visits by the consumer surplus value per visit, the FEA estimated that the total consumer surplus lost as a result of the temporary closure was $20.37 million. Id. at 8408-09, 8474 (¶159).

The FEA then estimated that the regional impact ("distributional effects") of past milk-vetch related management actions ranged from $13 to $26 million, consisting primarily of reduced OHV-related expenditures in the two counties primarily affected by OHV use in the ISDRA. Id. at 8409 (¶ 12). To calculate this figure, the FEA again assumed that the temporary closure reduced OHV visitation by 15 percent. The FEA then determined that expenditures relating to OHV recreation in the ISDRA range from $250 to $500 per trip. Id. at 8476 (¶167). The FEA calculated the regional economic impact by multiplying the number of trips lost by the estimated expenditures per trip. Id. at 8479 (¶169). The FEA also concluded that the regional impact was associated with 269 to 527 jobs and $0.86 to $1.72 million in tax revenue in the affected counties. Id. at 8409-10.[21]

Plaintiffs contend that these estimates are flawed because the FEA improperly assumed that the closure reduced OHV visitation by 15 percent. According to Plaintiffs, the record demonstrates that OHV visitation increased after the closure. Pl. Br. 33.

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[20] "Consumer surplus value" for a user day of OHV recreation represents the difference between the maximum amount users are willing to pay to engage in the activity and the amount they must pay. Id. at 8406, 8463 (¶ 130). For example, if an OHV enthusiast must pay $100 for a day of OHV recreation in the ISDRA, but he would be willing to pay $150, he accrues $50 in consumer surplus value for each day he engages in the activity.

[21] Distributional effects occur once and persist until the regional economy adjusts. Id. at 8479 (¶ 169). Thus, distributional effects are measured at one point in time (in this case 2004). Id.

In fact, however, the record demonstrates that OHV visitation declined by approximately 24 percent between 2000 and 2001; increased dramatically between 2001 and 2002; and declined again between 2002 and 2003. CH AR Doc# 418, 8454-55, 8469-70 (¶ 149). Moreover, the dramatic increase between 2001 and 2002 is entirely attributable to BLM's installation of underground vehicle counters at each major ISDRA entrance point prior to the 2002 OHV season, a fact Plaintiffs conveniently ignore. Prior to 2002, BLM merely estimated visitation by conducting on-the-ground and fly-over estimates of vehicles numbers during peak weekends. Id. at 8453-54 (¶ 108), 8469-70 (¶ 149); CH AR Doc# 430 at 8679.

Although BLM did not notice a drop in OHV visitation due to the closure, representatives of the OHV community stated that the closure likely reduced visitation by as much as 15 percent. CH AR Doc# 418 at 8470 (¶ 150). The FEA and FWS both recognized that the extent to which the closure reduced OHV visitation could not be determined with certainty. Id. at 8467 (¶ 141); CH AR Doc# 430 at 8679 (Comment 33). Nevertheless, in order to formulate an upper-bound estimate of the economic impact, the FEA and FWS reasonably assumed, based on the information provided by the OHV community, that the closure reduced OHV visitation by 15 percent. CH AR Doc# 430 at 8679 (Comment 33); CH AR Doc# 418 at 8467 (¶ 140), 8469-70 (¶¶ 149-150). Thus, FWS acknowledged the qualifications in the FEA and made a rational decision that was based on the available data, which is precisely what the APA requires. See Arizona Cattle Growers' Ass'n, 273 F.3d at 1229 (APA requires only that the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made.").

b. The FEA Reasonably Estimated The Potential Economic Impact Of The Proposed Critical Habitat Designation.

After estimating the economic impact of past management actions relating to the milk-vetch, the FEA estimated the future consumer surplus and regional economic contributions that OHV use in the proposed critical habitat could provide. CH AR Doc# 418 at 8410-18 (¶¶ 14-25). These estimates represents the upper limit of the economic impact that could result if the proposed critical habitat were closed to OHV use in the future. Id.

Using two BLM growth projections, the FEA first calculated the OHV visitation likely to occur in each ISDRA management area where OHV use is permitted for the period of 2005 through 2024. Id. at 8487-88 (¶¶ 184-186). Data indicating the extent of OHV use likely to occur in the critical habitat portion of each management area did not exist. Therefore, the FEA assumed that OHV use would be evenly distributed throughout each management area. The FEA calculated the expected OHV use in the proposed critical habitat by multiplying the expected visitation in each management area by the percentage of critical habitat in that area. Id. at 8411-12 (¶ 16). By multiplying the projected OHV visits by the consumer surplus value per visit, the FEA estimated that OHV use in the proposed critical habitat would contribute \$8.9 to \$9.9 million per year in consumer surplus value. Id. at 8412-13 (¶ 18), 8471-74 (¶¶ 155-158), 8489 (¶ 187), 8492 (Fig. 4-1). The most significant contributions were expected to come from the areas in proposed units 1B and 1C that FWS ultimately excluded. Id.

The FEA then calculated the regional economic contribution by multiplying the projected OHV visits to the proposed critical habitat by the estimated expenditures per visit. This calculation indicated that OHV use in the proposed critical habitat could contribute \$55 million to \$124 million to the regional economy associated with 1,207 to 2,585 jobs. Id. at 8413 (¶ 20), 8494-95 (¶¶ 194-195), 8499 (Fig. 4-2).[22] Once again, the most significant contributions were expected to come from the areas FWS ultimately excluded. Id.

Plaintiffs contend that these estimates are flawed because the assumption that OHV use will be evenly distributed throughout each management area is erroneous. According to Plaintiffs, minimal OHV use occurs in the proposed critical habitat because FWS excluded high-use areas from the proposed critical habitat designation. Pl. Br. 34-35. The record refutes Plaintiffs' argument.

Although FWS did exclude high-use areas, the record indicates that a substantial amount of OHV use may still occur within the proposed critical habitat. CH AR Doc# 430 at 8678 (Comment 32); CH AR Doc# 418 at 8444 (¶ 91). Indeed, according to BLM's comments, OHV users are

[22] The FEA used 2013 to measure the potential regional economic contribution of OHV use in the proposed critical habitat because the available data indicated that OHV visitation would peak in 2013. CH AR Doc# 418 at 8495 (¶ 195).

particularly attracted to the inner dunes that lie within the proposed critical habitat boudaries. CH AR Doc# 332 at 7505-06. However, data quantifying the extent of OHV use likely to occur within the proposed critical habitat did not exist. Therefore, the FEA and FWS reasonably assumed that OHV use was evenly distributed throughout each management area, recognizing that this assumption could result in an overstatement or understatement of the economic impact that could result if the proposed critical habitat were closed to OHV use:

> Lacking detailed data on user patterns and to offset conflicting attitudes towards visitation distribution, the analysis models visitation based on BLM counts and assumes an equitable distribution of visitation within each management area. To the extent that areas proposed for designation are less or more popular with OHV users, this analysis could overstate or understate impacts by over- or underestimating the number of trips that could be affected by the designation.

CH AR Doc# 418 at 8462 (¶ 127) & 4-43; CH AR Doc# 430 at 8679 (Comment 32). This approach is entirely consistent with FWS obligation to use the best available data. 16 U.S.C. § 1533(b)(2). Contrary to Plaintiffs' assumption, FWS is not required to create data that does not exist. See Southwest Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (9th Cir. 2000) ("The 'best available data' requirement makes it clear that the Secretary has no obligation to conduct independent studies."). FWS acknowledged the limitations of the existing data and made a rational decision based on the available information, which is all that the APA requires. See Arizona Cattle Growers' Ass'n, 273 F.3d at 1229.

Plaintiffs next assert that the FEA failed to take into account the reduction in public costs for on-site infrastructure, law enforcement, and emergency services that could result from reduced OHV visitation. Pl. Br. 36. However, contrary to Plaintiffs' assertion, the FEA and FWS recognized that a reduced OHV visitation due to a closure could reduce public costs. CH AR Doc# 418 at 8461 (¶ 125); CH AR Doc# 430 at 8679 (Comment 35). However, data indicating the extent of any potential reduction was unavailable. Id. Furthermore, as BLM's comments indicate, some public costs may increase in the event of a closure:

> The [draft economic analysis] reports that the closures are associated with cost savings to the agency. This statement is incorrect. The closures have substantially increased the cost of managing the area. Cost for signing, materials, labor, and equipment have all increased.

CH AR Doc# 332 at 7505; CH AR Doc# 430 at 8679 (Comment 35). Indeed, the very BLM cost analysis Plaintiffs rely on includes significant public costs associated with "enforcing the 2001 closures and implementing a biological monitoring plan." CH AR Doc# 418 at 8461 (¶ 123), 8466-67 (¶ 138), 8469 (¶ 148), 8485 (¶ 182); Pl. Br. 36. Because data quantifying the extent of any public cost increases or decreases that might result from a closure, the FEA and FWS reasonably concluded that such costs could not be monetized. CH AR Doc# 418 at 8461 (¶ 8461); CH AR Doc# 430 at 8679 (Comment 35).

Finally, Plaintiffs contend that a reduction in OHV visitation could result in an increase in non-motorized recreation. Plaintiffs assert that the FEA and FWS ignored the economic benefits that an increase in such activity could produce. Pl. Br. 37-38. Once again, contrary to Plaintiffs' assertion, the FEA and FWS did recognize that a decrease in OHV visitation could result in an increase in non-motorized recreation with associated economic benefits. CH AR Doc# 418 at 8420; CH AR Doc# 430 at 8679 (Comment 38). However, the record indicates that only a trivial amount of non-OHV recreation has historically occurred in areas closed to OHV use. Id.; CH AR Doc# 418 at 8443 (¶ 88), 8453 (¶ 105). Therefore, the FEA and FWS reasonably concluded that any increase in non-OHV recreation that might result from a future closure would be insignificant. Id.

3. FWS Reasonably Concluded That The Benefits Of Exclusion Outweighed The Benefits Of Inclusion.

FWS fully recognized that "there is a great deal of uncertainty in estimating the impact" of the proposed critical habitat designation, and that "it is not possible to forecast with certainty whether [the designation] would result in closures of portions of the ISDRA to OHV use, or in limitations on the numbers of users." CH AR Doc#430 at 8686. However, the potential for a closure was not merely a hypothetical concern. A substantial portion of the ISDRA had already been closed to OHV use to protect the milk-vetch, causing a significant economic impact. Id. As the FEA demonstrates, the consequences of a future closure could likewise be severe:

> [R]educed ISDRA visitation that results in revenue, employment and tax losses may pose considerable burdens to local communities. Several businesses that operate within the region rely heavily on income generated by OHV-based recreation. Additionally, losses to businesses within [the affected counties] from decreased ISDRA visitation are unlikely to be replaced by expenditures on other goods and services of the same order and magnitude.

CH AR Doc# 418 at 8415 (¶ 22), 8460 (¶ 120). Moreover, the counties that would be primarily affected by a closure "have historically experienced greater levels of unemployment and have a less diverse economic base. Any reduction in ISDRA visitation is therefore likely to adversely impact local businesses, and the overall regional economy." Id. At 8647 (¶ 95), 8452 (¶ 104).

Based upon this information, FWS reasonably determined that the benefit of excluding the relevant areas from the final critical habitat designation was avoiding the risk that the areas would be closed to OHV use as a result of the designation, causing significant adverse economic consequences in the affected counties. Id. at 8687. FWS's consideration of the potential benefits of exclusion was fully consistent with the intent of Section 4(b)(2), which is to insure that "[f]actors of recognized or potential importance to human activities will be considered by the Secretary in deciding whether or not all or part of th[e] area should be included in the critical habitat." H.R. Rep. No. 95-1625, at 17, reprinted in 1978 U.S.C.A.A.N. 9453, 9467.[23]

FWS then determined that the benefits of exclusion far outweighed the minimal benefits of inclusion, a judgment that was well within the agency's considerable discretion under Section 4(b)(2). CH AR Doc#430 at 8687; see 1978 U.S.C.A.A.N. at 9467 ("The consideration and weight given to any particular impact is completely within the Secretary's discretion."); Bennett, 520 U.S. at 172 (Secretary's exercise of her authority under ESA Section 4(b)(2) "is reviewable only for abuse of discretion."). Finally, FWS reasonably found that excluding the relevant areas would not result in the extinction of the Peirson's milk-vetch, CH AR Doc# 430 at 8687, a finding that the Plaintiffs do not challenge.

Accordingly, FWS's decision to exclude the relevant areas was reasonable and in full compliance with ESA Section 4(b)(2). The record amply demonstrates that FWS "articulated a

[23] Since the excluded areas are occupied by the Peirson's milk-vetch, closures due to the critical habitat designation could be coextensive with restrictions resulting the milk-vetch's status as a listed species. However, contrary to Plaintiffs' arguments (Pl. Br. 35 n.11), in fulfilling Congress's directive to consider the economic impact of critical habitat, FWS may consider all of the economic impacts of the critical habitat designation, regardless of whether they might be co-extensive with other causes. See N.M. Cattle Growers Assoc. v. FWS, 248 F.3d 1277, 1284-85 (10th Cir. 2001).

rational connection between the facts found and the choice made," which is all that the APA requires. Arizona Cattle Growers' Ass'n, 273 F.3d at 1236.

4. FWS Complied With The Rulemaking Requirements Of The ESA And The APA.

Plaintiffs' final argument is that FWS violated the rulemaking requirements of the ESA and the APA because the proposed rule did not indicate that FWS might exclude areas from the final designation, which deprived Plaintiffs of an opportunity to object to the exclusions. Pl. Br. 38-40. This argument lacks merit.

Notice of a proposed rule designating critical habitat must be published in the Federal Register together with "the complete text of the proposed regulation." 16 U.S.C. § 1533(b)(5)(A)(i). The notice must "fairly apprise interested persons of the subjects and issues before the agency." NRDC v. EPA, 863 F.2d 1420, 1429 (9th Cir. 1988) (internal quotations omitted). This does not mean that the final rule must be identical to the proposal. "That would be antithetical to the whole concept of notice and comment. Indeed, it is 'the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency.'" NRDC v. EPA, 279 F.3d 1180, 1186 (9th Cir. 2002) (quoting Trans-Pac. Freight Conference v. Fed. Mar. Comm'n, 650 F.2d 1235, 1249 (D.C. Cir. 1980)). Rather, "a final rule which departs from a proposed rule must be a 'logical outgrowth' of the proposed rule." NRDC, 863 F.2d at 1429. "The essential inquiry focuses on whether interested persons could have anticipated the final rulemaking from the draft." Id.

There can be no question that the final critical habitat designation was a "logical outgrowth" of the proposal, and that anyone could have anticipated Section 4(b)(2) exclusions in the final rule. FWS repeatedly stated in the proposed rule that it would consider excluding areas if it determined, based on the economic analysis, that the benefits of exclusion outweighed the benefits of inclusion:

> We will be preparing a draft economic analysis of this proposed action; we will use this analysis to meet the requirement of section 4(b)(2) of the [ESA] to determine the economic consequences of designating the specific areas as critical habitat and excluding any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless failure to designate such area as critical habitat will lead to the extinction of the [Peirson's milk-vetch]. This draft economic analysis will be made available for public review and comment before we finalize this designation.

68 Fed. Reg. at 46154, 46143, 46144, 46147, 46148.

When FWS notified the public of the availability of the draft economic analysis ("DEA"), FWS again emphasized that it might "exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat." 69 Fed. Reg. at 18018. Moreover, the DEA itself stated that it was "intended to assist the Secretary in determining whether the benefits of excluding particular areas from designation outweigh the benefits of including those areas in the designation." CH AR Doc# 320 at 05946 ¶ 32.

Plaintiffs know this because they obtained a copy of the DEA and submitted extensive comments to FWS. CH AR Doc# 337. In fact, many of Plaintiffs' present arguments are merely cut and pasted from their comments on the DEA. Id.; Pl. Br. 30-38. Thus, Plaintiffs' claim that they were deprived of an opportunity to "add their objections" lacks merit. Plaintiffs' own comments demonstrate that the final rule was a logical outgrowth of the proposal and that FWS did not violate the rulemaking requirements of the APA and the ESA. See Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1274 (D.C. Cir.1994) (salient question for determining whether final rule is a logical outgrowth is "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule").

D. BLM ADOPTED THE ROD IN COMPLIANCE WITH NEPA.

NEPA requires a comprehensive EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). In reviewing the sufficiency of an EIS, the Ninth Circuit has heeded the Supreme Court's instruction of deference to the agency in the NEPA context. Association of Public Agency Customers v. Bonneville Power Admin., 126 F.3d 1158, 1183 (9th Cir. 1997). Moreover, "'[t]he reviewing court may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies.'" Bonneville Power Admin.,126 F.3d at 1184; see also Swanson v. United States Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996); Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973) (NEPA "should not be employed as a crutch for chronic faultfinding"). While it "is of course always possible to explore a subject more deeply and to discuss it more thoroughly," the "line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts." Coalition on Sensible Transp. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987); see also No GWEN Alliance of Lake County, Inc. v. Aldridge,

1 855 F.2d 1380, 1385-6 (9th Cir. 1988) ("this court has also rejected the notion that every
2 conceivable environmental impact must be discussed in an EIS").
3 As a result of prior analysis and scoping on the challenged EIS (see 40 C.F.R. § 1501.7),
4 BLM identified significant issues to be addressed in its NEPA review. In its 1987 RAMP and
5 Environmental Assessment it identified 9 significant issues, including one that addressed impact to
6 candidate threatened and endangered species. ROD AR Sec.1 at 4265, 4273. In its 2003 RAMP and
7 EIS, BLM identified 17 planning issues, including the need to protect sensitive plant and wildlife
8 species. ROD AR Sec.2 at 9158-62. Based upon this information, BLM focused its analysis on
9 these significant issues and subsequently produced an EIS that fully analyzed a reasonable and
10 appropriate range of alternatives. Furthermore, based on issues identified by the public and a RAMP
11 Working Group comprised of representatives from the environmental and OHV communities, the
12 BLM, and Imperial County staff, BLM identified the following goals to guide its analysis: (1)
13 Providing a variety of sustainable OHV and other recreational activities; (2) Maintaining or
14 improving conditions of the special-status species and other unique natural and cultural resources;
15 and (3) Creating an environment to promote the health and safety of visitors, employees, and nearby
16 residents by working with local, state, and federal agencies and interest groups. ROD AR Sec.2 at
17 09163.
18 BLM considered and analyzed four alternatives in the EIS, which it identified as Alternative
19 1: No Action; Alternative 2 (the preferred alternative): Recreation and Natural/Cultural Resource
20 Protection Alternative; Alternative 3: Natural and Cultural Resource Protection Alternative; and
21 Alternative 4: Motorized Recreation Opportunities Alternative. ROD AR Sec.2 at 09167. Under
22 the No Action Alternative, the ISDRA would continue to be managed according to the existing and
23 approved management plan and policies, plus policies and management measures instituted since
24 the 1987 RAMP was implemented, such as the designation of the North Algodones Dunes
25 Wilderness in 1994. Under Alternatives 2, 3, and 4, geographically delineated management areas
26 would be applied to the ISDRA with differing Recreation Opportunity Spectrum ("ROS")
27 classifications to provide variations in the level and management focus of visitor use. ROD AR
28 Sec.2 at 09168-69 (describing ROS classifications and their characteristics).

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

1. BLM Adequately Identified and Analyzed Alternatives in the EIS.

a. The "No Action" Alternative Was Properly Identified and the Interim Closures Were Properly Eliminated From Consideration.

Plaintiffs argue that BLM violated NEPA by not including the 'Interim Closures' as part of the "no action" alternative. Pl. Br. at 41. However, BLM properly rejected such an analysis, stating that "Alternative 1 does not include the interim OHV closure areas or the temporary camping closure because these are temporary measures and not part of the management policy for the ISDRA." ROD AR Sec.2 at 09171. Furthermore, BLM explained that "[t]he primary reason for rejecting [the interim management alternative] is that interim closures (as stipulated in the settlement agreement) do not meet the purpose and need for the action." Id. at 09207.

NEPA requires consideration of "alternatives to the proposed action" in an EIS, which the CEQ regulations define as a "no action" alternative and "all reasonable alternatives." 42 U.S.C. 4332(C); 40 C.F.R. §1502.14(a), (d). The regulations direct that the reasons for eliminating any alternatives from detailed consideration should be briefly described. 40 C.F.R. §1502.14(a). The "purpose and need" underlying the proposal defines the bounds of a reasonable alternative analysis. 40 C.F.R. §1502.13. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978). Following the logic of the Supreme Court in Vermont Yankee, the Ninth Circuit has stated that "[t]he range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project." Laguna Greenbelt, Inc. v. United States Dep't of Transp., 42 F.3d 517, 524 (9th Cir. 1994); see also Idaho Conservation League v. Mumma, 956 F.2d 1508, 1520 (9th Cir. 1992). "An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives." Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996); see also Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990). Consideration of only one alternative can satisfy NEPA. Tongass Conservation Soc'y v. Cheney, 924 F.2d 1137 (D.C. Cir. 1991). Impacts and alternatives should be presented in comparative form, sharply defining the issues and providing a clear basis for choice among the alternatives. 40 C.F.R. § 1502.14.

1 Part of the basis for Plaintiffs' argument that the interim closures should have been
2 incorporated into the no action alternative is BLM's citation to 43 C.F.R. § 8341.2(a) when
3 instituting the temporary closures. See Pl. Br. at 42; ROD AR Sec.3 at 15531. However, a closer
4 examination of the administrative record demonstrates that the interim measures were established
5 primarily because of the threat of injunction due to the lack of consultation on the CDCA Plan. See
6 ROD AR Sec.2 at 14174 ("Agreement on these interim actions avoided litigation of plaintiffs'
7 request for injunctive relief and the threat of an injunction prohibiting all activities authorized under
8 the [CDCA] Plan."); ROD AR Sec.2 at 09152 (same). BLM's Federal Register notice on November
9 16, 2000, temporarily closing parts of the ISDRA to OHV and other vehicle use, explicitly stated
10 that the temporary closures were instituted to comply with stipulations entered into in Case No. C00-
11 0927 WHA-ADR. ROD AR Sec.3 at 15990. Subsequent to the November temporary closure
12 notice, on April 20, 2001, the Court issued an Order Amending Final Judgment which forbade the
13 BLM from asserting the consent decree as legal authority for any agency action. ROD AR Sec.3
14 at 15918-19. Thereafter, on June 15, 2001, BLM published a notice of proposed closure in the
15 Federal Register invoking 43 C.F.R. § 8364.1(a), which permits closure and restriction orders to
16 protect persons, property, and public lands and resources, as authority for temporarily closing parts
17 of the ISDRA to OHV and other vehicular use, and relying on an Environmental Assessment made
18 available for a 15-day public comment period. See ROD AR Sec.3 at 15722-23. On October 22,
19 2001, BLM published in the Federal Register the 'Temporary Closure of Approximately 49,300
20 Acres to Motorized Vehicle Use of Five Selected Areas in the Imperial Sand Dunes Recreation
21 Management Area, Imperial County, CA," which identified 43 C.F.R. § 8341.2(a) as the
22 implementation authority. ROD AR Sec.3 at 15531.

23 As this time line demonstrates, the interim measures did not proceed through a typical land
24 use planning process, but were instead developed as an agreement to resolve litigation.[24] The
25 interim closures were not part of the "no action" alternative, because the baseline at the Dunes is
26

27 [24] In his consideration whether to approve the Consent Decree, Judge Alsup ultimately determined to
28 approve it because the obligations thereunder were finite and limited in duration so as not to impact the agency's discretionary management authority for too long. ROD AR Sec.3 at 15955.

premised upon principles of land use planning, and is not established based upon threats of injunction. Plaintiffs' argue this position is not supported by CEQ guidance or case law. Pl. Br. at 42. NEPA regulation requires that a "no action" alternative be included in an analysis of alternatives. 40 C.F.R. § 1502.14. CEQ in its discussion of no action alternatives distinguishes a regular planning process from a court-ordered scenario. 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981) (CEQ 40 Questions). It defines "no action" in a planning process scenario as "no change" from current management direction in comparison to returning to a pre-action state. It does not define "no action" in a judicially-ordered scenario as the judicially-ordered state of affairs. Such an interpretation would render the land use planning process subordinate to judicial order, and could result in a judicial order directing management on a long-term basis without accompanying statutory authority or review. This certainly is not what Judge Alsup described, nor does case law support such a theory.

Plaintiffs cite to American Rivers v. FERC, 201 F.3d 1186, 1200 (9th Cir. 2000), to support their argument that the interim measures in place pursuant to a Consent Decree should be considered the environmental baseline pursuant to FLPMA and the no action alternative for NEPA review. Pl. Br. at 41-42. In American Rivers, the court determined that the Federal Power Act ("FPA") supports, but does not mandate, the use of an existing project as a baseline, and, since neither the FPA nor its legislative history define or mention the concept of environmental baseline, the court must defer to the agency's construction of the statute. Just as the FPA does not define or mention the concept of environmental baseline, neither does FLPMA, and the court should defer to BLM's construction of statutes it is responsible for administering.

In addition, BLM's identification of the no action alternative is reasonable. If the Court were to adopt Plaintiffs' argument, then the no action alternative would be continued management pursuant to the Consent Decree, an agreement that has by its terms expired. The ISDRA management program was instituted under FLPMA and examined under NEPA and, as new management plans are developed, the no action alternative is that which represents contemporaneous management direction, not a finite, limited duration agreement entered into to settle litigation. Since "no action" is not defined in the CEQ regulations, it is entirely reasonable for BLM to construe it

in the manner it has and the Court should defer to that construction. It is also significant that BLM's construction is consistent with CEQ's guidance in the CEQ 40 Questions.

Congress has been explicit in directing the management of public lands within the CDCA pursuant to land use plans. Furthermore, the Consent Decree entered into with CBD clearly reflects the limited nature and ultimate expiration of the interim measures, and as such, the use of the interim measures is not an appropriate "no action" alternative. See Kilroy v. Ruckelshaus, 738 F.2d 1448, 1453-54 (9th Cir. 1984) (relevant legal restrictions can help determine no action alternative). Here, the Consent Decree was agreed to in order to provide time for the agency to consult with FWS on the CDCA Plan through its various plan amendments. At no time did BLM consider the interim measures a substitute for its planning function. To adopt the interim measures as BLM's no action alternative would be to afford the settlement agreement more status than it is due. With the approval of the ROD for the ISDRA, the interim measures expire, and but for this Court's retention of jurisdiction over the administrative temporary closure order issued in furtherance of the Consent Decree, the use restrictions would not exist and management would proceed pursuant to the terms of the ISDRA RAMP and ROD. The interim measures have no status as a baseline in these proceedings nor do they qualify as a "no action" alternative.

Moreover, as noted above, the interim closures would not be within the reasonable range of alternatives for analysis because they do not meet the purpose and need for the Federal action in this case. In particular, continuation of the interim closures would not: (a) provide a process to allow the maximum recreational use of the ISDRA while maintaining the unique and diverse habitat of the dunes system; (b) develop a large continuous geographical area for habitat and species conservation; (c) allow the closed geographical areas to be available for OHV and other recreational uses or for the recreational use of the area to be adjusted as needed to conserve the habitat and species; or (d) utilize sound science when making decisions concerning species conservation and multiple use of the ISDRA. ROD AR Sec.2 at 09207. Agreeing to put the interim measures in place until BLM completed consultation on the ISDRA RAMP was not linked to the determination of whether the interim measures furthered the goals and purposes of the ISDRA.

BLM did in fact fully consider an alternative that would meet the purpose and need for the Federal action and still provide a substantially lower level of OHV use than that under the approved 1987 RAMP. Alternative 3, the Natural and Cultural Resources Protection Alternative, would close to OHV use approximately 41,000 acres within 3 units compared to the 49,000 acres within 5 units under the interim measures. BLM ultimately determined, however, that Alternative 2, the preferred alternative, best balanced the conflicting goals of resource conservation and recreational use. ROD AR Sec.2 at 9182, 9190.

BLM is entitled to considerable discretion in its determination that the interim closure alternative does not meet the purpose and need for the action. See Westlands Water Dist. v. United States Dep't of Interior, 376 F.3d 853, 871 (9th Cir. 2004) (quoting United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989) ("Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving . . . scientific matters.")). "[I]t would turn NEPA on its head to interpret the statute to require that [an agency] conduct in-depth analysis of . . . alternatives that are inconsistent with the [agency's] policy objectives." Kootenai Tribe v. Veneman, 313 F.3d 1094, 1122 (9th Cir. 2002). Accordingly, the Court should defer to BLM's reasonable conclusion that the interim closures did not meet the goals and purposes of the action.

2. BLM Adequately Identified and Analyzed the Effects of the Action on Endemic Invertebrates.

Plaintiffs argue that the Dunes are home to numerous endemic invertebrate species that BLM failed to analyze in the EIS. Pl. Br. at 45-48. As part of their argument, Plaintiffs allege that BLM failed to honor the monitoring and inventory requirements set forth in the 1987 ISDRA RAMP and 1987 Algodones Dunes Wildlife Habitat Management Plan, and that BLM approved the 2003 RAMP without gathering the proper data. Id.

As an initial matter, even if it is assumed, for the sake of argument, that Plaintiffs are correct and BLM failed to comply with all the monitoring and inventories recommended in previous management plans, BLM is still not precluded from amending the old land use plans or preparing new plans. There are no Congressional standards for the treatment of inventories or how to conduct

them. The case law makes clear that land use plans are recommended courses of action, and that statements in a plan that BLM "will" take certain actions do not constitute binding commitments enforceable under the APA. See Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 124 S.Ct. 2373, 2382 (2004) ("SUWA"). As the Supreme Court recently stated, "Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. It would be unreasonable to think that either Congress or the agency intended otherwise, since land use plans nationwide would commit the agency to actions far in the future, for which funds have not yet been appropriated." SUWA, 124 S.Ct. at 2383.

Moreover, in making their claims, Plaintiffs overlook the extensive amount of CDCA and ISDRA resource inventories that had been undertaken and were considered by BLM in the development and evaluation of the ISDRA RAMP. See, e.g., ROD AR Sec.1 at 05609 (inventory study that includes Algodones Dunes invertebrates); ROD AR Sec.1 at 07827 (addresses invertebrates from the Algodones Dunes); ROD AR Sec.1 at 4471; ROD AR Sec.1 at 5986; ROD AR Sec.1 at 6086; ROD AR Sec.1 at 7890. Furthermore, BLM sought out FWS input in developing the list of species to be addressed in its environmental review. See ROD AR Sec.2 at 15492-93. The invertebrate species addressed and analyzed in the DEIS and FEIS correspond to the special status invertebrate species identified in the California Department of Fish and Game's Natural Diversity Database as being known to exist in Imperial County. See ROD AR Sec.1 at 02231; ROD AR Sec.2 at 15490. Thus, the EIS adequately addressed the impacts of the RAMP on endemic invertebrates, and Plaintiffs' arguments are without merit. See California v. Block, 690 F.2d 753, 767 (9th Cir. 1982) (courts reviewing challenges to an EIS under NEPA should consider "whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation").

E. BLM DID NOT VIOLATE FLPMA IN ADOPTING THE ROD.

Next, Plaintiffs make three arguments that allege BLM violated mandatory duties under FLPMA: first, Plaintiffs argue that BLM violated FLPMA by failing to collect and maintain current inventory data on the resources of the ISDRA; second, Plaintiffs argue that BLM violated FLPMA

by approving the 2003 RAMP without the current inventory data; and third, Plaintiffs argue that BLM violated FLPMA by reopening the temporarily closed areas of the ISDRA to OHV use without a finding that the adverse effects caused by OHVs have been eliminated. All three of these arguments lack merit and should be rejected by the Court.

Plaintiffs' first two arguments are similar to their NEPA arguments, and are largely addressed in the preceding section of this brief. Inventories were conducted and incorporated in the CDCA Plan of 1980, which has been amended over time. And, during development of the latest RAMP, development of a list of threatened and endangered species and special status species in and around the ISDRA involved discussions with FWS and the California Department of Fish and Game, and reliance on the California Natural Diversity Database. The invertebrates analyzed in the EIS are the invertebrates identified through this process. In an Administrative Procedure Act context, the agency is afforded the discretion to determine whether the data supports the action, and the court should defer to the agency in this regard. In this case, the BLM determined it had ample inventory data to support the conclusions in the ROD.

FLPMA states that it is Congressional policy that "the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process." 43 U.S.C. § 1701(a)(2). The Act also states that "[t]he Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values," and that "[t]his inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." 43 U.S.C. § 1711(a). However, the Act goes on to instruct that "[t]he preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands." Id. And, in developing or revising land use plans, the Act instructs the Secretary to "rely, **to the extent it is available**, on the inventory of the public lands, their resources, and other values." 43 U.S.C. § 1712(c)(4) (emphasis added). Again, the agency has been delegated the responsibility to determine, using its expertise, whether or not and to what extent data is available to support its land use plans, and the Court should defer to the agency in this regard. Given that the requirements in management plans, even when stated

as directives, generally function as recommendations and guidance, not mandatory, legally-enforceable directives, see SUWA, 124 S.Ct. at 2382, BLM did not have a legally-enforceable duty to maintain an updated inventory of the ISDRA, and, regardless of inventory status, was not prevented from preparing and implementing a plan for management of the Dunes.

With respect to the validity of BLM's decision to re-open areas of the ISDRA that were temporarily closed to ORV use, Plaintiffs argue that removing the temporary Dune closures would violate the undue degradation provision of FLPMA, set forth at 43 U.S.C. § 1732(b), as evidenced by FWS's statements in the 2005 BO that continued Peirson's milk-vetch species degradation is likely. Pl. Br. at 49-50; BO AR Doc #697 at 12396.

The principle problem with Plaintiffs' argument is that it attempts to equate FWS's statement in the BO that continued habitat degradation is likely with the FLPMA proscription against undue degradation of public lands, despite the fact that these standards have not been equated and, when taken in context, are in fact quite different. In the 2005 BO, FWS used its terminology to further its discussion as to the effect OHV use would have on Peirson's milk-vetch habitat, and came to the conclusion that, despite the likelihood of continued habitat degradation, the RAMP contained sufficient measures to ensure the conservation of the species. BO AR Doc #697 at 12396. In the FLPMA context, BLM is required to prevent undue degradation, but that requirement does not equate to a proscription on OHV use, because to do so would negate Congressional recognition of OHV use on public land. See Sierra Club v. Clark, 774 F.2d 1406, 1410 (9th Cir. 1985); ROD AR Sec.2 at 08098. Thus, while there may be some level of habitat degradation under the ESA analysis according to FWS, here such degradation does not rise to a level sufficient to require cessation of a use recognized as appropriate by Congress under FLPMA.

Moreover, contrary to Plaintiffs' contentions, the adverse effect that led to the closures - the lack of consultation on the Dunes plan - was eliminated prior to the signing of the ROD with the receipt of a BO from FWS, and re-opening of the temporarily-closed areas was therefore consistent with 43 C.F.R. § 8341.2(a). In this case, because of the lack of consultation on a CDCA plan-wide basis, and the ensuing potential for continuing affects to listed species, including the Peirson's milk-vetch by OHVs within the Dunes, BLM agreed to temporarily close approximately 49,000 acres

within the ISDRA to OHV use. BLM instituted the temporary closure using 43 C.F.R. § 8341.2 because the agency was told to use its authorities, and not the settlement agreement or Judge Alsup's order, as support for the closure. ROD AR Sec.3 at 15918. Thus, even though the effect of the losure was to provide additional protection to the Peirson's milk-vetch, the reason for the closure was to satisfy a legal obligation not previously recognized by FWS or the BLM. Per the terms of the temporary closure, it was proper for BLM to re-open the areas once consultation was completed.

V. CONCLUSION

For the reasons set forth above, Federal Defendants respectfully request that the Court deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment.[25]

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Respectfully submitted,

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[25] If the Court is inclined to consider the request for injunctive relief set forth in Plaintiffs' Second Amended Complaint and Plaintiffs' proposed order (but absent from the summary judgment memoranda themselves), Federal Defendants' respectfully request an opportunity for further briefing.