KEVIN V. RYAN, United States Attorney (SBN 118321)
JAMES CODA, Assistant U.S. Attorney (SBN 1012669 (WI))
U.S. Department of Justice
United States Attorney, Northern District of California
450 Golden Gate Ave., Box 36055
San Francisco, CA 94102

SUE ELLEN WOOLDRIDGE, Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
LISA L. RUSSELL, Assistant Section Chief
KEVIN W. McARDLE, Trial Attorney (D.C. Bar No. 454569)
MICHAEL R. EITEL, Trial Attorney (Neb. Bar No. 22889)
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Tel: 202-305-0210
Fax: 202-305-0275

Attorneys for Federal Defendants

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 **FEDERAL DEFENDANTS' REMEDY BRIEF** Date: TBA Time: TBA Courtroom: TBA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATUTES

ACRONYMS

APA	Administrative Procedure Act
BLM	Bureau of Land Management
BO	Biological Opinion
CDCA	California Desert Conservation Area
CEQ	Council on Environmental Quality
DR	Decision Record
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy Management Act
FWS	U.S. Fish and Wildlife Service
ISDRA	Imperial Sand Dunes Recreation Area
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
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

INTRODUCTION

Pursuant to the Court's March 14, 2006, Order Re: Cross Motions for Summary Judgment ("Order and Opinion"), Federal Defendants Bureau of Land Management ("BLM" or "Bureau") and the United States Fish and Wildlife Service ("FWS" or "Service") (collectively, "Federal Defendants") hereby respond to the Court's request for briefing on the appropriate form of relief that should be granted in this case. See Center for Biological Diversity v. Bureau of Land Management ("CBD v. BLM"), 422 F. Supp. 2d 1115, 1168 (N.D. Cal. 2006).[1]

In Plaintiffs' Response and Reply In Support of Motion for Summary Judgment ("Pls' Reply"), Plaintiffs represented to the Court that they seek the following relief in this case:

> Plaintiffs respectfully request that this Court . . . vacate both FWS's 2005 biological opinion and the BLM's Record of Decision based thereupon, remand the inadequate critical habitat designation, and issue an order maintaining the current vehicle closures at the Dunes until and unless FWS develops a biological opinion and critical habitat designation consistent with the ESA, and BLM produces an EIS and Record of Decision compatible with the ESA, NEPA, and FLPMA.

Pls' Reply at 2. As discussed below, and in light of the Court's Opinion and Order, Defendants largely do not object to Plaintiffs' requested remedy, as it appropriately focuses on species protection and satisfies the applicable requirement to narrowly tailor any remedy to the violations found by this Court.

Defendants disagree, however, with Plaintiffs' request for full vacatur of the 2005 BO and the 2005 ROD because such relief extends beyond what is necessary to address the violations found and to protect the Peirson's milk-vetch (*Astragalus magdalene* var. *peirsonii*) ("PMV") and desert tortoise (*Gopherus agassizii*) during remand. The 2005 ROD and 2005 BO are broad management documents implicating vast areas of public lands, and numerous activities that were not the subject or concern of this litigation. By vacating the entire documents, numerous otherwise benign and beneficial actions would be swept aside, resulting in overly intrusive and broad relief.

---

[1] Federal Defendants submit this brief in response to the Court's Order requesting further briefing on remedy issues in this case. See CBD v. BLM, 422 F. Supp. 2d at 1168. In suggesting the appropriate scope of relief to be granted in this case, Federal Defendants do not waive and reserve the right to seek an appeal on the merits of this litigation and the relief ultimately ordered by this Court.

At the same time, full vacatur of these agency actions would not provide additional protections for the PMV or desert tortoise and, indeed, could result in less species protection in the Imperial Sand Dunes Recreation Area ("Dunes" or "ISDRA"), as the Bureau would revert to older, less protective management documents to fulfill its management mandate for these public lands. These older management documents do not take into account updated information on species and habitat and do not contain many significant management actions that were incorporated into the 2005 ROD through the most recent public planning and consultation processes. Moreover, as explained below, the maintenance of the administrative closures in the Dunes during remand ensures that the PMV and the desert tortoise are adequately protected, thereby eliminating any concerns over leaving portions of the 2005 BO and the 2005 ROD in place. Consequently, Federal Defendants believe that the most appropriate remedy would be to vacate the 2005 BO and the 2005 ROD only to the extent necessary to maintain the administrative closures in the Dunes during the remand period.

FACTUAL AND LEGAL BACKGROUND

I. THE COURT'S OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT.

Plaintiffs filed an eight-count Second Amended Complaint on June 3, 2005, against the Bureau and the 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 PMV on August 4, 2004, the issuance of a Biological Opinion ("BO") regarding management of the Dunes pursuant to the 2003 ISDRA Recreation Area Management Plan ("RAMP") on January 25, 2005, the issuance of the Final Environmental Impact Statement ("FEIS") for the ISDRA RAMP, and the issuance of the Record of Decision ("ROD") for, the ISDRA RAMP on March 24, 2005.

In the Court's March 14, 2006 Order and Opinion, the Court found certain deficiencies with the following agency actions promulgated by the Service: (1) the 2005 BO for the PMV; (2) the Incidental Take Statement for the desert tortoise; and (3) the critical habitat determination for the PMV. See CBD v. BLM, 422 F. Supp. 2d at 1121-22. The Court also found certain deficiencies with the

following agency actions promulgated by the Bureau: (1) the FEIS and (2) 2005 ROD. Id. Plaintiffs did not challenge and the Court did not rule on the 2003 ISDRA RAMP or the desert tortoise jeopardy analysis in the 2005 BO. Id.

The Court ordered the parties to submit briefs addressing remedies. Id. at 1168. Thereafter, the parties engaged in discussions regarding the appropriate form of relief, but were ultimately unable to agree on the form of relief that should be granted in this case. See Docket Nos. 175-180.

II. LEGAL STANDARDS GOVERNING THE REMEDIES IN ACTIONS REVIEWING AGENCY ACTION.

It is well settled under APA section 706(2) that, should a court determine that an agency action is in error, the only appropriate remedy is for the court to remand the action to the agency for further consideration and a new decision. See, e.g., Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980) ("If the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration."); FPC v. Idaho Power Co., 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."). This limitation is dictated by the language of the APA, which states that the Court "shall . . . hold unlawful and set aside agency action, findings, and conclusions" found to be arbitrary and capricious or not in accordance with statutory authority. 5 U.S.C. § 706.

"Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid. . . ." Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995) (finding failure to provide the public with an opportunity to review United States Geological Survey report constitute a significant procedural error by the Secretary of the Interior), citing Western Oil and Gas v. EPA, 633 F.2d 803, 813-14 (9th Cir. 1980); see also 5 U.S.C. § 706(2). Under these circumstances, the unlawful administrative action is typically vacated and set aside. See Alsea Valley Alliance v. Evans, 358 F.3d 1181, 1185 (9th Cir. 2004) ("Although not without exception, vacatur of an unlawful agency rule normally accompanies a remand." (citing Idaho Farm, 58 F.3d at 1405)). However, "when equity demands, the regulation can be left in place while the agency follows the necessary procedures." Idaho Farm, 58 F.3d at 1405.

Several Circuits have weighed a number of factors in determining whether or not to set aside a rule:

(1) The purposes of the substantive statute under which the agency was acting;

(2) The magnitude of the administrative error and how extensive, substantive, and serious it was;

(3) The possibility the agency will be able to substantiate its decision given an opportunity to do so;

(4) the likelihood that the errors can be mended and that such changes can be made without altering the order;

(5) equity and public interest considerations;

(6) the potential prejudice to those who will be affected by maintaining the status quo; and

(7) the disruptive consequences of an interim change, which could include invalidating or enjoining agency action.

See International Union, United Mine Workers v. Federal Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990); Cent. Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001); Central & South West Servs. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000) (finding EPA's failure to explain why it did not adopt a national variance for the electric utilities did not require vacatur because the agency may be able to justify its decision and the annulment would disrupt a rule that applies to their members of the regulated community); Center for Biological Diversity v. U.S. Fish and Wildlife Serv., 2005 WL 2000928, at * 16 (N.D. Cal. Aug. 19, 2005); see also NRDC v. U.S. Dept. of Interior, 275 F. Supp. 2d 1136, 1144 (C.D. Cal. 2002).

III. STANDARDS GOVERNING THE ISSUANCE OF INJUNCTIVE RELIEF.

An injunction is an "extraordinary remedy" that "should issue only where the intervention of a court of equity 'is essential in order effectually to protect . . . against injuries otherwise irremediable.'" Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citations omitted). An injunction "is not a remedy which issues as a matter of course," id. at 311 (citation omitted), and "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." Id. at 312 (citation omitted). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Id.

"The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success." Klay v. United Healthgroup, Inc. 376 F.3d 1092, 1097 (11th Cir. 2004) (citation omitted). When a federal court considers the propriety of injunctive relief, it must balance the equities of the case, considering the potential harms of granting and denying relief to each party, in an effort to "mold each decree to the necessities of the particular case." Weinberger v. Romero-Barcelo, 456 U.S. at 312 (quoting Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)); see also Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987) ("In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."); Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 (9th Cir. 1995) ("Injunctive relief is an equitable remedy, requiring the court to engage in the traditional balance of harms analysis, even in the context of environmental litigation.").

In cases under the ESA, however, Congress has altered the traditional balance-of-harms calculus by making it clear that the endangered species should be afforded "the highest of priorities." TVA v. Hill, 437 U.S. 153, 193-95 (1978). In other words, the balance of hardships tips in favor of the endangered species. Nat'l Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508, 1511 (9th Cir. 1994); Center for Biological Diversity v. Bureau of Land Management, Civ. No. 03-2509-SI, 2004 WL 3030209, at * 5 (N.D. Cal. Dec. 30, 2004). Even though Congress tipped the balance in favor of endangered species, a court may not enter injunctive relief unless there is a showing of likely irreparable harm to the species. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 422 F.3d 782, 796 (9th Cir. 2005), remanded, 2005 WL 2488447 (D. Or. Sept. 1, 2005) (noting that showing of irreparable harm "indicates that the issuance of an injunction is appropriate"); Burlington N., 23 F.3d at 1511; see also United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126, 1132 (E.D. Cal. 1992) (injunction is appropriate if defendant is violating a provision of the ESA and if "injury to the [listed species] is likely and irreparable"); Washington Toxics Coalition v. EPA, 413 F.3d 1024, 1035 (9th Cir. 2005) (injunction not required where action agency establishes that actions occurring during remand are non-jeopardizing).

Furthermore, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). Under the law of this Circuit, any remedy should be appropriately tailored to addressing the violation found. Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (declining to issue more drastic remedy "when a more closely tailored remedy is available"); Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d 970, 974 (9th Cir. 1991) ("Injunctive relief . . . must be tailored to remedy the specific harm alleged."); see e.g., Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 66-67 (2004) (Courts are "to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve," because, otherwise, "it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management").

ARGUMENT

I. THE COURT SHOULD REMAND THE CHALLENGED AGENCY ACTIONS TO THE BUREAU AND THE SERVICE FOR FURTHER ACTION.

As dictated by the APA, the Court should remand the agency actions challenged in this case – i.e., the 2005 BO, the critical habitat determination, the 2005 ROD, and the FEIS – to the Bureau and the Service, so that the agencies can correct the deficiencies identified by the Court in its Opinion and Order. See Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (ordering remand to Fish and Wildlife Service for notice and comment and review of record to make decision on whether to list the Bruneau Hot Springs snail as endangered); Resources Limited, Inc. v. Robertson, 35 F.3d 1300, 1308 (9th Cir. 1994); Nw. Res. Info. Ctr. v. Nw. Power Planning Council, 35 F.3d 1371 (9th Cir. 1994).

In remanding the agency actions, the Court should not dictate the manner in which the agencies should correct the deficiencies identified in the Court's opinion. The Supreme Court has made clear that a reviewing court may not substitute its judgment for that of the agency. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). While a court may use its power to compel action that involves the exercise of discretion by a federal agency, it may not direct the outcome of the exercise of that discretion. Miguel v. McCarl, 291 U.S. 442, 451 (1934) (court has authority to

"compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion.") (emphasis supplied); see Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 544 (1978) (holding that following remand "the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops.'") (quoting Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976)). Accordingly, in remanding the agency actions, the Court should not dictate to the agencies how they must remedy the deficiencies identified by this Court in its Opinion and Order.

Furthermore, in fashioning a remedy, the Supreme Court has cautioned that courts are not to impose schedules for the completion of activities on remand absent substantial justification. See e.g., Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976) ("In the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry.") (emphasis added) (footnote omitted) (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). Likewise, if substantial justification exists, any schedule imposed by the Court must be reasonable. See Center For Biological Diversity v. Norton, 212 F. Supp. 2d 1217, 1221 (S.D. Cal. 2002).

During remand, the Bureau and the Service intend to make every effort to complete the required actions and correct the deficiencies identified by this Court in an expeditious manner, consistent with appropriate levels of public participation and involvement and without sacrificing sound decision-making practices. Moreover, while the activities on remand occur, the Bureau will maintain the administrative closures, which exclude OHV use in a significant portion of the Dunes and provide protections to the listed and other sensitive resources within the Dunes. See Section II, *infra*; Declaration of Jack Anthony Danna ("Danna Decl.") ¶ 19 (attached as Exhibits A and B hereto). Because the PMV and other sensitive resources will be adequately protected during remand, substantial justification does not exist for establishing deadlines for the completion of agency actions on remand; thus, the Court should refrain from establishing arbitrary deadlines in this case.

II. THE COURT SHOULD NARROWLY TAILOR THE ISSUANCE OF ANY INJUNCTIVE RELIEF.

To the extent the Court finds it necessary to order injunctive relief, the relief should consist solely of maintaining the interim administrative closures in the Dunes. See "Temporary Closure of Approximately 49,300 Acres to Motorized Vehicle Use of Five Selected Areas in the ISDRA," 66 Fed. Reg. 53,431-32 (Oct. 22, 2001); Pls' Reply at 2 (requesting an order maintaining the administrative closures). This is precisely the relief that Plaintiffs have sought, and it has already been found reasonable by the courts.

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, collectively referred to as the "Consent Decree," 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 agreements, BLM temporarily closed five areas in the ISDRA, totaling approximately 49,000 acres, to OHV and other recreational use as a means to protect the PMV. BO AR Doc #128. These closures remained in place until BLM signed the decision document implementing the new RAMP for the ISDRA. Pursuant to this litigation, the administrative closures have remained in place.

Plaintiffs have already agreed that the current management of the Dunes, as modified by the administrative closures, protects the sensitive resources in the dunes, as evidenced by their request for an "order maintaining the current vehicle closures at the Dunes." Pls' Reply at 2. Plaintiffs have represented to this Court throughout this litigation that the interim administrative closures and the Bureau's modified management of the Dunes has been adequate in ensuring that the sensitive resources

within the Dunes are protected. See, e.g., Pls' Reply at 38 (The administrative closures and management thereunder "is a reasonable and viable alternative for managing the Dunes for multiple use and species protection as has been shown over the last five years."); Pls' Motion for Preliminary Injunction at 1 (Dkt. #15) (filed Aug. 8, 2003) ("Plaintiffs seek a preliminary injunction that would set aside the illegal BiOp and preserve the balanced interim management regime currently in place at the Dunes . . . ."); see also, Pls' MSJ at 42-44, Pls' Reply at 39, 42. The Court has also acknowledged that maintaining the administrative closures in the Dunes is "a reasonable and viable alternative for managing the Dunes for multiple use and species protection." CBD v. BLM, 422 F. Supp. 2d at 1160, 1161-62. And the Court in the American Sand Association litigation determined that the Bureau's decision to administratively close potions of the Dunes was reasonable under the circumstances. See American Sand Ass'n v. Dep't of Interior, 268 F. Supp. 2d 1250 (S.D. Cal. 2003).

Furthermore, the current management in the Dunes under the 2003 RAMP and the 2005 ROD, as modified by the administrative closures, has demonstrated that the sensitive resources in the Dunes are adequately protected. See Danna Decl. ¶¶ 16-19. For example, the Bureau's intensive monitoring during the spring of 2005 has initially revealed that "75% of occupied [plots surveyed] and 75% of the PMV plants observed in spring 2005 are in areas currently closed to OHVs, either through Wilderness designation (the Wilderness Management Area) or through administrative closure." Danna Decl. ¶ 19. "This fact, coupled with the high number of plants that are well distributed throughout the areas of the Dunes with suitable habitat, will more than suffice to ensure the conservation of PMV during the period in which FWS reconsiders the critical habitat designation, BLM prepares supplemental draft and final EISs, and FWS issues a biological opinion on the revised RAMP." Id.

Consequently, the Court should limit any injunctive relief to maintaining the administrative closures in the Dunes during remand, as identified in the "Temporary Closure of Approximately 49,300 Acres to Motorized Vehicle Use of Five Selected Areas in the ISDRA," 66 Fed. Reg. 53,431-32 (Oct. 22, 2001). This relief would, as asserted by Plaintiffs, adequately provide for the protection of sensitive species during the remand process. This relief would also comport with the standards governing the issuance of injunctive relief – namely, to narrowly tailor injunctive relief to ensure that the violation is stopped and the species is adequately protected during the remand process. See Idaho Farm Bureau

Fed'n v. Babbitt, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (declining to issue more drastic remedy "when a more closely tailored remedy is available"); Center for Biological Diversity v. Bureau of Land Management, Civ. No. 03-2509-SI, 2004 WL 3030209, at * 6 (N.D. Cal. Dec. 30, 2004) ("[T]he scope of [an] injunction must be tailored to the likelihood of future harm to the [species].").

III. THE COURT SHOULD VACATE THE CHALLENGED AGENCY ACTIONS ONLY TO THE EXTENT NECESSARY TO MAINTAIN THE ADMINISTRATIVE CLOSURES AND CURRENT MANAGEMENT IN THE DUNES.

A. The 2005 Biological Opinion And The 2005 Record Of Decision.

During summary judgment briefing, Plaintiffs requested the complete vacatur of only the 2005 BO and the 2005 ROD. See Pls' Reply at 2. However, the injunctive relief that Plaintiffs themselves seek does not necessitate the complete vacatur of the 2005 BO and the 2005 ROD. Moreover, vacating the documents would not aid in protecting the species and would negate several positive advances that have been made through the adoption of the 2005 ROD and the 2005 consultation with the Service. Accordingly, full vacatur is inappropriate. Rather, the Court should exercise its equitable discretion and only vacate the 2005 BO and the 2005 ROD to the extent necessary to accommodate the continued administrative closures in the Dunes. See MCI Telecomm. Corp. v. FCC, 143 F.3d 606, 609 (D.C. Cir. 1998) (one factor a court will consider in exercising its discretion to remand a rule without vacating is the potential disruptive effect).

First, full vacatur of the 2005 ROD is not necessary to ensure that the PMV and desert tortoise are adequately protected during the remand period. With respect to the desert tortoise, the Plaintiffs did not challenge and the Court did not rule on the Service's jeopardy analysis for the desert tortoise. Rather, the Court only found that the Service's Incidental Take Statement ("ITS") for the desert tortoise was deficient. See CBD v. BLM, 422 F. Supp. 2d at 1121-22. Because the ITS is severable and distinct from the underlying jeopardy analysis for the desert tortoise, the Court should leave in place the underlying jeopardy analysis for the desert tortoise while the Service revisits its ITS. Center for Biological Diversity v. Bureau of Land Management, 2004 WL 3030209, at *4 (noting that, under circumstances where findings in a BO may be considered separately, partial vacatur of only the deficient portions of a BO may be appropriate).

With respect to the PMV, the injunctive relief requested by Plaintiffs asks that the Bureau maintain the administrative closures in the Dunes, which will adequately protect PMV on remand. This relief can be granted and effectuated with partial vacatur of the 2005 ROD and 2005 BO, as this Court already granted such relief in its Order for Managing Remaining Claims In Case (Dkt. #131) (filed Mar. 23, 2005). As the Court stated:

> Notwithstanding any contrary provision of the Record of Decision, the Temporary Closure of Approximately 49,300 Acres to Motorized Vehicle Use of Five Selected Areas in the Imperial Sand Dunes Recreation Area published by BLM in the Federal Register on October 22, 2001, 66 Fed. Reg. 53431-02, shall remain in effect until this Court has heard and ruled upon the merits of any challenge to the Record of Decision and January 25, 2005, biological opinion . . . .

March 23, 2005 Order at 3. Accordingly, the same method can be employed here to maintain a management regime in the Dunes that adequately protects the sensitive resources, such as the PMV, during the remand period, thereby appropriately tailoring the remedy to the violations in this case.

Second, permitting portions of the 2005 ROD and the 2005 BO to remain in place during the remand period would compliment, rather than detract from, species protection in the Dunes. While this Court found certain deficiencies with the Bureau's 2005 ROD and the 2005 BO, those management and analysis documents were based on current and up-to-date information and were developed through rigorous process of public participation, environmental review and analysis, and land-use planning. See Danna Decl. ¶ 3-4. Many of those actions and measures expressed in and authorized by the 2005 ROD make important strides in public resource management planning and in species protection.

For example, the 2003 RAMP and the 2005 ROD (1) incorporate a comprehensive program that includes data collection, monitoring, ISDRA-wide adaptive management, restrictions on OHV use, and enhanced user information and education; (2) implement permitting or other methods to minimize use in sensitive areas; (3) require self-policing by OHV users to keep users out of sensitive areas; (4) call for partial closure of sensitive areas; and (5) call for complete closure of areas when necessary. See BO AR Doc #697 at 12360-64, 12389. See also CBD v. BLM, 422 F. Supp. 2d at 1129 (discussing the RAMP's monitoring and research plan). The 2005 ROD amended the multiple use classifications within the Dunes, expanded the Dunes by 1,200 acres, incorporated a comprehensive set of goals and objectives for managing the Dunes, and increased and enhanced law enforcement capabilities in the Dunes. See Danna Decl. ¶ 4. As the Bureau has explained, "[t]his new management regime [under the 2005 ROD] provides substantially better control over public use, protection of sensitive

environmental resources, and enhancement of visitor experience." Id. ¶ 7, 9 (noting the enhanced law enforcement provisions and visitor support provisions under the 2005 ROD).

Were the 2005 ROD vacated in its entirety, these resources would go by the wayside and the Bureau would revert to the 1987 Decision Record ("DR") and the 1987 RAMP to fulfill its statutorily mandated duty to manage the public lands under its jurisdiction. See Danna Decl. ¶ 3 (noting obligation to manage public lands pursuant to approved management plan); id. ¶ 12 (noting that, in the absence of the 2005 ROD, the 1987 DR and RAMP would become the guiding management documents in the Dunes). The management regime under the 1987 DR and RAMP, however, is less protective of sensitive resources in the Dunes than the more current and up-to-date 2003 RAMP and 2005 ROD.

For example, unlike the 1987 RAMP and DR, the 2005 ROD eliminates certain motorized vehicle corridors, thereby increasing protection to undeveloped and wilderness areas in the Dunes. Danna Decl. at ¶ 8. Unlike the 1987 RAMP and DR, the 2005 ROD eliminates several development and construction projects, thereby minimizing impacts to the Dunes, the PMV, and its habitat. Id. Vacating the entire 2005 ROD jeopardizes significant projects and the funding budgeted for such projects (nearing 1 million dollars) which will not affect sensitive resources in the Dunes, id.; hinders day-to-day management relating to commercial uses and activities in the Dunes, such as the increased regulation of commercial vendors and the burgeoning tour bus industry under the 2005 ROD, id. ¶ 10; jeopardizes money-generating activities which provide invaluable resources to the Bureau to manage the Dunes, id.; and eliminates important and vital improvements relating to environmental education and interpretative programs in the Dunes; id. ¶ 11. See also Danna Decl. at ¶ 8 (noting that the 1987 DR and RAMP would reinstate other management objectives less protective of species and habitat, such as the 1987 RAMP's provisions regarding the leasing of public lands for OHV rental and sales, restaurant development, RV park development, and development of other types of business establishments).

At bottom, while Defendants recognize that Plaintiffs' request to maintain administrative closures during remand is appropriate in this case, Defendants also believe that the Bureau should manage the Dunes based on the most current and up-to-date management documents established through public participation, based on current species data, and developed with a focus on furthering

species protection in the Dunes. Full vacatur of the 2005 BO and 2005 ROD would undermine this progress and would fail to provide any real benefits in terms of increasing protection of the PMV or desert tortoise. Indeed, as demonstrated above, full vacatur of the documents would lead to a less protective management regime in the Dunes. Under these circumstances, it is appropriate to decline to order full vacatur. Such a decision would be consistent with the ESA's prescribed approach of "institutionalized caution," TVA v. Hill, 437 U.S. 153, 194 (1978), and the Ninth Circuit's binding direction to avoid vacatur where there is a "possibility of undesirable consequences which we cannot now predict." Western Oil and Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980).

Accordingly, Defendants respectfully request that the Court exercise its discretion and only vacate the 2005 BO and the 2005 ROD to the extent necessary to maintain the administrative closures in the Dunes, as this Court did in preserving the administrative closures and current management regime during the pendency of this case. See March 23, 2005 Order at 3; see, e.g., Center for Biological Diversity v. Bureau of Land Management, 2004 WL 3030209, at * 7 (declining to enter injunctive relief when such relief "is not required to adequately protect the [species] pending re-issuance of a new biological opinion"); Center for Biological Diversity v. U.S. Fish and Wildlife Serv., 2005 WL 2000928, at * 16 (N.D. Cal. Aug. 19, 2005) (noting a court retains discretion in deciding whether or not to vacate challenged actions, regardless of whether the deficiencies were substantive or procedural in nature).

B. The Service's Final Critical Habitat Rule.

Plaintiffs do not request that the Service's final critical habitat rule, 69 Fed. Reg. 47,330 (Aug. 4, 2004), be vacated, and Defendants agree that the appropriate course would be to leave the critical habitat determination in place pending the completion of new economic and Section 4(b)(2) analyses consistent with the Court's Opinion and Order. The areas designated as critical habitat under the final rule were not challenged by Plaintiffs nor found deficient by this Court. Moreover, this Court has recognized the beneficial aspects of designating critical habitat for endangered and threatened species. CBD v. BLM, 422 F. Supp. 2d at 1142-1145. Under these circumstances, the final rule designating critical habitat should remain in place while the economic analysis and the exclusions of critical habitat

pursuant to 16 U.S.C. § 1533(b)(2) are remanded to the Service for reevaluation, based on the Service's proposed critical habitat rule and consistent with the Court's Opinion and Order.

C. The Court Should Not Vacate Underlying Environmental Analysis And Land-Use Planning Documents, Such As The Bureau's Final Environmental Impact Statement And The 2003 ISDRA RAMP.

This Court should further decline to vacate or set aside the Bureau's FEIS and 2003 ISDRA RAMP. The FEIS and 2003 ISDRA RAMP were documents created pursuant to statutory mandate and used to inform and guide the Bureau's final land-use planning decisions and determinations. Because the Court should remand the 2005 ROD, and because the Court found deficiencies with the Bureau's FEIS, the Bureau will have to revisit the FEIS and the 2003 ISDRA RAMP on remand. See Danna Decl. at ¶¶ 12, 19 (noting Bureau's intent to revisit its RAMP, ROD, and environmental analyses during remand). Accordingly, as stated above, an appropriate remedy in this case is an order remanding the FEIS to the Bureau for further action consistent with the Court's Opinion and Order.

The Court should not, however, dictate how the Bureau should correct the deficiencies highlighted by the Court, for instance by ordering the Bureau to complete an entirely new FEIS or RAMP. With respect to the 2003 ISDRA RAMP, although the Bureau's 2003 RAMP was discussed in briefing and in the Court's Opinion and Order, Plaintiffs did not challenge the adequacy of the 2003 RAMP. See, e.g., CBD v. BLM, 422 F. Supp. 2d at 1167 n. 39. Accordingly, the 2003 RAMP is not implicated in the remedy phase of this litigation and, if asked, the Court should decline to exercise jurisdiction over a land-use planning decision not specifically reviewed or challenged in these proceedings. See Center for Biological Diversity v. BLM, Civ. No. 03-2509-SI, 2004 WL 3030209, at *9 (declining to vacate an Incidental Take Statement not independently challenged in the litigation).

With respect to the FEIS, this Court should not eliminate the Bureau's discretion to supplement its existing environmental analysis through its remedy order, for instance by ordering the Bureau to complete a new FEIS. In issuing the FEIS, the Bureau devoted significant resources and efforts to formulate the proposed action (2003 RAMP) and its supporting environmental analysis (FEIS). The public comment period for the draft EIS was open for ninety days from March 29, 2002 through June 28, 2002. ROD AR Sec.2 at 09488. Six public meetings were held to explain the EIS and RAMP to the public, and BLM received over 7,000 comments, out of which over 1,000 unique issues were

identified and considered by the Bureau. Id. The Bureau considered these issues, gathered additional information and materials, and engaged in an extensive environmental analysis of the Dunes and the management therein. See Danna Decl. ¶¶ 13-15.

While the Court found deficiencies in the Bureau's FEIS, these deficiencies only pertained to certain portions of the FEIS and did not render the entire FEIS or the process employed in developing the FEIS invalid or deficient. For purposes of efficiency, the Bureau could legally prepare a supplemental EIS, as contemplated by the Council on Environmental Quality regulations at 40 C.F.R. § 1502.9(c)(1), to supplement the already completed analysis. See Danna Decl. ¶¶ 13-14 (noting potential availability to the Bureau to engage in supplemental NEPA analysis and noting that the Bureau's decision on how to proceed will ultimately depend on several factors, such as the Service's final critical habitat determination). Were this Court to issue relief requiring the Bureau to start the environmental analysis process anew, for instance by vacating or setting aside the FEIS, the Court would effectively foreclose this valid and legally permissible means of addressing and correcting the problems identified by the Court. This result should be avoided, as aptly noted by the Ninth Circuit in Metcalf v. Daley, 214 F.3d 1135, 1146 (9th Cir. 2000). There, the court found violations with an agency's compliance with NEPA and subsequently addressed the question of whether it could dictate how an agency must comply with NEPA on remand. Id. The court found that it could not, recognizing its "limited role in this process" and acknowledging that "[t]he manner of ensuring that the process for which we remand this case is accomplished objectively and in good faith shall be left to the relevant agencies." Id.

In accord, Defendants respectfully request that the Court remand the FEIS to the Bureau, without vacating the FEIS or setting it aside, and permit the agency to exercise its discretion and judgment to correct the deficiencies identified by this Court. See, e.g., Vermont Yankee, 435 U.S. at 549 (a court may not "impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good"); National Tank Truck Carriers v. EPA, 907 F.2d 177, 185 (D.C. Cir. 1990) ("We will not, indeed we cannot, dictate to the agency what course it must ultimately take . . . . It may even be that the EPA will choose some other solution altogether. In any event, that choice is the agency's and not ours." (citations omitted)).

IV. TERMINATION OF THE INJUNCTION.

Plaintiffs have also requested that the injunctive relief remain in place "until and unless FWS develops a biological opinion and critical habitat designation consistent with the ESA, and BLM produces an EIS and Record of Decision compatible with the ESA, NEPA, and FLPMA." Pls' Reply at 2. Defendants agree that once an agency develops and produces a superceding BO, critical habitat designation, EIS, or ROD under the applicable statutory guidelines, any injunctive relief as to the original BO, critical habitat designation, EIS, or ROD must terminate. Judge Armstrong recently iterated the rationales and principles supporting the termination of injunctive relief automatically upon the issuance of new or revised agency action, explaining that the Court lacks jurisdiction over the prior challenged agency actions once new agency action is issued. See Pac. Coast Fed'n of Fisherman's Ass'ns v. U.S. Bureau of Reclamation ("PCFFA"), Civ. No. 02-2006-SBA, 2006 WL 1469390 (N.D. Cal. May 25, 2006); see also Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1096 (9th Cir. 2003) (claim is moot where agency action has been superseded by new agency action); Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1124 (9th Cir. 1997) (specifically finding that issuance of new biological opinion rendered previous challenge to old biological opinion moot).

Here, once the Bureau or the Service complete the agency actions challenged in this case, the Court will lack jurisdiction over Plaintiffs' claims challenging those actions. Moreover, the Plaintiffs' entire case will become moot once the Bureau and the Service complete all agency actions on remand, culminating with an appropriate approval document. Consequently, all relief granted in this case, including any injunctive relief, must terminate automatically upon the issuance of a new BO and approval document (e.g., a new ROD) for the Dunes. See PCFFA, 2006 WL 1469390 at *9 (amending its remedy order to provide that the injunctive relief "expires upon the completion of a new biological opinion").

//

//

//

//

CONCLUSION

For the reasons set forth above, and without waiving their right to appeal, Federal Defendants respectfully request that the Court issue the following remedy order:

(1) The 2005 ROD, FEIS, 2005 BO, and the Section 4(b)(2) analyses in the final critical habitat rule for the Peirson's milk-vetch are remanded to the Bureau and the Service for further action consistent with the Court's Opinion and Order and applicable federal law;

(2) The Bureau shall maintain the interim administrative closures in the Dunes pursuant to the Temporary Closure of Approximately 49,300 Acres to Motorized Vehicle Use of Five Selected Areas in the Imperial Sand Dunes Recreation Area, 66 Fed. Reg. 53431-02 (Oct. 22, 2001), pending completion of remand in paragraph 1, above;

(3) The 2005 ROD and 2005 BO are vacated only insofar as necessary to maintain the interim administrative closures in the Dunes during remand;

(4) The Service's Section 4(b)(2) exclusions of critical habitat pursuant in its final critical habitat rule for the Peirson's milk-vetch, 69 Fed. Reg. 47,330 (Aug. 4, 2004), and the Service's economic analysis prepared in conjunction with the final critical habitat rule, are remanded to the Service for further action consistent with the Court's Opinion and Order and applicable federal law. The Service's final critical habitat rule shall remain in force and effect pending the completion of the remand; and

(5) All injunctive relief shall expire upon the Bureau's issuance of a new decision document governing the management of the Dunes, approved after the completion of appropriate levels of environmental analysis and consultation pursuant to NEPA and the ESA.

Dated: July 10, 2006

Respectfully submitted,

SUE ELLEN WOOLDRIDGE, Asst. Attorney General
JEAN E. WILLIAMS, Section Chief
LISA L. RUSSELL, Assistant Section Chief
KEVIN W. McARDLE, Trial Attorney

/s/ Michael R. Eitel
MICHAEL R. EITEL, Trial Attorney
Neb. Bar No. 22889

U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
Tel: (202) 305-0207; Fax: (202) 305-0275

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2006, I electronically filed Federal Defendants' Remedy Brief with the Clerk of Court using the CM/ECF system which will automatically send email notification to the attorneys of record.

/s/ Michael R. Eitel
MICHAEL R. EITEL, Trial Attorney