

1 Lisa T. Belenky (CA Bar No. 203225)
CENTER FOR BIOLOGICAL DIVERSITY
2 1095 Market St., Suite 511
3 San Francisco, CA 94103
4 Telephone: (415) 436-9682 x 307
5 Facsimile: (415) 436-9683
6 Email: lbelenky@biologicaldiversity.org

7 Deborah A. Sivas (CA Bar No. 135446)
8 STANFORD LAW SCHOOL ENVIRONMENTAL LAW CLINIC
9 559 Nathan Abbott Way
10 Stanford, CA 94305-8620
11 Telephone: (650) 723-0325
12 Facsimile: (650) 725-8509
13 Email: dsivas@stanford.edu

14 Attorneys for Plaintiffs Center for Biological Diversity, Sierra Club,
15 Public Employees for Environmental Responsibility, and Desert Survivors

16 Additional Parties and Counsel Listed on Signature Page

17 UNITED STATES DISTRICT COURT
18
19 NORTHERN DISTRICT OF CALIFORNIA
20
21 SAN FRANCISCO DIVISION

22 CENTER FOR BIOLOGICAL DIVERSITY,) Case No. 3:06 CV 04884 SC
23 SIERRA CLUB, PUBLIC EMPLOYEES FOR)
24 ENVIRONMENTAL RESPONSIBILITY,)
25 DESERT SURVIVORS, ALLIANCE FOR) **FIRST AMENDED COMPLAINT FOR**
26 RESPONSIBLE RECREATION, THE) **DECLARATORY AND INJUNCTIVE**
27 WILDERNESS SOCIETY, FRIENDS OF) **RELIEF**
28 JUNIPER FLATS, WESTERN SAN)
BERNARDINO COUNTY LANDOWNERS)
ASSOCIATION, CALIFORNIA)
WILDERNESS COALITION, CALIFORNIA)
NATIVE PLANT SOCIETY and)
COMMUNITY ORV WATCH,)

Plaintiffs,)
v.)

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

Defendants.)

1 **I. INTRODUCTION**

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

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

23 3. In addition, Plaintiffs challenge both BLM and the United States Fish & Wildlife
24 Service (“FWS”) for their failure: to insure listed species’ survival; to avoid jeopardizing the
25 continued existence of listed species; and to avoid adversely modifying designated critical
26 habitats as required by Section 7 of the ESA in both the WEMO Plan area and the Northern and
27 Eastern Colorado Desert Coordinated Management Plan (“NECO Plan”) area of the CDCA. 16
28

1 U.S.C. § 1536. Defendant BLM’s establishment and implementation of the WEMO plan
2 amendment to the California Desert Conservation Area Plan (“CDCA Plan”), BLM’s
3 implementation of the WEMO plan amendment, and Defendant FWS’s approval of these actions
4 through the issuance of Biological Opinions (“BOs”) violate the procedural and substantive
5 mandates of the ESA. The current action arises under and alleges violations under the ESA, 16
6 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.*

8 4. If any species epitomizes the California Desert and BLM’s mismanagement of it,
9 it is the desert tortoise. Due to a precipitous decline in desert tortoise populations throughout the
10 species’ range, FWS listed the desert tortoise as endangered by emergency rule in 1989. 54 Fed.
11 Reg. 32326. The Mojave population of the tortoise, comprised of all tortoises in California, as
12 well as in parts of Arizona, Nevada and Utah, was listed as “threatened” in 1990. 55 Fed. Reg.
13 12178. Since 1990, tortoise populations have continued to decline at alarming rates. On March
14 15, 2000, a BLM panel of tortoise experts concluded that, despite its listing under ESA, the
15 species was in worse condition than in 1990 and that the number of tortoises alive then was less
16 than the numbers estimated by the 1990 listing or by the Recovery Plan prepared for the species
17 in 1994. The expert panel concluded that the desert tortoise in the western Mojave Desert should
18 be characterized as “endangered” rather than “threatened.” In 2004, the Recovery Plan
19 Assessment Committee Report (“DTRPAC Report”) found that there had been significant
20 population decline in the West Mojave population. “[T]he year effect yielded a significantly
21 negative trend in adult density estimates over time . . . This analysis indicates that, taken
22 together, tortoise densities on the permanent study plots located within the Western Mojave
23 Recovery Unit are declining, as was suggested in the Recovery Plan. . . . This pattern suggests
24 that recovery actions implemented since the Plan have not resulted in the reversal of this
25 declining trend.” 2004 DTRPAC Report at 58. Within the NECO planning area, the report
26
27
28

1 showed a significant decline in desert tortoise populations in the Chuckwalla Bench, and the
2 Chemehuevi Desert Wildlife Management Area (“DWMA”) also generally showed a downward
3 trend. See DTRPAC Report at 57. The draft 2004 DTRPAC Report had also recommended that
4 the Western Mojave Recovery Unit of the tortoise should be uplisted to endangered status.

5
6 5. Nearly a decade ago, FWS developed a recovery plan for the tortoise that required
7 specified restrictions on harmful human activities in key desert tortoise habitat managed by BLM
8 in order to check the species slide towards extinction and, instead, insure its recovery to healthy
9 population levels. U.S. Department of the Interior, U.S. Fish and Wildlife Service, Desert
10 Tortoise (Mojave Population) Recovery Plan (1994). Since the issuance of the Recovery Plan,
11 the BLM has failed to implement the Plan’s measures. BLM’s failure to implement the
12 Recovery Plan is one of the primary factors contributing to the desert tortoises’ decline in the
13 CDCA. BLM continues to permit ORVs to drive through critical tortoise habitats, resulting in
14 direct tortoise deaths and serious damage to habitat that is critical to their survival. As the
15 Recovery Plan dictates, these activities and their impacts on the tortoise must be removed from
16 tortoise critical habitat in order to save the species. Nevertheless, BLM’s management plans and
17 FWS’s BOs perpetuate destructive ORV use in areas identified by the Recovery Plan as
18 necessary havens from these threats. The BOs’ conclusions of “no jeopardy” and “no adverse
19 modification” of critical habitat do not withstand analysis.

20
21
22 6. As with the desert tortoise, FWS and BLM have also failed to adequately protect
23 other listed species of the CDCA and their critical habitats, including, but not limited to, the
24 following: Lane Mountain milk-vetch; Parish’s daisy; Cushenbury milk-vetch; triple-ribbed
25 milk-vetch; Inyo California Towhee; and Southwestern willow flycatcher.

26
27 7. In creating the CDCA, Congress declared that the California Desert ecosystem is
28 “extremely fragile, easily scarred, and slowly healed.” 43 U.S.C. § 1781(a)(2). The desert

1 tortoise and other native species are irreplaceable parts of this fragile ecosystem. Absent proper
2 management by BLM and FWS, including compliance with NEPA, FLPMA, and the ESA and
3 other statutes, these fragile ecosystems and the species that depend on them are in grave danger
4 of disappearing forever. Plaintiffs seek an order from the Court overturning BLM and FWS's
5 unlawful management decisions and requiring these agencies to comply with NEPA, FLPMA,
6 the ESA, and other statutes and to protect these species and their habitats.
7

8 **II. JURISDICTION AND VENUE**

9 8. Jurisdiction over this action is conferred by 16 U.S.C. § 1540(g) (ESA); 28 U.S.C.
10 §§ 1331 (federal question), 1346, (United States as defendant), 2201 (declaratory judgment), and
11 2202 (injunctive relief), and 5 U.S.C. §§ 701 through 706 (APA).
12

13 9. On March 23, 2006, Plaintiffs, by facsimile and certified mail, sent a notice of
14 intent to sue to BLM and FWS for violations of the ESA related to BLM's management of the
15 CDCA pursuant to the CDCA Plan and various plan amendments. On May 19, 2006, Plaintiffs
16 received a response from Defendant BLM indicating that the agency had taken various actions in
17 order to address some of the violations described in Plaintiffs' notice letter. None of those
18 actions relate to the ESA violations that Plaintiffs identified regarding the WEMO Plan
19 amendment or 2006 WEMO BO, or the NECO Plan amendment or 2005 NECO BO. Defendant
20 FWS did not respond to the notice of intent to sue. For all claims brought pursuant to the APA
21 Plaintiffs have exhausted all of the administrative remedies available to them.
22

23 10. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because
24 Plaintiff Sierra Club is incorporated and has its national headquarters in San Francisco, Plaintiff
25 Desert Survivors is incorporated and based in Oakland, and Plaintiff California Wilderness
26 Coalition is incorporated and based in Oakland.
27
28

1 **III. INTRADISTRICT ASSIGNMENT**

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

7 **IV. RELATED CASES**

8 12. This case is related to Center for Biological Diversity, et al. v. BLM, et al., No. C
9 03-02509 SI (N.D. Cal.), and Center for Biological Diversity, et al. v. Bureau of Land
10 Management, Case No. C-00-0927 WHA-JCS (N.D. Cal.) as defined by Local Rule 3-12(a).

11 **V. PARTIES**

12 13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, nonprofit
13 organization with its main office in Tucson, Arizona and a regional office in San Francisco,
14 California. The Center’s mission is to protect endangered species and wild places through
15 science, policy, education, and environmental law. The Center has over 25,000 members, many
16 of whom reside in California. The Center’s members and staff regularly use, and will continue
17 to use, lands throughout the CDCA, for observation, research, aesthetic enjoyment, and other
18 recreational, scientific, and educational activities. The Center’s members and staff have and
19 continue to research, study, observe, and seek protections for the desert tortoise, the Parish’s
20 daisy, Cushenbury milk-vetch, Lane Mountain milk-vetch, and other listed and sensitive species
21 of the CDCA. The Center’s members and staff derive scientific, recreational, conservation, and
22 aesthetic benefits from these species’ existence in the wild. Defendants’ violations of law are
23 leading to the continued decline of tortoise populations and degradation of habitat used by the
24 tortoise, harming the Center’s and its members’ interests in the tortoise and its habitat.
25 Defendant’s violations of law are also leading the decline of the rare and listed plant species and
26
27
28

1 degradation of their habitats, and to the continued decline of other listed and sensitive species
2 within the WEMO and NECO plan areas and the degradation of habitat occupied by these
3 species, harming the Center's and its members' interests in these species and their habitats. The
4 Center brings this action on behalf of itself and its adversely affected members and staff.

5
6 14. Plaintiff SIERRA CLUB is a national, non-profit membership organization with
7 over 700,000 members dedicated to exploring, enjoying, and protecting the wild places of the
8 earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to
9 educating and enlisting humanity to protect and restore the quality of the natural and human
10 environment; and to using all lawful means to carry out these objectives. Sierra Club frequently
11 files citizen suits to stop activities that violate local, state or federal environmental laws and
12 cause harm to the natural environment. Over 150,000 Sierra Club members reside in California.
13 Sierra Club, incorporated under the laws of the State of California, maintains its national
14 headquarters in San Francisco, California. Many of Sierra Club's members actively use the
15 CDCA for recreational and aesthetic purposes such as hiking and nature study and would be
16 personally harmed if the threatened and endangered species found on the CDCA, including the
17 desert tortoise, were to become reduced in numbers or driven to extinction. Many Sierra Club
18 members also participate in group outings to the CDCA and will continue to do so on a regular
19 basis. Sierra Club believes that Defendants' recent actions will cause the continued decline of
20 desert tortoise and other listed and sensitive species populations within the CDCA. If these
21 declines continue, the Sierra Club's members will lose the recreational, aesthetic, scientific, and
22 conservation benefits they enjoy from stable and healthy populations of these species. Sierra
23 Club brings this action on behalf of itself and its adversely affected members.
24
25

26 15. Plaintiff PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
27 ("PEER") is a national, non-profit corporation based in Washington, D.C. with chapters
28

1 throughout the United States, including California. PEER represents current and former federal
2 and state employees of land management, wildlife protection, and pollution control agencies who
3 are frustrated by the failure of governmental agencies to enforce or faithfully implement the
4 environmental laws entrusted to them by Congress. The ability of PEER's members to
5 independently critique agency decisions frequently is compromised by conflicts between their
6 duties as employees of a federal agency to uphold the law and the risk of disciplinary action for
7 insubordination. Consequently, PEER's members rely on PEER to criticize agency action,
8 including the use of litigation, on their behalf. PEER members and staff regularly use CDCA
9 lands for observation, research, aesthetic enjoyment, and other recreational, scientific, and
10 educational activities. PEER members and staff research, study, and observe many federally
11 listed threatened and endangered species, including the desert tortoise, that live in the CDCA.
12 PEER's members and staff derive scientific, recreational, conservation, and aesthetic benefits
13 from the desert tortoise's existence in the wild. PEER believes that Defendants' actions will
14 cause the continued decline of desert tortoise and other listed and sensitive species populations
15 within the CDCA. If these declines continue, PEER's members will lose the recreational,
16 aesthetic, scientific, and conservation benefits they enjoy from stable and healthy populations of
17 the these species. PEER brings this action on behalf of itself and its adversely affected members.

18
19
20
21 16. Plaintiff DESERT SURVIVORS is a California non-profit corporation centered in
22 Oakland, California. Desert Survivors is a conservation organization with approximately 800
23 members focused on the protection of desert plants, wildlife and ecosystems. Desert Survivors
24 also engages in a vigorous program of public education about desert lands and their unique
25 character. Desert Survivors' primary goals are to protect fragile desert lands and to teach visitors
26 to those lands about their value. Desert Survivors members place a high value on the continuing
27 existence and essential value of desert wildlife and wilderness. Desert Survivors leads
28

1 educational trips to desert lands. Desert Survivors has led more than 400 such trips to the desert
2 in the last fourteen years, more than half of these to places that are home to the desert tortoise.
3 Desert Survivors members value the desert as a natural ecosystem inhabited by special plants and
4 animals. Desert Survivors will continue to lead trips, including service trips, to the desert areas of
5 California as part of its ongoing program of monitoring desert wilderness. A major goal of these
6 trips is to study desert plants and animals in their natural habitats, and to monitor their condition.
7 The desert tortoise is among the most valuable of these, because of its rarity and because of the
8 fragility of its habitat. As part of its ongoing desert excursion program, Desert Survivors has led
9 several trips in recent years to the California Desert Conservation Area including recent trips to
10 the Turtle Mountains, the Mecca Hills, the Sheephole Mountains, and Bright Star Creek. Desert
11 Survivors members value desert wildlife living in its wild and natural condition, and enjoy the
12 inspiration and educational benefits of observing wildlife in this habitat. Desert Survivors
13 members and staff have actively sought to protect desert wilderness as a place where threatened
14 and endangered wildlife may flourish, where their habitat may remain unimpaired by
15 development and excessive human interference. Desert Survivors members and directors derive
16 scientific, recreational, conservation, and aesthetic benefits from the desert tortoise's, and other
17 listed and sensitive species' existence in the wild. Desert Survivors believes that Defendants'
18 actions will cause the continued decline of desert tortoise and other listed and sensitive species
19 populations within the CDCA. If these declines continue, Desert Survivors' members will lose
20 the recreational, aesthetic, scientific, and conservation benefits they enjoy from stable and
21 healthy populations of the these species. Desert Survivors brings this action on behalf of itself
22 and its adversely affected members and directors.

26 17. Plaintiff ALLIANCE FOR RESPONSIBLE RECREATION is an unincorporated
27 association made up of groups dedicated to reasonable management of off road vehicle impacts
28

1 on federal lands, and in particular on the Western Mojave Desert. The Alliance for Responsible
2 Recreation works to protect both public lands and private property in the California desert from
3 damage caused by the irresponsible use of dirt-bikes, ATVs, and all other off-road vehicles. The
4 Alliance promotes policy solutions that advance our goals through public education, advocacy,
5 and grassroots activism. The following groups join in this action both as individuals and as
6 individual members of the ARR: the California Wilderness Coalition, Friends of Juniper Flats,
7 Western San Bernardino Landowners Association, Community ORV Watch, and the California
8 Native Plant Society. For the purposes of this action, the Sierra Club does not join this action as
9 a member of the ARR. The ARR, The Wilderness Society, the California Wilderness Coalition,
10 Friends of Juniper Flats, Western San Bernardino Landowners Association, and the California
11 Native Plant Society join only in the National Environmental Policy Act and Federal Land Policy
12 and Management Act claims regarding the West Mojave Planning area in this litigation.
13
14

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

25 19. Plaintiff FRIENDS OF JUNIPER FLATS is a non-profit corporation whose
26 members value the resources offered by the Juniper Flats area which include archaeological,
27 biological and recreational resources. Members are a diverse mix of nearby residents,
28

1 landowners and people who enjoy recreating in the area. Recreation includes family outings,
2 picnics, hiking, horseback riding, OHV touring, photography, wildlife watching and camping.

3 20. The WESTERN SAN BERNARDINO COUNTY LANDOWNERS
4 ASSOCIATION has 50 members, all private landowners in the El Mirage area. The organization
5 was founded in 1997 in order to combat rampant OHV trespass on private lands. Members have
6 submitted written comments on the West Mojave Plan Draft EIS and participated in numerous
7 West Mojave Plan public meetings.
8

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

17 22. The CALIFORNIA NATIVE PLANT SOCIETY is a non-profit group dedicated
18 to the conservation and protection of California's native plant life. CNPS has participated in the
19 WEMO Plan and the NECO Plan processes both formally and informally, and submitted
20 extensive comments on all NEPA documents. CNPS' members are directly harmed by the acts
21 and omissions of the BLM and the FWS, in particular in the impact on native plants of the illegal
22 designation of ORV routes and excessive grazing.
23

24 23. Plaintiff COMMUNITY ORV WATCH is composed of local residents and
25 property owners who are responding to the crisis of unlawful ORV use in the Morongo Basin of
26 the Western Mojave. Community ORV Watch was formed in response to ORV lawlessness
27 causing widespread and frequently permanent damage to private property and public lands.
28

1 Community ORV Watch’s members reside in this area, recreate on the private and public lands
2 in the area, and have been and continue to be damaged by the widespread damage to public
3 resources and private property caused by unchecked ORV use.

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

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

18 26. Defendant DIRK KEMPTHORNE is the Secretary of the United States
19 Department of the Interior and, among other things, is charged with overseeing the management
20 of the nation’s BLM lands and compliance with NEPA, FLPMA, and the ESA. The Secretary is
21 the federal official in whom the ESA vests final responsibility for providing biological opinions
22 and protecting species listed under the ESA. The Secretary has delegated responsibility for the
23 administration and implementation of the ESA to the United States Fish and Wildlife Service.
24 The Secretary is further charged with implementing statutes, regulations, and Executive Orders
25 11644 and 11989 on the lands within his control. Secretary Kempthorne is sued in his official
26 capacity as Secretary of the Department of the Interior.
27
28

1 **VI. LEGAL BACKGROUND**

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

3 27. The Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§ 1701-
4 1785, declares that the public lands be managed for multiple uses in a manner that will protect
5 the quality of the scientific, scenic, historical, ecological, environmental, air and atmospheric,
6 water resource, and archeological values. 43 U.S.C. § 1701 (a)(7) & (8).

7
8 28. As part of FLPMA, Congress designated 25 million acres of southern California
9 as the California Desert Conservation Area (“CDCA”). 43 U.S.C. § 1781(c). About half of the
10 CDCA is public land under BLM management.

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

14
15 30. FLPMA requires that BLM develop a “comprehensive, long-range plan for the
16 management, use, development, and protection of the public lands within the [CDCA].” 43
17 U.S.C. § 1781(d).

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

25
26 32. To protect and conserve the CDCA and its resources, FLPMA also requires that
27 BLM “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or
28

1 undue degradation of the lands.” 43 U.S.C § 1732(b).

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

10
11 34. In 1978, President Carter issued Executive Order 11989, which amended
12 Executive Order 11644 (collectively “the Executive Orders”), and gave federal agencies
13 additional direction and authority to control ORV use. Executive Order 11989 empowered
14 federal agencies to adopt a “closed, unless signed open” policy, and also to immediately close
15 areas suffering from ORV damage. The Executive Orders were enacted in furtherance of the
16 National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq., and are found in the
17 note following 42 U.S.C. § 4321.

18
19 35. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42.
20 These regulations further implement, and largely restate, the planning, informational, and
21 monitoring requirements of the Executive Orders. Specifically, the regulations require that the
22 BLM locate ORV trails so as “to minimize damage to soil, watershed, vegetation, air, or other
23 resources of the public lands and to prevent impairment of wilderness suitability,” 43 C.F.R. §
24 8342.1(a), “to minimize harassment of wildlife or significant disruption of wildlife habitats,” 43
25 C.F.R. § 8342.1(b), “to minimize conflicts between off-road vehicle use and other existing or
26 proposed recreational uses of the same or neighboring public lands, and to ensure compatibility
27
28

1 of such uses with existing conditions in populated areas, taking into account noise and other
2 factors,” 43 C.F.R. § 8342.1(c), and prohibit trails in “officially designated wilderness areas or
3 primitive areas,” 43 C.F.R. § 8342.1(d). The regulations also require BLM to close areas to
4 ORVs where ORVs are causing or will cause negative impacts to soil, vegetation, wildlife,
5 wildlife habitat, cultural resources, wilderness suitability, or threatened and endangered species.
6 43 C.F.R. § 8341.2(a). An area closed to ORVs under this provision can only be reopened to
7 such vehicles if BLM “determines that the adverse effects have been eliminated and measures
8 implemented to prevent recurrence.” Id.

10 **B. The National Environmental Policy Act**

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

20 37. NEPA and the regulations promulgated thereunder by the Council on
21 Environmental Quality (“CEQ”) require that all federal agencies, including the BLM, must
22 prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly
23 affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. §
24 1501.4.

26 38. An EIS must provide a detailed statement of: (1) the environmental impact of the
27 proposed action; (2) any adverse environmental effects that cannot be avoided should the
28

1 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship
2 between local short-term uses of the environment and the maintenance and enhancement of long-
3 term productivity; and (5) any irreversible and irretrievable commitments of resources that would
4 be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

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

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

18 40 C.F.R. § 1508.7. In the context of ORV route designations, NEPA requires that agencies such
19 as the BLM consider and disclose to the public the cumulative impacts of the designations on
20 biological resources, vegetation, water quality, cultural resources and other resources of the
21 public lands.

22 40. When preparing an EIS, an agency must ensure that high quality information is
23 available to the agency and the public before any decision is made or action is taken. Accurate
24 scientific analysis, expert agency comments, and public scrutiny are essential to implementing
25 NEPA. 40 C.F.R. § 1500.1(b). The agency is required to identify clearly all of its assumptions,
26 to explain any inconsistencies, to disclose all methodologies used, to rebut all contradictory
27

1 evidence, to eliminate guesswork, to make explicit reference to sources relied upon for
2 conclusions, and to record in an understandable manner the basis for those conclusions. 40
3 C.F.R. § 1502.24.

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

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

21 **C. Endangered Species Act**

22 43. *Listing of Species.* The ESA requires the Secretary of the Interior (“the
23 Secretary”) to issue regulations listing species as endangered or threatened based on the present
24 or threatened destruction, modification, or curtailment of a species’ habitat or range;
25 overutilization for commercial, recreational, scientific, or educational purposes; disease or
26 predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade
27
28

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

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

23
24
25 45. *Recovery Plans.* Section 4(f) of the ESA requires the Secretary to "develop and
26 implement plans . . . for the conservation and survival of endangered species and threatened
27 species." 16 U.S.C. §1533(f). Recovery plans must include a description of site-specific
28

1 management actions that may be necessary to achieve the conservation and survival of the
2 species; objective, measurable criteria which, when met, would result in a determination that the
3 species be removed from the list; and estimates of the time required and the cost to carry out
4 those measures needed to achieve the plan's goal and to achieve intermediate steps toward that
5 goal. 16 U.S.C. § 1533(f)(1).
6

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

15 47. *Duty to insure survival and recovery; duty to consult.* Pursuant to Section 7(a)(2)
16 of the ESA, all federal agencies must "insure that any action authorized, funded or carried out by
17 such agency . . . is not likely to jeopardize the continued existence of any endangered or
18 threatened species or result in the destruction or adverse modification of habitat of such species .
19 . . . determined . . . to be critical . . ." 16 U.S.C. § 1536(a)(2). To fulfill this mandate, the acting
20 agency must prepare a biological assessment for the purpose of identifying all endangered or
21 threatened species which are likely to be affected by the action, 16 U.S.C. § 1536(c)(1), and must
22 consult with FWS whenever such actions "may affect" a listed species. 16 U.S.C. § 1536(a)(2);
23 50 C.F.R. § 402.14(a). Because BLM's adoption and implementation of the CDCA plan and the
24 WEMO and NECO plan amendments are federal actions affecting the desert tortoise, Parish's
25 daisy, Cushenbury milk-vetch, the Lane Mountain milk-vetch and other listed species, BLM was
26 required to consult with FWS on these plans.
27
28

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

15
16 49. The BO must include an evaluation of the “cumulative effects on the listed
17 species.” 50 C.F.R. § 402.14(g)(3). In addition to effects of other federal actions, “cumulative
18 effects” include “effects of future State or private activities, not involving Federal activities, that
19 are reasonably certain to occur within the action area of the Federal action subject to
20 consultation.” 50 C.F.R. § 402.02.
21

22 50. Throughout its analysis, the BO must utilize the “best scientific and commercial
23 data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. §402.14(d). FWS must consider all the
24 relevant factors and articulate a rational connection between the facts and its ultimate conclusion.
25

26 51. If an action’s impact on a species’ habitat threatens *either* the recovery or the
27 survival of a species, the BO must conclude that the action adversely modifies critical habitat.
28 The ESA defines critical habitat as areas which are “essential to the conservation” of listed

1 species. 16 U.S.C. § 1532(5)(A). The ESA’s definition of “conservation” includes the recovery
2 of species. *See* 16 U.S.C. § 1532(3). Thus, the definition of “adverse modification” of critical
3 habitat in 50 C.F.R § 402.14, limiting the term’s meaning to degradation of critical habitat for
4 *both* the survival and recovery of a listed species, is facially inconsistent with the statute and is
5 therefore invalid. Multiple courts, including this Court, have ruled accordingly.

6
7 52. *Prohibition against “take.”* Section 9 of the ESA and its implementing
8 regulations prohibit any person from “taking” a threatened or endangered species. 16 U.S.C. §
9 1538(a)(1); 50 C.F.R. § 17.31. A “person” includes private parties as well as local, state, and
10 federal agencies. 16 U.S.C. § 1532(13). “Take” is defined broadly under the ESA to include
11 harming, harassing, trapping, capturing, wounding, or killing a protected species either directly
12 or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. §
13 1532(19). The ESA not only bans the acts of parties directly causing a take, but also bans the
14 acts of third parties whose acts bring about the taking.

15
16 53. One exception to Section 9’s take prohibitions is relevant here. A federal agency
17 may take listed species only in accordance with an “Incidental Take Statement.” 16 U.S.C. §
18 1536(b)(4). If the terms and conditions of the Incidental Take Statement are followed, the
19 federal agency and any permittee are exempted from Section 9’s take prohibitions. 16 U.S.C. §
20 1536(o)(2).

21 **VII. FACTUAL BACKGROUND**

22 **A. The California Desert Conservation Area Plan**

23
24 54. The California desert is a rich and unique environment teeming with “historical,
25 scenic, archeological, environmental, biological, cultural, scientific, educational, recreational,
26 and economic resources.” 43 U.S.C. § 1781(a)(2). Though vast, this desert and its resources are
27 “extremely fragile, easily scarred, and slowly healed.” *Id.* Human activities can easily threaten
28

1 rare and endangered species of wildlife and plants in this sensitive ecosystem. 43 U.S.C. §
2 1781(a)(3). To protect and conserve this desert and its resources, Congress designated 25
3 million acres of southern California as the California Desert Conservation Area (“CDCA”). 43
4 U.S.C. § 1781(c). About half of the CDCA is public land under BLM management. Id.
5 Congress mandated that the Secretary of the Interior develop a “comprehensive, long-range plan
6 for the management, use, development, and protection of the public lands within the [CDCA].”
7
8 43 U.S.C. § 1781(d).

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

13 56. ORVs can cause damage to soils and vegetation; harm to wildlife and wildlife
14 habitat; degradation of both water quality and riparian health; harm to wilderness areas and
15 wilderness values; and harm to cultural resources. ORVs include high-clearance jeeps and
16 trucks, dirt bikes, dune buggies, and all-terrain vehicles, often called four wheelers. As detailed
17 below, each of these harms is allowed to continue to occur as a result of the BLM’s management
18 of the CDCA pursuant to the WEMO and NECO plan amendments which allow excessive ORV
19 use in both the WEMO and NECO planning areas of the CDCA.
20

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

22 *1. Status of the Species*

23 57. FWS listed the desert tortoise as “threatened” in 1990. 55 Fed. Reg. 12178.
24 Unfortunately the species’ plight has only worsened since listing. Studies show that tortoise
25 populations in the Mojave Desert are facing a near total collapse. One study plot showed an 84%
26 decline between 1992 and 1999. In another study, surveys including 1,200 transects over a large
27
28

1 area of the Western Mojave Desert failed to detect desert tortoises in areas where desert tortoises
2 were previously considered to be common. On March 15, 2000, the BLM released the report of
3 a panel of tortoise experts addressing the status of the species in the West Mojave in relation to
4 the proposed expansion of Fort Irwin. The panel found that “substantially fewer” tortoises
5 occurred than were estimated to occur in 1994 and concluded that “the desert tortoise in the West
6 Mojave Recovery Unit is more appropriately characterized as ‘endangered’ than ‘threatened.’”
7 In 2004, the Recovery Plan Assessment Report found that there had been significant population
8 decline in the West Mojave population. “[T]he year effect yielded a significantly negative trend
9 in adult density estimates over time . . . This analysis indicates that, taken together, tortoise
10 densities on the permanent study plots located within the Western Mojave Recovery Unit are
11 declining, as was suggested in the Recovery Plan. . . . This pattern suggests that recovery actions
12 implemented since the Plan have not resulted in the reversal of this declining trend.” DTRPAC
13 Report at 58. Within the NECO planning area, the report showed a significant decline in desert
14 tortoise populations in the Chuckwalla Bench, and the Chemehuevi DWMA also generally
15 showed a downward trend. See DTRPAC Report at 57. The draft 2004 DTRPAC Report had
16 also recommended that the Western Mojave Recovery Unit of the tortoise should be uplisted to
17 endangered status.
18
19

20 58. Off-road vehicle use is a widespread threat to the desert tortoise. Off-road
21 vehicles traveling at high speeds through tortoise habitat disturb and frequently kill tortoises.
22 Tortoises can be particularly hard to detect and avoid when vehicles are traveling on unpaved
23 routes. Desert tortoises thrive best where there are few routes of access and no motorized traffic.
24 In particular, desert tortoises are known to inhabit the numerous washes found in the CDCA.
25 Off-road vehicles driving in washes, as is allowed by the CDCA Plan, will disturb or kill desert
26 tortoises using those washes. Off-road vehicle use also causes soil erosion and soil compaction
27
28

1 and is known to contribute to the reduction of native perennial grasses and native ephemerals
2 (wildflowers), as well as the invasion of non-native weeds, thereby reducing the desert tortoises'
3 preferred food sources.

4 59. Desert tortoises also are suffering habitat loss and degradation and increased
5 predation as a result of activities such as urbanization, agricultural development, grazing,
6 military training, recreational use, mining, and are at risk from diseases and collisions with
7 vehicles. Artificial water sources in backcountry and wilderness areas also present a threat to
8 desert tortoises.
9

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

22 2. *Recovery Plan*

23 61. In June 1999, the FWS released the desert tortoise Recovery Plan prepared by a
24 Recovery Team that consisted of eight experts on the desert tortoise, including Drs. Kristin H.
25 Berry and the late David J. Morafka. Numerous FWS and BLM employees also provided
26 assistance, and the BLM State director signed the Plan. When written, the Recovery Plan
27
28

1 represented the best available science on threats to the desert tortoise and necessary actions for
2 conservation. Subsequent scientific studies and analysis have reinforced and supplemented the
3 Recovery Plan’s central conclusions and recommendations.

4 62. The Recovery Plan considers the decline of desert tortoises and sets out a strategy
5 to achieve recovery of the species. The Plan summarizes scientific studies showing that
6 livestock grazing kills desert tortoises, degrades their habitat in a variety of ways, and threatens
7 their food supply to the point of starvation. The Plan also summarizes studies showing that
8 deaths from vehicle collisions also contribute to declining tortoise populations.

9
10 63. While detailing the harmful effects of specific activities such as grazing and off-
11 road vehicle use, the Recovery Plan also recognizes the significance of cumulative impacts on
12 the desert tortoise. The Plan finds that the cumulative load of human habitat destruction,
13 degradation, and fragmentation is the most serious problem facing desert tortoise populations. As
14 a result of cumulative impacts, desert tortoises are almost extirpated from large portions of their
15 geographic range in California.

16
17 64. To ensure recovery of the Mojave desert tortoise population, the Recovery Plan
18 recommends the establishment of Desert Wildlife Management Areas (“DWMAs”) in each of six
19 “recovery units.” A recovery unit is a geographic area harboring an evolutionary distinct
20 population of the desert tortoise. Four of the recovery units and a portion of a fifth recovery unit
21 are in the CDCA. According to the Recovery Plan, establishment of DWMAs and prompt
22 implementation of reserve-level protection within them are the key to the plan’s recovery
23 strategy. The Recovery Plan recommends establishment of fourteen DWMAs and sets out
24 suggestions for their boundaries.

25
26 65. The Recovery Plan recommends that DWMAs span at least 1,000 square miles.
27 Unconnected DWMAs of less than 500 square miles are considered “generally unacceptable.” If
28

1 necessary as the only alternative, the experts concluded that such reserves must be intensely
2 managed in perpetuity to maintain tortoise populations.

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

16 67. FWS has never fully implemented the recommendations in the desert tortoise
17 Recovery Plan. BLM has never fully implemented the recovery plan's recommendations within
18 its management areas.
19

20 3. *Critical Habitat*

21 68. In 1993, environmental groups sued the Secretary of Interior to compel
22 designation of critical habitat for the desert tortoise. Bay Area Nuclear Waste Coalition v. Lujan,
23 CV-93-0114 MHP (N.D.Cal.); Natural Resources Defense Council v. Babbitt, No. C-93-0301
24 MHP (N.D.Cal.). Pursuant to the Court's issuance of partial summary judgment and resulting
25 consent decrees, FWS designated critical habitat units ("CHUs") in 1994. The CHUs were based
26 on the DWMAAs in the Draft Recovery Plan and are consistent with the proposed DWMAAs in the
27
28

1 final Recovery Plan.

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

11 70. In designating critical habitat, FWS also recognized that actions inconsistent with
12 the Recovery Plan (such as illegal route proliferation, cross country ORV use, increasing ORV
13 use, and grazing in DWMA’s) would adversely modify the tortoises’ critical habitat. “[FWS]
14 expects that proposed actions that are inconsistent with land management recommendations for
15 DWMA’s in the Draft Recovery Plan would likely be considered to adversely modify critical
16 habitat.” 59 Fed. Reg. 5835.
17

18 71. Much of the tortoise’s critical habitat falls within the CDCA. Through the CDCA
19 Plan, BLM has decided the extent of measures the agency is willing to provide for all of the
20 desert tortoise habitat the agency manages in California. The CDCA Plan thus has far-reaching
21 effects on the tortoise’s survival and potential recovery.

22 72. Following the listing of the tortoise, BLM did not enter into consultation with the
23 FWS to address the CDCA Plan’s impact on the tortoise and other listed species. Instead,
24 BLM’s decided to “update” the CDCA Plan through a series of bioregional plan amendments,
25 which, in theory, would implement the Recovery Plan. These bioregional plans constantly
26 remained “a year away from completion” for over a decade after the tortoise’s listing. For
27
28

1 purposes of amending the CDCA Plan to address the desert tortoise and other listed species,
2 BLM subdivided the CDCA into several planning areas. These are the Northern and Eastern
3 Mojave Desert (“NEMO”) planning area, the Northern and Eastern Colorado Desert (“NECO”)
4 planning area, the Coachella Valley planning area (“CVP”), the West Colorado (“WECO”)
5 planning area, the West Mojave (“WEMO”) planning area, and the Imperial Sand Dunes (the
6 “Dunes”) planning area.

7
8 73. In 2000, tiring of BLM’s illusory promises of “imminent” CDCA plan
9 consultation and completion, and fearing for the survival of the tortoise and other species, three
10 of the Plaintiffs in this action challenged BLM’s failure to consult with FWS as to the effects of
11 the CDCA Plan on listed species. Center for Biological Diversity, et al. v. Bureau of Land
12 Management, Case No. C-00-0927 WHA-JCS (N.D. Cal.). As a result of that suit, the parties
13 entered into a Consent Decree requiring BLM to enter into formal consultation with FWS and
14 requiring BLM to take interim protective measures to protect listed species pending completion
15 of consultation and implementation of the Plan amendments. Subsequently, BLM and FWS
16 entered into the required consultation.

17
18 **C. Adoption of the NECO and WEMO Plan Amendments to the CDCA Plan, the**
19 **NECO and WEMO Route Designations, and the January, 2005, and January, 2006,**
20 **Biological Opinions.**

21
22 *1. NECO Plan Amendment.*

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

27 75. On June 17, 2002, FWS issued a BO regarding the impacts of the CDCA Plan, as
28 proposed to be amended by the first two bioregional plans, on the desert tortoise. U.S.

1 Department of the Interior, U.S. Fish and Wildlife Service, Biological Opinion for the California
2 Desert Conservation Area Plan [desert tortoise] (6480(P) CA-063.50) (1-8-01-F-16) (2002). The
3 2002 BO addressed impacts to the desert tortoise from the then-proposed NECO plan
4 amendment. The 2002 BO concluded that management of the NECO planning area pursuant to
5 the NECO plan amendment, was not likely to jeopardize the continued existence of the desert
6 tortoise or to destroy or adversely modify its critical habitat.

7
8 76. In August, 2002, BLM issued a combined final version of the NECO Plan and a
9 Final EIS. (“NECO Final EIS”). On December 19, 2002, BLM issued a Record of Decision
10 (“ROD”) implementing the NECO plan amendment. The ROD approved with very minor
11 changes the proposed NECO Plan amendment

12 77. The ROD constituted final agency action for the NECO plan amendment and the
13 accompanying NECO Final EIS. The approval of the NECO plan amendment through the ROD
14 also constitutes agency action for purposes of Section 7 of the ESA.

15 78. In issuing the ROD and approving the Final EIS and the NECO plan amendment,
16 BLM violated the procedural and substantive mandates of the ESA.

17
18 79. In an order dated December 30, 2004, the July 17, 2002 BO regarding the desert
19 tortoise was found to be invalid in ongoing litigation in the case entitled, Center for Biological
20 Diversity, et al. v. BLM, et al., No. C 03-02509 SI (N.D. Cal.). See Center for Biological
21 Diversity, et al. v. U.S. Bureau of Land Management, et al., 2004 WL 3030209 (N.D. Cal.
22 December 30, 2004). In that order, the Court enjoined the open wash policy in the NECO
23 planning area in order to protect the desert tortoise until a new biological opinion was issued.
24 Accordingly BLM closed these desert washes in the DWMA's in the NECO planning area to
25 ORV use.

26
27 80. On March 31, 2005, FWS issued a new BO analyzing the impacts of the CDCA
28

1 Plan, the NECO plan amendment, and the NEMO plan amendment on the desert tortoise. U.S.
2 Department of the Interior, U.S. Fish and Wildlife Service, Biological Opinion for the California
3 Desert Conservation Area Plan [Desert Tortoise] (6840 CA930(P)) (1-8-04-F-43R) (hereinafter
4 “2005 NECO BO”). In reliance on the 2005 NECO BO, BLM “terminated the restriction order
5 prohibiting off-highway vehicle (OHV) use in wash zones associated with the Desert Wildlife
6 Management Areas within the Northern and Eastern Colorado desert bio-region in parts of
7 Imperial, Riverside, and San Bernardino Counties.” BLM Press Release dated April 1, 2005
8 CA-CDD-05-42.

10 2. *WEMO Plan Amendment.*

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

22 82. In January 2005, BLM issued a combined plan amendment and final
23 environmental impact statement for the West Mojave Plan amendment (“WEMO Final EIS”).

25 83. On January 9, 2006, FWS issued a biological opinion for the West Mojave Plan
26 covering the threatened desert tortoise and Parish’s daisy, the Cushenbury milk-vetch and Lane
27 Mountain milk-vetch, and the critical habitat for the desert tortoise, the Parish’s daisy and the
28

1 Cushenbury milk-vetch.¹ U.S. Department of the Interior, U.S. Fish and Wildlife Service,
2 Biological Opinion for the California Desert Conservation Area Plan [West Mojave Plan]
3 (6840(P) CA-063.50) (1-8-03-F-58) (hereinafter “2006 WEMO BO”)

4 84. On March 13, 2006, BLM signed the Record of Decision (“ROD”) for the
5 WEMO Plan amendment. The ROD approved with minor changes the proposed WEMO Plan
6 amendment and the WEMO Final EIS.

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

12 86. In issuing the ROD and approving the FEIS and the WEMO plan amendment,
13 BLM violated the procedural and substantive mandates of FLPMA, NEPA and the ESA.

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

20
21 88. The ORV route network adopted by BLM in the March 2006 WEMO plan
22 amendment and ROD does not comply with the executive orders, laws and regulations governing
23 designation of ORV routes. This is in large part because the routes were adopted using a flawed
24 and simplistic process called the “Decision Tree,” which fails to consider the factors required by
25

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

1 the regulations, such as minimizing impacts to public lands resources, and instead weights the
2 designation process in favor of leaving routes open regardless of the consequences to other
3 resources. As a result of the use of this process, the BLM left open routes that are unnecessarily
4 damaging to scarce cultural resources, riparian areas, native plants and wildlife species, and other
5 public resources. Although BLM purports to have considered various resources in designating
6 ORV routes, plaintiffs have found that the BLM's records contain little or no specific
7 information to back up this claim. BLM's designation of this route system in both the June 30,
8 2003 and March 2006 decisions is arbitrary, capricious, and otherwise not in accordance with
9 law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in
10 violation of 5 U.S.C. § 706.

12 **D. FLPMA Violations.**

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

22 90. Among the significant resources in the WEMO planning area are the desert
23 streams and springs that wildlife depend on, and the desert tortoise, Parish's daisy, Cushenbury
24 milk-vetch, Lane Mountain milk-vetch, southwestern willow flycatcher, and other listed, rare
25 and sensitive native plants and wildlife species. Even for the most well known species, the
26 desert tortoise, FWS has repeatedly admitted that the current survey data is completely
27

1 inadequate. See 2004 DTRPAC Report.

2 91. BLM's utter failure to monitor, inventory, or study many of the special status
3 species and other unique resources of the WEMO planning area prior to approving the ROD and
4 plan amendment means that BLM has failed to prepare and maintain a current inventory of all
5 public lands and their resources, and has failed to follow FLPMA's mandate that the systematic
6 inventory of public lands and their resources form the basis of the land use planning process. 43
7 U.S.C. §1711(a); 43 U.S.C. §1701(a)(2); 43 C.F.R. §1610.4-3.

8
9 **E. NEPA Violations.**

10 92. The BLM also violated several provisions of NEPA in its issuance of the ROD
11 and approval of the FEIS for the WEMO plan amendment.

12 93. NEPA requires agencies to analyze alternatives as well as the direct, indirect, and
13 cumulative impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8. The FEIS for the
14 WEMO plan amendment is deficient in this regard.

15 94. In addition to alternatives and impacts, NEPA requires agencies to consider
16 mitigation measures to minimize the environmental impacts of the proposed action. 40 C.F.R. §
17 1502.14 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental
18 consequences and mitigation measures). The FEIS for the WEMO plan amendment fails to
19 analyze sufficient mitigation measures to address the impacts on listed and sensitive species, air
20 quality, non-motorized recreation, soils, water resources, wilderness, and many other resources.
21 This failure renders environmental review for the WEMO plan amendment inadequate under
22 NEPA.
23

24 95. The deficiencies in environmental review of the WEMO plan amendment and
25 route designation include, but are not limited to, the following: the EIS failed to adequately
26 consider environmental impacts including impacts to biological resources, wilderness, air
27
28

1 quality, and water resources; the EIS failed to adequately identify the environmental setting by
2 gathering sufficient baseline data regarding existing ORV routes and environmental resources
3 including, but not limited to, soils, air quality, and listed and sensitive species; the EIS failed to
4 consider a reasonable range of alternatives including failing to analyze any alternative that would
5 fully comply with the recommendations of the Desert Tortoise Recovery Plan or to consider
6 readily available alternative route configurations; the EIS used an improper no action alternative;
7 the EIS failed to adequately identify or analyze cumulative impacts; the EIS failed to include
8 appropriate mitigation measures for impacts identified; BLM failed to adequately respond to
9 public comments; and BLM used a flawed “Decision Tree” to make route designations that
10 weighted the designation process in favor of leaving routes open regardless of the consequences
11 to other resources and does not disclose the basis, if any basis exists, for routes being designated
12 as open. The discussion of the route designations and their impacts in the WEMO EIS is largely
13 taken from the March 2003 Environmental Assessment for the WEMO route designation, which
14 failed to discuss and disclose the major impacts of the route designations.
15

16 **F. ESA Violations.**

17 *1. 2005 NECO BO.*

18
19 96. In the NECO plan, BLM established 2 desert wildlife management areas
20 (“DWMAs”), ostensibly to protect wildlife and promote recovery of the desert tortoise.
21 However, in the NECO plan BLM also adopted an “open wash policy” that allows overland
22 ORV travel, stopping, and camping in desert washes over large expanses of the NECO planning
23 area including in over 200,000 acres of the Chemehuevi DWMA and over 350,000 acres of the
24 Chuckwalla DWMA. In the NECO plan amendment, the BLM approved continued use of many
25 ORV routes that were created illegally due to BLM’s failure to protect public lands from
26 unauthorized and illegal route proliferation. The NECO plan amendment also allowed the
27
28

1 Johnson Valley to Parker competitive ORV route to remain open, allowed livestock grazing to
2 continue within sensitive desert tortoise habitat, including areas within the DWMAs, and allowed
3 for the construction, improvement, and maintenance of up to 75 new artificial water sources (or
4 guzzlers) throughout the NECO planning area including 10 “priority artificial waters” in
5 wilderness areas.

6
7 97. Unfortunately, the March 2005 NECO BO, and the BLM management pursuant to
8 the NECO Plan amendment that it authorizes, are inconsistent with the Desert Tortoise Recovery
9 Plan. The March 2005 NECO BO and the NECO plan amendment also are at odds with the best
10 available science. The management regimes for the DWMAs are inconsistent with the Recovery
11 Plan’s recommendations regarding regulation off-road vehicle activity and other activities
12 impacting the tortoise. Additionally, the NECO plan amendment created DWMAs that are
13 inconsistent with the dictates of the Recovery Plan. For example, the two DWMAs in the NECO
14 are both smaller than the Recovery Plan’s recommendation of 1,000 square mile DMWAs.

15
16 98. The 2005 NECO BO failed to adequately analyze known impacts to the desert
17 tortoise and its critical habitat from ORV use and cattle grazing in the NECO planning area and
18 within the DWMAs. By concluding that the proposed route designations in the NECO, including
19 allowing ORVs to use the vast majority of desert washes, will not jeopardize the species or
20 destroy or adversely modify critical habitat, FWS’s March 2005 NECO BO is entirely at odds
21 with both the Recovery Plan’s direction and the best available science. Although the best science
22 shows that desert tortoises inhabit washes and that vehicles often strike and kill tortoises even on
23 paved roads, as well as in washes where tortoises would more frequently occur and be harder to
24 see, the March 2005 NECO BO fails to adequately analyze whether designating desert washes as
25 routes of travel in the NECO planning area will jeopardize the species or destroy or adversely
26 modify its habitat.
27
28

1 99. In the 2005 NECO BO, FWS also failed to consider cumulative effects on the
2 tortoise’s habitat. Such an incomplete analysis violates the ESA.

3 100. The 2005 NECO BO also includes an Incidental Take Statement (“ITS”)
4 authorizing take of the desert tortoise. The ITS authorizes take that results from “casual use”
5 including ORV use on designated routes and in the “open” wash zones and from grazing. FWS
6 refused to extend the take exemption to managed waters and guzzlers because FWS stated that
7 they “can be designed to avoid take of desert tortoises.” 2005 NECO BO at 181. An ITS must
8 specify the impact of the incidental taking on the species. The ITS in the 2005 NECO BO
9 contains no numeric limit on take of desert tortoises nor any other measure to assess whether the
10 take limit has been reached or exceeded. Additionally, the ITS must specify reasonable and
11 prudent measures necessary to minimize such impacts. Finally, the ITS must include terms and
12 conditions implementing the reasonable and prudent measures. Although the ITS allows take
13 from ORV use on approximately 5,000 miles of routes and on over 500,000 acres of open wash
14 zones within the DWMAs, the ITS does not specify the impacts of the taking of tortoises from
15 such vehicle use. Neither does the ITS contain any specific reasonable and prudent measures or
16 terms and conditions relating to the take of tortoises caused by such vehicle impacts other than
17 requiring the BLM to develop a monitoring program for use in the open wash zones.
18
19

20 2. *2006 WEMO BO.*

21 101. By concluding that the proposed route designations in the WEMO planning area
22 will not jeopardize the species or destroy or adversely modify critical habitat, FWS’s January 9,
23 2006 WEMO BO is entirely at odds with both the Recovery Plan’s direction and the best
24 available science. The 2006 WEMO BO fails to adequately analyze impacts to the desert tortoise
25 and its critical habitat such as whether ORV use, and continued grazing in the WEMO planning
26 area will jeopardize the desert tortoise or destroy or adversely modify its habitat. To the extent
27
28

1 that the 2006 WEMO BO concludes that BLM management actions that are inconsistent with the
2 Recovery Plan do not adversely modify the critical habitat for the desert tortoise FWS's
3 conclusions renders the 2005 WEMO BO arbitrary, capricious and unlawful.

4 102. The 2006 WEMO BO also failed to adequately analyze cumulative impacts to the
5 desert tortoise populations from increased highway traffic and highway expansion, increased
6 urbanization, and increased predation that accompanies development, and cumulative impacts to
7 desert tortoise and its critical habitat due to the Fort Irwin expansion.
8

9 103. The 2006 BO also fails to adequately analyze known impacts to other listed
10 species and their designated critical habitats. For example, the 2006 WEMO BO fails to
11 adequately identify and analyze ongoing impacts to the Lane Mountain milk-vetch from ORV
12 use in the WEMO planning area and cumulative impacts to the species due to the Fort Irwin
13 expansion.
14

15 104. The 2006 WEMO BO includes an Incidental Take Statement ("ITS") authorizing
16 take of the desert tortoise. The ITS authorizes take that results from "casual use" including ORV
17 use on over 5,400 miles of designated routes, stopping, parking and camping within 50 feet of
18 such routes in DWMAs and within 300 feet of such routes in other areas of the WEMO plan
19 area, and from grazing. An ITS must specify the impact of the incidental taking on the species.
20 The ITS in the 2006 WEMO BO contains no numeric limit on take or desert tortoise nor any
21 other measure to assess whether the take limit has been reached or exceeded. Additionally, the
22 ITS must specify reasonable and prudent measures necessary to minimize such impacts. Finally,
23 the ITS must include terms and conditions implementing the reasonable and prudent measures.
24 Although the ITS allows take from ORV use on over 5,400 miles of routes including routes
25 within the DWMAs, the ITS does not specify the impacts of the taking of tortoises from such
26 ORV use. Neither does the ITS contain any reasonable and prudent measures or terms and
27

1 conditions relating to the take of tortoises caused by ORV impacts other than incorporating the
2 reporting requirements of the existing regulations. See 50 C.F.R. § 402.14(i)(3).

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

14
15 106. BLM and FWS have violated the ESA by failing to use their authorities to
16 promote the recovery of the desert tortoise, to avoid jeopardy to the species, and to avoid
17 destroying or adversely modifying its critical habitat. Instead, the agencies have blatantly
18 disregarded expert recommendations for species recovery and, by validating illegally created
19 ORV routes in the DWMA's and elsewhere and designating desert washes as open routes of
20 travel in the NECO planning area, among other actions, have taken actions that not only do not
21 promote conservation or recovery but will in fact contribute to the decline of the species. FWS
22 and BLM approved the Recovery Plan for the desert tortoise over seven years ago. Since signing
23 the Recovery Plan, BLM has failed to implement its recommendations. Likewise, FWS has used
24 the consultation process to excuse BLM's failure to assure the tortoise's recovery rather than as a
25 means of implementing the necessary actions established in the Recovery Plan to restore desert
26
27
28

1 tortoise populations. Through the CDCA Plan and the amendments thereto, and with FWS'
2 blessing, BLM is authorizing extensive activities in the DWMA's in direct contradiction to the
3 Recovery Plan's call for reserve-level protection as the "key" to the species recovery.

4 107. In sum, the ROD and FEIS BLM issued for the WEMO plan amendment is
5 inadequate and unlawful in violation of the NEPA, FLPMA, the ESA, and the APA. Similarly,
6 FWS's 2005 NECO BO and 2006 WEMO BO which underlie BLM's actions in adopting the
7 WEMO plan amendment and in managing the WEMO planning area and the NECO planning
8 area, are unlawful and inadequate under the ESA and APA.

10 **VIII. CLAIMS FOR RELIEF**

11 108. For each of the Claims in this Complaint, Plaintiffs incorporate by reference each
12 and every allegation set forth in this Complaint as if set out in full below.

13 **First Claim for Relief**

14 **(Against BLM for Violating FLPMA, its implementing Regulations, 15 and relevant Executive Orders)**

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

24 110. The ORV route network adopted by BLM in the March 2006 WEMO plan
25 amendment and ROD does not comply with the executive orders, laws and regulations governing
26 designation of ORV routes because the routes were adopted using a flawed process, called the
27 "Decision Tree," which failed to consider the factors required by the regulations, such as
28

1 minimizing impacts to public lands resources, and instead weights the designation process in
2 favor of leaving routes open regardless of the consequences to other resources. As a result of the
3 use of this process, the BLM left open routes unnecessarily damaging scarce cultural resources,
4 riparian areas, and other public resources. BLM's designation of this route system for the
5 WEMO planning area in both the June 30, 2003 and March 2006 decisions is arbitrary,
6 capricious, and otherwise not in accordance with law and/or constitutes final agency action
7 unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.
8

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

15 **Second Claim for Relief**

16 **(Against BLM for Violating NEPA and CEQ Regulations)**

17 112. BLM has violated NEPA and its implementing regulations by issuing a ROD
18 adopting the WEMO plan amendment, and by approving the Final EIS for the WEMO plan
19 amendment and the environmental review for the WEMO route designation that each fail to meet
20 the requirements of NEPA. 42 U.S.C. § 4331 *et seq.*; 40 C.F.R. § 1500.1 *et seq.* BLM's NEPA
21 documentation for the WEMO route designation, dated June 30, 2003, and the Final EIS for the
22 WEMO plan amendment, dated January 2005, are arbitrary, capricious, and otherwise not in
23 accordance with law and/or constitute final agency action unlawfully withheld or unreasonably
24 delayed, in violation of 5 U.S.C. § 706.
25

26 113. An EIS must provide a detailed statement of: (1) the environmental impact of the
27 proposed action; (2) any adverse environmental effects that cannot be avoided should the
28

1 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship
2 between local short-term uses of the environment and the maintenance and enhancement of long-
3 term productivity; and (5) any irreversible and irretrievable commitments of resources that would
4 be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(C). An EIS
5 must “inform decision-makers and the public of the reasonable alternatives which would avoid
6 or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R.
7 § 1502.1. NEPA also requires federal agencies to analyze the direct, indirect, and cumulative
8 impacts of the proposed action. 40 C.F.R. §§ 1508.7, 1508.8. In addition to alternatives and
9 impacts, NEPA requires agencies to consider mitigation measures to minimize the environmental
10 impacts of the proposed action. 40 C.F.R. § 1502.14 (alternatives and mitigation measures); 40
11 C.F.R. § 1502.16 (environmental consequences and mitigation measures).

12
13 114. The ROD and FEIS that BLM prepared for the WEMO plan amendment failed to
14 comply with each of these requirements of NEPA. The FEIS does not analyze a full range of
15 alternatives, include a proper and accurate “no action” alternative, or adequately analyze the
16 impacts of the proposed action on the resources of CDCA. The FEIS also fails to consider
17 mitigation measures to reduce the impacts of the proposed action on the resources of the WEMO
18 planning area within the CDCA and relies on outdated, inaccurate and inadequate information in
19 analyzing the impacts of the proposed action.
20

21 115. For each of the above reasons, and others, BLM’s adoption of the ROD and FEIS
22 for the WEMO planning area is arbitrary, capricious, and not in accordance with law as required
23 by NEPA, its implementing regulations, and the APA, and is subject to judicial review under the
24 APA. 5 U.S.C. §§701-706, 706(2).
25

26
27 **Third Claim for Relief**
28

1 **(Against FWS for Issuing Unlawful Biological Opinions)**

2 116. FWS's issuance of the 2005 NECO BO, Biological Opinion for the California
3 Desert Conservation Area Plan [Desert Tortoise] (6840 CA930(P)) (1-8-04-F-43R), was
4 arbitrary, capricious, and unlawful because the conclusions in the 2005 NECO BO were not
5 based on the best available science, as required by the ESA, 16 U.S.C. § 1536(a)(2).
6

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

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

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

22 120. FWS's issuance of the 2006 WEMO BO, Biological Opinion for the California
23 Desert Conservation Area Plan [West Mojave Plan] (6840(P) CA-063.50) (1-8-03-F-58), was
24 arbitrary, capricious, and unlawful because the conclusions in the 2006 WEMO BO were not
25 based on the best available science, as required by the ESA, 16 U.S.C. § 1536(a)(2).
26

27 121. FWS's issuance of the 2006 WEMO BO was arbitrary, capricious, and
28

1 inconsistent with the law because the BO failed to address the cumulative effects of the proposed
2 actions on the desert tortoise and other listed species and their critical habitats as required by
3 ESA and its implementing regulations. 50 C.F.R. § 402.14. Among its deficiencies, the BO
4 failed to adequately consider cumulative effects of increasing ORV use, development, traffic, or
5 cumulative impacts resulting from the Fort Irwin expansion, among other present and future
6 activities.

7
8 122. FWS's issuance of the 2006 WEMO BO was arbitrary, capricious, and
9 inconsistent with the law because the BO included an Incidental Take Statement that failed to
10 adequately specify the impact of the incidental taking on the desert tortoise, failed to adequately
11 specify reasonable and prudent measures necessary to minimize such impacts, and failed to
12 include terms and conditions implementing such reasonable and prudent measures. 16 U.S.C. §
13 1536(b)(4).

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

17 **Fourth Claim for Relief**

18 **(Against BLM and FWS For Violating the ESA By Failing to Insure Against** 19 **Jeopardy and Destruction or Adverse Modification of Critical Habitat)**

20 124. BLM and FWS are violating Section 7(a)(2) of the ESA and its implementing
21 regulations as set forth at 50 C.F.R. § 402.16 by failing to ensure through consultation that
22 BLM's approval and implementation of the CDCA Plan, including the WEMO and NECO plan
23 amendments, do not jeopardize the desert tortoise or destroy or adversely modify its critical
24 habitat, and by failing to ensure that the WEMO plan amendment does not jeopardize the
25 Parish's daisy, the Cushenbury milk-vetch, and the Lane Mountain milk-vetch or destroy or
26 adversely modify the critical habitat of the Parish's daisy and the Cushenbury milk-vetch. BLM
27
28

1 is violating this provision by carrying out these actions notwithstanding the fact that the
2 conclusions in the 2005 NECO BO and 2006 WEMO BO are unsubstantiated and unlawful.
3 FWS is violating this provision by authorizing BLM to take federal actions that will either
4 jeopardize the desert tortoise or destroy or adversely modify the tortoise's critical habitat, and
5 will either jeopardize the Parish's daisy, the Cushenbury milk-vetch, and the Lane Mountain
6 milk-vetch, or destroy or adversely modify the Parish's daisy and the Cushenbury milk-vetch
7 critical habitat. These violations are subject to judicial review under 16 U.S.C. § 1540(g).
8

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiffs respectfully request that this Court:

11 (1) Adjudge and declare that Defendant Bureau of Land Management's
12 implementation of the California Desert Conservation Area Plan though the approval of the
13 Record of Decision for the West Mojave Plan violates the Federal Land Policy and Management
14 Act, its implementing regulations and relevant Executive Orders;

15 (2) Adjudge and declare that Defendant Bureau of Land Management's
16 implementation of the California Desert Conservation Area Plan though the approval of the
17 Record of Decision for the West Mojave Plan violates the National Environmental Policy Act
18 and its implementing regulations;

19 (3) Adjudge and declare that Defendant Fish and Wildlife Service's 2005 NECO BO,
20 Biological Opinion for the California Desert Conservation Area Plan [Desert Tortoise] (6840
21 CA930(P)) (1-8-04-F-43R), and 2006 WEMO BO, Biological Opinion for the California Desert
22 Conservation Area Plan [West Mojave Plan] (6840(P) CA-063.50) (1-8-03-F-58), for the
23 California Desert Conservation Area Plan amendments are arbitrary, capricious and inconsistent
24 with the law;

25 (4) Adjudge and declare that Defendant Fish and Wildlife Service's issuance of its
26
27
28

1 2005 NECO BO, Biological Opinion for the California Desert Conservation Area Plan [Desert
2 Tortoise] (6840 CA930(P)) (1-8-04-F-43R), violates Section 7(a)(2) of the ESA because the
3 agency has illegally concluded that BLM's actions do not jeopardize the desert tortoise or
4 destroy or adversely modify its critical habitat;

5 (5) Adjudge and declare that Defendant Fish and Wildlife Service's issuance of its
6 2006 WEMO BO, Biological Opinion for the California Desert Conservation Area Plan [West
7 Mojave Plan] (6840(P) CA-063.50) (1-8-03-F-58), violates Section 7(a)(2) of the ESA because
8 the agency has illegally concluded that BLM's actions do not jeopardize the desert tortoise or
9 adversely modify its critical habitat, and do not jeopardize the Parish's daisy, the Cushenbury
10 milk-vetch, and the Lane Mountain milk-vetch, or destroy or adversely modify the Parish's daisy
11 and the Cushenbury milk-vetch critical habitat;

12 (6) Order Defendant Fish and Wildlife Service to vacate and set aside the 2005
13 NECO BO for the Northern and Eastern Colorado Desert Coordinated Management Plan
14 amendment to the California Desert Conservation Area Plan, Biological Opinion for the
15 California Desert Conservation Area Plan [Desert Tortoise] (6840 CA930(P)) (1-8-04-F-43R),
16 and the 2006 WEMO BO, Biological Opinion for the California Desert Conservation Area Plan
17 [West Mojave Plan] (6840(P) CA-063.50) (1-8-03-F-58), for the West Mojave Plan amendment
18 to the California Desert Conservation Area Plan;

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

24 (8) Adjudge and declare that Defendant Bureau of Land Management's
25
26
27
28

1 implementation of the California Desert Conservation Area Plan in the West Mojave Plan
2 violates Section 7(a)(2) of the ESA because the agency has failed to insure that its actions do not
3 jeopardize the desert tortoise or destroy or adversely modify its critical habitat, and do not
4 jeopardize the Parish's daisy, the Cushenbury milk-vetch, and the Lane Mountain milk-vetch, or
5 destroy or adversely modify the Parish's daisy and the Cushenbury milk-vetch critical habitat;

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

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

16 (11) Order Defendant Bureau of Land Management's to vacate and set aside the
17 Record of Decision for the West Mojave Plan;

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

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

1 (14) Pending completion of an adequate biological opinion for the Northern and
2 Eastern Colorado Desert Coordinated Management Plan, order Defendant Bureau of Land
3 Management to close all washes in the Chemehuevi and Chuckwalla DWMA's to off-road
4 vehicle use to protect the desert tortoise and its critical habitat and impose such other restrictions
5 on off-road vehicle use as may be necessary to protect the desert tortoise, its critical habitat, and
6 other resources of these public lands;

7
8 (15) Award Plaintiffs their fees, costs, expenses and disbursements, including
9 reasonable attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), or the Equal Access
10 to Justice Act, 28 U.S.C. § 2412; and

11 (16) Grant Plaintiffs such additional and further relief as the court deems just and
12 proper.

13 IX. CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

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

16 DATED: August 28, 2006

/s/ Lisa T. Belenky
Lisa T. Belenky (CA Bar No. 203225)
CENTER FOR BIOLOGICAL DIVERSITY
1095 Market St., Suite 511
San Francisco, CA 94103
Telephone: (415) 436-9682 x 307
Facsimile: (415) 436-9683
Email: lbelenky@biologicaldiversity.org

Deborah A. Sivas (CA Bar No. 135446)
STANFORD LAW SCHOOL ENVIRONMENTAL
LAW CLINIC
559 Nathan Abbott Way
Stanford, CA 94305-8620
Telephone: (650) 723-0325
Facsimile: (650) 725-8509
Email: dsivas@stanford.edu

Attorneys for Plaintiffs Center for Biological
Diversity, Sierra Club, Public Employees for
Environmental Responsibility, and Desert Survivors

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Robert B. Wiygul, LA Bar # 17411*
Waltzer & Associates
1025 Division Street, Suite C
Biloxi, Mississippi 39530
Telephone: (228) 374-0700
Facsimile: (228) 374-0725
Email: robert@waltzerlaw.com

Attorney for Plaintiffs Alliance for Responsible
Recreation, The Wilderness Society, the California
Wilderness Coalition, Friends of Juniper Flats,
Western San Bernardino Landowners Association,
the California Native Plant Society, and Community
ORV Watch

*Application for admission pro hac vice pending

/s/ Lisa T. Belenky
Lisa T. Belenky (CA Bar No. 203225)
CENTER FOR BIOLOGICAL DIVERSITY
1095 Market St., Suite 511
San Francisco, CA 94103
Telephone: (415) 436-9682 x 307
Facsimile: (415) 436-9683
Email: lbelenky@biologicaldiversity.org

Local Counsel for Plaintiffs Alliance for
Responsible Recreation, The Wilderness Society,
the California Wilderness Coalition, Friends of
Juniper Flats, Western San Bernardino Landowners
Association, the California Native Plant Society,
and Community ORV Watch

1 **PROOF OF SERVICE**

2
3 I, Lisa T. Belenky, declare as follows:

4 I am employed in the County of San Francisco, State of California. I am over the age of
5 eighteen and my business address is 1095 Market St., Suite 511, San Francisco, CA 94103.

6 Pursuant to Local Rule 3-12(b) and Local Rule 5-6, on August 28, 2006, I served the following
7 documents entitled:

8 **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

9 as follows:

10 Service for Defendants the U.S. Bureau of Land Management, the U.S. Fish and Wildlife
11 Service, Dirk Kempthorne, Secretary of the Interior was accomplished pursuant to Fed. R. Civ.
12 P. 4(i) and by sending the document via electronic mail to:

13
14 LISA L. RUSSELL, Assistant Section Chief
15 MICHAEL R. EITEL, Trial Attorney
16 U.S. Department of Justice
17 Environment & Natural Resources Division
18 Wildlife & Marine Resources Section
19 Ben Franklin Station, P.O. Box 7369
20 Washington, D.C. 20044-7369
21 Tel: 202-305-0210
22 Fax: 202-305-0275
23 Lisa.Russell@usdoj.gov
24 michael.eitel@usdoj.gov

25
26 I declare under penalty of perjury under the laws of the state of California that the
27 foregoing is true and correct and that this Proof of Service was executed on August 28, 2006 at
28 San Francisco County, CA.

/s/ Lisa T. Belenky
Lisa T. Belenky