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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PRESCOTT DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

U.S. BUREAU OF LAND
MANAGEMENT; RON WENKER, Acting
Director of U.S. Bureau of Land
Management; JAMES KENNA, BLM
Arizona State Director; KEN SALAZAR,
Secretary of Interior, and U.S. FISH AND
WILDLIFE SERVICE,

Defendants,

NATIONAL RIFLE ASSOCIATION,

Defendant-Intervenor.

Case No. CV 09-8011-PGR

**CENTER FOR BIOLOGICAL
DIVERSITY'S STATEMENT OF
MATERIAL FACTS IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

Date: not set

Time: not set

Court: Courtroom 601

Judge: Hon. Paul G Rosenblatt

STATEMENT OF FACTS

THE ARIZONA STRIP MANAGEMENT PLANS

1. The Arizona Strip covers approximately 1.98 million acres of public land in isolated terrain adjacent to the Grand Canyon in the northwest corner of Arizona. Of this total, approximately 1.68 million acres are not within either the Vermilion Cliffs (“VCNM”) or the Grand Canyon-Parashant National Monument (“GCPNM”) and thus are covered by the management plan for the Arizona Strip Field Office (“ASFO”). ASRMP060330.

2. As it is separated by the Grand Canyon from the rest of Arizona, the Arizona Strip is among the most remote and rugged public lands in the lower 48 states. ASRMP060328.

3. The Arizona Strip contains many documented and undocumented fossils and other geologic treasures. Many special status species of both plants and animals inhabit the Arizona Strip, including the desert tortoise, desert-nesting bald eagle, peregrine falcon, and southwestern willow flycatcher. Historic and cultural resources are also found on the Arizona Strip including remnants of Native American culture as well as that of the homesteaders. ASRMP060332-38.

4. The GCPNM is collaboratively managed by the Bureau of Land Management (“BLM”) and the National Park Service (“NPS”). NPS has primary management authority over the portion of GCPNM that lies within the Lake Mead National Recreation Area, and BLM has primary management authority over the remaining part of the monument. ASRMP060325. VCNM is wholly located on BLM-administered public lands. ASRMP060325.

5. On November 16, 2005, BLM released a draft Resource Management Plan/Environmental Impact Statement (“Draft Plan/EIS”) for the Arizona Strip, including Resource Management Plans (“RMPs” or “Plans”) for lands managed by BLM within the ASFO, GCPNM, and VCNM. Plaintiff Center for Biological Diversity (the “Center”)

submitted timely comments on the Draft Plan/EIS on March 16, 2006, *see* ASRMP023614 *et seq.*, and timely comments on the Final EIS (“FEIS”) on April 2, 2007, *see* ASRMP036465 *et seq.*

6. BLM issued Records of Decision (RODs) for the Plans on January 29, 2008, approving final RMPs that were essentially identical to the proposed RMPs evaluated in the FEIS.

THE CALIFORNIA CONDOR

7. The California condor was listed as an endangered species under the Endangered Species Act (“ESA”) on March 11, 1967. 32 Fed. Reg. 4001; ASRMP056143.

8. Six California condors were released in the Arizona Strip on December 12, 1996 as an experimental nonessential population under 16 U.S.C. § 1539(j) (ESA § 10(j)). ASRMP056143.

9. Ninety-six condors have since been released in Arizona. ASRMP056144.

10. At the time the Biological Opinion was prepared, fifty-nine condors remained in the wild in Arizona. ASRMP056144.

11. For purposes of the ESA, § 10(j) condors are treated as either “threatened” or “proposed to be listed,” depending on whether they are found on National Park Service land or other federal land, respectively, and are fully protected as endangered on land outside of the designated experimental population area. 50 C.F.R. Part 17.84(j)(2)(i); ASRMP056144.

12. Under Section 10(j) of the ESA, a take of these condors does not constitute a per se violation of the ESA so long as the take is non-negligent, incidental to a lawful activity, and reported as soon as possible. ASRMP054057. *See also* 61 Fed. Reg. 54044, 54057.

13. The Bureau of Land Management Manual § 6840.21E3(c)2 provides that BLM must conference for proposed species as opposed to formally consult with U.S. Fish and Wildlife Service (“FWS”).

14. The U.S. Fish and wildlife Service (“FWS”) prepared a Biological Opinion (“BiOp”) for the ASRMP that concluded the Proposed Plan “is not likely to jeopardize the continued existence of the [listed species occurring on the project site], and is not likely to destroy or adversely modify designated . . . critical habitat.” ASRMP056212.

15. The BiOp’s “no jeopardy” conclusion in regards to the condor was based on an evaluation of two small subsets of the Arizona Strip project area. ASRMP56214.

16. Most condor movements in the Arizona Strip occur “within the nonessential experimental population area,” *i.e.*, outside of the limited geographic areas assessed in the BiOp. ASRMP056160.

17. The BiOp acknowledges that, per a FWS Southwest Condor Review Team report from April 2007 (SWCR), “most mortalities since 2002 have been due to lead poisoning” caused by “exposure from lead ammunition,” and that “[i]ngestion of lead in carcasses and the resulting toxicity is a primary cause of injury and mortality to condors in the nonessential experimental population.” ASRMP056169, 056192.

18. Hunting is allowed in most of the Arizona Strip, including in the Vermilion Cliffs National Monument and Grand Canyon-Parashant National Monument. ASRMP060329.

19. The Arizona Strip “is known worldwide as one of the best mule deer hunting areas.” ASRMP055829.

20. Condors are known to be poisoned by consuming hunter-shot lead ammunition and lead ammunition fragments found in carcasses shot by hunters. Lead poisoning is contributing to the overall decline of condors in California. ASRMP056169; ASRMP056210.

21. The “[i]ngestion of lead . . . is a primary cause of injury and mortality to condors in the [10(j)] population.” ASRMP056192.

22. “Numerous scientific studies have shown that shotgun pellets and rifle bullet fragments in animal carcasses are the primary source of this contamination.” M10015.

23. “Lead exposure has been recognized as a major threat to condors for several decades, and ingestion of ammunition has long been considered the primary source of this exposure. Free-flying condors have detectable blood lead levels that often require emergency veterinary intervention (Fry 2003). The vast majority of condors tested in the last ten years have blood lead levels that exceed the Centers for Disease Control (CDC) threshold for immediate clinical intervention in children of 10 µg/dL, and many condors have been observed with blood lead levels exceeding 100 µg/dL. Sorenson and Burnett (2007) documented a sharp increase in blood lead levels in condors during the fall hunting season. Lead ammunition is the only documented source that could cause acute lead exposure at the very high levels seen in wild condors. Since lead is not biologically accumulated, acute levels of blood lead, as seen in the vast majority of condors . . . are most reasonably derived from repeated ingestion of tiny lead fragments; condors must consume lead directly from highly concentrated sources such as lead ammunition.” M10026-27.

24. “According to the Fish and Wildlife Service (SCRT 2007), in 2002, 23 condors in Arizona had elevated blood lead levels (>15µg/dl, indicating exposure), with 13 condors requiring emergency treatment (chelation) to purge the lead from their systems. In 2003, there were 13 cases of lead exposure requiring 5 chelations. In 2004 there were 35 cases of lead exposure requiring 18 chelations. In 2005 over 50% of all Arizona condors had lead exposure and 23% (18 birds) required chelation treatment; radiographs of four condors showed visible lead fragments or shotgun pellets in their stomachs. In 2006 95% of all Arizona condors (54 birds) had lead exposure and 40 condors (70% of the Arizona population) were chelated; radiographs of four condors showed ammunition fragments consistent with those recovered in past years.” M10033-34.

25. BLM adopted one mitigation measure regarding condor exposure to lead in the FEIS and RODs: “The BLM and NPS [will] identify and, where possible, reduce or eliminate sources of lead contamination for Condors within the Planning Area. The BLM and NPS [will] encourage voluntary use of non-lead ammunition in the Planning Area.”

ASRMP060463; *see also* ASRMP062401; 06429; 062519.

26. Under Appendix 2E, “Conservation Measures for Special Status Species,” Conservation measure CC-3.D states that “[u]se of non-lead ammunition is strongly encouraged for activities involving the discharge of firearms.” ASRMP061637.

27. The FEIS fails to even mention, however, the adverse effects of lead ammunition on condors in the “environmental consequences” section of the FEIS. ASRMP060988-90.

28. A Southwest Condor Working Group study (FWS 2007) found it “unlikely that the northern Arizona and southern Utah condor program will succeed at achieving a self-sustaining condor population with the current lead exposure situation.” M010016; R014961.

29. During conferencing with BLM, FWS recommended that BLM “reduce effects of project activities on condors and further recovery of the species,” and that “for those activities where ammunition is used in the area and for which BLM has authority, BLM require that only non-lead ammunition will be used.” ASRMP056248.

30. Alternative non-lead ammunition is readily available in almost all calibers used by hunters. Table 5, R14968-69; R14966-70.

31. Yet, no restrictions are imposed on the use of lead ammunition within the areas covered by the RMPs by either BLM or the Arizona Department of Fish and Game. ASRMP061475.

DESERT TORTOISE

32. During the EIS process, it was determined that desert tortoises occur in the project area, and might be affected by the RMPs. ASRMP055724.

33. Desert tortoise populations north and west of the Colorado River in Arizona and Utah (excluding the Beaver Dam Slope population) were emergency listed as an endangered species under the ESA in 1989 due to a precipitous decline in populations throughout the species’ range. ASRMP056138; 54 Fed. Reg. 42270 (Aug. 4, 1989). In

1990, the entire Mojave desert tortoise population north of the Colorado River in Arizona and Utah and west of the Colorado in California and Nevada, including the Beaver Dam Slope population was listed as a threatened species. ASRMP056138; 55 Fed. Reg. 12178 (April 2, 1990).

34. FWS designated critical habitat for the desert tortoise in 1994. ASRMP056138; 59 Fed. Reg. 5820. Designated tortoise critical habitat covers the western portions of the ASFO and GCPNM RMP areas. ASRMP060722.

35. FWS issued a final Desert Tortoise Recovery Plan (“DTRP”) in 1994. The DTRP recommended establishment of 14 Desert Wildlife Management Areas (“DWMAs”) in six distinct recovery units. R004652.

36. The RMP area includes portions of two of these fourteen DWMAs: the Beaver Dam Slope DWMA and the Gold Buttes – Pakoon DWMA. ASRMP055716.

37. The ARIZONA Strip also includes areas designated critical habitat for the desert tortoise: The Parashant National Monument includes 169,377 acres of critical habitat on BLM lands and an additional 52,670 acres on NPS lands, ASRMP060721; Beaver Dam comprises 69,407 acres (90% of which is considered “highly sustainable” for desert tortoises); and the Virgin Mountains include an additional 38,979 acres. ASRMP060728.

38. Beaver Dam Slope and Virgin Slope are also each Areas of Critical Environmental Concern (“ACECs”) as designated by BLM. The Pakoon DWMA is designated as a “Wildlife Habitat Area.” These designations are based on FWS-designated Critical Habitat Units for the desert tortoise and, save for a small percentage of the Beaver Dam Slope ACEC, are all designated critical habitat. ASRMPO6O722; ASRMP056139.

39. The Beaver Dam ACEC contains all Category 1 (habitats that support medium to high densities of tortoises, are essential to the maintenance of large, viable populations, and in which management conflicts are resolvable) and 2 (habitats that support medium to high densities of tortoises, may be essential to the maintenance of large, viable populations, and in which most management conflicts are resolvable) habitat and almost all

Category 3 habitat (habitats that support low to medium densities of tortoises, are not essential to the maintenance of large, viable populations, and in where most conflicts are not resolvable) north of the Virgin River. ASRMP055717-19.

40. In total, the Arizona Strip includes 330,433 acres of critical habitat for the desert tortoise, plus additional land designated as ACECs or DWMAAs. ASRMP060950.

41. It is “generally accepted that [desert] tortoise populations have suffered dramatic declines throughout much of its range.” ASRMP055712.

42. FWS concluded that the reasons the desert tortoise was “declining precipitously” in many areas were “mainly attributed to direct and indirect human-caused mortality.” R004607. “[D]eclines in desert tortoise populations are associated with high densities of access routes, vehicular traffic, and human access.” R004663.

43. A 2001 study by the Utah Division of Wildlife Resources (“UDWR”) revealed that the density of reproductive tortoises in the Beaver Dam ACEC was 3.04 per square kilometer – one of the lowest estimates of areas surveyed by UDWR that year. ASRMP060729.

44. A 2003 Goodlett and Woodman study concluded that desert tortoises on the Virgin Mountain slope were also “dying at an alarming rate.” ASRMP060730.

45. FWS’ BiOp also concludes that the RMPs “promote[] recovery of the desert tortoise...in regards to management...on the Beaver Dam and Virgin slopes, and in the Pakoon Basin,” and is “largely in accordance” with the 1994 DTRP. ASRMP056213.

46. The DTRP (found at R004600 *et seq.*) made several recommendations to promote desert tortoise recovery.

47. The DTRP recommended that “all vehicle activity off designated roads” should be “prohibited throughout all DWMAAs because [it is] generally incompatible with desert tortoise recovery and other purposes of DWMAAs.” R004670-71.

48. The DTRP also found that increased vehicle activity on desert tortoise habitat has contributed to their precipitous decline in many areas. R004607.

49. Studies have shown that off-road vehicle (“ORV”) use ranks among the most destructive, widespread, and documented threats to the desert tortoise. ASRMP054297.

50. This decline is partially attributed to habitat fragmentation caused by roads, trails, fences, and other barriers. “By far, the largest single threat to biological diversity worldwide is the outright destruction of habitat, along with habitat alteration and fragmentation of large habitats into smaller patches”. ASRMP054415.

51. “Paved highways, unpaved and paved roads, trails, and tracks have profound impacts on desert tortoise populations and habitat. In addition to providing many opportunities for accidental mortality, they also provide access to remote areas for collectors, vandals, poachers, and people who do not follow vehicle-use regulations. Substantial numbers of desert tortoises are killed on roads. Thus, desert tortoises thrive best where the density of access routes is low, traffic on them is low, and human access is limited.” R004672.

52. “Desert tortoises are often struck and killed by vehicles on roads and highways, and mortality of desert tortoises due to gunshot and off-[road] vehicles is common in parts of the Mojave region, particularly near...where people and desert tortoises most frequently come in contact.” R004619

53. Loss of habitat through destruction, degradation (through vehicle use and livestock grazing), and fragmentation has also been found to have “profound impacts on desert tortoise populations.” R004621, R004672.

54. The vehicle limitations described in the FEIS and adopted in the RODs do not prohibit ORV activity on ACECs. ASRMP060451.

55. ORV use will be allowed on ACECs/DWMAs from October 15 to March 15. ASRMP056187.

56. ORV use has been listed as threat to listed species in Beaver Dam Slope ACEC, Black Knolls ACEC, Buckskin ACEC, Clayhole ACEC, Fort Pearce ACEC, Johnson Spring ACEC, Lone Butte ACEC, Lost Spring Mountain ACEC, Marble Canyon

ACEC, Moonshine Ridge ACEC, Pakoon ACEC and DWMA, Shinarump ACEC, Virgin River Corridor ACEC, and Virgin Slope ACEC. ASRMP061671-76.

57. Currently, relatively few human intrusions affect desert tortoises and their habitat in the Pakoon Basin because of its remote nature and limited access. ASRMP060723.

58. There are, however, increasing threats to the desert tortoise in the Pakoon Basin, including ORV use and other recreational activities that attract predators. ASRMP056168.

59. “Evidence from Beaver Dam Slope suggests that significant desert tortoise mortality may be occurring as a result of recreation activities.” ASRMP056210.

60. The Beaver Dam ACEC has also been found to be damaged by ORV usage, and such damage, according to FWS’ Biological Assessment (“BA”), “appears to be increasing.” ASRMP055719.

61. ORV use has the effect of directly killing tortoises by trampling them but also destroying their habitat. “Increasing [ORV] use would result in more soil and surface damage erosion.” ASRMP060880.

62. Desert tortoise habitat is found in desert ecosystems which “require decades to recover from disturbances, and desert tortoise populations are incapable of rapid growth, even under optimal conditions.” ASRMP057390.

63. A considerable portion of the area covered by the RMPs currently allows grazing, with 159 grazing allotments totaling 3,352,990 acres. The FEIS/ROD would continue to authorize livestock grazing on portions of eleven allotments on the AZ Strip within desert tortoise habitat, including within ACECs/DWMAs. ASRMP055728.

64. Within the area covered by the RMPs, livestock “grazing will be managed in some areas “at BLM’s discretion, consistent with achieving [desired future conditions].” ASRMP060512-13. Grazing management would also include “[s]eason of use and other management prescriptions consistent with achieving [desired future conditions].”

ASRMP060512.

65. The Record is clear that grazing adversely affects desert tortoises and their habitat. “Grazing by livestock (cattle and sheep) may have direct and indirect effects on tortoise populations including mortality from crushing of animals or their burrows, destruction of vegetation, alteration of soil, augmentation of forage (e.g., presence of livestock droppings, and stimulation of vegetative growth or nutritive value of forage plants), and competition for food.” ASRMP060998 (describing impacts of No Action alternative); 060999-61001; 061015 (preferred alternative); ASRMP056184-86 (BiOp); R004623 (Recovery Plan).

66. The Proposed Plan will allow grazing in the Beaver Dam Slope DWMA and in portions of the Pakoon DWMA. ASRMP056122, 056129-30; ASRMP062701-02.

67. The Plans provide for some limitations on grazing in the DWMA – for example, authorizing only seasonal grazing and closing some grazing allotments in the Pakoon DWMA – but the record is clear that grazing will occur on lands where the Recovery Plan recommended an absolute prohibition. ASRMP056122, 056129-30; ASRMP060450-51.

68. The DTRP concluded that: “[T]here are no data showing that continued livestock grazing is compatible with recovery of the desert tortoise . . . until such data are forthcoming, no grazing should be permitted within the DWMA. Data required to show that cattle grazing can be compatible with recovery include a demonstration that adult tortoise densities are stationary or increasing and that regular recruitment is occurring into the adult age classes in areas where cattle are grazed. Such studies must be adequately controlled, replicated, and statistically robust.” R004672.

69. Prior to approval of the RODs, FWS recommended the “removal of livestock grazing [from] the Arizona Strip ACECs.” ASRMP057391.

70. A 1990 study by Bostick concluded that “[n]o evidence is available to indicate that cattle benefit tortoises by providing food or improving habitat condition in the

Mojave Desert.” ASRMP055714.

71. The “[l]ong-term cattle grazing has been shown to decrease the abundance of perennial grasses and forbs and...[a]s a result, native grasses [have] been often replaced with invasive species.” ASRMP057388.

72. A 1992 study by Berry determined that “declines in desert tortoise populations were significantly correlated with percentages of introduced annual plants.” ASRMP055731.

73. A 1989 Jarchow & May study found the resultant malnutrition and starvation from these invasive, nonnative plants “may have contributed to declines in desert tortoise populations in the Beaver Dam Slope.” ASRMP055731.

74. Additionally, “cattle grazing can further compound adverse impacts by creating warmer and drier soil microclimates[] through soil compaction[] and loss of plant, microbotic crust, and litter cover.” ASRMP057389.

75. “In summary, livestock grazing may adversely affect desert tortoises directly or indirectly through trampling, range management activities, and changes to the vegetation community that reduce or remove forage or change species composition and diversity,” ASRMP056186

76. These grazing trends “are expected to continue under the proposed action.” ASRMP056184.

DATED: September 15, 2010

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