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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, No. C 06-4884 SI
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10 Plaintiffs,

**ORDER RE: SUMMARY JUDGMENT
MOTIONS**

11 v.

12 U.S. BUREAU OF LAND MANAGEMENT, *et al.*,
13

Defendants.
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INTRODUCTION

17 Plaintiffs are eleven environmental organizations¹ who have sued the Bureau of Land
18 Management (“BLM”) and the U.S. Fish and Wildlife Service (“FWS”). The BLM manages a vast area
19 of public land known as the California Desert Conservation Area (“CDCA”), home to a number of
20 protected species, including the threatened desert tortoise and an endangered plant, the Lane Mountain
21 milk-vetch. FWS consults with the BLM and is required to evaluate BLM actions that affect these
22 protected species.

23 Plaintiffs’ claims arise out of the BLM’s approval of three land management plans that amend
24 the California Desert Conservation Area Plan of 1980, the land use plan governing the CDCA: the West
25 Mojave (“WEMO”) Plan; the Northern and Eastern Mojave (“NEMO”) Desert Management Plan, and
26 the Northern and Eastern Colorado (“NECO”) Desert Coordinated Management Plan. With respect to
27

28 ¹ Defendants do not challenge plaintiffs’ standing, and have conceded that at least one or more
of the plaintiffs meets the necessary requirements to challenge the agency actions at issue here.

1 the WEMO Plan, plaintiffs claim that the BLM’s designation of an extensive “Off-Highway Vehicle”
2 (“OHV”) route network throughout the WEMO planning area violates the Federal Land Policy and
3 Management Act of 1976 (“FLPMA”), 43 U.S.C. §§ 1701-85. Plaintiffs also claim that the *Final*
4 *Environmental Impact Statement and Report for the West Mojave Plan* (“FEIS”) prepared for the
5 WEMO Plan violates the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321 *et*
6 *seq.* Finally, plaintiffs claim that Biological Opinions (“BiOps”) issued by the U.S. Fish and Wildlife
7 Service for the WEMO, NEMO and NECO Plans do not comply with the Endangered Species Act
8 (“ESA”), 16 U.S.C. §§ 1531-44, and that all three management plans imperil the desert tortoise and the
9 Lane Mountain milk-vetch.²

10 The Court recognizes the complexity of the issues presented in this case, and that defendants
11 have been given the difficult task of addressing the interests and needs of OHV recreationists while at
12 the same time protecting listed species as required by law. In deciding the pending summary judgment
13 motions, the Court has been mindful that its review is “narrow” but “searching and careful,” *Marsh v.*
14 *Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989), and that the Court will “reverse a decision as
15 arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider,
16 entirely failed to consider an important aspect of the problem, or offered an explanation that runs
17 counter to the evidence before the agency or is so implausible that it could not be ascribed to a
18 difference in view or the product of agency expertise.” *The Lands Council v. McNair*, 537 F.3d 981, 987
19 (9th Cir. 2008) (en banc) (internal citations omitted).

20 In summary, after careful consideration of the parties’ papers and the arguments of counsel, as
21 well as of the voluminous administrative record, the Court concludes the BLM violated the FLMPA and
22 the NEPA in numerous respects, but that defendants complied with their obligations under the ESA.
23 With regard to FLPMA, the BLM’s route designation process – insofar as that process is documented

25 ² FWS issued a consolidated BiOp for the NEMO and NECO Plans on March 31, 2005, NBO
26 12535-12737, and a separate BiOp for the WEMO Plan on January 9, 2006, WBO 14752. This opinion
27 uses the parties’ citation style when citing to the administrative record. Thus, citations to the
28 NEMO/NECO BiOp and amended Incidental Take Statement are “NBO _____” and “NSupp _____”;
citations to the WEMO BiOp and amended Incidental Take Statement are “WBO _____” and “WSupp
_____”; and citations to the administrative record for the WEMO, NECO and NEMO plans are “AR
_____” or “SAR _____.”

1 in the administrative record – did not comply with regulations mandating that the BLM consider various
2 “minimization criteria” when designating OHV routes. In addition, because the WEMO Plan authorizes
3 numerous OHV routes that were not in existence in 1980, the WEMO Plan is inconsistent with the
4 governing CDCA land use plan, which limits OHV routes to those existing in 1980. With regard to
5 NEPA, the Court concludes that the FEIS is flawed because it does not contain a reasonable range of
6 alternatives to the proposed action, and its discussion of the “no action” alternative is incomplete.
7 However, the Court finds that other aspects of the FEIS comply with NEPA, such as the FEIS’s
8 discussion of mitigation measures, and its analysis of some of the impacts of the WEMO Plan.

9 Turning to the ESA claims and the two BiOps at issue, the Court finds that FWS considered all
10 relevant factors, and that its analyses and conclusions are reasoned and supported by the record. The
11 BiOps explain in detail why FWS concluded that the WEMO and NECO Plans would not jeopardize
12 the continued existence of the desert tortoise and the Lane Mountain milk-vetch, as well as why those
13 plans would not destroy or adversely modify designated critical habitat of the desert tortoise. The Court
14 also finds that the amended Incidental Take Statements (“ITSs”) for both BiOps comply with the law.

15 BACKGROUND

16 I. Statutory background

17 A. Federal Land Policy and Management Act

18 The FLPMA, 43 U.S.C. §§ 1701-1785, declares that public lands must be managed for multiple
19 uses in a manner that will protect the quality of the scientific, scenic, historical, ecological,
20 environmental, air and atmospheric, water resource, and archeological values, but also provides for
21 outdoor recreation and human occupancy and use. *See* 43 U.S.C. § 1701(a)(7) & (8).

22 As part of FLPMA, Congress designated 25 million acres of southern California as the CDCA.
23 43 U.S.C. § 1781(c). Congress declared in FLPMA that the CDCA is a rich and unique environment
24 teeming with “historical, scenic, archeological, environmental, biological, cultural, scientific,
25 educational, recreational, and economic resources.” *Id.* Congress found that this desert and its
26 resources are “extremely fragile, easily scarred, and slowly healed.” *Id.* For the CDCA and other public
27 lands, Congress mandated that the BLM “shall, by regulation or otherwise, take any action necessary
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1 to prevent unnecessary or undue degradation of the lands.” *Id.* § 1732(b).

2 Of particular relevance to this case are regulations addressing OHV³ use on public lands. In
3 1978, the BLM promulgated 43 C.F.R. § 8342.1, which governs the opening of OHV routes within
4 public lands under the agency’s control. *See* Recodification of Recreation Regulations, 43 Fed. Reg.
5 40,734 (Sept. 12, 1978). 43 C.F.R. § 8342.1 provides:

6 The authorized officer shall designate all public lands as either open, limited, or closed
7 to off-road vehicles. All designations shall be based on the protection of the resources
8 of the public lands, the promotion of the safety of all the users of the public lands, and
the minimization of conflicts among various uses of the public lands; and in accordance
with the following criteria:

9 (a) Areas and trails shall be located to minimize damage to soil, watershed, vegetation,
10 air, or other resources of the public lands, and to prevent impairment of wilderness
suitability.

11 (b) Areas and trails shall be located to minimize harassment of wildlife or significant
12 disruption of wildlife habitats. Special attention will be given to protect endangered or
threatened species and their habitats.

13 (c) Areas and trails shall be located to minimize conflicts between off-road vehicle use
14 and other existing or proposed recreational uses of the same or neighboring public lands,
and to ensure the compatibility of such uses with existing conditions in populated areas,
15 taking into account noise and other factors.

16 (d) Areas and trails shall not be located in officially designated wilderness areas or
17 primitive areas. Areas and trails shall be located in natural areas only if the authorized
officer determines that off-road vehicle use in such locations will not adversely affect
their natural, esthetic, scenic, or other values for which such areas are established.

18 43 C.F.R. § 8342.1(a)-(d). These route designation criteria are referred to by the parties and throughout
19 this order as the “minimization criteria.”
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21 **B. The National Environmental Policy Act**

22 The NEPA requires federal agencies to analyze the environmental impacts of a proposed action
23 before proceeding with that action. *See* 42 U.S.C. § 4332(2)(C). Under NEPA and the regulations
24 promulgated thereunder by the Council on Environmental Quality (“CEQ”), federal agencies must
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26 ³ The Court uses defendants’ term “Off-Highway Vehicle” and the acronym “OHV.”
27 Defendants state that although the term “Off-Road Vehicle” and the “ORV” acronym appear in FLPMA,
28 the CDCA Plan, and BLM regulations, “OHV” is more commonly accepted today as it is consistent with
the State of California’s usage and avoids confusion with a different “ORV” acronym in the Wild and
Scenic Rivers Act.

1 prepare and circulate to the public a comprehensive environmental impact statement (“EIS”) so that the
2 environmental impacts can be considered and disclosed to the public during the decision-making
3 process. *See* 40 C.F.R. §§ 1501.2, 1502.5. In the EIS, the agency must identify direct, indirect, and
4 cumulative impacts of the proposed action, consider alternative actions (including the alternative of
5 taking no action) and their impacts, and identify all irreversible and irretrievable commitments of
6 resources associated with the action. *See* 42 U.S.C. § 4332(2); 40 C.F.R. § 1502.14(d).

8 **C. The Endangered Species Act**

9 Congress enacted the ESA to protect and conserve endangered and threatened species. 16 U.S.C.
10 § 1531(b). “Each Federal agency shall, in consultation with and with the assistance of the Secretary,
11 insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize
12 the continued existence of any endangered species or threatened species or result in the destruction or
13 adverse modification of [designated critical] habitat.” *Id.* § 1536(a)(2); *see* 50 C.F.R. Pt. 402. After
14 the agencies engage in the consultation process, the consulting agency issues a biological opinion
15 (“BiOp”), which includes a “detailed discussion of the effects of the action on listed species or critical
16 habitat.” 50 C.F.R. § 402.14(h)(2). The BiOp assesses the likelihood of the proposed action resulting
17 in jeopardy to a listed species or destruction or adverse modification to designated critical habitat. *See*
18 50 C.F.R. § 402.14(g)(4). If an action is not likely to result in jeopardy, but is reasonably likely to result
19 in “take” incidental to the proposed action, then the consulting agency attaches an ITS to the BiOp. 16
20 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i-v). If the agency implements the project as proposed
21 and complies with the terms and conditions (“T&Cs”) of the ITS, ESA § 7(o)(2) exempts the specified
22 level of take from the ESA § 9 take prohibition. 16 U.S.C. § 1563(o)(2).

23 Congress also directed the Secretary to develop and implement recovery plans to provide
24 guidance for the long-term objective of removing species from the list of endangered or threatened
25 species. 16 U.S.C. § 1533(f)(1). In 1994, the Secretary prepared a recovery plan for the desert tortoise.

27 **II. Factual background**

28 **A. Management of the CDCA**

1 In establishing the CDCA, Congress declared that the California desert is a “total ecosystem that
2 is extremely fragile, easily scarred, and slowly healed,” and that it is a rich and unique environment with
3 “historical, scenic, archaeological, environmental, biological, cultural, scientific, educational,
4 recreational, and economic resources.” 43 U.S.C. § 1781(a)(1)-(2). Congress also stated that “the use
5 of all California desert resources can and should be provided for in a multiple use and sustained yield
6 management plan to conserve these resources for future generations, and to provide present and future
7 use and enjoyment, particularly outdoor recreation uses, including the use, where appropriate, of off-
8 road recreational vehicles.” *Id.* § 1781(a)(4).

9 The CDCA contains approximately 25 million acres of land, of which the BLM administers
10 slightly less than one-half. AR 221935. The WEMO and NECO Plan⁴ areas are located within the
11 CDCA. The BLM issued a long-range management plan for the CDCA in 1980. AR 222401-222555.
12 The CDCA Plan identified 12 plan elements for consideration, including cultural resources, wildlife,
13 vegetation, livestock grazing, recreation, and motorized vehicle access, and the establishment of special
14 management areas, such as Areas of Critical Environmental Concern (“ACEC”), and 11 types of special
15 areas. AR 221936, 221941-222033. The CDCA Plan lists approximately 75 ACECs, including the
16 Desert Tortoise Natural Research Area. AR 222030-222031. Over the years, the CDCA Plan has been
17 amended a number of times. The WEMO and NECO Plans amended the CDCA Plan.

18
19 **1. 1982 amendment to the CDCA Plan and “existing” OHV routes**

20 A central issue in this case relates to the designation of OHV routes in portions of the CDCA.
21 In 1982,⁵ the BLM significantly revised the 1980 CDCA Plan to address OHV use. The BLM
22 determined that public land areas within the CDCA would be designated as “open,” “closed,” or
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⁴ The parties generally refer to the NEMO Plan in conjunction with the NECO Plan, and
26 collectively as “NECO Plan,” and this order similarly will refer to the “NECO Plan.”

27 ⁵ The BLM’s summary judgment papers state that the CDCA plan was amended in 1983.
28 However the CDCA plan, as amended, that is contained in the record reflects that those amendments
occurred in 1982. *See, e.g.*, AR 221929 (explaining that amendment changes are referenced with the
amendment number and year in brackets).

1 “limited” based upon the particular multiple use classification for the area.⁶ AR 222004. Within “open”
2 areas, vehicles could travel anywhere, while vehicle travel was prohibited in “closed” areas. *Id.* With
3 regard to “limited” areas, the CDCA Plan, as amended in 1982, states:

4 “Limited” vehicle access means that motorized-vehicle access is allowed only
5 on certain “routes of travel,” which include roads, ways, trails, and washes. At the
6 minimum, use will be restricted to existing routes of travel. *An existing route of travel*
7 *is a route established before approval of the Desert Plan in 1980, with a minimum width*
8 *of two feet, showing significant surface evidence of prior vehicle use or, for washes,*
9 *history of prior use.* Where necessary, other limitations will be stipulated.

10 In all areas of limited vehicle use, special attention will be given to identifying
11 conflict areas, zones of route proliferation, and special sites or resources being damaged
12 by vehicle use. The public will be involved in each step of this process. Appropriate
13 actions will then be taken to reduce or eliminate the problem, depending on the multiple-
14 use class and degree of control needed.

15 AR 222005 (emphasis added). Somewhat confusingly, in addition to OHV *areas* being designated as
16 “open,” “closed,” or “limited,” OHV *routes* could also be designated as “open,” “closed,” or “limited.”
17 *Id.* “Open” routes were open to OHVs, generally without restriction; “closed” routes prohibited OHV
18 use except for certain official, emergency or otherwise authorized vehicles; and “limited” routes
19 permitted OHVs, subject to limitations on the number and types of vehicles allowed, as well as
20 restrictions on time or season and speed limits. AR 222005-222006. The CDCA Plan provided special
21 management considerations for OHV use on washes, sand dunes and dry lakes. AR 222006.

22 Although the CDCA Plan defines “existing routes” as those established before approval of the
23 1980 CDCA Plan and provides a description of the characteristics of those routes, there was no complete
24 inventory of routes existing in 1980 when the plan was adopted. AR 230282. The original 1980 plan
25 relied on vehicle access information depicted on motorized vehicle interim access guides based on data
26 from at least 1973 in identifying an interim route management program. AR 222009. When the 1980

27 ⁶ The CDCA Plan established four primary multiple use classifications of public land: “C”
28 (potential wilderness/designated wilderness areas); “L” (limited areas established to protect sensitive,
natural, scenic, ecological and cultural resource values); “M” (moderate use areas established to provide
a controlled balance between higher intensity use and protection of public land resources, to provide for
mining, livestock grazing, recreation, energy, and utility development while providing management to
conserve desert resources and to mitigate for damage that permitted use may cause); and “I” (intensive
use areas providing for concentrated use of lands and resources to meet human needs while providing
reasonable protection, mitigation, and rehabilitation to sensitive natural and cultural values).
Unclassified lands account for scattered and isolated public land parcels within the CDCA. AR 221941-
221942.

1 CDCA Plan was approved, the interim designations became effective. *Id.* In 1982 when the CDCA
2 Plan was amended, the BLM replaced those interim designations with the guideline that “existing routes
3 of travel” may be used in Class L, Class M, and certain Class I areas. *Id.* There is, of course, an
4 inherent tension between the CDCA Plan’s statement that OHV routes are limited to those in existence
5 at the time of the adoption of the 1980 Plan, and the factual reality that the BLM did not have an
6 inventory or listing of what those routes were in 1980. In part, the roots of the current litigation can be
7 traced to this conflict.⁷

8 9 2. 1985-1987 OHV route designations

10 After the CDCA Plan was amended in 1982, the BLM began the process of creating an inventory
11 of existing OHV routes using aerial photographs from 1979 and, where available, U.S. Geological
12 Survey base maps. AR 230283. The BLM concluded that “the photo coverage, in and of itself, was not
13 [an] adequate means of identifying all existing routes.” *Id.*⁸ As a result, BLM staff conducted a route
14 designation project that resulted in the “1985-1987 OHV route designations.” The FEIS for the WEMO
15 Plan describes this process as follows:

16 **1985-87 Off-Road Vehicle Designations:** BLM conducted a field and map inventory
17 of off highway vehicle routes throughout the planning area in the mid-1980s and, based
18 upon that inventory, identified a network of open motorized vehicle access routes. BLM
personnel inventoried and evaluated existing routes of travel. Information from existing
maps and aerial photos was supplemented by field checks. This information was then

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20 ⁷ As the author of the report on the BLM’s 1985-1987 route designation project (discussed *infra*)
colorfully stated,

21 Enter the 1982 Desert Plan amendment to the Motorized Vehicle Access Element. For
22 the sake of time as well as my own sanity, I am not going to attempt to explain this
23 amendment to you here. . . . In brief this amendment, in conjunction with various district
24 Instruction Memorandums [], set the stage for the current route designation concept and
25 procedure. In concept it represents a somewhat perverted definition of “Designated
26 routes and trails” by attempting to identify and designate all roads and trails in the desert
while maintaining a user perception of “Existing roads and trails” knowing it could never
fully accomplish the first task. Interpret it as you will, but in my opinion, the current
system falls somewhat short.
27 AR 230282 (from “1985 and 1987 Route Designations: Barstow and Ridgecrest Resource Areas,” by
28 Bruce DiGennaro, Sept. 15, 1987).

⁸ The parties’ disagreement on whether the 1979 aerial photographs are a sufficient basis for
identifying the extant routes in 1980 is discussed *infra*.

utilized to create a known route inventory that primarily consisted of known “two-track” routes (i.e., “single-track” motorcycle routes were generally not part of the inventory). Public meetings were conducted and members of the public also reviewed these route inventories. Criteria for determining which routes were to remain open was based upon public access needs, recreational values and resource conflicts. Following public meetings, decisions to designate the route network were announced.

On August 21, 1985, BLM published a notice in the Federal Register titled *Off-Road Vehicle Designation Decisions; Ridgecrest Resource Area, CA* (Federal Register, Vol. 50, No. 182). Two years later, on June 19, 1987, BLM published Federal Register notice titled *Off-Road Vehicle Route Designation Decisions for the California Desert District, Barstow Resource Area* (Federal Register, Vol. 52, No. 118, p. 23364); and, on September 22, 1987 BLM published a Federal Register notice titled *Off-Road Vehicle Route Designation Decisions for the California Desert District, Barstow Resource Area* (Federal Register, Vol. 52, No. 183, p. 35589). These notices opened 2,949 miles of off highway vehicle routes.

AR 202199; *see also* AR 230278-230795 (“1985 and 1987 Route Designations: Barstow and Ridgecrest Resource Areas).

3. ACEC OHV route designations

In addition to the 1985-1987 OHV route designations, between 1982 and 1994 BLM designated 317 miles of OHV routes within each of the 20 ACECs in the WEMO Plan area. AR 202199-202202. Because these routes, referred to as the “ACEC routes,” were designated separately from the 1985-1987 OHV routes, the ACEC routes did not always connect seamlessly to the 1985-1987 network. AR 201843.

4. Development of the WEMO Plan and OHV route designations

The WEMO Plan establishes a 5,098 mile OHV route network in the WEMO Plan area, and a significant portion of these routes are derived from the 1985-1987 OHV routes, as well as the ACEC routes. AR 201843. The background leading up to the WEMO OHV route network is long and complicated, but a full recounting is necessary to understanding the claims and issues in this case.

a. Ord Mountain route designation

In 1995, BLM staff in the Barstow Field Office designated an emergency OHV route network for the Ord Mountain planning unit due to a “noted increase in regional route proliferation, concern for

1 desert tortoises within the designated Ord Mountain Desert Tortoise Critical Habitat Unit [], and other
2 at-risk natural resources.” AR 221204. According to the record, the emergency designation involved
3 only limited public input, and “[a] consensus emerged between BLM and representatives of several
4 interest groups, that a 100 percent vehicle route inventory, as well as a higher level of public
5 involvement, was needed.” *Id.* As a result, the BLM began a pilot route designation program in the Ord
6 Mountain planning unit. The pilot program used an inventory based on air photos and ground
7 verification. AR 221205. The results of the pilot program were examined in an Environment
8 Assessment published in January 2000, AR 221195, and were later incorporated into a larger Western
9 Mojave Desert Off Road Vehicle Designation Project. The Western Mojave Desert Off Road Vehicle
10 Designation Project was the subject of a 2003 Environmental Assessment (“2003 EA”), and was
11 ultimately approved by the BLM and incorporated into the CDCA. The 2003 EA, and the BLM’s
12 decision to approve the 2003 EA, played a significant role in the BLM’s OHV route designation process
13 and profoundly affected the OHV route network adopted in the WEMO plan. The 2003 EA is discussed
14 in greater detail *infra*. AR 211390.⁹

15
16 **b. The “Box” effort**

17 Between June and August 1998, the BLM met in Barstow (in an office known as “the Box”) and
18 in Ridgecrest. The two Box teams used aerial photography, data from desert tortoise studies dating back
19 to the 1970s, and other resources to identify “access and resource” attributes such as “recreational,”
20 “redundant route,” “tortoise,” “sensitive plants,” “cultural,” and “8342 criteria.” AR 240696. Using
21 this data, the BLM created large scale Geographic Information System (“GIS”) maps to develop route
22 inventories.

23
24 ⁹ The OHV routes designated through the Western Desert Off Road Vehicle Designation
25 Project, which include the routes designated through the Ord Mountain pilot, were ultimately
26 incorporated into the CDCA Plan by amendment on June 30, 2003. AR 206771. In March 2003, the
27 BLM released the *Western Mojave Desert Off-Road Vehicle Designation Project Environmental*
28 *Assessment and Draft CDCA Plan Amendment* (“2003 EA”). AR 211373-211726. On June 13, 2003,
the BLM released the *Proposed West Mojave Plan Draft Environmental Impact Report and Statement*.
AR 207756-210195. (“DEIS”) On June 30, 2003, the BLM issued a *Decision Record CDCA Plan*
Amendment Western Mojave Desert Off Road Vehicle Designation Project (“2003 ROD”). AR 206756-
77. The OHV routes designated in the 2003 EA – which were then incorporated into the CDCA plan
– became the “no action” alternative in the FEIS for the WEMO.

1 According to the declaration of William Haigh,¹⁰ Project Manager for the WEMO Plan, the Box
2 process resulted in recommendations regarding whether to keep certain vehicle routes open or closed,
3 but the rationale for each recommendation was not recorded. Haigh describes the Box process in detail,
4 and states that the BLM held a series of public meetings regarding the Box recommendations. Haigh
5 Decl. ¶¶ 32-33 (Docket No. 82-4). According to Haigh, the public response was highly critical due to
6 allegedly inaccurate photo inventories and the lack of explanation for route closures. *Id.* In response
7 to the public criticism, the BLM chose to disregard the Box effort's recommended route designations,
8 as well as much of the data compiled in the process.

9
10 **c. Western Mojave Desert Off Road Vehicle Designation Project**

11 On November 3, 1999, the WEMO Plan "Supergroup," consisting of representatives of over 100
12 jurisdictions, agencies and non-governmental agencies, and private individuals, established four task
13 groups to prepare the WEMO Plan. AR 221532-221538. The WEMO project manager, Haigh,
14 recommended a new on-the-ground field survey of OHV routes and route designations, and various
15 stakeholders agreed. The resulting effort became the Western Mojave Desert Off Road Vehicle
16 Designation Project.

17 The BLM first divided the entire WEMO region into three general groups comprised of (1)
18 twenty-one sub-regions, (2) the existing ACECs, and (3) remaining areas with routes designated in
19 1985-1987. AR 201830, 211393-211394. Eleven of the twenty-one sub-regions were selected for
20 "redesign" based in part on the designation of the desert tortoise and Lane Mountain milk-vetch as
21 threatened and endangered species. AR 201832. Nine of the eleven selected sub-regions were
22 redesigned using the "Decision Tree" process discussed in detail below.¹¹ All areas outside the redesign
23 area were "reviewed to ensure that they were compatible with the West Mojave Plan's conservation
24 strategy and were in compliance with federal regulations (specifically 43 CFR 8342)." AR 201842-

25
26 ¹⁰ The administrative record was supplemented with information about the "Box" effort.

27 ¹¹ The other two redesign sub-regions, called Ridgecrest and El Paso, were designated using a
28 "Collective Access Planning Area process," which plaintiffs do not appear to challenge except insofar
as the designations made in these regions include routes that did not exist in 1980. *See* Discussion I.C.,
infra.

1 201843.

2 The BLM retained the consulting firm CH2M Hill to conduct on-the-ground surveys in ten of
3 the eleven redesign sub-regions using GPS equipment; those surveys occurred between September 2001
4 and March 2002.¹² The data collected during these surveys concerned route data (type, condition, level
5 of use), and recreation or commercial data (camping, mining, utilities). AR 201832; *see also* SAR 3-
6 320433-Public (chart of data to be surveyed). The BLM downloaded the resulting data into a database
7 for integration with biological data regarding the desert tortoise, as well as population data. AR 201832,
8 201841.

9 The BLM further divided the surveyed redesign sub-regions into Motorized Access Zones
10 (“MAZs”) which possessed similar “issues” and “goals” as defined by the BLM. AR 211396-211403.
11 The “issues” include some mentioning of biological resources other than the desert tortoise. *See, e.g.,*
12 AR 211399 (“location of very rare Kern buckwheat.”). Under “goals,” almost every MAZ lists the
13 elimination of redundant routes, several list “minimize land-use conflicts,” and three MAZs cite 43
14 C.F.R. § 8342.1 specifically.¹³ The BLM redesign teams used maps of each MAZ, which contained
15 information about “biology polygons” and “disturbance polygons.” AR 201841. The biology and
16 disturbance polygons were limited to information obtained from desert wildlife management areas
17 (“DWMAs”), and identified areas where tortoise sign was higher than average (the biology polygons),
18 as well as areas where the amount of vehicle-related/dependent disturbance was greater than average
19 (the disturbance polygons). *Id.* The BLM then applied a “Decision Tree” to all of the 5200 routes
20 identified in the redesign areas to determine which routes should be designated “open” and which should
21 be closed. The Decision Tree is the focus of plaintiffs’ FLPMA claims, and is discussed in greater detail
22 *infra*.

23
24 ¹² The remaining sub-region, Juniper, was mapped in Fall 2003 due to time constraints and the
25 prior existence of apparently good data. AR 201832. The route designations for this sub-region were
26 described in the FEIS for the WEMO Plan, and integrated into the CDCA Plan via a March 2006 Record
of Decision (“2006 ROD”) approving the WEMO Plan amendment. AR 201847-201850.

27 ¹³ These goals are stated as: “[r]ecognize that better tortoise habitat is typically found in areas
28 with slopes less than 20%; therefore allow for adequate recreational commercial, private property
access, yet eliminate duplicity in order to minimize impacts to physical, biological and cultural
resources (43 C.F.R. 8342.1).” AR 211400-211401.

1 For the non-redesign areas, the record contains much less information about the process used
2 to evaluate OHV routes. The 2003 EA states:

3 **Revision of 1985-87 and ACEC Off Road Vehicle Designations:** Those portions of
4 the existing motorized vehicle access network that were not included in the 2002 route
5 designations were reviewed to ensure that they were compatible with the conservation
6 strategy being developed by the West Mojave Plan and were in compliance with federal
7 regulations (specifically, 43 C.F.R. § 8342). In some cases, minor adjustments were
8 necessary, based upon available new information (resource, law enforcement, land use
9 or recreation concerns). This arose, in part, due to the comparatively incomplete nature
10 of the field survey conducted for the 1985-87 network, which lacked modern GPS
11 equipment (not in existence in the mid-1980s) and which did not include most technical
12 4WD and motorcycle routes.

13 AR 211405. The 2003 EA provides five specific examples of how route information was updated in
14 different regions. AR 211405-211406. The 2005 FEIS contains an almost identical description of how
15 OHV routes in “Public Lands Not Included in Redesign Area” were evaluated, and provides the same
16 five examples. AR 201842-201843.

17 In March 2003, the BLM released the *Western Mojave Desert Off Road Vehicle Designation*
18 *Project Environmental Assessment and Draft CDCA Plan Amendment* for public review. AR 211373-
19 211726. This document, the “2003 EA,” addressed the route network developed through the Decision
20 Tree process, as well as the routes designated in the non-redesign areas. On June 30, 2003, FWS issued
21 a “biological opinion that the network of routes of travel proposed by the Bureau is not likely to
22 jeopardize the continued existence of the desert tortoise or the Lane Mountain milk-vetch or to destroy
23 or adversely modify critical habitat of the desert tortoise.” AR 206749.¹⁴ The BLM then executed the
24 2003 ROD. AR 206756-206777.

25 **5. Center for Biological Diversity v. BLM (“CBD I”), C No. 00-927 WHA (N.D. Cal.) and Center for Biological Diversity v. BLM (“CBDII”), C No. 03-2509 SI (N.D. Cal.), and adoption of the WEMO and NECO Plans**

26 On March 16, 2000, the Center for Biological Diversity, *et al.*, filed suit against the BLM for
27 its alleged failure to consult with FWS to address the CDCA Plan’s impact on the desert tortoise and
28 other protected species. The court later approved a consent decree with five stipulated agreements and
numerous interim measures. Under the consent decree, the BLM agreed to consult with FWS on, *inter*

¹⁴ Plaintiffs do not challenge this BiOp.

1 *alia*, the WEMO, NECO and NEMO Plan areas. The BLM also agreed to restrict cattle and sheep
2 grazing in desert grazing allotments until a decision on the plan amendments, and to defer final route
3 designation and maintain the existing emergency route closure in the Ord Mountain area until it
4 completed the WEMO Plan, when the interim measures would expire.

5 In May 2002, the BLM published a *Revised Notice of Intent to Prepare West Mojave Plan and*
6 *Environmental Impact Statement*, AR 214296-214297, and held public scoping meetings. AR 201668.
7 On June 13, 2003, the BLM released the *Proposed West Mojave Draft Environmental Impact Report*
8 *and Statement* (“DEIS”) for public review. AR 207756-210195. In January 2005, the BLM published
9 the FEIS. AR 201625-205379. On January 9, 2006, FWS issued a BiOp concluding that
10 implementation of the WEMO Plan was not likely to jeopardize the desert tortoise or adversely modify
11 desert tortoise critical habitat. WBO 14752-14949. In March 2006, the BLM issued the 2006 ROD to
12 adopt the WEMO Plan to amend the CDCA Plan. AR 200044-200066.

13 In February 2001, the BLM issued a combined Proposed California Desert Conservation Area
14 Plan Amendment for the Northern and Eastern Colorado Desert Coordinated Management Plan (“NECO
15 Plan”), and a DEIS for the proposed plan. On June 17, 2002, FWS issued a BiOp regarding the impact
16 of the NECO Plan. The BiOp concluded that the NECO Plan was not likely to jeopardize the continued
17 existence of the desert tortoise and was not likely to destroy or adversely modify designated critical
18 habitat of the desert tortoise.

19 On May 27, 2003, Center for Biological Diversity *et al.*, filed a lawsuit against BLM and FWS
20 challenging the June 17, 2002 BiOp, *Center for Biological Diversity v. BLM (CBD II)*, C No. 03-2509
21 SI (N.D. Cal.). In 2004, the court held that FWS had relied on an invalid regulatory definition of
22 “adverse modification” when analyzing effects to designated desert tortoise critical habitat in the June
23 17, 2002 BiOp. The BiOp was vacated and remanded to FWS with instructions to reissue the BiOp after
24 applying the appropriate definition of adverse modification. On March 31, 2005, FWS issued a new
25 BiOp analyzing the impacts of the CDCA Plan, and the NEMO and NECO Plan amendments on the
26 desert tortoise. It is this March 31, 2005 BiOp, along with the January 9, 2006 BiOp issued by FWS
27 for the WEMO Plan amendment, that are challenged in this lawsuit in connection with plaintiffs’ ESA
28 claims.

B. The desert tortoise and the Lane Mountain milk-vetch

The desert tortoise (*Gopherus agassizii*) is a large, herbivorous reptile, with adults measuring up to 15 inches in shell length and found in portions of the western United States and Mexico. The Mojave population of the desert tortoise was listed as a threatened species in 1990. *See* Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Mojave Population of the Desert Tortoise, 55 Fed. Reg. 12,178 (Apr. 2, 1990). On February 8, 1994, FWS published a final designation of critical habitat for the Mojave population of the desert tortoise. Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Mojave Population of the Desert Tortoise, 59 Fed. Reg. 5820 (Feb. 8, 1994); NBO 900-47. FWS identified 12 areas, encompassing a total of 6.5 million acres, as critical habitat. NBO 908. Eight units totaling 4.8 million acres were designated in California; the rest are located in Nevada, Utah, and Arizona. *Id.*

In June 1994, FWS finalized the Recovery Plan for the Mojave population of the desert tortoise, which describes a strategy for recovering and delisting the desert tortoise. NBO 546-899. The Recovery Plan divides the range of the Mojave population of the desert tortoise into 6 recovery units and recommends that land management agencies establish 14 DWMA's throughout the recovery units, with at least one DWMA in each recovery unit. NBO 582, 596, 598. The Recovery Plan also identifies activities which directly or indirectly threaten the desert tortoise and its habitat, such as domestic livestock grazing and OHV use. NBO 700-42. The Recovery Plan generally recommends that grazing not be permitted in DWMA's because no data exist to show that cattle grazing can be compatible with desert tortoise recovery. NBO 618. The Recovery Plan also recommends establishing vehicular controls and notes that the "recommendations are presented to aid land managers in the development of management plans," such as the NECO and WEMO Plans, as "DWMA-specific management plans cannot yet be precisely defined." NBO 606.

The Lane Mountain milk-vetch (*Astragalus jaegerianus*) ("LMMV") is a slender light-gray or greenish perennial plant species in the pea family which grows 12 to 27.5 inches tall. WBO 14911-12 (describing biology and ecology of the LMMV). The LMMV is known only from four occurrences and "does not appear to have been more widespread than is currently known; no extirpations of populations

1 have been documented.” WBO 14913, 14916 (discussing occurrences and distribution of LMMV). The
2 LMMV was listed as an endangered species on October 6, 1998. 63 Fed. Reg. 53596. In the final
3 critical habitat rule published on April 8, 2005, FWS did not designate critical habitat for the species.
4 Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Astragalus*
5 *jaegerianus* (Lane Mountain milk-vetch), 70 Fed. Reg. 18,220 (Apr. 8, 2005). The occurrences of
6 LMMV in the WEMO planning area are entirely within areas designated as critical habitat for the desert
7 tortoise. WBO 4915-16. On January 9, 2006, FWS issued a BiOp concluding that implementation of
8 the CDCA Plan, as amended by previous amendments and the proposed WEMO bioregional plan, was
9 not likely to jeopardize the LMMV. WBO 14921-22. Plaintiffs challenge that “no jeopardy” finding.
10

11 **III. Procedural background**

12 This lawsuit was filed on August 14, 2006. By order filed January 11, 2007, the Court granted
13 a motion by Kern County, San Bernadino County, Imperial County, and the Quadstate County
14 Government Coalition to intervene with full party rights with regard to liability and remedial matters.
15 In addition, by order filed January 4, 2007, the Court approved a stipulation by all parties to allow
16 various OHV interest groups to intervene with full party rights as to remedy issues, and as *amicus curiae*
17 with respect to liability.¹⁵ On February 7, 2008, plaintiffs filed a second amended complaint for
18 declaratory and injunctive relief.

19 The parties filed cross-motions for summary judgment, and on May 16, 2008 the Court held a
20 hearing on the motions. On August 12, 2008, the Court directed the parties to file revised cross-motions
21 that incorporated two Ninth Circuit decisions issued after the May 16, 2008 hearing, *Lands Council v.*
22 *McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc), and *Oregon Natural Desert Ass’n v. Bureau of Land*
23 *Management (ONDA)*, 531 F.3d 1114 (9th Cir. 2008).
24

25 **LEGAL STANDARDS**

26
27 ¹⁵ The Counties and the OHV intervenors have filed summary judgment papers in support of
28 defendants’ motion for summary judgment and in opposition to plaintiffs’ motion. For ease of
reference, this order generally refers to “defendants” rather than separately distinguishing between the
various defendants and defendants-intervenors.

I. Summary judgment

Summary adjudication is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c).

In a motion for summary judgment, “[if] the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact, the burden of production then shifts so that the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.” *See T.W. Elec. Service, Inc., v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the non-moving party. *See T.W. Electric*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)); *Ting v. United States*, 927 F.2d 1504, 1509 (9th Cir. 1991). The evidence presented by the parties must be admissible. *See* Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

II. Review of administrative action

Judicial review of final agency actions is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of the Navy*, 898 F.2d 1410, 1413 (9th Cir. 1990). The court “shall” set aside any agency decision that the Court finds is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The APA precludes the trial court reviewing an agency action from considering any evidence outside of the administrative record available to the agency at the time of the challenged decision. *See* 5 U.S.C. § 706(2)(E); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985);

1 *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991).

2 The Court must determine whether the agency decision “was based on a consideration of the
3 relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton*
4 *Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S.
5 99 (1977). The Supreme Court has explained that an agency action is arbitrary and capricious if “the
6 agency has relied on factors which Congress has not intended it to consider, entirely failed to consider
7 an important aspect of the problem, offered an explanation for its decision that runs counter to the
8 evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or
9 the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463
10 U.S. 29, 43 (1983). Although the arbitrary and capricious standard “is narrow and presumes the agency
11 action is valid, . . . it does not shield agency action from a ‘thorough, probing, in-depth review.’”
12 *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 481-82 (W.D. Wash. 1988) (citations omitted). The
13 Court cannot, however, substitute its judgment for that of the agency or merely determine that it would
14 have decided an issue differently. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377
15 (1989).

16 17 **DISCUSSION**

18 **I. Federal Land Policy and Management Act claims**

19 Plaintiffs challenge the OHV route designations in the WEMO Plan on three grounds. First,
20 plaintiffs contend that the Decision Tree process failed to consider the “minimization criteria” contained
21 in 43 C.F.R. § 8342.1, and further that there is no information or documentation in the administrative
22 record regarding application of that criteria to the Decision Tree routes. Second, plaintiffs contend that
23 there is nothing in the administrative record to show that BLM’s designation of OHV routes outside of
24 the redesign areas complied with 43 C.F.R. § 8342.1. Third, plaintiffs contend that the BLM’s
25 designation of all new OHV routes after 1980 are arbitrary and capricious because those routes were
26 not “existing routes” in 1980 as required by the language of the CDCA Plan.

1 **A. The Decision Tree routes**

2 Plaintiffs contend that the Decision Tree OHV route designation process is fatally flawed
3 because it did not explicitly consider the minimization criteria contained in 43 C.F.R. § 8342.1. 43
4 C.F.R. § 8342.1 provides:

5 The authorized officer shall designate all public lands as either open, limited, or closed
6 to off-road vehicles. All designations shall be based on the protection of the resources
7 of the public lands, the promotion of the safety of all the users of the public lands, and
8 the minimization of conflicts among various uses of the public lands; and in accordance
9 with the following criteria:

10 (a) Areas and trails shall be located to minimize damage to soil, watershed, vegetation,
11 air, or other resources of the public lands, and to prevent impairment of wilderness
12 suitability.

13 (b) Areas and trails shall be located to minimize harassment of wildlife or significant
14 disruption of wildlife habitats. Special attention will be given to protect endangered or
15 threatened species and their habitats.

16 (c) Areas and trails shall be located to minimize conflicts between off-road vehicle use
17 and other existing or proposed recreational uses of the same or neighboring public lands,
18 and to ensure the compatibility of such uses with existing conditions in populated areas,
19 taking into account noise and other factors.

20 (d) Areas and trails shall not be located in officially designated wilderness areas or
21 primitive areas. Areas and trails shall be located in natural areas only if the authorized
22 officer determines that off-road vehicle use in such locations will not adversely affect
23 their natural, esthetic, scenic, or other values for which such areas are established.

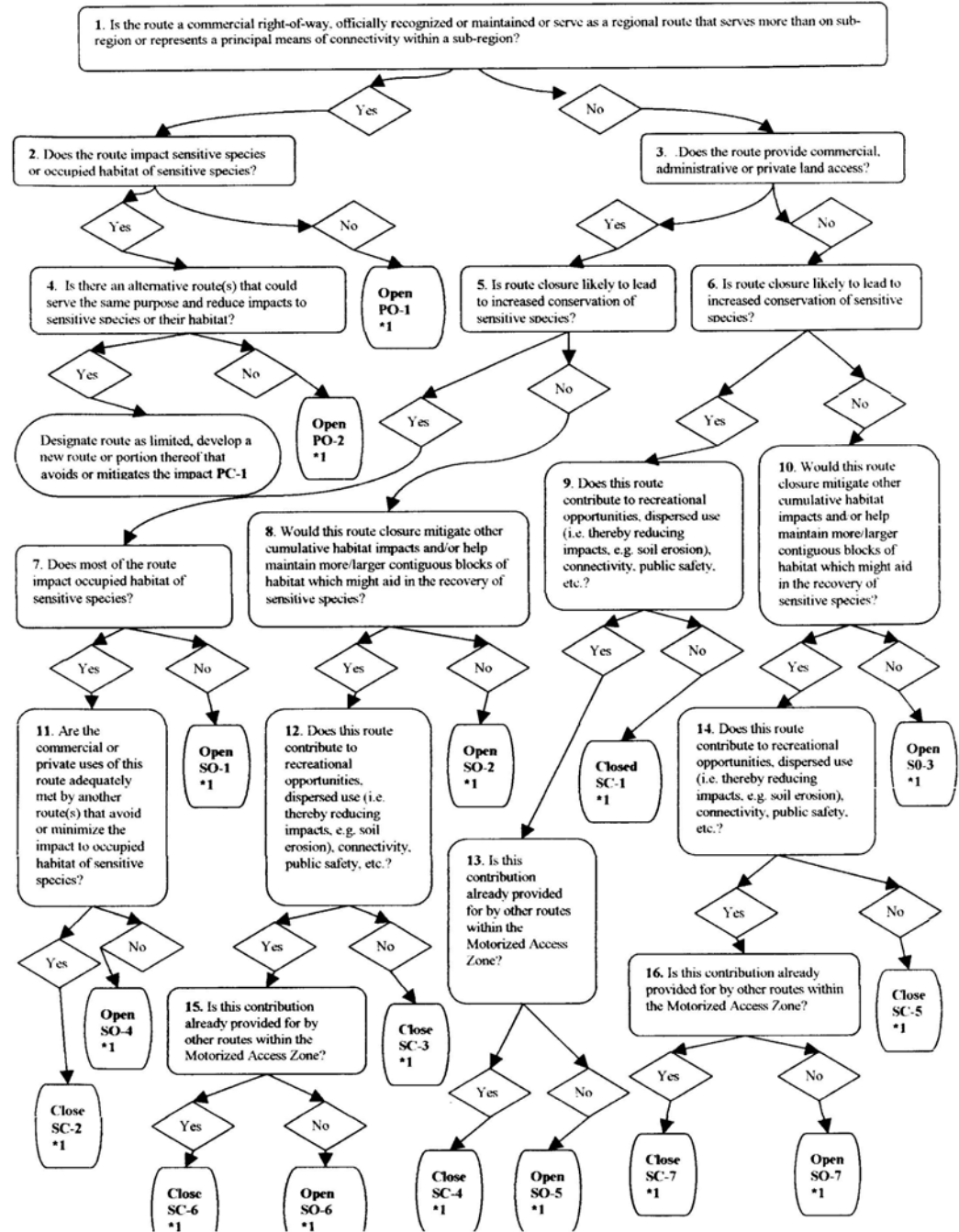
24 43 C.F.R. § 8342.1(a)-(d).

25 The Decision Tree begins by asking “Is the route a commercial right-of-way, officially
26 recognized or maintained or [sic - to?] serve as a regional route that serves more than on[e] sub-region
27 or represents a principal means of connectivity within a sub-region?” AR 211559. Based on the answer
28 to this question, the reviewer proceeds down the tree, answering further questions such as “Is route
closure likely to lead to increased conservation of sensitive species?” and “Are the commercial or
private uses of this route adequately met by another route(s) that avoid or minimize the impact to
occupied habitat of sensitive species?” *Id.* At the end of the process, the Decision Tree assigns each
route a code which allows a reviewer to determine the path down the Tree, *i.e.*, the answers to each
question presented in the Tree. AR 211585. Appendix C to the 2003 EA lists each route designated
using the Decision Tree, its location, its code assigned by the Decision Tree questions, and the reasons
for the recommendation of open or closed. AR 211584-211725.

The Decision Tree is reproduced in full below:

BLM AR WMP-211559

Case No. 3:06 CV 04884 SI



Case No. 3:06 CV 04884 SI

BLM AR WMP-211559

The Decision Tree also includes footnotes which identify “other concerns that need to be taken into consideration as each question is answered”:

West Mojave Route Designation Tree Footnotes

1. **Question 2:** Evaluate and take into account:

- both season and intensity of use as it relates to impacts to sensitive species or their habitat;
- the number of sensitive species and/or the amount of sensitive habitat potentially impacted;
- Other areas already designated or set aside or other measures that may be already contributing to the conservation of these species (e.g. Wilderness Areas and raptor nests, bat guano, etc.)

2. **Question 3:** E.g. utility, military mining, ranching facilities; monitoring sites; guzzlers)

3. **Questions 8, 10:** I.e. Would this route closure likely lead to a reduction of those indirect impacts suspected of leading to a significant decline in habitat quality (e.g. litter, poaching, harassment, plinking, etc.) or lead to a decline in impacts that directly negatively impact sensitive species?

4. **Questions 11, 13, 15, 16:** When evaluating the duplicity of this route take into consideration the quality of this route, particularly as it relates to public safety.

5. *1:

- Are there any other special circumstances that would warrant reconsideration? (e.g. unusual public safety issues, Section 106 considerations, current or future community growth/zoning issues, current or reasonably foreseeable land acquisitions or trades (e.g. for mitigation as part of this planning effort or by other resource organizations/agencies), special permits (e.g. Mining Plan of Operations), environmental benefits of a route (e.g. facilitating the maintenance of a guzzler), legal easements, user conflicts, neighboring uses, etc.).
- Should a limited designation be used in lieu of either an open or closed designation in order to mitigate for impacts?

AR 211560.¹⁶

Plaintiffs contend that the Decision Tree method used to designate routes inside the redesign area does not comply with 43 C.F.R. § 8342.1 because it does not address a route’s minimization of damage to soil, watersheds, vegetation, air or other resources, such as cultural resources; does not consider minimization of conflicts between OHV uses and compatibility with existing populated areas; does not mention “noise” anywhere; and does not ask if routes dead-end into private land or otherwise lead to

¹⁶ The Decision Tree does not define “guzzlers” or “plinking.” However, those issues are not material to the questions presented.

1 circumstances where conflicts with private landowners might arise. Plaintiffs also contend that the
2 sequence of questions in the Decision Tree improperly prefers motorized vehicle access over any other
3 resource.

4 The issue here is very similar to the one considered by then-District Court Judge Tashima in
5 *American Motorcycle Association v. Watt*, 543 F. Supp. 789 (C.D. Cal. 1982). *Watt* involved a
6 challenge to the following OHV route designation criteria contained the CDCA Plan: “(1) Is the route
7 new or existing? (2) Does the route provide access for resource use or enjoyment? (3) Are there alternate
8 access opportunities? (4) Does the route cause considerable adverse impacts? (5) Are there alternate
9 access routes which do not cause considerable adverse impacts?” *Id.* at 797. The court found that these
10 criteria were “presented in such a manner so as to appear to be the exclusive standard pursuant to which
11 route designation decisions are to be made,” did not explicitly prohibit route designation in any defined
12 situation, and thus “would permit agency officials to make route designations without the minimization
13 of environmental impacts and conflicts between uses expressly required by 43 C.F.R. § 8342.1.” *Id.*

14 Defendants contend that *Watt* must be “viewed in light of” *Sierra Club v. Clark (Sierra I)*, 756
15 F.2d 686 (9th Cir. 1985), and *Sierra Club v. Clark (Sierra II)*, 774 F.2d 1406 (9th Cir. 1985). In *Sierra*
16 *I*, the plaintiffs sought review of the BLM’s failure to close a portion of the CDCA previously
17 designated as open to unrestricted OHV use. 756 F.2d at 688. The plaintiffs relied on 43 C.F.R. §
18 8341.2, which states that “where the authorizing officer determines that off-road vehicles are causing
19 or will cause considerable adverse effects . . . the authorized officer shall immediately close the areas
20 or trails affected.” 43 C.F.R. § 8341.2(a). The plaintiffs argued that the regulation’s use of “shall”
21 required the agency to close all routes for which “considerable adverse effects” were found. The Ninth
22 Circuit determined that the plaintiffs’ interpretation would inevitably result in the total prohibition of
23 OHV use because there was no dispute as to the extent of damage caused by OHV use. *Sierra*, 756 F.2d
24 at 690-91. The court rejected the plaintiffs’ argument that the Secretary was required to close any area
25 damaged by OHV use: “However appealing might be such a resolution of the environmental dilemma,
26 Congress has found that OHV use, damaging as it may be, is to be provided ‘where appropriate.’ It left
27 determination of appropriateness largely up to the Secretary in an area of sharp conflict.” *Id.* at 691
28

1 (quoting FLPMA, 43 U.S.C. § 1781(a)(4)).¹⁷ Defendants contend that under *Sierra I*, the BLM retains
2 broad discretion to designate OHV routes anywhere it deems “appropriate.” However, *Sierra I*
3 addressed the Secretary’s discretion to *close* areas previously designated as open to OHV use, and the
4 court simply rejected an interpretation of 43 C.F.R. § 8341.2(a) that would contradict FLPMA. *Sierra*
5 *I* did not change the mandated minimization criteria that must be applied during route designation. *Id.*
6 at 690 (“the closure standard of the Executive Orders and the Regulation [43 C.F.R. 8341.2(a)] applies
7 independently of the designation of the land as open under the Act [FLPMA]”).

8 In *Sierra II*, the Ninth Circuit reviewed the BLM’s decision to open a race course extending from
9 Barstow to Las Vegas pursuant to an amendment to the CDCA and purportedly in compliance with the
10 minimization criteria of 43 C.F.R. § 8342.1. 774 F.2d at 1409-10. The amendment was issued in
11 response to what had become a regular occurrence of “protest rides,” which, if not controlled, would
12 have produced even greater harm. *Id.* The Ninth Circuit found that the amendment was a proper
13 exercise of BLM discretion because it included mitigation requirements which sought to assure the
14 “minimization” of impacts from the race.¹⁸ *Id.* Neither *Sierra I* nor *Sierra II* altered the regulatory
15 mandate that all OHV route designations within the CDCA must meet the minimization criteria of 43
16 C.F.R. § 8342.1. If anything, *Sierra II* confirmed this fact, notwithstanding the Ninth Circuit’s
17 description of Congressional intent in *Sierra I*. Likewise, neither case overruled the holding in *Watt* as
18 it applied to the designation process in that case. Thus, the Court must still determine whether the
19 designation process here complies with the criteria laid out in 43 C.F.R. § 8342.1.

20 The BLM’s *Decision Record CDCA Plan Amendment Western Mojave Desert Off Road Vehicle*
21 *Designation Project*, AR 206756-206777, which amended the CDCA Plan to include the OHV route
22 network developed through the Designation Project, states that “the questions that comprise the
23 ‘branches’ in the Decision Tree were based upon statutory requirements concerning resource protection,

24
25 ¹⁷ FLPMA, 43 U.S.C. § 1781(a)(4), states: “the use of all California desert resources can and
26 should be provided for in a multiple use and sustained yield management plant (sic) to conserve these
27 resources for future generations, and to provide present and future use and enjoyment, particularly
28 outdoor recreation uses, including the use, where appropriate, of off-road recreational vehicles.” 43
U.S.C. § 1781(a)(4) (2009).

¹⁸ The specific mitigation requirements, described as “extensive,” are not set forth in the Ninth
Circuit’s opinion.

1 the provision of commercial and recreational access, and criteria set forth in the CDCA.” AR 206773.
2 However, the Decision Tree itself does not reference 43 C.F.R. § 8342.1 or the particular factors cited
3 therein.¹⁹ The only resource-related questions in the Decision Tree concern sensitive species and
4 sensitive species’ habitat, and several questions indirectly ask about soil erosion (“Does this route
5 contribute to recreational opportunities, dispersed use (i.e. thereby reducing impacts, e.g. soil erosion),
6 connectivity, public safety, etc.?” AR 211559. Just as in *Watt*, considering only the questions asked
7 by the Decision Tree would permit the BLM to designate routes open “without the minimization of
8 environmental impacts and conflicts between uses expressly required by 43 C.F.R. § 8342.1.” *Watt*, 543
9 F. Supp. at 797.

10 For example, consider those routes designated “open” using the Decision Tree code SO-3. Any
11 route so designated has the following properties:

- 12 (1) Is the route a commercial right-of-way, officially recognized or maintained or
13 serve as a regional route that serves more than on[e] sub-region or represents a
14 principal means of connectivity within a sub-region?
Answer: NO
- 15 (2) Does the route provide commercial, administrative or private land access?
Answer: NO
- 16 (3) Is the route closure likely to lead to increased conservation of sensitive species?
17 Answer: NO
- 18 (4) Would this route closure mitigate other cumulative habitat impacts and/or help
19 maintain more/larger contiguous blocks of habitat which might aid in the
recovery of sensitive species?
Answer: NO

20 AR 211559. Thus, routes designated as “SO-3” open routes have been evaluated for their impact on
21 sensitive species and their habitat; however, even that consideration is not necessarily equivalent to
22 determining whether an OHV route is located “to minimize harassment of wildlife or significant
23 disruption of wildlife habitats.” 43 C.F.R. § 8342.1(b). More importantly, even assuming that the
24 Decision Tree’s consideration of impacts on species and their habitat did comply with § 8342.1, the
25 Decision Tree is still deficient because the minimization criteria apply to more than just conservation

26
27 ¹⁹ The “Vehicle Route Designation Record of Decision” – which is a form that was completed
28 for each route evaluated under the Decision Tree, does reference 43 C.F.R. § 8342.1. The Court
addresses BLM’s argument that those forms are evidence of compliance with the minimization criteria
infra.

1 of sensitive species and habitat. 43 C.F.R. § 8342.1(a) requires the minimization of damage to “soil,
2 watershed, vegetation, air, or other resources of public land.” None of these resources are addressed
3 by the questions posed above for “SO-3” open routes (and numerous other branches leading to other
4 designated open routes), and yet the Decision Tree determines such routes should be opened based on
5 these questions alone.

6 Conversely, and equally problematic, a route cannot be closed using the Decision Tree,
7 regardless of the level of impact on sensitive species or potential to mitigate cumulative effects, unless
8 it either: (a) does not contribute to recreational opportunities, dispersed use (i.e. thereby reducing
9 impacts, e.g. soil erosion), connectivity, public safety, etc. (SC-1, SC-3, SC-5); or (b) makes such a
10 contribution, or provides some other commercial or private use, but is redundant with other routes that
11 provide the same opportunity or use (SC-2, SC-4, SC-6, SC-7). *Id.*

12 Routes designated as “SO-4” open routes are instructive. To reach the SO-4 designation, one
13 must take the following path down the Decision Tree:

- 14 (1) Is the route a commercial right-of-way, officially recognized or maintained or serve as
15 a regional route that serves more than one region or represents a principal means of
16 connectivity within a sub-region?
Answer: YES
- 17 (2) Does the route provide commercial, administrative, or private land access?
Answer: YES
- 18 (3) Is route closure likely to lead to increased conservation of sensitive species?
Answer: YES
- 19 (4) Does most of the route impact occupied habitat of sensitive species?
20 Answer: YES
- 21 (5) Are the commercial or private uses of this route adequately met by another
22 route(s) that avoid or minimize the impact to occupied habitat of sensitive
23 species?
Answer: NO

24 After answering all of these questions, a route is designated as open to OHV use, and assigned the “SO-
25 4” code. AR 211559. Thus, although “most” of a SO-4 route impacts occupied habitat of a sensitive
26 species, and route closure is likely to lead to increased conservation of sensitive species, because the
27 commercial or private uses of the route are not “adequately met by another route that avoids or
28 minimizes the impact to occupied habitat of sensitive species,” the route is designated open. There is

1 nothing on the face of the Decision Tree to reflect that routes designated as S0-4 comply with § 8342.1's
2 requirement that routes "shall be located to minimize harassment of wildlife or significant disruption
3 of wildlife habitats." 43 C.F.R. § 8342.1(b). Indeed, as with the flawed OHV route designation criteria
4 in *Watt*, the Decision Tree questions "would permit agency officials to make route designations without
5 the minimization of environmental impacts and conflicts between uses expressly required by 43 C.F.R.
6 § 8342.1," and "in practice is almost certain to skew route designation decision-making in favor of ORV
7 use." *Watt*, 543 F. Supp. at 797.

8 Defendants contend that the Decision Tree only produced a recommendation that was later
9 evaluated in light of the minimization criteria in 43 C.F.R. § 8342.1, and that taken as a whole, the
10 process adequately addressed and considered all the required factors. In other words, defendants argue
11 that the Decision Tree questions were not the "exclusive standard to which route designations were
12 made" like the route designation questions in *Watt*. To support this position, defendants cite four
13 general pieces of the record: (1) the stated goals for the overall route designation project, (2) the stated
14 goals and issues identified for each MAZ, (3) the footnotes that were part of the Decision Tree itself,
15 and (4) the Route Designation Forms that were completed for each route.

16 The stated goals for the overall route designation project are set forth in the March 2003 EA.
17 They include a table of authorities which must be complied with during the process, including NEPA,
18 FLPMA and 43 C.F.R. § 8342.1. AR 211391-92. The goals also indicate a desire to utilize a process
19 which concerns a "variety of data, including biological, cultural, and recreational resources." AR
20 211390. Likewise, the issues and goals for each MAZ express, at least in some cases, an
21 acknowledgment of concerns relevant to the minimization criteria of 43 C.F.R. § 8342.1. However, the
22 stated goals for the overall project and for each MAZ do not explain how they would be achieved, and
23 simply citing stated goals is not tantamount to showing that the BLM actually applied the minimization
24 criteria in the OHV route designation process. As Judge Tashima observed in *Watt*, references in the
25 record that "the BLM did not intend nor was authorized to designate routes not in conjunction with 43
26 C.F.R. § 8342.1 are not sufficient to counteract the impression that [the challenged route designation]
27 criteria are the exclusive bases for route approval decisions." *Watt*, 543 F. Supp. at 797.

28 Defendants describe the footnotes to the Decision Tree as a "critical" part of the process. At

1 the end of each Decision Tree branch (both routes designated open as well as closed), the reviewer is
2 directed to the route code (e.g., “SO-4”), and footnote “*1”. AR 211559. Footnote *1 states:

- 3 • Are there any other special circumstances that would warrant reconsideration?
4 (e.g. unusual public safety issues, Section 106 considerations, current or future
5 community growth/zoning issues, current or reasonably foreseeable land
6 acquisitions or trades (e.g. for mitigation as part of this planning effort or by
7 other resource organizations/agencies), special permits (e.g. Mining Plan of
8 Operations), environmental benefits of a route (e.g. facilitating the maintenance
9 of a guzzler), legal easements, user conflicts, neighboring uses, etc.).
- 10 • Should a limited designation be used in lieu of either an open or closed
11 designation in order to mitigate for impacts?

12 AR 211560. The BLM argues that reviewers considered § 8342.1 criteria in connection with assessing
13 whether there were “special circumstances that would warrant reconsideration.” There are several
14 problems with this assertion. First, footnote *1 does not reference the criteria set forth in 43 C.F.R. §
15 8342.1, such as “minimiz[ing] damage to soil, watershed, vegetation, air, or other resources of the public
16 lands.” 43 C.F.R. § 8342.1(a). Although the footnote mentions “user conflicts,” that reference is not
17 equivalent to directing reviewers to locate trails “to minimize conflicts between off-road vehicle use and
18 other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the
19 compatibility of such uses with existing conditions in populated areas, taking into account noise and
20 other factors.” *Id.* § 8342.1(c).

21 Moreover, even if the BLM did determine that “special circumstances” based on the § 8342.1
22 minimization criteria warranted reconsideration and routes were changed from the “open” designation
23 to a “closed” one, it is impossible to determine that from the administrative record. Every Decision Tree
24 route has a corresponding route designation form. *See, e.g.*, AR 214896-214955. The forms contain
25 a recommendation based on the Decision Tree, as well as additional specific information concerning
26 the route in question; this information was later incorporated into Appendix C of the 2003 EA. *See* AR
27 214896-214955 (route designation forms), 211700-211703 (corresponding records in Appendix C). A
28 review of these forms demonstrates that the information included in the “specific comments/special
circumstances” section virtually never includes any mention of anything outside of recreational values
and occasional references to species prevalence and type of habitat: all items already addressed by the
questions in the Decision Tree itself. *See, e.g.*, AR 211910 (SC-4 closed route: “Redundant parallel

1 route, Not expanding recreation opportunity”), 211911 (SO-5 open route: “Good dirt, connective
2 route”), 211922 (SO-5 open route: “Good dirt, Jeep route serving recreation”).²⁰ Each form also
3 includes a verbatim recitation of 43 C.F.R. § 8342.1 directly above the final signature line for the “Field
4 Manager.”²¹ *Id.* However, there is no indication on the forms themselves that these criteria have
5 actually been considered or applied. *See id.*

6 Here, nothing in the record documents that anything other than the Decision Tree questions and
7 the route-type and recreation data collected during the on-the-ground surveys determined the
8 designation of routes. Defendants repeatedly emphasize the extensive route surveys and information
9 gathering process leading up to the application of the Decision Tree. The Court recognizes that the
10 BLM expended considerable effort in surveying and inventorying OHV routes. However, there is
11 nothing in the record to show that the minimization criteria were in fact applied when OHV routes were
12 designated. To the extent that the Decision Tree footnotes and route designation forms truly were
13 “critical,” BLM failed to adequately explain and document how and when they entered the decision
14 process. Moreover, there are suggestions in the record that the BLM may have interpreted 43 C.F.R.
15 § 8342.1 simply to require the elimination of redundant routes when required to reduce resource
16 damage. For example, in response to questions from the public, the BLM stated:

17 In those cases where an evaluator determined a route to be redundant (that is, serving the
18 same purpose, providing access to the same location, or offering a similar recreational
19 experience), and where retaining more than one route could lead to increased resource
20 damage, the route was usually closed in accordance with 43 C.F.R. § 8342.1. This
regulation provides guidance criteria concerning route designation, specifically requiring
minimization of resource damage and wildlife harassment.

21 AR 202570-202571. Likewise, the 2003 ROD states that the OHV route network meets the “full range”
22 of visitor needs while remaining “compatible” with wildlife and plant conservation. AR 206773.
23 “Compatibility” was achieved by closing redundant routes, and closures were “offset (i.e. mitigated)
24 by opening routes where resource concerns were minimal.” *Id.* However, nothing in the language of

26 ²⁰ The record indicates that the designation teams filled out the form immediately after applying
27 the Decision Tree questions. AR 216344 (notes of April 24, 2002 meeting of West Mojave Plan Task
Group 2, discussing Decision Tree process).

28 ²¹ None of the route forms in the Administrative Record appear with signatures on this line.

1 § 8342.1 provides that the minimization criteria is to be applied solely or primarily when another route
2 would provide a similar recreational experience.

3 Defendants assert that the fact that many routes were closed as a result of the Decision Tree
4 process demonstrates that BLM implemented the § 8342.1 criteria. Defendants cite three pieces of
5 evidence for support of their decisions in the record, (1) Appendix C to the 2003 EA, (2) the fact that
6 almost two-thirds of the routes were closed, and (3) the fact that several “open” designations were
7 changed in response to public comments. However, the overarching problem with this evidence is that
8 while it explains how the Decision Tree was applied, nothing in the administrative record explains or
9 documents how the factors in 43 C.F.R. § 8342.1 were considered.

10 Appendix C of the 2003 EA contains a table of records for each designated route, purportedly
11 enabling the public and the Court to discover the reasons for each route’s designation as open or closed.
12 AR 211584-211725. A review of Appendix C shows that the vast majority of routes that were closed
13 were closed because they were considered redundant. As stated above, redundancy is indeed one of
14 only two reasons that a route could be closed using the Decision Tree process. In any event, if it is true
15 that the BLM minimized the impacts identified in 43 C.F.R. § 8342.1 in some manner other than the
16 Decision Tree questions, there is no way to glean that information from Appendix C. For example,
17 Appendix C does not explain how the minimization criteria have been applied to routes designated as
18 “SO-4” open routes, despite the fact that, as discussed *supra*, these routes both “impact sensitive species
19 or occupied habitat of sensitive species,” and “most of the route impact[s] occupied habitat of sensitive
20 species.” AR 211559. For example, Appendix C contains the following information for four SO-4
21 routes, three designated open and one closed. The specific comments for the three open SO-4 routes
22 are “Access to private property including water tank”; “Primarily private property access dead-end
23 route”; and “Camping access and interesting terrain.” AR 211609. The specific comment for the closed
24 SO-4 route is “Redundant low use parallel route.” *Id.*; see also AR 211696 (SO-4 open route: “short
25 route connects to larger routes”), 211705 (“Route provides access to Rainbow Basin”).²² While the
26

27 ²² Other examples of specific comments for routes designated “open” include: “fun route” (SO-
28 7), AR 211673; “Jeep route offering recreation opportunity” (SO-5), AR 211626; and “Popular rock
hounding route” (SO-3), AR 211665.

1 information provided in Appendix C identifies the particular resource or use served by the route, it does
2 not speak to how impacts on other resources were minimized. In sum, neither the Decision Tree nor
3 Appendix C reflect or document any analysis of the § 8342.1 minimization criteria.

4 Nor does the fact that the BLM closed almost two-thirds of the evaluated routes constitute
5 evidence that the BLM complied with 43 C.F.R. § 8342.1. “Minimize” as used in the regulation does
6 not refer to the number of routes, nor their overall mileage.²³ It refers to the *effects* of route
7 designations, i.e. the BLM is required to place routes specifically to minimize “damage” to public
8 resources, “harassment” and “disruption” of wildlife and its habitat, and minimize “conflicts” of uses.
9 43 C.F.R. § 8342.1(a)-(c). Thus, simply because the BLM closed two-thirds of the routes evaluated
10 does not, on its own, compel the conclusion that the minimization criteria were applied.

11
12 **B. Routes designated outside the redesign area**

13 Over half of OHV route network (2,833 miles) that the BLM designated lies outside of the
14 redesign areas. AR 201843.²⁴ As noted *supra*, the explanation of the route designation process for those
15 lands outside the redesign area is markedly different from the extensive description of the Decision Tree
16 process. The process for the non-redesign area routes is summarized by nearly identical two-page
17 statements in both the 2003 EA and the 2005 FEIS. AR 211405-211406, 201842-201843. These
18 descriptions are cursory and poorly-documented at best. For instance, the FEIS states only that “[l]ands
19 outside the redesign area were reviewed to ensure that they were compatible with the federal regulations
20 (specifically, 43 C.F.R. 8342).” AR 201842. The FEIS then identifies five regions where routes were
21 altered, purportedly to comply with 43 C.F.R. § 8342.1, and a brief description of why these alterations
22 were necessary. AR 201842-201843. Beyond this conclusory statement and the five limited examples
23 provided, defendants point to nothing in the record that explains how BLM conducted the review of the
24 OHV routes outside the redesign areas, let alone how it ensured compliance with the minimization

25
26 ²³ The Court notes that while 64% of the routes evaluated were closed, the total mileage of the
network designated “open” increased by 15% over the 1985-87 network that it replaced. AR 206773.

27 ²⁴ This total consists of “159 miles within the Ord Pilot region, 406 miles within ACECs for
28 *Id.* which route networks were designated after 1980, and 2,268 miles of remaining 1985-87 designations.”

1 criteria of 43 C.F.R. § 8342.1.

2 Defendants rely on the Ninth Circuit’s en banc decision in *The Lands Council v. McNair*, 537
3 F.3d 981 (9th Cir. 2008) (en banc), to support their position that the BLM is not required to engage in
4 an on the ground, site-specific analysis for every route. *Lands Council* does not support defendants’
5 position. The plaintiffs in *Lands Council* contended that the Forest Service had violated the National
6 Forest Management Act because it had not demonstrated the reliability of the scientific methodology
7 underlying the Service’s analysis of the effect of a proposed project on a protected species and its
8 habitat. *Id.* at 990. Specifically, the plaintiffs contended that the Forest Service was required to
9 “verify[] its prediction regarding the effect of treatment on old-growth species’ habitat with observation
10 or on-the-ground analysis.” *Id.* The Ninth Circuit rejected “a broad rule that, in effect, requires the
11 Forest Service to always demonstrate the reliability of its scientific methodology or the hypotheses
12 underlying the Service’s methodology with ‘on the ground analysis.’” *Id.* The court held that there was
13 no requirement in either the law or the regulations specifically requiring on the ground analysis, and that
14 instead “[g]ranting the Forest Service the latitude to decide how best to demonstrate that its plans will
15 provide for wildlife viability comports with our reluctance to require an agency to show us, by any
16 particular means, that it has met the requirements of the NFMA every time it proposes action.” *Id.* at
17 992. Nothing in *Lands Council* changes the fundamental principle of administrative law that an agency
18 must comply with applicable laws and regulations, and must establish a rational connection between the
19 facts it considered and the decisions it made. *Id.* at 994 (holding that the Forest Service must support
20 its conclusions that a project meets the relevant legal requirements with studies it deems reliable, explain
21 the conclusions it drew from its chosen methodology, and provide reasons it considers the supporting
22 evidence to be reliable); *see also Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (an agency must “articulate
23 a satisfactory explanation for its action including a rational connection between the facts found and the
24 choice made”) (internal quotations and citations omitted).

25 Here, the BLM has not identified any factual basis in the record to support the assertion that the
26 OHV routes outside the redesign areas were designated in compliance with the minimization criteria
27 set forth in 43 C.F.R. § 8342.1. Moreover, what information is in the record suggests otherwise.
28 Although the 2003 EA and FEIS state that the five examples of “updating” are not exhaustive, the FEIS

also states in the public comment and response section:

Topical Comment 5a: It is critical to complete a survey of existing motorized vehicle routes in those areas where BLM has relied on the 1985-87 route surveys.

Response to Topical Comment 5a: A network of motorized vehicle access routes was designated in the western Mojave Desert in 1985 and 1987, and during the development of ACEC management plans during the 1980s and early 1990s. All twenty-one polygons, or “subregions,” were surveyed at that time, and the route network that was adopted was based upon the findings of those surveys.

Since the middle 1980s, new issues have arisen that created a need to redesign portions of the existing network. Among these developments was the listing of the desert tortoise as threatened in the early 1990s. The BLM decided to redesign portions of the existing network to address these concerns. Funds were available to resurvey eleven subregions. These included the seven subregions that are located entirely within desert tortoise critical habitat, which had not been designated when the original network was designed. *The remainder of the existing network was unchanged (excepting a very few site-specific modifications).*

AR 202567 (emphasis added). Moreover, in response to another public comment in the FEIS, the BLM describes the route network adopted in 1985-87 as having “a design [that] did not ensure that those routes were located outside of biologically sensitive areas” and “based on a relatively cursory field inventory conducted in the 1980s, prior to the availability of GPS technology and modern field data recording equipment.” AR 202573.²⁵

The essence of the BLM’s position is that the Court should find that the BLM complied with 43 C.F.R. § 8342.1 when it designated thousands of miles of OHV routes outside the redesign area because the BLM says that it did. This is not enough, even under a deferential level of review. *See Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 996 (9th Cir. 2004) (“In sum, the only mention of cumulative effects in the two EAs comes in the form of generalized conclusory statements that the effects are not significant or will be effectively mitigated. At oral argument, counsel for the BLM assured us that to the eye of the ‘agency specialists,’ the scant information included in the EAs is sufficient to determine what the cumulative environmental impacts will be and supports the conclusory statements that they will not be significant. But while the conclusions of agency experts are surely

²⁵ Moreover, the FEIS rejected the 1985-87/ACEC route network from consideration as an alternative to the proposed project because it included many design flaws, in that, *inter alia*, “it did not provide for adequate recreational and commercial access.” AR 201916. Yet for those areas outside the redesign area, this same 1985-1987/ACEC network was formally adopted by the June 2003 ROD, with very few site-specific modifications. AR 202569. The BLM provides no explanation for its inconsistent analysis of the 1985-1987 network.

entitled to deference, NEPA documents are inadequate if they contain only narratives of expert opinions.”).

C. Routes designated after 1980

Plaintiffs challenge all OHV route designations after 1980 – whether through the Decision Tree, the ACEC designations, or the 1985-1987 designations – as being in violation of the language of the CDCA Plan which defines “Limited Areas” for the purposes of route designation. The BLM has amended the CDCA several times since 1980. The third amendment, passed in 1982 and unchanged since, defined “Limited Area” as follows:

“‘Limited’ designation vehicle access means that motorized-vehicle access is allowed only on certain ‘routes of travel,’ which include roads, ways, trails, and washes. *At the minimum, use will be restricted to existing routes of travel. An existing route of travel is a route established before approval of the Desert Plan in 1980*, with a minimum width of two feet, showing significant surface evidence of prior vehicle use or, for washes, history of prior use.”

AR 222005 (emphasis added).

Plaintiffs contend that this definition places a fixed cap on the routes that may be designated open in “Limited Areas” at those routes that were “established before the approval of the Desert Plan in 1980.” As discussed above, the route designations challenged here were finalized pursuant to amendments to the CDCA issued in June 2003 and March 2006. AR 206756-206777, 200044-200066. Plaintiffs argue that in contravention of the definition of “Limited Area,”²⁶ and without explanation, the BLM has legitimized hundreds, if not thousands, of routes that did not exist before the approval of the Desert Plan in 1980, and therefore the decisions are arbitrary and capricious.

Defendants do not really dispute that the plain language of the CDCA Plan imposes a cap on OHV routes to those that existed in 1980, and the Court agrees with plaintiffs’ interpretation of the CDCA’s “at the minimum” language as forbidding the establishment of routes that did not exist before 1980. That the CDCA Plan contains such a ceiling on OHV routes is made clear by the definitions of “Class I” and “Class M” sub-areas that follow the general definition for “Limited Areas” cited above:

²⁶ All individual routes designated in the amendments are contained in “Limited” areas. *See* AR 211475.

1 Class I: Unless it is determined that *further* limitations are necessary, those areas not
2 “open” will be limited to use of existing routes.

3 Class M: access will be on existing routes, unless it is determined that use on specific
4 routes must be limited *further*.”

5 AR 222005 (emphasis added). These definitions reveal that the “at the minimum” language refers to
6 the *minimum limitation* that can be imposed on an area, which is to keep all existing routes open but
7 forbid the creation of any new routes. If necessary, *further limitations* would be imposed, the *maximum*
8 *limitation* being to close all routes. This section of the CDCA shows a clear intention to limit the routes
9 designated open within the “Limited Areas” to no more than the routes that existed before the approval
10 of the CDCA in 1980.

11 Indeed, the record reflects that throughout the BLM’s various post-1980 OHV route designation
12 projects, including the Western Mojave Desert Off Road Vehicle Designation Project that resulted in
13 the OHV route network in the 2003 EA and the WEMO Plan, the BLM staff have been acutely aware
14 of the OHV route limitation contained in the CDCA Plan, and of the potential conflict between that
15 language and the post-1980 OHV route designations. Indeed, the WEMO Plan manager expressed the
16 view that post-1980 OHV route designations would require an amendment to CDCA Plan, along with
17 a justification for the post-1980 routes. Mr. Haigh received an email from a BLM employee asking,

18 Bill,

19 I don’t know to what extent the various CDCA Plan amendment efforts completed or
20 underway have or will designate routes as open that did not exist in 1980. However, on
21 a CDCA wide basis, I think that if we have and will deviate with the CDCA Plan with
22 respect to the route designation procedures (limiting consideration to routes that existed
23 in 1980), we may be heading toward an unsecured situation. If we are designating or are
24 considering designating routes as open that didn’t exist in 1980, we should have a plan
25 amendment to back us up rather than to make the change and designate post 1980 routes
26 simultaneously.

27 Thoughts?

28 AR 211762 (Jan. 15, 2003 email from Jeffrey Aardahl to Bill Haigh). On January 18, 2003, Mr. Haigh
responded,

I agree that we would need a plan amendment. Since the plans are themselves “plan
amendments”, I think we can do it all at once, if it proves necessary. It will be a lot more
defensible if any variations from “proven” 1980 routes are relatively minor, and would
further the intent of regulations and desert plan criteria (for example, a non-1980 route
that avoids a 1980 route through a wash on a bajada of the type favored by tortoises).
Maybe, in the West Mojave, a comparison with the 1985 route inventory will help – if

1 a route existed in 1985, it certainly isn't one that emerged from route proliferation during
2 the past 15 years.

3 How did NEMO and NECO handle this? I haven't read their RODs yet, so I don't know
4 if they explicitly took care of any post-1980 routes through the plan amendment process,
and explained why a post-1980 route was necessary. I think they should have done that,
at least. Do you know?

5 *Id.*; see also AR 211763-211674, 211305 ("I want to make sure that the decisions, and the EIS, are very
6 clear why we are not limiting the route network to routes 'existing in 1980' (see CDCA Plan language
7 which some interpret as imposing such as limit)"), 230281-230282 (1985-1987 OHV route designation);
8 SAR 305745.

9 Defendants respond with a variety of arguments about why the post-1980 OHV designations are
10 not "illegal." The BLM argues that "neither FLPMA nor NEPA requires that the BLM impose a blanket
11 closure on all routes and restore them to pre-1980 status. Instead, FLPMA directs the BLM to prepare
12 and maintain a current inventory of resources, including outdoor recreation uses such as OHV routes.
13 The BLM has done so through the route designation process and the WEMO Plan and FEIS." Rev. MSJ
14 at 23:18-22. The BLM is correct that neither FLPMA nor NEPA directly imposes the 1980 OHV route
15 limitation; that limitation is contained in the CDCA Plan itself. However, the BLM is required under
16 FLPMA to comply with the terms of the CDCA Plan, unless those terms are amended. See *Oregon*
17 *Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). Despite the numerous
18 amendments to the CDCA Plan, including the WEMO Plan amendment, the language imposing the 1980
19 OHV route limit has never been amended or removed from the CDCA Plan.

20 In *Brong*, the Ninth Circuit held that the BLM acted arbitrarily and capriciously when it
21 interpreted a land use plan as permitting a logging project in an area designated protected under a land
22 use plan. *Id.* The court first noted that "once a land use plan is developed, "[a]ll future resource
23 management authorizations and actions . . . shall conform to the approved plan." *Id.* (quoting FLPMA
24 regulations, 43 C.F.R. § 1610.5-3(a)). The court found that while the land use plan permitted salvage
25 logging in limited circumstances and clearly prioritized the preservation of protected ecosystems over
26 commercial benefits, the BLM had interpreted the salvage guidelines as balancing environmental
27 concerns and economic factors equally. *Id.* at 1127. The court found that several aspects of the salvage
28 logging project were "inconsistent with the Plan and, consequently, violate[d] FLPMA." *Id.* at 1128;

1 *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 69 (2004) (BLM actions that are
2 inconsistent with the provisions of a land use plan are properly set aside under the APA as contrary to
3 law).

4 Defendants argue that there is no inconsistency between the post-1980 OHV route designations
5 and the CDCA Plan because the WEMO Plan amended the CDCA Plan. However, the WEMO Plan
6 amendment did not amend or remove the language imposing a cap on OHV routes to those existing in
7 1980, nor is there any effort in the WEMO Plan to explain *why* the limitation should not apply to the
8 post-1980 designated OHV routes. Instead, the WEMO Plan simply ignores the language capping OHV
9 routes to those existing in 1980, and designates thousands of OHV routes, a significant portion of which
10 did not exist in 1980.²⁷ As in *Brong*, the WEMO plan, which designates numerous OHV routes that
11 were not in existence in 1980, is in conflict with the governing land use plan, the CDCA Plan, and
12 therefore violates FLPMA.

13 The Court does *not* hold that OHV route designations in the WEMO are forever frozen at the
14 1980 OHV route network. The BLM has the authority to amend the CDCA Plan to lift the restriction
15 on routes established after 1980, so long as those amendments satisfy NEPA, FLPMA, and all other
16 applicable statutes and regulations. But the BLM must actually amend that language, not ignore it, and
17 presumably any such amendment would require a reasoned explanation based on information and data
18 in the record why post-1980 routes should be designated. Indeed, as the emails and other documents
19 cited above indicate, the WEMO planning staff were aware of this need to justify the designation of
20 post-1980 OHV routes, and there is no explanation why the final WEMO Plan did not, in fact, contain
21 such an explanation.

22 23 **II. National Environmental Policy Act claims**

24 Plaintiffs contend that the BLM violated NEPA in three respects: (1) BLM did not consider a

25
26 ²⁷ Defendants and intervenors argue that many of the designated routes were in existence in
27 1980. This is undoubtedly true. However, the record also reflects that numerous routes that were
28 designated did not exist in 1980. The Court also recognizes that it is difficult, if not impossible, to
reconstruct the 1980 OHV route network. However, this fact does not permit the BLM to ignore the
limitations contained in the CDCA Plan. To the contrary, the BLM is required to follow the CDCA Plan
or amend it.

1 full range of reasonable alternatives because every action alternative left open the same 5,098 miles of
2 OHV routes, (2) BLM did not properly analyze the environmental impacts of the WEMO Plan because
3 the environmental baseline was never clearly identified, and (3) BLM failed to present accurate
4 information regarding many of the most critical impacts resulting from OHV route designations and the
5 other activities authorized under the WEMO Plan.

6
7 **A. Alternatives analysis**

8 The NEPA regulations require that an agency “[r]igorously explore and objectively evaluate all
9 reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss
10 the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a). Such rigorous exploration and
11 objective evaluation of all reasonable alternatives is “the heart of an EIS.” *Natural Res. Def. Council*
12 *v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005). As the Ninth Circuit has held,

13 In order to be adequate, an environmental impact statement must consider not every
14 possible alternative, but every reasonable alternative. The existence of a viable but
15 unexamined alternative renders an environmental impact statement inadequate. The
question for the district court, therefore, is whether the [omitted alternative] was
reasonable.

16 *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) (internal citations
17 omitted). Put differently, “[t]he touchstone for [the court’s] inquiry is whether an EIS’s selection and
18 discussion of alternatives fosters informed decision-making and informed public participation.”
19 *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

20 “The stated goal of a project necessarily dictates the range of ‘reasonable’ alternatives and an
21 agency cannot define its objectives in unreasonably narrow terms.” *City of Carmel-By-The-Sea v. U.S.*
22 *Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). The range of alternatives that the BLM did and
23 did not consider are evaluated in light of the BLM’s stated project goals. *Id.* The stated purpose and
24 need for the WEMO Plan as set forth in the FEIS and the 2003 ROD is to “establish[] a regional
25 biological strategy to conserve plant and animal species and their habitats and prevent future listing”
26 and to “provide an efficient, equitable and cost-effective process for complying with threatened and
27 endangered species law.” AR 200058. Plaintiffs do not challenge the BLM’s stated goal. Instead,
28 plaintiffs contend that because every alternative contained in the FEIS is based on the same 5,098 OHV

1 route network, the range was too limited to foster informed decision-making. Plaintiffs argue that the
2 BLM should have, but did not, consider alternatives that reduced the overall OHV route network, thus
3 rendering the FEIS inadequate under NEPA. *See Hodel*, 768 F.2d at 1057; *Westlands Water Dist. v.*
4 *United States Dept. of Interior*, 376 F.3d 853, 868 (9th Cir. 2004).

5 Plaintiffs challenge both the range of alternatives contained in the 2003 EA and the FEIS. The
6 alternatives in the two documents are similar, and in some instances identical. The FEIS considered
7 seven alternatives: Alternative A (“Proposed Action – Habitat Conservation Plan”); Alternative B
8 (“BLM only”); Alternative C (“Tortoise Recovery Plan”); Alternative D (“Enhanced Ecosystem
9 Protection”); Alternative E (“One DWMA – Enhanced Recreation Opportunities”); Alternative F (“No
10 DWMA – Aggressive Disease and Raven Management”); and Alternative G: (“No Action”).²⁸ Although
11 the seven alternatives differed in some respects,²⁹ all seven considered the same 5,098 miles³⁰ of
12 designated OHV routes set out in Alternative A. The FEIS states that

13 Alternative A recommends a route network that includes 2,265 miles of open routes
14 within the redesign area, 159 miles within the Ord Pilot region, 406 miles within ACECs
15 for which route networks were designated after 1980, and 2,268 miles of remaining
16 1985-87 designations, or 5,098 miles overall, a total that includes single-track
17 motorcycle routes. This compares to 4,260 miles currently designated open, although
18 that network does not include all single-track routes (many of which were not surveyed
19 in 1985-7) and provided little or no designations for the Middle Knob, Amboy and Ord
20 subregions. Proposed mileage of non-motorcycle routes in higher density tortoise
21 populations (see Chapter 3) would be 384, a decrease from the 439 miles currently open.
22 The 406 miles within the ACECs would be a decrease from current 427.

23 AR 201843-201844. Alternative A also proposed route closures within DWMA; the FEIS states that
24 “[i]n DWMA, the network would result in the closure of 1,855 of the 4,225 total linear miles of routes
25 on public land, which is a 44% reduction of routes in DWMA,” and that “[u]se of the remaining 2,370
26 linear miles of open routes in DWMA, representing 56% of existing routes in DWMA, would continue
27

28 ²⁸ The 2003 EA contained four similar alternatives.

29 For example, Alternative C would adopt measures outlined by the FWS Desert Tortoise
Recovery Plan, and Alternative F focused on desert tortoise protection through management of disease
control and predation.

³⁰ In different places in the FEIS, and in the parties’ papers, the total route network is sometimes
stated as 5,098 miles, and sometimes stated as 5,041 miles.

1 to result in permitted and un-permitted impacts.” AR 202261.³¹

2 All seven alternatives allowed OHV use to some degree on the 5,098 mile network; for example,
3 Alternative B (which was ultimately selected) included 5,098 miles of “open” routes and 0 miles of
4 “limited” routes, while other alternatives had different levels of “open” versus “limited” routes. The
5 alternatives also differed in that the areas affected by stopping-parking-camping limits for OHVs varied,
6 as do drought closures, and one alternative (Alternative D) banned non-street legal OHVs. However,
7 it is undisputed that all of the alternatives considered OHV access on the same 5,098 miles of routes,
8 and no alternative considered OHV use on a lesser route network. The BLM also eliminated from
9 consideration seven other alternatives on the ground that they did not meet the purpose and need for the
10 WEMO Plan or the CDCA Plan. AR 201914-17. The rejected alternatives include the Interim
11 Management Alternative that was the subject of this Court’s order in *CBD II*, 422 F. Supp. 2d 1115
12 (N.D. Cal. 2006), and the 1985-87/ACEC network that was considered as the No Action Alternative in
13 both the EA and the DEIS. *Id.* At least some of the eliminated alternatives, such as the Interim
14 Management Alternative, included a smaller OHV route network than the 5,098 mile network
15 considered in each of the seven alternatives.

16 Plaintiffs rely heavily on *ONDA*, 531 F.3d 1114 (9th Cir. 2008), to challenge the FEIS’s range
17 of alternatives. In *ONDA*, the Ninth Circuit considered the adequacy of a range of alternatives in an
18 EIS, and in *ONDA* as in this case, the plaintiffs challenged the range of alternatives as too limited
19 because all of the presented alternatives varied “almost entirely by the amount of land they allocate[d]
20 between the open and limited use categories” and none of the alternatives closed a significant amount
21 of land to OHVs. *Id.* at 1126. The Ninth Circuit held that the EIS violated NEPA because:

22 It considered no alternative that proposed closing more than a fraction of the planning
23 area to ORV use, as opposed to merely designating areas for “limited” use. As *ONDA*
24 observes, the BLM did not consider any alternative that would have closed more than
0.77% of the planning area to ORVs. Indeed, every alternative would have reduced the
extent of closed areas from that in effect previously.

25 *Id.* at 1145. In *ONDA*, the BLM argued that “its analysis of ORV designations is adequate because it
26 considered a wide range of use allocations between open and limited ORV designations, and because

27 ³¹ The 2,370 miles of open routes in DWMAAs are part of the 5,098 mile OHV route network
28 considered in every alternative.

1 it could implement emergency closures if necessary.” *Id.* The Ninth Circuit disagreed: “Limited ORV
2 use is simply not identical to no ORV use. A limited designation, even with the possibility of closure,
3 does not provide protection equivalent to a straightforward closure.” *Id.*

4 Defendants argue that *ONDA* is irrelevant to the Court’s inquiry because that case turned largely
5 on the BLM’s failure to consider wilderness characteristics in the EIS, an issue not present here.
6 However, while the *ONDA* court found the EIS inadequate because the BLM did not consider
7 “wilderness” values, the Ninth Circuit held that “the ORV analysis [in the range of alternatives] is also
8 flawed, however, *for a reason independent of wilderness issues*,” namely the BLM’s failure to include
9 any alternatives that did not include “closures of significant portions of the land it manages.” *Id.*
10 (emphasis added).

11 Here, the range of alternatives in the FEIS suffers from flaws similar to those identified in
12 *ONDA*. All of the alternatives in the FEIS considered the same OHV route network, with variations on
13 the extent to which the routes would be designated “open” versus “limited”: no alternative proposed
14 closing additional routes to OHV use. Indeed, in assessing Alternative A, the FEIS states that “All
15 alternatives share the same proposed route designation and implementation characteristics.” AR
16 202269. As in *ONDA*, all of the alternatives resulted in an increase in the amount of miles formally
17 designated as open to OHV use. AR 201843. Defendants argue that this case differs from *ONDA* in
18 that the 2003 route designations actually reduce OHV route mileage as compared to the 2001-2002 on
19 the ground route inventory, whereas in *ONDA* all of the alternatives increased OHV usage over the “no
20 action” alternative. However, as discussed in greater detail in connection with plaintiffs’ challenges to
21 BLM’s designation of the “no action” alternative, the 2001-2002 inventory identified the actual on the
22 ground route network in various subregions; many of those routes had not been formally designated by
23 BLM but instead were the result of informal and illegal proliferation. *See* AR 202203 (chart comparing,
24 for various subregions, mileage designated open in 1985-1987 versus 2001 route inventory, and showing
25 significant mileage increases for every subregion covered by both the 1985-1987 designation and the
26 2001 route inventory). Thus, the factual distinction that defendants emphasize between this case and
27 *ONDA* is not a meaningful one because the OHV route network designated in the WEMO Plan, while
28 smaller than the 2001-2002 inventoried network, is indisputably more extensive than the “designated”

1 OHV route network leading up to the WEMO Plan (the ACEC and 1985-1987 designated routes).

2 Defendants emphasize other differences between the alternatives, such as the fact that dirt bikes
3 and ATVs were banned from Alternative D, or that speed limits were set for designated routes in
4 DWMAAs under Alternative C. However, under both Alternatives C and D, all 5,098 miles of routes
5 were designated for some level of OHV use. Thus, despite the differences in levels and intensity of use
6 – which are similar to the types of differences in the *ONDA* alternatives– all of the alternatives in the
7 FEIS are based on the same 5,098 mile OHV route network. The BLM also stresses the fact that
8 Alternative B narrows the stopping-camping-parking corridors from 600 feet (300 feet on each side from
9 the centerline of routes) to 100 feet (50 feet from the centerline) within tortoise DWMAAs, thus reducing
10 the acreage accessible by OHVs. While this is a significant impact, the fact remains that all of the
11 alternatives, including Alternative B, are based on the same OHV route network, and thus do not
12 provide a truly meaningful range of alternatives.

13 The BLM also argues that Alternative E, which expands certain of the “open access” areas,
14 demonstrates that the agency complied with its NEPA obligations. However, providing a range of
15 alternatives that allow for OHV use to differing – and in the case of Alternative E, much greater –
16 degrees on the same basic route network does not satisfy the requirement to provide a reasonable range
17 of alternatives. As the Ninth Circuit held, “[i]t is precisely this sort of ‘uncritical []’ privileging of one
18 form of use over another that we have held violates NEPA,” and “[c]losures, not just ‘limited’
19 designations, must be considered to comply with NEPA.” *ONDA*, 531 F.3d at 1145.

20 Plaintiffs posit four possible alternatives that the BLM could have considered, including one
21 under which the BLM could have retained the interim route designations in five specific sub-regions
22 put in place pursuant to the previous settlement agreements and consent decrees.³² The other three
23 alternatives suggested by plaintiffs are: (1) designating less route mileage and focusing on minimizing
24 impacts to soil, cultural and other resources, and species and habitats; (2) reducing vehicular access in
25 the DWMAAs to provide “reserve level” protection as recommended in the Desert Tortoise Recovery
26

27 ³² The five sub-regions are Fremont, Kramer, Red Mountain, Newberry/Rodman, and Superior.
28 These interim closures were to remain in effect until the BLM issued a formal Record of Decision
designating routes in the WEMO area, which it did on June 30, 2003. AR 207936.

1 Plan; and (3) designating only those routes in existence in 1980 and closing all other routes. The Court
2 finds it unnecessary to decide whether any of these specific proposed alternatives should have been
3 considered by the BLM. Suffice it to say, there are clearly a range of alternatives that could have been
4 considered that would have reduced the OHV route network.³³

5
6 **B. “No action” alternative/baseline**

7 NEPA regulations provide that an EIS must include “the alternative of no action” as well as “all
8 reasonable alternatives.” 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.14(a), (d). Plaintiffs contend that
9 neither the 2003 EA nor the FEIS uses a clearly defined baseline from which environmental impacts are
10 discussed and compared. Plaintiffs contend that the correct baseline is the OHV route as it existed in
11 1980 because that is the only OHV route that is permitted by the CDCA Plan. In contrast, the BLM and
12 the intervenors argue that the baseline in the 2003 EA and the FEIS (which are different) accurately
13 reflect the baseline as it currently existed, and that is all that is required under the law.

14 The parties’ arguments highlight one of the central difficulties of this case. While plaintiffs are
15 correct that the CDCA Plan limited the OHV route network to those routes in existence in 1980, it is
16 also true that there is no readily identifiable inventory of the OHV routes extant in 1980. It is also a fact
17 that since 1980, the BLM has designated numerous OHV routes through the ACEC and 1985-1987 route
18 designation processes – at least some of which did not exist in 1980 – that have become part of the
19 actual on the ground OHV route network. Further complicating matters is the fact that over the years,
20 numerous “illegal” OHV routes that were not designated by the BLM have proliferated and also became
21 part of the *de facto* OHV route network. Defendants are correct that NEPA does not impose an
22 independent requirement of setting a “legal” environmental baseline. *See Am. Rivers v. FERC*, 201 F.3d
23 1186, 1195 (9th Cir. 1999) (“A baseline is not an independent legal requirement, but rather, a practical
24

25 ³³ Plaintiffs also argue that the FEIS’s range of alternatives was insufficient because none of the
26 alternatives would end grazing in the DWMA’s and desert tortoise critical habitat as recommended in
27 the Desert Tortoise Recovery Plan. The BLM does not address this argument. The Court finds it
28 unnecessary to decide whether the range of alternatives is also deficient on this ground. The Court notes
that while the Recovery Plan is certainly relevant to assessing the reasonable range of alternatives, the
Recovery Plan is not determinative of that question. On remand, the BLM will consider a host of
factors, including grazing issues, in its alternatives analysis.

1 requirement in environmental analysis often employed to identify the environmental consequences of
2 a proposed agency action.”). Instead, the purpose of setting a baseline is because the “‘no action’ status
3 quo alternative . . . is the standard by which the reader may compare the other alternatives’ beneficial
4 and adverse impacts related to the applicant doing nothing.” *Kilroy v. Ruckelshaus*, 738 F.2d 1448,
5 1453 (9th Cir. 1984) (internal citation and quotation omitted).

6 To the extent that plaintiffs contend that the BLM was required to use the “1980” OHV route
7 network as the “no action” alternative, the Court disagrees. As a practical matter, there is no way to
8 easily identify that network. More importantly for NEPA purposes, the “1980 OHV network” cannot
9 be the “no action” alternative against which the proposed action would be compared because the 1980
10 network has not been the status quo since 1980, decades before the proposed action. That does not mean
11 that the BLM can ignore the CDCA Plan’s language limiting the OHV route network to routes existing
12 in 1980; the BLM must recognize that limitation either by amending the CDCA Plan to eliminate that
13 limitation, as discussed *supra*, or by prospectively ensuring that only those routes that are “designated”
14 are the routes that existed in 1980.

15 NEPA requires that agencies “present complete and accurate information to decision makers and
16 to the public to allow an informed comparison of the alternatives considered in the EIS.” *Natural Res.*
17 *Def. Council v. U.S. Forest Serv.*, 421 F.3d at 813. “Where the information contained in the initial EIS
18 was so incomplete or misleading that the decision maker and the public could not make an informed
19 comparison of the alternatives, revision of the EIS may be necessary to provide a reasonable, good faith,
20 and objective presentation of the subjects required by NEPA.” *Animal Def. Council v. Hodel*, 840 F.2d
21 1432, 1439 (9th Cir. 1988), *amended by* 867 F.2d 1244 (9th Cir. 1989) (internal citation and quotations
22 omitted).

23 To fulfill NEPA’s goal of providing the public with information to assess the impact of a
24 proposed action, the “no action” alternative should be based on the status quo – with a full description
25 of what the status quo is and how it was reached – and should be consistently used as the benchmark
26 by which the various alternatives are compared. The FEIS defined the “no action” alternative as the
27 route network that had been adopted by the 2003 ROD (the 2003 EA routes), because that was the
28 “status quo” at the time of the FEIS. However, in order to present an accurate picture of that status quo

1 “no action” alternative to the public, the FEIS should have informed the public that many of the routes
2 included in that alternative were not part of the 1980 route network. The FEIS also should have
3 informed the public that the “no action” alternative consisted of a route network that was *larger* than
4 both the 1980 OHV route network, as well as the 1985-1987/ACEC network, but *smaller* than the actual
5 on the ground network as identified in the 2001-2002 inventory. Only with all of this information could
6 the public accurately assess the true nature of the status quo, as well as the proposed alternatives against
7 which it is compared. Of course, the development of the OHV route network from 1980 through the
8 creation of the WEMO Plan is relevant both in the context of explaining and justifying the need to
9 deviate from the 1980 cap (and amend the CDCA Plan language to eliminate that limitation), and in the
10 context of the “no action” alternative.

11 Another problem arises out of the fact that it is not always clear in the FEIS that the same
12 baseline is used in the “no action” alternative as a basis for comparison. As plaintiffs note, Table 3-58
13 in the FEIS compares the 1985-1987 route network against the 2001-2002 route inventory, AR 202203-
14 202204, while Table 4-45, which purportedly compares Alternative A against the no action alternative
15 states, *inter alia*, that “a proportionally higher number of route closures occurred in those areas
16 characterized by ‘bajada’ topography.” AR 202342. However, because the no action alternative in the
17 FEIS consisted of the routes designated through the 2003 EA, and Alternative A only incorporated
18 “several minor network modifications” suggested by the public when the 2003 EA routes were presented
19 in the DEIS³⁴, the differences between Alternative A and the no action alternative, at least with respect
20 to the OHV route network, were not significant. Thus, it is not clear what route network Alternative A
21 is being compared against in Table 4-45 – the 1985-1987 network? The 2001-2002 inventory? This
22 lack of clarity – and potential inconsistency – undermines the purpose underlying NEPA’s requirement
23 to present information about the actual impact of a proposed action, and its alternatives, in comparison
24 to the alternative of doing nothing. The same OHV network should be used as the basis of comparison
25

26 ³⁴ At least part of the confusion and the shifting “no action” baseline arises out of the timing
27 between the 2003 EA, the DEIS, and the FEIS. The 2003 EA and DEIS used the same “no action”
28 alternative, namely a combination of the 1985-1987 routes and the ACEC routes. However, by the time
the FEIS was prepared, the BLM had adopted the 2003 EA, and thus the 2003 EA routes (which
incorporated the Decision Tree routes), became the status quo, and thus the “no action” alternative.

1 for all types of impacts – recreational, biological, cultural, etc.

2 The fluidity and inconsistent definition of the “no action” alternative is more evident in the 2003
3 EA. There, the “no action” alternative was defined as those routes put in place during the preparation
4 of the ACEC management plans since 1980, and states that for all other areas the 1985-87 OHV route
5 designations would “remain in place.” AR 211415. Alternative A in the 2003 EA, which was the
6 “Proposed Action” compared against the “no action” alternative, consisted of the routes designated
7 through the Decision Tree process. However, all non-recreational impacts are compared between
8 Alternative A and the 2001 inventory, or the actual on-the-ground OHV route network, while all
9 recreational impacts are compared between Alternative A and the 1985-87 network. For example, in
10 evaluating the cumulative impacts of Alternative A on biological resources, the BLM stated: “[w]ithout
11 an education and enforcement program, and signing of open routes, the public will continue under the
12 impression that off road travel is allowable anywhere it is possible (outside wilderness and established
13 ACECs),” concluding “the No Action Alternative has a moderate cumulative adverse impact on
14 biological resources.” *Id.* AR 211544.³⁵ On the very next page of the 2003 EA, the BLM describes the
15 impacts on recreation, stating:

16 The existing network entirely ignores motorcycle routes and recreation. In fact, few
17 single-track routes were either inventoried or designated. It provides fewer opportunities
18 for popular motorcycle tours, camping areas and other traditional activities than
19 Alternative A. . . . The current network is not seamless; rather, it is composed of
different components designed years apart, and the routes in any given two components
(such as an ACEC network and a portion of the 1985-87 network) do not necessarily
match at the boundaries.”

20 AR 211545.

21
22 **C. Discussion of mitigation measures**

23 Plaintiffs contend that the 2003 EA and the FEIS do not address whether the implementation
24 measures included as part of the action will actually be effective in preventing further expansion of

25
26 ³⁵ In describing impacts on cultural resources, the BLM stated: “On-going impacts to cultural
27 resources from the existing route network would continue at existing levels, much of which is described
28 in Alternative A. In some areas, impacts from existing routes are severe and significant resources are
being degraded or completely lost.” AR 211547. Similar statements are made with regard to a
reduction in emissions. In the 2003 ROD: “[a]ll routes in the redesign area are located on existing
vehicle routes, as confirmed by 2002 field surveys. No new roads would be established.” AR 206774.

1 “illegal” OHV routes. Plaintiffs note that the BLM has acknowledged that illegal route proliferation
2 does indeed occur, and that several of its previous measures to stop it have been unsuccessful. Plaintiffs
3 argue that the 2003 EA and the FEIS contain broad statements, without reference to data, concerning
4 implementation and compliance efforts. Plaintiffs assert that the BLM was required to demonstrate,
5 through data or studies, that its management strategy would be effective. Plaintiffs also assert that the
6 various enforcement and education measures are dependent on the BLM obtaining future funding, thus
7 adding to the uncertainty.

8 Defendants respond that the BLM’s obligation under NEPA is procedural, not substantive, and
9 that the BLM has adequately identified and assessed potential mitigation measures. The BLM notes that
10 the FEIS contains numerous proposed mitigation measures, such as mitigation fees (AR 201722-
11 201727); desert tortoise take-avoidance measures and survey protocols (AR 201745-201754); and a
12 monitoring and adaptive management program for various species, including the desert tortoise, the
13 LMMV, the Barstow Woolly Sunflower, and the Mojave monkeyflower (AR 201863-201891). *See also*
14 AR 204532-204597 (Appendix C – Implementation Tasks). More importantly, the FEIS does contain
15 a fairly detailed discussion of the measures that BLM would take with regard to signing and maintaining
16 the OHV route network, which would prevent against proliferation of illegal, non-designated OHV
17 routes. *See* AR 201851-201855.

18 The Court agrees with the BLM that there is no requirement that BLM “prove” in an EIS that
19 its mitigation measures will work, and that “NEPA requires only that an EIS contain ‘a reasonably
20 complete discussion of possible mitigation measures.’” *N. Alaska Env’tl Ctr. v. Kempthorne*, 457 F.3d
21 969, 979 (9th Cir. 2006) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352
22 (1989)).³⁶ The mitigation must “be discussed in sufficient detail to ensure that environmental
23 consequences have been fairly evaluated.” *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d
24 at 1142, 1154 (9th Cir. 1997). While an EIS must include “[m]eans to mitigate adverse environmental
25 impacts,” 40 C.F.R. § 1502.16(h), “NEPA does not require an agency to formulate and adopt a complete

26
27 ³⁶ “Mitigation” includes (a) avoiding impacts by not taking an action, (b) limiting the degree of
28 magnitude of the action, (c) repairing, rehabilitating, or restoring the environment, (d) reducing or
eliminating the impact over time by preservation and maintenance, and (e) compensating for impact by
replacing or substituting resources. 40 C.F.R. § 1508.20.

mitigation plan.” *Kemphorne*, 457 F.3d at 979. The Court finds that the FEIS’s discussion of mitigation measures is adequate.³⁷

D. Analysis of impacts on resources

Plaintiffs next contend that BLM failed to inventory, identify and analyze significant impacts to sensitive resources. Plaintiffs rely on FLPMA, which 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 this “[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). Plaintiffs also rely on this Court’s decision in *CBD II*. There, the plaintiffs claimed that the BLM relied on incomplete and insufficient inventory data in the Final Environmental Impact Statement regarding the resources of the Imperial Sand Dunes Recreation Area (“ISDRA”), and thus that the BLM’s approval of a management plan tied to that FEIS was arbitrary and capricious. The Court held,

Defendants are correct that FLPMA does not require that the BLM have current inventory data on every species potentially in the ISDRA prior to approving the [management plan]. Defendants are also correct that directives in management plans, such as directives to monitor and study species, are not legally enforceable. *See Southern Utah Wilderness Alliance*, 542 U.S. at 69-70, 124 S.Ct. 2373. However, the problem here is not that the BLM did not update the inventory data so that it was exhaustive and current; to the contrary, the problem lies with the fact that, despite extensive evidence in the record indicating the existence of numerous other species found at the ISDRA, discussed *supra*, the BLM nevertheless approved the [management plan] which does not take these species into consideration.

CBD II, 422 F. Supp. 2d at 1167. The Court found that the BLM had violated NEPA’s requirement to consider every significant aspect of the environmental impact of a proposed action because “despite extensive information in the record and available to the BLM regarding scores of invertebrates that are known or believed to be endemic to the Dunes, the EIS only identifies five invertebrates.” *Id.* at 1162. The Court found that despite the existence of resource inventories describing the other species, “there is no indication from the EIS itself that the BLM considered the environmental impact of the [management plan] on the numerous endemic invertebrates that are known or likely to occur in the

³⁷ Of course, in light of the disposition of plaintiffs’ claims, BLM may supplement its discussion of mitigation measures on remand.

1 Dunes.” *Id.* at 1164.

2 With this framework in mind, the Court turns to plaintiffs’ specific challenges.

3
4 **1. Soils**

5 First, plaintiffs contend that the BLM did not adequately consider the effects of the WEMO Plan
6 on soils. Plaintiffs argue that the FEIS simply notes a number of impacts that OHVs may have on soils,
7 including infiltration, erosion, and soil chemistry, but that the FEIS does not discuss the impact on soils
8 of the actual route network designated as open, nor does it discuss the impacts of grazing on soils.

9 Defendants counter that the FEIS contains a more than adequate discussion of the impacts on
10 soils. The Court agrees that the FEIS contains a detailed discussion of the general impacts of OHV use
11 on soils. *See, e.g.,* AR 202232-202233. The FEIS also discusses measures to address disturbance to
12 soils, such as revegetation and controlling erosion. *See e.g.,* AR 201748. However, what is lacking
13 from the FEIS is a discussion of how soils would be impacted by the proposed WEMO OHV route
14 network. A general discussion of how soils are affected by OHV use, while informative, does not
15 provide the public with information about how to assess the particular impact of the proposed project.
16 Of course, the BLM need not provide a detailed description on a route-by-route basis; however, the
17 FEIS should contain some discussion of the particular impacts on soils of the proposed Plan, both with
18 regard to the designated OHV route network, and livestock grazing. “NEPA requires federal agencies
19 to examine the environmental effects of a proposed project and, for those actions that will significantly
20 affect the environment, to inform the public in an EIS of the relevant factors that were considered in the
21 decision-making process.” *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir.
22 2005).

23
24 **2. Cultural resources**

25 Plaintiffs also challenge the FEIS’s discussion of impacts to cultural resources. The FEIS
26 contains a section describing cultural resources in the chapter on “Affected Environment.” AR 202209-
27 202223. The cultural resources include a number of known cultural sites that are listed in the National
28 Register of Historic Places, such as Last Chance Canyon (with “known values” listed as

1 “prehistoric/historic/Native American”), Fossil Falls Archaeological District (“prehistoric”), Rodman
2 Mountain Petroglyphs (“scientific, conservation, traditional use, public”), and Alf’s Blacksmith Shop
3 (“conservation, public, only known complete blacksmith shop remaining in San Bernadino County”).
4 AR 202212-202213. The cultural resources also include a number of “potentially significant areas,”
5 such as prehistoric sites, and “significant paleontological localities.” *See, e.g.*, AR 202215-202216,
6 202218-202222. The FEIS states:

7 Activities proposed in Alternative A that may affect cultural resources include the
8 following listed actions:

- 9 • Implementing actions for Conservation Areas and new, non-cultural resource
10 ACECs within DWMA’s, such as construction of fences or culverts, placement
11 of signs and kiosks, rehabilitation and restoration of routes or larger areas,
12 removal of structures and debris if 50 years old or older;
- 13 • Multiple use class changes that increase or decrease protection of cultural
14 resources, depending on the nature of the change (generally, L to M decreases
15 protection of cultural resources, e.g., and vice versa);
- 16 • Land exchanges that result in removal of important cultural resources from
17 protective federal management (which would be mitigated through CEQA for
18 development);
- 19 • Designation of routes of travel as open to vehicle use if those routes occur on or
20 near cultural resources; and
- 21 • Decisions to continue use of existing designated routes that are located inside,
22 near, or in the vicinity of cultural resources.

23 For many of these activities, significance of effect would be evaluated when
24 specific actions are proposed and their locations are known. Specific actions would be
25 subject to full compliance with cultural resource statutes and regulations, and managers
26 must not approve proposed activities until compliance with Section 106 of the Natural
27 Historic Preservation Act has been completed and documented, including consultation
28 with the State Historic Preservation Officer and federally recognized Indian tribes.

AR 202349. Plaintiffs focus on the following paragraph in the FEIS’s discussion of impacts to cultural
resources:

The effect of BLM routes of travel on public land cultural resources has not been
fully determined because information needed to assess effect is incomplete at the present
time; however, records and observation indicate the effect on some public land sites is
significant. To mitigate significant impacts, route designation would be reviewed under
the Section 106 process, and a programmatic approach to Section 106 compliance for
routes of travel within this planning area is being discussed with the California State
Office of Historic Preservation.

AR 202350. Plaintiffs contend that it is inadequate to simply state that OHV use has a “significant”

1 effect on cultural resources, but that “[t]he effect of BLM routes of travel on public land cultural
2 resources has not been fully determined because information needed to assess effect is incomplete at
3 the present time.” Plaintiffs argue that the BLM is not permitted to take such actions without first
4 expending reasonable costs to ascertain what it can. *See* 40 C.F.R. § 1502.22.

5 The BLM generally responds that plaintiffs’ objection is “too vague” and that plaintiffs fail to
6 identify any particular cultural resources or site of concern. However, it is not plaintiffs’ burden to
7 identify specific cultural resources that may be negatively impacted by the WEMO Plan; to the contrary,
8 the onus is on the BLM to inform the public of the impacts of the Plan on cultural resources. The BLM
9 also relies on the Decision Tree to assert that the BLM subjected individual route decisions to cultural
10 resources review. For all of the reasons stated *supra*, the record does not document a cultural resources
11 review, and there is no way for the Court to assess whether, in fact, cultural resources were considered
12 in the route designation process. If impacts on cultural resources *were* considered in the route
13 designation process, BLM has this information and it should have been distilled and presented in the
14 FEIS. While the FEIS does contain some information about effects on cultural resources, *see, e.g.*, AR
15 202355 (“A number of open routes within these sub-regions cross significant archaeological sites and
16 are causing damage, sometimes severe, to the resources.”), there are numerous statements throughout
17 the FEIS indicating that the BLM has not made an assessment of the impact of the WEMO OHV routes
18 on cultural resources. *See, e.g.*, AR 202352 (“Within the Ridgecrest Field Office Area, no cultural
19 resources field inventory data has been carried out on the proposed 2002 route designation updates.”).
20 To the extent that the FEIS does contain a discussion of the impact of the WEMO Plan on specific
21 cultural resources, the BLM has satisfied its obligation under NEPA. However, for those areas in which
22 “[t]he effect of BLM routes of travel on public land cultural resources has not been fully determined
23 because information needed to assess effect is incomplete at the present time,” the FEIS is inadequate
24 because it does not inform the public of the scope and extent of the impacts of the WEMO Plan.

25 26 **3. Biological resources**

27 Plaintiffs identify several specific biological resources of concern, but also state that these are
28 just examples of the BLM’s broad failure to keep adequate inventories of biological resources as

1 required by FLPMA. Plaintiffs cite riparian concerns, “unusual plant assemblages” (“UPAs”), and
2 water quality, for which plaintiffs contend the BLM has no inventory whatsoever. Plaintiffs also cite
3 the spreading of non-native plants (i.e. weeds) and several sensitive species. Defendants counter that
4 FLPMA does not require the BLM to have a current inventory on every species potentially in the plan
5 area prior to approving a plan. *CBD II*, 422 F. Supp. 2d at 1167.

6
7 **a. “Unusual plant assemblages” and riparian and water resources**

8 Plaintiffs challenge the FEIS’s treatment of the impacts of OHV routes and grazing on water-
9 associated UPAs and on riparian and water resources. Plaintiffs argue that the FEIS does not contain
10 basic information regarding the condition of water resources or UPAs, and more importantly, that the
11 FEIS does not assess the impact of the OHV routes or grazing on these resources. The BLM responds
12 by citing the BLM’s WEMO Rangeland Standards of Public Land Health, which require healthy,
13 productive, and diverse habitats for native species, including UPAs, and protect riparian and water
14 resources. The BLM also cites portions of the FEIS that generally discuss water quality and water
15 resources, and the general threats posed by OHV use. However, as with the FEIS’s discussion of
16 impacts to soils, there is no discussion or analysis of the impacts flowing from the OHV route network
17 designated by the WEMO plan, or from grazing. Again, while NEPA does not require a detailed
18 discussion of how every designated route will affect every riparian resource or UPA, the FEIS should
19 contain some discussion of the particular impacts flowing from the WEMO Plan.

20
21 **b. Spread of non-native plants**

22 Plaintiffs also contend that the FEIS does not adequately address another impact of OHV use
23 and grazing, namely the spread of non-native plants. Plaintiffs note that the FEIS only contains a few
24 references to the spread of non-native plants, usually in connection with discussion of a mitigation
25 measure. Plaintiffs argue that although the BLM concluded that the route network would reduce the
26 spread of invasive weeds, there is no analysis in the FEIS to support that conclusion.

27 The FEIS concludes that implementation of the BLM’s motorized vehicle access network would
28 reduce the “spread of exotic weeds,” and that the reduction “would be proportionate to the linear miles

1 of routes closed.” AR 202261. The BLM cites various portions of the FEIS which mention invasive
2 weeds and mitigation measures to address invasive weeds. The Court finds that this discussion is
3 adequate under NEPA.

4
5 **c. Sensitive species**

6 Plaintiffs contend that the FEIS fails to provide adequate information or analysis of impacts to
7 State listed and BLM sensitive species, including, but not limited to, the Mojave fringe-toed lizard, the
8 Barstow wooly sunflower, the desert cymopterus, and the Mojave monkeyflower. Plaintiffs provide
9 several examples of the BLM’s allegedly inadequate analysis, and they state that the examples are
10 “representative, not exclusive.” However, plaintiffs have not identified a general deficiency that would
11 apply more broadly to the BLM’s treatment of sensitive species in the FEIS, and thus the Court limits
12 its review to the specific examples identified by plaintiffs.

13 With regard to the Mojave fringe-toed lizard, plaintiffs note that the “Species Account”³⁸ for the
14 lizard states that there is no recent data on population status and relative density, AR 204475, but that
15 the FEIS nevertheless concludes, *inter alia*, that “light” OHV travel on three “primary routes across
16 fringe-toed lizard habitat . . . which cover about one-fourth of the occupied habitat, does not appear to
17 be impacting this species.” AR 202289. While the FEIS’s discussion of impacts to the fringe-toed
18 lizard is detailed, and when viewed in isolation appears adequate, when assessed in conjunction with
19 the Species Account, the BLM’s statement that the OHV routes over one-quarter of the lizard’s habitat
20 do “not appear to be impacting these species” is unsupported by any factual basis. *See Native*
21 *Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (“To have not acted in an
22 arbitrary and capricious manner, the agency must present a rational connection between the facts found
23 and the conclusions made.”) (internal quotations omitted).

24 With regard to the Barstow wooly sunflower, the desert cymopterus, and the Mojave
25 monkeyflower, plaintiffs argue that the BLM has failed to adequately identify and analyze the impacts
26 of the WEMO Plan on these species. However, the FEIS discusses specific threats and impacts of the

27
28 ³⁸ A Species Account was prepared for each plant or animal addressed by the WEMO Plan. AR 204451.

1 WEMO Plan to these species. *See, e.g.*, AR 203284 (stating Alternative B can conserve most, but not
2 all, of the known occurrences of the Barstow wooly sunflower outside Edwards AFB, noting other
3 measures that would promote conservation), 202385 (stating that under Alternative B, the majority of
4 Mojave monkeyflower populations would be conserved), 202385 (stating that the desert cymopterus
5 would remain protected on public land by the requirement of avoidance and would benefit from route
6 designation in certain subregions, and noting other threats that could lead to its listing as a threatened
7 or endangered plant). This NEPA analysis sufficiently informs the public of impacts to these species.
8

9 **E. Impacts on air quality**

10 The FEIS states that under Alternative B (the selected BLM alternative) “[t]here would be
11 reductions in emissions of particulate matter from BLM managed lands. This would result in
12 corresponding declines in PM₁₀ concentrations in a number of areas. On an overall plan basis, there
13 would be a significant reduction in particulate emissions. Reductions would occur on BLM lands away
14 from population centers.” AR 202261.³⁹

15 Plaintiffs contend that the BLM’s conclusion that PM₁₀ will be reduced by the implementation
16 of the WEMO Plan is flawed because the BLM did not adequately quantify or analyze emissions from
17 increased OHV use, and because the BLM did not quantify or analyze emissions from OHV use in open
18 *areas*, as opposed to on designated routes.

19 The BLM cites pieces of the record which support its conclusion that PM₁₀ will be reduced from
20 what they were “at present.” AR 201979, 201981, 202232, 202423, 202621, 202626. There can be little
21 doubt that reducing the parking-camping area that is available from 600 ft. (300 ft. in each direction)
22 to 100 ft. (50 ft. in each direction) reduces OHV impacts and will likewise reduce PM₁₀. However, the
23 BLM does not assert that the FEIS assessed the impact of emissions in open *areas*, and the discussion
24 in the FEIS does not reflect that any such analysis was conducted. *See* SAR 300183-300184. While
25 the BLM’s conclusion that reducing the on the ground network of designated *routes* would result in
26 reduced emissions is supported and discussed, plaintiffs are correct that the discussion of impacts on
27

28 ³⁹ PM₁₀ is particulate matter with particles with a diameter of 10 micrometers or less. *See*
<http://www.epa.gov/air/airtrends/aqtrnd95/pm10.html>.

1 air quality is incomplete without consideration of emissions in open areas.

2 Plaintiffs also contend that the FEIS is inadequate because the BLM did not discuss the impacts
3 to air quality from increased OHV use. Plaintiffs cite statements from chapter 3 of the FEIS, “Affected
4 Environment,” in which the BLM describes general statewide trends in OHV use. *See, e.g.*, AR 202174.
5 However, the cited statements consist of general background information, and do not contain projections
6 about future OHV levels under the WEMO Plan. The FEIS’s discussion of impacts on air quality –
7 aside from the failure to discuss OHV use in open areas – is sufficient.

8
9 **F. Cumulative impacts**

10 Plaintiffs’ final NEPA contention is that the BLM failed to fully analyze the cumulative impacts
11 of the WEMO Plan, and in particular of the 5,098 OHV route network. As discussed *supra*, because
12 the specific impacts of the route network are not analyzed (for example, with regard to soils, cultural
13 resources, and water and riparian resources), the Court finds that the cumulative impacts analysis is
14 deficient as well. Because the BLM will be required to reassess the specific impacts of the WEMO Plan
15 on remand, the Court finds it unnecessary to address the parties’ specific arguments about the
16 cumulative impacts analysis.

17
18
19 **III. Endangered Species Act claims**

20 On March 31, 2005, FWS issued a BiOp concluding that implementation of the CDCA Plan, as
21 amended by previous amendments, the proposed NEMO and NECO bioregional plans, and the interim
22 conservation measures in the WEMO planning area, was not likely to jeopardize the desert tortoise or
23 to destroy or adversely modify its critical habitat. NBO 12535-12737 (“NECO BiOp”). On January 9,
24 2006, FWS issued a BO concluding that implementation of the CDCA Plan, as amended by previous
25 amendments and the proposed WEMO bioregional plan, was not likely to jeopardize the desert tortoise
26 or the Lane Mountain milk-vetch, or destroy or adversely modify desert tortoise critical habitat. WBO
27 14752-14949 (“WEMO BiOp”). The BiOps also contain Incidental Take Statements for the desert
28

1 tortoise that permit “take”⁴⁰ of the tortoise within the plan areas. On November 30, 2007, FWS issued
2 amended ITSs for the NECO and WEMO BiOps. NSupp ITS 1175; WSupp ITS 1018.

3
4 **A. The “No Jeopardy” conclusion for the desert tortoise**

5 Plaintiffs contend that in arriving at its “no jeopardy” findings, the FWS failed to adequately
6 address the impacts of proposed activities on desert tortoise recovery. In particular, plaintiffs argue that
7 FWS ignored a Desert Tortoise Recovery Plan issued by the FWS in 1994. Section 4 of the ESA
8 requires the Secretary of the Interior “to develop and implement plans . . . for the conservation and
9 survival of endangered and threatened species . . . to the maximum extent practicable.” 16
10 U.S.C. § 1533(f). FWS issued the Desert Tortoise Recovery Plan pursuant to Section 4(f), and that plan
11 recommends that many activities, including livestock grazing and off-road vehicle activity, “be
12 prohibited throughout all DWMAAs because they are generally incompatible with tortoise recovery.”
13 NBO 616-17.

14 The Court’s review of the “no jeopardy” conclusion is deferential. A final agency decision, such
15 as a BiOp, may only be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not
16 in accordance with law.” 5 U.S.C. § 706(2)(A). However, the Court “must ensure that the FWS’s
17 decisions are based on a consideration of relevant factors and we assess whether there has been a clear
18 error of judgment.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th
19 Cir. 2004) (internal citations omitted). The BiOp must articulate “a rational connection between the
20 facts found and the choice made.” *Pac. Coast Fed’n of Fishermen’s Ass’n, v. Nat’l Marine Fisheries*
21 *Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001) (internal quotations omitted).

22
23 **1. Consideration of ability to recover**

24
25

⁴⁰ Section 9 of the ESA and its implementing regulations prohibit the “take” of a threatened or
26 endangered species of animal. *See* 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.31. “Take” is defined
27 broadly under the ESA to include harming, harassing, trapping, capturing, wounding or killing a
28 protected species either directly or by degrading its habitat sufficiently to impair essential behavior
patterns. *See* 16 U.S.C. § 1532(19). The ESA provides an exception to its prohibitions on take: a
federal agency may take listed species in accordance with an Incidental Take Statement issued with a
BiOp. *See id.* at § 1536(b)(4).

1 Plaintiffs generally assert that FWS failed to consider relevant information regarding the ability
2 of the desert tortoise to recover in light of the effects of authorized activities in the NECO and WEMO
3 Plans, and also failed to analyze effects on the tortoise in light of the species' degraded baseline
4 condition. Plaintiffs assert that FWS improperly compared the effects of the WEMO and NECO Plans
5 to the effects under existing management, rather than conducting a correct jeopardy analysis that
6 focused on what jeopardy might result from the BLM's proposed actions. For the most part, plaintiffs
7 do not identify specific deficiencies with FWS's analysis, and instead just generally assert that the no
8 jeopardy findings are unsupported.

9 In order to evaluate plaintiffs' largely generalized attack,⁴¹ it is important to first understand how
10 the NECO and WEMO Plans amended the CDCA. In addition to the OHV route network contained in
11 the WEMO Plan and discussed *supra*, the proposed NECO and WEMO bioregional plans designate
12 numerous conservation and special protection areas, such as DWMA's, and ACECs. In the plan
13 amendments, the BLM reduced the areas where livestock grazing can occur; imposed protective
14 management prescriptions applicable to ongoing grazing, such as the requirement to remove cattle from
15 allotments when forage levels reach certain threshold levels; designated routes and reduced the overall
16 vehicle route access network from the actual on the ground OHV route network; restricted the areas in
17 which OHV users can stop, camp, and park to 50 feet off the centerline in WEMO; authorized camping
18 only within 50 feet of the centerline of a route and only in disturbed areas in WEMO; authorized OHV
19 use in open washes in NECO only within navigable washes and only when such use will not result in
20 the crushing of perennial vegetation on the banks of the washes, and reduced the overall area in which
21 such activities may occur; withdrew lands from mineral entry and exploration; and provided for the
22 voluntary relinquishment of grazing leases and permits. WBO 14759-14785; NBO 12540-12572. In
23 addition, the plans establish a one percent threshold for "new ground disturbance" in the DWMA's.
24 "New ground disturbance includes any clearing, excavating, grading or other manipulation of the terrain,
25 whether or not a permanent use is proposed for the site." WBO 14763; *see also* NBO 12555-12556.

26 FWS summarized its no jeopardy finding for the WEMO Plan as follows:

27
28 ⁴¹ To the extent plaintiffs raise specific challenges, such as plaintiffs' contention that FWS failed
to consider survival on a recovery unit basis, the Court addresses those arguments *infra*.

1 The proposed amendment of the California Desert Conservation Area Plan for the
2 Western Mojave Recovery Unit would increase protection of the desert tortoise above
3 the current management situation that occurs within this region. Additionally, except
4 for casual uses (e.g., casual mining exploration, vehicle use on existing roads, hiking,
5 and vehicle camping along existing roads) and ongoing grazing, activities and projects
6 will receive site-specific environmental review and consultation with the Service,
7 pursuant to section 7(a)(2) of the Act, as appropriate. Therefore, all activities and
8 projects, except casual uses, may be denied, modified, or mitigated to reduce adverse
9 effects to desert tortoise if, as proposed for some future specific activity, they would
10 violate section 7(a)(2) of the Act. . . .

11 The Bureau's proposal to designate all lands within desert wildlife management areas
12 as Class L should provide increased protection to the desert tortoise over that currently
13 provided by Class M guidance; however, the Bureau can authorize actions within Class
14 L areas that could kill desert tortoises. The proposal to limit the cumulative amount of
15 ground disturbance to one percent should ensure that the vast majority of desert tortoises
16 residing on public lands within the desert wildlife management areas are conserved in
17 a manner that provides for their survival and recovery.

18 The designation of routes in desert wildlife management areas, with an overall reduction
19 in the amount of the road network, should reduce the level of mortality of desert tortoises
20 on roads; it should also reduce the area in which they are threatened by other human
21 activities related to access (e.g., poaching, vandalism). Neither the Bureau nor the
22 Service has definitive information on how differing route networks affect the desert
23 tortoise. Roadless areas would have the least adverse effect on desert tortoises; an access
24 network that provides for large expanses of undisturbed habitat for the desert tortoise
25 would seem to provide the opportunity for recovery. The extent that the changes in the
26 access network affect the desert tortoise will be difficult to measure because of the slow
27 reproductive rate of the species and other factors, such as disease, drought, and
28 predation, which may be affecting the number of individuals in a region.

The desert tortoise will benefit from the Bureau's proposal to allow the voluntary
relinquishment of grazing leases and related authorizations; cattle have been removed
from several allotments and sheep have not grazed substantial areas of critical habitat
since it was designated. As a result of this action, only one cattle allotment remains
within a desert wildlife management area in this bioregion; desert tortoises will be
threatened with trampling and crushing by cattle and operators on a far smaller area.

Reducing the distance that cars and trucks can drive and park from up to 300 feet from
a route of travel to 50 feet in the desert wildlife management areas provides a great
degree of protection to the desert tortoise. The requirement that camping be limited to
existing disturbed areas provides an additional level of protection.

Maintaining a corridor for competitive events along the Johnson Valley to Parker route
is likely to kill or injure desert tortoises. We do not have sufficient information to assess
the likely level of mortality at this time. The Bureau's review of a specific proposed race
in the future will provide an opportunity to review the potential level of mortality in
adequate detail. We note that the Bureau eliminated the western fragment of the corridor
for the Barstow to Las Vegas race course; this action eliminates a potential threat to
desert tortoises.

The Bureau has proposed to withdraw several areas from mineral location and entry.
This action has the potential to reduce to a substantial degree the number of desert
tortoises that may be killed during casual use and under future plans of operation.

1 The acquisition of private lands within desert wildlife management areas will remove at
2 least some threats that desert tortoises may face on non-federal lands; this acquisition
3 will also facilitate the Bureau's management. The addition of lands to the retention zone
in the West Mojave Land Tenure Adjustment Program will increase the area within
which desert tortoises may be conserved.

4 Programs to educate visitors about the desert tortoise and how they can assist in
5 conserving the species will also promote recovery of the species. A permitting and
6 education program for use of vehicles in the Rand Mountains may be particularly
beneficial, given the difficulty that the Bureau has had in enforcing compliance with the
route network in this area.

7 The California Desert Conservation Area Plan, as amended by the West Mojave Plan,
8 provides guidance, including the requirement to consider the needs of listed species,
sufficient to ensure the survival and recovery of the desert tortoise in the Western
9 Mojave Recovery Unit. The decline in this region prompts concern; desert tortoise
10 numbers are low enough in certain areas to make them almost undetectable. Full and
swift implementation of the amended California Desert Conservation Area Plan may
reduce the severity and duration of the decline, if it is tied to anthropogenic causes.

11 In summary, the actions in the West Mojave Plan were proposed with consideration of
12 the Bureau's mandates to manage public lands and after careful evaluation of the current
situation in these areas and input from the public and numerous agencies. With a few
13 exceptions, such as the Johnson Valley-to-Parker race corridor and permitting vehicles
to stop and camp off of routes, the actions that were adopted by the Bureau are highly
14 protective of desert tortoises. Even the exceptions as noted provide greater protection
to the desert tortoise than the California Desert Conservation Area Plan of 1980. In
15 addition, as we discussed previously in this biological opinion, the best data available
seem to indicate that none of these actions have severe adverse effects on the desert
16 tortoise. However, the cause of the recent declines in the number of desert tortoises
across California has not been identified. Consequently, the mechanisms needed to
17 reverse these declines are also unknown. The potential exists that reversal of the decline
of the desert tortoise may require substantial additional management; another scenario
18 is that we may not be able to identify or manage the agent or agents responsible for the
decline.

19 WBO 14880-12882. FWS's summary of the effects of the NECO Plan on the desert tortoise is similar.
20 See NBO 12701-12704.

21 Plaintiffs assert that the BiOps are flawed because they do not determine the degree to which
22 the take anticipated from activities authorized under the Plans would be deleterious to the tortoise's
23 viability and ability to recover. In making this argument, plaintiffs cite various portions of the Desert
24 Tortoise Recovery Plan, as well as *National Wildlife Federation v. National Marine Fisheries Service*
25 (*NWF*), 524 F.3d 917 (9th Cir. 2008). In *NWF*, the consulting agency (NMFS) prepared a BiOp
26 addressing the effects of dams and related facilities on threatened and endangered fish, and found that
27 the proposed agency action would not jeopardize the continued existence of the listed fish. *Id.* at 926.
28 The BiOp "did not point to any improvement in the fishes' status" and "also omitted any clear

1 consideration of the impact of proposed operations on listed species' chances of recovery." *Id.* The
2 Ninth Circuit held that the agency's failure to consider the proposed actions' impacts on the chances
3 of recovery as opposed to just survival, violated ESA regulations that prohibit any action "that
4 reasonably would be expected, directly or indirectly, to *reduce appreciably the likelihood of both the*
5 *survival and recovery of a listed species in the wild.*" *Id.* at 931 (quoting 50 C.F.R. § 402.02) (emphasis
6 in opinion); *see also id.* at 933 ("The only reasonable interpretation of the jeopardy regulation requires
7 NMFS to consider recovery impacts as well as survival.").

8 Here, unlike *NWF*, FWS did consider impacts to desert tortoise recovery. FWS identified the
9 survival and recovery needs of the species, explaining that the desert tortoise requires significant
10 expanses of largely undisturbed habitat to ensure long-term viability, and finding that BLM's proposed
11 actions ensure that most desert tortoise habitat within the planning areas, including the vast majority of
12 critical habitat, is sufficiently protected and will remain largely undisturbed. *See* WBO 14799-14801
13 (discussing "Relationship of Recovery Units, Distinct Population Segments, Desert Wildlife
14 Management Areas, and Critical Habitat Units"), 14827, 14835, 14880-14881 (noting that limiting
15 amount of cumulative ground disturbance to 1% in each DWMA "will likely ensure that proposed
16 actions do not cause injury to or mortality of a large number of desert tortoises," "should ensure that
17 large numbers of individuals are not disturbed by activities associated with specific projects," "will
18 likely ensure that proposed actions do not appreciably compromise the function and conservation role
19 of critical habitat units in the Mojave Desert planning area," and "should ensure that the vast majority
20 of desert tortoises residing on public lands within the desert wildlife management areas are conserved
21 in a manner that provides for their survival and recovery"); NBO 12610-12611 ("[W]e conclude that
22 all of the critical habitat units within the action area are capable of supporting their conservation role
23 and function."), 12701 (stating that limiting cumulative amount of surface disturbance to 1% should
24 ensure that "vast majority" of desert tortoises within DWMA "are conserved in a manner that provides
25 for their survival and recovery"). FWS explicitly found that the proposed actions improve conditions
26 for the desert tortoise and afford the opportunity for the species' recovery. *See* WBO 14880-14888;
27 NBO 12701-12711. Unlike the "structural" flaw in the *NWF* BiOp where the agency did not address
28 recovery needs whatsoever, *NWF*, 532 F.3d at 926, here the WEMO and NECO BiOps repeatedly

1 address recovery and conclude that the proposed plans will not reduce appreciably the likelihood of
2 recovery, but in fact will promote recovery.

3 Plaintiffs appear to suggest that FWS's no jeopardy finding is flawed because the WEMO and
4 NECO Plans do not fully implement the Desert Tortoise Recovery Plan. However, while the Recovery
5 Plan is certainly relevant to assessing the impact of the proposed actions on desert tortoise recovery, the
6 ESA does not require that a Recovery Plan be fully implemented. In *Fund for Animals v. Rice*, 85 F.3d
7 535 (11th Cir. 1996), the Eleventh Circuit rejected the plaintiffs' contention that a no jeopardy
8 conclusion was flawed on the ground that it conflicted with habitat provisions in the recovery plan for
9 the Florida Panther:

10 The Plaintiffs' line of reasoning is flawed in several respects. First, the practical effect
11 of the Plaintiffs' position would be to elevate the 1987 Recovery Plan into a document
12 with the force of law. We cannot take such an approach. Section 1533(f) makes it plain
13 that recovery plans are for guidance purposes only. See 16 U.S.C. § 1533(f). By
14 providing general guidance as to what is required in a recovery plan, the ESA "breathe[s]
15 discretion at every pore." *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975).

16 Second, the Plaintiffs' position cannot be reconciled with the Corps' statutory duty under
17 § 7 of the ESA to consult with the F.W.S. about the environmental impact of proposed
18 agency actions and the F.W.S.'s duty to arrive at a biological opinion based upon the
19 best scientific data available. There would be absolutely no point to the consultation and
20 preparation of a biological opinion if the F.W.S.'s opinion were predetermined based
21 upon whether proposed project lands fell within the borders of properties discussed in
22 one of any number of recovery plan documents. The Plaintiffs thus misconstrue the
23 interrelationship and legal effect of the 1987 Recovery Plan on the 1995 F.W.S.
24 Biological Opinion.

25 *Id.* at 547. The Eleventh Circuit found that FWS issued "reasonable justifications" for its no jeopardy
26 conclusion, including the facts that there had been no verified panther sightings in the area at issue, and
27 the contested land was not designated as critical habitat for the panther. *Id.*

28 Thus, to the extent plaintiffs' challenge is grounded in the fact that there may be substantive
differences between the Recovery Plan and the WEMO and NECO Plans, that challenge fails. Plaintiffs
must point to a specific aspect of the no jeopardy finding that is arbitrary and capricious, and they have
not done so. As discussed above, FWS concluded that the WEMO and NECO Plans would *improve*
conditions for the desert tortoise, and thus would promote recovery. Clearly, the plans do not promote
recovery to the full extent recommended in the Recovery Plan or as much as the plaintiffs would like.
However, that does not render FWS's no jeopardy findings unsupported, or arbitrary and capricious.

1 **2. Baseline condition**

2 Plaintiffs also contend that FWS used an improper “environmental baseline” when analyzing the
3 effects of the WEMO and NECO Plans on the desert tortoise. ESA regulations define the environmental
4 baseline as including “the past and present impacts of all Federal, State or private actions and other
5 human activities in the action area” and “the anticipated impacts of all proposed Federal projects in the
6 action area that have already undergone formal or early section 7 consultation.” 50 C.F.R. § 402.02.
7 A baseline analysis “will involve consideration of the present environment in which the species or
8 critical habitat exists, as well as the environment that will exist when the action is completed, in terms
9 of the totality of factors affecting the species or critical habitat. The evaluation will serve as the baseline
10 for determining the effects of the action on the species or critical habitat.” Interagency
11 Cooperation-Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,932 (June 3,
12 1986).⁴²

13 Plaintiffs assert that FWS simply listed prior consultations and recited impacts from future
14 implementation of the plans, and that FWS failed to adequately account for other authorized take from
15 ongoing activities in the West Mojave planning area in analyzing the impact of the WEMO Plan.
16 Specifically, plaintiffs assert that the impacts from the existing on-the-ground destruction of habitat by
17 routes (both previously designated routes and illegally created routes) should have been included as part
18 of the baseline, and that authorization for use of the routes and the terms of that use in the future
19 (including, *inter alia*, routes networks, speed limits and seasons of use) should have been considered
20 in the jeopardy analysis. Plaintiffs do not cite any portions of the WEMO BiOp in support of their
21 argument that FWS did not consider the impacts of the on the ground OHV route network, and in fact
22 the BiOp discusses OHV routes in connection with the environmental baseline and future impacts. *See*,
23
24
25

26
27 ⁴² The ESA baseline analysis focuses on the impacts of the proposed action on a protected
28 species, whereas the NEPA baseline analysis discussed *supra* is directed at providing the public with
an assessment of the broader impacts of a proposed project in comparison to a variety of alternatives,
including the alternative of taking no action.

1 e.g., WBO 14803-14804, 14816-14818, 14845-14847; *see also* NBO 12583, 12613-12614, 12623.⁴³

2 Plaintiffs also assert that the environmental baseline did not adequately account for take of desert
3 tortoises as a result of the expansion of Fort Irwin. Plaintiffs rely on language from the Fort Irwin BiOp,
4 in which FWS discussed the Army's proposal to translocate desert tortoises from areas where new
5 training exercises would occur to managed areas where the translocated tortoises would be protected.
6 WBO 9949-9950. Plaintiffs emphasize language in the Fort Irwin BiOp in which FWS recognized that
7 it was theoretically possible that all translocated tortoises could die: "At the worst, both translocated and
8 resident animals will be subjected to high levels of mortality; if such an event happens, the information
9 we gather as we monitor the translocation would be the sole benefit of the action." *Id.* at 9950.
10 However, plaintiffs isolate that sentence and ignore the context of that statement:

11 To reduce the level of mortality associated with training, the Army has proposed to
12 translocate as many desert tortoises as it can from the Superior Valley and UTM 90
13 parcels. Translocation of desert tortoises to managed parcels of land may, at best,
14 prevent the loss of a large number of animals, allow these individuals to contribute to the
15 conservation of the species in the Western Mojave Recovery Unit, and provide valuable
16 information on how to use translocation as a recovery tool. At the worst, both
translocated and resident animals will be subjected to high levels of mortality; if such
an event happens, the information we gather as we monitor the translocation would be
the sole benefit of the action. Given the results of the Nussear study⁴⁴ at Bird Springs
Valley, *we expect that the translocation effort will be successful in large part.*

17 *Id.* (emphasis added). The Fort Irwin BiOp concluded that based on a variety of factors, "approximately
18 136 adult desert tortoises may die during translocation," that this loss may be spread out over many
19 years, and that when the estimated deaths of 136 tortoises from translocation was added to other
20 expected deaths of tortoises (located in another area not subject to translocation) "[t]his level of
21 mortality translates to approximately 1.03 to 2.07 percent of the 20,420 to 41,224 adult desert tortoises
22
23
24

25 ⁴³ Of course, FWS's assessment of the impact of the WEMO Plan is based, in large part, on the
26 OHV route network designated in that Plan. The Court's finding that those route designations did not
27 comply with FLPMA, however, does not affect the Court's analysis of whether FWS complied with the
ESA in reviewing the effect of the WEMO Plan on the desert tortoise and its critical habitat.

28 ⁴⁴ The Fort Irwin BiOp states that "[a]s shown by the Nussear study, desert tortoises that are
moved to more distant locations exhibited a high rate of survival." *Id.*

1 that Heaton et al. (2004) estimated resided in the Western Mojave Recovery Unit. *Id.* at 9951.⁴⁵

2 The WEMO BiOp addressed the Fort Irwin expansion and the Fort Irwin BiOp in its discussion
3 of the current status and environmental baseline for the desert tortoise. WBO 14794, 14804-14805.⁴⁶
4 There is no support for plaintiffs' assertion that FWS was required to assume that the Army's
5 translocation of desert tortoises would result in the death of all tortoises when the language of the Fort
6 Irwin BiOp expressly states that FWS expects the translocation efforts to be largely successful.

7 Plaintiffs' reliance on *NWF* is unavailing, and again the differences between that case and this
8 one are instructive. In *NWF*, the agency completely excluded from the environmental baseline all
9 impacts from "nondiscretionary" federal activities such as operations relating to irrigation, flood control
10 and power generation. 524 F.3d at 926. The Ninth Circuit held that this exclusion was improper and
11 that nothing in the ESA or case law "permits agencies to ignore potential jeopardy risks by labeling parts
12 of an action nondiscretionary." *Id.* at 928. Here, FWS did not ignore the impact of the Fort Irwin
13 expansion or OHV use in formulating its environmental baseline.

14 Relatedly, and again citing *NWF*, plaintiffs argue that FWS improperly compared the effect of
15 the NECO and WEMO Plans to the effects under existing management, rather than conducting a
16 comprehensive jeopardy analysis. In *NWF*, the agency segregated its jeopardy analysis as follows:

17 [I]nstead of assessing whether the listed fish would be jeopardized by the aggregate of
18 the proposed agency action, the environmental baseline, cumulative effects, and current
19 status of the species, NMFS segregated its analysis, first evaluating whether the
20 proposed agency action – consisting only of the proposed discretionary operation of the
21 FCRPS – would have an appreciable net effect on the species. It considered additional
22 context only if it found such an effect. By using this so-called comparative approach
23 rather than a more holistic, aggregate approach, NMFS concluded that the proposed
24 action would not jeopardize the continued existence of the fish. Although the 2004 BiOp
25 did not point to any improvement in the fishes' status or the impacts of FCRPS
26 operations, its new approach attributed only a much smaller portion of the fishes'
27 perilous condition to the proposed operations under review.

24 ⁴⁵ The Fort Irwin BiOp also concluded that the loss of this number of adult desert tortoises "will
25 not appreciably reduce the ability of the species to survive and recover in the Western Mojave Recovery
26 Unit." *Id.*

26 ⁴⁶ Although the area within the boundaries of Fort Irwin is not within the action area of the
27 NECO BiOp, the NECO BiOp also addressed the Fort Irwin expansion in its discussion of the current
28 status and environmental baseline for the desert tortoise because "the conservation measures being
implemented by the Army as part of the proposed action are likely to have substantial beneficial effects
on the desert tortoise and its critical habitat within the action area." NBO 12587.

1 524 F.3d at 926. The Ninth Circuit rejected the agency’s argument that “it may satisfy the ESA by
2 comparing the effects of proposed FCRPS operations on listed species to the risk posed by baseline
3 conditions [and] [o]nly if those effects are ‘appreciably’ worse than baseline conditions must a full
4 jeopardy analysis be made. Under this approach, a listed species could be gradually destroyed, so long
5 as each step on the path to destruction is sufficiently modest.” *Id.* at 930.

6 Here, the critical difference is that FWS concluded that the WEMO and NECO Plans *improved*
7 conditions for the desert tortoise. Thus, unlike in *NWF* where the true adverse impact of the proposed
8 agency action was distorted and minimized – and possibly placing the listed species in “jeopardy” – here
9 the proposed agency actions improve the status quo. The Ninth Circuit emphasized that “[o]ur approach
10 does not require [the agency] to include the entire environmental baseline in the ‘agency action’ subject
11 to review. It simply requires that [the agency] appropriately consider the effects of its actions ‘within
12 the context of other existing human activities that impact the listed species.’” *Id.* (quoting *ALCOA v.*
13 *BPA*, 175 F.3d 1156, 1162 n.6 (9th Cir. 1999)). Both BiOps contain extensive discussions of “other
14 existing human activities” that impact the desert tortoise, and plaintiffs have failed to demonstrate
15 anything arbitrary or capricious about FWS’s assessment of the environmental baseline.

17 3. Survival on recovery unit basis

18 Plaintiffs also challenge the BiOps on the ground that FWS failed to consider survival on a
19 recovery unit basis. Plaintiffs rely on the Recovery Plan, which defines a “recovery unit” as a
20 “geographic unit harboring an evolutionarily distinct population segment of the desert tortoise within
21 the Mojave region,” NBO 553 n.1, and states that the goal of the Recovery Plan is to protect and recover
22 each of these unique populations of desert tortoise: “[p]reserving viable populations of desert tortoises
23 within each of these units is essential to the long-term recovery, viability, and genetic diversity of the
24 species.” NBO 591. Plaintiffs argue that even moderate losses in the already declining Western
25 Mojave recovery unit could cause a rapid population decline and impede the prospects for recovery of
26 the species. As such, plaintiffs contend that FWS “failed to consider an important aspect of the
27 problem,” and that the analyses and conclusions in the BiOps are arbitrary and capricious.

28 Plaintiffs do not cite any portions of the BiOps to support their argument that FWS did not

1 consider survival on a recovery unit basis. Indeed, the WEMO BiOp states,

2 The California Desert Conservation Area Plan, as amended by the West Mojave Plan,
3 provides guidance, including the requirement to consider the needs of listed species,
4 sufficient to ensure the survival and recovery of the desert tortoise in the Western
5 Mojave Recovery Unit. The decline in this region prompts concern; desert tortoise
6 numbers are low enough in certain areas to make them almost undetectable. Full and
7 swift implementation of the amended California Desert Conservation Plan may reduce
8 the severity and duration of the decline, if it is tied to anthropogenic causes.

9 WBO 14882. Thus, contrary to their assertions, FWS did consider survival within the recovery units,
10 including the depleted Western Mojave Recovery Unit. To the extent that plaintiffs suggest that FWS
11 was required to conduct a separate jeopardy analysis for each recovery unit, there is no authority for that
12 position. To the contrary, the ESA requires that FWS issue a jeopardy determination for the entire listed
13 species. 16 U.S.C. §1536(b)(3)(A) (agency shall provide a “written statement setting forth the
14 Secretary’s opinion . . . detailing how the agency action affects the species”).

15 **B. “Adverse modification” of desert tortoise critical habitat**

16 As part of the consultation process, FWS also concluded that the BLM’s plan amendments are
17 not likely “to result in the destruction or adverse modification” of desert tortoise critical habitat.⁴⁷ In
18 reaching its conclusions, FWS assessed the current status of the species’ critical habitat units:

19 The critical habitat units within the Western Mojave Recovery Unit clearly experience
20 the most visitation by recreational users and economic interests, primarily because of
21 their proximity to the Los Angeles Basin. Despite this level of use, large areas of critical
22 habitat in the western Mojave Desert remain undisturbed. We base this statement on
23 information provided by [BLM] that was gathered in support of the West Mojave Plan.
24 Using aerial photographs from 1994 of the proposed [DWMAs] in the planning area for
25 the western Mojave Desert region, [BLM] used conservative calculations (i.e., it erred
26 on the side of overestimating the amount of disturbance) and concluded that
27 approximately 1.3 percent of the proposed [DWMAs] had been disturbed to date (LaPre
28 2005e). Given that the critical habitat units throughout the remainder of the [CDCA]
have been disturbed to a lesser degree than those in the western Mojave Desert planning
area, we conclude that all of the critical habitat units within the action area are capable
of supporting their conservation role and function. We acknowledge that the critical
habitat units and [DWMAs] do not overlap completely; however, this information
comprises the best available data with regard to surface disturbance in the planning area.
At this level of disturbance, we anticipate that the critical habitat units should function

⁴⁷ The NECO Plan area includes two designated desert tortoise critical habitat units, the Chuckwalla Critical Habitat Unit (1,202,600 acres) and the Chemehuevi Critical Habitat Unit (937,000 acres). NBO 12585. The WEMO Plan area includes four designated critical habitat units: Superior-Cronese (766,900 acres), Ord-Rodman (253,000 acres), Fremont-Kramer (518,000 acres), and Pinto Mountains (171,700 acres). WBO 14834.

1 fully to support the conservation of the desert tortoise.

2 WBO 14814-14815; NBO 12610-12611 (similar discussion about NECO Plan); *see also* WBO 14798-
3 14800, 14810-14813; NBO 12581-12583, 12594-12609.

4 FWS then analyzed the likely effects of the BLM's proposed action on desert tortoise critical
5 habitat. FWS found that certain adverse impacts to portions of the habitat would continue, but that a
6 number of adverse impacts would be lessened and/or removed. Specifically, FWS found that the BLM's
7 plans significantly reduce the extent of cattle grazing within critical habitat, designate routes and reduce
8 the overall route network, reduce the areas where OHVs can stop, park and camp within DWMAs,
9 remove and reduce the amount of burros within critical habitat, and limit future cumulative ground
10 disturbance in DWMAs to no more than one percent. WBO 14882-14884; NBO 12704-12707.⁴⁸ Based
11 upon these findings, FWS concluded that the plan amendments would not destroy or adversely modify
12 the desert tortoise critical habitat:

13 In summary, the California Desert Conservation Area Plan, as amended by the West
14 Mojave Plan, provides guidance, including the requirement to consider the needs of
15 listed species, sufficient to ensure the conservation role and function of critical habitat
16 of the desert tortoise in the Western Mojave Recovery Unit. Additionally, the specific
17 actions that were adopted by the Bureau are highly protective of critical habitat. The
18 best data available seem to indicate that the few exceptions to this statement, such as
19 permitting vehicles to stop and camp off of routes, are not likely to have severe adverse
20 effects on the overall function of affected critical habitat units; in these cases, the scale
21 of the impact is minor in comparison with the area of critical habitat. Although recent
22 declines in the numbers of desert tortoises in several regions of the desert prompt
23 concern, we have not been able to attribute those declines in a definitive manner to
24 changes in the condition of desert tortoise habitat.

25 Any consideration of the effects of an action on a species must consider the scale of
26 those effects; that is, how much of the species' range would be degraded or enhanced by
27 the proposed action. The range, recovery units, and critical habitat units of the desert
28 tortoise encompass vast areas. The scale of the California Desert Conservation Area
Plan is also vast. Its goal is to provide for the use of public lands and resources in a
manner that enhances, where possible, and does not diminish, on balance, the
environmental, cultural, and aesthetic values of the desert and its productivity (Bureau
1999). The immensity of the range and the large amount of critical habitat assist in
achieving this balance. Although the Bureau has authorized many projects under the
guidance of the California Desert Conservation Plan, large expanses of habitat, including
most critical habitat of the desert tortoise, remain undisturbed by the Bureau's

26 ⁴⁸ The WEMO and NECO Plans contain the same general proposed actions, such as the
27 designation of DWMAs and the one percent cap on cumulative ground disturbance in DWMAs. There
28 are some differences. For example, in WEMO the distance that cars and trucks can drive and park from
a route of travel would be reduced from 300 feet to 50 feet in large portions of critical habitat, WBO
14883, while in NECO that distance is reduced from 300 feet to 100 feet. NBO 12706.

1 management actions. In our analysis, we place particular emphasis on the Bureau's
2 commitment to ensure that no more than one percent of land within the desert wildlife
3 management areas under its management will be disturbed by future actions; this
measure should ensure that the conservation role and function of critical habitat of the
desert tortoise are maintained.

4 WBO 14884; NBO 12706-12707 (virtually identical statement about NEMO and NECO).

5
6 **1. "Conflict" with Recovery Plan**

7 Plaintiffs first challenge the "no adverse modification" finding on the ground that it conflicts
8 with earlier statements made by FWS in the critical habitat designation and the desert tortoise Recovery
9 Plan. Plaintiffs emphasize that the Recovery Plan's "Priority 1" recommendations for ensuring the
10 tortoise's survival and eventual recovery include a total prohibition of activities in critical habitat that
11 are "generally incompatible with desert tortoise recovery," including "all vehicle activity off designated
12 roads[,] domestic cattle grazing," and "any other surface disturbance that diminishes the capacity of the
13 land to support desert tortoises, other wildlife, and native vegetation." NBO 616, 623, 629. Plaintiffs
14 argue that based on these statements, OHV use and grazing should be completely prohibited in critical
15 habitat because they are likely to cause adverse modification. Plaintiffs argue that FWS "did not explain
16 how these activities would promote recovery," and thus that FWS's conclusions are arbitrary and
17 capricious.

18 Defendants respond that there is no conflict between FWS's adverse modification analyses and
19 statements made in the critical habitat designation or the Recovery Plan, and that while FWS recognized
20 that there would be continued adverse impacts from OHV use and grazing, those impacts would be
21 lessened under the WEMO and NECO Plans. Defendants argue that the general recommendations in
22 the Recovery Plan do not supplant the detailed and specific analyses in the BiOps, and that FWS's
23 extensive analyses of the plan amendments' impact on desert tortoise critical habitat explicitly took into
24 account the Recovery Plan.

25 The Court agrees with defendants that plaintiffs have failed to show that FWS's analyses or
26 conclusions about critical habitat are arbitrary and capricious. Plaintiffs ignore FWS's detailed
27 assessments of the specific plan amendments, and explanations of why those amendments generally
28 improved conditions for desert tortoises and their critical habitat. *See, e.g.*, WBO 14834, 14844, 14847,

1 14851, 14856, 14858-14870, 14872, 14876, 14880, 14882. Contrary to plaintiffs’ assertions, FWS did
2 not ignore the Recovery Plan, but instead explicitly considered that plan in conjunction with the
3 jeopardy and adverse modification analyses. *See* WBO 14789-14792, 14796-14797, 14799-14800,
4 14806-14810, 14834, 14843, 14880, 14882, 14886-87; NBO 12554, 12576-12580, 12583-12584, 12587,
5 12590-12592, 12594, 12639-12640, 12666-12667, 12678. Moreover, the record shows that FWS
6 considered how critical habitat within each recovery unit would be impacted. *See generally id.*

7 Relatedly, plaintiffs assert that FWS overlooked significant adverse impacts in order to reach
8 the “no adverse modification” conclusion. Plaintiffs argue that FWS “largely ignored” the life cycle
9 and migration needs of the tortoise, and that FWS failed to adequately consider impacts that
10 disproportionately affect juveniles, such as raven predation. However, the record shows that FWS
11 considered these factors. *See, e.g.,* WBO 14786-14788, 14797; NBO 12573-12575, 12580 (life cycles
12 and migration needs); *see also* WBO 14834-14841, 14882-14884, NBO 12666-12667, 12687-12692,
13 12704-12707 (discussing the BLM’s proposals to set aside majority of desert tortoise critical habitat for
14 conservation-based management); WBO 14825 (stating that in proposed ACECs, the BLM’s general
15 management strategy includes a program to reduce predation by ravens on the desert tortoise); NBO
16 12668 (same) . Plaintiffs have not shown that FWS ignored adverse impacts; they just disagree with
17 FWS’s conclusions.

18 Plaintiffs also argue that FWS improperly diluted the adverse effects of the proposed plans by
19 analyzing the scale of those effects in light of the “vast areas” of the critical habitat units. Plaintiffs rely
20 on *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1075 (9th Cir. 2004),
21 which cautioned that “[f]ocusing solely on a vast scale can mask multiple site-specific impacts that,
22 when aggregated, do pose a significant risk to a species.” However, the *Gifford Pinchot* court found
23 that, in fact, FWS had properly considered local impacts:

24 After a careful review of the record, we conclude that the FWS is correct. The BiOps
25 considered the important local effects, analyzing critical habitat more broadly when
26 individual effects were not important. Appellants do not show that material local effects
27 were missed, but merely point out that large scale analysis can pose a risk of masking.
28 The possibility of risk alone here does not mean that the agency’s decision-making was
arbitrary and capricious, an abuse of discretion, or contrary to law. Without evidence
in the record supporting that some localized risk was improperly hidden by use of large
scale analysis, we will not second-guess the FWS.

1 *Id.* Similarly, although the critical habitat here is “vast,” the record shows that FWS considered
2 important local effects. *See, e.g.,* WBO 14874 (addressing BLM’s proposal to designate 15 miles of
3 new open routes and approximately 20 miles of open routes as competition routes adjacent to Spangler
4 Hills Off-highway Vehicle Management Area), 14883 (discussing impact of maintaining a corridor for
5 competitive events along Johnson Valley-to-Parker route). Plaintiffs have not identified any localized
6 risk that was “improperly hidden by use of large scale analysis,” and instead simply disagree with
7 FWS’s assessment of those risks. As in *Gifford Pinchot*, this Court “will not second-guess the FWS.”
8 378 F.3d at 1075.

9 10 **2. Effects to critical habitat outside DWMA**

11 Plaintiffs next assert that FWS improperly focused its analysis of effects to critical habitat in the
12 DWMA and largely ignored critical habitat outside of DWMA. Plaintiffs note that over 215,000 acres
13 of critical habitat remain outside DWMA in the NECO (NBO 12600, 12603), and approximately
14 18,000 acres of critical habitat remain outside DWMA in the WEMO (WBO 14834-14835), and they
15 emphasize that critical habitat outside of DWMA is subject to less protection.

16 A review of the BiOps, including the portions cited by plaintiffs, refutes plaintiffs’ argument that
17 FWS overlooked critical habitat outside of the DWMA. In the WEMO BiOp, FWS analyzed the
18 location, status and effects to the critical habitat outside of the DWMA. For example, FWS discussed
19 9,678 acres of the Ord-Rodman critical habitat unit that were not included in a DWMA:

20 [T]hese lands lie within the northern portion of the Johnson Valley Off-highway
21 Vehicle Management Area. In this situation, the Service used section lines to draw the
22 boundaries of the critical habitat unit; however, the Bureau had previously established
23 the boundary of the off-highway vehicle management area along an unpaved road, which
24 provides a much more well-defined boundary than section lines. The 9.678 acres are
25 located in numerous parcels along approximately 16 miles of the boundary. The primary
26 constituent elements on at least some of these parcels, particularly along the western
27 portion of the boundary, were degraded prior to the designation of critical habitat. Given
28 the location of the critical habitat that was excluded from the desert wildlife management
area (i.e., at its edge) and the degraded condition of the primary constituent elements in
at least a portion of the unit, its exclusion from the desert wildlife management area will
not affect the conservation role and function of the Ord-Rodman Critical Habitat Unit.

WBO 14234. Plaintiffs challenge the above-quoted passage by asserting that FWS “speculat[es]
(without any citation or reference) that some areas ‘were degraded prior to the designation of critical

1 habitat’ and noting that in other areas there *remains* ‘less disturbed’ habitat because ‘the level of off-
2 road vehicle use is lower.’” Rev. Reply at 19:6-8. However, there is no requirement that FWS provide
3 citations or references for its statements that certain areas were degraded and others less disturbed, and
4 the case law is clear that courts should not fly-speck a BiOp for this level of detail.

5 FWS also addressed other critical habitat areas located outside DWMAs in WEMO. *See* WBO
6 14834-14836 (discussions of critical habitat outside DWMAs in Fremont-Kramer, Superior-Cronese,
7 and Pinto Mountain critical habitat units). FWS concluded that disturbance within critical habitat,
8 including those portions located outside DWMAs, was not likely to exceed the one percent limit on
9 cumulative future ground disturbance:

10 We note that the one percent limit is tied to the size of the desert wildlife management
11 area but not to the critical habitat unit. For this reason and because we do not know
12 where future actions may occur, we cannot, with absolute certainty, state that only one
13 percent of the critical habitat unit will be affected. We expect, however, that project
14 impacts within the portions of the Superior-Cronese, Fremont-Kramer, Ord-Rodman, and
15 Pinto Mountain critical habitat units managed by the Bureau will not exceed the one
16 percent limit for several reasons. First, given the past history of the area, most actions
17 will be relatively small in scale and will be spread across the critical habitat units.
Second, the large degree of overlap between the desert wildlife management areas and
critical habitat should ensure that many actions would not be concentrated within critical
habitat but outside of the desert wildlife management areas. Finally, at least some
projects will likely occur within the desert wildlife management areas but outside of
critical habitat. Consequently, we conclude that the one percent limit on cumulative
ground disturbance within desert wildlife management areas is also likely to confer a
high degree of protection to critical habitat.

18 WBO 14836. As these portions of the BiOps demonstrate, FWS did not ignore or overlook critical
19 habitat outside the DWMAs.

20 The NEMO BiOp contains a similar level of detail in its discussion of critical habitat located
21 outside of DWMAs. *See e.g.*, NBO 12600-12601 (Chemehuevi critical habitat unit), 12603-12604
22 (Chuckwalla critical habitat unit), 12704-12707 (summarizing effects of plan on critical habitat located
23 within and outside DWMAs). FWS explained why BLM did not include particular areas of critical
24 habitat within DWMAs. *See e.g.*, NBO 12600 (“In the northwest corner of the critical habitat unit, in
25 the upper Cadi Valley, the Bureau did not include an area with a checker-boarded land ownership”).
26 In a number of instances, the non-DWMA critical habitat is located within Joshua Tree National Park,
27 conservation areas, wilderness areas, and other areas that receive increased protection. *See, e.g.*, NBO
28 12600 (15,843 acres of non-DWMA critical habitat in Chemehuevi critical habitat unit are included in

wilderness “which provides the highest level of protection afforded any land use class” in the CDCA, and 5,615 acres are located in multi-species wildlife habitat management area “which provides a level of protection somewhat greater than Class M lands”), 12687 (“The amount of critical habitat captured within [BLM’s] Chuckwalla [DWMA], when combined with additional critical habitat within Joshua Tree National Park and the Chocolate Mountains Aerial Gunnery Range, will promote the conservation role and function of Chuckwalla Critical Habitat Unit.”); *see also* NBO 11892, 12501, 12738 (maps of NECO and NEMO planning areas showing non-DWMA critical habitat located within other protected areas such as Joshua Tree National Park and wilderness areas).

3. OHV use

Plaintiffs contend that FWS improperly found that there was no adverse modification of critical habitat unless there was complete extirpation of that habitat. For example, plaintiffs cite FWS’s statements that “[w]e are unaware of any research that conclusively shows the density at which roads would be likely to extirpate desert tortoises from a region.” WBO 14817; NBO 12613. However, that statement is contained within a broader assessment of the state of existing scientific knowledge on the effects of roads on desert tortoises, *see* WBO 14816-14818; NBO 12613-12614, and is it not an articulation of the standard that FWS applied in analyzing whether the WEMO or NECO Plans adversely modified desert tortoise critical habitat. In the same paragraph containing the sentence quoted by plaintiffs, FWS also noted, *inter alia*, that “[i]ntuitively fewer desert tortoises are likely to be killed if fewer roads are available for travel.” WBO 14817.

Plaintiffs also contend that FWS minimized the negative impacts on critical habitat from OHV use, and again argue that FWS’s findings are inconsistent with the Recovery Plan. However, the Recovery Plan recommended that “all vehicle activity off of designated roads” or routes should be prohibited. NBO 616. Here, the plan amendments largely limit OHV use to designated routes. Where the BLM did authorize OHV use off of designated routes (for stopping, parking and camping), FWS analyzed the impacts of that use as it affected the conservation role and function of critical habitat, as well as the survival and recovery of the desert tortoise. *See, e.g.*, WBO 14874 (noting that proposed amendment would reduce the amount of existing open routes in subregions that overlap critical habitat

1 from 4,062 to 2,475 miles),14876-14878; NBO 12655, 12658, 12672-12673, 12682-12686, 12696,
2 12698, 12700.⁴⁹ Plaintiffs rely on *ONDA* for the proposition that OHV use on existing routes and en
3 route to camping sites significantly impacts the land, and they suggest therefore that any OHV use must
4 result in adverse modification of desert tortoise critical habitat. However, *ONDA* did not address OHV
5 use within an ESA and adverse modification context, and did not suggest that OHV use *per se* results
6 in adverse modification. Here, the BiOps demonstrate that FWS analyzed the likely effects of OHV use
7 and camping on critical habitat. *See e.g.*, WBO 14874 (noting that proposed amendment would reduce
8 the amount of existing open routes in subregions that overlap critical habitat from 4,062 to 2,475
9 miles),14876-14878; NBO 12655, 12658, 12672-12673, 12682-12686, 12696, 12698, 12700.

10 Similarly, FWS analyzed the impacts of the BLM’s designation of certain routes as open on
11 critical habitat. *See, e.g.*, WBO 14874 (“[F]or several subregions, a proportionately higher number of
12 route closures are in areas characterized by bajada topography. Conversely, a proportionately higher
13 number of routes were designated as open in more mountainous terrain. Desert tortoises are generally
14 more abundant on bajadas and valleys than in mountains areas; also, instances of authorized and
15 unauthorized off-road travel would likely occur less frequently in mountainous terrain.”).⁵⁰

16 Plaintiffs next assert that FWS arbitrarily and incorrectly found that OHV use of washes in the
17 Chemehuevi critical habitat unit in NECO is low, thus masking the extent of the adverse effects from
18 OHV use in that area. Plaintiffs note that FWS observed that washes in the NECO planning area are
19 “wide, flat, sandy, relatively free of rocks, and lined with tall trees [and that] [t]hese features are
20 attractive to recreational users,” NBO 12605, and that FWS recognized that “any wash that can support
21 a vehicle within large acreages is open to use.” NBO 12683. However, the fact that FWS recognized
22 a theoretical negative impact does not render FWS’s specific analysis arbitrary. Indeed, as FWS found
23

24 ⁴⁹ Plaintiffs also argue that FWS relied on uncertain future improvements to critical habitat,
25 primarily route closures, that FWS “admits may not occur” due to funding contingencies. Rev. Reply
26 at 14:9. Plaintiffs cite WBO 14920, in which FWS discusses route closures in the context of Lane
27 Mountain milk-vetch habitat; plaintiffs raised the identical challenge in conjunction with FWS’s no
jeopardy finding for the LMMV, and the Court addresses this argument *infra* in its review of that
finding.

28 ⁵⁰ Statements such as these show that, contrary to plaintiffs’ assertions, FWS did consider the
location of routes in making its evaluation of the impacts to the desert tortoise and critical habitat.

1 in assessing OHV use of washes in NECO:

2 Obviously, the potential exists that desert tortoises in an open wash zone are at a much
3 higher degree of risk of being struck by a vehicle than those in an area where only a few
4 specific washes are available for use. . . . In this case, we know desert tortoises reside in
the Chemehuevi and Chuckwalla desert wildlife management areas. We will next
evaluate the level of vehicle use that the open wash zones receive.

5 The final environmental impact statement for the Northern and Eastern Colorado Desert
6 Coordinated Management Plan notes that washes in the open zone provide motorized
7 vehicle access for hunting, sight-seeing, nature study and camping (Bureau and
8 California Department of Fish and Game 2002, page 3-56). The final environmental
9 impact statement continues to describe the level of use of the washes as generally low,
10 based on information provided by members of Desert Wildlife Unlimited; the Bureau
11 notes that "very little cross-country travel occurs due to the extensive nature of existing
12 roads, trails, and washes." The Bureau provides some quantification of the level of use;
13 compared to other popular recreational areas in the California Desert Conservation Area,
such as the Imperial Sand Dunes and Dumont Dunes, the numbers provided by the
Bureau seem to indicate a low degree of use. Clearly, as we stated previously in this
discussion, the number of desert tortoises that could be killed by vehicular use in open
wash zones is a function of the level of use and type of use. A high volume of traffic
would result in more desert tortoises being struck by vehicles; vehicles that are traveling
faster, such as motorcycles, may also strike more desert tortoises. We conclude that the
level of vehicle use in the open wash zones is generally low and that it generally consists
of recreationists whose primary activity is not based on speed.

14 NBO 12683. Plaintiffs criticize FWS for extrapolating the information about OHV use of certain
15 washes in NECO to OHV use of open washes in NECO more generally. However, FWS
16 "acknowledge[d] that the information available in the final environmental impact statement for the
17 [NECO] is not comprehensive. It is, however, the only published documentation of the level of use that
18 was available to us. Any attempt to gather new information on the level of vehicle use in the open wash
19 zones will require years to gain a comprehensive view of use over such a large area; consequently, we
20 could not obtain this information during the course of this consultation." NBO 12683-12684. Thus,
21 contrary to plaintiffs' arguments, FWS did explain how it reached its conclusion that OHV use of the
22 washes was low, and why that use would not adversely modify desert tortoise critical habitat.

23 Plaintiffs also contend that FWS did not appropriately consider the extent to which OHV use
24 fragments critical habitat. FWS found that while major highways constitute a barrier to movement,
25 "[u]npaved roads that are used infrequently likely do not pose a threat of fragmentation." WBO 14876.
26 FWS also concluded that "because the disturbance and loss of habitat would likely occur through the
27 implementation of numerous actions, separated through the desert wildlife management area by distance
28 and over time, we do not anticipate that habitat is likely to be fragmented to the extent that the function

1 and conservation role of the critical habitat unit as a whole is compromised.” WBO 14836. Similarly,
2 plaintiffs take issue with FWS’s treatment of the impact of “road maintenance” on critical habitat.
3 While plaintiffs argue that FWS’s analysis is flawed, plaintiffs do not cite to any evidence in the record
4 that renders FWS’s findings arbitrary or capricious. *See Greenpeace Action v. Franklin*, 14 F.3d 1324,
5 1336 (9th Cir. 1992) (disagreement with agency’s analysis “is not a sufficient basis for [the court] to
6 conclude that the [agency’s] action was arbitrary and capricious.”).

7 Plaintiffs also assert that FWS did not consider the likely increase in OHV use when assessing
8 impacts. As support, plaintiffs rely on statements from the FEIS in which the BLM discusses the great
9 interest in and demand for OHV recreational opportunities. However, there is nothing inconsistent
10 about the BLM’s general statement that the public is increasingly interested in OHV recreation, and
11 FWS’s conclusions in the BiOps based upon the information assessed that impacts from OHV use will
12 be lessened as a result of route designations and closures. Somewhat relatedly, plaintiffs also assert that
13 FWS “knew that the number and amount of routes that remained on the ground and would continue to
14 be used in critical habitat was not likely to decrease simply because of the adoption of the plans,” and
15 they quote this sentence from the WEMO BiOp: “Realistically, however, the route network in the
16 western Mojave Desert at the current time consists of any route that shows evidence of prior use.”
17 WBO 14875. However, plaintiffs’ selective quotation is misleading, as a full reading of the quoted
18 paragraph demonstrates:

19 Finally, we note that the proposed action establishes a network of roads that is more
20 extensive than those proposed by the 1985-97 inventory and the interim network that
21 resulted from the settlement agreement with the Center for Biological Diversity.
22 *Realistically, however, the route network in the western Mojave Desert at the current*
23 *time consists of any route that shows evidence of prior use.* The proposed alternative
24 would allow vehicle use only on routes marked as open. Clearly, establishing a well-
25 defined system of marked routes would reduce the density of routes and thereby reduce
26 mortality of desert tortoises.

27 WBO 14875 (quoted sentence emphasized).

28 4. Grazing

Plaintiffs also contend FWS overlooked and minimized the negative impact of grazing on desert
tortoise critical habitat. Plaintiffs assert that FWS’s recognition that livestock grazing “will continue”

1 to adversely affect critical habitat by reducing tortoises' forage and shelter, crushing tortoise burrows,
2 and rendering critical habitat more prone to wildfire, is inconsistent with FWS's conclusion that the
3 grazing permitted under the WEMO and NECO Plans would not adversely modify desert tortoise critical
4 habitat.

5 However, a review of the BiOps shows that FWS conducted a detailed and extensive analysis
6 of livestock grazing and its impacts, and that the "no adverse modification" conclusion is supported by
7 the record. In the WEMO BiOp, FWS noted that within the 1,670,479 acres of critical habitat within
8 the action area, grazing is authorized only on 110,000 acres:

9 Most of this acreage is located within the Ord Mountain Allotment. The remaining areas
10 of critical habitat that would continue to be grazed are relatively small parcels that are
11 located at the edges of critical habitat units. These parcels, in total, cover approximately
12 8,000 acres.

13 We conclude that the grazing program proposed by the Bureau is not likely to
14 compromise the conservation role and function of critical habitat of desert tortoise in the
15 action area. We have reached this conclusion because grazing would occur on
16 approximately 110,000 acres of critical habitat. At least portions of the grazed areas are
17 located at elevations where some of the primary constituent elements of critical habitat
18 are not found naturally. Most of the critical habitat within the planning area, which
19 totals approximately 1,670,479 acres (Service 2005g), would not be grazed.
20 Additionally, the intensity at which the Bureau proposes to allow grazing within critical
21 habitat should reduce, to some degree, the adverse effects of grazing on the primary
22 constituent elements.

23 WBO 14873. The last sentence refers to the BLM's management prescriptions for the Ord-Mountain
24 allotment, which require the exclusion of cattle from 34,185 acres between March 15 to June 15 of each
25 year, when forage levels fall below 230 pounds per acre. WBO 14864.

26 The NECO BiOp contains similar analyses and conclusions about grazing and the impact on
27 desert tortoise habitat. In the NECO, cattle grazing is only permitted within the Lazy Daisy allotment,
28 which is contained within the Chemehuevi DWMA. NBO12693-12695. As in the WEMO BiOp, FWS
found that the removal of cattle from desert wildlife management areas when ephemeral forage
production is less than 230 pounds per acre from March 15 through June 15 "should, to some degree,
protect the primary constituent elements of critical habitat related to the availability of food." NBO
12693. FWS recognized, however, that continuing grazing at "even these lower levels may prevent
desert tortoises from acquiring enough nutrition in good years to survive through times that provide
fewer resources." *Id.* However, FWS explained that "[t]he overall effect of an action on the primary

1 constituent elements of critical habitat . . . is a combination of the intensity and scale of the effect.”
2 NBO 12694. FWS evaluated the scale of the impact of cattle grazing on the primary constituent
3 elements within the Chemehuevi Critical Habitat Unit, and found: (1) utilization data from the Lazy
4 Daisy allotment showed that utilization was in the 0 to 10 percent range, which was characterized as
5 “none to slight” and that utilization levels were expected to continue to be low; (2) “all health standards
6 were being met” in the allotment; (3) the BLM removed approximately 21,600 acres of high quality
7 desert tortoise habitat from the Lazy Daisy allotment; (4) “some amount of grazing within the allotment
8 occurs either outside of the boundaries of the desert wildlife management area and critical habitat or
9 inside at elevations that generally do not support desert tortoise habitat”; and (5) that the BLM had taken
10 steps that reduced grazing from past levels. NBO 12695. “For these reasons, we conclude that the
11 intensity of grazing on the Lazy Daisy Allotment is low and that management of grazing within the
12 northern and eastern Colorado Desert planning area is compatible with the function and conservation
13 role of the Chemehuevi Critical Habitat Unit. *Id.*

14 Plaintiffs also contend that FWS failed to assess the aggregate effects from all activities
15 authorized by the plans, such as areas where tortoises are subject to both grazing and OHV use within
16 critical habitat. Again, however, plaintiffs ignore the actual language and analysis contained in the
17 BiOps, which show that FWS evaluated the degree to which impacts in the aggregate would affect
18 critical habitat. *See* WBO 14882-14884; NBO 12704-12707.

19 20 **5. Best available scientific data**

21 Plaintiffs contend that FWS failed to use the best scientific and commercial data in reaching its
22 conclusions in the BiOps. To a large extent, plaintiffs’ arguments simply repeat and repackage the
23 assertions discussed above regarding FWS’s consideration of impacts to critical habitat. For example,
24 plaintiffs contend that FWS ignored impacts to critical habitat when there was no conclusive proof that
25 they would cause complete extirpation of tortoises in the area, and that “nothing in the ESA requires that
26 each threat be quantified before it can be taken into account.” Rev. MSJ at 18. For the reasons stated
27 above, these assertions mischaracterize the BiOps and lack merit because FWS did not ignore impacts
28 to critical habitat, and did not require “conclusive proof” of complete extirpation when formulating its

1 jeopardy and adverse modification findings.

2 Citing WBO 14817-18, plaintiffs also generally criticize FWS “for dismissing or ignoring
3 findings in other studies.” Plaintiffs’ motion does not specify which studies plaintiffs contend FWS
4 dismissed or ignored, nor do plaintiffs advance any argument as to why FWS’s analysis was
5 unsupported or arbitrary. The Court assumes that at least one study to which plaintiffs are referring is
6 the Hoff and Marlow (2002) study discussed on WBO 14817-14818 (study found at WBO 4717-4724)
7 regarding road density and desert tortoise mortality. FWS’s discussion of this study is detailed, and
8 FWS explains why it decided not to extrapolate certain information from the study. WBO 14817.
9 Further, as a review of the BiOp demonstrates, FWS did not entirely dismiss or ignore that study.
10 Plaintiffs have failed to show anything arbitrary or capricious about FWS’s assessment of this study.

11 Plaintiffs also contend that FWS should have considered certain studies discussing the
12 deleterious effects of grazing and OHV use. For example, plaintiffs argue that FWS ignored a study
13 (Bury and Luckenbach (2002)) finding “current data suggest that the operation of ORVs in the western
14 Mojave Desert results in major reductions in habitat and tortoise numbers, and possibly the body mass
15 of surviving tortoises” and that studies “suggest both direct and sublethal effects on tortoises from
16 operation of ORVs in their habitats. Such effects occur in areas with low to moderate ORV activities,
17 which occupy large portions of the Mojave Desert.” WSupp 465, 469 (Bury and Luckenbach study).
18 Defendants argue that this study was not relevant to FWS’s analysis of the WEMO and NECO planning
19 areas because the study compared the effects of OHV use in open areas – i.e, areas similar to the
20 Imperial Sand Dunes Recreation Area, where OHVs are for the most part permitted to go anywhere at
21 any time – with areas closed to OHV use. In WEMO and NECO, in contrast, OHV use is materially
22 different because such use is limited to a designated route network and navigable washes. Plaintiffs do
23 not respond to this argument, nor do plaintiffs articulate why FWS was required to extrapolate the
24 findings of the Bury and Luckenbach study to its analyses of the WEMO and NECO planning areas,
25 particularly given the extensive discussions in both BiOps about the effects of OHV use.

26 Plaintiffs seek judicial notice of three scientific studies that they contend FWS should have
27 considered in its assessment of the WEMO and NECO Plans. *See* Docket No. 122, Ex. 3 (Jennings
28 (2002)); Ex. 4 (Ofstedal *et al.* (2002)); Ex. 5 (Heaton (2007)). Defendants object to the Court taking

1 judicial notice of studies outside the administrative record, while plaintiffs assert that these documents
2 assist the Court in determining whether FWS considered all relevant factors.⁵¹ The Court will consider
3 the Jennings and Oftedal studies for that limited purpose.⁵² The Jennings and Oftedal studies pertain
4 to the effects of grazing on desert tortoise forage. As the administrative record shows, FWS extensively
5 considered these issues in the BiOps. *See, e.g.*, WBO 14787 (desert tortoise diet), 14849-14882 (impact
6 of livestock grazing on desert tortoise and critical habitat); NBO 12574 (desert tortoise diet), 12640-
7 12646 (impact of livestock grazing on desert tortoise and critical habitat). As with the Hoff & Marlow
8 study discussed *supra*, plaintiffs do not advance any particular arguments about *why* FWS should have
9 reviewed these particular studies in connection with the consultation. Given the extensive discussions
10 of livestock grazing and the impacts on desert tortoises and their critical habitat, the Court does not find
11 anything arbitrary or capricious about FWS's decision not to consider these studies.

12 13 **C. The Incidental Take Statements for the desert tortoise**

14 Under Section 7 of the ESA, FWS is required to specify whether any "incidental taking" of
15 protected species will occur as a result of the agency action. *See* 16 U.S.C. § 1536(b)(4). "Take" is
16 defined to include harming, harassing, trapping, pursuing, collecting, shooting, capturing, wounding,
17 or killing a protected species. *See id.* at § 1532(19). If FWS determines that an incidental taking will
18 result, FWS must prepare an ITS which identifies areas where members of the protected species are at
19 risk. Any taking which is subject to an ITS, and in compliance with the terms and conditions of the
20 statement, is not a prohibited taking under the ESA. *See* 16 U.S.C. § 1536(o)(2). As relevant here, the

21
22 ⁵¹ Defendants do not object to the Court taking judicial notice of Exhibits 1 and 2 to the Request
23 for Judicial Notice because those documents are in fact part of the administrative record. Accordingly,
the Court GRANTS plaintiffs' request as to these documents.

24 ⁵² The Heaton study (2007) post-dates the BiOps at issue here, and thus could not have been
25 considered by FWS when preparing the BiOps. The Heaton study discusses FWS's 2005 distance
26 sampling effort, which collected data on perceived threats to the desert tortoise. Docket No. 122 Ex.
27 5. The Executive Summary of the Heaton study states that FWS's 2005 Distance Sampling effort
28 collected data on "exotic vegetation species, information on different dirt road types, trash, ravens, and
canids. These data represent the most comprehensive attempt to date to produce a spatial inventory of
these perceived threats to desert tortoises. This report provides a first-cut summary of the spatial
distribution of these threats using simple spatial interpolation methods." *Id.* at 2. Not only did the
Heaton study post-date the BiOps, but plaintiffs have not identified any findings in that study that would
have altered FWS's analysis.

ITS must specify (1) the amount or extent of such incidental taking on the species; (2) the reasonable and prudent measures necessary to minimize such impacts; and (3) the terms and conditions that must be complied with to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i).

On November 30, 2007, FWS issued revised ITSs for the NECO and WEMO BiOps, which cover livestock grazing, removal of burros, and casual use activities within the action areas that are authorized by the approval of the CDCA Plan, as amended by the NECO and WEMO plans. NSupp ITS 1177, WSupp ITS 1020-21.

Plaintiffs raise four challenges to the amended ITSs. First, plaintiffs contend that FWS was not permitted to amend the ITSs, and instead was required to re-initiate consultation with the BLM and issue new BiOps with the new ITSs. Second, plaintiffs contend that the amended ITSs are invalid because FWS only considered direct take causing tortoise death and disregarded take due to habitat modification and degradation. Third, plaintiffs contend that the numbers of allowable take and re-initiation triggers are irrational. Finally, plaintiffs contend that the ITSs lack “terms and conditions” implementing the reasonable and prudent measures necessary to minimize the impact of authorized take on the desert tortoise.

1. Legality of amendments

FWS amended the ITSs to address this Court’s opinion reviewing the incidental take statement accompanying the BiOps for the Imperial Sand Dunes Recreation Area. *See CBD II*, 422 F. Supp. 2d at 1137-41 (holding invalid an ITS that did not provide specific estimate for take). The amended ITSs state:

We are amending the incidental take statement to clarify our anticipated level of incidental take by providing specific estimates of the level of incidental take that we anticipate is likely to occur, along with our rationale for those specific estimates. . . .

To more specifically determine the number of desert tortoises that are anticipated to be killed or injured by various casual uses, livestock grazing, and removal of burros, we have supplemented the analysis contained in the prior incidental take statement for the biological opinion for the Northern and Eastern Mojave Desert Management Plan and the Northern and Eastern Colorado Desert Coordinated Management Plan with various methodologies and analyses. To aid in determining the level of anticipated incidental take, we used the results of line-distance sampling throughout the range of the desert

1 tortoise to estimate its densities within the action area. The Service published the results
2 of the first 5 years of line-distance sampling after the biological opinion was issued. The
3 information presented in this amendment does not, in any way, alter the conclusions we
4 reached in our biological opinion (Service 2005a); these methodologies and analyses
5 serve to further quantify the number of desert tortoises that we anticipate will be killed
6 or injured as a result of various casual uses, livestock grazing, and removal of burros
7 within the action area. The amount or extent of take from such uses was previously
8 expressed in a more qualitative manner in the biological opinion, and these quantitative
9 assessments fall squarely within the scope of the qualitative analysis contained in the
10 biological opinion. Furthermore, although the line-distance sampling data provided
11 more detailed density information, it did not reveal any new or different effects of the
12 action that may affect the listed species or critical habitat within the action area that
13 would indicate that re-initiation of consultation was required. The inclusion of this
14 information simply associates numerical values with the more qualitative assessment
15 presented in the biological opinion. Therefore, because this amended incidental take
16 statement only serves to clarify our previous analyses in the biological opinion, rather
17 than substantively change or alter the analyses, re-initiation of formal consultation, as
18 described at 50 *Code of Federal Regulation* § 402.16, is not required.

19 NSupp ITS 1175-76.

20 Plaintiffs contend that FWS was not permitted to amend the ITSs, and instead was required to
21 reinitiate consultation and create an entirely new BiOp. As support, plaintiffs rely on *Gifford Pinchot*
22 *Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). In *Gifford Pinchot*, FWS
23 amended several BiOps in a number of substantive ways. The Ninth Circuit held that these amendments
24 were improper.

25 As a general rule, such “updates” are prohibited because they would render the
26 consultation process “meaningless” and would allow the FWS to issue “unsupported
27 Biological Opinions knowing that it could search for evidentiary support if the opinion
28 was later challenged.” *Ariz. Cattle Growers’ Ass’n*, 273 F.3d at 1245. . . . If the data is
new and the new data may affect the jeopardy or critical habitat analysis, then the FWS
was obligated to reinitiate consultation pursuant to 50 C.F.R. § 402.16. If the data was
preexisting, then the FWS is to be faulted for not generating the information in time for
the initial BiOp. Stated another way, the evidence either was old and cumulative, added
to the administrative record to bolster support, or was new data that mandated
reconsideration.

29 *Id.* at 1077. However, under the ESA, an ITS is not part of the jeopardy analysis, but instead provides
30 an exemption from liability under Section 9 of the ESA. *See Arizona Cattle Growers Ass’n v. U.S. Fish*
31 *& Wildlife Serv.*, 273 F.3d 1229, 1239, 1242 (9th Cir. 2001). An ITS is issued after FWS completes its
32 jeopardy analysis. *See* 16 U.S.C. § 1536(b)(4) (“If after consultation under subsection (a)(2) of this
33 section, the Secretary concludes that” the agency action and any incidental taking will not violate the
34 substantive provisions of ESA § 7(a)(2), then “the Secretary shall provide the Federal agency” with an
35 incidental take statement). In *Gifford Pinchot*, the BiOps were substantively amended, thus raising the

possibility that the amendments affected the jeopardy or critical habitat analyses. *Gifford Pinchot*, 378 F.3d 1077. Here, FWS amended the ITSs, not the BiOps, and specifically determined that the previously issued BiOps remained sound. *See* NSupp ITS 1176; WSupp ITS 1019 (concluding that “[t]he information presented in this amendment does not, in any way, alter the conclusions reached in” the NECO or WEMO BiOps). Because FWS concluded that the amendments did not alter the analyses or conclusions contained in the BiOps, FWS was not required to reinitiate consultation with the BLM. *See* 50 C.F.R. § 402.16 (reinitiation required when, *inter alia*, “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,” or “[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion”).

Plaintiffs have not identified any way in which the amendments to the ITSs substantively affect the jeopardy or critical habitat analyses, and instead the essence of their challenge is that FWS is procedurally prohibited from amending an ITS. However, plaintiffs do not cite any authority holding that an amendment to an ITS is unlawful as a matter of law, and the Court declines to so hold. Indeed, the facts of this case demonstrate why there are circumstances when proactive amendment might be necessary, as FWS amended the ITSs because the ITSs shared some of the same deficiencies identified in *CBD II*, 422 F. Supp. 2d at 1137-41.

2. Take due to habitat modification and degradation

Plaintiffs also raise several substantive challenges to the amended ITSs. Plaintiffs contend that FWS disregarded take due to habitat modification and degradation which kills or injures tortoises by impairing essential behaviors such as feeding and sheltering. Plaintiffs argue that the ITSs fail to account for injury that will result from livestock grazing due to collapsed burrows used for sheltering or reduction of native forage critical to tortoise survival. However, both BiOps discuss at length the amount of grazing permitted within the planning areas; the BLM’s management prescriptions governing authorized grazing activities; and the impacts on the species’ habitat. *See* NBO 12544, 12559-12561, 12597, 12602, 12673-76, 12692-12695; WBO 14810-14814, 14848-14871. FWS concluded that authorized grazing is not likely to result in significant habitat degradation such that injury or mortality

1 to desert tortoises is likely to occur. *See id.*

2 Plaintiffs appear to equate any level of negative impacts with a “take” under the ESA. However,
3 for habitat degradation to be considered a take, and therefore provide FWS with the authority to regulate
4 and exempt such a take in an ITS, there must be “significant impairment of the species’ breeding or
5 feeding habits and [proof] that the habitat degradation prevents, or possibly, retards, recovery of the
6 species.” *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1513 (9th Cir. 1994). As set forth
7 in the BiOps, FWS concluded that “[t]he measures proposed by [BLM] should ensure that habitat for
8 the desert tortoise on public lands is not substantially degraded from its current condition.” WBO
9 14859.

10 Plaintiffs also argue that the ITSs also failed to include injury from loss of forage and collapsed
11 burrows due to OHV use in washes. However, FWS did analyze the likely effects of OHV use on desert
12 tortoise habitat, and concluded that “the Bureau’s criteria for allowing vehicular use of a wash speaks
13 directly to the issue of these effects; specifically section 3.9.5 of the final environmental impact
14 statement . . . states that ‘washes can be considered routes of travel only if soil stability is not adversely
15 affected consequent to passage of vehicles.’” NBO12690; *see also id.* (“Vehicular use that does not
16 damage the banks of washes will avoid most burrows and caliche caves. Again, the same passage we
17 quoted in the previous paragraph states that ‘washes can be considered routes of travel only if wash
18 banks are not compromised.’”). Plaintiffs have not shown that FWS’s decision not to include injury
19 from habitat degradation due to grazing or OHV use in washes was arbitrary or capricious.

20 21 **3. Amount or extent of take**

22 An ITS is required to contain measurable guidelines to determine whether incidental take is
23 exceeded. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(4). In the ITSs, FWS estimated that 19
24 desert tortoises per year in WEMO and 32 desert tortoises per year in NECO and NEMO are anticipated
25 to be taken incidental to activities authorized under the plan amendments. WSupp ITS 1033; NSupp
26 ITS 1194. FWS explained in the ITS for WEMO,

27 We arrived at these estimates by considering the interrelationship of factors such as the
28 intensity and frequency of the involved areas, the area over which the activities may
occur, and the estimated density of desert tortoise. For example, an activity of higher

intensity that occurs infrequently in a relatively small area may yield a lower level of estimated incidental take than a less intense activity that occurs constantly over a wide area.

Therefore, we anticipate that 19 desert tortoises per year are likely to be taken, in the form of injury or mortality, as a result of activities described in the Biological Opinion. We consider this number to be within the scope of the “relatively few” desert tortoises we anticipated would be killed or injured in the Biological Opinion, as it represents less than one-tenth of 1 percent of the desert tortoise population estimated to reside within the action area. The loss of these individuals is not likely to appreciably reduce the likelihood of the desert tortoise’s ability to survive and recover.

WSupp 1032-1033; *see also* NSupp ITS 1194. The ITSs also contain “reinitiation triggers,” which are the amount of dead or injured tortoises that indicate when anticipated take levels have been exceeded. If reached, the “reinitiation trigger” invalidates the safe harbor provision of an ITS and reinitiates consultation between the parties. *See Arizona Cattle Growers*, 273 F.3d at 1250 (describing trigger process). For WEMO, reinitiation of consultation is required “if 4 desert tortoises are found dead or injured in any 12-month period,” WSupp ITS 1035. For NECO, reinitiation of consultation is required if six desert tortoises are found dead or injured in any 12-month period, NSupp ITS 1198, and for NEMO, the reinitiation trigger is 3 dead or injured desert tortoises in any 12-month period. *Id.*⁵³

Plaintiffs raise several challenges to FWS’s selection of the numbers of allowable take. Plaintiffs contend that the numerical values bear no rational connection to the biological analysis in the BiOps. Plaintiffs note that FWS staff initially believed that it was impossible to specify a number of take. However, the record reflects that FWS staff developed a methodology for calculating the number of desert tortoises in the action area, and then for estimating anticipated take. *See, e.g.*, WSupp ITS 526-532 (emails from FWS staff discussing process). The amended ITSs describe this methodology in detail:

We estimate the density of desert tortoises within the desert wildlife management areas and critical habitat discussed in the Biological Opinion based on the average of the densities obtained from line-distance sampling conducted in the Western Mojave Recovery Unit over several years between 2001 and 2005 (Service 2006b). The densities of the areas surveyed during the line-distance sampling are highly unlikely to be uniform throughout the desert wildlife management areas and critical habitat within the recovery unit. However, the estimates provided by line-distance sampling comprise

⁵³ The ITSs contain discrepancies between the discussion sections and the terms & conditions regarding the numbers set for the reinitiation triggers. Defendants assert, and plaintiffs do not disagree, that the triggers contained in the terms & conditions are controlling. *See* 16 U.S.C. § 1536(b)(4)(C)(iv) (stating that terms and conditions “must be complied with”).

1 the best available information on the densities of desert tortoises within these vast areas.

2 WSupp ITS 1023.

3 Plaintiffs criticize FWS for the manner in which it estimated densities of desert tortoises outside
4 of desert wildlife management areas and critical habitat in the action area. For those areas, FWS took
5 the DWMA density numbers and multiplied by 0.1. NSupp ITS 1181; WSupp ITS 1023. However, as
6 FWS explained,

7 We do not have extensive data on the density of desert tortoises in these areas; where
8 data do exist (e.g., a Bureau study of desert tortoise density west of Highway 14 between
9 Red Rock Canyon State Park and Highway 178 (Keith et al. 2005); various surveys of
10 the eastern Antelope Valley, Victor Valley, and near the town of Rosamond), they were
11 collected using methods other than line-distance sampling and are not comparable to the
12 numbers obtained through the line-distance sampling conducted from 2001 through
13 2005. We consider areas outside of desert wildlife management areas and critical habitat
14 to support lower densities of desert tortoise based in part on the fact that some of these
15 areas are near the periphery of the range of the desert tortoise and naturally support
16 fewer animals because habitat conditions are not as favorable as within desert wildlife
17 management areas and critical habitat; we also base this condition on the results of
18 various surveys conducted in these areas. In addition, urbanization and recreation likely
19 have suppressed the density of desert tortoises in other areas. In some locations, both
20 of these factors may be responsible for the reduced densities. Our professional opinion
21 is that densities of desert tortoises outside of desert wildlife management areas and
22 critical habitat are well below those within the boundaries of these areas and that
23 estimating such densities at 10 percent of the higher density areas is a reasonable
24 approximation.

25 WSupp ITS 1023. This discussion demonstrates that there is a reasonable scientific basis for FWS's
26 methodology, and that it is all that is required. Moreover, as the Ninth Circuit recently emphasized in
27 *Lands Council*, the law "requires us to defer to an agency's determination in an area involving a high
28 level of technical expertise. We are to be most deferential when the agency is making predictions,
within its area of special expertise, at the frontiers of science." 537 F.3d at 993 (internal citations and
quotations omitted); cf. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336 (9th Cir. 1992) ("When an
agency relies on the analysis and opinion of experts and employs the best evidence available, the fact
that the evidence is 'weak,' and thus not dispositive, does not render the agency's determination
'arbitrary and capricious.'").

29 Plaintiffs also challenge FWS's treatment of juvenile desert tortoises in its estimation
30 methodology. The ITSs state,

31 [T]he estimates provided by line-distance sampling include only adult and sub-adult
32 desert tortoises (Service 2006b). Consequently, we suggest that the number of desert

tortoises is best viewed in the context of a comparison of potential differences between various areas rather than an absolute assessment of population numbers. For example, this methodology may underestimate the number of desert tortoises because individuals smaller than sub-adults are not detected during line-distance sampling. On the other hand, this methodology may overestimate the number of desert tortoises because we did not exclude areas of non-habitat from our calculations. However, we expect that, given the imprecision of survey results, the overall patchiness of the distribution of desert tortoises, and the relatively small amount of non-habitat areas in relation to suitable habitat, the inclusion of the acreage of non-habitat areas and the detection of only adult and sub-adult desert tortoises likely has little overall effect on the final estimations. Although numerous factors contribute to the imprecision of determining the number of desert tortoises in the action area, we consider the line-distance sampling to be the best available scientific information, and have determined that the methodology used in this document is a reasonable approach to estimate desert tortoise densities within the action area.

WSupp ITS 1024-1025. Contrary to plaintiffs' assertions, FWS did not "assum[e] that the take of smaller individuals omitted from the calculations would be roughly offset by FWS' inclusion of areas within critical habitat that may have had lower density of tortoises in the calculation." Rev. MSJ at 22:11-13. Instead, FWS simply recognized that due to the limitations of the line-distance sampling data, the estimates could be inflated in some regards, and lower in others. The recognition of a limitation in the data – which FWS also considers to be the best available scientific information – demonstrates that FWS "consider[ed] an important aspect of the problem," and not that FWS acted in an arbitrary or capricious manner. *Lands Council*, 537 F.3d at 993.

Plaintiffs also challenge the "reinitiation triggers" as arbitrary. Plaintiffs contend that the triggers should have been set lower because of the difficulty in detecting tortoise deaths and assigning a definitive cause of death. Plaintiffs rely on an FWS working paper, which stated that "we are assuming that finding 10 percent of the animals that are killed or injured is a reasonable estimate." WSupp ITS 00780. However, as FWS notes, the working paper was a partial, early draft of the revised ITS, and the statement about a ten percent trigger was made in the context of analyzing grazing activities in marginal habitat with low numbers of desert tortoises. *See id.* The final amended ITSs apply to the detection of desert tortoises throughout the planning areas and thus in areas of both marginal and suitable habitat, and lower and higher densities of desert tortoises. *See* WSupp ITS 1021-1033; NSupp ITS 1178-1194. The ITSs contain detailed explanations of the various factors FWS considered in arriving at the take numbers and reinitiation triggers, and plaintiffs have not shown that FWS "relied on factors which Congress has not intended it to consider, entirely failed to consider an

important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Lands Council*, 537 F.3d at 993 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); see also *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007) (“With regard to the various statements made by the involved agencies’ regional offices during the early stages of consideration, the only “inconsistency” respondents can point to is the fact that the agencies changed their minds-something that, as long as the proper procedures were followed, they were fully entitled to do.”).

Plaintiffs also suggest that the amended ITSs are internally inconsistent because they state both that finding carcasses is problematic due to the presence of numerous scavengers that are likely to find dead desert tortoises soon after they die, WSupp ITS 1021, and also that FWS expects that the cause of any injury or death resulting from grazing or casual use “is likely to be reasonably identifiable.” *Id.* 1035-1036. These statements are not contradictory because there is a difference between locating desert tortoises that have been injured or killed in the planning areas, and identifying the cause of death or injury once a tortoise has been found. See also WSupp ITS 1036 (“For example, desert tortoises that are killed or injured by livestock will show signs of trampling; individuals may also be trapped in cattle guards. Desert tortoises that are killed or injured as a result of casual use activities will most likely be crushed.”).

4. Reasonable and Prudent Measures and Terms and Conditions

Plaintiffs also raise several challenges to the reasonable and prudent measures (“RPMs”) and corresponding terms and conditions (“T&C”) contained in the ITSs. The ESA requires an ITS to specify those RPMs the Secretary deems “necessary or appropriate” to minimize the impact on listed species and set forth T&Cs implementing each RPM. 16 U.S.C. § 1536(b)(4)(C)(ii), (iv).

Plaintiffs first challenge RPM 4 and T&C 4 in the ITS for the NECO Plan. RPM 4 provides: “The Bureau must ensure that the use of the open wash zones in the Northern and Eastern Colorado Desert Planning Area does not result in the take of substantial numbers of desert tortoises.” NSupp ITS 1196. T&C 4, which implements RPM 4, states “The Bureau must develop a monitoring plan that tracks

1 the types and levels of use in, and the effects of that use, within the open wash zones in the Northern
2 and Eastern Colorado Desert Planning Area.” *Id.* at 1197. Plaintiffs argue RPM 4 is deficient because
3 it does not define “substantial numbers,” and FWS provides no explanation of how monitoring alone
4 will minimize the impacts of take from OHV use in open wash zones.

5 Plaintiffs’ challenges lack merit. First, RPM 4’s usage of “substantial numbers” does not render
6 that RPM hopelessly vague, particularly given relative specificity of the ITS as a whole, including the
7 specific take numbers and reinitiation triggers. With regard to T&C 4, plaintiffs concede that
8 monitoring is essential to minimizing take from OHV use in open washes; plaintiffs’ quibble is that
9 there are no additional measures specified to minimize take. However, that is not a basis for setting
10 aside the ITS as invalid. Plaintiffs’ reliance on *CBD II*, 422 F. Supp. 2d at 1140-41, is unavailing. In
11 that case, an RPM directed the BLM to “minimize the potential for incidental take of desert tortoises
12 from recreational use, facility construction, and maintenance activities.” *Id.* at 1140. However, the
13 corresponding T&C only addressed facility construction and maintenance activities, and did not address
14 recreational use. *Id.* Here, T&C 4 implements the corresponding RPM.

15 Plaintiffs next challenge RPM 1 in the WEMO ITS. RPM 1 states “The Bureau must monitor
16 its activities to ensure that the level of incidental take is commensurate with the analysis contained in
17 the Biological Opinion.” WSupp ITS 1034. Plaintiffs argue that because the WEMO BiOp noted that
18 “[c]learly, establishing a well-defined system of marked routes would reduce the density of routes and
19 thereby reduce mortality of desert tortoises,” WBO 14875, FWS was required to devise an RPM that
20 minimized the impact of the authorized route network by, for example, reducing overall route density
21 or closing redundant routes. However, the ESA grants FWS discretion to identify RPMs that it finds
22 “necessary or appropriate,” 16 U.S.C. § 1536(b)(4)(C)(ii), and does not require FWS to specify any
23 particular RPMs. *See Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1074 (9th Cir. 2003) (analyzing
24 similar language in Federal Power Act, and holding that “where Congress has not directly said what
25 ‘necessary or appropriate’ means,” Congress “left the complex policy decision about how far [the
26 agency] should extend its regulatory tentacles up to [the agency] itself.”). Moreover, the RPMs
27 plaintiffs contend should have been included – such as reducing overall route density or closing
28 redundant routes – are not “minor changes [to the proposed action] that do not alter the basic design,

1 location, duration, or timing of the action,” Interagency Cooperation-Endangered Species Act of 1973,
2 as Amended; Final Rule, 51 Fed. Reg.19,937 (June 3, 1986), but rather substantive changes to the
3 BLM’s proposed action. Plaintiffs also criticize T&C 1, which implements RPM 1, because it
4 requires development of a monitoring plan but does not include any timetables of specific requirements
5 for monitoring. However, T&C 1 contains numerous specific details, and is directly tied to
6 implementing RPM 1:

7 The Bureau must develop and implement a monitoring plan to determine the level of
8 incidental take of desert tortoises associated with livestock grazing and casual uses in
9 the action area. The monitoring plan must include a standardized mechanism for Bureau
10 employees, contractors, permittees, and volunteers to report any observations of dead or
11 injured desert tortoises to the Desert District office. The Desert District office must
12 collect information obtained through the monitoring plan to include in the Bureau’s
13 annual report to the Service that is required by this incidental take statement and
14 described in the “Reporting Requirements” section herein. At that time, the Service and
15 the Bureau must review the circumstances surrounding the incident to determine whether
16 any patterns of repeated authorized or unauthorized activities are occurring (e.g., use of
an authorized area for stopping, parking and camping where habitat is being degraded,
development of unauthorized routes or the beginnings of a trash-dumping site, or desert
tortoises are being struck by vehicles in particular portions of routes) that may indicate
that additional protective measures are required. If, after completion of the review, the
Service and Bureau agree that additional protective measures are required and can be
implemented within the existing scope of the action, the Bureau must implement the
agreed-upon measures within a reasonable time frame; if the corrective actions cannot
be implemented within the scope of the existing action, the Bureau and Service will
determine whether re-initiation of consultation is appropriate.

17 WSupp ITS 1035. Plaintiffs have not shown anything arbitrary or capricious about this T&C.

18
19 **D. No jeopardy finding for LMMV**

20 In the January 9, 2006 BiOp, FWS also concluded that the WEMO Plan amendment was not
21 likely to jeopardize the continued existence of the Lane Mountain milk-vetch. WBO 14921.⁵⁴

22 We reached this conclusion for two reasons. First, the general guidance provided by the
23 California Desert Conservation Area Plan and the specific actions contained in the West
24 Mojave Plan will ensure that actions the Bureau takes, funds, and authorizes are not
25 likely to reduce appreciably, either directly or indirectly, the reproduction, numbers, or
26 distribution of Lane Mountain milk-vetch; additionally, we did not detect any cumulative
effects that would substantially alter the status of Lane Mountain milk-vetch in the action
area. Second, the Bureau has proposed and, in some cases, already implemented,
measures to avoid or reduce adverse effects to the Lane Mountain milk-vetch and to
further its conservation. These measures include, but are not limited to:

27
28 ⁵⁴ LMMV is found only within the WEMO Plan area.

- 1 • The establishment of areas of critical environmental concern that will be
2 managed in a manner that will promote the survival and recovery of the species
3 within this portion of its range;
- 4 • The designation of all lands within the area of critical environmental concern as
5 Class L, which will provide increased protection to Lane Mountain milk-vetch
6 over that currently provided by Class M;
- 7 • Removal of livestock grazing from habitat occupied by the Lane Mountain milk-
8 vetch;
- 9 • Acquisition of private lands, which will result in a higher level of protection of
10 Lane Mountain milk-vetch under the guidance of the California Desert
11 Conservation Area Plan;
- 12 • A limit of one percent of new disturbance within the area of critical
13 environmental concern to reduce the loss of Lane Mountain milk-vetch, which
14 will ensure that most individuals and their habitat in areas that are essential to
15 their conservation will not be exposed to the adverse effects of human activities;
16 and
- 17 • The withdrawal of the area of critical environmental concern from mineral
18 location and entry, which has the potential to reduce, to some degree the number
19 of individuals of Lane Mountain milk-vetch that may be destroyed or disturbed
20 during casual use and under future plans of operation.
- 21 • The provision that no activities will be authorized that involve loss of individual
22 Lane Mountain milk-vetch.

23 WBO 14921-14922.

24 Plaintiffs contend that FWS failed to assess the ability of the LMMV to survive and recover in
25 the face of the effects of the WEMO Plan. Plaintiffs argue that FWS's no jeopardy finding was based
26 on an unsupported assumption that route closures will improve conditions. Plaintiffs note that FWS
27 recognized that "administrative designation of a route as closed may be ineffective" until funding is
28 available to "eliminate the road on the ground." WBO 14920. However, plaintiffs ignore the next
portion of that same sentence, where FWS explained that "funding that the Army has committed to
provide to mitigate for the effects of the expansion of Fort Irwin should enable the Bureau to implement
numerous route closure projects." *Id.* Thus, FWS's reliance on route closures was supported. *See Nat'l
Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) (agency may rely on
"clear, definite commitment of resources for future improvements").

Plaintiffs also argue that FWS assumed impacts of dust on LMMV pollinators were "minor"
although no studies had been done. WBO 14919. However, in reaching this conclusion, FWS stated,

1 The legal use of designated routes could negatively affect the Lane Mountain milk-vetch
2 if dust generated by the passage of vehicles impairs the rate of photosynthesis or the
3 effectiveness of pollinators. The U.S. Geological Survey evaluated the effects of dust
4 on Lane Mountain milk-vetch and concluded that, at the current level of use, dust
5 generated by vehicle use of unpaved roads on Coolgardie Mesa does not greatly affect
Lane Mountain milk-vetch (Wijayratne et al. 2005). To date, the effects of dust on
pollinators of Lane Mountain milk-vetch have not been studied; we anticipate that, at the
current level of use, these effects will be minor because Lane Mountain milk-vetch
plants reproduce in close proximity to the routes of travel.

6 WBO 14919. As this discussion demonstrates, FWS had a reasoned basis for its conclusion that the
7 effects of dust will be minor: the U.S. Geological Survey's evaluation, and the fact that LMMV
8 reproduce in close proximity to the routes of travel. There is nothing arbitrary or capricious about the
9 FWS's assessment in this regard. *See Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1120 (9th Cir.
10 2006), *cert. denied*, 127 S. Ct. 2028 (2007) ("Bereft of any contrary science, plaintiffs' bare allegation
11 that the agency's distinction conflicts with the 'best scientific evidence available' fails.").

12 Plaintiffs also argue that the "no jeopardy" decision is flawed because it is based on FWS's
13 assessment of the WEMO Plan's measures to avoid or reduce adverse effects to the LMMV, such as the
14 provision that no permits will be issued for activities that result in the loss of LMMV. Plaintiffs argue
15 that the permitting measure "may have little bearing on whether further loss of LMMV occurs because
16 the WEMO plan authorizes many activities with no permit required, such as continued casual mining
17 and stopping and parking within 50 feet of authorized routes. However, the BiOp states that the
18 disturbance from casual mining is "negligible," WBO 14917, and the WEMO Plan reduces the impact
19 from vehicles stopping and parking by reducing the distance from the centerline of a route from 300 to
20 50 feet. *Id.* at 14920.

21 Next, plaintiffs argue that although more than half of the known occurrences of LMMV are
22 within the Fort Irwin expansion area, FWS failed to examine the impact the potential loss of this habitat
23 will have on survival and recovery. However, the BiOp at issue here – the January 9, 2006 WEMO
24 BiOp – only examined the impact of the West Mojave plan; the Fort Irwin expansion was examined in
25 an entirely different BiOp that is not challenged in this case. The January 9, 2006 BiOp explained, by
26 way of background,

27 Note that the Service issued a biological opinion to the Army on March 15, 2004,
28 regarding the proposed use of additional training lands at Fort Irwin. In the biological
opinion, we concluded that the proposed action was not likely to jeopardize the

1 continued existence of the Lane Mountain milk-vetch. The Army estimated that
2 approximately 11,387 acres of Lane Mountain milk-vetch habitat would occur within
3 Fort Irwin. As a result of the proposed action, approximately 6,789 acres would be
4 placed in conservation areas and a “no dig” zone; this amount comprises approximately
5 58.6 percent of the area within the occurrences. The use of the new training lands would
6 result in the loss of approximately 4,598 acres; this amount comprises approximately
7 21.5 percent of the known habitat for this species.

8 WBO 14915. Thus, to the extent that plaintiffs contend that FWS did not examine the direct impact of
9 the Fort Irwin expansion, that claim is misplaced in this lawsuit.⁵⁵ To the extent that plaintiffs contend
10 that FWS did not account for the impact of the Fort Irwin expansion when setting the environmental
11 baseline of the LMMV in the 2006 BiOp, that contention lacks merit, as the BiOp repeatedly discusses
12 the Fort Irwin expansion and states, *inter alia*, that “Given the area of occupied Lane Mountain milk-
13 vetch habitat that will likely be disturbed by future training activities within Fort Irwin, conservation
14 of the occurrences on public lands is essential.” *Id.* at 14916.

15 Finally, plaintiffs argue that FWS incorrectly stated that the one percent cap on new ground
16 disturbance applied specifically within the West Paradise and Coolgardie Mesa conservation areas.
17 Plaintiffs assert that the one percent cap only applies to DWMAs as a whole, and not to particular
18 subsections of the DWMAs. In the WEMO BiOp, FWS stated that one of the protective measures was
19 “[a] limit of one percent of new disturbance within the area of critical environmental concern to reduce
20 the loss of Lane Mountain milk-vetch , which will ensure that most individuals and their habitat in areas
21 that are essential to their conservation will not be exposed to the adverse effects of human activities.”
22 WBO 14918. Both West Paradise and Coolgardie Mesa lie entirely within the Superior-Cronese
23 DWMA. FWS correctly stated that the one percent threshold for new ground disturbance will apply in
24 these conservation areas. Plaintiffs are parsing FWS’s language – particularly the use of “within” – to
25 argue that FWS’s statement is incorrect. FWS’s statement is susceptible to both interpretations, and
26 given the extensive discussion throughout the BiOp about the one percent cap applying in DWMAs, the
27

28 ⁵⁵ The Fort Irwin expansion is relevant to the 2006 BiOp in that, in connection with the
expansion project, the Army agreed to undertake various mitigation measures outside the expansion area
and in the action area addressed in the 2006 BiOp. *See* WBO 14917 (“As part of the proposed action
for the use of additional training lands at Fort Irwin, the Army committed to providing funds or labor
to close and rehabilitate roads in the Coolgardie Mesa and West Paradise Conservation Areas. Closure
and rehabilitation of unauthorized routes would be an important element in the conservation of the Lane
Mountain milk-vetch.”).


1 Court will assume that FWS meant that the one percent cap applied to these geographic areas by virtue
2 of their inclusion in DWMAs, and not that FWS was stating that the one percent cap applied separately
3 to each ACEC.

4
5 **CONCLUSION**

6 For the foregoing reasons, the Court GRANTS in part and DENIES in part plaintiffs' motion for
7 summary judgment, and GRANTS in part and DENIES in part defendants' motion for summary
8 judgment. (Docket Nos. 159-161). The Court GRANTS summary judgment in favor of plaintiffs on
9 the FLPMA claims, GRANTS summary judgment on some of the NEPA claims in favor of plaintiffs,
10 and GRANTS summary judgment on some of the NEPA claims in favor of defendants, and GRANTS
11 summary judgment in favor of defendants on the ESA claims. **The Court will hold a case**
12 **management conference at 3:00 pm on October 30, 2009 to discuss the remedial phase of this**
13 **litigation.** The parties are directed to meet and confer and to submit a joint case management statement
14 one week prior to the conference setting forth any agreed-upon form of relief, as well as specific
15 proposals on areas of disagreement.

16 **IT IS SO ORDERED.**

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18 Dated: September 28, 2009

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20 SUSAN ILLSTON
21 United States District Judge
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