Adam Keats (CA Bar No. 191157) (*pro hac vice*)
John Buse (CA Bar No. 163156) (*pro hac vice*)
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 436-9682 x 304
Facsimile: (415) 436-9683
akeats@biologicaldiversity.org
jbuse@biologicaldiversity.org

Attorneys for Plaintiff Center for Biological Diversity

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 COMBINED REPLY IN SUPPORT OF SUMMARY JUDGMENT, OPPOSITION TO CROSS-MOTIONS FOR SUMMARY JUDGMENT, AND RESPONSE TO BRIEFS BY AMICI CUREA

Date: not set
Time: not set
Court: Courtroom 601
Judge: Hon. Paul G Rosenblatt

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

I. INTRODUCTION

Plaintiff Center for Biological Diversity ("the Center") submits this combined brief in reply and opposition to the brief submitted by the Bureau of Land Management ("BLM"), Fish and Wildlife Service ("FWS") and other Federal Defendants (Memorandum in Support of Federal Defendant's Cross-Motion for Summary Judgment (Nov. 27, 2010) ("Def. Br.")); in reply and opposition to the brief submitted by Intervenor-Defendant National Rifle Association ("NRA") (Defendant-Intervenor National Rifle Association's Motion for Partial Summary Adjudication (Dec. 10, 2010) ("NRA Br.")); in response to the brief submitted by Amicus Curiae State of Arizona ("Arizona") (Brief of Amicus State of Arizona (Dec. 10, 2010) ("Arizona Br."); and in response to the brief submitted by Amicus Curiae Safari Club International ("Safari Club") (Amicus Curiae Brief of Safari Club International (Dec. 10, 2010) ("Safari Club Br.")). For the following reasons, the Center's motion for summary judgment should be granted and Defendants' and Intervenor-Defendant's cross-motions for summary judgment should be denied.

II. NEPA VIOLATIONS

A. California Condors

BLM argues that its failure to analyze the impacts of the use of lead ammunition by hunters in the Arizona Strip does not violate the National Environmental Policy Act ("NEPA") because a) BLM does not have any discretion to regulate the use of lead ammunition in the Arizona Strip, and b) there is no "federal action" regarding lead ammunition that must be analyzed in the FEIS. *See* Def. Br. at 22-27. These arguments are largely repeated by NRA, Arizona, and Safari Club. *See* NRA Br. at 9-14, Arizona Br. at 5-7, and Safari Club Br. at 10-11. The first argument fails as the Federal Land Policy and Management Act ("FLPMA") is quite clear that BLM's obligation to protect migratory birds and endangered and threatened species is superior to any cooperative management of hunting or delegation of power regime (even that described in FLMPA).

The second argument fails because the Resource Management Plans ("RMPs") at issue here—which are indisputably "federal actions"—are not mere "failures to act" that do not require NEPA analysis but rather are affirmative acts that contemplate, enable, and enhance hunting with lead ammunition in the Arizona Strip—and the environmental effects of the use of lead ammunition must therefore be disclosed and analyzed.

As described below, the Center seeks to require BLM to comply with NEPA in fully disclosing and analyzing all the impacts of its approval of the RMPs for the Arizona Strip in its FEIS. These impacts include the harm caused to California condors by hunter-shot lead ammunition, a significant impact on the species that is explicitly and admittedly absent from the FEIS. BLM cannot hide behind its perceived lack of authority over the cause of this impact, first because it actually has authority over the cause, and second because regardless of its authority to regulate, it must analyze all impacts, including indirect and cumulative impacts.

1. FLPMA Does Not Prevent BLM from Complying with NEPA

While it is true that FLPMA generally reserves the regulation of hunting to the States, BLM's assertion that it lacks any authority to regulate hunting on federal land, and thus does not have to analyze the impacts of such hunting, is misplaced. *See* Def. Br. at 23 ("the decision is not for BLM to make"). As the Sixth Circuit recently explained, although FLPMA makes clear that it does not affect "the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests, …there are clear exceptions to that rule." *Meister v. United States Dep't of Agric.*, 623 F.3d 363, 378 (6th Cir. 2010) (*citing* 43 U.S.C. § 1732(b) and other laws). One such express exception is that FLPMA specifically does not "modify or change any provision of Federal law relating to migratory birds or to endangered or threatened species." 43 U.S.C. § 1732(b). The California condor is a "migratory bird" pursuant to the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711, and listed as a threatened or "proposed to be listed" species in the Arizona Strip under the Endangered Species Act. 50 C.F.R. Part 10.13; 50 C.F.R. Part

17.84(j)(2)(i).[1] FLPMA's general deferral of regulation of hunting to the states is thus not relevant in a discussion of the environmental impacts of a federal agency's actions on a migratory and ESA-listed bird.

Furthermore, under FLPMA, there are two standards under which BLM regulates the use of federal land: "BLM has the authority to manage public lands so as to prevent impairment of wilderness characteristics, unless those lands are subject to an existing use. In the latter case BLM may regulate so as to prevent unnecessary or undue degradation of the environment." *State of Utah v. Andrus*, 486 F. Supp. 995, 1005 (D.C. Utah 1979). Under this "existing use" standard, the Secretary clearly has the authority to promulgate regulations concerning hunting. *See also Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1250 (D.C. Cir. 1980) ("FLPMA arguably gives [the Secretary the power] to preempt state wildlife-management programs"). As such, FLPMA can provide no cover for the BLM's failure to discuss the impacts of hunting with lead ammunition in the Arizona Strip.

For NEPA purposes, an agency must include a complete discussion of the project's effects on the "human environment," which "shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. Part 1508.14. The California condor is undeniably a part of the Arizona Strip environment—natural, physical, and human. ASRMP056144. Not only does the species serve an important biological role in the Arizona Strip, but it is also the subject of extensive study and aesthetic interest to Arizona Strip visitors.[2] The U.S. Fish and Wildlife Service ("FWS") has stated that "lead exposure has emerged as a critical management issue" in regards to the survival of the

---

[1] The special status of the condor in most of the Arizona Strip as a "10(j) species" does not impact its designation as a migratory bird under the MBTA. 16 U.S.C. § 1540(j)(2)(C) (experimental populations treated as species proposed for listing solely for purposes of Section 7 consultation).

[2] *See* Declaration of Taylor McKinnon at ¶ 13.

condors within the Project area, concluding that "it is 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." R014962. *See also* M10026-27, 10033-34, R014962, ASRMP056143. Any impact to condors resulting from the management of the Arizona Strip must, therefore, be discussed in the FEIS.

2. The MOU Does Not Prevent BLM from Complying with NEPA

BLM and State of Arizona both point to a Memorandum of Understanding ("MOU") entered into between BLM and the Arizona Game and Fish Commission regarding hunting in the Arizona Strip for further support of their argument that BLM does not have the authority to regulate hunting in the Arizona Strip. Def. Br. at 23, Arizona Br. at 3. This MOU was presumably entered into pursuant to FLPMA's requirement that the Secretary consult with the appropriate state agency before adopting regulations relating to hunting and fishing. 43 U.S.C. § 1732(b). This provision of FLPMA further emphasizes the existing authority of BLM to regulate hunting in the Arizona Strip, as consultation with the appropriate state agency is not the same as the state agency being granted a veto over federal action.

BLM and Arizona suggest that the right to regulate hunting on federal land is exclusive to the state. Def. Br. at 23 ("Under FLPMA, the management of hunting on public lands is reserved to the states."); Arizona Br. at 2-3. But the type of cooperative management described in FLPMA does not reserve that management to the states, depriving federal agencies of regulatory power—or more importantly—responsibility. *See State of Utah v. Andrus*, 486 F.Supp. 995, 1009 (D. Utah 1979); *see also Fund for Animals, Inc. v. Thomas*, 932 F.Supp. 368, 369-70 (D. D.C. 1996) ("The common law has always regarded the power to regulate the taking of animals *ferae naturae* to be vested in the states to the extent 'their exercise of that power may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.'" (*quoting Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896)). Rather, the federal

government has the constitutional authority and responsibility to manage federal lands. *Kleppe v. New Mexico*, 426 U.S. 529, 545-46 (1976).

Other courts have found that the federal government possesses the authority to manage hunting on federal land. *See e.g.*, *State of Alaska v. Andrus*, 429 F. Supp. 958, 961 (D. Alaska 1977) (holding that the Secretary has the power to halt a State-implemented hunting program); *Defenders of Wildlife v. Andrus*, 627 F.2d at 1250. In *Meister v. United States Dep't of Agric.*, the Forest Service was found to have acted arbitrarily and capriciously by not considering a proposal to ban, *inter alia*, gun hunting on part of a National Forest subject to a forest management plan. *Meister*, 623 F.3d. at 379. Inherent in this finding was that the Forest Service possessed the ability to prohibit gun hunting in certain areas of the forest, while, at the same time, allowing bow hunting. *Cf. id*. at 378 ("the Service has compounded . . . its error by overlooking that Meister proposes to restrict only gun hunting, not bow hunting"); *id*. at 379 ("Meister's alternative likewise warrants consideration on grounds of *compliance with applicable law*. 43 U.S.C. § 1732(b)."). If the Forest Service lacked all authority to regulate hunting, like BLM contends it lacks here, the discussion of regulating certain types of hunting in *Meister* would be moot.

Similar to the Forest Service's failure discussed in *Meister*, BLM failed to address any mitigation measure in regards to condor lead exposure in the EIS, let alone any impact of lead hunting on condors in the Arizona Strip. Because BLM possesses the authority to preempt and supersede State management of wildlife, BLM was unjustified in its omission of any such discussion and acted arbitrarily and capriciously in doing so. The inclusion of other impacts to the condor does not correct this material omission. *See* Def. Br. at 24-27; *cf. Oregon Natural Desert Ass'n v. Bureau of Land Management*, 531 F.3d 1114, 1141 (9th Cir. 2008) (agency cannot suppose that "members of the public and government decisionmakers might be able to piece together [an] analysis from what the Bureau did say") (*rehearing denied, opinion amended by Oregon Natural Desert Ass'n v. Bureau of Land Management*, 2010 WL 3398386 (9th Cir. 2010)).

3. The Major Federal Action Implicating NEPA Is the Adoption of the RMPs, which Anticipate and Contemplate Hunting with Lead Ammunition

There is no question that BLM's approval of the RMPs is a major federal action requiring an EIS under NEPA.[3] BLM and *amici* Safari Club and Arizona each argue that BLM's failure to regulate hunting on the Arizona Strip is an *inaction*, and therefore not a "major federal action" requiring analysis in the EIS. Def. Br. at 24; Safari Club Br. at 10; Arizona Br. at 5.[4] But the Center does not complain about BLM's failure to adopt a regulation; rather, the Center contends that BLM failed to provide the required "hard look" at the environmental consequences of its decision to approve the RMPs, and that this hard look necessarily would include a discussion of the impacts on condors of the use of lead ammunition by hunters. *See* Plaintiff's Second Amended Complaint at ¶ 91. The question is thus not whether there was a major federal action warranting an FEIS—the RMPs are undeniably major federal actions and an FEIS has already been prepared—but what the scope should be of the FEIS's effects analysis.[5]

According to the FEIS, hunting is a recreational activity contemplated in the Arizona Strip and expressly enabled and enhanced by the adopted RMPs. ASRMP060310. ("Visitors using the Planning Area for a variety of recreation activities including…hunting… [M]anagement of visitor activities is recognized as potentially

---

[3] "Approval of a resource management plan is considered a major Federal action significantly affecting the quality of the human environment." 43 C.F.R. Part 1601.0-6.

[4] NRA makes a similar but notably different argument: that there is no causal relationship between the federal action of the adoption of the RMP and the impacts alleged by the Center, because those impacts (if they exist at all) existed prior to the action and the action did not change those impacts. This argument is discussed below.

[5] Even so, a "major federal action" "includes actions with effects that may be major and which are *potentially subject to Federal control and responsibility*." 40 C.F.R. Part 1508.18 (emphasis added). The "plenary power of the federal government over hunting" certainly encompasses the Secretary's ability to supersede state management of resources, including hunting activities. *Fund for Animals v. Thomas*, 932 F. Supp. at 371 (discussing National Forests); *Cf. State of Alaska v. Andrus*, 429 F. Supp. at 961; *Defenders of Wildlife v. Andrus*, 627 F.2d at 1250.

having profound environmental effects on [Arizona Strip Lands]. The BLM and NPS assessed these possible effects, along with potential user conflicts. Planners propose an appropriate recreation management framework…"). The FEIS also concludes that some of the *proposed changes* in those plans (*i.e.*, the same changes that warrant the completion of the NEPA process) will have adverse environmental impacts. These include increasing access for Off-Road Vehicles ("ORVs") and hunters, which will, according to BLM, "facilitate recreational activities [that] may lead to injury or mortality of wildlife, which include hunting." ASRMP060950.[6] *See also* AZ Strip FO ROD, ASRMP062925 (recreation opportunities . . . *such as hunting* . . . will be maintained/*enhanced*") (emphasis added).[7]

It is unquestioned that the increase of recreational activities under the RMPs may have significant environmental impacts, even if the impacts are indirect. In fact, BLM assesses other indirect recreational impacts in the EIS. *See e.g.*, ASRMP061003, 061014 ("Campers in the Pakoon DWMA/ACEC are not commonly encountered *except perhaps during the hunting season*. Some tortoise mortality and crushing of burrows could occur as result of vehicles pulling off the road for camping, horseback riding, mountain biking, or *other recreational pursuits*"); ASRMP061003, 061014 ("Foot traffic through sensitive areas could trample injure or kill special status plants. Camping increases the likelihood of such effects") (emphasis added). It appears that BLM assessed impacts from increased use of the Arizona Strip by hunters (who also appear to be campers and recreational vehicle users), save for the effects of the hunters actually using their guns.

BLM's admitted neglect to include any discussion of the impacts of hunters using lead ammunition within the Arizona Strip clearly falls short of its statutory duty to discuss possible adverse environmental impacts and inform the public. *Cf. Kern v.*

---

[6] Although this quote pertains to Alternative A, Alternative E, the proposed action, lists the overall impacts from travel management to be "similar to those described under Alternative A." ASRMP060973.

[7] Amicus Safari Club even acknowledges that BLM's actions here will "facilitate hunting in the [Arizona] Strip." Safari Club Br. at 8.

Bureau of Land Management, 284 F.3d 1062, 1066 (9th Cir. 2002); 40 C.F.R. Part 1500.1(c) ("The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment"); *Kern*, 284 F.3d at 1066; 40 C.F.R. Part 1500.2(d) (agencies shall encourage and facilitate public involvement in decisions affecting environment "to the fullest extent possible"); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision").

Both cases cited by BLM to support the notion that it has not taken any action are simply inapposite. For example, in *State of Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979), the Secretary's refusal to end a state-implemented wolf kill program did not require NEPA analysis because *no action was taken at all*; no final decision, agency action, permit, plan, or other "overt" federal action was ever taken in connection with the wolf kill program. *Id*. at 541-42; a*ccord*, *Defenders of Wildlife v. Andrus*, 627 F.2d 1238 at 1244 (D.C. Cir. 1980). The issue in both of these cases was whether an EIS should be prepared at all, not the scope of an EIS that was already prepared. This logical error—that the standard for determining the threshold for *preparing* an EIS is the same as the standard for determining the *scope* of the EIS—is repeated in each of the other briefs. See NRA Br. at 13, Safari Club Br. at 9, and Arizona Br. at 5. Here, however, BLM has prepared an FEIS for its action adopting RMPs regarding the management of recreational pursuits on the Arizona Strip. This management includes hunting, even if the actual day-to-day management of hunting is cooperatively performed with the State of Arizona. Because the RMPs contemplate and even enhance hunting on the Arizona Strip, and the RMPs are unquestionably major federal actions requiring NEPA analyses, the effects of hunting with lead ammunition must be analyzed.

4. Impacts to Condors Will Increase as a Result of BLM's Action

An EIS must disclose the direct, indirect, and cumulative environmental impacts of the proposed action, analyze alternatives (including the no action alternative) and their impacts, and identify all irreversible and irretrievable commitments of resources associated with the action. 42 U.S.C. § 4332(2); 40 C.F.R. Parts 1502.1, 1502.14(d), 1508.7, 1508.8; *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352 (1989). "As in other legal contexts, an environmental effect is 'reasonably foreseeable' if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.'" *Mid States Coalition for Progress v. Surface Trans. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (*quoting Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)).

NRA contends that there is no causal relationship between the impacts alleged by the Center and the adoption of the RMPs by BLM. NRA Br. at 11. One Fifth Circuit court has stated that "[a]n EIS need not discuss the environmental effects of continuing to use land in the manner which it is presently being used." *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992).[8] If however, a major federal action will cause adverse environmental impacts, those impacts must be discussed fully in a NEPA analyses. 42 U.S.C. § 4332(2)(C). The Supreme Court has stated that:

> [t]o determine whether [NEPA] § 102 [42 U.S.C. § 4332] requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue…

---

[8] *Sabine River Auth*. is factually distinguishable from the immediate case. In *Sabine River Auth*., FWS conducted an EA for a negative easement and issued a FONSI. The court agreed no EIS was required, stating: "[s]imply put, we hold that the acquisition of a negative easement which by its terms prohibits any change in the status quo does not amount to 'major Federal action[ ] significantly affecting the quality of the human environment.'" *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992). The Sierra Club even intervened, advocating against the need for an EIS for the first time. *Id*. at 680 n. 4.

> Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms "environmental effect" and "environmental impact" in § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law.

Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 773-74 (1983).

As discussed above, the RMPs affect all aspects of the use of the Arizona Strip by the public, including hunting, even if only indirectly (by affecting use patterns or opening or closing areas to access, for example). This alone creates a sufficiently causal relationship between the adoption of the RMPs and the impacts of hunting with lead ammunition to warrant discussion in the EIS, but the relationship is even greater, as the RMPs clearly facilitate increased access and enhanced opportunities to hunt in the Arizona Strip. ASRMP060950. These new and increased impacts to condors warrant a full discussion in the EIS. Given the scientifically-proven causal relationship between hunting with lead ammunition and condor mortalities (*see* Pl.'s MSJ 20 n. 11; M010016; R014960-61; M10026-27, 10033-34; R014962),[9] it stands, *a fortiori*, that facilitating and increasing hunting on the Arizona Strip will increase the risk of lead toxicity to condors. Therefore, contrary to NRA's assertion that the RMPs will maintain the status quo with regards to lead toxicity in condors, the RMPs will likely *increase* condor mortalities caused by hunter-shot lead ammunition. Ultimately, the FEIS makes it clear that the Arizona Strip land will *not* continue to be used in the same way and the status quo will not be maintained. The precise effects to condors of this new management are, however, uncertain, as BLM has admittedly failed to conduct any analysis on the matter.[10]

---

[9] NRA disputes the ultimate "effect" of hunting on condors (*i.e.* lead toxicity), but provides absolutely no evidence or authority to debunk the many scientific studies showing hunting with lead ammunition is the leading cause of project area condor mortalities. NRA Br. at 11, n. 16.

[10] NRA also confusingly claims that "only effects that are potentially the result of a proposed alternative need be considered" in an EIS. NRA Br. at 9. Although NRA misstates the standard for what must be considered in an EIS, it is true that only effects

5. The Center's Action Is Not Time-Barred

NRA contends that the Center's action regarding the use of lead ammunition in the Arizona Strip is time-barred because environmental review for the reintroduction of the California condor in the area was completed in 1996. NRA Br. at 14. This argument can be disposed of simply: the Center is not challenging the 1996 reintroduction of condors to the Arizona Strip; it is challenging the adoption of RMPs by BLM. These RMPs include and contemplate the use of lead ammunition by hunters—even the increased use—and therefore an analysis of this impact must be included in the FEIS.

Even if, *arguendo*, NRA's assertion that the new resource management plans maintain the status quo in regards to BLM's policy towards hunting, BLM was still obligated to consider the new scientific information in existence now, but not at the time of the adoption of the old resource management plans. 40 C.F.R. Part 1502.9(c). According to the Supreme Court, "where '[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,'" supplemental analysis is required. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) (*quoting* 40 C.F.R. Part 1502.9). This requirement has been interpreted "to require an agency to take a 'hard look' at the new information to assess whether supplementation might be necessary." *Id*. at 72-73 (*citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378-85 (1989)).

---

that are *reasonably foreseeable* as the result of a proposed alternative need be considered in an EIS. The purpose of the EIS is, in part, to guarantee "that the agency has taken a 'hard look' at the environmental consequences of proposed federal action," *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352, and the means to do this is a complete discussion of both direct and indirect environmental consequences of any alternatives, including the proposed action – an alternative in and of itself. *See* 40 C.F.R. Part 1502.16 ("The [Environmental Impacts] discussion will include the environmental impacts of the alternatives *including the proposed action* . . . It shall include discussions of (a) Direct effects and their significance (§ 1508.8); (b) Indirect effects and their significance (§ 1508.8) . . . (d) The environmental effects of alternatives *including the proposed action.* The comparisons under § 1502.14 will be based on this discussion.") (emphasis added.)

Southern Utah Wilderness ultimately concluded that no federal action remained because BLM had already implemented its resource management plan, and was being sued for its alleged failure to undertake "supplemental environmental analyses for areas in which ORV use had increased." 542 U.S. at 61. The Court noted, however, that although "[t]here [was] no ongoing 'major Federal action' . . . *BLM [would be] required to perform additional NEPA analyses if a plan is amended or revised*" to address the increased ORV usage. *Id*. at 73 (emphasis added). *See also* 43 C.F.R. Part 46.120 ("The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.").

Here, resource management plans were revised. BLM was therefore obligated to assess whether its new plans would significantly affect the health of condors occurring in the project area, based on any new information that it was made aware of, like the various newer studies that clearly show a causal relationship between hunting with lead ammunition and condor lead poisoning, particularly in the Arizona Strip. *See* Pl.'s MSJ at 20 n. 11; M010016; R014960-61; M10026-27, 10033-34; R014962. BLM's actions and the subsequent environmental consequences must be disclosed in the FEIS. BLM's failure to do so is necessarily arbitrary and capricious. 5 U.S.C. § 706(2).

6. BLM's Failure Was Not Harmless Error

NRA argues that if no action to address an alleged environmental impact is possible, it is harmless error if that impact is not discussed in the FEIS. NRA Br. at 19. NRA provides absolutely no authority for this extremely novel argument, and considering that NEPA is first and foremost an informational and disclosure statute, requiring absolute certainty in the ability to address environmental harms at the outset is nonsensical and runs contrary to all NEPA jurisprudence. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); *see also Gifford Pinchot Task Force v. United States Fish and Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (agency error is harmless only "when a mistake of the administrative body is one that *clearly* had

no bearing on the procedure used or the substance of decision reached.") (emphasis in original).

Moreover, the argument raises new issues and allegations that are well outside of the Center's claims, for which the administrative record in this matter has not been prepared and for which an insufficient factual record exists (to the extent it exists at all). For example, NRA alleges that no action to redress the harm caused by lead poisoning is "possible" save for removing condors from the Planning Area (NRA Br. at 22), that a "rehash" of the lead threat will only lead to "reducing the time and manpower available to guide the reintroduction effort" (NRA Br. at 23), and that regulating the *type* of ammunition used by hunters is a "restriction" on hunting in the first place (NRA Br. at 21).[11] The Center vigorously disagrees with these arguments, but adjudication of them is not appropriate at this stage. Once a proper EIS is prepared that discusses all of the impacts of the action, there will be ample opportunity for all parties to discuss the best course of action given the scientific, political, and economic realities at that time.

7. BLM's Duty to Discuss Cumulative Impacts

Finally, even if, *arguendo*, the management of hunting is outside of the scope of the RMPs, it does not excuse BLM from considering the effects of the RMPs in conjunction with state actions regarding the use of lead ammunition. The Forest Service made a similar argument to BLM's in *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300 (9th Cir. 1993), which was rebuffed by the court. There, "[t]he Forest Service [said] that cumulative impacts from non-Federal actions need not be analyzed because the Federal government cannot control them." The court held that such an "interpretation is inconsistent with 40 C.F.R. § 1508.7, which specifically requires such analysis." *Id*. at 1306. BLM's requirements are no different here.

---

[11] Under this logic, the BLM's management of ORV routes would also be a "restriction," as such management could impede hunting as it existed at the time of adoption of 50 C.F.R. Part 17.84(j)(2)(i).

Pursuant to CEQ regulations, BLM acted arbitrarily and capriciously by failing to discuss the known impacts of lead toxicity on condors resulting from the use of lead ammunition used for hunting on federal lands. In the FEIS analysis, BLM is required to address all cumulative impacts, which are "the impact[s] on the environment which result[] from the incremental impact[s] of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency* (Federal *or non-Federal*) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7." (Emphasis added). Here, BLM admittedly knew of the impacts of lead ammunition on condors when it prepared the FEIS but omitted any such discussion of those effects. *See* ASRMP061003 ("[t]he effects of hunting are not analyzed here [in the FEIS]"); 056169, 056192. This is an inexcusable error for NEPA purposes. The D.C. Circuit has held that:

> a "meaningful cumulative impact analysis must identify" five things: "(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions - past, present, and proposed, and reasonably foreseeable - that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."

TOMAC v. Norton, 433 F.3d 852, 864 (D.C. Cir. 2006) (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002). "In other words, the agency 'cannot treat the identified environmental concern in a vacuum.'" *Id*.

Under BLM's narrow construction of its NEPA analysis requirements, the effects of lead toxicity on condors fit precisely within the definition of cumulative effects. As *TOMAC* explained, the "'cumulative' impacts to which [40 C.F.R. § 1508.8] refers are those outside of the project in question; it is a measurement of the effect of the current project along with any other past, present, or likely future actions in the same geographic area." *Id*. Therefore, even if State management of lead ammunition in the project area

was outside of the scope of BLM's management plans, the known impacts to condors within the project area still must be discussed.

BLM asserts that it "analyzed the impacts of the decisions it made on condors in the FEIS" *with the exception of hunting*. Def. Br. at 25. It is this exception that renders the EIS inadequate. FWS concluded that all mortality factors other than lead toxicity (*i.e.*, those included in BLM's FEIS discussion) might not threaten the survival of the experimental population group of condors. However, the same FWS study also found that, factoring in the impact of lead exposure, "it is unlikely that the northern Arizona and southern Utah condor program will succeed at achieving a self-sustaining condor population." R014962. Therefore, in conjunction with the impacts of the proposed plan, the effects of lead toxicity could be significantly harmful to the condor, thereby requiring BLM to include in its EIS discussion impacts to the condor and possible mitigating measures. *Cf. Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1378 (9th Cir. 1998) ("Where several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS" (quoting *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) (internal quotation marks omitted); *see also Kern v. United States BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002) ("It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now").

Therefore, even if Arizona's management of hunting on federal land was not part of BLM's resource management of the same federal land, BLM was certainly aware of it and obligated to fully discuss it and its effects in the EIS. Implicit in this required analysis is a discussion of possible mitigation measures in both the EIR and ROD. 40 C.F.R. Parts 1508.25(b)(3), 1502.14(f), 1502.16(h), 1502.2(c). This discussion of mitigation "must include 'sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352). As BLM has conceded, it omitted any such discussion in regards to

lead ammunition and its effects on condors in the project area and discussed no mitigation measures regarding lead toxicity. Def. Br. at 24-27. BLM's actions were, therefore, necessarily arbitrary and capricious.

A comparable situation arose in *Sierra Club v. U.S. Fish and Wildlife Service*, 235 F. Supp. 2d 1109 (D. Or. 2002). There, environmental groups successfully argued that a state-helmed (but federally funded and monitored) elk study might have significant effects on the cougar population in the study area that were not analyzed in an EIS. The court explained that:

> [w]hile the actual number of cougars killed as part of the elk study is relatively small, and the actual number of cougars killed by hunters or damage is also relatively small, when combined together and assessed against an unknown cougar population in [the project area], there is a reasonable possibility that the annual mortality rate from all causes will be greater than fifty percent, and could reach one hundred percent.

Id. at 1131.

Likewise, here, public and federal decisionmakers have been deprived of critical information in the EIS regarding impacts to condors. As per the FEIS and FWS' 2007 Condor Review Team study, two facts are known: first, omitting analysis of hunting with lead ammunition from the RMP results in a finding that the RMP will likely not significantly impact the condor in the Arizona Strip; and second, that adding the effects of hunting to the RMPs' effects results in potentially significantly adverse impacts to the survivability of condors in the project area. R014960-61. No analysis was undertaken, however, to assess to what extent the new management plans will impact project area condors. Similar to *Sierra Club v. FWS*, the cumulative impacts of both federal and non-federal actions on project area condors must be analyzed in an EIS to adequately inform the public and federal decisionmakers.

BLM's reliance on *Enos v. Marsh*, 769 F.2d 1363 (9th Cir. 1985), in an attempt to distance itself from state action under NEPA, is misplaced. BLM cites *Enos* for the proposition that an "agency may properly exclude from NEPA analysis a state action that [is] complementary to, but distinct from, the federal action." Def. Br. at 23. In that case,

however, the court held that the state-planned and funded construction of shoreside facilities was not even "federal": "Lacking both federal funding and federal supervision over the development of the facilities, the construction of the shoreside facilities is not 'federal' action for purposes of NEPA." *Enos*, 769 F.2d at 1372. Such is clearly not the case here.[12] As one Texas court noted, if the state action is "part of the same federal activity for which the [federal agency] has jurisdiction and responsibility," or if the agency "has a responsibility to evaluate [environmental] impacts regardless of its jurisdictional scope," and did not do so, then "the [agency] did not perform its statutory duty under NEPA." *Stewart v. Potts*, 996 F. Supp. 668, 681 (S.D. Texas 1998). In *Potts*,

> the Court [came] to the inescapable conclusion that the [agency's] characterization of the project as a filling of the wetlands separate and distinct from the clearing of forest located on those wetlands [was] irrational. To suggest that the [agency] has no jurisdiction to consider the environmental impacts of the fragmentation of the forest, even though it has jurisdiction to consider the impacts of the wetlands which co-exist underneath those very trees, is asinine on its face, and an impermissible abdication of a federal agency's duties under NEPA.

Id. at 682-83. Likewise, in the instant case, it is unreasonable for BLM to suggest it has no authority to discuss the impacts to condors resulting from hunting on the land which it manages and over which it retains federal control. 43 U.S.C. § 1732(b).

Furthermore, unlike in several other cases (*La Raza Unida of Southern Alameda County v. Volpe*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974), and *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972)), there was no attempt in *Enos* "to circumvent the prescriptions of NEPA. As a matter of fact, the state ha[d] filed an

---

[12] As discussed above, BLM manages the Arizona Strip and its resources in cooperation with the State, but the federal government retains preemptive control over listed species found in the project area. 43 U.S.C. § 1732(b). The federal government also provides funding to States to help manage and study wildlife, which the federal government also monitors. *See e.g., Sierra Club v. U.S. Fish and Wildlife Service*, 235 F. Supp. 2d at 1120-22 (finding the federal funding and monitoring role during the life of a State elk study to be a "major federal action" for NEPA purposes). In *Enos*, the federal

EIS outlining the environmental impact of its planned shoreside facilities." *Enos,* 769 F.2d at 1372 n.10. Here, no alternative state analysis was ever conducted regarding the effects of lead ammunition use on condor health.

B. The FEIS Does Not Discuss the Effects of the RMPs' Inconsistency with the Desert Tortoise Recovery Plan on Tortoise Recovery

Federal Defendants attempt to evade the Center's argument that the FEIS failed to evaluate the RMPs' effects on desert tortoise recovery by fundamentally misrepresenting the argument. They suggest that the Center's "claim under NEPA that BLM was required to follow a particular course of action by following the Desert Tortoise Recovery Plan is without merit because NEPA is a procedural statute and does not require substantive results." Def. Br. at 28. Federal Defendants' argument is wholly inapposite because the Center does not argue that BLM was required to follow a particular course of action according to the Recovery Plan. On the contrary, the Center contends that, having chosen to ignore recommendations in the Desert Tortoise Recovery Plan, the FEIS must disclose and evaluate the RMPs' significant environmental effects on tortoise recovery. The FEIS, however, manifestly failed to do so.

It is firmly established that an EIS must take a "hard look" at the significant adverse environmental effects of federal action by disclosing and evaluating them so that the public and agency decisionmakers can understand the consequences of the action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349; *Western Watersheds Project v. Kraayenbrink*, 620 F.3d 1187, 1200-01 (2010) ("By focusing agency and public attention on the environmental effects of proposed agency action, 'NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" [*quoting Marsh v. Oregon Natural Resources Council*, 490 U.S. at 371 (1989)]). It is further undisputed that BLM did not follow the Recovery Plan's express recommendation that domestic livestock grazing be prohibited throughout all

---

government exercised no control over the planning and development of the State facilities.

DWMAs because grazing is "generally incompatible with desert tortoise recovery and other purposes of DWMAs." R004670-71. Because the Recovery Plan is "pertinent evidence of the measures necessary to prevent the extinction" of the desert tortoise, *Southwest Center for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1136-37 (S.D. Cal. 2006), an action that disregards this evidence will result in a potentially significant adverse environmental effect within the ambit of NEPA's required "hard look" analysis. Accordingly, the EIS failed to do what it must do – namely, to fulfill BLM's obligation to disclose and evaluate this impact.

Federal Defendants enumerate how the EIS discussed the environmental effects of the Plan on special status species including the desert tortoise. Def. Br. at 28. Notably absent from this list is *any* discussion of the effects of allowing grazing in contravention of the Recovery Plan's recommendations on desert tortoise recovery – and in particular, any analysis of whether and how allowing grazing in DWMAs may impair tortoise recovery. Federal Defendants cannot cite any such discussion because it exists nowhere in the FEIS. It is not enough, as Federal Defendants assert, that BLM "considered" the Recovery Plan in the RMP process, because the EIS did not disclose and evaluate the potential impact resulting from acting in contravention of the Recovery Plan's recommendations, and therefore failed to fulfill NEPA's fundamental hard look requirement. *Western Watersheds Project*, 620 F.3d at 1205 (EIS failed to address concerns raised by agency's own experts, FWS, and other agencies).[13]

II. ESA VIOLATIONS

A. The BiOp Fails to Evaluate the RMPs' Effects on Desert Tortoise Recovery

1. Impairment of Desert Tortoise Recovery by ORV Use

[13] The Center does not assert, as Federal Defendants suggest, that BLM must "fully implement" the Recovery Plan. BLM's legal failure does not involve its failure to fully

FWS and BLM demand complete deference for their determination that the project will not jeopardize the continued existence of the desert tortoise or adversely modify its critical habitat, which they support by pointing to the "significant protective measures" contained in the RMPs that offset the "adverse impacts" that they acknowledge may continue with the plans. Def. Br. at 15, 14. But the portion of the BiOp cited by the Federal Defendants does not contain any detailed analysis of the RMPs' impact on tortoise recovery as a result of activities within designated critical habitat. Rather, the BiOp bases its conclusion almost exclusively on its assessment that "[c]ritical habitat will be managed largely in accordance with the desert tortoise recovery plan." ASRMP056213. Unfortunately, "largely in accordance with," undefined in the BiOp, is merely a euphemism for "largely ignoring"; not only do the RMPs not come close to implementing the Recovery Plan, they do their best to skirt the concrete recommendations it contains.

The RMPs' significant deviations from the Recovery Plan's recommendations result in management of the Arizona Strip that will adversely modify desert tortoise critical habitat—and these deviations are not sufficiently disclosed or discussed in a manner that qualifies as the "reasoned analysis" required by the law. Federal Defendants gloss over these deviations by conflating roads and trails designated for motorized vehicle use. For example, Federal Defendants contend that the RMPs follow the Desert Tortoise Recovery Plan because ORV use is "strictly limited to existing roads." Def. Br. at 12; *see also id*. at 19 ("Consistent with the Recovery Plan, the RMPs restricted all off-road OHV use to already designated roads…"). This statement is both inaccurate and misleading. The RMPs allow motorized and mechanized travel on any "designated roads *and trails*," including motorized ORV trails within designated tortoise critical habitat (ASRMP055615, 055616, 060604 (emphasis added)), while the Recovery Plan recommends that "all vehicle activity off of designated roads" be prohibited in Desert

---

implement the Recovery Plan; rather, it concerns BLM's failure to disclose the consequences of not implementing one part of the Recovery Plan.

Wildlife Management Areas ("DWMAs") (R004670), plainly not including "trails" or any vehicle route other than designated roads.

The Recovery Plan has no difficulty distinguishing between roads and trails, demonstrating that it didn't intend to include "trails" in its recommendation, as it differentiates them in discussing their impacts: "Paved highways, unpaved and paved roads, trails and tracks have profound impacts on desert tortoise populations and habitat." R004672. Furthermore, the Recovery Plan states that only "limited speed travel on *designated*, *signed* roads and maintenance of these roads" is compatible with tortoise recovery "and may be allowed in DWMAs," (R004671) (emphasis added), but the BiOp fails to require that either the roads or trails be *designated* (designation is deferred, so ORVs are permitted on "existing roads and trails" until designation is completed (ASRMP060604)) or *signed* ("a signing and fencing plan would be developed…as funding allows." (ASRMP055616)). This is a huge deviation from the Recovery Plan and on its face not "largely" following it. FWS's and BLM's conclusions to the contrary cannot be supported.

Similarly, while the Recovery Plan recommends limits on vehicle speed in tortoise critical habitat (R004671), and Federal Defendants tout the RMPs' "strict speed limits" (Def. Br. at 10), the RMPs actually only provide that "[s]peed limits for vehicles *associated with agency-authorized projects* would be at or below 40 mph in tortoise habitat during the active season." ASRMP055616. The "strict speed limits" do not apply to private vehicles unassociated with "agency-authorized project" and worse, are not even "limits" in any regulatory sense, since "maximum safe travel speeds" on the dirt roads in the area are only 35 mph. (ASRMP060982; Def. Br. at 12). The 40 mph speed limit is clearly arbitrary, as no correlation is provided between it and the safety of desert tortoises. A true speed limit would apply to all vehicles on the roads, all the time, and would actually limit speeds to what is scientifically defensibly for the protection of desert tortoises—not just to roughly what is a physically safe speed. Otherwise, it is a purely empty gesture with regards to the tortoise. Again, not only do the RMPs completely fail

to come close to "largely following" the Recovery Plan, but the BiOp fails to clearly disclose and provide a reasoned analysis for this significant deviation.

Accordingly, the BiOp's conclusion that the RMPs promote desert tortoise recovery is not supported in the record. The BiOp's analysis of jeopardy and adverse modification of critical habitat must consider both the survival and recovery of the species. *National Wildlife Federation v. National Marine Fisheries Service* 481 F.3d 1224, 1232 (9th Cir. 2007) (jeopardy analysis); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service* 378 F.3d at 1070-71 (adverse modification analysis). Here, although the RMPs authorize ORV use inconsistent with the recommendations of the Desert Tortoise Recovery Plan, the BiOp fails to provide a rational explanation of how the RMPs will promote desert tortoise recovery.

2. Impairment of Desert Tortoise Recovery by Grazing

The BiOp likewise fails to adequately evaluate the effects on desert tortoise recovery of grazing. The RMPs allow grazing throughout desert tortoise critical habit with some seasonal limitations within DWMAs/ACECs and without any seasonal limitations in the rest of critical habitat in the Arizona Strip. ASRMP055728. This is in direct conflict with the Recovery Plan's recommendation that "no grazing should be permitted within the DWMAs" (R004671-72), yet the BiOp claims that critical habitat will be managed "largely in accordance with" the Recovery Plan. ASRMP056213. The BiOp admits a huge exception to even this weak "largely in accordance with" standard: management of critical habitat outside of the DWMAs/ACECs will be largely in accordance with the Recovery Plan "*with the exception of livestock grazing*." *Id*. (emphasis added). Yet Defendants claim that the RMPs "accomplish" the "intent" of the Recovery Plan despite this manifest conflict, and that FWS "reasonably concluded that the RMPs were not likely to destroy or adversely modify the desert tortoise's critical habitat." Def. Br. at 15.

Contrary to Federal Defendants' assertion, and as discussed more fully above, the Center is not seeking enforcement of the Recovery Plan here and acknowledges that FWS

and BLM may—in some circumstances—deviate from its recommendations. But if they do so, their deviations must be rational and reasoned, and they must provide reasoned explanations for those deviations. *See e.g.*, *Southwest Center for Biological Diversity v. Bartell*, 470 F.Supp.2d 1118, 1136-1137 (S.D. Cal. 2006) ("The language and structure of the ESA's provisions for recovery plans shows that FWS must make a conscientious and educated effort to implement the plans for the recovery of the species," *citing* 16 U.S.C. § 1533(f)(1)). Here, neither the FEIS nor the BiOp provide any rational counter to the extensive evidence concerning the impacts of grazing to desert tortoises and their habitat (that both specifically acknowledge) (ASRMP055728-34; ASRMP060998-61001); *see also* Pl. Br. at 22, n. 5) and no support for the BiOp's conclusion that grazing in critical habitat will not adversely modify that critical habitat. ASRMP056213. Instead, Defendants point to one mention in the FEIS of a non-published anecdotal observation of the impacts of winter grazing schedules being imposed on two ACECs: that the results "suggest that vegetative communities were healthy prior to implementation of grazing restrictions and continue to remain at or near their potential." Def. Br. at 15, citing ASRMP061000. Yet Defendants omit the sentences that immediately follow: "Despite these somewhat encouraging results, tortoise populations apparently continued to decline. It is clear that some aspects of livestock grazing have minor to moderate effects on desert tortoise and continue to contribute to the myriad of other factors affecting tortoise survival." ASRMP061000-01.

The FEIS's answer to the conundrum created by the overwhelming evidence demonstrating grazing's negative impact on tortoise habitat is to merely continue studying the issue, to continue to use desert tortoise critical habitat as a laboratory in a perpetually hopeless attempt to prove that grazing is compatible with desert tortoise recovery. *Id*. The "significant protective measures" highlighted by Defendants amount to just the continuation of authorization of "low to moderate levels" of grazing "under close monitoring," (and the continuation of some very limited seasonal limitations) so the agency may eventually determine whether or not grazing is an effective method for

promoting recovery of the tortoise. Def. Br. at 15, *citing* ASRMP061000-01. This conclusion merits no deference. It is arbitrary, capricious, and an abuse of discretion as it is an explanation that runs counter to all the evidence and is neither reasonable nor rational.

B. The BiOp's Conclusions Are Not Entitled to a Heightened Level of Deference

Defendants insist that their decisions warrant an extreme level of deference from the Court, citing *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008). Defendants contend that they are entitled to "considerable deference", as courts must 'defer to an agency's determination in an area involving a high level of technical expertise,' and 'to be most deferential when the agency is making predictions, within its area of special expertise, at the frontiers of science.'" Def. Br. at 16 and 8, citing *Lands Council*, 537 F.3d at 993 (internal quotation marks and citation omitted). The argument that the Court should follow *Lands Council* in deferring to the FWS's purported expertise in approving the BiOp is mistaken for several reasons. First, the language quoted from *Lands Council* relates to claims brought under the National Forest Management Act regarding the Forest Service's alleged failure to demonstrate the reliability of the scientific methodology underlying its analysis of a timber treatment project's effects on the flammulated owl and its habitat. 537 F.3d at 990, 993. *Lands Council* involved complex, highly technical decisions regarding the Forest Service's methodological choices – thus, the reference to the "frontiers of science." *Id*. at 991, 993. The context is very different in this case, where FWS's BiOp simply omitted part of the analysis required by law—consideration of the effect of the RMPs on desert tortoise recovery where the RMPs are inconsistent with the Desert Tortoise Recovery Plan. The decision to forego this analysis is not the result of a complex methodological choice. Moreover, the decision that continued permitting of livestock grazing and ORV use within designated tortoise critical habitat involves neither a "high level of technical expertise" nor the "frontiers of science." After all, the science is not in dispute in this case—as Federal Defendants point out, the FEIS discloses that

both grazing and ORV use have significant adverse effects on desert tortoises and their habitat.

Lands Council does not require any heightened deference under these circumstances, nor does it alter the well-established arbitrary and capricious standard of review for agency action. As the Ninth Circuit re-affirmed in a decision addressing the review of agency action under the arbitrary and capricious standard issued after *Lands Council*, the Court "must engage in a careful, searching review to ensure that the agency has made a rational analysis and decision on the record before it." *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 524 F.3d 917, 927 (9th Cir. 2008) (citing *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005). Here, where Defendants have cloaked their decision in an expertise that is not unique or specialized, a careful and searching review is particularly justified.

Finally, FWS's analysis of the impacts of grazing and ORV use on the desert tortoise directly conflicts with the same agency's recommendations in the Recovery Plan, and is therefore 'entitled to considerably less deference' than a consistently held agency view. *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n. 30 (1987) (*quoting Watt v. Alaska*, 451 U.S. 259 273 (1981)). FWS's inconsistent position casts serious doubt on the validity of its analysis. *See, e.g., Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992) (holding that the court would not give deference to the agency's "expertise" when the agency has fluctuated in its position). An "agency interpretation of a relevant provision which conflicts with an agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997) (*quoting INS v. Cardozo-Fonesca*, 480 U.S. at 446 n.30)).

III. CONCLUSION

For the foregoing reasons, the Center respectfully requests that the Court grant its Motion for Summary Judgment and deny Defendants' and Intervenor-Defendants' Cross-Motions for Summary Judgment.

DATED: January 7, 2011

/s/ Adam Keats

Adam Keats (CA Bar No. 191157)
John Buse (CA Bar No. 163156)
CENTER FOR BIOLOGICAL DIVERSITY
351 California Street, Suite 600
San Francisco, CA 94104
Telephone: (415) 436-9682
Facsimile: (415) 436-9683
akeats@biologicaldiversity.org
jbuse@biologicaldiversity.org

Attorneys for Plaintiff
Center for Biological Diversity

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2011, I electronically transmitted the document **Center for Biological Diversity's Combined Reply in Support of Summary Judgment, Opposition to Cross-Motions for Summary Judgment, and Response to Briefs by Amici Curea** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Luther Langdon Hajek
US Dept of Justice ENRD
PO Box 663
Ben Franklin Station
Washington, DC 20044-0663
luke.hajek@usdoj.gov

Seth M. Barsky
US Dept of Justice
Env. & Nat. Res. Div.
601 D St NW
Washington, DC 20004
seth.barsky@usdoj.gov

Srinath Jay Govindan
US Dept of Justice
Env. & Nat. Res. Div. WMRS
PO Box 7369
Washington, DC 20044-7369
Jay.Govindan@usdoj.gov

Carl Dawson Michel
Michel & Associates PC
180 E Ocean Blvd, Ste 200
Long Beach, CA 90802
michel@michelandassociates.com

David T Hardy
David Hardy PC
8987 E Tanque Verde
PMB 265
Tucson, AZ 85749
dthardy@mindspring.com

William Lee Smith
Michel & Associates PC
180 E Ocean Blvd, Ste 200
Long Beach, CA 90802
lsmith@michelandassociates.com

Sue A Klein
US Attorney's Office
40 N Central Ave, Ste 1200
Phoenix, AZ 85004-4408
sue.klein@usdoj.gov

Dated: January 7, 2011

/s/ Adam Keats
Adam Keats