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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, a non-profit corporation; SIERRA CLUB, a non-profit corporation; PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, a non-profit corporation; and DESERT SURVIVORS, a non-profit corporation, Plaintiffs, vs. BUREAU OF LAND MANAGEMENT, a federal Agency; and UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency,	Case No. CV 03-2509 SI MEMORANDUM ADDRESSING REMEDY ISSUES FROM DEFENDANT-INTERVENORS

Defendant,
and

DESERT VIPERS MOTORCYCLE CLUB; CALIFORNIA ASSOC. OF 4 WHEEL DRIVE CLUBS; and THE BLUERIBBON COALITION,

and

AMERICAN SAND ASSOCIATION, et al.

Defendant-Intervenors.

No Hearing Date Set

I. INTRODUCTION

This matter is now entering the remedy phase, following the Court's order dated March 13, 2006 (Doc. No. 174) resolving cross-motions for summary judgment. Defendant-Intervenors – Desert Vipers Motorcycle Club, California Association of 4 Wheel Drive Clubs, the Blueribbon Coalition, the American Sand Association, American Motorcyclists Association District 37, Off-Road Business Association, San Diego Off-Road Coalition, and California Off-Road Vehicle Association (collectively, " Defendant-Intervenors") – hereby submit the following brief in support of their proposed remedy. Said remedy is (1) faithful to the Court's order; (2) directs the federal defendants to make the required revisions to the challenged documents in an efficient manner, pursuant to a reasonable schedule; and (3) provides an adequate margin of safety to the Peirson's milkvetch and the Mojave desert tortoise.

II. ARGUMENT

A. The Court's Authority to Fashion a Remedy

The Court retains broad discretion in formulating an appropriate remedy here, for "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every

violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Instead, the bases for injunctive relief remain "irreparable injury and inadequacy of legal remedies," and "[i]n 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." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). These principles are modified in an ESA case, because:

> Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests. The "language, history, and structure" of the ESA demonstrates Congress' determination that the balance of hardships and the public interest tips heavily in favor of protected species.

National Wildlife Federation v. Burlington Northern Railroad, 23 F.3d 1508, 1511 (9th Cir. 1994) (citations omitted). However, even in an ESA case, injunctive relief requires some showing of irreparable injury:

> [T]hese cases do not stand for the proposition that courts no longer must look at the likelihood of future harm before deciding whether to grant an injunction under the ESA. Federal courts are not obligated to grant an injunction for every violation of law. The plaintiff must make a showing that a violation of the ESA is at least likely in the future.

Id. (citations omitted). Thus, a district court correctly denied a motion for preliminary injunction alleging impacts to Montana Grizzly Bear populations where there was a:

> lack of a showing of future harm to the bears…[and] the attempted showing of future harm was wholly insufficient to support injunctive relief, even in light of the fact that the "balance of hardships and the public interest should tip heavily in favor of endangered species."

Id. (quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987)). While the ESA thus limits the full range of the Court's equitable discretion, movants must still establish irreparable injury. This is true even though the balance of hardships is "sharply tipped" in favor of the species in question. The Court should therefore blend the elements of the ESA jurisprudence,

which contemplates a "sharply tipping" balance on some factors, while still applying each element of the "traditional" balancing test in determining whether to issue an injunction and in formulating the specific elements of any justified relief. Included in such a test is whether a party seeking an injunction has made a sufficient showing of irreparable injury, a balancing of the hardships to the parties, and consideration of the public interest in granting or withholding injunctive relief.

Where claims outside the ESA are involved, a court retains broad discretion in determining whether to impose injunctive relief and the form of any such relief. The Second Circuit Court of Appeals has concluded:

> Although the procedural requirements of NEPA must be followed scrupulously and cost or delay will not alone justify noncompliance with the Act, where the equities require, it remains within the sound discretion of a district court to decline an injunction, even where deviations from prescribed NEPA procedures have occurred.

Conservation Society of Southern Vermont v. Secretary of Transportation, 508 F.2d 927, 933-934 (2d Cir. 1974), *vac. on other grounds*, 423 U.S. 809 (1975). It is notable to distinguish decisions involving a discrete project, such as construction of a dam or approval of a timber sale, from those involving ongoing activities, as is the case here.

In the first situation, courts regularly "set aside" the decision at issue and enjoin further work on the project. 5 U.S.C. § 706(2) (APA review standard authorizing reviewing court to declare unlawful and set aside illegal agency action); See, e.g., *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1154 (9th Cir. 1998) (enjoining further implementation of timber sale); *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (suggesting an injunction preventing implementation of the decision(s) at issue is "the appropriate remedy for a violation of NEPA's

procedural requirements."); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988).

In the second situation, however, courts are often unwilling to immediately "set aside" the decisions at issue, which often contain improvements to the pre-decisional status quo. For example, in *High Sierra Hikers Ass'n v. Powell*, 2001 WL 1382176 (N.D.Cal. 2001), *aff'd*, 390 F.3d 630 (9th Cir. 2004), the court found the NEPA compliance lacking for commercial horse packing operations, but declined to enjoin "all packer operations, even though technically the pack stations…have no valid authorization to operate in the wilderness areas until compliance with NEPA is achieved." *Id.* at *6. Rather, the court opted for "a combination and refinement of remedies" designed "to mitigate the impact on the environment pending compliance with NEPA." *Id.* Courts are not obligated to "set aside" the results of invalidated NEPA decisions, but conduct an equitable balancing to determine an appropriate remedy.

In crafting any form of relief addressing future procedures or agency actions, a reviewing court must be particularly cautious to maintain appropriate distance between functions of the executive branch and the judiciary. See, generally, *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining APA review standard of agency action "is narrow and a court is not to substitute its judgment for that of the agency"); *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983) (under NEPA "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' " (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)).

B. Defendants-Intervenors' Proposed Remedy

As noted above, the proper balance of any relief in this case may require additional briefing or analysis by the Court following resolution of the cross-motions for summary judgment. The Court is not mechanically obligated to impose any particular remedy here. Given the unique history of this case, coupled with the complex technical and scientific issues underlying this controversy, the Court should simply set aside the decision(s) addressed by its March 13th decision, while leaving the on-the-ground "status quo" in place pending remand. The status quo would include the "interim" closures that have governed visitor conduct at the Imperial Sand Dunes for more than five (5) years.

One should keep in mind that the "interim" closures adopted by Consent Decree in 2001 were developed expressly to provide an adequate degree of safety for sensitive resources while BLM and FWS completed their ESA Section 7 consultations and prepared the requisite documents (Recreation Area Management Plan, Environmental Impact Statement, Critical Habitat Designation, and Biological Opinion). While Defendant-Intervenors believe that the interim closures were and remain too extensive, there is no question that the closures have, for the past five years, successfully protected the Peirson's milkvetch (PMV) and the desert tortoise from irreparable harm in the Dunes. For example, evidence presented to the Court during the merit phase of this litigation shows that the PMV continues to inhabit both the open and closed areas of the dunes in large numbers and is rarely struck by off-highway vehicles.

Given that the interim closures implemented in November 2000 have served adequately to safeguard the PMV and the desert tortoise, there is no reason to change them – one way or the other – until the challenged actions come back to the Court following remand to the federal agencies. In short, if the interim closures were good enough for the first round of litigation (presided over by Judge Alsop), they are good enough for this second round. Absent evidence to

the contrary, one must conclude that these closures have prevented any serious, irreparable harm to the species in question and will continue to do so.

In addition, any relief ordered by this Court should include time parameters to ensure that the federal agencies complete their work expeditiously. The parameters should be reasonable and flexible enough to grant the agencies the time required to perform their assigned tasks properly and skillfully, but not so lax or open-ended as to add years to a process that has already taken half a decade to reach this point. In its March 13 Order, the Court was comprehensive and precise in identifying the respective defects in the RAMP EIS, the Critical Habitat Designation, and the Biological Opinion. It should not take the federal agencies more than 12 months to address these defects and return with revised documents.

III. CONCLUSION

For the foregoing reasons, the Defendant-Intervenors respectfully request that the Court adopt the remedy proposed above as the preferred form of relief in this litigation.

Respectfully submitted this 10th day of July, 2007.

LOUNSBERY, FERGUSON, ALTONA, & PEAK, LLP

s/ David P. Hubbard
David P. Hubbard

MOORE SMITH BUXTON & TURCKE, CHARTERED

s/ Paul A. Turcke
Paul A. Turcke

DENNIS L. PORTER, ATTORNEY AT LAW

s/ Dennis L. Porter
Dennis L. Porter
Attorneys for Defendant-Intervenors

SECTION X ATTESTATION

I, David P. Hubbard, in accordance with section X of General Order 45, Electronic Case Filing, hereby attest that Paul A. Turcke and Dennis L. Porter have reviewed the pleading

presented above, have concurred in the same, and have authorized the filing of this document bearing their signatures with the Court.

s/ David P. Hubbard
David P. Hubbard
Attorney for Defendant-Intervenors ASA et al.