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13
14 **UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**
16 **PRESCOTT DIVISION**

17
18 **CENTER FOR BIOLOGICAL
DIVERSITY,**

19 **Plaintiff,**

20 **v.**

21 **U.S. BUREAU OF LAND
MANAGEMENT, ET AL.,**

22 **Federal Defendants,**

23 **and**

24 **THE NATIONAL RIFLE
ASSOCIATION,**

25 **Intervenor-Defendant.**
26
27
28

CASE NO. 09-CV-8011-PGR

**MEMORANDUM IN SUPPORT OF
FEDERAL DEFENDANTS' COMBINED
CROSS-MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

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1 Plaintiff, Center for Biological Diversity (“Plaintiff”), challenges the approval and
2 implementation by the Bureau of Land Management (“BLM”), after consultation under
3 the Endangered Species Act (“ESA”) with the U.S. Fish & Wildlife Service (“FWS”) and
4 environmental review under the National Environmental Policy Act (“NEPA”), of the
5 Arizona Strip Resource Management Plans (collectively, “RMPs”). Dkt. No. 91.
6 Plaintiff’s present motion (Dkt. No. 98, “Pl’s Br.”) now seeks summary judgment on its
7 claims. In response, Federal Defendants hereby file their combined cross-motion for
8 summary judgment and opposition to Plaintiff’s motion for summary judgment.

9 INTRODUCTION

10 In February 2008, after five years of extensive environmental analysis and public
11 review of a detailed 2,000-page final environmental impact statement (“FEIS”), BLM
12 approved thorough and well-reasoned RMPs for the management of public lands under
13 its jurisdiction in the Arizona Strip Region. Consistent with BLM’s multiple-use
14 mandate, the RMPs contain overall direction for the management of the region and
15 carefully attempt to balance human use of these public lands with appropriate resource
16 protection. To that end, the Arizona Strip RMPs emphasized, “minimal human influence
17 and use in the southern and more remote sections of the Planning Area and more human
18 use/influence in the northern areas and locations adjacent to communities.”

19 Plaintiff now seeks to set aside the RMPs and their benefits to the local
20 communities and the environment. Plaintiff asserts that FWS and BLM violated the
21 ESA, 16 U.S.C. § 1536, by failing to insure that implementation of the RMPs was not
22 likely to jeopardize the desert tortoise or destroy or adversely affect its designated critical
23 habitat. Plaintiff also argues that BLM violated NEPA, 42 U.S.C. § 4332, in analyzing
24 potential effects to both the California condor and the desert tortoise. However, as
25 discussed below, Plaintiff cannot meet its burden under the judicial review provisions of
26 the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, of establishing that FWS’s or
27 BLM’s analyses and determinations are arbitrary, capricious, or otherwise contrary to the
28 ESA or NEPA. Plaintiff’s claims are without merit, and the Court should grant summary

1 judgment in favor of Federal Defendants.¹

2 STATUTORY AND REGULATORY BACKGROUND

3 I. Endangered Species Act

4 Congress enacted the ESA to protect and conserve endangered and threatened
5 species. 16 U.S.C. § 1531(b). “Each Federal agency shall, in consultation with and with
6 the assistance of the Secretary, insure that any action authorized, funded, or carried out
7 by such agency . . . is not likely to jeopardize the continued existence of any endangered
8 species or threatened species or result in the destruction or adverse modification of
9 [designated critical] habitat.” 16 U.S.C. § 1536(a)(2); see 50 C.F.R. Pt. 402.

10 Formal consultation under Section 7 of the ESA, which was the process followed
11 here, culminates in a biological opinion (“BiOp”), which includes a “detailed discussion
12 of the effects of the action on listed species or critical habitat.” 50 C.F.R. § 402.14(h)(2).
13 The BiOp assesses the likelihood of the proposed action resulting in jeopardy to a listed
14 species or destruction or adverse modification to designated critical habitat. 50 C.F.R. §
15 402.14(g). If an action is not likely to result in jeopardy or adversely modify critical
16 habitat, but is reasonably likely to result in “take” incidental to the proposed action, then
17 the consulting agency attaches an incidental take statement (“ITS”) to the BiOp. 16
18 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i-v). If the action agency implements the
19 project as proposed and complies with the terms and conditions (“T&Cs”) of the ITS,
20 ESA § 7(o)(2) exempts the specified level of take from the ESA § 9 take prohibition. 16
21 U.S.C. § 1536(o)(2).

22 Congress directed the Secretary to develop and implement recovery plans to
23

24 ¹ Plaintiff has not moved for summary judgment on its claim under the Federal Land
25 Policy and Management Act (FLPMA). See Pl’s Second Amended Compl. ¶¶ 84-88.
26 Claims not brought forth on summary judgment are deemed abandoned. See United
27 States v. Romm, 455 F.3d 990, 997 (9th Cir. 2006) (citations omitted) (“[A]rguments not
28 raised by a party in its opening brief are deemed waived.”); Mountain States Legal
Found. v. Espy, 833 F. Supp. 808, 813 n.5 (D. Idaho 1993) (deeming claims not raised in
summary judgment motion abandoned and granting judgment for defendants).
Accordingly, judgment on the FLPMA claim should be entered for Federal Defendants.

1 provide guidance for the long-term objective of removing species from the list of
2 endangered or threatened species. 16 U.S.C. § 1533(f)(1). The ESA imposes no duties on
3 federal agencies or other persons to implement or adhere to a recovery plan, and the
4 courts have affirmed the purely advisory nature of such plans. See Fund for Animals v.
5 Rice, 85 F.3d 535, 548 (11th Cir. 1996) (“[T]he Recovery Plan is not a document with
6 the force of law.”); Oregon Natural Res. Council v. Turner, 863 F. Supp. 1277, 1284 (D.
7 Or. 1994) (a recovery plan does not mandate any actions, at any particular time, to obtain
8 recovery goals).

9 **II. Federal Land Policy and Management Act**

10 FLPMA requires “public lands [to] be managed in a manner that will protect the
11 quality of scientific, scenic, historical, ecological, environmental, air and atmospheric,
12 water resource, and archeological values; that, where appropriate, will preserve and
13 protect certain public lands in their natural condition; that will provide food and habitat
14 for fish and wildlife and domestic animals; and that will provide for outdoor recreation
15 and human occupancy and use.” 43 U.S.C. § 1701(a)(8). FLPMA directs the Secretary to
16 prepare land use plans for the public lands under the Department’s control. 43 U.S.C. §
17 1712. This authority is delegated to BLM, which, by regulation, directed its managers to
18 prepare “resource management plans” as land use plans to implement FLPMA. 43
19 C.F.R. § 1601.1-4.

20 **III. National Environmental Policy Act**

21 NEPA directs federal agencies to consider the potential effects of a proposed
22 federal action before implementation. Marsh v. Oregon Natural Res. Council, 490 U.S.
23 360, 371 (1989). NEPA’s purposes and goals are: (1) to ensure the agency will have
24 detailed information on significant environmental impacts when it makes its decisions;
25 and (2) to guarantee that this information will be available to a larger audience.
26 Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). NEPA exists
27 to ensure a process, not a particular result, and its goal is satisfied once the information is
28 properly disclosed. Id. at 350; Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88

1 F.3d 754, 758 (9th Cir. 1996); Marsh, 490 U.S. at 371. NEPA requires a federal agency
 2 to prepare an environmental impact statement (“EIS”) when it proposes a “major Federal
 3 actions significantly affecting the quality of the human environment.” 42 U.S.C. §
 4 4332(C). Once an agency takes the requisite “hard look” at the environmental
 5 consequences, Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976), its analysis should
 6 be affirmed. Laguna Greenbelt v. U.S. Dep’t of Transp., 42 F.3d 517, 523 (9th Cir.
 7 1994). The agency must discuss mitigation measures “in sufficient detail to ensure that
 8 environmental consequences have been fairly evaluated.” Robertson, 490 U.S. at 352
 9 (1989). If an EIS contains a “reasonably thorough discussion of the significant aspects of
 10 the probable environmental consequences,” a court may not “fly speck” the document or
 11 hold it insufficient for inconsequential, technical deficiencies. Oregon Env’tl. Council v.
 12 Kunzman, 817 F.2d 484, 492 (9th Cir.1987) (citations omitted).

13 **FACTUAL BACKGROUND**

14 **I. Arizona Strip Resource Management Plans**

15 The Arizona Strip encompasses approximately 2.7 million acres of public land
 16 found in the northwest corner of Arizona, north of the Colorado River. ASRMP 060326.
 17 This region includes the Vermilion Cliffs National Monument, the Grand Canyon-
 18 Parashant National Monument, and other public lands found within the Arizona Strip
 19 Field Office area. ASRMP 060327. The majority of the public land within these three
 20 areas on the Arizona Strip is managed by BLM under RMPs, which attempt to balance
 21 human use of these areas with resource protection.

22 In accordance with FLPMA, BLM engaged in a land use planning process for the
 23 purpose of making management decisions regarding the public lands under its
 24 jurisdiction in the Arizona Strip Region. See 43 U.S.C. § 1712 (directing the preparation
 25 of land use plans), ASRMP 060307² (discussing the scope of the FEIS). BLM issued a
 26 _____

27 ² Citations to BLM’s record are cited as “ASRMP #####.” Citations of FWS’s record
 28 are cited as “R#####” or “M#####.”

1 Draft Resource Management Plan/Draft Environmental Impact Statement (“DEIS”) for
2 public review and comment in November 2005. ASRMP 058946. Following review of
3 comment on the DEIS, BLM prepared a Proposed RMP/FEIS, which was issued in
4 January 2007. After additional public comment, BLM issued separate Records of
5 Decision (“RODs”) and RMPs for each of the Monuments and for the Arizona Strip Field
6 Office in February 2008. ASRMP 062315 (“Vermilion ROD”); ASRMP 062585
7 (“Parashant ROD”); ASRMP 062910 (“Arizona Strip FO ROD”).

8 The RMPs provide overall direction for the management of the region. ASRMP
9 062325-27; 062596-97; 062920-22. The RMPs implement BLM’s decisions regarding
10 the designation of routes for off-highway vehicle (“OHV”) travel within the Monuments,
11 but not for the Arizona Strip Field Office outside of the Ferry Swale area. ASRMP
12 062327-28 (Vermilion ROD); ASRMP 062597-99 (Parashant ROD); ASRMP 062922
13 (Arizona Strip FO ROD). The RMPs also make administrative designations and land use
14 allocations for particular uses, including grazing. ASRMP 062326-27, 062597, 062991.

15 **II. Endangered Species Act Listing and Consultation**

16 The only species at issue in Plaintiff’s ESA claims is the desert tortoise. The
17 desert tortoise (*Gopherus agassizii*) is a large, herbivorous reptile found in portions of
18 California, Arizona, Nevada, and Utah deserts, and portions of Mexico. See ASRMP
19 055710-11 (discussion of biology and ecology of the desert tortoise); ASRMP 056138
20 (same). On April 2, 1990, FWS listed the Mojave population of desert tortoise as
21 threatened under the ESA. 55 Fed. Reg. 12,178 (factors contributing to the threatened
22 status included construction and development, grazing, off-road vehicle use, illegal
23 collection, upper respiratory disease, and predation). On February 8, 1994, FWS
24 published a final designation of critical habitat for the Mojave population of the desert
25 tortoise. 59 Fed. Reg. 5,820; R004507. FWS identified 12 areas, with a total of 6.4
26 million acres, as critical habitat. R004514. Two critical habitat units in Arizona contain
27 338,700 acres, with the rest located in Nevada, Utah, and California. Id. Of this,
28 288,800 acres were designated on BLM lands. ASRMP 056159.

1 In June 1994, FWS finalized the Recovery Plan for the Mojave population of the
2 desert tortoise, describing a strategy for recovering and delisting the species. See
3 R004600. The Recovery Plan divides the Mojave population range into six recovery
4 units³ and recommends that land management agencies establish 14 desert wildlife
5 management areas (“DWMA”) ⁴ throughout the recovery units, with at least one DWMA
6 in each recovery unit. R004633-36; R004650-56. The Recovery Plan identifies activities
7 which directly or indirectly threaten the desert tortoise and its habitat, such as domestic
8 livestock grazing and OHV recreational use. See R004753-93. While acknowledging
9 that “cattle grazing under certain circumstances can be compatible with desert tortoise
10 survival,” the Recovery Plan generally recommends that grazing not be permitted in
11 DWMA’s because, as of 1994, no data show that cattle grazing is compatible with tortoise
12 recovery. R004672. The Recovery Plan also recommends vehicular controls such as
13 restricting OHV use to designated roads and limiting all competitive and organized
14 events on designated roads. R004670. Also, the Recovery Plan further notes that these
15 “recommendations” are to “aid land managers in the development of management plans,”
16 such as BLM’s RMPs, as “DWMA-specific management actions cannot yet be precisely
17 defined.” R004660.

18 BLM and FWS have completed many formal consultations for actions affecting
19 the desert tortoise or its critical habitat within the boundaries of the Arizona Strip.
20 ASRMP 055596-97; ASRMP 056247. These consultations have included several
21 analyzing the effects of livestock grazing and roads on the desert tortoise and its critical
22

23 ³ A “recovery unit” is a geographic area harboring an evolutionary distinct population
24 segment of the desert tortoise within the Mojave region. R004645. The six recovery
25 units are Northern Colorado, Eastern Colorado, Upper Virgin River, Eastern Mojave,
26 Northeastern Mojave, and Western Mojave. Id. Of the six recovery units, the RMP area
27 at issue in this case falls within the Northeastern Mojave Recovery Unit. R004655.

28 ⁴ “DWMA” is an administrative area in a recovery unit managed to afford reserve-level
protection to desert tortoise populations and habitat while maintaining and protecting
other sensitive species and ecosystem functions. R004645. BLM established two
DWMA’s (Beaver Dam Slope DWMA and Gold Butte-Pakoon DWMA) which are
currently found within the area covered by the Arizona Strip RMPs. R004655.

1 habitat. See ASRMP 056247. On May 1, 2007, BLM initiated consultation and
2 submitted a biological assessment (“BA”) to FWS outlining the potential effects of its
3 proposed RMPs on, among other species, the desert tortoise and its critical habitat.
4 ASRMP 055589. On November 7, 2007, after reviewing the proposed RMPs and BLM’s
5 BA, the FWS issued a BiOp to BLM regarding the effects of its proposed RMPs on listed
6 species, including the desert tortoise and its critical habitat. See ASRMP 056112.
7 Relevant to this case, FWS’s BiOp concluded that BLM’s implementation of the
8 proposed RMPs was not likely to jeopardize the desert tortoise or to destroy or adversely
9 modify its critical habitat. ASRMP 056212-13. The BiOp also included an ITS for the
10 desert tortoise. ASRMP 056218-219.

11 STANDARD OF REVIEW

12 Plaintiff’s ESA and NEPA challenges are reviewed under the scope and standard
13 of review set forth in the APA, 5 U.S.C. § 701 *et seq.* See, e.g., Native Ecosystems
14 Council v. Dombeck, 304 F.3d 886, 891 (9th Cir. 2002) (“Judicial review of agency
15 decisions under NEPA . . . and the ESA is governed by the [APA], which specifies that
16 an agency action may be overturned only where it is found to be ‘arbitrary, capricious, an
17 abuse of discretion, or otherwise not in accordance with law.’”) (quoting 5 U.S.C. §
18 706(2)(A)). While recognizing that the APA governs judicial review for its claims, Pl’s
19 Br. at 6, Plaintiff fails to advise the Court that the APA’s “arbitrary [and] capricious”
20 standard, 5 U.S.C. § 706(2), is extremely limited and highly deferential: this Court will
21 “‘not substitute [its] judgment for that of the agency.’” Lands Council v. McNair, 537
22 F.3d 981, 987 (9th Cir. 2008) (en banc) (citations omitted). Instead, the Court “will
23 reverse a decision as arbitrary and capricious only if the agency relied on factors
24 Congress did not intend it to consider, ‘entirely failed to consider an important aspect of
25 the problem,’ or offered an explanation ‘that runs counter to the evidence before the
26 agency or is so implausible that it could not be ascribed to a difference in view or the
27 product of agency expertise.’” Id. (citation omitted).

28 Following Lands Council’s en banc decision, the Ninth Circuit, in River Runners

1 for Wilderness v. Martin, 593 F.3d 1064 (9th Cir. 2010) (per curiam), again emphasized
2 the appropriate APA standard of review:

3 The APA does not allow the court to overturn an agency decision because it
4 disagrees with the decision or with the agency's conclusions about
5 environmental impacts. An agency's decision may be set aside only if it is
6 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
7 with law. The standard is deferential. The court may not substitute its
8 judgment for that of the agency concerning the wisdom or prudence of [the
9 agency's] action. In conducting an APA review, the court must determine
10 whether the agency's decision is founded on a rational connection between
11 the facts found and the choices made . . . and whether [the agency] has
12 committed a clear error of judgment. The [agency's] action . . . need only
13 be a reasonable, not the best or most reasonable, decision.

14 Id. at 1070. (internal cites omitted) .

15 The Court is to be especially deferential in situations, like the one here where the
16 determination involves technical judgments in an area of the agency's special expertise.
17 Lands Council, 537 F.3d at 993 (“[O]ur law [] requires us to defer to an agency's
18 determination in an area involving a high level of technical expertise. We are to be most
19 deferential when the agency is making predictions, within its area of special expertise, at
20 the frontiers of science.”) (quotations and internal citations omitted); Baltimore Gas &
21 Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983) (“When examining this
22 kind of scientific determination, as opposed to simple findings of fact, a reviewing court
23 must generally be at its most deferential.”). Even if specialists express conflicting views,
24 the “agency must have discretion to rely on the reasonable opinions of its own qualified
25 experts even if, as an original matter, a court might find contrary views more persuasive.”
26 National Wildlife Fed'n v. U.S. Army Corps of Engineers, 384 F.3d 1163, 1177 (9th Cir.
27 2004) citing Marsh, 490 U.S. at 378.

28 Finally, “[t]he focal point for judicial review should be the administrative record
already in existence, not some new record made initially in the reviewing court.” Camp
v. Pitts, 411 U.S. 138, 142 (1973). The “task of the reviewing court is to apply the
appropriate APA standard of review . . . to the agency decision based on the record the

1 agency presents to the court.” Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44
2 (1985).

3 ARGUMENT

4 I. PLAINTIFF’S ESA CLAIMS LACK MERIT.

5 A. FWS’s BiOp Complies With the ESA and Should Be Upheld.

6 At issue in this case is a program-level BiOp, in which FWS reviewed the effects
7 of BLM’s proposed RMPs for the Arizona Strip on listed species and designated critical
8 habitat. ASRMP 056112. Pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. §
9 1536(a)(2), FWS was tasked with issuing an expert opinion on the likely effects of the
10 RMPs on ESA listed species, including the desert tortoise, and on designated critical
11 habitat. Following an extensive review, FWS concluded that, while implementation of
12 the RMPs may have some adverse effects on listed species, it was not likely to jeopardize
13 the continued existence of the desert tortoise or destroy or adversely modify the desert
14 tortoise’s critical habitat. ASRMP 056213. As demonstrated below, FWS considered all
15 relevant factors, its analyses and conclusions are reasoned and supported by the record,
16 and the BiOp should be upheld.

17 1. FWS’s Jeopardy Analysis Was Reasonable, Thorough, and Considered 18 All Relevant Factors.

19 The RMPs at issue in this case are multi-faceted plans that either maintain or
20 improve upon the then-existing management of the planning area to, among other things,
21 conserve and provide additional protections to the desert tortoise and other sensitive and
22 listed species. See ASRMP 060313-22 (RMPs proposed actions – Alternative E);
23 ASRMP 055602-30 (same). In accordance with BLM’s multiple-use mandate, 43 U.S.C.
24 § 1701(a)(8), the RMPs attempt to balance human use with resource protection. ASRMP
25 060301. To that end, the RMPs at issue “emphasize minimal human influence and use in
26 the southern and more remote sections of the Planning Area, and more human
27 use/influence in the northern areas and locations adjacent to communities.” ASRMP
28 060301. The RMPs govern many different activities such as, among other things, casual

1 mining exploration, recreational use, OHV use, and limited ongoing grazing in the
2 RMPs' planning areas. ASRMP 060313-22. While authorizing these limited activities,
3 the RMPs also designate numerous conservation and special resource protection areas,
4 such as Wildlife Habitat Areas ("WHA") and Areas of Critical Environmental Concern
5 ("ACECs"). Also, as part of the proposed action, the RMPs provide mandatory
6 protective management guidelines and prescriptions governing future actions in the RMP
7 planning areas. See ASRMP 060320; ASRMP 055606-07. As a program-level BiOp,
8 future site-specific actions, and any action not explicitly analyzed and reviewed in the
9 BiOp, can proceed only following additional environmental review under NEPA and the
10 ESA. ASRMP 056115.

11 BLM, through its FEIS and its Biological Assessment, candidly acknowledge the
12 likely effects of the RMPs, including the possible adverse effects resulting from OHV use
13 and livestock grazing on the desert tortoise. ASRMP 060981-1016; ASRMP 055712-16.
14 To minimize the possible adverse effects, the RMPs include, as part of the proposed
15 action, mandatory conservation measures to protect and conserve the desert tortoise
16 including, among others: expansion of the Beaver Dam Slope and Virgin Slope ACECs,
17 ASRMP 055615-16; designation of the Pakoon WHA, ASRMP 055615-16; closure and
18 restriction of more than 350 miles of existing roads,⁵ ASRMP 062439, 062749; complete
19 prohibition of "off-road" OHV use areas within designated critical habitat, ASRMP
20 055615-16, 060321; strict speed limits on designated roads, ASRMP 055615-16;
21 complete prohibition of competitive speed events within ACECs and tortoise habitat,
22 ASRMP 060605; restriction of non-competitive speed events within ACECs and tortoise
23 habitat to existing roads/trails and restricted to the inactive desert tortoise period (October
24 15 through March 15), ASRMP 060605; reduction of overall amount of land available for
25 grazing within desert tortoise habitat and restricted to inactive desert tortoise period,

26 ⁵ More route closures/limitations are possible, in addition to the 350 miles of road already
27 closed or limited, once ASFO completes its route inventory. See ASRMP 060315-16,
28 060318.

1 ASRMP 055615-16, 061001, 060518; grazing allotment rotations, ASRMP 060774-76;
2 utilization levels of grazing set at 45% of current year's growth on all allotments
3 containing desert tortoise habitat, ASRMP 055615-17. See also FEIS Appendix 2.E,
4 ASRMP 061624 (listing all protective/conservation measures for the desert tortoise and
5 its critical habitat).

6 As part of the consultation process, FWS first reviewed the proposed RMPs and
7 BLM's BA to determine whether implementation of the RMPs would "jeopardize" the
8 desert tortoise. In so doing, FWS explained that, while desert tortoise "surveys in the
9 Northeastern Mojave [Recovery Unit] and some other RUs detected too few live tortoises
10 to determine a population trend[,]" ASRMP 056139, desert tortoise density studies in the
11 Beaver Dam Slope indicated a relatively stable population structure. ASRMP 056159; see
12 also ASRMP 055719-23. Against this backdrop, FWS analyzed BLM's proposed RMPs
13 and found that some authorized activities, such as OHV use and grazing, may adversely
14 affect the desert tortoise and its habitat. However, FWS also found that the RMPs
15 lessened the current impacts to the desert tortoise, the expected impacts were not likely to
16 reduce appreciably the reproduction, numbers, or distribution of the desert tortoise, and
17 the RMPs contain numerous mandatory conservation actions that affirmatively promote
18 the recovery of the species. ASRMP 056139-40, 056167-68, 056180-89, 056209-10,
19 056212-13; see also ASRMP 056134, 056254-60 (listing the mandatory conservation
20 measures that are part of the proposed action).

21 For example, with respect to grazing, FWS found that there may be adverse effects
22 to the tortoise due to trampling. ASRMP 056173, 056183-88. However, FWS also found
23 that the RMPs, and their conservation measures, are likely to lessen the likelihood of
24 trampling. ASRMP 056183-88. The RMPs reduced the areas where grazing can occur
25 and limited grazing to the tortoise's inactive period (i.e., winter grazing). FWS therefore
26 concluded that, with the RMPs' protective measures for grazing in place, any adverse
27 effects due to trampling would be unlikely. ASRMP 056173-74, 056183-88; see also
28 ASRMP 055710-23.

1 With respect to OHV use, FWS found that although OHV use is strictly limited to
2 existing roads, there may still be adverse effects due to OHV/tortoise collisions. ASRMP
3 056173, 056183-88; see also ASRMP 055615-16 (limiting all of “off-road” OHV use to
4 existing roads); ASRMP 060321 (same). However, FWS found that the RMPs and their
5 conservation measures, combined with the unique characteristics of the planning area,
6 would lessen the likelihood of any OHV/tortoise collision. ASRMP 056183-88. The
7 agencies reasoned that:

8 [M]ortality is very low or non-existent threat for populations away from
9 highways. The effects of roads on wildlife vary with road surface, traffic
10 speed and volume, and density of the species. Most studies of the effects of
11 routes on desert tortoise were conducted in areas of high density tortoise
12 habitat. Of these, only von Seckendorff Hoff and Marlow (1997) address
13 dirt roads.

14 Desert tortoise habitat on the Arizona Strip is characterized by single-width
15 dirt roads with maximum safe travel speeds of 35 mph. Public use of most
16 of these routes involves fewer than 10 vehicles per day, with most use [due
17 to the extreme Arizona heat] occurring during the inactive season. Desert
18 tortoise densities are lower in Parashant and the Arizona Strip FO than
19 anywhere else in the range of the species.

20 ASRMP 060982 (emphasis added) (citations omitted); see also ASRMP 056173-74,
21 056187. Also, FWS recognized the RMPs’ added measures to protect the tortoise from
22 potential collisions as the RMPs further closed or limited use on over 350 miles of
23 existing road; prohibited competitive speed event, and limited non-speed event to the
24 inactive season; and provided many other beneficial and conservation-focused actions.
25 See ASRMP 056183-88. For these reasons, FWS reasonably concluded that “given the
26 relatively low level of public use in these areas, the incidence of injury or mortality
27 [attributable to OHV use or any other recreational activities] should be very low.”
28 ASRMP 056187; see also ASRMP 056173-74, 056183-88; ASRMP 055710-23.

Also, as part of its “jeopardy” analysis, FWS analyzed any potential adverse effect
to the tortoise’s critical habitat and determined that the RMPs would maintain the overall

1 quality of critical habitat, and that it would be managed for the recovery of the species.⁶
2 ASRMP 056183-88, 056212-13. The RMPs closed or restricted certain grazing
3 allotments. ASRMP 055615-16, 060518 (deeming the Tassi grazing allotment
4 unavailable for grazing); *id.* (deeming portions of the Mosby-Nay and Pakoon Springs
5 grazing allotments found within the former Pakoon ACEC unavailable for grazing). The
6 RMPs also limited grazing to the desert tortoise’s inactive season, and set grazing
7 utilization levels at 45% of current year’s growth on all allotments containing desert
8 tortoise habitat. ASRMP 055616. Furthermore, the RMPs required vegetative trend
9 studies/monitoring to ensure adequate habitat quality for the desert tortoise which would
10 allow the agencies to take the proper protective measures if the quality of tortoise critical
11 habitat ever came into question. ASRMP 061000-01. As explained above, the RMPs also
12 limited OHV use within tortoise critical habitat to designated roads and restricted the
13 areas in which OHV users can stop, camp, and park to 100 feet off the centerline of
14 routes. Based on these collective findings regarding the tortoise and its critical habitat,
15 FWS reasonably concluded that the RMPs were not likely to jeopardize the desert
16 tortoise. This conclusion fully complied with the dictates of the ESA and should be
17 upheld. See National Wildlife Fed’n v. NMFS, 524 F.3d 917, 930 (9th Cir. 2008)
18 (“Agency action can only ‘jeopardize’ a species’ existence if that agency causes some
19 deterioration in the species’ pre-action condition.”).

20 **2. FWS’s Conclusions Regarding Critical Habitat Are Reasonable and**
21 **Should Be Upheld.**

22 Next, as part of the consultation process, FWS analyzed whether implementation
23 of the RMPs would “result in the destruction or adverse modification” of desert tortoise
24 critical habitat. 16 U.S.C. §§ 1536(a)(2), (b)(3)(A); ASRMP 056212-13 (noting that
25 FWS’s analysis was governed by the statutory requirements of ESA and not by FWS’s
26

27 ⁶ As set forth below, FWS separately conducted an evaluation of “destruction or adverse
28 modification” of desert tortoise critical habitat.

1 regulatory definition of “adverse modification”). In arriving at its conclusions, FWS
2 methodically examined the current status of the designated critical habitat for desert
3 tortoise. See 056138-141. FWS first noted that “[d]esignation of most [critical habitat
4 units] as DWMAs/ACECs has aided in protection of these areas, particularly by limiting
5 off-highway vehicle use and other ground-disturbing activities, and reducing or
6 eliminating wild burros and livestock grazing in many units,” but also acknowledged that
7 recent fires had degraded a significant portion of critical habitat in the Northeastern
8 Mojave Recovery Unit. ASRMP 056140. FWS identified and assessed the areas
9 designated as critical habitat on federal, state, and private lands, including areas on BLM-
10 managed lands within and outside of DWMAs, and FWS identified the activities that
11 have resulted and continue to result in disturbance to the desert tortoise’s critical habitat.
12 ASRMP 056159, 056167-68, 056209-10.

13 As part of this analysis, FWS next analyzed the likely future effects of BLM’s
14 proposed action on desert tortoise critical habitat. See ASRMP 056180-89. FWS noted
15 that adverse impacts to portions of the habitat may continue, but that numerous impacts
16 to critical habitat have been removed or largely abated. FWS found that the RMPs, at a
17 minimum, maintained the present quality of critical habitat but in most cases required
18 improvement upon the present quality of critical habitat. As explained above, the RMPs
19 limited OHV use to designated roads/trails, reduced the area where OHVs can stop, park,
20 and camp within DWMAs, and limited future cumulative ground disturbance in
21 DWMAs. ASRMP 055612, 056183-88, 056212-13. FWS determined that because the
22 measures in place to protect against OHV use, destruction or adverse modification of
23 tortoise critical habitat would not occur. ASRMP 056213; see also R004670 (noting the
24 Recovery Plan’s recommendation of a prohibition of “all vehicle activity off of
25 designated roads; all competitive and organized events on designated roads”).

26 With respect to grazing, the RMPs reduced and limited the extent of cattle grazing
27 within critical habitat. In addition, the RMPs, as part of the proposed action, must
28 comply with the Arizona Standards for Rangeland Health which mandates the

1 conservation of the tortoise through maintenance and restoration of its habitat. R015914-
2 15. Although the Recovery Plan discourages cattle grazing, the intent of the Recovery
3 Plan was to maintain and improve the present quality desert tortoise habitat with
4 sufficient forage vegetation, not only for desert tortoise survival, but for its recovery.

5 The RMPs accomplish this intent:

6 Allotments in the Beaver Dam and Virgin Slope ACECs were placed on
7 winter grazing schedules after 1998. Vegetative trend studies at key areas
8 should provide useful information for evaluating the effects of reducing the
9 grazing season on desert tortoise. Key vegetative species on allotments
10 with desert tortoise have been in late seral or potential natural community
11 for more than a decade, despite many years of pervasive drought. At most
12 key areas, bare ground has decreased, perennial grasses have remained
13 static, and overall trend has also been static. These results suggest that
14 vegetative communities were healthy prior to implementation of grazing
15 restrictions and continue remain at or near their potential.

16 . . .

17 In an effort to continue to try to determine the relative impacts of changes
18 in grazing season of use on desert tortoise, the FEIS includes proposals to
19 continue to authorize low to moderate levels of grazing in desert tortoise
20 habitats under close monitoring, consistent with the [intent of the] recovery
21 plan. Documenting changes in habitat conditions under various grazing
22 regimes is essential to determining whether or not this is an effective
23 method for reducing threats and promoting recovery of desert tortoise.

24 ASRMP 061000-01. Based on these significant protective measures, while considering
25 both the conservation function and role of designated critical habitat, FWS reasonably
26 concluded that the RMPs were not likely to destroy or adversely modify the desert
27 tortoise's critical habitat. See Gifford Pinchot Task Force v. FWS, 378 F.3d 1059, 1070,
28 amended on other grounds, 387 F.3d 968 (9th Cir. 2004) (noting that the "destruction or
adverse modification" inquiry assesses whether "sufficient critical habitat is lost so as to
threaten a species' recovery even if there remains sufficient critical habitat for the
species' survival").

29 In sum, FWS analyzed the current status of the desert tortoise population and its
critical habitat, analyzed the possible future effects on the desert tortoise population and

1 its critical habitat, fully considered all relevant factors, and provided a reasoned and
2 rational explanation supporting its “no jeopardy” and “no adverse modification”
3 determinations. As the expert wildlife agency charged by Congress with implementing
4 the ESA, FWS’s expertise is entitled to considerable deference, and FWS’s BiOp should
5 be upheld. See Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (reviewing
6 court should defer to the agency as to what evidence is, or is not, necessary to support its
7 scientific analysis and the court is most differential when the federal agency is “making
8 predictions, within its [area of] special expertise, at the frontiers of science.” (citations
9 omitted)).

10 **B. Plaintiff Has Failed to Meet Its Burden in Demonstrating That the**
11 **Challenged BiOp is Arbitrary and Capricious.**

12 **1. The Consultation Provisions Of The ESA Are Not Modified, Displaced,**
13 **Or Enlarged By The Recovery Planning Provisions Of The ESA.**

14 In this case, Plaintiff has challenged only FWS’s BiOp and the agencies’
15 compliance with ESA § 7(a)(2). Second Amended Complaint (“SAC”) ¶¶ 95-97 (Dkt.
16 No. 90). Plaintiff has not challenged any agency’s compliance with the ESA’s separate
17 recovery planning provisions, such as FWS’s obligation to “develop and implement
18 [recovery] plans.” 16 U.S.C. § 1533(f)(1). Nonetheless, with respect to its claims
19 regarding the desert tortoise, Plaintiff appears to suggest that ESA § 4(f) governs the
20 agencies’ analysis in this case. To the extent that Plaintiff argues that § 4(f) dictates
21 FWS’s analysis in a BiOp, that BLM’s actions must be viewed against the
22 recommendations contained in the desert tortoise recovery plan, and that the agencies
23 must affirmatively implement recommendations contained in a recovery plan to comply
24 with ESA § 7(a)(2), Pl’s Br. at 8-12, 27-29, Plaintiff is mistaken. To be clear, there is no
25 legal support for the proposition that the agencies must implement a recovery plan
26 through an ESA §7(a)(2) consultation.

27 Under the ESA, FWS possesses several means to comply with its statutory
28 mandates in ESA § 4(f), and nothing in the ESA mandates that FWS do so in the context

1 of ESA § 7 consultation. See Fund for Animals v. Rice, 85 F.3d 535 (11th Cir. 1996)
2 (rejecting a near identical claim that a BiOp is invalid because a recovery plan was not
3 implemented). Similarly, there is no authority for the claim that ESA § 4(f) is
4 incorporated into ESA § 7(a)(2), or that ESA § 4(f) and a recovery plan modify or alter
5 the obligations explicitly set forth in ESA § 7(a)(2). Rather, where Congress has
6 intended overlap between sections of the ESA, Congress has made that point expressly.
7 That Congress similarly did not incorporate ESA § 4(f)’s recovery planning provisions
8 into ESA § 7(a)(2) is therefore dispositive. See Keene Corp. v. United States, 508 U.S.
9 200, 208 (1993) (“[W]here Congress includes particular language in one section of a
10 statute but omits it in another . . ., it is generally presumed that Congress acts
11 intentionally and purposely in the disparate inclusion or exclusion.” (citations omitted)).

12 In addition, Plaintiff’s implied argument that FWS must require the full
13 implementation of a recovery plan under the guise of a Section 7(a)(2) consultation is
14 fundamentally at odds with the plain language and structure of ESA § 7(a)(2). FWS’s
15 role under ESA § 7(a)(2) is advisory – it reviews a proposed action another Federal
16 agency seeks to undertake, examines a variety of factors and the best available scientific
17 data, and issues an expert “opinion” on the likely effects of that action on listed species
18 and designated critical habitat. See 16 U.S.C. § 1536(a)(2), (b); 50 C.F.R. § 402.14; 51
19 Fed. Reg. 19,926, 19,928 (June 3, 1986) (“The Service performs strictly an advisory
20 function under section 7”). Further, ESA § 7(a)(2) does not preclude Federal actions
21 from proceeding that do not promote or advance a species’ recovery, but rather imposes a
22 prohibition against actions which have too great an impact on the survival and recovery
23 of a species. 16 U.S.C. § 1536(a)(2); Selkirk Conservation Alliance v. Forsgren, 336 F.3d
24 944, 954 (9th Cir. 2003) (noting existence of adverse effects does not mandate
25 “jeopardy” determination under ESA § 7). Thus, Congress neither required the
26 implementation of a recovery plan in the Section 7 context nor evinced an intent to halt
27 activities that affirmatively do not recover or promote the recovery of a species. See
28 Idaho Dep’t of Fish & Game v. NMFS, 850 F. Supp. 886, 895 (D. Or. 1994) (ESA

1 contains different procedures, with “several critical differences,” by which species
2 protection and recovery are addressed); Arizona Cattle Growers’ Ass’n v. Kempthorne,
3 534 F. Supp. 2d 1013, 1036 (D. Ariz. 2008) (rejecting invitation “to fashion an entirely
4 new requirement, unsupported by any ESA-related precedent, simply based upon what
5 Plaintiff believes to be sound environmental policy”).

6 That said, it is not Defendants’ position that the recovery plan can be or was
7 ignored, and the record plainly demonstrates that it was considered. See ASRMP
8 056213. However, full implementation of the recommendations in a recovery plan is not
9 required to satisfy the statutory mandates of ESA § 7 and that the ESA’s consultation
10 provisions provide the standards by which BLM’s actions are assessed, not a recovery
11 plan or § 4(f). Indeed, FWS’s conclusions were premised in part on the finding that the
12 RMPs promoted tortoise recovery and were “largely in accordance” with or met the
13 intent of the Recovery Plan. ASRMP 056213. Accordingly, any argument that seeks to
14 transform the consultation provisions of the ESA into a mandate to implement a recovery
15 plan or recover a species must be rejected. See Chevron, USA v. Natural Res. Def.
16 Council, 467 U.S. 837, 842-43, 844 (1984) (“If the intent of Congress is clear, that is the
17 end of the matter; for the court, as well as the agency, must give effect to the
18 unambiguously expressed intent of Congress.”).

19 **2. BLM Reasonably Insured that the RMPs’ Authorization of Limited**
20 **OHV Use Was Not Likely to Jeopardize or Destroy or Adversely**
21 **Modify Critical Habitat.**

22 Plaintiff next argues that BLM, in its development and implementation of the
23 RMPs, failed to insure that the authorization of limited OHV use was not likely to
24 jeopardize the tortoise or adversely modify its critical habitat. Pl’s Br. at 12-14. Plaintiff
25 attempts to demonstrate that, due to the limited OHV use, desert tortoises in the Beaver
26 Dam and Virgin Slopes ACECs are “dying at an alarming rate” and cites two studies in
27 an attempt to support this assertion. Pl’s Br. at 14. However, Plaintiff fails to disclose
28 that these two sources attribute desert tortoise loss to disease. ASRMP 060729 (“Young

1 et al. (2002) suggested that the cause of the decline [on the Beaver Dam ACEC] was
2 unknown, but speculated it was due to combination of factors including but not restricted
3 to: disease, drought, and/or unknown toxicants.”); ASRMP 060730 (“Goodlett and
4 Woodman (2003) attributed the probable cause of [desert tortoise decline on the Virgin
5 Mountain Slope] to cutaneous dyskeratosis.”). Plaintiff’s argument must fail.

6 As discussed above, the RMPs go to great lengths to insure that the authorization
7 of limited OHV use was not likely to jeopardize the tortoise. Consistent with the
8 Recovery Plan, the RMPs restricted all off-road OHV use to already designated roads,
9 imposed a strict speed limit on designated roads, further closed or restricted
10 approximately 350 miles of existing roads within the planning area, prohibited all
11 competitive speed events entirely within desert tortoise habitat, and limited non-speed
12 vehicular events to the desert tortoise’s inactive period. ASRMP 056187-88; R004670.
13 The agencies further noted the low public use of the existing roads in this area. ASRMP
14 060982 (“Public use of most of these routes involves fewer than 10 vehicles per day with
15 most use occurring during the inactive season.”). The agencies’ analyses in this case
16 fully acknowledged this potential impact, accounted for the RMPs’ conservation
17 measures, determined that these measures were largely in accordance with the Recovery
18 Plan, and concluded that the RMPs would therefore adequately protect the desert tortoise
19 and protect the present quality of the habitat. ASRMP 056187-88, 056213; see also
20 R004670 (“The following activities [according to the Recovery Plan] should be
21 prohibited throughout all DWMA’s . . . all vehicle activity off of designated roads; all
22 competitive and organized events on designated roads[.]”) (emphasis added). This
23 conclusion is reasonable, supported by the record, and should be upheld.

24 **3. BLM Reasonably Insured that the RMPs’ Authorization of Limited**
25 **Grazing Was Not Likely to Jeopardize or Destroy or Adversely Modify**
26 **Critical Habitat.**

27 Plaintiff also argues that the RMPs’ conservation measures with respect to grazing
28 were “uncertain to occur” and therefore improperly relied on “future promises.” Pl’s Br.

1 at 15. Plaintiff’s argument is without merit. The RMPs’ conservation measures are part
2 of the overall “proposed action” and are therefore mandatory. That is, BLM must
3 implement these measures to remain consistent with its ESA obligations. As explained
4 above, the conservation measures with respect to grazing are extensive and comply with
5 the intent of the Recovery Plan. The RMPs closed or restricted certain grazing
6 allotments. ASRMP 055615-16, 060518 (deeming the Tassi grazing allotment
7 unavailable for grazing); *id.* (deeming portions of the Mosby-Nay and Pakoon Springs
8 grazing allotments found within the former Pakoon ACEC unavailable for grazing). The
9 RMPs also limited grazing to the desert tortoise’s inactive season, and set grazing
10 utilization levels at 45% of current year’s growth on all allotments containing desert
11 tortoise habitat. ASRMP 055616. Furthermore, the RMPs required vegetative trend
12 studies/monitoring to ensure adequate habitat quality for the desert tortoise which would
13 allow the agencies to take the proper protective measures if the quality of tortoise critical
14 habitat ever came into question.⁷ ASRMP 061000-01. Finally, The RMPs, as part of the
15 proposed action, must comply with the Arizona Standards for Rangeland Health which
16 mandates the conservation of the tortoise through maintenance and restoration of its
17 habitat. R015914-15. Based on these mandatory conservation measures, the agencies
18 concluded that authorization of limited grazing was not likely to jeopardize the tortoise or
19 adversely modify its critical habitat. This decision is reasonable, supported by the record,
20 and should be upheld.

21 **4. FWS’s BiOp Accounts For the Recovery Value of Critical Habitat.**

22 Plaintiff also attempts to impugn FWS’s analysis by arguing that “extensive,”
23 “off-road” vehicle use and “widespread grazing” will impair desert tortoise recovery by
24 destroying or adversely modifying its critical habitat which FWS’s BiOp failed to
25 consider. Pl’s Br. at 8-12. Plaintiff’s argument is wrong and turns a blind eye to the

26

27 ⁷ Indeed, if the allotment monitoring data did not support a reduction/elimination of
28 grazing, then reducing/eliminating grazing would be arbitrary and capricious.

1 agencies' extensive desert tortoise analysis in this case.

2 As explained above, FWS's BiOp does indeed account for OHV use and its
3 potential adverse effect on desert tortoise critical habitat. The agencies fully
4 acknowledge the possible adverse effects from "off-road" OHV use on desert tortoise
5 habitat. The RMPs account for this impact and prohibit all "off-road" vehicle use within
6 the tortoise's critical habitat. The RMPs strictly limit OHV use to designated roads and
7 primitive roads within tortoise habitat; there is no "off-road" use permitted except for
8 emergency situations outlined in the FEIS. ASRMP 062330-31, 062601-02. FWS's
9 BiOp analyzed and accounted for these conservation measures and determined that these
10 measures were largely in accordance with the Recovery Plan and therefore preserved the
11 recovery value of the desert tortoise critical habitat. ASRMP 056187-88, 056213; see
12 also R004670 ("The following activities [according to the Recovery Plan] should be
13 prohibited throughout all DWMA's . . . all vehicle activity off of designated roads[.]")
14 (emphasis added).

15 FWS's BiOp also accounts for grazing and its potential adverse effect on desert
16 tortoise critical habitat. Contrary to Plaintiff's assertion, the RMPs do not allow for
17 "widespread grazing" in desert tortoise critical habitat; rather, the RMPs reduce the
18 amount of habitat available for grazing. ASRMP 055615-16, 060518. In addition, the
19 RMPs limit grazing to the desert tortoise's inactive period to allow the appropriate forage
20 vegetation to replenish. As explained above, the RMPs further required vegetative trend
21 studies/monitoring to ensure adequate habitat quality for the desert tortoise, ASRMP
22 061000-01, and require that BLM comply with the Arizona Standards for Rangeland
23 Health, R015914-15. The agencies reasonably determined that this met the intent of the
24 recovery plan in maintaining the present quality of the critical habitat and would also
25 seek to improve upon present conditions. This conclusion was reasonable and supported
26 by the record.

27 In sum, the BiOp carefully accounted for the recovery value of the critical habitat.
28 Based on the circumstances unique to the Arizona Strip in conjunction with the protective

1 conservation measures as part of the proposed action, FWS reasonably determined that
2 the RMPs were largely in accordance with the Recovery Plan and appropriately
3 safeguarded the recovery value of the existing desert tortoise critical habitat. Gifford
4 Pinchot Task Force v. FWS, 378 F.3d 1059, 1065, amended, 387 F.3d 968 (9th Cir.
5 2004).

6 **5. Plaintiff's ESA Claim Against BLM Must Be Rejected.**

7 Finally, Plaintiff alleges that BLM's reliance on the FWS BiOp constitutes a
8 violation of ESA §7(a)(2). Because, as demonstrated above, the BiOp is valid, BLM's
9 reliance on the expert agency's conclusions was reasonable, and Plaintiff's argument
10 must also be rejected.

11 **II. BLM COMPLIED WITH NEPA IN ITS ANALYSIS OF** 12 **ENVIRONMENTAL IMPACTS ON AND MITIGATION MEASURES FOR** 13 **CONDORS AND DESERT TORTOISES.**

14 BLM conducted a thorough NEPA process and prepared a lengthy and detailed
15 FEIS in conjunction with preparation of the RMPs. See ASRMP 060299-314 (FEIS).
16 Plaintiff claims that the FEIS inadequately addresses potential impacts to condors and
17 desert tortoises from BLMs management actions in the RMPs, including the effects of
18 hunting using lead ammunition on condors. Pl's Br. at 19-29. These arguments are
19 without merit. BLM appropriately analyzed the effects of its actions on condors and
20 desert tortoises, but since BLM does not manage hunting in the Arizona Strip region it
21 was not required to analyze the effects of hunting using lead ammunition on condors.

22 **A. BLM Was Not Required to Analyze the Effects of Hunting with Lead** 23 **Ammunition on Condors Because BLM Does Not Manage Hunting in the** 24 **Arizona Strip.**

25 **1. BLM Does Not Take any "Major Federal Action" With Regard To** 26 **Hunting in the Arizona Strip.**

27 Plaintiff claims that the FEIS is inadequate because it does not discuss the impacts
28 on condors of permitting the use of lead ammunition, nor measures to mitigate these
impacts. Pl's Br. at 19, 25. Plaintiff's argument is based on the mistaken assumption that

1 approval of the RMPs would “allow the use of lead ammunition by hunters.” Pl’s Br. at
2 21. BLM, however, does not manage hunting on the Arizona Strip. ASRMP 060850.
3 The management of hunting on the Arizona Strip is under the authority of the State of
4 Arizona. *Id.* BLM did not take any “major federal action” with regard to hunting in the
5 Arizona Strip and was not required to analyze the potential impacts of hunting using lead
6 ammunition in the FEIS. 42 U.S.C. § 4332(C). *See Enos v. Marsh*, 769 F.2d 1363,
7 1371-72 (9th Cir. 1985) (agency may properly exclude from NEPA analysis a state action
8 that was complementary to, but distinct from, the federal action). Thus, BLM is not
9 deferring a decision on lead ammunition, as Plaintiff claims. Pl’s Br. at 26. Rather, the
10 decision is not for BLM to make.

11 Under FLPMA, the management of hunting on public lands is reserved to the
12 states. 43 U.S.C. § 1732(b). The Secretary of the Interior may designate certain areas of
13 public land where no hunting is permitted “for reasons of public safety, administration, or
14 compliance with provisions of applicable law.” *Id.* The Secretary is required to consult
15 with the relevant state agencies before putting any such designations into effect. *Id.*
16 BLM made decisions regarding routes that hunters on the Arizona Strip may use.
17 ASRMP 062987 (discussing recreational uses, including hunting, in different Travel
18 Management Areas); ASRMP 063097 (discussing coordination with the Arizona
19 Department of Game and Fish if access to federal lands is restricted in the Arizona Strip).
20 However, BLM does not have the authority to decide what type of ammunition may be
21 used.

22 To coordinate their distinct responsibilities, BLM and the Arizona Game and Fish
23 Commission entered into a Memorandum of Understanding (“MOU”) governing the
24 management of wildlife. ASRMP 037542 (MOU text), 060617-18 (FEIS discussion of
25 collaboration between BLM and the Arizona Game and Fish Commission). Under the
26 MOU, BLM is responsible for managing the habitat of special status species, while the
27 Arizona Game and Fish Commission is responsible for regulating hunting. ASRMP
28 037543, 037548, 0609617. Plaintiff itself recognized BLM’s lack of authority to regulate

1 ammunition in its comments on the Draft EIS when it stated “[w]e urge the BLM to
2 continue working with Arizona Game and Fish Department with public education efforts
3 to promote the use of non-lead ammunition to reduce the risk of lead ingestion.” ASRMP
4 035397.

5 Plaintiff is not claiming that the Secretary should have considered prohibiting
6 hunting in the Arizona Strip or that he should have prepared a NEPA analysis in support
7 of that determination. Even if Plaintiff were to make such an argument, it would fail.
8 The Ninth Circuit has found that just because the Secretary has the power to halt hunting
9 altogether does not mean that the Secretary’s failure to do so constitutes a major federal
10 action to which NEPA applies. See State of Alaska v. Andrus, 591 F.2d 537, 540 (9th
11 Cir. 1979) (finding that “even if the Secretary had some power under a delegation by
12 Congress to stop the wolf-kill program . . . his inaction was not the type of conduct that
13 requires an environmental impact statement.”). Courts in other circuits have agreed. See,
14 e.g., Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1244 (D.C. Cir. 1980) (“in no
15 published opinion of which we have been made aware has a court held that there is
16 “federal action” where an agency has done nothing more than fail to prevent the other
17 party's action from occurring”). Therefore there is no federal action regarding the use of
18 lead ammunition to be analyzed in the FEIS.

19 **2. BLM Sufficiently Analyzed the Effects of its Decisions on Condors.**

20 Although BLM was not required to analyze the effects of hunters using lead
21 ammunition, BLM analyzed the potential impacts on condors and the FEIS. BLM makes
22 decisions in the RMPs about: Areas of Critical Environmental Concern (Arizona Strip
23 Field Office only); cultural resources; fire and fuels management; geology and
24 paleontology; livestock grazing; wild horses and burros (Grand Canyon-Parashant
25 National Monument only); public health and safety; lands and realty; minerals;
26 recreation, visitor services, and environmental education; riparian zones; national historic
27 trails (Vermilion Cliffs National Monument and Arizona Strip Field office only);
28 soundscapes; scientific research; special status species; travel management; vegetation;

1 visual resources; wilderness characteristics; wildlife and fisheries; wilderness; wild and
2 scenic rivers (Vermilion Cliffs National Monument and Arizona Strip Field Office only);
3 and air, water, and soils. ASRMP 062369-70 (list of decisions in the Vermilion RMP);
4 ASRMP 062661-62 (list of decisions in the Parashant RMP); ASRMP 062965 (list of
5 decisions in the Arizona Strip Field Office RMP). BLM did not make any decisions
6 regarding hunting.

7 BLM analyzed the impacts of the decisions it made on condors in the FEIS.
8 ASRMP 060988-90 (analyzing the effect of vegetation and fire management on condors),
9 ASRMP 060933 (analyzing the effect of watershed restoration on condors), 060995
10 (analyzing the effect of wildlife transplants and the construction and maintenance of
11 wildlife water developments on condors), 060997 (analyzing the effect of mineral
12 extraction on condors). BLM thus sufficiently analyzed the effects of its decisions on
13 condors. See Oregon Env'tl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir.1987)
14 (holding that if an EIS contains a “reasonably thorough discussion of the significant
15 aspects of the probable environmental consequences,” a court may not hold it
16 insufficient).

17 In addition, BLM has authority to regulate recreational shooting in the Arizona
18 Strip. ASRMP 060535, 060613. “Recreational shooting” is defined as “the discharge of
19 any firearm for any lawful, recreational purpose other than the lawful taking of a game
20 animal,” such as target shooting. ASRMP 062272 (emphasis added). Recreational
21 shooting “does not include the legitimate and legal pursuit of game or shooting at
22 controlled, permitted ranges or other sport shooting venues.” Id. To the extent that BLM
23 has authority to regulate the type of ammunition used in the Arizona Strip,⁸ it encourages
24 the use of non-lead ammunition. ASRMP 061637. BLM analyzed the effects of

25 _____
26 ⁸ BLM has the authority to regulate the type of ammunition used in recreational shooting,
27 ASRMP 060535, 060613, and when applicable to granting land-use permits, such as
28 permits for commercial filming. See ASRMP 060765 (discussing commercial filming
among the short-term permits that BLM may grant).

1 recreational shooting on wildlife in the Arizona Strip in the FEIS. ASRMP 060958
2 (“[r]ecreational shooting activities may increase noise and trash in a localized area and
3 could lead to injury or death of animals.”). While hunting with lead ammunition poses a
4 risk of lead poisoning to condors, ASRMP 056192-93, 056210, recreational shooting
5 does not pose such a risk because it does not involve the shooting of game animals that
6 may be eaten by condors. ASRMP 062272.

7 Plaintiff claims that “[t]he FEIS does not contain a reasonably complete discussion
8 of possible mitigation measures given the acknowledged harm to condors.” Pl’s Br. at
9 25-26. On the contrary, BLM included a detailed description of measures to mitigate
10 harm to condors in the FEIS. ASRMP 061635-38 (discussing measures to mitigate harm
11 from construction activities, the discharge of firearms, the use of aircraft, fire
12 management, and camping). This examination of mitigation measures meets the
13 requirements of NEPA that the agency discuss mitigation measures “in sufficient detail to
14 ensure that environmental consequences have been fairly evaluated.” Okanogan
15 Highlands Alliance v. Williams, 236 F.3d 468, 476 (9th Cir. 2000) (citing Robertson v.
16 Methow Valley Citizens Council, 490 U.S. 332, 352 (1989)) (finding that an FEIS listing
17 a nine-step process to be followed if a mine-pit’s water quality exceeded the state criteria
18 for protecting aquatic life or human health was sufficient). As Plaintiff notes, one of
19 these measures states that “[u]se of non-lead ammunition is strongly encouraged for
20 activities involving the discharge of firearms.” ASRMP 061637. Since BLM does not
21 regulate hunting, ASRMP 060850, this measure does not apply to hunting.

22 Plaintiff notes that FWS recommended that BLM require only non-lead
23 ammunition for activities over which BLM has authority. Pl’s Br. at 20. As explained
24 above, BLM encouraged the use of non-lead ammunition for recreational shooting.
25 ASRMP 061637. However, Plaintiff’s implicit suggestion that BLM has authority over
26 hunting is incorrect. See ASRMP 037542-43 (Memorandum of Understanding between
27 BLM and Arizona Department of Fish and Game, recognizing that “the State of Arizona
28 is responsible for managing the wildlife on lands in Arizona owned by the United States”

1 and that BLM “is the agency responsible for managing wildlife habitat on Bureau public
2 lands within the State of Arizona.”). The BiOp also recognized that the Arizona
3 Department of Fish and Game has the authority to regulate ammunition. ASRMP 056228
4 (recommending that “BLM continue to work with Arizona Game and Fish Department to
5 educate and encourage hunters to use non-lead bullets.”). The BiOp also pointed out that
6 condors can be “injured or killed as a result of illegal shooting,” but illegal shooting is, of
7 course, not an activity that is permitted by BLM or any other entity. ASRMP 056210.

8 Plaintiff erroneously claims that BLM “impermissibly relied on the BiOp’s
9 geographically narrow evaluation of the project’s environmental impacts in its conclusion
10 that the Plan would be consistent with the biological opinion.” Pl’s Br. at 23. Plaintiff
11 also implies that BLM did not fully discuss the impacts of the RMPs on condors because
12 most of the condor population in the Arizona Strip is designated as “experimental and
13 nonessential.”⁹ Pl’s Br. at 22. However, both the BiOp and the FEIS discussed impacts
14 to condors across the entire project area. ASRMP 056112-13 (Biological Opinion);
15 ASRMP 060326, 060990 (FEIS). As discussed above, BLM discussed the impacts of its
16 actions on condors in detail in the FEIS without regard to whether they were part of the
17 experimental population. ASRMP 060988-90 (analyzing the effect of vegetation and fire
18 management on condors), ASRMP 060933 (analyzing the effect of watershed restoration
19 on condors), 060995 (analyzing the effect of wildlife transplants and the construction and
20 maintenance of wildlife water developments on condors), 060997 (analyzing the effect of
21 mineral extraction on condors). BLM thus complied with NEPA in its analysis of
22 impacts of the RMPs on condors.

23 _____
24 ⁹ In 1996, FWS issues a final rule establishing a non-essential, experimental population of
25 California Condors in Northern Arizona. 61 Fed. Reg. 54044-01 (Oct. 16, 1996); 50
26 C.F.R. § 17.81(j). The designated experimental population area covers a large area in
27 Arizona, Nevada, and Utah and includes lands within the Arizona Strip. 50 C.F.R. §
28 17.84(j)(8). In the experimental area, the “take” prohibitions of the ESA will not be
violated due to the unavoidable or unintentional take of California condors. 50 C.F.R. §
17.84(j)(2)(i). Plaintiff has not brought an ESA claim relating to the California condor.
See Second Amen. Comp. ¶¶ 93-97.

1 **B. BLM Analyzed the Potential Impacts on Desert Tortoises in the FEIS.**

2 Plaintiff claims that the RMPs authorize activities that are inconsistent with the
3 management recommendations in the 1994 Desert Tortoise Recovery Plan (“DTRP”),
4 and because of this supposed inconsistency, BLM violated NEPA by failing to take a
5 “hard look” at impacts on the desert tortoise. Pl’s Br. at 27-28. Contrary to Plaintiff’s
6 claims, the FEIS contains sufficient analysis of the potential impacts on desert tortoises.
7 Plaintiff’s claim under NEPA that BLM was required to follow a particular course of
8 action by following the Desert Tortoise Recovery Plan is without merit because NEPA is
9 a procedural statute and does not require substantive results. See Marsh v. Oregon
10 Natural Res. Council, 490 U.S. 360, 371 (1989) (holding that NEPA “does not work by
11 mandating that agencies achieve particular substantive [] results.”); Robertson, 490 U.S.
12 at 349 (holding that “NEPA itself does not mandate particular results, but simply
13 prescribes the necessary process.”).

14 BLM discussed the environmental impacts of its decisions on special status
15 species in the FEIS as required by NEPA. See 40 C.F.R. 1508.27(b)(9) (requiring
16 agencies to consider the adverse effects of its action on threatened species); ASRMP
17 060978-61018 (discussing impacts of BLM decisions on special status species). This
18 included a discussion on the impacts of grazing on desert tortoises. ASRMP 060998
19 (finding that “grazing by livestock (cattle and sheep) may have direct and indirect effects
20 on tortoise populations including mortality from crushing of animals or their burrows,
21 destruction of vegetation, alteration of soil, augmentation of forage . . . and competition
22 for food.”). BLM also discussed the efficacy of different mitigation measures: allowing
23 livestock grazing only during years of abundant annual plant growth; closing areas to
24 grazing; managing allotments as forage reserves; and placing allotments on winter-only
25 grazing schedules. ASRMP 06100-01. BLM fulfilled its requirements under NEPA to
26 include “a reasonably thorough discussion of the significant aspects of the probable
27 environmental consequences of a challenged action” that “fostered informed decision-
28 making and public participation.” National Parks & Conservation Ass’n v. U.S. Dep’t of

1 Transportation, 222 F.3d 677, 680 (9th Cir. 2000) (quotations and citations omitted).

2 As discussed above in section I.B.1, BLM was not required to fully implement the
3 Desert Tortoise Recovery plan in the RMPs, but it did consider the Recovery Plan in the
4 resource management process. Under the RMPs, BLM will closely monitor grazing on
5 individual allotments in desert tortoise habitat and obtain information on the effect of
6 different grazing regimes on desert tortoise recovery, which will be provided to the
7 Tortoise Recovery Office in support of that office's efforts to revise the plan. ASRMP
8 061409 (discussing the need to document changes in habitat conditions under various
9 grazing regimes.).

10 **CONCLUSION**

11 Plaintiff has failed to meet its burden under the APA of demonstrating that the
12 FWS's or the BLM's actions were "arbitrary, capricious, or otherwise contrary to law."
13 The agencies' decision-making processes and decisions were reasonable and are entitled
14 to deference. This Court should deny Plaintiff's Motion for Summary Judgment and
15 grant summary judgment in favor of Federal Defendants.

16

17 Dated: November 24, 2010 Respectfully Submitted,

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PRESCOTT DIVISION**

CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiffs,

v.

U.S. BUREAU OF LAND
MANAGEMENT, ET. AL.,

Defendants,

and

THE NATIONAL RIFLE
ASSOCIATION,

Intervenor-Defendant.

CASE NO. 09-CV-8011-PCT-GMS

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Rickey D. Turner, Jr.
RICKEY D. TURNER, JR.