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

16 CENTER FOR BIOLOGICAL)
17 DIVERSITY, *et al.*,)
Plaintiffs,)
18 v.)
19 U.S. BUREAU OF LAND)
20 MANAGEMENT, *et al.*,)
Defendants,)
21 and)
22 KERN COUNTY, CALIFORNIA, *et al.*,)
23 Intervenor-Defendants.)
24

No. 06-4884-SI

**THE COUNTIES' MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
OF FEDERAL DEFENDANTS' CROSS-
MOTION FOR SUMMARY JUDGMENT,
AND IN OPPOSITION TO PLAINTIFFS'
MOTION**

Hearing Date: May 16, 2008
Time: 9:00 a.m.
Courtroom 10, 19th Floor

The Honorable Susan Illston

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	<i>Natural Resources Defense Council v. Kempthorne</i> , 506 F. Supp. 2d 322 (E.D. Cal. 2007).....	26

1 *Natural Resources Defense Council v. Kempthorne*, No. 05-cv-1207 OWW TAG, 2007 WL
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2 *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998).....36

3 *New Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th
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10 *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1995).....7

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13 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).....2, 35, 36

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15 *Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994).....8

16 *Sierra Club v. FWS*, 245 F.3d 434 (5th Cir. 2001).....16

17 *Sierra Club v. Glickman*, 67 F.3d 90 (9th Cir. 1995).....8

18 *Southern Or. Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475 (9th Cir. 1983).....39

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21 *Southwest Ctr. for Biological Diversity v. Norton*, No. 98-0934 (RMU/JMF), 2002 WL
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22 *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31 (D.D.C. 2007)15

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 9 55 Fed. Reg. 12170 (Apr. 2, 1990) 9
 59 Fed. Reg. 5820, et seq. (Feb. 4, 1994) 10, 17
 10 61 Fed. Reg. 4722 (Feb. 7, 1996) 9, 10

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12 124 Cong. Rec. 38,655 (Oct. 14, 1978) 16
 125 Cong. Rec. 29,437 (Oct. 24, 1979) 26
 H.R. Conf. Rep. No. 96-697, *reprinted in* 1979 U.S.C.C.A.N. 2572 26
 13 H.R. Conf. Rep. No. 97-835, *reprinted in* 1982 U.S.C.C.A.N. 2860 15
 H.R. Rep. No. 95-1625, *reprinted in* 1978 U.S.C.C.A.N. 9453 16
 14 H.R. Rep. No. 97-567, *reprinted in* 1982 U.S.C.C.A.N. 2807 29, 30, 33, 35
 S. Rep. No. 95-874 (1978) 16
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16 **Other**

17 BEAN & ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1997) 7, 17
 Brennan, *et al.*, *Square Pegs and Round Holes: Application of the “Best Scientific Data*
 18 *Available” Standard in the Endangered Species Act*, 16 TULANE ENVTL. L.J. 387 (2003) 27
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 19 ENVTL. L. REV. 165 (2006) 27
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 20 *Declare Victory Without Winning the War*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 11302
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 21 Council on Environmental Quality, *Guidance on the Consideration of Past Actions in*
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 22 Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection*
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 23 Doremus, *The Purposes, Effects, and Future of the Endangered Species Act’s Best Available*
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Ruhl, *The Battle Over Endangered Species Act’s Methodology*, 34 ENVTL. L. 555 (2004)..... 26, 27
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U.S. General Accounting Office, *Endangered Species – A Controversial Issue Needing
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Yagerman, *Protecting Critical Habitat Under the Endangered Species Act*, 20 ENVTL. L. 811
(1990)..... 16

INTRODUCTION

1
2 Plaintiffs Center for Biological Diversity, *et al.* (“CBD” or “Plaintiffs”) challenge two
3 environmentally sensitive amendments to land-use plans adopted by the Bureau of Land
4 Management (“BLM”). The amendments provide future land management direction for two areas in
5 the California Desert Conservation Area (“CDCA”): the West Mojave Plan Amendment
6 (“WEMO”) and the Northern and Eastern Colorado Desert Coordinated Management Plan
7 (“NECO”). CBD asserts that BLM violated the Endangered Species Act (“ESA”) and the other Acts
8 introduced below. In formal biological opinions, the U.S. Fish and Wildlife Service (“FWS”) found
9 that WEMO and NECO satisfy ESA § 7. The opinions are the focus of CBD’s ESA challenges.

10 Kern County, San Bernardino County, and Imperial County, California, and QuadState Local
11 Governments Authority (“the Counties”) were granted Intervenor-Defendant status on Jan. 11, 2007.
12 The Counties have important governmental stakes in the challenged actions that go beyond the
13 interests of a run-of-the-mill intervenor. *See* pages 3-5, below.

14 In February, CBD filed separate briefs on its ESA claims (Mem. of Pts....for Summ.
15 Adjudication of Claims 3 and 4, “CBD ESA Br.”) and its other claims (Pls’ Notice of Mot. for
16 Summ. Adjudication on the First and Second Claims, “CBD NEPA/FLPMA Br.”). Below, the
17 Counties support Federal Defendants’ cross-motion for summary judgment and oppose CBD’s
18 motion. Our Argument will focus predominantly on the ESA claims, but will also address certain
19 aspects of Plaintiffs’ NEPA claims.¹ First, we provide some regulatory context.

STATUTORY AND REGULATORY CONTEXT

20
21 **Federal Land Policy and Management Act.** FLPMA, 43 U.S.C. 1701-84, provides that
22 BLM lands are managed for multiple uses: “recreation, range, timber, minerals, watershed, wildlife
23 and fish, and natural scenic, scientific, and historical values.” 43 U.S.C. 1702(c), 1732302, . Land
24 use plans prepared under public procedures make choices on which multiple-use benefits will be
25 featured in particular areas. Such plans can be amended or revised. *Id.* § 1712202, .

26
27 ¹ The Counties are exercising their option under the parties’ stipulation to file a single brief
28 addressing ESA and NEPA issues. *See* Order (Oct. 28, 2007) at 3 (approving stipulation).

1 FLPMA § 601 also established the CDCA and provided some general considerations for
2 CDCA management. 43 U.S.C. 1781601, . BLM has discretion to balance devoting lands to the
3 recovery of ESA-listed species with “outdoor recreation uses” and the “economic resources of the
4 California desert.” 43 U.S.C. 1781(a), (b), (d) and (f).

5 **National Environmental Policy Act.** NEPA requires an environmental impact statement
6 (“EIS”) on certain federal agency actions. 42 U.S.C. 4332(2)(C). NEPA is a procedural statute
7 calling for disclosure of significant environmental impacts. *Robertson v. Methow Valley Citizens*
8 *Council*, 490 U.S. 332, 349-52 (1989). A “rule of reason” is employed in ascertaining whether an
9 EIS complies with NEPA. *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004).

10 **Endangered Species Act.** The ESA, 16 U.S.C. 1531-44, provides certain protections for
11 endangered or threatened species listed (“listed species”), and for critical habitat designated, by the
12 Secretary of the Interior under the rulemaking processes in ESA § 4, 16 U.S.C. 1533.

13 ESA § 7 creates duties for federal agencies. Substantively, § 7(a)(2) allows a federal agency
14 to approve an action if it finds the action is “not likely to jeopardize the continued existence of” a
15 listed species or to adversely modify designated critical habitat. ESA § 7(a)(2), 16 U.S.C.
16 1536(a)(2) . Procedurally, if the proposed action is “likely to adversely affect” listed species or
17 critical habitat, formal “consultation” with FWS is conducted, and FWS prepares a written biological
18 opinion (“BiOp”). 16 U.S.C. 1536(a)(2) and (b)(3); 50 C.F.R. 402.14.

19 ESA § 9 and regulations generally prohibit the “take” of listed wildlife by any private or
20 public “person.”² The 1982 ESA amendments allow some land uses to proceed which incidentally
21 take members of a listed species. FWS has control of these processes through the conditions
22 specified in an ESA § 7(b)(4) incidental take statement (“ITS”), or in an § 10(a)(2) incidental take
23 permit (“ITP”) and habitat conservation plan (“HCP”). 16 U.S.C. 1536(b)(4) and (o)(2), 1539(a)(2).

24 **Administrative Procedure Act.** The APA provides for judicial review of final federal

25 _____
26 ² 16 U.S.C. 1538(a)(1)(B) and (G); *see* 50 C.F.R. 17.31(a) (presumptively extending the
27 statute’s prohibition against “take” of “endangered” wildlife to “threatened” wildlife). “Take” is
28 defined to include causing “harm” to listed wildlife. Implementing rules define “harm” to include a
“habitat modification” or land use activity that “actually kills or injures wildlife.” 50 C.F.R. 17.3;
see Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon, 515 U.S. 687 (1995).

1 agency actions under deferential standards. 5 U.S.C. 706. The agency action is presumed to be
 2 lawful. Plaintiffs bear the burden of proving the action is arbitrary or otherwise unlawful. *Citizens*
 3 *to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *Ctr. for Biological Diversity v.*
 4 *BLM*, 422 F. Supp. 2d 1115, 1126-27 (N.D. Cal. 2006).³

5 **WEMO, The EIR/S Under Federal And State Law, And The Proposed HCP.** WEMO is
 6 not merely a BLM land use plan. BLM, San Bernardino County, and the City of Barstow are the
 7 lead authors of the *Final Environmental Impact Report and Statement for the West Mojave Plan – A*
 8 *Habitat Conservation Plan and California Desert Conservation Area Plan Amendment* (“WEMO
 9 EIR/S”). The WEMO EIR/S serves as both an EIS under the federal NEPA and an environmental
 10 impact report under the California Environmental Quality Act (“CEQA”).⁴

11 An integral part of WEMO – and the principal reason for the joint WEMO EIR/S – is a

12 _____
 13 ³ This “*Imperial Sand Dunes*” decision is the later of two opinions this Court has rendered on
 14 federal compliance with the ESA in CDCA contexts. The first opinion vacated a 2002 BiOp on
 15 NECO, another plan amendment (“NEMO”), and interim WEMO measures, finding that the
 16 regulatory definition of “adverse modification of critical habitat” employed in the BiOp contravened
 17 ESA § 7(a)(2). *American Motorcycle Ass’n v. Norton*, Nos. C 03-03807 SI, C 03-02509 SI, 2004
 18 WL 1753366 (N.D. Cal. Aug. 3, 2004). In conformance with that decision, FWS prepared a revised
 19 2005 BiOp on NECO and a 2006 BiOp on WEMO that employed a permissible interpretation of
 20 “adverse modification.”

21 *Imperial Sand Dunes* concluded that the federal agencies had inadequately explained their
 22 conclusion that the reopening of certain areas to off-highway vehicles (“OHVs” or “ORVs”) would
 23 not violate ESA § 7 constraints (duties to avoid likely jeopardy to the species and adverse
 24 modification of critical habitat) to Peirson’s milk-vetch. The opinion was based on unusual facts.
 25 The Imperial Sand Dunes plan allowed destruction of 50% of the milk-vetch’s critical habitat before
 26 (potentially ineffective) constraints would be initiated. *See* 422 F. Supp. 2d at 1127-36. On
 27 challenges concerning the desert tortoise, the opinion found defects in the incidental take statement
 28 (FWS has not shown that it was impractical to give a numerical estimate of the number of tortoises
 that could be legally taken) and the terms and conditions for allowing incidental take (the failure to
 include measures designed to minimize incidental take). *Id.* at 1137-41.

22 ⁴ We generally follow CBD’s short form for citing the administrative record, and provide
 23 parallel citations to the stand-alone BiOps and EISs (the version most people review). San
 24 Bernardino County is a “co-lead agency” on the EIR/S (the lead agency for CEQA purposes) and a
 25 “NEPA Cooperating Agency.” WEMO EIR/S at 1-3, 1-9 (AR WMP 201668, 201674). Kern
 26 County is both a “CEQA Responsible Agency” and “NEPA Cooperating Agency.” WEMO EIR/S
 27 at 1-9 (AR WMP 201674). The coordinated management in WEMO carries out the intent that BLM
 28 and the Counties first recognized in a 1992 Memorandum of Understanding. EIR/S at 1-13 and
 Appendix A (AR WMP 201678). In 1997, the affected Counties and other members of a West
 Mojave Supergroup adopted equitable principles supporting that WEMO: (1) will provide an
 “improved and streamlined process” for ESA and CESA consultation; and (2) “will be equitable,
 predictable and compatible with local, state and federal agency permitting procedures so as to be
 easily administered.” *Id.* at 1-14 (AR WMP 201674).

1 proposed HCP and ITP under ESA § 10(a)(2) and the California Endangered Species Act (“CESA”)
 2 for management of listed species on interspersed federal, State, and private lands.⁵ The HCP is
 3 being sponsored by San Bernardino and Kern Counties, and over a dozen cities. The HCP would
 4 provide: (1) protection for the threatened desert tortoise and other listed species; and (2) an efficient
 5 mechanism to comply with the ESA and CESA with respect to future uses of private lands.

6 The proposed HCP would impose mitigation fees on development of enrolled private lands.
 7 This, in turn, would provide secure funding for greater habitat conservation activities on BLM-
 8 administered lands for the desert tortoise and other federal and State-listed species. James Decl. ¶ 3
 9 and Scott Decl. ¶ 4 (CR 32). The proposed HCP would provide higher levels of funding for desert
 10 tortoise protection (e.g., fencing of roads, ORV management, restoration of habitat) on the superior
 11 habitat located on federal lands. Consequently, the BLM plan amendment and proposed HCP are
 12 interconnected actions and were analyzed together in a document to fulfill the requirements of both
 13 NEPA and CEQA. *See* WEMO EIR/S at 1-1 to 1-6, 2-9 to 2-223, 3-37 to 3-43 (AR WMP 201666-
 14 71, 201697-911, 201967-73).

15 Some of the threats facing the desert tortoise can be addressed, not through habitat acreage
 16 allocations, but only by providing additional funding.

17 Numerous factors are likely involved in the decline. Predation by common ravens and
 18 domestic and feral dogs, unauthorized off-road vehicle activity, authorized vehicular activity,
 19 illegal collecting, upper respiratory tract disease, possibly other diseases, mortality on paved
 roads, vandalism, drought, livestock grazing, feral burros, human development, nonnative
 plants, and environmental contaminants are known or potential contributing factors.
 20 WEMO BiOp at 59 (WBO AR 1480); *see* CBD ESA Br. at 3. The Counties’ proposed HCP would
 21 provide dollars and other resources currently unavailable to BLM in these budget-strapped times.

22 **NECO.** The NECO planning area encompasses portions of San Bernardino, Riverside, and
 23 Imperial Counties.⁶ San Bernardino and Imperial Counties are cooperating agencies on the NECO
 24

25 ⁵ Within the 9.5 million-acre WEMO planning area, some 3 million acres of private lands are
 26 subject to the jurisdiction of San Bernardino, Kern, Inyo, Los Angeles, and Riverside Counties. The
 non-federal lands are 32% of the WEMO acreage. BLM and other Department of the Interior
 agencies control 3.5 million acres. WEMO EIR/S at 1-2, 1-4 (AR WMP 201667, 201669).

27 ⁶ *Proposed Northern & Eastern Colorado Desert Coordinated Management Plan – an*
 28 *Amendment to the California Desert Conservation Area Plan 1980 and Sikes Act Plan with the*
 (continued...)

1 EIS to provide coordinated planning of the federal and private lands interspersed in the NECO
 2 planning area. NECO EIS at 1-2 to 11 (AR NECO 101217-26). The NECO EIS is an EIS
 3 addressing: (1) the NECO plan amendment with respect to BLM-managed lands; and (2) a Sikes Act
 4 Plan with the California Department of Fish and Game with respect to non-federal lands. NECO
 5 EIS at title page, 1-11 (AR NECO 101194, 101226).

6 BLM formally adopted NECO in a record of decision (“ROD”) dated Dec. 19, 2002. After
 7 the *Am. Motorcycle* opinion found a 2002 BiOp on NECO (and NEMO) employed an unlawful
 8 standard for assessing “adverse modification of critical habitat,” FWS prepared a curative 2005
 9 BiOp. The 2005 BiOp addressed NECO and other measures BLM was taking at that time in the
 10 WEMO area (interim measures) and in NEMO (unchallenged by CBD). *See* NECO BiOp at 1
 11 (NBO AR 12535). A 2006 BiOp addresses the effects of implementing the long-term WEMO. *See*
 12 WEMO BiOp at 1 (WBO AR 14752).

13 ARGUMENT

14 **I. WEMO And NECO Substantively Comply With The ESA. As They Provide Net 15 Improvements, They Go Beyond The Degradation Constraints In ESA Section 7(a)(2).**

16 CBD’s ESA arguments are short on substance and long on procedural demands. *See* CBD
 17 ESA Br. at 7-24. While Plaintiffs hint that WEMO and NECO substantively violate the ESA, they
 18 develop few supporting arguments. As Section I of this brief explains, the environmentally-
 19 protective plan amendments clearly do satisfy ESA § 7(a)(2), and even assist in discretionary
 20 conservation and recovery.

21 The BiOps are each over 200 pages long and fully address the Court’s prior procedural
 22 critiques. Undeterred, CBD urges the Court to ladle on further procedures. However, the strong
 23 administrative record on procedural ESA compliance, and a court’s duty to “uphold a decision of
 24 less than ideal clarity if the agency’s path may reasonably be discerned” (*Motor Vehicle Mfrs. Ass’n*

25 _____
 (...continued)

26 *California Department of Fish and Game and Final Environmental Impact Statement* (“NECO EIS”)
 27 at Appendix A (AR NECO 101194, 101676-74). Within the 5.5 million acre NECO planning area,
 28 there are over 680,000 acres of private lands subject to the Counties’ jurisdiction (12.3% of the total
 acreage), while BLM manages 3.8 million acres (69% of the total). *Id.* at 1-4 (AR NECO 101219).

1 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), should lead the Court to dismiss the
 2 procedural ESA claims. *See* Section II.

3 **A. The ESA Only Requires Federal Agencies To Avoid Actions That**
 4 **Degrade A Species' Status Or Critical Habitat Conditions In Some**
 5 **Appreciable Way. The ESA Does Not Require Conservation, Recovery,**
 6 **Or Improvement Actions.**

7 ESA § 7(a)(2) sets a floor that, normally, federal agency actions are limited to those “not
 8 likely to jeopardize the continued existence of a” listed species or to “result in the destruction or
 9 adverse modification of [the designated critical] habitat” of such species. 16 U.S.C. 1536(a)(2). To
 10 “jeopardize” means that an “action causes some ‘deterioration in the species’ pre-action condition.”
 11 *National Wildlife Fed’n v. National Marine Fisheries Serv.*, 481 F.3d 1224, 1236 (9th Cir. 2007)
 12 (“*NWF v. NMFS*”). “Destruction or adverse modification” of critical habitat also clearly focuses on
 13 whether the proposed action subject to consultation would cause “adverse” future changes in habitat
 14 conditions.⁷ Thus, § 7(a)(2) bars federal actions that *degrade* the status of the species or critical
 15 habitat in some manner that is significant to the species.

16 In contrast, ESA § 4(f) and § 7(a)(1) encourage – but do not compel – federal agencies to
 17 take actions that assist in the “conservation” of a species, including the *improvement* actions
 18 identified in a recovery plan. 16 U.S.C. 1533(f), 1536(a)(1). A BiOp’s ESA § 7(a)(1) “conservation

19 ⁷ *See NWF v. NMFS*, 481 F.3d at 1239-41 (adverse modification considers “near-term habitat
 20 loss” and whether the action “will not appreciably reduce the odds of success for future recovery
 21 planning, by tipping a listed species too far into danger”).

22 While *NWF v. NMFS* and *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378
 23 F.3d 1059, 1069-75 (9th Cir. 2004), require procedural consideration of the impacts of the action on
 24 the potential that critical habitat can serve a recovery role, those opinions do not substantively
 25 prohibit any federal action that does not assist in “recovery.” The definition of “critical habitat”
 26 does allow designation of critical habitat that could serve a “conservation” function. 16 U.S.C.
 27 1532(5). But the critical habitat actually designated can be reduced below what is desirable
 biologically for conservation to level that just avoids “extinction of the species,” based on the
 “economic” and other public interest factors. 16 U.S.C. 1533(b)(2). The public can and usually
 does comment that areas should be excluded from critical habitat on economic or other grounds.
 This has occurred with greater intensity after *Gifford Pinchot* found that areas designated as critical
 habitat could be subject to more stringent land use constraints than occurs under the automatic
 “jeopardy” constraint. For modern designations of critical habitat, this political process creates
 powerful incentives for FWS to designate as critical habitat only parts of the currently-occupied
 habitat needed to sustain a listed species. *See Quarles & Lundquist, Critical Habitat: Current*
Centerpiece of Endangered Species Act Litigation and Policymaking? Critical for Whom? The
 (continued...)

1 recommendations” do not “carry any binding force.” 50 C.F.R. 402.14(j). The Services adopted this
 2 ESA interpretation after agreeing with the House Committee with ESA jurisdiction that ESA
 3 § 7(a)(2) cannot be transformed from a no-significant-degradation provision to a provision only
 4 allowing federal actions that improve the status of listed species and critical habitat.⁸

5 If an agency action satisfies ESA § 7(a)(2), the federal agency has “discretion in ascertaining
 6 how to best fulfill the mandate to conserve.” *Pyramid Lake Paiute Tribe v. U.S. Dep’t of Navy*, 898
 7 F.2d 1418 (9th Cir. 1990); *Southwest Center for Biological Diversity v. U.S. Bureau of Recl.*, 143
 8 F.3d 515, 522-23 (9th Cir. 1998) (agency need not choose the “most effective” strategy). This
 9 discretion includes the ability to forgo maximizing recovery benefits, in order to achieve some of the
 10 objectives stated in the agency’s organic statute. *Platte River Whooping Crane Trust v. FERC*, 962
 11 F.2d 27, 34 (D.C. Cir. 1995) (it is too “far-fetched” to interpret the ESA as obliging federal agencies
 12 to do “whatever it takes” to conserve listed species).

13 The Supreme Court recently found that ESA § 7 should be construed with reference to the
 14 agency’s discretion under its organic statute. *National Ass’n of Home Builders v. Defenders of*
 15 *Wildlife*, 127 S. Ct. 2518 (2007).⁹ Thus, once ESA § 7(a)(2)’s floor is satisfied, BLM has the
 16 discretion to structure WEMO and NECO to provide for some of the “economic resources of the
 17 California desert” and “outdoor recreational use” in a “framework of ...multiple use and sustained

18 _____
 (...continued)

19 *Species Or The Landowner?*, 46 ROCKY MT. MIN. L. INST. 18-1, 18-26 to 41 (2002); BEAN &
 ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 252-62 (1997).

20 ⁸ The preamble to the ESA § 7 rules quotes a letter from the relevant House Committee.
 21 “[W]e do not believe that it was intended that section 7(a)(1) require developmental agency actions
 22 to be treated as conservation programs” as this “would render the much debated provisions of
 23 section 7(a)(2)...essentially meaningless and bring about endless litigation.... [F]ailure to accept or
 24 implement the [conservation] recommendations does not constitute a violation of section 7.” 51 Fed.
 Reg. 19926, 19954 (June 3, 1986). The “Service agrees with the Committee’s comments” and
 accordingly added § 402.14(j) language to “emphasize the advisory, non-binding nature of
 conservation recommendations.” *Id.* at 19954-55.

25 ⁹ *NAHB v. Defenders* reversed the decision in *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th
 26 Cir. 2005), that ESA § 7 overrides all other laws and makes protection of listed species the first
 27 priority in every federal agency action. *See also NWF v. NMFS*, 481 F.3d at 1234 (relying on the
 28 now-reversed Ninth Circuit opinion in *Defenders v. EPA*). Though the Ninth Circuit declined to
 follow the Services’ interpretation of their ESA § 7 rules in *NWF v. NMFS* and *Defenders v. EPA*,
 the Supreme Court found the Services’ reasonable regulatory interpretation was controlling in *NAHB*
v. Defenders, 127 S. Ct. at 2533-36.

1 yield” under FLPMA § 601, and not to make maximization of listed species recovery the dominant
 2 or sole objective. 43 U.S.C. 1781(a)(4) and (6), (b), (d); *Sierra Club v. Glickman*, 67 F.3d 90, 97
 3 (9th Cir. 1995) (if the Forest Service satisfies the minimum required by ESA §§ 7 and 9, “the district
 4 court is not to substitute its judgment” on whether other “features might be most desirable”).¹⁰

5 Further, ESA § 4(f) recovery plans do not establish any legally-binding standards. *Fund for*
 6 *Animals v. Rice*, 85 F.3d 535, 547-48 (11th Cir. 1996); *Biodiversity Legal Found. v. Norton*, 285 F.
 7 Supp. 2d 1, 13-14 (D.D.C. 2004). Thus, the fact that WEMO and NECO diverge somewhat from the
 8 Tortoise Recovery Plan does not establish any violation of law.

9 For these reasons, ESA § 7(a)(2) should not be infused with a “conservation” or “recovery”
 10 or improvement constraint. Congress decided to not push federal agencies that far.¹¹

11 **B. WEMO and NECO Go Beyond The ESA Minimum By Conserving**
 12 **Ample Habitat For The Tortoise**

13 Contrary to CBD’s implication that Federal Defendants have shortchanged ESA-listed
 14 species, the record shows the agencies have provided ample habitat. BLM has exercised its
 15 discretion in favor of going beyond what the ESA requires. In WEMO and NECO, BLM made
 16 protection of the desert tortoise and other species the dominant use on *millions* of acres.

17 WEMO establishes four tortoise Desert Wildlife Management Areas (“DWMAs”), totaling
 18 over 1.5 million acres, and 14 areas of critical environmental concern (“ACECs”) to protect habitat
 19 for different rare species. WEMO EIR/S at 2-10, 2-13 to 17 (AR WMP 207822, 207825-29).
 20 NECO establishes two DWMAs (“encompassing about 1.75 million acres”) and 14 other multi-
 21 species wildlife habitat management areas. NECO ROD at D-1 (AR NECO 100641).
 22

23 ¹⁰ The similar multiple-use mandate for national forests allows compromises and does not make
 24 providing all possible benefits to wildlife the dominant use. *Seattle Audubon Soc’y v. Moseley*, 80
 F.3d 1401, 1404 (9th Cir. 1996); *Sierra Club v. Espy*, 38 F.3d 792, 799-802 (5th Cir. 1994).

25 ¹¹ As a former attorney for the Sierra Club has summarized: “Like it or not, the common
 26 notions of recovery and delisting...will not become a realistic aspiration for any significant number
 27 of species any time in the foreseeable future.... An obvious problem with [the current ESA]...is that
 it identifies species in need of protection, but does very little to ‘recover’ them.” Cheever, *The*
 28 *Rhetoric of Delisting Species Under the Endangered Species Act: How to Declare Victory Without*
Winning the War, 31 ENVTL. L. REP. (ENVTL. L. INST.) 11302, 11304 (Nov. 2001).

1 Indeed, WEMO and NECO provide redundant habitats for the tortoise.¹² In 1990, FWS
 2 determined that the Mojave Desert population of the desert tortoise was a “distinct population
 3 segment” (“DPS”) and a “threatened species.” 55 Fed. Reg. 12170 (Apr. 2, 1990). Congress limited
 4 the smallest “species” unit to a DPS because subdividing the true biological “species” into smaller
 5 and smaller subpopulations leads to absurd results, dilutes scarce FWS resources, and greatly
 6 increases the scope of the ESA’s economic constraints.¹³

7 FWS and BLM have provided redundant habitats for smaller subsets than the listed tortoise
 8 population. For example, the 1994 *Desert Tortoise (Mojave Population) Recovery Plan* subdivided
 9 the listed DPS into six “evolutionarily significant units” (“ESUs”), each of which comprised a
 10 separate “recovery unit.”¹⁴ The Recovery Plan advocated broader and more stringent measures
 11

12 ¹² Some of the County intervenors were so concerned about the redundant habitats being
 13 provided to the desert tortoise that they filed a formal notice of an ESA citizen suit on June 27, 2003.
 14 The Counties have subsequently worked within the administrative process to find acceptable
 solutions. If restrictions in critical habitat and on other tortoise matters become more severe, the
 Counties may have to reconsider the litigation option.

15 ¹³ The 1978 ESA Amendments eliminated the broader ability under the 1973 ESA’s definition
 16 of “species” to list any “group of fish or wildlife...in common spatial arrangement.” 87 Stat. 886
 17 (1973). Those Amendments substituted a more-restrictive phrasing which forbids the listing of
 18 invertebrates below the “subspecies” level and only allows listing of a “distinct population segment”
 of vertebrates “which interbreeds when mature.” 16 U.S.C. 1532(16). As the GAO described in
 1979, there was a concern that, under a loose definition of “species,” the ESA could be trivialized
 because

squirrels in a specific city park could be listed as endangered, even though an abundance of
 squirrels lived in other parks in the same city and elsewhere.... Such listings could increase
 the number of potential conflicts between endangered and threatened species and Federal,
 State, and private projects and programs.... However, the purpose of the Endangered Species
 Act is to conserve endangered and threatened species and their critical habitats, not preserve
 every individual animal and plant.

22 *Endangered Species – A Controversial Issue Needing Resolution* 52, 58 (GAO CED-79-65, 1979).
 23 Responding to GAO, the Senate Report on the 1979 ESA Amendments stated an intent to list a DPS
 24 only “sparingly”: “the Committee is aware of the great potential for abuse of this authority and
 expects FWS to use the ability to list populations sparingly and only when the biological evidence
 indicates that the action is warranted.” S. Rep. No. 96-151, at 7 (1979).

25 ¹⁴ Tortoise Recovery Plan at 19-26 (NBO 578-85). Neither the ESA nor the Services’
 26 subsequent *Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the*
 27 *Endangered Species Act* (“DPS Policy”), 61 Fed. Reg. 4722 (Feb. 7, 1996), provide for the
 designation and protection of subpopulations or any other units smaller than a DPS. The six
 28 individual ESUs may not satisfy the “significance” to the species standard of the DPS Policy. *See*
National Ass’n of Home Builders v. Norton, 340 F.3d 835, 844-52 (9th Cir. 2003).

(continued...)

1 deemed necessary to protect and recover each of these six smaller ESUs/recovery
2 units/subpopulations than would have been warranted if the objective was just to recover one
3 Mojave tortoise DPS. Because the numbers of tortoises in each recovery unit were smaller and more
4 susceptible to extinction, the Recovery Plan recommended a "reserve architecture" which contains
5 "redundancy" in the DWMA. Recovery Plan at 34-36 and Appendix C (NBO 594-96, 644-98).
6 Using this redundancy principle, the Recovery Plan (at 36-42) recommended that 14 DWMA be
7 established in six recovery units/ESUs for a *single* distinct population of tortoises.

8 FWS carried out this redundancy in its 1994 designation of over 6.4 million acres of critical
9 habitat for a single DPS, based on the draft recovery plan. 59 Fed. Reg. 5820 (Feb. 4, 1994). With a
10 few minor adjustments (e.g., not including the proposed Joshua Tree DWMA because these National
11 Park Service lands were already protected), the 14 DWMA recommended in the Draft Tortoise
12 Recovery Plan formed the basis for the 12 critical habitat units designated by FWS. *See* 59 Fed.
13 Reg. 5825, 5842, 5847-66. As described above, WEMO and NECO largely implement this
14 redundant set of DWMA habitat protections for different subsets of one listed tortoise population.

15 **C. WEMO And NECO Exceed The ESA Minimum By Providing Net**
16 **Improvements For Listed Species And Critical Habitat**

17 If one examines the future for tortoises and other listed species without WEMO and NECO,
18 and compares it to the future with those plan amendments' creation of extensive DWMA and
19 ACECs and adoption of protective regulations, the answer clearly is: WEMO and NECO are a net
20 improvement, and do not cause net degradation, for listed species and their critical habitat.

21 FWS supported this common-sense conclusion throughout the BiOps. WEMO and NECO
22 "would increase protection of the desert tortoise above the current management situation," would
23 "improve management of critical habitat of the desert tortoise above the current management
24 situation," and are "consistent with most of the recommendations of the recovery plan for the desert

25 _____
(...continued)

26 Moreover, use of the ESU terminology for tortoises is questionable. The preamble to the
27 DPS Policy states that the ESU policy adopted by the National Marine Fisheries Service ("NMFS")
28 "applies only to species of salmonids native to the Pacific," not to tortoises in the desert. 61 Fed.
Reg. 4722.

1 tortoise and will promote the survival and recovery of the species” within the planning areas.
2 WEMO BiOp at 129, 131, 135 (WBO AR 14880, 14882, 14886); NECO BiOp at 169, 172, 174
3 (NBO AR 12703, 12706, 12708). Habitat *improvements* will result from such WEMO and NECO
4 elements as: (1) “[s]ubstantial reductions in the amount of livestock grazing”; (2) “[a]cquisition of
5 private lands” with high habitat values; (3) “[r]educing” the areas within DWMA’s for parking and
6 camping “from 300 feet to 50 feet” or “from 300 feet to 100 feet” of roads; and (4) “[c]losure of
7 routes, which will reduce the exposure of desert tortoises to human-related threats.” WEMO BiOp
8 at 135-36 (WBO AR at 14886-87); NECO BiOp at 174-77 (NBO AR 12708-11).

9 FWS also responsibly concluded that WEMO is not likely to jeopardize Parish’s daisy,
10 Cushenbury milk-vetch, or Lane Mountain milk-vetch, or to adversely modify the critical habitat
11 designated for the first two species. WEMO BiOp at 150-71 (WBO AR 14901-22). There is a
12 “limit of one percent of new disturbance within the area of critical environmental concern to reduce
13 the loss of Parish’s daisy” and the two milk-vetches. *Id.* Habitat *improvements* will result from
14 several WEMO plan elements.¹⁵

15 FWS, the ESA-expert agency, concluded that WEMO and NECO do satisfy ESA § 7(a)(2) in
16 BiOps issued after formal consultation and after taking a serious look at ESA impacts. Courts must
17 defer to FWS’s reasonable judgment in an area of predictive biology. *Marsh v. Oregon Natural Res.*
18 *Council*, 490 U.S. 360, 376-78 (1989); *Gifford Pinchot*, 378 F.3d at 1066. For this reason, courts
19 normally affirm FWS’s judgment that a particular agency action substantively satisfies ESA
20 § 7(a)(2). *E.g.*, *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336-37 (9th Cir. 1992); *Hayward*
21 *Area Planning Comm’n v. Norton*, No. C 00-04211 SI, 2004 WL 724950 at *3-7 (N.D. Cal. Mar. 29,
22 2004).

23
24 ¹⁵ Those elements include: (1) “establishment of an area of critical environmental concern” and
25 designating them “as Class L, which will provide increased protection to Parish’s daisy [and the
26 milk-vetches] than currently provided by Class M”; (2) “[r]emoval of livestock grazing from habitat
27 occupied by Parish’s daisy” and the milk-vetches; (3) “[a]cquisition of private lands” with high
28 habitat values; (3) a “no surface occupancy standard” within the ACEC to “eliminate the loss of
Parish’s daisy as a result of mining activities”; and (4) “[d]esignation of all routes of travel within”
the ACEC “as limited use.” *Id.*

1 **D. The Courts In *NWF v. NMFS*, *Gifford Pinchot*, And *Imperial Sand Dunes***
2 **Required Further Explanations Because The Agency Actions There**
3 **Allowed Degrations That Contributed To Arguable Jeopardy/Adverse**
4 **Modification Situations. WEMO And NECO Are Different, As They**
5 **Provide Net Conservation Benefits.**

6 CBD's claims of substantive ESA § 7 violations, as well as several of Plaintiffs' procedural
7 claims, are based primarily on *NWF v. NMFS*, 481 F.3d 1224 (9th Cir. 2007). *NWF v. NMFS*
8 addressed a distinguishable situation.

9 1. The opinion concerned the effects of continued operation of the Federal Columbia
10 River Power System on ESA-listed salmon. NMFS concluded that ESA § 7(a)(2) would not be
11 violated if federal agencies operated dams in a manner that would continue to reduce greatly the
12 numbers of listed salmon, and where structural improvements to increase the survival rate would not
13 occur until 2010. Since salmon have short lifespans, the Ninth Circuit found that NMFS's current
14 conclusion was arbitrary, because a BiOp must provide a more-rational justification where it appears
15 the short-term effects would jeopardize listed salmon and adversely modify their critical habitat.
16 481 F.3d at 1232-41.

17 Similarly, *Gifford Pinchot* required that FWS provide a greater justification for why Forest
18 Service actions would not adversely modify critical habitat where planned timber harvesting would
19 alter tens of thousands of acres of critical habitat for the spotted owl. *See* 378 F.3d at 1064-65,
20 1072-75. In *Imperial Sand Dunes*, this Court found, because a BLM land-use plan tolerated a 50%
21 decrease in the usable critical habitat for Peirson's milk-vetch, FWS had a greater duty to explain
22 rationally and non-arbitrarily its findings of no jeopardy and no adverse modification of critical
23 habitat. 422 F. Supp. 2d at 1127-36; *see* note 3.

24 Here, WEMO and NECO do not result in a net degradation of the status of listed species and
25 critical habitat, but a net improvement. Rather than continuing the status quo, WEMO and NECO
26 immediately provide net benefits for the desert tortoise and other listed species, and critical habitat
27 (e.g., designation of over 3 million acres of DWMAs, reducing ORV use, reducing grazing). This
28 shows substantive compliance with ESA § 7. Further, because FWS's rationale on ESA § 7
 compliance or "path may reasonably be discerned" (*State Farm*, 463 U.S. 43), no additional
 procedural explanation should be required. *See* Section II.

1 2. Moreover, there are causation differences as well. ESA § 7(a)(2) and (b)(3) speak in
2 terms of “how the agency action affects [or causes impacts to] the species or its critical habitat.” 16
3 U.S.C. 1536(b)(3). “Agency action can only ‘jeopardize’ a species’ existence if that agency action
4 causes some deterioration in the species’ pre-action condition.” *NWF v. NMFS*, 481 F.3d at 1236
5 (emphasis added).¹⁶ Federal actions on dams were a principal cause of the threats to salmon in *NWF*
6 *v. NMFS*.

7 In contrast, the principal causes of threats to tortoises in the future are not WEMO and
8 NECO. One significant set of threats to desert tortoises is environmental (e.g., drought depriving
9 tortoises of food sources and leaving tortoises to eat plants with high metal concentrations, upper
10 respiratory disease, predation by ravens and dogs). NECO BiOp at 57-60 (NBO AR 12591-94);
11 WEMO BiOp at 55-59 (WBO AR 14806-10); CBD ESA Br. at 3. Because ESA § 7(a)(2) is
12 concerned with degradation caused by a discretionary federal agency action, neither BLM nor the
13 Counties can be held responsible for such acts of nature. This is especially true when WEMO and
14 NECO do not “deepen the jeopardy by causing additional harm” (as compared to future conditions
15 without WEMO and NECO, and their DWMAAs and ACECs). *NWF v. NMFS*, 481 F.3d at 1236.

16 Another underlying cause of threats to tortoises and other listed species and their critical
17 habitats is BLM’s limited budget. Courts cannot remedy this directly, as Congress has the
18 constitutional power to set appropriations. The Counties’ proposed HCP/ITP would effectively
19 increase BLM’s funding for the WEMO area, and allow more acquisition of habitat, fencing, law
20 enforcement, and research. *See* pages 3-4, above.

21 For these reasons, under the logic of *NWF v. NMFS* – and under the factual differences
22 between the beneficial WEMO and NECO versus the damaging federal actions in *NWF v. NMFS*,
23 *Gifford Pinchot*, and *Imperial Sand Dunes* – WEMO and NECO substantively satisfy ESA § 7.

24 3. Further, the key defect found by the *NWF v. NMFS* Court was that NMFS had
25 improperly “use[d] a hypothetical ‘reference operation’” as the current environmental baseline

26 _____
27 ¹⁶ “Proximate cause” is read into ESA § 9 “take.” *Sweet Home*, 515 U.S. at 697 n.9, 700 n.13,
28 709. There is no persuasive reason to not also create a proximate cause limit on liability under ESA
§ 7. *See NAHB v. Defenders*, 127 S. Ct. at 2534-36.

1 conditions under 50 C.F.R. 402.02 and 402.14(g)(2), instead of the current status of the species and
 2 critical habitat. 481 F.3d at 1233-35. The unlawful baseline infected other parts of the BiOp, as
 3 discussed in 481 F.3d at 1235-41. Here, CBD does not argue that FWS used some hypothetical
 4 baseline to reduce the effects of the WEMO and NECO plan amendments. This factual distinction
 5 also significantly undercuts reliance on *NWF v. NMFS*.

6 **E. FWS's Interpretation Of Adverse Modification Of Critical Habitat Is**
 7 **Reasonable And Lawful**

8 FWS does not interpret "adverse modification of critical habitat" to prevent the disturbance
 9 of a small area within a large designated critical habitat, if the critical habitat remains functional in
 10 allowing the survival and recovery of the listed species, especially if the trend is towards
 11 improvement of critical habitat conditions over time. See WEMO BiOp at 84-85, 132-33, 136-37
 12 (WBO AR 14835-36, 14882-83, 14887-88). This is allowed by *Gifford Pinchot*, 378 F.3d at 1075.

13 No court has found that "no disturbance, anywhere" is the only permissible interpretation of
 14 the "adverse modification" constraint. See WEMO BiOp at 4-5 (WBO AR 14755-56, discussing the
 15 amended order in *Am. Motorcycle*). That draconian interpretation would broadly interfere with
 16 mankind's use of land for many productive purposes, and that was not intended by Congress.¹⁷

17 In the 1982 ESA Amendments, Congress ratified the Services' regulatory standards that
 18 § 7(a)(2) is violated only if an action impairs both the "survival and recovery" of the listed species,
 19 or the value of critical habitat for both "survival and recovery." Incidental takes are allowed if the
 20 "taking will not appreciably reduce the likelihood of the *survival and recovery* of the species in the
 21 wild." 16 U.S.C. 1539(a)(2)(B)(iv) (emphasis added). Congress consciously borrowed the "survival
 22 and recovery" language from the 1978 jeopardy and adverse modification rules.

23 The Secretary will base his determination as to whether or not to grant the permit, in part, by
 24 using the *same standard as found in section 7(a)(2) of the Act, as defined by Interior*
Department regulations, that is, whether the taking will appreciably reduce the likelihood of

25 ¹⁷ There is "nothing remarkable about resolving the textual ambiguity against the alternative
 26 meaning the framers are highly unlikely to have intended." *Robbins v. Chronister*, 435 F.3d 1238,
 27 1241 (10th Cir. 2006) (en banc); see Sunstein, *Avoiding Absurdity? A New Canon in Regulatory*
 28 *Law*, 32 ENVTL. L. REP. 11126 (Sept. 2002); *Sweet Home*, 515 U.S. at 697 n.10 (ESA § 9 literally
 prohibits only the taking of an entire "species," but declining to reach that absurd result); *American*
Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (9th Cir. 1994).

1 the *survival and recovery* of the species in the wild.

2 H.R. Conf. Rep. No. 97-835, at 29-30, 1982 U.S.C.C.A.N. 2860, 2870-71 (emphasis added). Where
3 Congress incorporates the text of a regulatory interpretation of a statute into the statute, Congress
4 adopts and ratifies that interpretation. *E.g., Bragdon v. Abbott*, 524 U.S. 624, 631 (1998); *Hall v.*
5 *EPA*, 273 F.3d 1146, 1158 (9th Cir. 2001).

6 Accordingly, the 1982 Congress ratified the interpretation that critical habitat is adversely
7 modified (and that a species is jeopardized) only if the modification appreciably reduces its value for
8 a listed species' "survival and recovery." By allowing actions to proceed unless both "survival and
9 recovery" are compromised, this "makes clear that ITPs can be granted even if doing so threatens the
10 recovery of the species," as long as survival is not jeopardized. *Spirit of the Sage Council v.*
11 *Kemphorne*, 511 F. Supp. 2d 31, 43 (D.D.C. 2007).

12 Further, "adverse modification of critical habitat" cannot be pushed too far in the direction of
13 conservation/recovery without violating several ESA provisions. First, as described in Section I.A,
14 ESA § 7(a)(2) imposes constraints against significant degradation of the current status of a listed
15 species and its critical habitat, while "conservation" and "recovery" are the domain of the more
16 discretionary ESA §§ 4(f) and 7(a)(1). Second, ESA § 4(b)(2) allows FWS to exclude areas from
17 critical habitat down to the point that the "failure to designate such area as critical habitat will result
18 in the extinction of the species." 16 U.S.C. 1533(b)(2); *see note 7, above*. Since ESA § 4(b)(2)
19 shows the only mandatory role for critical habitat is for the species' persistence, "adverse
20 modification" can permissibly emphasize "survival."

21 Moreover, the purpose of the 1978 ESA Amendments was to *narrow* the acreage of critical
22 habitat designated – accordingly, those Amendments should not be read as a directive to apply the
23 ESA § 7(a)(2) constraint against adversely modifying critical habitat more *stringently*. The 1978
24 ESA Amendments on critical habitat "curtailed FWS's broad [1978 regulatory] definition of critical
25 habitat." Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat*
26 *Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 215 (2000). The 1978
27 Congress was incensed that FWS had proposed to designate broad areas of currently-unoccupied
28 habitat as critical habitat for grizzly bears:

1 [U]nder present regulations the Fish and Wildlife Service is now using the same criteria for
 2 designating and protecting areas to extend the range of an endangered species as are being
 3 used in designation and protection of those areas which are *truly critical to the continued*
 4 *existence of a species....* The committee is particularly concerned about the implications of
 this policy when extremely large areas are involved in a critical habitat designation. For
 example, as much as 10 million acres of Forest Service land is involved in the critical habitat
 being proposed for the grizzly bear in three Western States.

5 S. Rep. No. 95-874, at 9-10 (1978) (emphasis added).¹⁸

6 None of this pertinent law was addressed in the opinions that reached out to declare the
 7 regulatory definition of “adverse modification” of critical habitat to be unlawful, in cases where the
 8 rules were not directly challenged and based on inadequate briefing. *Gifford Pinchot*, 378 F.3d 1059
 9 (9th Cir. 2004); *Sierra Club v. FWS*, 245 F.3d 434 (5th Cir. 2001); *Am. Motorcycle*, 2004 WL
 10 1753366 at *7-10. Any “nonbinding dicta” in those opinions are not controlling once an issue has
 11 been adequately briefed. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173-74 (9th Cir. 2004) (contrary
 12 to prior Ninth Circuit statements, species cannot be plaintiffs on ESA claims). Once these matters
 13 are considered, this Court should recognize that the ESA does not force “adverse modification” of
 14 critical habitat to be read broadly in the direction of “recovery” and no small disturbances.

15 There are alternative, more reasonable approaches to “adverse modification” of critical
 16 habitat. One such approach is to look at whether, even with some small disturbance, the critical
 17 habitat as a whole retains the primary constituent elements needed for critical habitat to function for
 18 the survival and recovery of the pertinent listed species. *See Gifford Pinchot*, 378 F.3d at 1075.
 19 Another approach is to examine whether there would be material degradation of critical habitat if the
 20 action is allowed, as compared to the habitat’s future status if the action was not taken. *See*
 21 *Hayward*, 2004 WL 724950 (this Court found no adverse modification because, while the “Project

22 _____
 23 ¹⁸ The “truly critical to the continued existence of a species” language from the Senate Report
 24 supports an emphasis on “survival” of the species. Congress wanted to avoid the result that “any
 25 decrease in the likelihood of conserving the species so long as that decrease would be capable of
 26 being perceived or measured” would mean an area is critical habitat. H.R. Rep. No. 95-1625 at 25,
 27 *reprinted in* 1978 U.S.C.C.A.N. 9453, 9475. The House Report indicates that Congress “narrows
 the scope of” critical habitat so that the Services would not designate “virtually all the habitat of a
 listed species as its critical habitat.” H.R. Rep. No. 95-1625 at 25, *reprinted in* 1978 U.S.C.C.A.N.
 9453, 9475; *see also* 124 Cong. Rec. 38,655 (Oct. 14, 1978) (House floor manager Murphy’s
 description that the Conference Report includes an “extremely narrow definition of critical habitat”).
 The 1978 legislation “narrow[s] the scope of ‘critical habitat.’” Yagerman, *Protecting Critical*
Habitat Under the Endangered Species Act, 20 ENVTL. L. 811, 831 (1990).

1 will have extensive negative effects on the critical habitat,” this “will be mitigated by compensation
2 measures” and other “benefits”). FWS employed a combination of those approaches here.

3 FWS has the interpretive discretion to construe “adverse modification” in this reasonable
4 manner. In light of the legislative materials cited above, the intended meaning of “critical habitat”
5 for ESA § 4 designation purposes and of “adverse modification” of critical habitat for ESA § 7
6 purposes is unclear¹⁹ and does not require a strong focus on recovery. Because the ESA does not
7 compel a preservationist or recovery-based interpretation of “adverse modification,” courts should
8 defer to FWS’s reasonable interpretation of the ESA. *See NAHB v. Defenders*, 127 S. Ct. at 2533-
9 36 (sustaining another Service interpretation of ESA § 7 under *Chevron* Step Two where the ESA
10 was ambiguous); *Sweet Home*, 515 U.S. at 703, 708 (sustaining FWS’s ESA definition of “harm”
11 and emphasizing the Secretary’s “broad discretion” under the ambiguous ESA).

12 Further, it would be very unfair to impose a preservationist reading now on “adverse
13 modification.” In the 1990s, when thousands to millions of acres were designated as critical habitat
14 for each of many species, the public was informed that the critical habitat designation had little or no
15 economic impact. *See New Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife Service*, 248 F.3d
16 1277, 1283-85 (10th Cir. 2001). In 1994, FWS designated over 6.4 million acres of critical habitat
17 for the Mojave Desert population of the desert tortoise, after informing the public that the
18 designation had few additional economic impacts outside the reduction of grazing that was
19 occurring. *See* 59 Fed. Reg. 5820 (Feb. 4, 1994). The regulatory significance and adverse economic
20 impacts of designating critical habitat should not be altered after-the-fact, especially in a manner
21 contrary to the public comment process and economic impact analysis that ESA § 4(b)(2) requires.

22 **F. CBD’s Remaining Arguments On Substantive ESA Violations Are**
23 **Unconvincing**

- 24 1. One portion of *NWF v. NMFS* imposed an “aggregation approach” on BiOps. 481

25
26 ¹⁹ As Michael Bean of Environmental Defense has stated: “Is there an understanding of critical
27 habitat that can make sense of the 1978 legislative history? Probably not, since Congress...failed to
28 make clear its own conception of how critical habitat was to fit in with the rest of the statutory
structure.” BEAN & ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 261 (1997).

1 F.3d at 1235-36.²⁰ The Service’s BiOp must consider the totality of “activities that impact the listed
2 species.” 481 F.3d at 1236. This way, if there were seriously “degraded baseline conditions,” where
3 the “agency action causes some deterioration in the species’ pre-action condition,” the aggregate of
4 the current conditions facing a listed species and some incremental “deterioration” or “new
5 jeopardy” caused by the proposed action could be said to jeopardize a listed species. 481 F.3d at
6 1235-36. The Ninth Circuit favored this approach because it avoids allowing a species to be
7 “gradually destroyed, so long as each step to the path of destruction is sufficiently modest,” as a
8 “slow slide into oblivion is one the very ills the ESA seeks to prevent.” *Id.*

9 It is dispositive that *NWF v. NMFS* might find an ESA § 7(a)(2) violation only if the
10 proposed “agency action causes some deterioration in the species’ pre-action condition” – if the
11 action “deepens the jeopardy by causing additional harm.” 481 F.3d at 1236. Even if there are
12 degraded habitat conditions, “an agency may still take action...that lessens the degree of jeopardy.”
13 *Id.*

14 FWS has reasonably and non-arbitrarily found that, as a whole, WEMO and NECO (e.g.,
15 with their designation of extensive DWMAs, reduced ORV use, and reduced grazing) “increase
16 protection of the desert tortoise” and “would improve management of critical habitat of the desert
17 tortoise above the current management situation.” WBO AR 14480, 14882, 14885-88; *see* Section
18 I.C. Thus, WEMO and NECO are expected to improve (not degrade) the status of listed species
19 under the current environmental baseline condition. In such a fact pattern, because the proposed
20 federal action “lessens the degree of” risk, the proposed actions do not cause jeopardy or adverse
21 modification of critical habitat under the Ninth Circuit’s reading of ESA § 7. *NWF v. NMFS*, 481
22 F.3d at 1236; *see id.* at 1239-41.

23 2. CBD focuses on minor aspects of WEMO and NECO. For example, NECO allows
24 some “continued” ORV uses in the desert and reduced livestock grazing. Continuation of historic

25 _____
26 ²⁰ The “aggregation approach” was contrary to NMFS’s interpretation of the Services’ rules and
27 of ESA § 7. In NMFS’s view, 50 C.F.R. 402.02 (definitions of “jeopardize” and “destruction or
28 adverse modification” of critical habitat) and 402.14(g) and (h) call for an approach which examines
whether the proposed action makes the status of an imperiled species “appreciably ‘worse.’” 481
F.3d at 1235.

1 activities, and mainly at a lower level, cannot violate ESA § 7(a)(2). The ESA has “no ‘retroactive’
 2 application” – rather, it takes the world as it finds it, including the effects of “*prior* action of a
 3 federal agency.” *TVA v. Hill*, 437 U.S. 153, 186 n.32 (1978); *NWF v. NMFS*, 481 F.3d at 1235-36.
 4 There is no persuasive basis for finding jeopardy or adverse modification where historic activities
 5 would be continued in a reduced, more environmentally sensitive manner.

6 **II. The BiOps Satisfy ESA § 7 Procedures, And Are Not Arbitrary Actions**

7 The bulk of CBD’s brief encourages the Court to impose additional ESA *procedures* on
 8 FWS. As we show below, the BiOps – each over 200 pages, and already revised to respond to a
 9 procedural criticism that incidental take should be quantified – are procedurally adequate.²¹

10 **A. The ESA And APA Do Not Require Great Detail**

11 CBD demands a level of detail that goes far beyond the limited procedural duties in the ESA
 12 and APA. ESA § 7 does not require that a BiOp have great detail. The statute merely requires a
 13 “written statement setting forth the Secretary’s opinion, and a *summary* of the information on which
 14 the opinion is based” on whether the agency action does or does not substantively comply with ESA
 15 § 7(a)(2). 16 U.S.C. 1536(b)(3) (emphasis added). Thus, a BiOp can be “summary.”

16 The APA also does not require great detail. Courts will “uphold a decision of less than ideal
 17 clarity if the agency’s path may reasonably be discerned.” *State Farm Mut. Auto. Ins. Co.*, 463 U.S.
 18 at 43.²² If FWS gives some consideration to the issue, that is sufficient. *Southwest Center for*
 19 *Biological Diversity v. U.S. Bureau of Recl.*, 143 F.3d at 522-23. A court cannot “mandate that FWS

20 _____
 21 ²¹ The Court should not set aside BLM’s environmentally sensitive WEMO and NECO, or
 22 FWS’s BiOps that correctly concluded the planning actions comply with the ESA, based on any
 23 curable procedural defects. *See* Section V, below.

24 ²² Judicial review normally does not reach whether the agency’s reasoning is substantively
 25 “arbitrary.” That confuses the roles of the Executive and Judicial Branches. A “court is not to
 26 substitute its judgment for that of the agency,” and cannot find the agency’s reasoning to be arbitrary
 27 unless it is “so implausible that it could not be ascribed to a difference in views.” *State Farm*, 463
 U.S. at 43; *see Overton Park*, 401 U.S. at 416 (“clear error of judgment” standard). The Executive
 Branch has the relevant policy discretion in choosing how to implement a statute if it is susceptible
 to more than one reading. “[T]he whole point of *Chevron* is to leave the discretion provided by the
 ambiguities of a statute with the implementing agency.” *National Cable & Tel. Ass’n v. Brand X*
Internet Servs., 545 U.S. 967, 981-86 (2005). When the issue before the court “really centers on the
 wisdom of the agency’s policy,” courts “have a duty to respect legitimate policy choices made” by
 (continued...)

1 answer [a plaintiff's] particular questions before making" an ESA decision. *Kern County Farm*
 2 *Bureau v. Allen*, 450 F.3d 1072, 1081 (9th Cir. 2006). Because WEMO and NECO clearly satisfy
 3 and go beyond ESA § 7(a)(2), FWS's "path can be reasonably discerned" and that path is not
 4 arbitrary – courts should not require detailed explanations in such settings. *See* Section I.D, above.

5 "[B]edrock principles of administrative law preclude [a court] from declaring that [a federal
 6 agency] was arbitrary and capricious without first affording [the agency] an opportunity to articulate,
 7 if possible, a better explanation." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir.
 8 1999). This has significant implications for remedies. *See* Section V.

9 **B. The BiOps Satisfy *NWF v. NMFS* And The Consultation Regulation By**
 10 **Providing Both A Stepwise "Incremental" And An "Aggregate" Analysis**

11 CBD argues (e.g., at 8, 10-11) that the BiOps contain only an "incremental" analysis of the
 12 impacts of WEMO and NECO on listed species and critical habitat. CBD argues this violates the
 13 procedural duty under *NWF v. NMFS*, 481 F.3d at 1235-36, to consider the totality of impacts on
 14 listed species and critical habitat.

15 Yet, the BiOps do both. The BiOps do examine: (1) the current status of listed species under
 16 the environmental baseline (WEMO BiOp at 35-64 (WBO AR 14786-815); NECO BiOp at 39-77
 17 (NBO AR 12573-611)); (2) next add and subtract the future impacts of implementing WEMO and
 18 NECO (WEMO BiOp at 64-133 (WBO AR 14815-884); NECO BiOp at 77-173 (NBO AR 12611-
 19 707)); and (3) then add the cumulative effects of other expected future actions to provide the totality
 20 of factors that are likely to affect the desert tortoise (and other listed species) and critical habitat in
 21 the future (WEMO BiOp at 133-37 (WBO AR 14884-88); NECO BiOp at 173-77 (NBO AR
 22 125707-11)). Since the BiOps consider the "aggregate" of factors that will affect listed species and
 23 critical habitat in the future, and address whether the increment added by the "agency action causes
 24 some deterioration in the species' pre-action condition," the BiOps procedurally satisfy *NWF v.*
 25 *NMFS*, 481 F.3d at 1235-36.

26 _____
 27 (...continued)
 28 an Executive Branch agency. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837,
 866 (1984).

1 Contrary to CBD's view (at 8), *NWF v. NMFS* does not prohibit FWS from considering, as a
2 step in this analysis, the incremental impacts of the action subject to consultation. The stepwise
3 approach in the BiOps is specifically required by 50 C.F.R. 402.14(g) and (h). *NWF v. NMFS*
4 embraces a stepwise approach in requiring use of an "environmental baseline" and then examining
5 whether the "agency action causes some deterioration in the species' pre-action condition" under the
6 environmental baseline. 481 F.3d at 1236; *see id.* at 1233-36.

7 The ESA's text requires a BiOp to focus on the proposed action that is the subject of ESA § 7
8 consultation and compliance. Under ESA § 7(b)(3), the BiOp details "how the agency action affects
9 the species or its critical habitat" (not how other actions or baseline conditions might do so). Section
10 § 7(a)(2) similarly states the focus is on whether the proposed "action...is not likely to jeopardize" a
11 listed species or adversely modify critical habitat. 16 U.S.C. 1536(a)(2) and (b)(3).²³

12 C. The BiOps Appropriately Considered Impacts On Recovery

13 CBD argues (e.g., at 7, 9-10, 12-13) that the BiOps failed to document sufficient procedural
14 consideration of WEMO's and NECO's impacts on recovery. CBD argues that a BiOp must
15 describe impacts to the recovery potential for a species and to the recovery value of critical habitat
16 under *NWF v. NMFS*, 481 F.3d at 1236-38, 1241; and *Gifford Pinchot*, 378 F.3d at 1069-71.

17 The procedural duty to consider impacts to recovery should not be burdensome. The text of
18 ESA § 7(a)(2) and (b) do not mention any duty to consider recovery in a "summary" BiOp. Placing
19 a heavy emphasis on recovery or improvement in an ESA § 7(a)(2) consultation would conflict with
20 the ESA's structure. *See* Section I.A, above.

21 The BiOps adequately discuss the impacts of WEMO and NECO on recovery of listed
22 species and on the recovery potential of critical habitat. An electronic word search (using the "Find"
23 function) shows the BiOps use "conservation" and "recovery" over 100 times in addressing the
24

25 ²³ NEPA analysis focuses on the "incremental impact" that is "proximate[ly]" caused by the
26 proposed agency action and that the agency can control under its organic statutes. *DOT v. Public*
27 *Citizen*, 541 U.S. at 767-70. The same concept should apply to ESA § 7. This is particularly apt in
28 light of the Supreme Court's recent holding that ESA § 7 applies only when the federal agency has
discretion under its organic statute to control impacts to listed species. *NAHB v. Defenders*, 127 S.
Ct. 2518 (2007); *see* page 13, above.

1 impacts of various elements of WEMO and NECO. For example, the establishment of large
2 DWMAAs, the reduced grazing, and the reduced ORV use were found to be consistent with the
3 Tortoise Recovery Plan and with the survival and recovery of tortoises. E.g., WEMO BiOp at 45-
4 50, 64, 70-75, 93-137 (WBO AR 14796-801, 14815, 14821-26, 14844-88); NECO BiOp at 78, 94-
5 183 (NBO AR 12612, 12628-717).

6 FWS concluded that the DWMAAs and other protections in WEMO and NECO “will promote
7 the survival and recovery of” tortoises and “will generally improve” critical habitat or retain its
8 functionality “to serve its conservation role.” WEMO BiOp at 135-36 (WBO AR 14886-87); NECO
9 BiOp at 174-76 (NBO AR 12708-10). Thus, the BiOps consider recovery in a procedurally adequate
10 and non-arbitrary fashion.

11 CBD also argues (at 7) that FWS had a duty to determine “the degree to which the take
12 anticipated from activities authorized under the Plans would be deleterious to the tortoise’s viability
13 and ability to recover.” Yet, no law or regulation requires that FWS identify the “degree that take”
14 caused by some subaction affects a species if FWS concludes that the action as a whole does not
15 impair the survival or recovery of a listed species. In any event, FWS answered BD’s question
16 through statements that the allowed incidental take “represents less than one-tenth of 1 percent of the
17 desert tortoise population estimated to reside” in the action area. WSupp ITS 1033.

18 **D. CBD’s Other Arguments Regarding Adverse Modification Of Critical**
19 **Habitat Are Unpersuasive**

20 CBD (at 9-13) throws out a series of allegations concerning adverse modification of critical
21 habitat. Several of those arguments (e.g., procedural consideration of recovery, whether there is a
22 duty to advance recovery) have been rebutted above. The remainder are addressed below.

23 1. CBD (e.g., at 11) argues that FWS improperly found that ORV uses would not
24 adversely modify critical habitat by just comparing the small areas disturbed (limited to 1%) to the
25 large portions of critical habitat designated as DWMAAs. A similar comparison was found lawful in
26 *Gifford Pinchot*, 378 F.3d at 1075.

27 Moreover, the BiOps also compared the status of critical habitat with and without WEMO
28 and NECO (and their designation of DWMAAs and ACECs, and their more-stringent regulations).

1 The BiOps found the plan amendments reduced levels of historical disturbances that would be
2 continued without the plan amendments' additional protections (e.g., reduced ORV routes, "reducing
3 the distance that cars and tucks can drive and park from up to 3000 feet from a route of travel to 100
4 feet") and thereby improved the status of critical habitat, as opposed to adversely modifying critical
5 habitat. WEMO BiOp at 131-37 (WBO AR 14882-88); NECO BiOp at 171-73 (NBO AR 12705-
6 07).

7 Such a comparison is required by the ESA. Making sure a federal "action will "not result in
8 destruction or adverse modification" (16 U.S.C. 1536(a)(2)) suggests a comparison to some baseline
9 set of conditions. So do 50 C.F.R. 402.02 and 402.14(g) and (h). *NWF v. NMFS*, 481 F.3d at 1239-
10 41, also endorses the use of an "environmental baseline" to determine whether the "agency action in
11 question will not appreciably reduce the odds of success for future recovery planning."

12 2 CBD (at 12) insists that "FWS was required to *explain* how approval" of off-road
13 uses "would nonetheless promote recovery." Since ESA § 7 creates no duty that a BLM multiple-
14 use action must promote recovery (*see* Section I.A, above), there was no duty to explain.

15 The BiOps did reasonably explain why *decreased* areas for ORV use would not adversely
16 modify critical habitat. WEMO BiOp at 80, 94-97, 125-29, 131-37 (WBO AR 14831, 14845-49,
17 14876-80, 14882-88); NECO BiOp at 88, 121-25, 132-34, 136-40, 153-57, 161-66, 171-73, 175-77
18 (NBO AR 12622, 12655-59, 12686-88, 12670-74, 12687-91, 12695-700, 12705-07, 12709-11). And
19 since the DWMA's established in WEMO and NECO are largely consistent with the Tortoise
20 Recovery Plan, the plan amendments do "not undermine the recovery value of critical habitat" (CBD
21 ESA Br. at 12).

22 3. Finally, CBD (at 12-13) argues that FWS "failed to analyze the plan amendments'
23 effect on designated critical habitat *outside* DWMA's." Yet again, CBD's assertions are disproven
24 by the factual record.

25 The BiOps did discuss the consequences that more activities could continue on critical
26 habitat areas outside DWMA's. WEMO BiOp at 83-85, 88-89, 94-97 132-37 (WBO AR 14834-36,
27 14839-40, 14845-49, 14883-88); NECO BiOp at 61, 66, 69-70, 133-34, 153, 162, 171-73, 176 (NBO
28 AR 12595, 12600, 12603-04, 1267-68, 12687, 12696, 12705-07, 12710). FWS reasonably found

1 that there was no adverse modification of critical habitat outside DWMAAs as: (1) the general trend is
 2 that WEMO and NECO *reduce* such critical habitat disturbances compared to future land uses
 3 without WEMO's and NECO's protections; and (2) the critical habitat areas designated as DWMAAs
 4 still "ensure the conservation role and function of critical habitat."²⁴

5 **E. FWS Did Consider The Best Science Available**

6 CBD's next procedural challenge is to argue (at 13-16) that FWS did not use the best science.

7 1. ESA § 7(a)(2) states that "each agency shall use the best scientific and commercial
 8 data available." 16 U.S.C. 1536(a)(2). This is a procedural requirement to consider the best science
 9 currently "available," not a substantive duty to conduct new wildlife surveys or to reach particular
 10 conclusions. *Southwest Ctr. for Biological Diversity v. Norton*, 215 F.3d 58, 60-61 (D.C. Cir. 2000);
 11 *see Kern County*, 450 F.3d at 1080.²⁵

12 Under the APA, it is presumed that FWS did rely on the best available science. Best science
 13 claims fail unless Plaintiffs have identified "superior data" that was placed before FWS and then
 14 ignored by the agency. *Building Industries Ass'n of S. Cal. v. Norton*, 247 F.3d 1241, 1246-47 (D.C.
 15 Cir. 2001); *Kern County*, 450 F.3d at 1080-81.

16 Since CBD has not shown that FWS ignored some new scientific principle, its best science
 17 claims fail. CBD (at 14-15) asserts that there are several 2002 journal articles that are not "listed as
 18 a reference in the BO." However, the information in those articles is cumulative – it confirms what
 19 FWS's scientists already suspected and what was already in the literature. CBD ESA Br. at 14 (the
 20 "studies built on early research, that FWS did" describe in the BiOps). Where new information
 21 "supplemented FWS's existing understanding..., but did not alter the primary conclusions..., it was
 22 not critical to FWS's decision." *Kern County*, 450 F.3d at 1080; *accord Water Keeper Alliance v.*

23 _____
 24 ²⁴ *See id.* For example, FWS was "aware of areas...where the condition of critical habitat has
 25 been degraded...by human activities." WEMO BiOp at 136 (WBO AR 14887). The specific actions
 in WEMO "will ensure that the condition of critical habitat of the desert tortoise will generally
 improve or remain functional and continue to serve its conservation role." *Id.*

26 ²⁵ One "implication of the 'best data available' requirement is that FWS must rely on the even
 27 inconclusive or uncertain information if that is the best available at the time." *Southwest Ctr. for*
Biological Diversity v. Norton, No. 98-0934 (RMU/JMF), 2002 WL 1733618 at *9 (D.D.C. July 29,
 28 2002).

1 *U.S. Dep't of Defense*, 271 F.3d 21, 33 (1st Cir. 2001) (no likely ESA violation just because the
 2 agency “did not consult two available studies”). Unless CBD can show that the articles provided
 3 something new that might have changed FWS’s opinion, their omission from an extensive reference
 4 list is harmless error.

5 2. CBD (at 15-16) argues that, where there is scientific uncertainty, courts should
 6 override FWS’s BiOps and “give the benefit of the doubt to the species” because there is a “pressing
 7 need for caution.” This misconceives the judicial role under the APA. A court must defer to the
 8 Service’s reasonable and non-arbitrary judgment on a debatable issue of fact or scientific opinion.
 9 *Marsh v. ONRC*, 490 U.S. at 376-78. Where the agencies employ the “best evidence available, the
 10 fact that the evidence is ‘weak,’ and thus not dispositive, does not render the agency’s [no-jeopardy]
 11 determination ‘arbitrary.’” *Greenpeace*, 14 F.3d at 1336-37.

12 CBD also misconstrues ESA § 7(a)(2) in arguing that a neutral provision on using the best
 13 science requires that all benefits of the doubt be resolved in favor of listed species. This
 14 preservationist reading is not tenable in light of the Supreme Court’s statement that the

15 obvious purpose of the requirement that each agency “use the best scientific and commercial
 16 data available” is to ensure that the ESA is not implemented haphazardly, on the basis of
 17 speculation or surmise. While this no doubt serves to advance the ESA’s overall goal of
 18 species preservation, we think it readily apparent that another objective (if not indeed the
 19 primary one) is to avoid needless economic dislocation produced by agency officials
 20 zealously but unintelligently pursuing their environmental objectives.

21 *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

22 Further, the evolution of ESA § 7 and its legislative history show there is no “benefit of the
 23 doubt” for listed species, except in a very narrow circumstance not present here.²⁶ The current ESA

24 ²⁶ As originally enacted in 1973, ESA § 7 only allowed a federal agency action to proceed if the
 25 agency could “insure” its action “do[es] not jeopardize” listed species” 87 Stat. 892 (1973). *TVA v.*
 26 *Hill* described ESA § 7 as affording “endangered species the highest of priorities” and reflecting
 27 “institutionalized caution.” See 437 U.S. 153, 185, 194 (1978). After *TVA v. Hill* described the
 28 potency of the enacted ESA, the 1979 Congress became concerned that ESA § 7 could be read as
 prohibiting federal actions unless the federal agency could insure there was *no possibility* of
 jeopardy. The 1979 ESA amendments changed ESA § 7(a)(2) to its present language allowing
 federal agency actions to proceed if the agency could “insure” that the proposed action is “not likely
 to jeopardize the continued existence of a” listed species. As Rep. Breaux stated in describing his
 adopted floor amendment:

(continued...)

1 § 7(a)(2) language gives the benefit of the doubt to listed species only in the narrow sense that,
 2 where the biological facts suggest a roughly 50% likelihood of jeopardy and non-jeopardy, the
 3 agencies could not “insure” the proposed action “is not likely to jeopardize” the continued existence
 4 of a listed species. But the 1979 ESA Amendments tolerate a higher risk of jeopardy (e.g., due to
 5 uncertainties in science) and do not allow the Service to issue a “negative biological opinion” (a
 6 jeopardy opinion) merely because small potentials for jeopardy cannot be eliminated. H.R. Conf.
 7 Rep. No. 96-697 at 12, *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576.

8 The “benefit of the doubt to the species” legislative history should not be extended beyond its
 9 “not likely to jeopardize” statutory base. It does not trump the legislative intent to allow projects to
 10 go forward where scientific uncertainties do not rise, in the Services’ professional judgment, to a
 11 level where jeopardy is “likely.” *Oceana v. Evans*, 384 F. Supp. 2d 203, 218-21 (D.D.C. 2005); *see*
 12 *Natural Resources Defense Council v. Kempthorne*, 506 F. Supp. 2d 322, 359-62 (E.D. Cal. 2007);
 13 Ruhl, *The Battle Over Endangered Species Act’s Methodology*, 34 ENVTL. L. 555, 592-99 (2004).
 14 Thus, Congress has moved in the direction of reducing the ESA § 7 “benefit of the doubt” in favor of
 15 listed species, and towards allowing more actions to proceed without running afoul of the ESA.

16 Further, the legislative history presented in note 26 shows that the “benefit of the doubt”
 17 language construes the “not likely to jeopardize” phrasing adopted in 1979. It does not place a gloss
 18 on the “best commercial and scientific data available.”

19 3. CBD frequently seeks to set aside FWS’s judgment because, where there are no
 20 definitive field data, FWS relied on its professional judgment. This does not provide a basis for

21 _____
 (...continued)

22 No matter how many precautions are taken, there may be a small chance that the agencies’
 23 action will end up jeopardizing the species. No agency can or should be expected to give a
 24 100-percent guarantee of no adverse impact. I am concerned that the language of the existing
 25 statute [“insure . . . do not jeopardize”] could be interpreted to require this guarantee. The
 language I have proposed . . . allows Federal agencies to consider the probability or
 likelihood of jeopardizing a listed species in deciding whether to go ahead with a particular
 action.

26 125 Cong. Rec. 29,437 (Oct. 24, 1979). The key sentence in the Conference Report states: “This
 27 language continues to give the benefit of the doubt to the species, and would continue to place the
 burden on the action agency to demonstrate...that its action will not violate Section 7(a)(2).” H.R.
 Conf. Rep. No. 96-697 at 12, 1979 U.S.C.C.A.N. 2572, 2576.

1 overriding FWS's judgment.

2 The reality is that "species data is...often vague, ambiguous, frequently subjective, best-
3 professional-judgment-based...and of uncertain scientific reliability." Brennan, *et al.*, *Square Pegs*
4 *and Round Holes: Application of the "Best Scientific Data Available" Standard in the Endangered*
5 *Species Act*, 16 TULANE ENVTL. L.J. 387, 390 (2003). But, in light of the time limits for taking
6 actions to which the "best available science" standard applies in ESA § 4 (species listings and
7 critical habitat designations) and § 7 (consultation on federal agency actions), the Services "must
8 move forward with decision making even in the face of limited information." Ruhl, *Is The*
9 *Endangered Species Act Eco-Pragmatic?*, 87 MINN. L. REV. 885, 928 (2003); *National Wildlife*
10 *Fed'n v. Babbitt*, 128 F. Supp. 2d 1274, 1286-87 (E.D. Cal. 2000) (under ESA § 7, "[w]here the
11 'available data' is imperfect, the Service is not obligated to supplement it or to defer issuance of its
12 biological opinion until better information is available").²⁷ Where the agencies employ the "best
13 evidence available, the fact that the evidence is 'weak,' and thus not dispositive, does not render the
14 agency's determination 'arbitrary.'" *Greenpeace*, 14 F.3d at 1336.

15 ESA § 7 embodies more of a "professional judgment" model than a precautionary principle.
16 See Ruhl, *The Battle Over Endangered Species Act Methodology*, 34 ENVTL. L. at 576-603;
17 Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science*
18 *Mandate*, 34 ENVTL. L. 397, 414-50 (2004); Carden, *Bridging the Divide: The Role of Science in*
19 *Species Conservation Law*, 30 HARV. ENVTL. L. REV. 165, 216-22 (2006). That is, under the APA,
20 FWS's professional judgment and any other federal agency action are presumed to be lawful, and the
21 plaintiff bears the burden of showing the agency acted arbitrarily or unlawfully. *Overton Park*, 401

22
23 ²⁷ The instinct to delay decisions until better-quality information is obtained is understandable.
24 But it can easily lead to analysis paralysis. Our knowledge is always imperfect, and knowledge
25 improves in small steps. The Supreme Court requires deference to agency decisions on whether to
26 prepare further studies precisely because chasing after better information "would render agency
27 decisionmaking intractable, always awaiting updated information only to find the new information
28 outdated by the time a decision is made." *Marsh v. ONRC*, 490 U.S. at 373-74 & n.1989); see *id.* at
376-78 (since deciding the appropriate level of study "implicates substantial agency expertise,"
courts should not overturn agency judgments unless there has been a "clear error of judgment");
Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 447 (7th Cir. 1990) (requiring better information
repeats what logicians call Zeno's Paradox, where one never gets to the finish line).

1 U.S. at 415-16 (1971); *American Rivers v. National Marine Fisheries Serv.*, No. Civ. 96-384-MA,
2 1997 WL 33797790 at *10 (D. Or. Apr. 3, 1997) (court should “not interfere with a federal agencies’
3 exercise of professional judgment”). Courts should defer to an agency’s reasonable judgment in an
4 area of predictive biology and scientific uncertainty. *Marsh v. ONRC*, 490 U.S. at 376-78.
5 Accordingly, FWS’s professional judgment prevails over CBD’s speculation to the contrary, where
6 there is no data supporting either side.

7 **F. FWS Did Not Violate ESA Procedures Regarding The Environmental**
8 **Baseline**

9 CBD (at 16-17) argues that there is imperfect information about the current environmental
10 baseline condition of the desert tortoise. While this is true and unfortunate, CBD has not shown any
11 procedural violation of ESA rules. Similar complaints about the adequacy of baseline data on
12 “population size, variability, and stability” were rejected in *Gifford Pinchot*, 378 F.3d at 1068.

13 At bottom, CBD is demanding that BLM and FWS conduct more studies (e.g., how much
14 “take” of desert tortoises is occurring across millions of acres of the CDCA?) – that they are acting
15 arbitrarily until they obtain more survey information and then analyze the new data. But the “best
16 science available” language only requires FWS to consider information that is currently “available.”
17 It does not require the agency to conduct new wildlife surveys. *Southwest Ctr. for Biological*
18 *Diversity v. Norton*, 215 F.3d at 60-61; *see Kern County*, 450 F.3d at 1080.

19 Here, the BiOps provide extensive information on the current environmental baseline
20 condition of desert tortoises (and other listed species) and their critical habitat. *See* WEMO BiOp at
21 35-64 (WBO AR 14786-815); NECO BiOp at 39-77 (NBO AR 12573-611). This greatly exceeds
22 the level of procedural detail required by ESA § 7(b)(3), which merely requires a BiOp to provide a
23 “summary of the information on which the opinion is based.”

24 Moreover, the “environmental baseline” is largely a concept created by the ESA § 7 rules.
25 *See* 50 C.F.R. 402.02 (where the “environmental baseline” is defined in the definition of “effects of
26 the action”), 402.14(g)(2) and (h)(1) (employing the “environmental baseline” concept and only
27 requiring a “summary of the information on which the opinion is based”). FWS’s interpretation that
28 it has complied with its own rule is “controlling” because it is not “plainly erroneous.” *Auer v.*

1 *Robbins*, 519 U.S. 452, 461-62 (1997). As CBD often is challenging FWS’s compliance with ESA
2 rules, this logic undercuts many of CBD’s claims.

3 **G. The Amended BiOps Satisfy The Procedures For Authorizing Incidental**
4 **Take**

5 The 1982 Congress softened the absolute prohibition against “take,” in order to allow some
6 productive land uses to proceed. Congress allowed “incidental take” in 16 U.S.C. 1536(b)(4) and
7 1539(a)(2). See *Sweet Home*, 515 U.S. at 700-01, 707-08. Congress legislated to resolve “conflicts
8 between Section 7 and Section 9” – the conflict that, “[a]fter complying with the rigorous demands
9 of...Section 7” in avoiding jeopardy to a listed species, the project could be halted because “Section
10 9...prohibits any taking” of any individual. H.R. Rep. No. 97-567 at 15, 26, *reprinted in* 1982
11 U.S.C.C.A.N. 2807, 2815, 2826. Congress resolved this conflict by including provisions so that an
12 action complying with ESA § 7(a)(2), but causing incidental take, could go forward. The
13 “Committee intends that such incidental takings be allowed provided that the terms and conditions
14 specified by the Secretary...are complied with.” *Id.* This “significantly changes” the ESA “in
15 response to legitimate problems brought before Congress” by “industry” and others. *Id.*

16 “Once the Service is satisfied that an agency’s action will not threaten an endangered
17 species’ continued existence, it *must* issue the ITS.” *Center for Biological Diversity v. U.S. Fish*
18 *and Wildlife Serv.*, 450 F.3d 930, 942 (9th Cir. 2006). CBD’s arguments demand excessive
19 procedures before an ITS is effective. This contravenes the objective of providing legislative relief
20 and of allowing actions that satisfy ESA § 7(a)(2) to go forward.

21 The set of ITS claims raised by CBD springs from judicial constructions of the Services’ § 7
22 rules. Under the rules, a BiOp will provide a statement that “[s]pecifies the impact, *i.e.*, the amount
23 or extent, of such incidental take,” states the “reasonable and prudent measures...appropriate to
24 minimize such impact,” and states that if the “amount or extent of [allowed] incidental taking...is
25 exceeded, the Federal agency must reinstate consultation immediately.” 50 C.F.R. 402.14(i).

26 The preamble recognizes that, “in some cases, exact numerical limits on the amount of
27 permissible taking” cannot be determined as a practical matter. 51 Fed. Reg. 19953-54 (June 3,
28 1986). The “Service reserved the flexibility in the rule so that the most appropriate standard [e.g.,

1 “habitat loss”] can be used” – the “Service declines to endorse the use of numerical amounts in all
 2 cases.” *Id.*²⁸ Courts have found that this language and ESA legislative history allow FWS to
 3 conclude that “no such numerical value could be practically obtained.” *Arizona Cattle Growers’*
 4 *Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1249-50 (9th Cir. 2001); *see Oreg. Natural Res.*
 5 *Council v. Allen*, 476 F.3d 1031, 1037-38 (9th Cir. 2007); *Imperial Sand Dunes*, 422 F. Supp. 2d at
 6 1137-38.

7 FWS’s original BiOps provided a reasonable explanation of why the agencies “cannot
 8 quantify the precise numbers of desert tortoises that may be killed or injured” as a result of
 9 authorized activities on millions of acres of lands, and provided standards for reinitiating ESA
 10 consultation.²⁹ After CBD sued on the procedural aspects of incidental take and after the decisions
 11 in *ONRC v. Allen* and *Imperial Sand Dunes*, FWS sought to eliminate litigation issues by providing
 12 40 pages of greater detail on incidental take in amended BiOps issued in Nov. 2007. *See* WSupp
 13 ITS 1018; NSupp ITS 01175. The amended BiOps continue to state cogent reasons why FWS
 14 “cannot quantify the exact number of desert tortoises that may be incidentally killed or injured,” but
 15 provide an admirable attempt at numerical estimates. WSupp ITS 1021, 1033; *see id.* at 1021-37.

16 Undeterred, CBD now argues that the 40 pages of additional ITS discussion fail to provide an
 17 adequate explanation and are otherwise procedurally inadequate. This record suggests CBD is
 18 overreaching. None of CBD’s specific claims is persuasive.

19 1. CBD (at 20-21) argues that the BiOps disregard “take due to habitat modification and
 20 degradation, even in critical habitat.” CBD improperly equates the degradation of habitat with the
 21 “take” of (death or injury to) a member of a listed wildlife species.

22 _____
 23 ²⁸ The legislative history similarly states “Section 7(b)(4) requires the Secretary to specify the
 24 impact of [f] such incidental taking on the species. The Committee does not intend that the Secretary
 will, in every instance, interpret the word ‘impact’ to be a precise number.” H. R. Rep. No. 97-567
 at 27, 1982 U.S.C.C.A.N. 2807, 2827.

25 ²⁹ It is often impossible to predict, in advance, whether or where chance events (e.g., a cow
 26 stepping on a tortoise, a vehicle intersecting a tortoise) will mean that an activity will kill or injure a
 27 tortoise. And, if a tortoise “take” occurs somewhere in the CDCA, it may well not be reported to
 federal authorities (e.g., a person may not know if a tortoise has been trampled by cattle). For sound
 reasons like these, FWS initially refrained from attempting to provide a numerical estimate of the
 (continued...)

1 The Supreme Court sustained FWS’s regulation on the “harm” form of ESA § 9 “take”
 2 precisely because it does “emphasize that actual death or injury of a protected animal is necessary
 3 for a violation.” *Sweet Home*, 515 U.S. at 691 n.2; *see id.* at 696 n.9, 698-701 and n. 13, 708-09.
 4 The Court effectively rejected CBD’s argument that habitat degradation itself is “take” when it
 5 stated “Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that § 9
 6 does not replicate, and § 7 does not limit its admonition to habitat modification that ‘actually kills or
 7 injures wildlife.’” 515 U.S. at 703.³⁰

8 In sum, though habitat modification can be the source or proximate cause of “take” (the death
 9 or injury of a live individual), the fact that some habitat elements have been adversely modified does
 10 not prove “take.” *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (dismissing a
 11 “take” claim; “habitat modification does not constitute harm unless it ‘actually kills or injures
 12 wildlife’” and plaintiff bears the burden of showing the “proposed construction would harm a
 13 pygmy-owl by killing or injuring it”); Quarles & Lundquist, *When Do Land Use Activities ‘Take’*
 14 *Listed Wildlife Under ESA Section 9 and the “Harm” Regulation?*, ENDANGERED SPECIES ACT:
 15 LAW, POLICY, AND PERSPECTIVES 211-34 (Baur & Irvin eds., ABA 2002).

16 FWS adhered to this definition of “harm” and a “take” of wildlife in using its best
 17 professional judgment on the amount of expected incidental take, and on identifying an amount of
 18 reported take that would require reinitiation of ESA consultation. *E.g.*, WSupp ITS 1020, 1025-33.
 19 In contrast, CBD’s speculation (at 20) that grazing might reduce “key native forage plants” or
 20 “collapse burrows” either: (1) improperly equates habitat modification with “take”; or (2) creates
 21 such a high level of speculation on the extent of any actual “take” as to make the exercise
 22 unproductive in providing a trigger on when consultation should be reinitiated (e.g., how would one

23 _____
 (...continued)

24 numbers of desert tortoises likely to be incidentally taken under WEMO and NECO. WEMO BiOp
 at 172-77 (WBO AR 14923-28); NECO BiOp at 177-86 (NBO AR 12711-20).

25 ³⁰ Further, while one ESA bill would have made the modification of occupied habitat a “take,”
 26 that was rejected by Congress. 515 U.S. at 705-06. The “habitat protection provision in S. 1983
 27 would have applied far more broadly than the regulation does because it made adverse habitat
 28 modification a categorical violation of the ‘take’ prohibition, unbounded by the regulation’s limit to
 habitat modifications that actually kill or injure wildlife.” *Id.* at 706.

1 know if a tortoise died in a burrow, how would one know the cause of a tortoise's death in the
2 absence of a cracked shell or some other clear signal?).

3 In any event, the Amended BiOps effectively cover death from any livestock or casual use.
4 They require reinitiation of consultation "if 4 desert tortoises are found dead or injured in any 12-
5 month period as a result of any activity or circumstance specifically related to casual use or livestock
6 grazing." WSupp ITS 1035.

7 2. CBD's next complaint (at 21-22) is that FWS did not provide an explanation for the
8 predicted numerical level of take beyond its exercise of "best professional judgment." Yet, no
9 regulation or court decision requires that level of detail. The Ninth Circuit found the ESA does "not
10 mean that [FWS] must demonstrate a specific number of takings: only that it must establish a link
11 between the activity and the taking of species before setting forth specific conditions." *Arizona*
12 *Cattle*, 273 F.3d at 1249-50.³¹

13 The ESA and APA do not require any further explanation where the agency has already
14 explained that, because there are no adequate data, any estimate is necessarily the agency's exercise
15 of judgment. *See* pages 3 and 12, above. FWS went beyond what the law requires in attempting to
16 estimate how many desert tortoises there are in the action area (e.g., WSupp ITS 1021-25), then
17 describing how grazing and other activities might "take" tortoises and stating that there are "no data"
18 on the frequency of "take" (e.g., WSupp ITS 1025-33, "No data exist on the frequency at which
19 cattle may trample desert tortoises"), and then exercising "best professional judgment" in the
20 absence of any meaningful data (e.g., WSupp ITS 1029). Since FWS explained its basis, there was
21 no failure to explain and no arbitrariness.

22 3. CBD's next claim is that, "because the RPMs [reasonable and prudent measures] and
23 T&Cs [terms and conditions] do not include any means to minimize take of tortoises in the NECO

24 _____
25 ³¹ Moreover, the thrust of *Arizona Cattle* is, because "it would be unreasonable for [FWS] to
26 impose conditions on otherwise lawful land use [the reasonable and prudent conditions] if a take
27 were not reasonably certain to occur," the subject of the increased regulation can require reasoned
28 decisionmaking on whether "take" is reasonably certain to occur. 273 F.3d at 1243; *see id.* at 1240
(FWS cannot "engage in widespread land regulation even where no Section 9 liability could be
imposed"), 1244-50. *Arizona Cattle* does not suggest that third parties like CBD can demand such
detail.

1 and WEMO, both ITSs violate the plain language of the ESA and are thus arbitrary and capricious.”
2 CBD ESA Br. at 23; *see id.* at 22-23. But the amended BiOps do include T&Cs that implement the
3 RPMs. *See* WSupp ITS at 1034-36.

4 Perhaps CBD is arguing that ESA § 7(b)(4) requires FWS to “minimize take.” That
5 argument would be unpersuasive. FWS’s compulsory authorization of incidental take must include
6 the “reasonable and prudent measures *that the Secretary considers* necessary or appropriate to
7 minimize the impact.” 16 U.S.C. 1536(b)(4)(B)(ii) (emphasis added). This plain language can be
8 permissibly construed – indeed, can only be sensibly construed – to be a grant of discretion to FWS
9 to include whatever measures FWS finds “appropriate.”

10 Further, the statute: (1) does not require minimizing take, but only minimizing the “impact”
11 of take on the species as a whole; and (2) has a sense of proportionality in referring to “minimiz[ing]
12 the impact” of allowed take on the species’ status. ESA § 7(b)(4) does not require a numerical
13 estimate of incidental take, but merely some discussion of the “impact of such incidental taking on
14 the species.” 16 U.S.C. 1536(b)(4)(C)(i). The BiOps describe those impacts.

15 Under an unchallenged ESA § 7 rule, the RPMs and T&Cs “cannot alter the basic design,
16 location, scope, duration, or timing of the actions and may involve only minor changes.” 50 C.F.R.
17 402.14(i)(2). This permissibly implements the general legislative policy that, “[a]fter complying
18 with the rigorous demands of the Section 7” process, a project should not be halted because it would
19 cause “incidental and unintentional takings” of some individuals. H. R. Rep. No. 97-567 at 15 and
20 26, 1982 U.S.C.C.A.N. 2807, 2815, 2826. Thus, once FWS has concluded that WEMO and NECO
21 comply with ESA § 7(a)(2), FWS should not impose as incidental take constraints any further limits
22 on the “location, scope,...or timing” of grazing, ORV uses, etc. *See* WSupp ITS at 17 (WEMO
23 already includes measures “to reduce the adverse effects or livestock grazing and causal use
24 associated with recreation and mining on the desert tortoise”). The take-relief provisions of ESA
25 § 7(b)(4) cannot reasonably be read as upping the standard for ESA § 7 compliance from § 7(a)(2)’s
26 no significant degradation standards to minimizing any degradation. *See Arizona Cattle*, 273 F.3d at
27 1240 (rejecting an analogous argument because that “would turn the purpose behind the 1982
28 Amendment on its head”).

1 “Fashioning appropriate standards...for takings that would otherwise violate § 9 necessarily
2 requires the exercise of broad discretion,” and a court should not “substitute [its] views of wise
3 policy for [FWS’s].” *Sweet Home*, 515 U.S. at 708; *see CBD v. FWS*, 450 F.3d at 942 (9th Cir.
4 2006) (sustaining FWS’s view of an ITS). Given FWS’s wide range of discretion, the Court should
5 find the BiOps do not violate ESA § 7(b)(4).

6 4. CBD (at 23-24) faults the levels of discovered/reported “take” that FWS selected to
7 require reinitiation of consultation. *ONRC v. Allen*, 476 F.3d at 1039-41, found a BiOp was arbitrary
8 because it provided no clear “trigger” for reinitiating consultation. These BiOps comply with *ONRC*
9 *v. Allen* because they provide clear triggers that consultation must be reinitiated. For example, if “4
10 desert tortoises are found dead or injured in any 12-month period as a result of any activity or
11 circumstance related specifically to casual use or livestock grazing.” WSupp ITS 1035.

12 CBD argues that FWS lacks a rational basis for this number “[g]iven the high likelihood of
13 undercounting [reported] tortoise deaths from the covered activities.” CBD is again unfairly using
14 the absence of any real-world data to attempt to set aside FWS’s reasonable exercise of professional
15 judgment. But, under the APA, FWS’s judgments are presumed to be correct, courts must defer to
16 FWS where the science or facts are in doubt, and the plaintiff bears the burden of proving
17 arbitrariness. *See* pages 2-3, above.

18 While FWS thought it might find perhaps 10% of any dead or injured tortoises, this is a best
19 guess. FWS could build in a comfort factor or margin of error due to the small sample size, the
20 guesstimate nature of the exercise, and the legislative intent that projects satisfying ESA § 7(a)(2)
21 should go forward. Accordingly, FWS had the discretion to require that consultation be reinitiated
22 only if the level of discovered tortoise deaths and injuries attributable to the covered actions were
23 more than 20% of the anticipated annual take.

24 5. CBD is also mistaken in asserting (e.g., at 23) that, if the level of anticipated
25 incidental take is being exceeded, the agency action (here, land uses over millions of acres) must be
26 halted. The legislative intent was that the penalty for exceeding an ITS is reinitiation of
27 consultation, not that the action (an action earlier found to substantively comply with ESA § 7(a)(2))
28 must stop:

1 If the specified impact on the species is exceeded, the Committee expects that the Federal
 2 agency or permittee or licensees will immediately reinitiate consultation since the level of
 3 taking exceeds the impact specified in the initial Section 7(b)(4) statement. In the interim
 4 period between the initiation and completion of the new consultation, the Committee would
 5 not expect the Federal agency...to cease all operations unless it was clear that the impact of
 6 the additional taking would cause an irreversible and adverse impact on the species.

7 H.R. Rep. No. 97-567 at 27, 1982 U.S.C.C.A.N. 2827. Consistent with this legislative intent, the
 8 preamble to the ESA § 7 rules states that “[e]xceeding the level of anticipated taking does not, by
 9 itself, require the stopping of an ongoing action during reinitiation of consultation.” 51 Fed. Reg. at
 10 19954.

11 **III. BLM Has Not Violated ESA Section 7(a)(2)**

12 Section I has shown that WEMO and NECO clearly satisfy ESA § 7. Section II has shown
 13 FWS’s BiOps satisfy applicable law. If the Court agrees with Defendants, then BLM did not violate
 14 the ESA by relying on FWS’s BiOps. *See Greenpeace*, 14 F.3d at 1337; *Pyramid Lake*, 898 F.2d at
 15 1415.

16 **IV. The WEMO EIR/S Satisfies NEPA’s Rule Of Reason**

17 Plaintiffs do not challenge the sufficiency of Defendants’ compliance with NEPA in the
 18 preparation of NECO, but only WEMO. *See CBD NEPA/FLPMA Br.* at 1. The WEMO EIR/S
 19 provides an impressive multi-volume description of the environmental impacts of implementing the
 20 WEMO plan amendment on BLM lands and the ITP/HCP on non-federal lands. It more than
 21 satisfies the “rule of reason” standard that governs judicial review under NEPA.

22 Plaintiffs (at 3) state that the purposes of NEPA are “well documented” and “need not be
 23 repeated at length here.” Yet, they need at least be described, which Plaintiffs never do. We fill that
 24 gap here. Our response below explains the overall nature of NEPA, the appropriate standard of
 25 juridical review of Plaintiffs’ claims in this case, and why, under that standard, Plaintiffs’ NEPA
 26 arguments should be rejected.

27 **A. BLM’s Compliance With NEPA Is Subject To Deferential Judicial Review**

28 NEPA is a *procedural* statute. *Robertson v. Methow Valley*, 490 U.S. at 349-52; *Swanson v.*
U.S. Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996). It “does not mandate particular results, but
 simply describes the necessary process” an agency must follow to review the environmental

1 consequences of its actions. 490 U.S. at 350. The requirement that a federal agency prepare an EIS
2 for major federal actions that significantly affect the quality of the human environment (42 U.S.C.
3 4332) has a twofold procedural goal:

4 [1] It ensures that the agency, in reaching its decision, will have available, and will carefully
5 consider, detailed information concerning significant environmental impacts; [2] it also
6 guarantees that the relevant information will be made available to the larger audience that
may also play a role in both the decisionmaking process and the implementation of that
decision.

7 490 U.S. at 332. While other statutes may impose substantive environmental obligations, “NEPA
8 merely prohibits uninformed – rather than unwise – agency action.” *Id.* at 351.

9 NEPA does not contain a separate provision for judicial review, so the court reviews an
10 agency’s compliance with NEPA under the deferential standard of the APA, 5 U.S.C. 706(2)(A).
11 *See, e.g., Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001); *CBD v. BLM*, 422 F.
12 Supp. 2d at 1126-27. Under the APA, the scope of judicial review is narrow, and an agency action
13 may be set aside only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in
14 accordance with law.” 5 U.S.C. 706(2)(A).

15 Judicial review under NEPA dovetails with the APA in the “rule of reason” standard.
16 “Review under the rule of reason standard and for abuse of discretion are ‘essentially the same.’”
17 *Churchill County*, 276 F.3d at 1071 (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137
18 F.3d 1372, 1376 (9th Cir. 1998) (citing *Marsh v. ONRC*, 490 U.S. at 377 n.23)). Under that
19 standard, the court asks “whether an EIS contains a reasonably thorough discussion of the significant
20 aspects of the probable environmental consequences.” *Churchill County*, 276 F.3d at 1071 (quoting
21 *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)). The court cannot substitute its
22 judgment for the agency’s or “merely determine that it would have decided an issue differently.”
23 *CBD v. BLM*, 422 F. Supp. 2d at 1126-27 (citing *Marsh v. ONRC*, 490 U.S. at 377). Moreover,

24 In determining whether the EIS contains a “reasonably thorough discussion,” we may not
25 “fly-speck the document and hold it insufficient on the basis of inconsequential, technical
26 deficiencies...” *Swanson v. United States Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996)
(internal quotations and citation omitted). That is to say, once we are satisfied that a
proposing agency has taken a “hard look” at a decision’s environmental consequences, our
review is at an end. *Id.*

27 *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998).
28

1 **B. CBD’s NEPA Claims Are Without Merit**

2 Many of CBD’s NEPA arguments concern alleged deficiencies in the portions of WEMO
3 dealing with ORV management. *See* CBD NEPA/FLPMA Br. at 3-5 (summarizing NEPA
4 arguments); *id.* at 20-35 (arguments concerning reasonable range of alternatives, environmental
5 baseline, effectiveness of route designations, impact on cultural resources, spread of non-native
6 invasive plants, and impacts to air quality). We leave detailed responses to the ORV-based
7 arguments to the Federal Defendants and the two groups of intervenors who represent off-road
8 vehicle and related interests. We address other aspects of CBD’s arguments below.

9 **1. The WEMO EIR/S Adequately Addresses Effects On Soils**

10 Plaintiffs (at 26) contend that the EIS fails to identify and analyze impacts to soils from
11 activities permitted under the Plan – specifically, that the EIS “provides no discussion of grazing
12 impacts to soil whatsoever.” But, as they admit, the grazing impacts to soil “are well documented”
13 in the EIS. CBD NEPA/FLPMA Br. at 26 (citing EIS Appendix J (AR WMP 205070-75)). As the
14 Council on Environmental Quality (“CEQ”) has explained, the inclusion of a technical discussion in
15 an appendix comports with NEPA and does not violate it. *See* CEQ, *Forty Most Asked Questions*
16 *About CEQ’s NEPA Regulations*, Ans. to Quest. 25a (reprinted at 46 Fed. Reg. 18026, 18033 (Mar.
17 23, 1981) (“The body of the EIS should be a succinct statement. . . . Lengthy technical discussions of
18 modeling methodology, baseline studies, or other work are best reserved for the appendix.”).³²

19 The body of the EIS readily satisfies the requirement for a “succinct statement” of the
20 impacts of grazing on soil. For example, the EIS addresses concerns that grazing may affect plant
21 seed banks and germination potential, and may promote soil conditions that favor weed species
22 (WEMO EIR/S 3-75, 3-95, 3-100 (AR WMP 202005, 202025, 202030)); explains that changes in
23 grazing activities “would result in changes in disturbance rates to soil surfaces” (WEMO EIR/S 4-5
24 (AR WMP 202229)); describes new regulations and management measure for cattle and sheep
25 grazing that include soil-related factors such as removing cattle from areas where there is less

26 _____
27 ³² CEQ’s regulations are entitled to deference. *Andrus v. Sierra Club*, 442 U.S. 347, 358
28 (1979).

1 rainfall and less available forage, restricting grazing during the ephemeral plant growing season,
2 eliminating most temporary non-renewable grazing permits and thus prohibiting additional
3 allocations of perennial forage consumption (WEMO EIR/S 4-30 to 4-32 (AR WMP 202254-56));
4 describes constraints on grazing in desert tortoise habitat (*e.g.*, WEMO EIR/S 4-98 (AR WMP
5 202322)); and prescribes monitoring of impacts of grazing on wildlife habitat (*e.g.*, WEMO EIR/S 4-
6 54, 4-46, 4-63 (AR WMP 202278, 202285, 202287)). Plaintiffs fail to explain why the EIS’s
7 thorough discussion of the effects of grazing on soils and soil-related resources, coupled with the
8 Appendix J information whose inclusion in the EIS Plaintiffs freely admit, is inadequate merely
9 because it does not occur in one particular subsection of the voluminous EIS document.

10 **2. The WEMO EIR/S Adequately Addresses Effects On** 11 **Biological Resources**

12 Plaintiffs also resort to fly-specking in their arguments concerning impacts to biological
13 resources. For example, they complain that the EIS “barely mentions surface water resources in the
14 affected environment section (AR-201990).” CBD NEPA/FLPMA Br. at 28 (emphasis added). Yet,
15 the CEQ regulations caution against excessive detail in the affected environment section of an EIS.
16 Rather, NEPA is satisfied if the EIS

17 *succinctly* describe[s] the environment of the area(s) to be affected or created by the
18 alternatives under consideration. *The description shall be no longer than is necessary to*
19 *understand the effects of the alternatives....*

20 40 C.F.R. 1502.16 (emphasis added). The description of the Mojave River to which the Plaintiffs
21 cite (WEMO EIR/S 3-63 to 3-64 (AR WMP 201993-94)) is more than succinct – it runs a full page
22 and provides a basis for understanding the alternatives by describing the River’s physical location
23 and attributes, noting that it is a major source of groundwater in the study area, and explaining that
24 the River’s above-ground flow is intermittent and for the most part occurs only after storms. The
25 EIS’s chapter on environmental impacts (Chap. 4) contains sundry discussions of Mojave River-
26 dependent species and their reliance on the Mojave River groundwater levels. *E.g.*, WEMO EIR/S
27 2-77, 4-60 to 4-68, 4-154 to 4-158, 4-262 to 4-265 (AR WMP 201765, 202284-92, 202378-82,
28 202486-89)). Beyond that, other details concerning the Mojave River resource are described other

1 portions of EIS Chapter 3. *See, e.g.*, WEMO EIR/S 3-3, 3-6 (AR WMP 201933, 201936)
 2 (describing Areas of Critical Environmental Concern (“ACECs”) on the Mojave River).

3 Similarly, the detail Plaintiffs claim is lacking on ACECs is provided elsewhere in the EIS –
 4 in EIS Appendix D, “New and Revised ACEC Management Plans.”

5 The fourteen new ACECs all contain robust populations and essential habitat of threatened,
 6 endangered or sensitive species. Without the added protection provided by the ACEC
 7 designation, conflicting uses could lead to declines in the numbers or ranges of these species.
 8 A goal of the CDCA Plan is to prevent rare species from declining to the point of becoming
 listed as threatened or endangered. The ACEC management provisions, which are described
 in Appendix D of the West Mojave Plan, are tailored to the specific needs of the plants and
 animals found in each new ACEC.

9 *See* WEMO ROD at 14 (AR WMP 200059). As explained above, the placement of this type of
 10 detail in an appendix rather than in the “affected environment” section is appropriate and does not
 11 make the EIS defective. *See also Southern Or. Citizens Against Toxic Sprays, Inc. v. Clark*, 720
 12 F.2d 1475, 1480 (9th Cir. 1983) (“The [NEPA] label ... is unimportant. We review the sufficiency of
 13 the environmental analysis as a whole.”).

14 Plaintiffs also err when they state that “UPAs are not discussed in the FEIS.” On the
 15 contrary, the EIS expressly describes protections for UPAs:

16 *Native Species.* Healthy, productive and diverse habitats for native species, including special
 17 status species (Federal T&E, Federally proposed, Federal candidates, BLM sensitive, or
 California State T&E, and CDD UPAs) are maintained in places of natural occurrence. As
 indicated by:

- 18 • Photosynthetic and ecological processes continue at levels suitable for the site,
 19 season, and precipitation regimes;
- 20 • Plant vigor, nutrient cycle, and energy flow are maintaining desirable plants and
 ensuring reproduction and recruitment;
- 21 • Plant communities are producing sufficient litter;
- 22 • Age class distribution of plants and animals are sufficient to overcome mortality
 23 fluctuations;
- 24 • Distribution and cover of plant species and their habitats allow for reproduction and
 recovery from localized catastrophic events;
- 25 • Alien and noxious plants and wildlife do not exceed acceptable levels;
- 26 • Appropriate natural disturbances are evident; and
- 27 • Populations and their habitats are sufficiently distributed and healthy to prevent the
 28 need for listing special status species.

1 WEMO EIR/S 2-121 (AR WMP 201809) (emphasis added). Moreover, in response to the comment
 2 plaintiffs cite, the EIS explains that “CDCA prescriptions for Unusual Plant Assemblages would still
 3 apply under the West Mojave Plan amendment,” and points to a highly detailed table (that was
 4 expanded from its draft version) summarizing goals, objectives, management strategies. WEMO
 5 EIR/S 6-130 (AR WMP 202689); WEMO EIR/S (Table 2-26), at 2-174 to 2-195 (AR WMP
 6 201863-84).³³ The readily satisfies BLM’s duty to respond to comments. *See* 40 C.F.R. 1503.4(a).

7 Finally, contrary to Plaintiffs’ implication (at 29), the EIS does address impacts to riparian
 8 areas from grazing. *See, e.g.*, WEMO EIR/S 4-11 (AR WMP 202235) (full-page discussion of
 9 impacts of grazing on riparian areas); WEMO EIR/S 2-122 to 2-124 (AR WMP 201810-12)
 10 (discussing objective of managing effects of grazing activities on riparian-wetland areas, springs and
 11 seeps, and other projects affecting water); WEMO EIR/S 4-30 to 4-33 (AR WMP 202254-57) (table
 12 detailing impacts of grazing on BLM allotments under Alternative A); WEMO EIR/S 4-145 (AR
 13 WMP 202369). (incorporating same into Alternative B). Plaintiffs’ fly-specking notwithstanding,
 14 this detailed information satisfies BLM’s obligation under NEPA to provide a “reasonably thorough
 15 discussion of the significant aspects of the probable environmental consequences.” *Swanson*, 87
 16 F.3d at 343. The Court should reject Plaintiffs’ demand that the EIS address environmental impacts
 17 in more detail. The NEPA regulations were designed to “reduc[e] the length of environmental
 18 impact statements” and “reduc[e] delay,” not to overwhelm the reader with minutiae. 40 C.F.R.
 19 1500.4(a), 1500.5.

20 3. The WEMO EIR/S Adequately Addresses Cumulative 21 Impacts

22 Plaintiffs’ attack on the EIS’s analysis of cumulative impacts is similarly myopic. For
 23 grazing, Plaintiffs (at 35) focus exclusively on the conclusion of Chapter 4’s discussion of

24 ³³ Plaintiffs (at 29) mistakenly cite Table 2-1, which was included in roughly the same form in
 25 both the draft and the final EIS. *See* AR WMP 207815-20. BLM’s response to the comment refers
 26 to a “new table summarizing goals, objectives, monitoring and adaptive management” (AR WMP
 27 202689) (emphasis added), which appears to be Table 2-26. Table 2-26 provides significantly
 28 greater detail than Table 2-1. In addition, Table 2-26, but not Table 2-1, was substantially expanded
 from the draft version following the comment period. *Compare* Draft EIS at 2-155 to 2-159 (AR
 WMP 207967-71), *with* WEMO EIR/S at 2-174 to 2-195 (AR WMP 201863-84).

1 Alternative A. CBD NEPA/FLPMA Br. at 35 (citing WEMO EIR/S 4-135 to 4-141 (AR WMP
2 202359-65)). Yet, as the opening page of Chapter 4 forthrightly explains, “[c]umulative impacts are
3 addressed throughout the analyses presented in this chapter” – the portion Plaintiffs cite is an
4 “overview” but not, as they imply, the entire analysis. WEMO EIR/S 4-1 (AR WMP 202225).

5 As Plaintiffs acknowledge (at 35), the Cumulative Impacts overview identifies, *inter alia*,
6 impacts *to* livestock grazing. WEMO EIR/S 4-137 to 4-138 (AR WMP 202360-61). That is entirely
7 appropriate, because one result of Alternatives A and B would be, as the EIS states, “an overall *loss*
8 of land designated for livestock grazing that the BLM administers” – a loss of “approximately
9 465,871 acres.” *Id.* (emphasis added). Since this loss is attributable to constraints imposed to
10 protect resources such as wildlife, riparian areas, DWMA’s, etc., as described throughout the EIS
11 (including in the Cumulative Effects overview, WEMO EIR/S 4-135 to 4-136 (AR WMP 202359-
12 60)), the effects *of* grazing are addressed here by necessary implication – the acreage available to
13 grazing was reduced out of concern for the effects of grazing.

14 In particular, Plaintiffs’ complaint about an alleged failure to address impacts from grazing
15 on DWMA’s is refuted by the EIS’s discussion headed “Loss Of Ephemeral Sheep Grazing Due To
16 DWMA’s Boundaries,” which enumerates 381,729 acres that will be protected from the potential
17 effects of grazing. WEMO EIR/S 4-138 (AR WMP 202362). In addition, impacts from cattle and
18 sheep grazing, including effects on DWMA’s, are fully disclosed earlier in the Chapter 4 analysis.
19 *See* Tables 4-20 and 4-21 and accompanying text, WEMO EIR/S 4-30 to 4-32 (AR WMP 202254-
20 56). Nothing requires that those impacts be broken out again as separate line items in the
21 Cumulative Effects overview when they are disclosed earlier in the EIS’s review of environmental
22 consequences.

23 Moreover, the focus of the cumulative effects analysis falls appropriately on the impacts *of the*
24 *proposed action*. The proposed action in this case is to *restrict* grazing –not to expand it. Insofar as
25 Plaintiffs would demand greater detail about the effects of past grazing, there is no NEPA violation.
26 CEQ has interpreted its NEPA rules not to require detailed information on the cumulative impacts of
27 past actions:

28

1 NEPA is forward-looking, in that it focuses on the potential impacts of the proposed action that
 2 an agency is considering.... Generally, agencies can conduct an adequate cumulative effects
 3 analysis by focusing on the *current aggregate effects of past actions* without delving into the
 4 historical details of individual past actions.... CEQ regulations do not require consideration of
 5 the individual effects of all past actions to determine the present effects of past actions....
 6 CEQ, *Guidance on the Consideration of Past Actions in Cumulative Effects Analysis* at 1-3 (June 24,
 7 2005) (emphasis added) (available at http://www.nepa.gov/nepa/regs/Guidance_on_CE.pdf). CEQ's
 8 guidance accords with the Supreme Court's recent ruling that NEPA's "rule of reason" only requires
 9 discussion of impacts "caused" by the agency's proposed action – in this instance, reduced acreage
 10 for grazing – and that the agency can control now, not the cumulative effects of other actions. *DOT*
 11 *v. Public Citizen*, 541 U.S. 752, 767-70 (2004).

12 * * *

13 To sum up, the multi-volume WEMO EIR/S readily satisfies NEPA's twin goals of ensuring
 14 that BLM has carefully considered environmental impacts and making the relevant information
 15 available to the public at an appropriate level of detail. Plaintiffs' fine-grained objections go at most to
 16 the EIS's form, not its substance. Since the EIS takes the requisite "hard look" at environmental
 17 consequences, BLM's compliance with NEPA should be upheld at summary judgment.

18 **V. CBD Has Not Shown That It Is Entitled To Any Extraordinary Injunctive Relief. The**
 19 **Environmentally-Sensitive WEMO And NECO, And the Underlying Coordinated**
 20 **Planning Under Federal And State NEPAs And ESAs, Should Not Be Set Aside. This Is**
 21 **Particularly True For Curable Procedural Errors.**

22 If the Court finds some procedural shortcoming in FWS's BiOps or BLM's WEMO EIS,
 23 issues on the appropriate remedy would arise. CBD requests broad relief, but does not support
 24 entitlement to any set aside or injunctive relief. That is, CBD just states a conclusion that the BiOps,
 25 EISs, WEMO, and NECO should be set aside. *See* CBD ESA Br. at 25; CBD NEPA/FLPMA Br. at
 26 35. No such remedy should be granted for the following reasons.

27 1. An injunction is "extraordinary" remedy (*Weinberger v. Romero-Barcelo*, 456 U.S.
 28 305, 312 (1982)) "that does not issue as of course" (*Amoco Prod. Co. v. Village of Gambell*, 480
 U.S. 531, 542 (1987)). To obtain an extraordinary injunction, plaintiffs must sustain their burdens of
 showing: (1) "irreparable injury and the inadequacy of legal remedies"; (2) that the "public
 consequences of employing the extraordinary remedy" against a federal agency support an

1 injunction; and (3) that the balance of “injuries to” the “parties” from “granting or withholding of the
 2 injunction” also favors an injunction. *Romero-Barcelo*, 456 U.S. at 312 (finding that the Clean
 3 Water Act did not require an injunction where a Navy program lacked a required CWA permit).³⁴

4 A “NEPA violation is subject to traditional standards in equity for injunctive relief and does
 5 not require an automatic blanket injunction.” *Northern Cheyenne*, 503 F.3d at 842. A “procedural
 6 violation of NEPA does not compel issuance of a preliminary injunction.” *Fund for Animals v.*
 7 *Lujan*, 962 F.2d 1392, 1400 (9th Cir. 1992).

8 The same is true for CBD’s ESA/APA claims. CBD’s procedural ESA § 7 claims against
 9 FWS’s BiOps are “maladministration” claims that cannot be brought under the ESA § 11(g) citizen
 10 suit provision, but only under the APA. *Bennett v. Spear*, 520 U.S. at 173-75. This takes CBD
 11 outside the scope of any arguable mandatory injunction under 16 U.S.C. 1540(g). The APA does not
 12 mandate “set aside” relief every time there is some legal misstep in a federal agency action. Instead,
 13 the APA preserves a court’s traditional discretion to grant or deny injunctive relief.³⁵

14 CBD has not attempted to sustain its burden of persuasion on any of the equitable factors.
 15 Accordingly, extraordinary set aside or injunctive relief should be denied.

16 2. The procedural nature of CBD’s claims and the different agencies those claims are
 17 brought against provide powerful reasons for denying an injunction.

18 First, there are mismatches between the narrow deficiencies argued by CBD and its demand
 19 for broad remedies. If FWS’s BiOps have some procedural shortcoming, why should this dictate
 20 any relief against BLM’s WEMO and NECO actions? No such relief should be granted where

21 _____
 22 ³⁴ To obtain an injunction, in addition to demonstrating success on the merits, the “plaintiff
 23 must demonstrate: (1) that it has suffered [or will suffer] an irreparable injury...; (3) that, considering
 24 the balance of the hardships between the plaintiff and defendant, a remedy in equity is warranted;
 and (4) that the public interest would not be disserved by a[n]...injunction. *eBay v. MercExchange*,
L.L.C., 126 S. Ct. 1837, 1839 (2006); *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th
 Cir. 2007).

25 ³⁵ See Levin, “*Vacation*” at Sea: *Judicial Remedies and Equitable Discretion in Administrative*
 26 *Law*, 53 DUKE L. J. 291, 309-44 (2003). The APA provides that “[n]othing herein...affects...the
 27 power...of the court to...deny relief on any other appropriate legal or equitable ground.” 5 U.S.C.
 702. Accordingly, the APA should be read to not eliminate a court’s longstanding equitable
 discretion “to mould each decree to the necessities of the particular case.” *United States v. Oakland*
 (continued...)

1 BLM's action substantively satisfies the ESA. *See* Section I.³⁶ An "injunction must be narrowly
 2 tailored to give only the relief to which plaintiffs are entitled" and which is in the public interest.
 3 *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990); *see Brock v. Pierce County*,
 4 476 U.S. 253, 260 (1986); *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995). Courts should not enjoin
 5 the "whole conduct of the defendants' business," as would occur if the Court were set aside WEMO
 6 and NECO, which control the management of millions of acres in the CDCA. *Hartford-Empire Co.*
 7 *v. United States*, 323 U.S. 386, 410 (1945).

8 Second, courts should not presumptively set aside agency actions for curable procedural
 9 defects. Many of CBD's arguments boil down to "the BiOps or EISs did not adequately explain X."
 10 "[B]edrock principles of administrative law preclude us from declaring definitively that [an
 11 agency's] decision was arbitrary and capricious without first affording [the agency] an opportunity
 12 to articulate, if possible, a better explanation." *County of Los Angeles v. Shalala*, 192 F.3d 1005,
 13 1023 (D.C. Cir. 1999).³⁷

14 3. As described in *Amoco Prod.*, 480 U.S. at 542-46, and *Romero-Barcelo*, 456 U.S. at
 15 312-20, the public interest and the balance of harms among the parties are often determinative on
 16 whether to grant or deny an extraordinary injunction against an Executive Branch action. Those
 17 factors weigh heavily against enjoining WEMO and NECO.

18 First, WEMO and NECO, with their extensive DWMAs and ACECs and protective

19 _____
 (...continued)

20 *Cannabis Buyers' Cooperative*, 532 U.S. 483, 496 (2001); *see Amoco Prod.*, 480 U.S. at 542-46;
Romero-Barcelo, 456 U.S. 305 at 312-13.

21 ³⁶ And, because 5 U.S.C. 706 only empowers a court to "set aside" the particular "agency
 22 action" found to be in contravention of the procedures required by law, why should any shortcoming
 23 in the EIS actions mean that WEMO and NECO should be set aside? WEMO and NECO comply
 with FLPMA and the ESA.

24 ³⁷ A court sometimes needs a greater explanation to satisfy itself that the agency did not act
 25 arbitrarily on some issue emphasized in litigation. In those situations, the court may obtain an
 26 agency explanation by remand or through an agency declaration. But no statute provides that a
 27 federal agency violates the law unless it compiles an exhaustive contemporaneous administrative
 28 record of the reasons the agency chose a particular action, given the hundreds of actions an agency
 takes each day. Since the absence of a complete agency explanation is not unlawful or "arbitrary," it
 does not provide a basis for immediately setting aside the action. *Pension Benefit Guar. Corp. v.*
LTV Corp., 496 U.S. 633, 654 (1990); *Midwater Trawlers Co-op. v. Dep't of Commerce*, 393 F.3d
 994, 1006 (9th Cir. 2004); *Shalala*, 192 F.3d at 1023.

1 regulations, are environmentally sensitive. They provide greater protection of environmental
 2 resources than would occur if WEMO and NECO were set aside. *See* Section I. WEMO and NECO
 3 should not be enjoined, particularly as those actions substantively satisfy the ESA and FLPMA. *See*
 4 *Center for Biological Diversity v. BLM*, No. C 03-2509 SI, 2006 WL 2788252 at *2-3 (N.D. Cal.
 5 Sept. 26, 2006) (though this Court’s *Imperial Sand Dunes* opinion found errors in the critical habitat
 6 designation for Peirson’s milk-vetch, the remedy order kept the protective designation in effect).

7 Second, BLM, the Counties, and the public have strong interests in not having the results of
 8 multi-year coordinated planning set aside. The Counties have been active participants in the WEMO
 9 and NECO planning processes due to the need for coordination among the main regulatory entities
 10 in those areas.³⁸ The Counties’ proposed HCP depends on the legality of WEMO and the adequacy
 11 of the WEMO EIR/S under federal and state law. *See* pages 3-4, above. Additionally, two Counties
 12 are cooperating agencies on the NECO EIS. *See* pages 4-5, above. The Counties’ interests in
 13 efficient planning, and the public interest in coordinated planning, suggest that WEMO and NECO
 14 (and their supporting documents) not be set aside. If the Court were to set aside any of the joint
 15 work products, this would have significant adverse impacts on joint planning efforts, on County
 16 resources, and on the Counties’ proposed HCP.

17 Third, a court must consider the public interest reflected in statutes. *Amoco Prod.*, 480 U.S.
 18 at 544-46 (reversing the Ninth Circuit because it presumed environmental injury was irreparable and

19 _____
 20 ³⁸ For example, coordination is needed on: (1) ESA and CESA matters, including regulation of
 21 land uses and identification of high-wildlife value lands for federal acquisition; (2) providing linear
 22 rights-of-way (e.g., roads and utilities) through areas of mixed land ownership; (3) economic
 23 activities (e.g., mining) that contribute to local economies; and (4) providing public services (e.g.,
 24 road maintenance, microwave towers for communications including those associated with
 25 emergencies in the desert, solid waste disposal landfills). *See* James Decl. ¶¶ 3-4; Scott Decl. ¶¶ 6-7;
 26 Leimgruber Decl. ¶¶ 4-5; Hillier Decl. ¶¶ 5-6 (CR 32).

27 Due to their regulatory functions, the Counties have special rights under several statutes and
 28 policies. Counties have review and comment rights under NEPA. *See* 42 U.S.C. 4332(2)(C)
 (requirements that the NEPA comments of “State, and local agencies” be solicited, and that those
 comments be part of the final EIS). FLPMA emphasizes coordination between BLM and local
 governments on BLM land use plans and land ownership adjustments. *See* 43 U.S.C. 1712(c)(9) and
 (f), 1720210, , 1721211, , 1733(d)303, , 1747317, . Moreover, the regulatory policy of the
 Department of the Interior is to coordinate with State and local governments on wildlife and other
 issues of common interest. *See* 43 C.F.R. Parts 9 and 24, 1601.0-8 (“impact on local

(continued...)

1 because it failed to consider the public interest in oil and gas development under OSCLA). Here, the
2 NEPA and ESA regulatory provisions cited by CBD are procedural, whereas FLPMA expresses a
3 multiple-use policy which WEMO and NECO permissibly implement. Accordingly, preservation
4 factors should not and need not control the public interest balancing.

5 4. CBD has not shown irreparable injury or that its injuries outweigh the interests
6 described above. CBD's procedural interests in obtaining greater information can be remedied by a
7 declaratory order directing FWS or BLM to provide the required information.

8 CBD's substantive environmental interests seem to be better served by keeping WEMO and
9 NECO in place, and not setting aside these protective actions. And the potential loss of a few desert
10 tortoises, where incidental take is limited to "one-tenth of one percent of the desert population
11 estimated to reside within the action area" (WSupp ITS 1033), is not an irreparable injury. *Water*
12 *Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 33-34 (1st Cir. 2001); *Natural Resources*
13 *Defense Council v. Kempthorne*, No. 05-cv-1207 OWW TAG, 2007 WL 1989015 at *13 (E.D. Cal.
14 July 3, 2007); *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1135-36 (N.D. Ala.
15 2006).

16 5. CBD's refers to later briefing on interim relief. This may mean CBD will ask the
17 Court to set aside some portions of WEMO and NECO, and keep other portions (e.g., the DWMA's)
18 intact. This approach risks improperly "injecting the judge into day-to-day agency management,"
19 when it is BLM that has the primary discretion over how to manage CDCA lands. *Norton v.*
20 *Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004) (BLM planning case); *see id.* at 64-67.

21 Still, there is something to be said for narrowly tailoring relief to the specific defect found.
22 *See Northern Cheyenne*, 503 F.3d at 843-44; *CBD v. BLM*, 2006 WL 2788252 at *2-3 (tailoring the
23 remedy after this Court's *Imperial Sand Dunes* opinion and keeping the ITS in effect). Most clearly,
24 if FWS needs to improve its reasoning on some portion of the BiOps: (1) other portions of the BiOps
25 (such as the ITS that Congress required as a relief measure) should remain intact; and (2) WEMO

26 _____
27 (...continued)
28 economies...shall be considered" in BLM land-use planning), 1610.3-1 (coordination with local
planning).

1 and NECO should not be set aside. The concept of narrowly tailoring injunctive relief also might
2 support, for example, requiring supplementation of the WEMO EIS on some ORV or grazing issue
3 that the Court finds was not adequately addressed, but not setting aside the EIS or WEMO and
4 NECO.

5 6. As the foregoing illustrates, different permutations of remedies issues may arise
6 depending on how this Court disposes of different claims. This might support post-summary
7 judgment briefing on remedies.

8 But no set aside or injunctive relief should be ordered at the time of the summary judgment
9 opinion. CBD's opening briefs have not carried a plaintiff's burden with respect to an extraordinary
10 injunction against a federal land-use program.

11 **CONCLUSION**

12 CBD's Complaint should be dismissed at summary judgment.

13 Respectfully submitted,

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19 Dated: March 7, 2008

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