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11 Public Employees for Environmental Responsibility, and Desert Survivors

12 Additional Counsel Listed on Signature Page

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION

16 CENTER FOR BIOLOGICAL DIVERSITY, )  
17 SIERRA CLUB, PUBLIC EMPLOYEES FOR )  
ENVIRONMENTAL RESPONSIBILITY, )  
18 DESERT SURVIVORS, ALLIANCE FOR )  
RESPONSIBLE RECREATION, THE )  
19 WILDERNESS SOCIETY, FRIENDS OF )  
JUNIPER FLATS, WESTERN SAN )  
20 BERNARDINO COUNTY LANDOWNERS )  
ASSOCIATION, CALIFORNIA )  
21 WILDERNESS COALITION, and )  
22 CALIFORNIA NATIVE PLANT SOCIETY, )

23 Plaintiffs, )

24 v. )

25 U.S. BUREAU OF LAND MANAGEMENT, )  
U.S. FISH AND WILDLIFE SERVICE, and )  
26 DIRK KEMPTHORNE, Secretary of the )  
Interior, )

27 Defendants. )  
28

Case No.:

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

1 **I. INTRODUCTION**

2 1. This is an action for declaratory and injunctive relief challenging the continuing  
3 failure of agencies within the United States Department of Interior to comply with the National  
4 Environmental Policy Act (“NEPA”), 42 U.S.C. 4321 *et seq.*, the Federal Land Policy and  
5 Management Act (“FLPMA”), 43 U.S.C. §§ 1701-1785, and the Endangered Species Act  
6 (“ESA”), 16 U.S.C. § 1531 *et seq.*, in managing the public lands and threatened and endangered  
7 species of the California Desert. Continuing a long history of violations, Defendants again have  
8 failed to comply with NEPA, FLPMA, and the ESA by refusing to incorporate actions necessary  
9 to protect public lands from adverse impacts of excessive off-road vehicle use and to preserve  
10 and recover threatened and endangered species, including the desert tortoise and other threatened  
11 and endangered species, in their land and wildlife management planning for the California Desert  
12 Conservation Area (“CDCA”).  
13

14 2. Specifically, Plaintiffs challenge the United States Bureau of Land Management’s  
15 (“BLM”) designation of off-road vehicle (“ORV”) routes in both the West Mojave Plan  
16 (“WEMO Plan”) area and the Northern and Eastern Colorado Desert Coordinated Management  
17 Plan (“NECO Plan”) areas of the CDCA because: BLM legitimized and adopted routes that were  
18 illegally created; allowed unrestricted ORV use of fragile desert washes; failed to provide  
19 adequate environmental review; and failed to provide the public with the information required by  
20 NEPA. BLM also violated Presidential Executive Orders, federal laws, and its own regulations,  
21 all of which require that the agency minimize the effects of ORV use on public land resources.  
22

23 3. In addition, Plaintiffs challenge both BLM and the United States Fish & Wildlife  
24 Service (“FWS”) for their failure: to insure listed species’ survival; to avoid jeopardizing the  
25 continued existence of listed species; and to avoid adversely modifying designated critical  
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1 habitats as required by Section 7 of the ESA. 16 U.S.C. § 1536. Defendant BLM's  
2 establishment and implementation of the WEMO and NECO plan amendments to the California  
3 Desert Conservation Area Plan ("CDCA Plan") and Defendant FWS's approval of these actions  
4 through the issuance of Biological Opinions ("BOs") violate the procedural and substantive  
5 mandates of the ESA. The current action arises under and alleges violations under the ESA, 16  
6 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*

8 4. If any species epitomizes the California Desert and BLM's mismanagement of it,  
9 it is the desert tortoise. Due to a precipitous decline in desert tortoise populations throughout the  
10 species' range, FWS listed the desert tortoise as endangered by emergency rule in 1989. 54 Fed.  
11 Reg. 32326. The Mojave population of the tortoise, comprised of all tortoises in California, as  
12 well as in parts of Arizona, Nevada and Utah, was listed as "threatened" in 1990. 55 Fed. Reg.  
13 12178. Since 1990, tortoise populations have continued to decline at alarming rates. On March  
14 15, 2000, a BLM panel of tortoise experts concluded that, despite its listing under ESA, the  
15 species was in worse condition than in 1990 and that the number of tortoises alive then was less  
16 than the numbers estimated by the 1990 listing or by the Recovery Plan prepared for the species  
17 in 1994. The expert panel concluded that the desert tortoise in the western Mojave Desert should  
18 be characterized as "endangered" rather than "threatened." In 2004, the Recovery Plan  
19 Assessment Committee Report ("DTRPAC Report") found that there had been significant  
20 population decline in the West Mojave population. "[T]he year effect yielded a significantly  
21 negative trend in adult density estimates over time . . . This analysis indicates that, taken  
22 together, tortoise densities on the permanent study plots located within the Western Mojave  
23 Recovery Unit are declining, as was suggested in the Recovery Plan. . . . This pattern suggests  
24 that recovery actions implemented since the Plan have not resulted in the reversal of this  
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1 declining trend.” 2004 DTRPAC Report at 58. Within the NECO planning area, the report  
2 showed a significant decline in desert tortoise populations in the Chuckwalla Bench, and the  
3 Chemehuevi Desert Wildlife Management Area (“DWMA”) also generally showed a downward  
4 trend. See DTRPAC Report at 57. The draft 2004 DTRPAC Report had also recommended that  
5 the Western Mojave Recovery Unit of the tortoise should be uplisted to endangered status.  
6

7 5. Nearly a decade ago, FWS developed a recovery plan for the tortoise that required  
8 specified restrictions on harmful human activities in key desert tortoise habitat managed by BLM  
9 in order to check the species slide towards extinction and, instead, insure its recovery to healthy  
10 population levels. U.S. Department of the Interior, U.S. Fish and Wildlife Service, Desert  
11 Tortoise (Mojave Population) Recovery Plan (1994). Since the issuance of the Recovery Plan,  
12 the BLM has failed to implement the Plan’s measures. BLM’s failure to implement the  
13 Recovery Plan is one of the primary factors contributing to the desert tortoises’ decline in the  
14 CDCA. BLM continues to permit ORVs to drive through critical tortoise habitats, resulting in  
15 direct tortoise deaths and serious damage to habitat that is critical to their survival. As the  
16 Recovery Plan dictates, these activities and their impacts on the tortoise must be removed from  
17 tortoise critical habitat in order to save the species. Nevertheless, BLM’s new management plans  
18 and FWS’s BOs perpetuate destructive ORV use in areas identified by the Recovery Plan as  
19 necessary havens from these threats. The BOs’ conclusions of “no jeopardy” and “no adverse  
20 modification” of critical habitat do not withstand analysis.  
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23 6. As with the desert tortoise, FWS and BLM have also failed to adequately protect  
24 other listed species of the CDCA and their critical habitats, including, but not limited to, the  
25 following: Lane Mountain milk-vetch; Parish’s daisy; Cushenbury milk-vetch; triple-ribbed  
26 milk-vetch; Inyo California Towhee; and Southwestern willow flycatcher.  
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1 Desert Survivors is incorporated and based in Oakland, and Plaintiff California Wilderness  
2 Coalition is incorporated and based in Oakland.

### 3 **III. INTRADISTRICT ASSIGNMENT**

4 11. This action is properly assigned to the San Francisco Division of this court  
5 because Plaintiff Sierra Club has its national headquarters in San Francisco, Plaintiff Desert  
6 Survivors is based in Oakland, Plaintiff California Wilderness Coalition is based in Oakland, and  
7 Plaintiff Center for Biological Diversity maintains an office in San Francisco.  
8

### 9 **IV. RELATED CASES**

10 12. This case is related to Center for Biological Diversity, et al. v. Bureau of Land  
11 Management, Case No. C-00-0927 WHA-JCS (N.D. Cal.), and Center for Biological Diversity,  
12 et al. v. BLM, et al., No. C 03-02509 SI (N.D. Cal.) as defined by Local Rule 3-12(a).  
13

### 14 **V. PARTIES**

15 13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, nonprofit  
16 organization with its main office in Tucson, Arizona and a regional office in San Francisco,  
17 California. The Center's mission is to protect endangered species and wild places through  
18 science, policy, education, and environmental law. The Center has over 25,000 members, many  
19 of whom reside in California. The Center's members and staff regularly use, and will continue  
20 to use, lands throughout the CDCA, for observation, research, aesthetic enjoyment, and other  
21 recreational, scientific, and educational activities. The Center's members and staff have and  
22 continue to research, study, observe, and seek protections for the desert tortoise, the Parish's  
23 daisy, Cushenbury milk-vetch, Lane Mountain milk-vetch, and other listed and sensitive species  
24 of the CDCA. The Center's members and staff derive scientific, recreational, conservation, and  
25 aesthetic benefits from these species' existence in the wild. Defendants' violations of law are  
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1 leading to the continued decline of tortoise populations and degradation of habitat used by the  
2 tortoise, harming the Center's and its members' interests in the tortoise and its habitat.  
3 Defendant's violations of law are also leading the decline of the rare and listed plant species and  
4 degradation of their habitats, and to the continued decline of other listed and sensitive species  
5 within the WEMO and NECO plan areas and the degradation of habitat occupied by these  
6 species, harming the Center's and its members' interests in these species and their habitats. The  
7 Center brings this action on behalf of itself and its adversely affected members and staff.  
8

9       14. Plaintiff SIERRA CLUB is a national, non-profit membership organization with  
10 over 700,000 members dedicated to exploring, enjoying, and protecting the wild places of the  
11 earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to  
12 educating and enlisting humanity to protect and restore the quality of the natural and human  
13 environment; and to using all lawful means to carry out these objectives. Sierra Club frequently  
14 files citizen suits to stop activities that violate local, state or federal environmental laws and  
15 cause harm to the natural environment. Over 150,000 Sierra Club members reside in California.  
16 Sierra Club, incorporated under the laws of the State of California, maintains its national  
17 headquarters in San Francisco, California. Many of Sierra Club's members actively use the  
18 CDCA for recreational and aesthetic purposes such as hiking and nature study and would be  
19 personally harmed if the threatened and endangered species found on the CDCA, including the  
20 desert tortoise, were to become reduced in numbers or driven to extinction. Many Sierra Club  
21 members also participate in group outings to the CDCA and will continue to do so on a regular  
22 basis. Sierra Club believes that Defendants' recent actions will cause the continued decline of  
23 desert tortoise and other listed and sensitive species populations within the CDCA. If these  
24 declines continue, the Sierra Club's members will lose the recreational, aesthetic, scientific, and  
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1 conservation benefits they enjoy from stable and healthy populations of these species. Sierra  
2 Club brings this action on behalf of itself and its adversely affected members.

3         15. Plaintiff PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY  
4 (“PEER”) is a national, non-profit corporation based in Washington, D.C. with chapters  
5 throughout the United States, including California. PEER represents current and former federal  
6 and state employees of land management, wildlife protection, and pollution control agencies who  
7 are frustrated by the failure of governmental agencies to enforce or faithfully implement the  
8 environmental laws entrusted to them by Congress. The ability of PEER’s members to  
9 independently critique agency decisions frequently is compromised by conflicts between their  
10 duties as employees of a federal agency to uphold the law and the risk of disciplinary action for  
11 insubordination. Consequently, PEER’s members rely on PEER to criticize agency action,  
12 including the use of litigation, on their behalf. PEER members and staff regularly use CDCA  
13 lands for observation, research, aesthetic enjoyment, and other recreational, scientific, and  
14 educational activities. PEER members and staff research, study, and observe many federally  
15 listed threatened and endangered species, including the desert tortoise, that live in the CDCA.  
16 PEER’s members and staff derive scientific, recreational, conservation, and aesthetic benefits  
17 from the desert tortoise’s existence in the wild. PEER believes that Defendants’ actions will  
18 cause the continued decline of desert tortoise and other listed and sensitive species populations  
19 within the CDCA. If these declines continue, PEER’s members will lose the recreational,  
20 aesthetic, scientific, and conservation benefits they enjoy from stable and healthy populations of  
21 the these species. PEER brings this action on behalf of itself and its adversely affected members.  
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25         16. Plaintiff DESERT SURVIVORS is a California non-profit corporation centered in  
26 Oakland, California. Desert Survivors is a conservation organization with approximately 800  
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1 members focused on the protection of desert plants, wildlife and ecosystems. Desert Survivors  
2 also engages in a vigorous program of public education about desert lands and their unique  
3 character. Desert Survivors' primary goals are to protect fragile desert lands and to teach visitors  
4 to those lands about their value. Desert Survivors members place a high value on the continuing  
5 existence and essential value of desert wildlife and wilderness. Desert Survivors leads  
6 educational trips to desert lands. Desert Survivors has led more than 400 such trips to the desert  
7 in the last fourteen years, more than half of these to places that are home to the desert tortoise.  
8 Desert Survivors members value the desert as a natural ecosystem inhabited by special plants and  
9 animals. Desert Survivors will continue to lead trips, including service trips, to the desert areas of  
10 California as part of its ongoing program of monitoring desert wilderness. A major goal of these  
11 trips is to study desert plants and animals in their natural habitats, and to monitor their condition.  
12 The desert tortoise is among the most valuable of these, because of its rarity and because of the  
13 fragility of its habitat. As part of its ongoing desert excursion program, Desert Survivors has led  
14 several trips in recent years to the California Desert Conservation Area including recent trips to  
15 the Turtle Mountains, the Mecca Hills, the Sheephole Mountains, and Bright Star Creek. Desert  
16 Survivors members value desert wildlife living in its wild and natural condition, and enjoy the  
17 inspiration and educational benefits of observing wildlife in this habitat. Desert Survivors  
18 members and staff have actively sought to protect desert wilderness as a place where threatened  
19 and endangered wildlife may flourish, where their habitat may remain unimpaired by  
20 development and excessive human interference. Desert Survivors members and directors derive  
21 scientific, recreational, conservation, and aesthetic benefits from the desert tortoise's, and other  
22 listed and sensitive species' existence in the wild. Desert Survivors believes that Defendants'  
23 actions will cause the continued decline of desert tortoise and other listed and sensitive species  
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1 populations within the CDCA. If these declines continue, Desert Survivors' members will lose  
2 the recreational, aesthetic, scientific, and conservation benefits they enjoy from stable and  
3 healthy populations of the these species. Desert Survivors brings this action on behalf of itself  
4 and its adversely affected members and directors.

5  
6 17. Plaintiff ALLIANCE FOR RESPONSIBLE RECREATION is an unincorporated  
7 association made up of groups dedicated to reasonable management of off road vehicle impacts  
8 on federal lands, and in particular on the Western Mojave Desert. The Alliance for Responsible  
9 Recreation works to protect both public lands and private property in the California desert from  
10 damage caused by the irresponsible use of dirt-bikes, ATVs, and all other off-road vehicles. The  
11 Alliance promotes policy solutions that advance our goals through public education, advocacy,  
12 and grassroots activism. The following groups join in this action as individual members of the  
13 ARR: The Wilderness Society, the California Wilderness Coalition, Friends of Juniper Flats,  
14 Western San Bernardino Landowners Association, and the California Native Plant Society. For  
15 the purposes of this action, the Sierra Club does not join this action as a member of the ARR.  
16 The ARR, The Wilderness Society, the California Wilderness Coalition, Friends of Juniper Flats,  
17 Western San Bernardino Landowners Association, and the California Native Plant Society join  
18 only in the National Environmental Policy Act and Federal Land Policy and Management Act  
19 claims regarding the West Mojave Planning area in this litigation.  
20

21  
22 18. Plaintiff THE WILDERNESS SOCIETY ("TWS") is a non-profit national  
23 membership organization founded in 1935 and devoted to preserving wilderness and wildlife on  
24 our public lands, and fostering an American land ethic. The Wilderness Society is particularly  
25 focused on ensuring that remaining roadless lands are managed to preserve their wild character --  
26 free from road building, logging, mining, off-road vehicle use, and other development -- and on  
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1 protecting additional lands as designated wilderness. The Wilderness Society has over 180,000  
2 members nationwide, many of whom reside in the State of California. Many of TWS' members  
3 use BLM lands for business and recreation. TWS members suffer direct harm by the unregulated  
4 use of ORVs, and the improper designation of damaging ORV routes, in the Western Mojave.

5  
6 19. Plaintiff FRIENDS OF JUNIPER FLATS is a non-profit corporation whose  
7 members value the resources offered by the Juniper Flats area which include archaeological,  
8 biological and recreational resources. Members are a diverse mix of nearby residents,  
9 landowners and people who enjoy recreating in the area. Recreation includes family outings,  
10 picnics, hiking, horseback riding, OHV touring, photography, wildlife watching and camping.

11 20. The WESTERN SAN BERNARDINO COUNTY LANDOWNERS  
12 ASSOCIATION has 50 members, all private landowners in the El Mirage area. The organization  
13 was founded in 1997 in order to combat rampant OHV trespass on private lands. Members have  
14 submitted written comments on the West Mojave Plan Draft EIS and participated in numerous  
15 West Mojave Plan public meetings.

16  
17 21. The CALIFORNIA WILDERNESS COALITION is a statewide, non-profit  
18 organization that was founded in 1976. CWC's members use the areas in which the BLM has  
19 designated illegal ORV routes without adequate NEPA documentation. CWC defends the  
20 pristine landscapes that make California unique and provide clean air and water, a home to  
21 wildlife, and a place for spiritual renewal. CWC is the only organization dedicated to protecting  
22 and restoring California's wild places and native biodiversity on a statewide level. Its members  
23 have been harmed by the acts and omissions set out in this complaint.  
24

25 22. The CALIFORNIA NATIVE PLANT SOCIETY is a non-profit group dedicated  
26 to the conservation and protection of California's native plant life. CNPS has participated in the  
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1 WEMO Plan and the NECO Plan processes both formally and informally, and submitted  
2 extensive comments on all NEPA documents. CNPS' members are directly harmed by the acts  
3 and omissions of the BLM and the FWS, in particular in the impact on native plants of the illegal  
4 designation of ORV routes and excessive grazing.

5  
6 23. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM")  
7 is a federal agency within the Department of Interior charged with the management of public  
8 lands, including those within the CDCA, and has legal responsibility for ensuring that its actions  
9 comply with NEPA, FLPMA, and the ESA.

10 24. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("Service") is  
11 an agency of the United States government, and is an agency within and under the jurisdiction of  
12 the Department of the Interior. Through delegation of authority from the Secretary, the Service  
13 administers and implements the ESA, and is legally responsible for the protection and  
14 management of the fish, wildlife, and native plant resources of the United States, through  
15 enforcement and implementation of the ESA. The Service is also charged with determining  
16 through the consultation process whether federal agency actions that affect listed species or  
17 designated critical habitats comply with the ESA.

18  
19 25. Defendant DIRK KEMPTHORNE is the Secretary of the United States  
20 Department of the Interior and, among other things, is charged with overseeing the management  
21 of the nation's BLM lands and compliance with NEPA, FLPMA, and the ESA. The Secretary is  
22 the federal official in whom the ESA vests final responsibility for providing biological opinions  
23 and protecting species listed under the ESA. The Secretary has delegated responsibility for the  
24 administration and implementation of the ESA to the United States Fish and Wildlife Service.  
25 The Secretary is further charged with implementing statutes, regulations, and Executive Orders  
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1 11644 and 11989 on the lands within his control. Secretary Kempthorne is sued in his official  
2 capacity as Secretary of the Department of the Interior.

### 3 **VI. LEGAL BACKGROUND**

#### 4 **A. Federal Land Policy and Management Act and Executive Orders Regarding ORVs.**

5 26. The Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701-  
6 1785, declares that the public lands be managed for multiple uses in a manner that will protect  
7 the quality of the scientific, scenic, historical, ecological, environmental, air and atmospheric,  
8 water resource, and archeological values. 43 U.S.C. § 1701 (a)(7) & (8).

9  
10 27. As part of FLPMA, Congress designated 25 million acres of southern California  
11 as the California Desert Conservation Area (“CDCA”). 43 U.S.C. § 1781(c). About half of the  
12 CDCA is public land under BLM management.

13  
14 28. FLPMA contains several provisions related to BLM’s planning and management  
15 of lands such as the CDCA. In carrying out any action in the CDCA, BLM is required to act in  
16 accordance with FLPMA and its implementing regulations. See 43 U.S.C. §§ 1731, 1740.

17 29. FLPMA requires that BLM develop a “comprehensive, long-range plan for the  
18 management, use, development, and protection of the public lands within the [CDCA].” 43  
19 U.S.C. § 1781(d).

20 30. FLPMA requires that BLM prepare and maintain a current inventory of all public  
21 lands and their resources. 43 U.S.C. §1711(a). Similarly, FLPMA provides that the systematic  
22 inventory of public lands and their resources form the basis of the land use planning process. 43  
23 U.S.C. §1701(a)(2). Accordingly, the regulations implementing FLPMA require that BLM  
24 collect resource and environmental inventory data and information and that the inventory data  
25 and information “shall be collected in a manner that aids application in the planning process,  
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1 including subsequent monitoring requirements.” 43 C.F.R. §1610.4-3.

2 31. To protect and conserve the CDCA and its resources, FLPMA also requires that  
3 BLM “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or  
4 undue degradation of the lands.” 43 U.S.C § 1732(b).

5 32. In 1972, President Nixon issued Executive Order 11644, entitled “Use of Off-  
6 Road Vehicles on the Public Lands.” That Executive Order imposed a number of specific and  
7 non-discretionary duties on the Secretary to control and minimize the effects of ORV use. These  
8 duties include: classifying all BLM lands as either “open,” “closed,” or “limited” to ORV travel;  
9 designating trails for ORV use in limited areas; marking areas and trails and providing the public  
10 with maps depicting such classifications and designations; minimizing the effects of ORV use on  
11 specifically identified natural resources; and monitoring ORV impacts throughout BLM lands.

12 33. In 1978, President Carter issued Executive Order 11989, which amended  
13 Executive Order 11644 (collectively “the Executive Orders”), and gave federal agencies  
14 additional direction and authority to control ORV use. Executive Order 11989 empowered  
15 federal agencies to adopt a “closed, unless signed open” policy, and also to immediately close  
16 areas suffering from ORV damage. The Executive Orders were enacted in furtherance of the  
17 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq., and are found in the  
18 note following 42 U.S.C. § 4321.

19 34. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42.  
20 These regulations further implement, and largely restate, the planning, informational, and  
21 monitoring requirements of the Executive Orders. Specifically, the regulations require that the  
22 BLM locate ORV trails so as “to minimize damage to soil, watershed, vegetation, air, or other  
23 resources of the public lands and to prevent impairment of wilderness suitability,” 43 C.F.R. §  
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1 8342.1(a), “to minimize harassment of wildlife or significant disruption of wildlife habitats,” 43  
2 C.F.R. § 8342.1(b), “to minimize conflicts between off-road vehicle use and other existing or  
3 proposed recreational uses of the same or neighboring public lands, and to ensure compatibility  
4 of such uses with existing conditions in populated areas, taking into account noise and other  
5 factors,” 43 C.F.R. § 8342.1(c), and prohibit trails in “officially designated wilderness areas or  
6 primitive areas,” 43 C.F.R. § 8342.1(d). The regulations also require BLM to close areas to  
7 ORVs where ORVs are causing or will cause negative impacts to soil, vegetation, wildlife,  
8 wildlife habitat, cultural resources, wilderness suitability, or threatened and endangered species.  
9  
10 43 C.F.R. § 8341.2(a). An area closed to ORVs under this provision can only be reopened to  
11 such vehicles if BLM “determines that the adverse effects have been eliminated and measures  
12 implemented to prevent recurrence.” Id.

## 13 **B. The National Environmental Policy Act**

14  
15 35. The purpose of the National Environmental Policy Act (“NEPA”) is to “promote  
16 efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. NEPA’s  
17 fundamental purposes are to guarantee that: (1) agencies take a “hard look” at the environmental  
18 consequences of their actions before these actions occur by ensuring that the agency carefully  
19 considers detailed information concerning significant environmental impacts; and (2) agencies  
20 make the relevant information available to the public so that it may also play a role in both the  
21 decisionmaking process and the implementation of that decision. See, e.g., 42 U.S.C. §  
22 4332(2)(C); 40 C.F.R. § 1500.1.

23  
24 36. NEPA and the regulations promulgated thereunder by the Council on  
25 Environmental Quality (“CEQ”) require that all federal agencies, including the BLM, must  
26 prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly  
27 affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. §  
28

1 1501.4.

2 37. An EIS must provide a detailed statement of: (1) the environmental impact of the  
3 proposed action; (2) any adverse environmental effects that cannot be avoided should the  
4 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship  
5 between local short-term uses of the environment and the maintenance and enhancement of long-  
6 term productivity; and (5) any irreversible and irretrievable commitments of resources that would  
7 be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).  
8

9 38. NEPA is intended to insure that agencies make informed choices when federal  
10 decisions are likely to have environmental consequences. To that end, an EIS must “inform  
11 decision-makers and the public of the reasonable alternatives which would avoid or minimize  
12 adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1. NEPA  
13 also requires federal agencies to analyze the direct, indirect, and cumulative impacts of the  
14 proposed action. 40 C.F.R. §§ 1508.7, 1508.8. One of the most important aspects of NEPA is  
15 that the agency is required to consider the cumulative effects of its actions, which the CEQ  
16 regulations describe as:  
17

18 the impact on the environment which results from the incremental impact of the  
19 action when added to other past, present, and reasonably foreseeable future  
20 actions regardless of what agency (Federal or non-Federal) or person undertakes  
such other actions. Cumulative impacts can result from individually minor but  
collectively significant actions taking place over a period of time.

21 40 C.F.R. § 1508.7. In the context of ORV route designations, NEPA requires that agencies such  
22 as the BLM consider and disclose to the public the cumulative impacts of the designations on  
23 vegetation, water quality, cultural resources and other resources of the public lands.  
24

25 39. When preparing an EIS, an agency must ensure that high quality information is  
26 available to the agency and the public before any decision is made or action is taken. Accurate  
27 scientific analysis, expert agency comments, and public scrutiny are essential to implementing  
28



1 NEPA. 40 C.F.R. § 1500.1(b). The agency is required to identify clearly all of its assumptions,  
2 to explain any inconsistencies, to disclose all methodologies used, to rebut all contradictory  
3 evidence, to eliminate guesswork, to make explicit reference to sources relied upon for  
4 conclusions, and to record in an understandable manner the basis for those conclusions. 40  
5 C.F.R. § 1502.24.

6  
7 40. NEPA requires federal agencies to “study, develop, and describe appropriate  
8 alternatives to recommended courses of action in any proposal which involves unresolved  
9 conflicts concerning alternative uses of available resources.” 42 U.S.C. §4332(2)(E). The  
10 analysis of alternatives is the “heart” of the environmental review process; the EIS must  
11 “rigorously explore and objectively evaluate all reasonable alternatives,” in order to “provid[e] a  
12 clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. §  
13 1502.14(a). Alternatives that must be considered include the following: (1) no action  
14 alternative, (2) other reasonable courses of actions, and (3) mitigation measures (not in the  
15 proposed alternative). A “reasonable range” of alternatives must be considered, and this must  
16 include consideration of full protection of all the resources involved. The exclusion of  
17 reasonable alternatives from review under an EIS renders the analysis invalid.

18  
19 41. In addition to alternatives and impacts, NEPA requires agencies to consider  
20 mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. §  
21 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental  
22 consequences and mitigation measures).

### 23 **C. Endangered Species Act**

24  
25 42. *Listing of Species.* The ESA requires the Secretary of the Interior (“the  
26 Secretary”) to issue regulations listing species as endangered or threatened based on the present  
27 or threatened destruction, modification, or curtailment of a species’ habitat or range;

1 overutilization for commercial, recreational, scientific, or educational purposes; disease or  
2 predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade  
3 factors affecting the species' continued existence. 16 U.S.C. § 1533(a)(1). An endangered  
4 species is one "in danger of extinction throughout all or a significant portion of its range." 16  
5 U.S.C. § 1532(a). A threatened species is one that will become endangered if current  
6 circumstances continue. The ESA requires that the Secretary make listing determinations "solely  
7 on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A).  
8 Only if officially listed does a species receive the full protection of the ESA. The ultimate goal  
9 of the law is to conserve and recover species so that they no longer require the protections of the  
10 ESA. 16 U.S.C. §§ 1531(b), 1532(3). The Secretary has delegated his authority under the ESA  
11 to the FWS for terrestrial species including the desert tortoise, Parish's daisy, Cushenbury milk-  
12 vetch, Lane Mountain milk-vetch and other listed species found in the CDCA.

13  
14  
15 43. *Critical Habitat.* Concurrently with listing a species as threatened or endangered,  
16 the Secretary must also designate the species' "critical habitat." 16 U.S.C. § 1533(b)(2).  
17 "Critical habitat" is the area that contains the physical or biological features essential to the  
18 "conservation" of the species and which may require special protection or management  
19 considerations. 16 U.S.C. 1532(5)(A). The ESA requires the Secretary to make critical habitat  
20 designations and amendments "on the basis of the best scientific data available." 16 U.S.C. §  
21 1533(b)(2). The ESA defines "conservation" to mean "...the use of all methods and procedures  
22 which are necessary to bring any endangered species or threatened species to the point at which  
23 the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. §1532(3). This  
24 definition of "conservation" is broader than mere survival; it also includes the recovery of  
25 species. Id.

1           44.     *Recovery Plans.* Section 4(f) of the ESA requires the Secretary to “develop and  
2 implement plans . . . for the conservation and survival of endangered species and threatened  
3 species.” 16 U.S.C. §1533(f). Recovery plans must include a description of site-specific  
4 management actions that may be necessary to achieve the conservation and survival of the  
5 species; objective, measurable criteria which, when met, would result in a determination that the  
6 species be removed from the list; and estimates of the time required and the cost to carry out  
7 those measures needed to achieve the plan's goal and to achieve intermediate steps toward that  
8 goal. 16 U.S.C. § 1533(f)(1).

9  
10           45.     *Duty to Conserve.* Federal agencies have an affirmative duty to promote the  
11 conservation (*i.e.*, recovery) of threatened and endangered species. Section 2(c) of the ESA  
12 provides that it is “...the policy of Congress that all Federal departments and agencies shall seek  
13 to conserve endangered species and threatened species and shall utilize their authorities in  
14 furtherance of the purposes of this Act.” 16 U.S.C. §1531(c)(1). Section 7(a)(1) also establishes  
15 an affirmative duty to conserve. 16 U.S.C. § 1536(a)(1). The duty to conserve applies equally  
16 to the Secretary of Interior and other agencies.

17  
18           46.     *Duty to insure survival and recovery; duty to consult.* Pursuant to Section 7(a)(2)  
19 of the ESA, all federal agencies must “insure that any action authorized, funded or carried out by  
20 such agency . . . is not likely to jeopardize the continued existence of any endangered or  
21 threatened species or result in the destruction or adverse modification of habitat of such species .  
22 . . . determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2). To fulfill this mandate, the acting  
23 agency must prepare a biological assessment for the purpose of identifying all endangered or  
24 threatened species which are likely to be affected by the action, 16 U.S.C. § 1536(c)(1), and must  
25 consult with FWS whenever such actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2);  
26  
27  
28

1 50 C.F.R. § 402.14(a). Because BLM’s adoption and implementation of the CDCA plan and the  
2 WEMO and NECO plan amendments are federal actions affecting the desert tortoise, Parish’s  
3 daisy, Cushenbury milk-vetch, the Lane Mountain milk-vetch and other listed species, BLM was  
4 required to consult with FWS on these plans.

5  
6 47. *Biological opinion.* Consultation under Section 7(a)(2) results in the preparation  
7 of a Biological Opinion (“BO”) by FWS that determines if the proposed action is likely to  
8 jeopardize the continued existence of a listed species or destroy or adversely modify a species’  
9 critical habitat. The BO must include a summary of the information on which it is based and  
10 must adequately detail and assess how the action affects listed species and their critical habitats.  
11 16 U.S.C. § 1536(b)(3). Additionally, a BO that concludes that the agency action is not likely to  
12 jeopardize a listed species or destroy or adversely modify its critical habitat must include an  
13 Incidental Take Statement which specifies the impact of any incidental taking, provides  
14 reasonable and prudent measures necessary to minimize such impacts, and sets forth terms and  
15 conditions that must be followed. 16 U.S.C. § 1536(b)(4). Where an agency action may affect a  
16 listed species, the absence of a valid BO means that the action agency has not fulfilled its duty to  
17 insure through consultation that its actions will neither jeopardize a listed species nor destroy or  
18 adversely modify the species’ critical habitat.

19  
20 48. The BO must include an evaluation of the “cumulative effects on the listed  
21 species.” 50 C.F.R. § 402.14(g)(3). In addition to effects of other federal actions, “cumulative  
22 effects” include “effects of future State or private activities, not involving Federal activities, that  
23 are reasonably certain to occur within the action area of the Federal action subject to  
24 consultation.” 50 C.F.R. § 402.02.

25  
26 49. Throughout its analysis, the BO must utilize the “best scientific and commercial  
27  
28

1 data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. §402.14(d). FWS must consider all the  
2 relevant factors and articulate a rational connection between the facts and its ultimate conclusion.

3 50. If an action’s impact on a species’ habitat threatens *either* the recovery or the  
4 survival of a species, the BO must conclude that the action adversely modifies critical habitat.  
5 The ESA defines critical habitat as areas which are “essential to the conservation” of listed  
6 species. 16 U.S.C. § 1532(5)(A). The ESA’s definition of “conservation” includes the recovery  
7 of species. *See* 16 U.S.C. § 1532(3). Thus, the definition of “adverse modification” of critical  
8 habitat in 50 C.F.R § 402.14, limiting the term’s meaning to degradation of critical habitat for  
9 *both* the survival and recovery of a listed species, is facially inconsistent with the statute and is  
10 therefore invalid. Multiple courts, including this Court, have ruled accordingly.  
11

12 51. *Prohibition against “take.”* Section 9 of the ESA and its implementing  
13 regulations prohibit any person from “taking” a threatened or endangered species. 16 U.S.C. §  
14 1538(a)(1); 50 C.F.R. § 17.31. A “person” includes private parties as well as local, state, and  
15 federal agencies. 16 U.S.C. § 1532(13). “Take” is defined broadly under the ESA to include  
16 harming, harassing, trapping, capturing, wounding, or killing a protected species either directly  
17 or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. §  
18 1532(19). The ESA not only bans the acts of parties directly causing a take, but also bans the  
19 acts of third parties whose acts bring about the taking.  
20

21 52. One exception to Section 9’s take prohibitions is relevant here. A federal agency  
22 may take listed species only in accordance with an “Incidental Take Statement.” 16 U.S.C. §  
23 1536(b)(4). If the terms and conditions of the Incidental Take Statement are followed, the  
24 federal agency and any permittee are exempted from Section 9’s take prohibitions. 16 U.S.C. §  
25 1536(o)(2).  
26  
27  
28

## VII. FACTUAL BACKGROUND

### A. The California Desert Conservation Area Plan

53. The California desert is a rich and unique environment teeming with “historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources.” 43 U.S.C. § 1781(a)(2). Though vast, this desert and its resources are “extremely fragile, easily scarred, and slowly healed.” *Id.* Human activities can easily threaten rare and endangered species of wildlife and plants in this sensitive ecosystem. 43 U.S.C. § 1781(a)(3). To protect and conserve this desert and its resources, Congress designated 25 million acres of southern California as the California Desert Conservation Area (“CDCA”). 43 U.S.C. § 1781(c). About half of the CDCA is public land under BLM management. *Id.* Congress mandated that the Secretary of the Interior develop a “comprehensive, long-range plan for the management, use, development, and protection of the public lands within the [CDCA].” 43 U.S.C. § 1781(d).

54. In September of 1980, the BLM, as the Secretary of Interior’s designee, published and implemented a land management plan for the CDCA, called the California Desert Conservation Area Plan (hereinafter “CDCA Plan” or “Plan”). Since its adoption in 1980, BLM has made over 100 amendments to the CDCA Plan.

55. ORVs can cause damage to soils and vegetation; harm to wildlife and wildlife habitat; degradation of both water quality and riparian health; harm to wilderness areas and wilderness values; and harm to cultural resources. ORVs include high-clearance jeeps and trucks, dirt bikes, dune buggies, and all-terrain vehicles, often called four wheelers. As detailed below, each of these harms is allowed to continue to occur as a result of the BLM’s adoption of the WEMO and NECO plan amendments which allow excessive ORV use in both the WEMO and NECO planning areas of the CDCA.

1 **B. The Desert Tortoise and Prior Related Litigation.**

2 *1. Status of the Species*

3 56. FWS listed the desert tortoise as “threatened” in 1990. 55 Fed. Reg. 12178.  
4 Unfortunately the species’ plight has only worsened since listing. Studies show that tortoise  
5 populations in the Mojave Desert are facing a near total collapse. One study plot showed an 84%  
6 decline between 1992 and 1999. In another study, surveys including 1,200 transects over a large  
7 area of the Western Mojave Desert failed to detect desert tortoises in areas where desert tortoises  
8 were previously considered to be common. On March 15, 2000, the BLM released the report of  
9 a panel of tortoise experts addressing the status of the species in the West Mojave in relation to  
10 the proposed expansion of Fort Irwin. The panel found that “substantially fewer” tortoises  
11 occurred than were estimated to occur in 1994 and concluded that “the desert tortoise in the West  
12 Mojave Recovery Unit is more appropriately characterized as ‘endangered’ than ‘threatened.’”  
13 In 2004, the Recovery Plan Assessment Report found that there had been significant population  
14 decline in the West Mojave population. “[T]he year effect yielded a significantly negative trend  
15 in adult density estimates over time . . . This analysis indicates that, taken together, tortoise  
16 densities on the permanent study plots located within the Western Mojave Recovery Unit are  
17 declining, as was suggested in the Recovery Plan. . . . This pattern suggests that recovery actions  
18 implemented since the Plan have not resulted in the reversal of this declining trend.” DTRPAC  
19 Report at 58. Within the NECO planning area, the report showed a significant decline in desert  
20 tortoise populations in the Chuckwalla Bench, and the Chemehuevi DWMA also generally  
21 showed a downward trend. See DTRPAC Report at 57. The draft 2004 DTRPAC Report had  
22 also recommended that the Western Mojave Recovery Unit of the tortoise should be uplisted to  
23 endangered status.  
24  
25  
26

27 57. Off-road vehicle use is a widespread threat to the desert tortoise. Off-road  
28

1 vehicles traveling at high speeds through tortoise habitat disturb and frequently kill tortoises.  
2 Tortoises can be particularly hard to detect and avoid when vehicles are traveling on unpaved  
3 routes. Desert tortoises thrive best where there are few routes of access and no motorized traffic.  
4 In particular, desert tortoises are known to inhabit the numerous washes found in the CDCA.  
5 Off-road vehicles driving in washes, as is allowed by the CDCA Plan, will disturb or kill desert  
6 tortoises using those washes. Off-road vehicle use also causes soil erosion and soil compaction  
7 and is known to contribute to the reduction of native perennial grasses and native ephemerals  
8 (wildflowers), as well as the invasion of non-native weeds, thereby reducing the desert tortoises'  
9 preferred food sources.  
10

11 58. Desert tortoises also are suffering habitat loss and degradation and increased  
12 predation as a result of activities such as urbanization, agricultural development, grazing,  
13 military training, recreational use, mining, and are at risk from diseases and collisions with  
14 vehicles. Artificial water sources in backcountry and wilderness areas also present a threat to  
15 desert tortoises.  
16

17 59. Due to continued grazing in critical habitat areas, desert tortoises have insufficient  
18 refuges from the many risks posed to their continued survival. Livestock trample desert tortoises  
19 both above ground and in their burrows, resulting in injury or death. Livestock also trample  
20 burrow sites themselves and destroy the shrubs used by tortoises for shade and cover. Loss of  
21 cover increases desert tortoises' vulnerability to predation. Grazing causes soil erosion and soil  
22 compaction and is known to contribute to the reduction of native perennial grasses and native  
23 ephemerals (wildflowers), as well as the invasion of non-native weeds. The desert tortoise's  
24 preferred food sources are native ephemerals and native perennial grasses. Livestock grazing  
25 thus affects the quality and quantity of plant foods available to desert tortoises and limits the  
26 food available to tortoises, threatening their survival or ability to reproduce where grazing  
27  
28



1 occurs.

2       2. *Recovery Plan*

3       60.     In June 1999, the FWS released the desert tortoise Recovery Plan prepared by a  
4 Recovery Team that consisted of eight experts on the desert tortoise, including Drs. Kristin H.  
5 Berry and the late David J. Morafka. Numerous FWS and BLM employees also provided  
6 assistance, and the BLM State director signed the Plan. When written, the Recovery Plan  
7 represented the best available science on threats to the desert tortoise and necessary actions for  
8 conservation. Subsequent scientific studies and analysis have reinforced and supplemented the  
9 Recovery Plan’s central conclusions and recommendations.  
10

11       61.     The Recovery Plan considers the decline of desert tortoises and sets out a strategy  
12 to achieve recovery of the species. The Plan summarizes scientific studies showing that  
13 livestock grazing kills desert tortoises, degrades their habitat in a variety of ways, and threatens  
14 their food supply to the point of starvation. The Plan also summarizes studies showing that  
15 deaths from vehicle collisions also contribute to declining tortoise populations.  
16

17       62.     While detailing the harmful effects of specific activities such as grazing and off-  
18 road vehicle use, the Recovery Plan also recognizes the significance of cumulative impacts on  
19 the desert tortoise. The Plan finds that the cumulative load of human habitat destruction,  
20 degradation, and fragmentation is the most serious problem facing desert tortoise populations. As  
21 a result of cumulative impacts, desert tortoises are almost extirpated from large portions of their  
22 geographic range in California.  
23

24       63.     To ensure recovery of the Mojave desert tortoise population, the Recovery Plan  
25 recommends the establishment of Desert Wildlife Management Areas (“DWMAs”) in each of six  
26 “recovery units.” A recovery unit is a geographic area harboring an evolutionary distinct  
27 population of the desert tortoise. Four of the recovery units and a portion of a fifth recovery unit  
28

1 are in the CDCA. According to the Recovery Plan, establishment of DWMA's and prompt  
2 implementation of reserve-level protection within them are the key to the plan's recovery  
3 strategy. The Recovery Plan recommends establishment of fourteen DWMA's and sets out  
4 suggestions for their boundaries.

5 64. The Recovery Plan recommends that DWMA's span at least 1,000 square miles.  
6 Unconnected DWMA's of less than 500 square miles are considered "generally unacceptable." If  
7 necessary as the only alternative, the experts concluded that such reserves must be intensely  
8 managed in perpetuity to maintain tortoise populations.

9 65. The Recovery Plan sets out a number of specific management recommendations  
10 for DWMA's, stating that, if the desert tortoise is to be recovered within its native range, the  
11 causes of the species' decline must stop within the DWMA's. Domestic livestock grazing and all  
12 off-road vehicle use are both included in a list of activities that should be prohibited in DWMA's  
13 because they are generally incompatible with desert tortoise recovery and other purposes of the  
14 DWMA's. This recommendation is based on the recovery team's assessment of the best available  
15 science at the time. "At this time," the Recovery Plan states, "there are no data showing that  
16 continued livestock grazing is compatible with recovery of the desert tortoise... Because tortoise  
17 recovery is the goal of management within DWMA's, until such data are forthcoming, no grazing  
18 should be permitted within the DWMA's." Since the recovery team made this statement in 1994,  
19 the subsequent data has shown livestock grazing to be even more harmful to tortoises than  
20 previously thought.

21 66. FWS has never fully implemented the recommendations in the desert tortoise  
22 Recovery Plan. BLM has never fully implemented the recovery plan's recommendations within  
23 its management areas.

24  
25  
26  
27 *3. Critical Habitat*

1           67. In 1993, environmental groups sued the Secretary of Interior to compel  
2 designation of critical habitat for the desert tortoise. Bay Area Nuclear Waste Coalition v. Lujan,  
3 CV-93-0114 MHP (N.D.Cal.); Natural Resources Defense Council v. Babbitt, No. C-93-0301  
4 MHP (N.D.Cal.). Pursuant to the Court’s issuance of partial summary judgment and resulting  
5 consent decrees, FWS designated critical habitat units (“CHUs”) in 1994. The CHUs were based  
6 on the DWMAs in the Draft Recovery Plan and are consistent with the proposed DWMAs in the  
7 final Recovery Plan.  
8

9           68. Like the Recovery Plan, FWS’s critical habitat rule emphasized the detrimental  
10 effects of roads, ORV use, and grazing on desert tortoises and their habitat. In addition to the  
11 direct effects, FWS identified numerous indirect grazing impacts including loss of plant cover,  
12 reduction in number of suitable shelter sites, change in vegetation, compaction of soils, reduced  
13 water infiltration, erosion, inhibition of nitrogen fixation in desert plants and promotion of  
14 harmful exotic plants. FWS stated in the critical habitat rule that the Draft Recovery Plan  
15 represented the best available biological information on the conditions need to recover the  
16 Mojave population of the desert tortoise.  
17

18           69. In designating critical habitat, FWS also recognized that actions inconsistent with  
19 the Recovery Plan (such as illegal route proliferation, cross country ORV use, increasing ORV  
20 use, and grazing in DWMAs) would adversely modify the tortoises’ critical habitat. “[FWS]  
21 expects that proposed actions that are inconsistent with land management recommendations for  
22 DWMA’s in the Draft Recovery Plan would likely be considered to adversely modify critical  
23 habitat.” 59 Fed. Reg. 5835.  
24

25           70. Much of the tortoise’s critical habitat falls within the CDCA. Through the CDCA  
26 Plan, BLM has decided the extent of measures the agency is willing to provide for all of the  
27 desert tortoise habitat the agency manages in California. The CDCA Plan thus has far-reaching  
28

1 effects on the tortoise's survival and potential recovery.

2 71. Following the listing of the tortoise, BLM did not enter into consultation with the  
3 FWS to address the CDCA Plan's impact on the tortoise and other listed species. Instead,  
4 BLM's decided to "update" the CDCA Plan through a series of bioregional plan amendments,  
5 which, in theory, would implement the Recovery Plan. These bioregional plans constantly  
6 remained "a year away from completion" for over a decade after the tortoise's listing. For  
7 purposes of amending the CDCA Plan to address the desert tortoise and other listed species,  
8 BLM subdivided the CDCA into several planning areas. These are the Northern and Eastern  
9 Mojave Desert ("NEMO") planning area, the Northern and Eastern Colorado Desert ("NECO")  
10 planning area, the Coachella Valley planning area ("CVP"), the West Colorado ("WECO")  
11 planning area, the West Mojave ("WEMO") planning area, and the Imperial Sand Dunes (the  
12 "Dunes") planning area.  
13

14 72. In 2000, tiring of BLM's illusory promises of "imminent" CDCA plan  
15 consultation and completion, and fearing for the survival of the tortoise and other species, three  
16 of the Plaintiffs in this action challenged BLM's failure to consult with FWS as to the effects of  
17 the CDCA Plan on listed species. Center for Biological Diversity, et al. v. Bureau of Land  
18 Management, Case No. C-00-0927 WHA-JCS (N.D. Cal.). As a result of that suit, the parties  
19 entered into a Consent Decree requiring BLM to enter into formal consultation with FWS and  
20 requiring BLM to take interim protective measures to protect listed species pending completion  
21 of consultation and implementation of the Plan amendments. Subsequently, BLM and FWS  
22 entered into the required consultation.  
23

24 **C. Adoption of the NECO and WEMO Plan Amendments to the CDCA Plan, the**  
25 **NECO and WEMO Route Designations, and the January, 2005, and January, 2006,**  
26 **Biological Opinions.**

27 *1. NECO Plan Amendment.*  
28

1 73. In February, 2001 BLM issued a combined Proposed California Desert  
2 Conservation Area Plan Amendment for the Northern and Eastern Colorado Desert Coordinated  
3 Management Plan (“NECO plan”) and a Draft Environmental Impact Statement which proposed  
4 specific management measures for public lands within the CDCA managed by the BLM.

5 74. On June 17, 2002, FWS issued a BO regarding the impacts of the CDCA Plan, as  
6 proposed to be amended by the first two bioregional plans, on the desert tortoise. U.S.  
7 Department of the Interior, U.S. Fish and Wildlife Service, Biological Opinion for the California  
8 Desert Conservation Area Plan [desert tortoise] (6480(P) CA-063.50) (1-8-01-F-16) (2002). The  
9 2002 BO addressed impacts to the desert tortoise from the then-proposed NECO plan  
10 amendment. The 2002 BO concluded that management of the NECO planning area pursuant to  
11 the NECO plan amendment, was not likely to jeopardize the continued existence of the desert  
12 tortoise or to destroy or adversely modify its critical habitat.

13 75. In August, 2002, BLM issued a combined final version of the NECO Plan and a  
14 Final EIS. (“Final NECO EIS”). On December 19, 2002, BLM issued a Record of Decision  
15 (“ROD”) implementing the NECO plan amendment. The ROD approved with very minor  
16 changes the proposed NECO Plan amendment  
17

18 76. The ROD constituted final agency action for the NECO plan amendment and the  
19 accompanying Final Environmental Impact Statement (“FEIS”). The approval of the NECO  
20 plan amendment through the ROD also constitutes agency action for purposes of Section 7 of the  
21 ESA.  
22

23 77. In issuing the ROD and approving the FEIS and the NECO plan amendment,  
24 BLM violated the procedural and substantive mandates of FLPMA, NEPA and the ESA.

25 78. On January 4, 2005, the July 17, 2002 BO regarding the desert tortoise was found  
26 to be invalid in ongoing litigation in the case entitled, Center for Biological Diversity, et al. v.  
27

1 BLM, et al., No. C 03-02509 SI (N.D. Cal.), and the Court enjoined the open wash policy in the  
2 NECO planning area in order to protect the desert tortoise until a new biological opinion was  
3 issued. Accordingly BLM closed these desert washes in the DWMA's in the NECO planning  
4 area to ORV use.

5           79. On March 31, 2005, FWS issued a new BO analyzing the impacts of the CDCA  
6 Plan and the NEMO and NECO plan amendments on the desert tortoise. U.S. Department of the  
7 Interior, U.S. Fish and Wildlife Service, Biological Opinion for the California Desert  
8 Conservation Area Plan [Desert Tortoise] (6840 CA930(P)) (1-8-04-F-43R) (hereinafter "2005  
9 NECO BO"). In reliance on the 2005 NECO BO, BLM "terminated the restriction order  
10 prohibiting off-highway vehicle (OHV) use in wash zones associated with the Desert Wildlife  
11 Management Areas within the Northern and Eastern Colorado desert bio-region in parts of  
12 Imperial, Riverside, and San Bernardino Counties." BLM Press Release dated April 1, 2005  
13 CA-CDD-05-42.

14  
15  
16           2. *WEMO Plan Amendment.*

17           80. The WEMO planning area covers about 9 million acres, about 3 million of which  
18 are managed by the BLM, in the California Desert Conservation Area. On several occasions in  
19 the past the BLM has designated ORV routes in parts of the Western Mojave Planning area. In  
20 the mid and late 1980's the BLM designated almost 3,000 miles of ORV routes in several parts  
21 of the planning area. More recently, on June 30, 2003, the BLM issued a WEMO route  
22 designation opening a total of over 5,000 miles of routes to ORV traffic. However, the June 30,  
23 2003 WEMO route designations were never put into effect as a consequence of agreements put  
24 in place in prior litigation and the subsequent invalidation of the June 17, 2002 BO regarding the  
25 desert tortoise. Center for Biological Diversity, et al. v. BLM, et al., No. C 03-02509 SI (N.D.  
26 Cal.).

1           81.     On January 9, 2006, FWS issued a new biological opinion for the West Mojave  
2 Plan covering the threatened desert tortoise and Parish’s daisy, the Cushenbury milk-vetch and  
3 Lane Mountain milk-vetch, and the critical habitat for the desert tortoise, the Parish’s daisy and  
4 the Cushenbury milk-vetch.<sup>1</sup> U.S. Department of the Interior, U.S. Fish and Wildlife Service,  
5 Biological Opinion for the California Desert Conservation Area Plan [West Mojave Plan]  
6 (6840(P) CA-063.50) (1-8-03-F-58) (hereinafter “2006 WEMO BO”)  
7

8           82.     On March 13, 2006, BLM signed the Record of Decision (“ROD”) for the  
9 WEMO Plan amendment. The ROD approved with minor changes the proposed WEMO Plan  
10 amendment.

11           83.     The ROD constituted final agency action for the plan amendment and the  
12 accompanying Final Environmental Impact Statement (“FEIS”). The approval of the WEMO  
13 plan amendment through the ROD also constitutes agency action for purposes of Section 7 of the  
14 ESA.

15           84.     In issuing the ROD and approving the FEIS and the WEMO plan amendment,  
16 BLM violated the procedural and substantive mandates of FLPMA, NEPA and the ESA.

17           85.     BLM incorporated the 2003 WEMO route designations into its March 13, 2006  
18 WEMO plan amendment and ROD, and BLM purported to analyze the effects of the route  
19 designation in the EIS for the WEMO plan amendment. To the extent necessary, this Complaint  
20 also challenges the BLM’s June 30, 2003 decision adopting the WEMO route designations, and  
21 the March, 2003 Environmental Assessment and Finding of No Significant Impact for the  
22 WEMO on which the June 30, 2003 WEMO route designation decision was based.  
23

24           86.     The ORV route network adopted by BLM in the March 2006 WEMO plan  
25

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26 <sup>1</sup> Presumably the Service did not analyze the impacts of the WEMO plan amendment on critical habitat for the the  
27 Lane Mountain milk-vetch, because the Service designated zero acres of critical habitat for that species. See 70 Fed.  
28 Reg. 18220 – 18241 (April 8, 2005)

1 amendment and ROD does not comply with the executive orders, laws and regulations governing  
2 designation of ORV routes. This is in large part because the routes were adopted using a flawed  
3 and simplistic process called the “Decision Tree,” which fails to consider the factors required by  
4 the regulations, such as minimizing impacts to public lands resources, and instead weights the  
5 designation process in favor of leaving routes open regardless of the consequences to other  
6 resources. As a result of the use of this process, the BLM left open routes that are unnecessarily  
7 damaging to scarce cultural resources, riparian areas, native plants and wildlife species, and other  
8 public resources. Although BLM purports to have considered various resources in designating  
9 ORV routes, plaintiffs have found that the BLM’s records contain little or no specific  
10 information to back up this claim. BLM’s designation of this route system in both the June 30,  
11 2003 and March 2006 decisions is arbitrary, capricious, and otherwise not in accordance with  
12 law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in  
13 violation of 5 U.S.C. § 706.  
14

15 **D. FLPMA Violations.**

16 87. BLM also violated FLPMA in adopting the WEMO and NECO plan amendments.  
17 FLPMA requires that BLM prepare and maintain a current inventory of all public lands and their  
18 resources. 43 U.S.C. §1711(a). Similarly, FLPMA provides that the systematic inventory of  
19 public lands and their resources form the basis of the land use planning process. 43 U.S.C.  
20 §1701(a)(2). Accordingly, the regulations implementing FLPMA require that BLM collect  
21 resource and environmental inventory data and information, and that the inventory data and  
22 information “shall be collected in a manner that aids application in the planning process,  
23 including subsequent monitoring requirements.” 43 C.F.R. §1610.4-3.  
24

25 88. Among the significant resources in the WEMO planning area are the desert  
26 streams and springs that wildlife depend on, and the desert tortoise, Parish’s daisy, Cushenbury  
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1 milk-vetch, Lane Mountain milk-vetch, southwestern willow flycatcher, and other listed, rare  
2 and sensitive native plants and wildlife species. The desert tortoise is also a significant resource  
3 in the NECO planning area along with Coachella Valley milk-vetch, desert bighorn sheep, and  
4 other listed, rare, and sensitive native plant and wildlife species. Even for the most well known  
5 species, the desert tortoise, FWS has repeatedly admitted that the current survey data is  
6 completely inadequate. See 2004 DTRPAC Report.  
7

8 89. BLM's utter failure to monitor, inventory, or study many of the special status  
9 species and other unique resources of the WEMO and NECO planning areas prior to approving  
10 the RODs and plan amendments means that BLM has failed to prepare and maintain a current  
11 inventory of all public lands and their resources, and has failed to follow FLPMA's mandate that  
12 the systematic inventory of public lands and their resources form the basis of the land use  
13 planning process. 43 U.S.C. §1711(a); 43 U.S.C. §1701(a)(2); 43 C.F.R. §1610.4-3.  
14

15 **E. NEPA Violations.**

16 90. The BLM also violated several provisions of NEPA in its issuance of the RODs  
17 and approval of the FEISs for the WEMO and NECO plan amendments.

18 91. NEPA requires agencies to analyze alternatives as well as the direct, indirect, and  
19 cumulative impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8. The FEIS for the  
20 WEMO plan amendment and the FEIS for the NECO plan amendment are both deficient in this  
21 regard.

22 92. In addition to alternatives and impacts, NEPA requires agencies to consider  
23 mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. §  
24 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental  
25 consequences and mitigation measures). Neither the FEIS for the WEMO plan amendment nor  
26 the FEIS for the NECO plan amendment analyzes sufficient mitigation measures to address the  
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1 impacts on listed and sensitive species, air quality, non-motorized recreation, soils, water  
2 resources, wilderness, or any other resource. This failure renders environmental review for each  
3 of the plan amendments inadequate under NEPA.

4         93. The deficiencies in environmental review of the WEMO plan amendment and  
5 route designation include, but are not limited to, the following: the EIS failed to adequately  
6 consider environmental impacts including impacts to biological resources, wilderness, air  
7 quality, and water resources; the EIS failed to adequately identify the environmental setting by  
8 gathering sufficient baseline data regarding existing ORV routes and environmental resources  
9 including, but not limited to, soils, air quality, and listed and sensitive species; the EIS failed to  
10 consider a reasonable range of alternatives including failing to analyze any alternative that would  
11 fully comply with the recommendations of the Desert Tortoise Recovery Plan or to consider  
12 readily available alternative route configurations; the EIS used an improper no action alternative;  
13 the EIS failed to adequately identify or analyze cumulative impacts; the EIS failed to include  
14 appropriate mitigation measures for impacts identified; BLM failed to adequately respond to  
15 public comments; and BLM used a flawed “Decision Tree” to make route designations that  
16 weighted the designation process in favor of leaving routes open regardless of the consequences  
17 to other resources and does not disclose the basis, if any basis exists, for routes being designated  
18 as open. The discussion of the route designations and their impacts in the WEMO EIS is largely  
19 taken from the March 2003 Environmental Assessment for the WEMO route designation, which  
20 failed to discuss and disclose the major impacts of the route designations.  
21  
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23         94. The deficiencies in environmental review of the NECO plan amendment and  
24 route designation include, but are not limited to, the following: the EIS failed to adequately  
25 consider environmental impacts including impacts to biological resources, soils, wilderness, air  
26 and water resources; the EIS failed to adequately identify the environmental setting such as the  
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1 proposed routes and desert washes that would be designate as “open” for ORV use and failed to  
2 adequately analyze the impacts of ORV routes and washes; the EIS failed to adequately identify  
3 and analyze impacts from the Johnson Valley to Parker competitive ORV route on biological  
4 resources, among them the Pisgah Crater ACEC; the EIS failed to consider a reasonable range of  
5 alternatives including failing to analyze any alternative that would fully comply with the  
6 recommendations of the Desert Tortoise Recovery Plan; failed to adequately identify or analyze  
7 cumulative impacts; the EIS failed to include appropriate mitigation measures for impacts  
8 identified; and BLM failed to adequately respond to public comments.  
9

10 **F. ESA Violations.**

11 *1. 2005 NECO BO.*

12 95. In the NECO plan, BLM established 2 desert wildlife management areas  
13 (“DWMAs”), ostensibly to protect wildlife and promote recovery of the desert tortoise.  
14 However, in the NECO plan BLM also adopted an “open wash policy” that allows overland  
15 ORV travel, stopping, and camping in desert washes over large expanses of the NECO planning  
16 area including in over 200,000 acres of the Chemehuevi DWMA and over 350,000 acres of the  
17 Chuckwalla DWMA. In the NECO plan amendment, the BLM approved continued use of many  
18 ORV routes that were created illegally due to BLM’s failure to protect public lands from  
19 unauthorized and illegal route proliferation. The NECO plan amendment also allowed the  
20 Johnson Valley to Parker competitive ORV route to remain open, allowed livestock grazing to  
21 continue within sensitive desert tortoise habitat, including areas within the DWMAs, and allowed  
22 for the construction, improvement, and maintenance of up to 75 new artificial water sources (or  
23 guzzlers) throughout the NECO planning area including 10 “priority artificial waters” in  
24 wilderness areas.  
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27 96. Unfortunately, the March 2005 NECO BO and the NECO Plan amendment that it  
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1 authorizes are inconsistent with the Desert Tortoise Recovery Plan. The March 2005 NECO BO  
2 and the NECO plan amendment also are at odds with the best available science. The  
3 management regimes for the DWMAAs are inconsistent with the Recovery Plan's  
4 recommendations regarding regulation off-road vehicle activity and other activities impacting the  
5 tortoise. Additionally, the NECO plan amendment created DWMAAs that are inconsistent with  
6 the dictates of the Recovery Plan. For example, the two DWMAAs in the NECO are both smaller  
7 than the Recovery Plan's recommendation of 1,000 square mile DMWAs.  
8

9 97. The 2005 NECO BO failed to adequately analyze known impacts to the desert  
10 tortoise and its critical habitat from ORV use and cattle grazing in the NECO planning area and  
11 within the DWMAAs. By concluding that the proposed route designations in the NECO, including  
12 allowing ORVs to use the vast majority of desert washes, will not jeopardize the species or  
13 destroy or adversely modify critical habitat, FWS's March 2005 NECO BO is entirely at odds  
14 with both the Recovery Plan's direction and the best available science. Although the best science  
15 shows that desert tortoises inhabit washes and that vehicles often strike and kill tortoises even on  
16 paved roads, as well as in washes where tortoises would more frequently occur and be harder to  
17 see, the March 2005 NECO BO fails to adequately analyze whether designating desert washes as  
18 routes of travel in the NECO planning area will jeopardize the species or destroy or adversely  
19 modify its habitat.  
20

21 98. In the 2005 NECO BO, FWS also failed to consider cumulative effects on the  
22 tortoise's habitat. Such an incomplete analysis violates the ESA.

23 99. The 2005 NECO BO also includes an Incidental Take Statement ("ITS")  
24 authorizing take of the desert tortoise. The ITS authorizes take that results from "casual use"  
25 including ORV use on designated routes and in the "open" wash zones and from grazing. FWS  
26 refused to extend the take exemption to managed waters and guzzlers because FWS stated that  
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1 they “can be designed to avoid take of desert tortoises.” 2005 NECO BO at 181. An ITS must  
2 specify the impact of the incidental taking on the species. The ITS in the 2005 NECO BO  
3 contains no numeric limit on take of desert tortoises nor any other measure to assess whether the  
4 take limit has been reached or exceeded. Additionally, the ITS must specify reasonable and  
5 prudent measures necessary to minimize such impacts. Finally, the ITS must include terms and  
6 conditions implementing the reasonable and prudent measures. Although the ITS allows take  
7 from ORV use on approximately 5,000 miles of routes and on over 500,000 acres of open wash  
8 zones within the DWMAs, the ITS does not specify the impacts of the taking of tortoises from  
9 such vehicle use. Neither does the ITS contain any specific reasonable and prudent measures or  
10 terms and conditions relating to the take of tortoises caused by such vehicle impacts other than  
11 requiring the BLM to develop a monitoring program for use in the open wash zones.  
12

13 *2. 2006 WEMO BO.*

14 100. By concluding that the proposed route designations in the WEMO planning area  
15 will not jeopardize the species or destroy or adversely modify critical habitat, FWS’s January 9,  
16 2006 WEMO BO is entirely at odds with both the Recovery Plan’s direction and the best  
17 available science. The 2006 WEMO BO fails to adequately analyze impacts to the desert tortoise  
18 and its critical habitat such as whether ORV use, and continued grazing in the WEMO planning  
19 area will jeopardize the desert tortoise or destroy or adversely modify its habitat. To the extent  
20 that the 2006 WEMO BO concludes that BLM management actions that are inconsistent with the  
21 Recovery Plan do not adversely modify the critical habitat for the desert tortoise FWS’s  
22 conclusions renders the 2005 WEMO BO arbitrary, capricious and unlawful.  
23

24 101. The 2006 WEMO BO also failed to adequately analyze cumulative impacts to the  
25 desert tortoise populations from increased highway traffic and highway expansion, increased  
26 urbanization, and increased predation that accompanies development, and cumulative impacts to  
27  
28

1 desert tortoise and its critical habitat due to the Fort Irwin expansion.

2       102. The 2006 BO also fails to adequately analyze known impacts to other listed  
3 species and their designated critical habitats. For example, the 2006 WEMO BO fails to  
4 adequately identify and analyze ongoing impacts to the Lane Mountain milk-vetch from ORV  
5 use in the WEMO planning area and cumulative impacts to the species due to the Fort Irwin  
6 expansion. To the extent the 2006 WEMO BO relies on the carbonate habitat management  
7 strategy, which does not have a secure funding source, as a mitigation measure to preserve  
8 critical habitat for the Parish's daisy and Cushenbury milk-vetch it is also inadequate.  
9

10       103. The 2006 WEMO BO includes an Incidental Take Statement ("ITS") authorizing  
11 take of the desert tortoise. The ITS authorizes take that results from "casual use" including ORV  
12 use on over 5,400 miles of designated routes, stopping, parking and camping within 50 feet of  
13 such routes in DWMAs and within 300 feet of such routes in other areas of the WEMO plan  
14 area, and from grazing. An ITS must specify the impact of the incidental taking on the species.  
15 The ITS in the 2006 WEMO BO contains no numeric limit on take or desert tortoise nor any  
16 other measure to assess whether the take limit has been reached or exceeded. Additionally, the  
17 ITS must specify reasonable and prudent measures necessary to minimize such impacts. Finally,  
18 the ITS must include terms and conditions implementing the reasonable and prudent measures.  
19 Although the ITS allows take from ORV use on over 5,400 miles of routes including routes  
20 within the DWMAs, the ITS does not specify the impacts of the taking of tortoises from such  
21 ORV use. Neither does the ITS contain any reasonable and prudent measures or terms and  
22 conditions relating to the take of tortoises caused by ORV impacts other than incorporating the  
23 reporting requirements of the existing regulations. See 50 C.F.R. § 402.14(i)(3).  
24  
25

26       104. Because the conclusions in both the 2005 NECO BO and the 2006 WEMO BO  
27 that the WEMO and NECO plan amendments will not jeopardize the continued existence of the  
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1 desert tortoise, the Parish's daisy, the Cushenbury milk-vetch, or the Lane Mountain milk-vetch  
2 nor destroy or adversely modify the critical habitat of the desert tortoise, the Parish's daisy, or  
3 the Cushenbury milk-vetch, are arbitrary and capricious, any reliance on those BOs by BLM in  
4 signing the RODs and approving the plan amendments is also arbitrary and capricious. By  
5 signing the two RODs and approving the WEMO and NECO plan amendments BLM has failed  
6 to ensure through consultation that its actions will not jeopardize the continued existence of the  
7 desert tortoise, the Parish's daisy, the Cushenbury milk-vetch, or the Lane Mountain milk-vetch  
8 nor destroy or adversely modify the critical habitat of the desert tortoise, the Parish's daisy, or  
9 the Cushenbury milk-vetch. 16 U.S.C. § 1536(a)(2)

11 105. BLM and FWS have violated the ESA by failing to use their authorities to  
12 promote the recovery of the desert tortoise, to avoid jeopardy to the species, and to avoid  
13 destroying or adversely modifying its critical habitat. Instead, the agencies have blatantly  
14 disregarded expert recommendations for species recovery and, by validating illegally created  
15 ORV routes in the DWMA's and elsewhere and designating desert washes as open routes of  
16 travel in the NECO planning area, among other actions, have taken actions that not only do not  
17 promote conservation or recovery but will in fact contribute to the decline of the species. FWS  
18 and BLM approved the Recovery Plan for the desert tortoise over seven years ago. Since signing  
19 the Recovery Plan, BLM has failed to implement its recommendations. Likewise, FWS has used  
20 the consultation process to excuse BLM's failure to assure the tortoise's recovery rather than as a  
21 means of implementing the necessary actions established in the Recovery Plan to restore desert  
22 tortoise populations. Through the CDCA Plan and the amendments thereto, and with FWS'  
23 blessing, BLM is authorizing extensive activities in the DWMA's in direct contradiction to the  
24 Recovery Plan's call for reserve-level protection as the "key" to the species recovery.  
25  
26

27 106. In sum, the ROD and FEIS BLM issued for the WEMO plan amendment and the  
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1 ROD and FEIS BLM issued for the the NECO plan amendment are inadequate and unlawful in  
2 violation of the NEPA, FLPMA, the ESA, and the APA. Similarly, FWS's 2005 NECO BO and  
3 2006 WEMO BO which underlie BLM's actions, are unlawful and inadequate under the ESA  
4 and APA.

### 5 **VIII. CLAIMS FOR RELIEF**

6  
7 107. For each of the Claims in this Complaint, Plaintiffs incorporate by reference each  
8 and every allegation set forth in this Complaint as if set out in full below.

#### 9 **First Claim for Relief**

#### 10 **(Against BLM for Violating FLPMA, its implementing Regulations, 11 and relevant Executive Orders)**

12 108. BLM has failed to collect and maintain a current inventory of the environmental  
13 resources of the CDCA, including in the WEMO and NECO planning areas, in violation of  
14 Section 201 of FLPMA, 43 U.S.C. §1711(a). By failing to provide current data and inventory on  
15 many species and other resources before approving the plan amendments, BLM violated its duty  
16 under the statute and undermined the regulatory requirements that current inventory data and  
17 information will be used to inform the planning process and assist in formulating subsequent  
18 monitoring requirements. 43 CFR §1610.4-3.

19  
20 109. The ORV route network adopted by BLM in the March 2006 WEMO plan  
21 amendment and ROD does not comply with the executive orders, laws and regulations governing  
22 designation of ORV routes because the routes were adopted using a flawed process, called the  
23 "Decision Tree," which failed to consider the factors required by the regulations, such as  
24 minimizing impacts to public lands resources, and instead weights the designation process in  
25 favor of leaving routes open regardless of the consequences to other resources. As a result of the  
26 use of this process, the BLM left open routes unnecessarily damaging scarce cultural resources,  
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1 riparian areas, and other public resources. BLM’s designation of this route system for the  
2 WEMO planning area in both the June 30, 2003 and March 2006 decisions is arbitrary,  
3 capricious, and otherwise not in accordance with law and/or constitutes final agency action  
4 unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

5 110. BLM has also violated FLPMA and its implementing regulations as set forth in 43  
6 C.F.R. § 8342.2(a) by re-opening desert washes in the NECO planning area that had been closed  
7 to off-road vehicles without first making a determination that the considerable adverse effects  
8 that were caused by off-road vehicles upon environmental resources, including adverse effects  
9 upon listed and sensitive species, in the closure areas have been eliminated, and without adopting  
10 and implementing measures sufficient to prevent recurrence of these adverse effects.

11 111. For each of the above reasons, and others, BLM’s adoption of the WEMO route  
12 designations, WEMO plan amendment, NECO plan amendment, the associated RODs and  
13 environmental documents for these actions, is arbitrary, capricious, and not in accordance with  
14 law as required by FLPMA, its implementing regulations, relevant executive orders, and the  
15 APA, and is subject to judicial review under the APA. 5 U.S.C. §§701-706, 706(2).

## 18 **Second Claim for Relief**

### 19 **(Against BLM for Violating NEPA and CEQ Regulations)**

20 112. BLM has violated NEPA and its implementing regulations by issuing RODs  
21 adopting the WEMO and NECO plan amendments, and by approving the FEIS for the WEMO  
22 plan amendment and the environmental review for the WEMO route designation and the FEIS  
23 for the NECO plan amendment that each fail to meet the requirements of NEPA. 42 U.S.C. §  
24 4331 *et seq.*; 40 C.F.R. § 1500.1 *et seq.* BLM’s NEPA documentation for the WEMO route  
25 designation, dated June 30, 2003, and the FEIS for the WEMO plan amendment, dated March  
26 2006, are arbitrary, capricious, and otherwise not in accordance with law and/or constitute final  
27

1 agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.  
2 BLM's FEIS for the NECO plan amendment, dated August, 2002, is arbitrary, capricious, and  
3 otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld  
4 or unreasonably delayed, in violation of 5 U.S.C. § 706.

5           113. An EIS must provide a detailed statement of: (1) the environmental impact of the  
6 proposed action; (2) any adverse environmental effects that cannot be avoided should the  
7 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship  
8 between local short-term uses of the environment and the maintenance and enhancement of long-  
9 term productivity; and (5) any irreversible and irretrievable commitments of resources that would  
10 be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(C). An EIS  
11 must "inform decision-makers and the public of the reasonable alternatives which would avoid  
12 or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R.  
13 § 1502.1. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative  
14 impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8. In addition to alternatives and  
15 impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental  
16 impacts of the proposed action. 40 C.F.R. § 1502.14 (alternatives and mitigation measures); 40  
17 C.F.R. § 1502.16 (environmental consequences and mitigation measures).

18           114. The ROD and FEIS that BLM prepared for both the NECO and WEMO plan  
19 amendments fail to comply with each of these requirement of NEPA. Neither FEIS analyzes a  
20 full range of alternatives, includes a proper and accurate "no action" alternative, or adequately  
21 analyze the impacts of the proposed action on the resources of CDCA. Both FEIS's also fail to  
22 consider mitigation measures to reduce the impacts of the proposed action on the resources of  
23 these planning areas within the CDCA and both rely on outdated, inaccurate and inadequate  
24 information in analyzing the impacts of the proposed action.  
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1           115. For each of the above reasons, and others, BLM’s adoption of the ROD and FEIS  
2 for both the NECO and WEMO planning areas are arbitrary, capricious, and not in accordance  
3 with law as required by NEPA, its implementing regulations, and the APA, and are subject to  
4 judicial review under the APA. 5 U.S.C. §§701-706, 706(2).

5   **Third Claim for Relief**  
6   **(Against FWS for Issuing Unlawful Biological Opinions)**

7           116. FWS’s issuance of the 2005 NECO BO was arbitrary, capricious, and unlawful  
8 because the conclusions in the 2005 NECO BO were not based on the best available science, as  
9 required by the ESA, 16 U.S.C. § 1536(a)(2).

10           117. FWS’s issuance of the 2005 NECO BO was arbitrary, capricious, and inconsistent  
11 with the law because the BO failed to address the cumulative effects of the proposed actions on  
12 the desert tortoise and its critical habitat as required by ESA and its implementing regulations. 50  
13 C.F.R. § 402.14. Among the deficiencies in the BO are its failure to consider cumulative effects  
14 of increasing ORV use, development, and traffic, among other future activities.

15           118. FWS’s issuance of the 2005 NECO BO was arbitrary, capricious, and inconsistent  
16 with the law because the BO included an Incidental Take Statement that failed to adequately  
17 specify the impact of the incidental taking on the desert tortoise, failed to adequately specify  
18 reasonable and prudent measures necessary to minimize such impacts, and failed to include  
19 terms and conditions implementing such reasonable and prudent measures. 16 U.S.C. §  
20 1536(b)(4).

21           119. For each of the above reasons, and others, FWS’s issuance of the 2005 NECO BO  
22 is arbitrary, capricious, and not in accordance with law as required by the APA, and is subject to  
23 judicial review thereunder. 5 U.S.C. §§ 701 through 706.

24           120. FWS’s issuance of the 2006 WEMO BO was arbitrary, capricious, and unlawful  
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1 because the conclusions in the 2006 WEMO BO were not based on the best available science, as  
2 required by the ESA, 16 U.S.C. § 1536(a)(2).

3 121. FWS's issuance of the 2006 WEMO BO was arbitrary, capricious, and  
4 inconsistent with the law because the BO failed to address the cumulative effects of the proposed  
5 actions on the desert tortoise and other listed species and their critical habitats as required by  
6 ESA and its implementing regulations. 50 C.F.R. § 402.14. Among its deficiencies, the BO  
7 failed to adequately consider cumulative effects of increasing ORV use, development, traffic, or  
8 cumulative impacts resulting from the Fort Irwin expansion, among other present and future  
9 activities.  
10

11 122. FWS's issuance of the 2006 WEMO BO was arbitrary, capricious, and  
12 inconsistent with the law because the BO included an Incidental Take Statement that failed to  
13 adequately specify the impact of the incidental taking on the desert tortoise, failed to adequately  
14 specify reasonable and prudent measures necessary to minimize such impacts, and failed to  
15 include terms and conditions implementing such reasonable and prudent measures. 16 U.S.C. §  
16 1536(b)(4).  
17

18 123. For each of the above reasons, and others, FWS's issuance of the 2006 WEMO  
19 BO is arbitrary, capricious, and not in accordance with law as required by the APA, and is  
20 subject to judicial review thereunder. 5 U.S.C. §§ 701 through 706.

#### 21 **Fourth Claim for Relief**

#### 22 **(Against BLM and FWS For Violating the ESA By Failing to Insure Against** 23 **Jeopardy and Destruction or Adverse Modification of Critical Habitat)**

24 124. BLM and FWS are violating Section 7(a)(2) of the ESA and its implementing  
25 regulations as set forth at 50 C.F.R. § 402.16 by failing to ensure through consultation that  
26 BLM's approval and implementation of the CDCA Plan, including the WEMO and NECO plan  
27 amendments, do not jeopardize the desert tortoise or destroy or adversely modify its critical  
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1 habitat, and failing to ensure that the WEMO plan amendment does not jeopardize the Parish's  
2 daisy, the Cushenbury milk-vetch, and the Lane Mountain milk-vetch or destroy or adversely  
3 modify the critical habitat of the Parish's daisy and the Cushenbury milk-vetch. BLM is  
4 violating this provision by carrying out these actions notwithstanding the fact that the  
5 conclusions in the 2005 NECO BO and 2006 WEMO BO are unsubstantiated and unlawful.  
6 FWS is violating this provision by authorizing BLM to take federal actions that will either  
7 jeopardize the desert tortoise or destroy or adversely modify the tortoise's critical habitat, and  
8 will either jeopardize the Parish's daisy, the Cushenbury milk-vetch, and the Lane Mountain  
9 milk-vetch, or destroy or adversely modify the Parish's daisy and the Cushenbury milk-vetch  
10 critical habitat. These violations are subject to judicial review under 16 U.S.C. § 1540(g).

11  
12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs respectfully request that this Court:

14 (1) Adjudge and declare that Defendant Bureau of Land Management's  
15 implementation of the California Desert Conservation Area Plan though the approval of the  
16 Record of Decision for the West Mojave Plan and the Record of Decision for the Northern and  
17 Eastern Colorado Desert Coordinated Management Plan violates the Federal Land Policy and  
18 Management Act, its implementing regulations and relevant Executive Orders;

19 (2) Adjudge and declare that Defendant Bureau of Land Management's  
20 implementation of the California Desert Conservation Area Plan though the approval of the  
21 Record of Decision for the West Mojave Plan and the Record of Decision for the Northern and  
22 Eastern Colorado Desert Coordinated Management Plan violates the National Environmental  
23 Policy Act and its implementing regulations;

24 (3) Adjudge and declare that Defendant Fish and Wildlife Service's 2005 NECO BO  
25 and 2006 WEMO BO for the California Desert Conservation Area Plan amendments are  
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1 arbitrary, capricious and inconsistent with the law;

2 (4) Adjudge and declare that Defendant Fish and Wildlife Service's issuance of its  
3 2005 NECO BO for the NECO California Desert Conservation Area Plan amendment violates  
4 Section 7(a)(2) of the ESA because the agency has illegally concluded that BLM's actions do not  
5 jeopardize the desert tortoise or destroy or adversely modify its critical habitat;

6 (5) Adjudge and declare that Defendant Fish and Wildlife Service's issuance of its  
7 2006 WEMO BO violates Section 7(a)(2) of the ESA because the agency has illegally concluded  
8 that BLM's actions do not jeopardize the desert tortoise or adversely modify its critical habitat,  
9 and do not jeopardize the Parish's daisy, the Cushenbury milk-vetch, and the Lane Mountain  
10 milk-vetch, or destroy or adversely modify the Parish's daisy and the Cushenbury milk-vetch  
11 critical habitat;

12 (6) Order Defendant Fish and Wildlife Service to vacate and set aside the 2005  
13 NECO BO for the Northern and Eastern Colorado Desert Coordinated Management Plan  
14 amendment to the California Desert Conservation Area Plan and the 2006 WEMO BO for the  
15 West Mojave Plan amendment to the California Desert Conservation Area Plan;

16 (7) Adjudge and declare that Defendant Bureau of Land Management's  
17 implementation of the California Desert Conservation Area Plan in the Northern and Eastern  
18 Colorado Desert Coordinated Management Plan violates Section 7(a)(2) of the ESA because the  
19 agency has failed to insure that its actions do not jeopardize the desert tortoise or destroy or  
20 adversely modify its critical habitat;

21 (8) Adjudge and declare that Defendant Bureau of Land Management's  
22 implementation of the California Desert Conservation Area Plan in the West Mojave Plan  
23 violates Section 7(a)(2) of the ESA because the agency has failed to insure that its actions do not  
24 jeopardize the desert tortoise or destroy or adversely modify its critical habitat, and do not  
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1 jeopardize the Parish's daisy, the Cushenbury milk-vetch, and the Lane Mountain milk-vetch, or  
2 destroy or adversely modify the Parish's daisy and the Cushenbury milk-vetch critical habitat;

3 (9) Pending the completion of adequate BOs for listed species within the NEMO and  
4 WEMO planning areas of the California Desert Conservation Area Plan, enjoin Defendants Fish  
5 and Wildlife Service and Bureau of Land Management from issuing any permit, approval, or  
6 other action within both the West Mojave Plan and the Northern and Eastern Colorado Desert  
7 Coordinated Management Plan for any action that may adversely affect the desert tortoise or the  
8 Parish's daisy, the Cushenbury milk-vetch, and the Lane Mountain milk-vetch;

10 (10) Pending the completion of adequate BOs for the Desert Tortoise, Parish's daisy,  
11 the Cushenbury milk-vetch, and the Lane Mountain milk-vetch within the California Desert  
12 Conservation Area Plan, require Defendants to submit quarterly status reports to Plaintiffs and  
13 the Court describing their progress in complying with the Court's order;

14 (11) Order Defendant Bureau of Land Management's to vacate and set aside the  
15 Record of Decision for the West Mojave Plan and the Record of Decision for the Northern and  
16 Eastern Colorado Desert Coordinated Management Plan;

18 (12) Pending the completion of an adequate Record of Decision and Environmental  
19 Impact Statement for both the West Mojave Plan and for the Northern and Eastern Colorado  
20 Desert Coordinated Management Plan, enjoin Defendant Bureau of Land Management from  
21 authorizing off-road vehicle use in any areas in which they are currently prohibited;

22 (13) Pending the completion of an adequate Record of Decision and Environmental  
23 Impact Statement for both the West Mojave Plan and for the Northern and Eastern Colorado  
24 Desert Coordinated Management Plan, order Defendant Bureau of Land Management to impose  
25 such other restrictions on off-road vehicle use as may be necessary to protect the resources of the  
26 these public lands;  
27  
28

1 (14) Award Plaintiffs their fees, costs, expenses and disbursements, including  
2 reasonable attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), or the Equal Access  
3 to Justice Act, 28 U.S.C. § 2412; and

4 (15) Grant Plaintiffs such additional and further relief as the court deems just and  
5 proper.

6 **IX. CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

7 Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the  
8 named parties, there is no such interest to report.

9 DATED: August 14, 2006

10 /s/ Lisa T. Belenky  
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Recreation, The Wilderness Society, the California



Wilderness Coalition, Friends of Juniper Flats,  
Western San Bernardino Landowners Association,  
and the California Native Plant Society

\*Application for admission pro hac vice pending

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