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**NOTICE OF FINAL GRAZING DECISION  
EFFECTIVE IMMEDIATELY**

**INTRODUCTION**

The Cronese Lake Allotment, #08007, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your grazing lease, #046815, authorizes 500 animal unit months (AUMs), equivalent to 40 head of cattle year-long on the Cronese Lake Allotment. The allotment encompasses 65,304 total acres, of which 11,054 acres are state or privately owned land and 54,250 acres are BLM land. On BLM-administered land within the allotment there are 30,080 acres of critical habitat for the desert tortoise.

The Cady Mountain Allotment, #08006, is an ephemeral/perennial allotment with potential forage production to enable the BLM to authorize ephemeral forage and established perennial forage allocation on a temporary non-renewable basis; however, total grazing use shall not

exceed 2,059 AUMs. Your current lease, #046815, authorizes 2,059 AUMs, equivalent to 172 head of cattle year-long on the Cady Mountain Allotment. The allotment encompasses 231,897 total acres, of which 71,793 acres are state or privately owned land and 160,104 acres are BLM land. On BLM-administered land within the allotment, there are 160,104 acres of non-critical habitat for the desert tortoise.

This final grazing decision, effectively immediately, modifies the terms and conditions of your grazing permit, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, and establishes the period for this modification, and sets parameters for livestock use.

## **BACKGROUND**

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species. Instead of litigating the case, the BLM entered into five stipulated agreements. On January 29, 2001, the stipulation respecting livestock grazing became effective.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations and reached agreement regarding interim actions to avoid litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the endangered and threatened species in accordance with 7(a) of the ESA and avoid making

irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA.

On April 9, 2001, you were sent the Environmental Assessment # 610-01-02 (EA) and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. A final grazing decision was issued on May 15, 2001. On June 12, 2001, I received an appeal filed from the Budd-Falen Law Offices, P.C. on your behalf. On June 15, 2001, Secretary of the Interior Gale Norton, took jurisdiction of the appeal and assigned it to Administrative Law Judge Harvey C. Sweitzer. Judge Sweitzer was directed to render a final written decision on behalf of the Department of the Interior by August 24, 2001. A hearing concerning the appealed decisions commenced on July 23, 2001 and lasted 13 days. Testimony during the hearing fully portrayed the issues under appeal and the subject of this decision.

### **Judge Sweitzer's Decision**

On August 24, 2001, BLM received Judge Sweitzer's decision (Blincoe, et. al. v. BLM, CA-690-01-01, CA-690-01-02, CA-690-01-03, CA-690-01-04, CA-680-01-03, CA-680-01-04, CA-680-01-05, CA-680-01-06, Decision, August 24, 2001). Judge Sweitzer concluded the following:

- (1) The EA and Decision Record are legally sufficient under NEPA;
- (2) The final grazing decisions are not arbitrary and capricious, are not an abuse of discretion, are supported upon a rational basis, and are otherwise in accordance with the law, except as provided in conclusion (4) below;
- (3) The final grazing decisions are consistent with section 7 of the ESA; and
- (4) BLM complied with the grazing regulations when it issued the final grazing decisions, except that BLM failed to comply with the requirement of consultation, cooperation, and coordination with the affected permittees and therefore the final grazing decisions are hereby set aside and the matters remanded to BLM for further action consistent with this Decision.

### **Additional Efforts to Engage in Consultation, Cooperation, and Coordination (CCC)**

On August 31, 2001, you and interested parties were sent a letter in accordance with Judge Sweitzer's decision and consistent with 43 CFR subparts 4110 and 4130 of the grazing regulations. That letter invited you to participate in a consultation, cooperation, and coordination (CCC) workshop on September 6 and 7, in Barstow, California. The purpose of the CCC workshop was to seek your advice and exchange views regarding implementation of the court approved stipulated agreement. In addition, BLM requested your advice and views on relevant

issues and proposed management actions related to the grazing decision. Through your attorney, you indicated you were not available for the September 6 and 7 workshop but were available to meet on September 13 and 14. BLM also offered you the opportunity to submit written advice and comment. When we learned that you were not available to meet, through your attorney, we afforded you the opportunity to participate in a conference call on September 5, or 6, 2001. We did not receive advice or comments from you, nor did a conference call take place.

Beginning on August 31, 2001 the BLM also telephoned each lessee to determine whether they were available to participate in the meetings. On August 31, 2001, Barstow Field Office staff phoned Mrs. Wetterman to inform her of the CCC workshop scheduled for September 6 and 7 in Barstow. Mrs. Wetterman indicated that she would try to attend the workshop on September 6 but was unsure of her future schedule and would advise BLM of her attendance on that day. On September 5, 2001, Barstow Field Office staff phoned and left messages with the Wettermans, reminding them of the meetings scheduled on September 6 and 7 for CCC on their allotments. Mr. and Mrs. Wetterman did not attend the workshop on September 6 or 7.

On August 31, 2001, after a number of telephone calls to counsel for lessees, the Office of the Regional Solicitor, on behalf of BLM, also wrote to the lessees' counsel informing her of the September 6 and 7 meeting dates. Counsel for lessees wrote indicating that the vast majority of the lessees were not available on September 6 or 7, but that some could meet on September 13 and 14, 2001, and raised certain issues respecting the scope of CCC. On September 5, 2001, another letter was issued by the Regional Solicitor's Office which addressed those issues raised by counsel for the lessees, and which encouraged their participation in CCC. In that same letter it was explained that BLM intended to issue decisions on September 7, 2001, which would be effective immediately based upon resource needs as documented in the grazing hearings and Judge Sweitzer's decision. This determination of imminent likelihood was based upon the extensive administrative record compiled in the grazing hearings, and upon Judge Sweitzer's decision of August 24, 2001. BLM telephoned each lessee to determine whether they were available to participate in the meetings. Some of the lessees indicated that they were available and might attend.

Staff from the California Department of Fish and Game (CDFG) and California State Lands Commission were contacted by my staff about issuing a final grazing decision on this allotment. We explained the need for the grazing decision and the requirement (43 CFR §4110.3-3(a) and §4130.3-3) to contact the State under these conditions. The CDFG stated they had earlier concerns about potential excess grazing use on portions of the allotment when areas are seasonally excluded from cattle use. After conveying there would be weekly field visits to the allotments, those concerns seemed alleviated. Staff from State Lands Commission appreciated the opportunity to contribute to this effort, but did not have any additional information to offer.

California District Manager Tim Salt telephoned San Bernardino County Supervisor Bill Postmus and invited him or a representative to the September 6 and 7 meeting. Tim Salt called Gerry Hillier, who had represented the County during the grazing hearings, to inform him about

the scope of the September 6 and 7 workshop.

On August 31, 2001, after a series of conference calls with counsel for the Center (including the Center for Biological Diversity, PEER, and the Sierra Club), the Office of the Regional Solicitor issued a letter again inviting the Center to attend the meeting scheduled for September 6 and 7, in Barstow. Because the Center had initially stated it would not attend, it was also offered the opportunity to participate by telephone. The Center did not attend the meetings scheduled for September 6 or 7, nor was a conference call held.

BLM was present in Barstow on September 6 and 7, in furtherance of its offer and attempt to meet with lessees, interested parties, the Center and county officials. Only County Supervisor Postmus' representative Bob Smith, and Gerry Hillier attended the meeting on September 6. BLM was ultimately informed by letter dated September 6, 2001, from lessees' counsel that none of the lessees would be able to attend those meetings.

### **FIELD MANAGER'S FINAL DECISION EFFECTIVE IMMEDIATELY**

With the above additional CCC, the analysis presented in the EA, the testimony presented and documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3(b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is my final decision, effective immediately in accordance with 4110.3-3(b), that livestock grazing is not authorized in the area of seasonal exclusion within the Cronese Lake Allotment, an area which encompasses approximately 18,000 acres of critical habitat for the desert tortoise. This area is shown on the enclosed map. In order to protect the desert tortoise and its habitat, this decision modifies the terms and conditions of your grazing permit, the way your livestock may use the Cronese Lake Allotment, establishes the period for this modification, and sets parameters for livestock use. The exclusion area will be closed to cattle grazing from March 1 to June 15 and from September 7 to November 7. Grazing use on the Cronese Lake Allotment shall not exceed 13,383 animal (cattle) days for the year. The permitted use for the Cronese Lake Allotment shall be temporarily reduced to 444 AUMs, with a maximum stocking rate of 37 animals. These modifications of terms and conditions on the Cronese Lake Allotment shall be incorporated into the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

With the above additional CCC, the analysis presented in the EA, the testimony presented and documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3 (b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is also my final decision, effective immediately in accordance with 4110.3-3(b), that livestock grazing is not authorized in the area of seasonal exclusion within the Cady Mountain Allotment. In order to protect the desert tortoise and its habitat, this decision modifies the terms and conditions of your grazing permit, the way your livestock may use the Cady Mountain Allotment, establishes the period for this modification, and sets parameters for livestock use. This exclusion area comprises approximately 88,320 acres of desert tortoise non-critical habitat. This area is shown on the

enclosed map. This area will be closed to cattle grazing from March 1 to June 15 and from September 7 to November 7. In addition, water at Hidden Valley Well shall not be available to livestock during the exclusion periods for the duration of this decision. Livestock grazing in the Cady Mountain Allotment shall not be permitted along or within the Mojave River at Afton Canyon for the duration of this decision. To facilitate the interim closure of the Afton Canyon portion of the Cady Mountain Allotment the construction of gap fences at the western and eastern ends of the canyon shall be implemented through this decision. The Livestock Use Agreement for the management of livestock in Afton Canyon shall be cancelled. These modifications on the Cady Mountain Allotment shall be incorporated into the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

If, during the periods of exclusion, cattle are found in the exclusion areas you will have 48 hours after notification from the BLM to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Cady Mountain and Cronese Lake Allotments will be denied.

This final grazing decision will be effective immediately and remain in effect until either, receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment, or January 31, 2002, whichever shall be later.

## **RATIONALE**

The imminent likelihood of significant resource damage for desert tortoise and its habitat as determined by the hearing record and reflected in Judge Sweitzer's decision, caused the BLM to make this decision immediately effective to meet the fall closure date, which begins September 7. The BLM made reasonable attempts at CCC within the constraints of the immediacy of the fall grazing season and the requirement of the settlement agreement that grazing not be authorized from September 7 through November 7. Because the fall and spring closures are of critical importance to desert tortoise biology and because cattle grazing impacts desert tortoise and its habitat, BLM determined that this decision should be effectively immediately.

### Decline of Desert Tortoise Populations

During the hearings conducted by Judge Sweitzer, July 23 through August 7, 2001, in Barstow, California, and in his August 24 decision, it became clear that continued grazing use posed an imminent likelihood of significant damage to desert tortoise and its habitat. Various desert tortoise experts testified as to the physiological needs of the desert tortoise, the deterioration and

loss of its habitat, declines in various populations, and the factors which adversely affect the tortoise and its habitat. (Sweitzer Decision, 22) “The recent severe and catastrophic declines in desert tortoise populations in California signal a need for new and immediate action to reduce all sources of mortality and to stabilize populations.” (Sweitzer Decision, 26)

At the hearing, all desert tortoise experts agreed that the tortoise’s plight has worsened over the decade since it was listed and described findings from various surveys showing declines in tortoise throughout its range in California. The testimonies of Dr. Kristin Berry, a USGS wildlife biologist, and Edward LaRue, a BLM biologist, show a near total collapse of tortoise populations in the Mojave Desert. (Sweitzer Decision, 32)

Field work Dr. Berry supervised in spring 2001 indicated recent declines in Ivanpah Valley. She was unable to identify any moderate to high density, robust, stable or increasing California population of desert tortoises at that time. “The new declines in Fenner, Ward, and Chemehuevi valleys are new developments since 1994, when the Desert Tortoise Recovery Plan was published. Study sites exhibited population declines in the 1980’s, such as Fremont Valley, the Desert Tortoise Research Natural Area, Fremont Peak, Kramer Hills, Lucerne Valley, and Johnson Valley.” (Sweitzer Decision, 23) The Fremont Valley plot was resurveyed in spring 2001 and show marked declines in numbers since 1991. “Dr. Berry observed in a study plot in Chemehuevi that ‘the decline between 1992 and 1999 \* \* \* was 84%’. A study plot near Goffs showed that ‘in comparisons of gross numbers of registered tortoises, there has been a decline of 94-95% of the female tortoises of breeding size.’ ” (Sweitzer Decision, 32)

“The testimony of Mr. LaRue is equally grim”. (Sweitzer Decision, 32) In 1984 there were 237 square miles of the West Mojave that were believed to support 250 tortoises or more per square mile. “By 1999 that number was down to 7 square miles. Mr. LaRue described a ‘region-wide die off of tortoises [in the West Mojave] that is generally bounded by the Calico Mountains to the southeast, Goldstone to the northeast, eastern Superior Valley to the northwest, and the Mud Hills to the southwest.’ ” (Sweitzer Decision, 32)

“Dr. Foreman observed that declines in tortoise populations have been severe in the far western Mojave, specifically the Fremont-Kramer Critical Habitat Unit and the western portion of the Superior-Cronese Critical Habitat Unit, and portions of the Chuckwalla Critical Habitat Unit. Large declines in Lucerne Valley and Johnson Valley have also occurred. Recently, sharp declines in the eastern desert, specifically Chemehuevi and Ward Valleys have been observed. Due to the small number of plots, population trends are not known everywhere. He concluded that declines are continuing in the West Mojave and southern desert and that large declines are now occurring in previously stable areas of the East Mojave.” (Sweitzer Decision, 32)

#### Affects of Livestock Grazing on Desert Tortoises

“Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats.” (Sweitzer Decision, 25) Impacts include “trampling of tortoises; trampling of or damage to cover sites; reduction in the thermal and

canopy cover provided by shrubs; changes in composition of perennial and annual plants; creation of fragmented habitat, open spaces and cleared areas from wallows, bedding, watering, loading and unloading areas; attraction and concentration of predators (such as ravens) to livestock watering areas; crushing of tortoises on and off roads by watering trucks or other vehicles used to maintain livestock facilities and monitor livestock; reduction of key forage items available to tortoises whether through direct consumption of forage or by trampling of plants used for forage; contributions to the establishment and invasion of alien plant species; and damage to desert [microbiotic soil] crusts.” (Sweitzer Decision, 25)

Raymond Bransfield, a FWS biologist, described the effects of livestock grazing on the desert tortoise and its habitat. “A desert tortoise must consume its annual forage requirement during its active period, which can range from six weeks to five months out of the year (March to June and occasionally during September and October). If forage has not been produced or is of poor nutritive quality during this period, the opportunity for the desert tortoise to meet its nutritional needs cannot be met until the next year. Therefore, desert tortoises are highly dependent upon productive native plant communities and may be susceptible to increased mortality during poor years. Changes in perennial and native vegetation, including alteration of species composition and reduction in cover of shrubs and perennial grasses, are believed to be the result of long-term livestock grazing. The loss of cover can result in increased exposure to predators and decreased opportunities to use the shade of shrubs for thermoregulation. Native annual plants and perennial grasses are essential in meeting the nutritional needs of the desert tortoise. Nonnative plant species, such as red brome (*Bromus rubens*), filaree (*Erodium cicutarium*), and split grass (*Schismus arabicus*), have become widely established in the Mojave Desert. In some areas, these alien plants are often more common than native annual species. The disturbance of soils associated with livestock grazing likely promotes the spread of these non-native species. Abundant large herbivores can alter [microbiotic soil] crusts that are normally found in many areas of the desert and can disrupt normal germination of native species. Introduced annual grasses remain in place after drying and create a fuel source sufficient to carry fire across large areas. Desert shrubs are not fire-adapted; therefore, once a large area has been burned, the shrubs are killed. This change further decreases the value of habitat for the desert tortoise. Because of its slow growth, the shrub component of the desert may take many decades to return to pre-fire conditions. . . Grazing animals can crush burrows and nests of desert tortoises and trample young desert tortoises. The degree and nature of impacts from cattle grazing are dependent upon the habitat type, grazing history, seasons of use, stocking rates, and density of the desert tortoise population.” (Sweitzer Decision, 30, 31)

### Seasonal Exclusion

“ The Decision Record and grazing decisions state that BLM took action in the form of the Proposed Action for several purposes: (1) to meet this § 7(a)(2) duty to ensure protection of the tortoise and its critical and non-critical habitat until BLM implements the applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable prudent measures to be identified in the biological opinion to be issued by FWS, (2) to avoid making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent

alternatives to be identified during consultation under § 7(d), and (3) to contribute to the conservation of the species pursuant to § 7(a)(1). For the reasons set forth below, this decision concludes that the terms of the grazing decisions rationally further the legitimate objective of fulfilling the mandate of § 7(a)(2), as well as the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), and therefore are supported on a rational basis and are consistent with the ESA.” (Sweitzer Decision, 81)

Based on testimony at the hearing, Judge Sweitzer found support for the seasonal closures. “Doctors Berry and Morafka also testified to the negative impacts of cattle during the period coinciding with the fall exclusion period established in the grazing decisions. In addition to potential disruption of mating activity, which is only effective from late July to early October, there are potential impacts to vulnerable neonates which hatch during the fall:

[D]uring September and October tortoise hatchlings emerge from egg nests and disperse, typically 100-1000 ft across local landscapes, eventually selecting small rodent burrows for winter hibernation. During this period, the largest number of neonate tortoises are concentrated in the smallest of areas, at a time when they themselves are both smallest and physically most vulnerable to the crushing effects of cattle hoofs. These young tortoise are not only at their smallest, but their protective shells are least calcified, and their first burrows, those abandoned by small rodents, are most easily collapsed under the impacts of cattle “traffic”. Furthermore, such losses may be rarely recorded because juvenile tortoises would be killed underground in burrows indistinguishable from those of rodents during the first several months of their occupation by tortoises.” (Sweitzer Decision, 91 & 92)

“Dr. Morafka’s testimony highlights the importance of the spring seasonal exclusion period to juvenile tortoises, but that period is important to adult tortoises too. Doctors Berry and Morafka testified that the benefits of the spring exclusion include better access to preferred forage providing more nutrition and energy to grow and produce eggs, avoidance of trampling of cover sites and eggs, and avoidance of disruption to nesting activities.” (Sweitzer Decision, 91)

Judge Sweitzer states “...the formulation of the exclusion area boundaries was based on the goals of minimizing the impact to any one livestock operator while maximizing the acreage of critical habitat protected. This balancing of interests is an appropriate exercise of BLM’s discretion, and the location of critical habitat is certainly data upon which BLM may reasonably rely to avoid adverse impacts to tortoise habitat and thus help maintain the status quo.” (Sweitzer Decision, 94)

“Non-critical habitat was reasonably included in the exclusion areas in an attempt to apportion the “pain” and leave each permittee with some prospect of continuing operation over the short time frame of the decisions. Also, protecting non-critical habitat assists in maintaining the status quo as well. Doctors Berry and Morafka and Mr. Bransfield all testified to the value of non-critical habitat. Non-critical habitat areas may contain healthy individuals necessary for repopulation of other areas with populations that have been temporarily decimated. They may

promote gene flow from one area to another. Genetically diverse populations may exist there which are important to the species' survival.” (Sweitzer Decision, 95)

“The caps on active permitted use are also rationally related to the legitimate management objectives of maintaining the status quo and thus protecting the tortoise against potentially greater use that might have occurred under lease terms of higher permitted use. The caps were reasonably based upon the average annual active use for the last three years for which BLM had available data: 1997, 1998, and 1999. As BLM personnel testified, this determination provides a measure of stability to the Appellants with respect to their actual use, while protecting the tortoise.” (Sweitzer Decision, 96)

“The grazing decisions also provided that if, during the seasonal exclusion periods, cattle are found in the exclusion areas, an additional day will be added to the period of exclusion for every day cattle are found inside the exclusion areas and the grazing permittee will have 48 hours after notification from BLM to remove them. If they are not removed within 48 hours, BLM will initiate trespass procedures.” (Sweitzer Decision, 96)

Based on the foregoing as well as additional information found in the decision, hearing record, and testimony, Judge Sweitzer concluded these “... decisions are rationally designed to maintain, as much as possible, the status quo for the desert tortoise in accordance with § 7(a)(2) pending completion of consultation with FWS on the CDCA Plan, and to further BLM’s management objectives regarding the protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants’ with the opportunity to continue their operations on the short term. To the extent that the decisions cause economic injury, that injury does not render the decisions unreasonable because, under statutory mandate, protection of the desert tortoise is paramount.” (Sweitzer Decision, 101).

Judge Sweitzer states: “In light of the foregoing lengthy discussion and recitation of evidence regarding the criticality of the spring and fall seasons to the tortoise and the likely effects of grazing on the tortoise during those seasons, no further discussion is warranted to justify holding the seasonal exclusion periods are supported by a rational basis.” (Sweitzer Decision, 94)

Information provided in testimony during the grazing hearing regarding desert tortoise declines and livestock grazing impacts to desert tortoise and its habitat provide the immediacy for this decision. This information includes, but is not limited to, Mr. LaRue’s recitation of desert tortoise declines between 1970 and 1999; Dr. Berry’s information respecting significant declines in East Mojave populations; and Dr. Morofka’s testimony relating to neonate and juvenile tortoise impacts from trampling by livestock.

### Finding of No Significant Impact

I have determined that this grazing decision would not result in significant environmental impacts on the human environment; therefore, an environmental impact statement is not required. EA No. CA-610-01-02 was prepared for a prior grazing decision remanded under Judge

Sweitzer's decision of August 24, 2001. BLM has reviewed that EA , along with the August 24, 2001 decision and the results of consultation, cooperation, and coordination with the affected permittee. BLM concludes that the existing information is relevant to this grazing decision and no further environmental analysis is required.

## **AUTHORITY**

The authority for this decision includes but is not limited to:

16 U.S.C. 1536(a)(1): "...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

43 CFR 4100.0-5: "...Consultation, cooperation, and coordination means interaction of the purpose of obtaining advice, or exchanging opinions on issues, plans, or management actions."

43 CFR 4110.3-2 (b): "When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices."

43 CFR 4110.3-3 (a): "After consultation , cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area,

and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4110.3-3 (b): “When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an imminent likelihood of significant resource damage, after consultation with, or reasonable attempt to consult with, affected permittees or lessees, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provision of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorize grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decision shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.”

43 CFR 4120.3-1 (c): “The authorized officer may require a permittee or lessee to maintain and/or modify range improvements on the public lands under §4130.3-2 of this title.”

43 CFR 4120.3-2 (a): “The Bureau of Land Management may enter into a cooperative range improvements or rangeland developments to achieve management or resource condition objectives. The cooperative range improvement agreement shall specify how the costs or labor, or both, shall be divided between the United States and cooperators(s).”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow

a specified time from receipt of notice to the alleged violator to show that there has been no violation or to make settlement under 4150.3"

43 CFR 4150.2(b): "Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer."

43 CFR 4180.1: "The authorized officer shall take appropriate action under subparts 4110, 4120, 4130, and 4160 of this part as soon as practicable but not later than the start of the next grazing year upon determining that existing grazing management needs to be modified to ensure that the following conditions exist."

(d): "Habitats are, or are making significant process toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed Categories 1 and 2, Federal candidate and other special status species."

## **RIGHT OF APPEAL**

This decision is effectively immediately. If you, or other individuals, believe you are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;

- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/

\_\_\_\_\_  
Tim Read  
Field Manager

cc: Tim Salt, District Manager  
Members of Interested Public

Enclosures:

Map



United States Department of the Interior  
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE  
2601 BARSTOW ROAD  
BARSTOW, CA 92311  
(760) 252-6000  
[www.ca.blm.gov/barstow](http://www.ca.blm.gov/barstow)



*IN REPLY REFER TO:*  
4160(P)  
CA-680.36

CERTIFIED MAIL NO. 70993220000132561949  
RETURN RECEIPT REQUESTED

9/7/01

**NOTICE OF FINAL GRAZING DECISION  
EFFECTIVE IMMEDIATELY**

**INTRODUCTION**

The Harper Lake Allotment, #08004, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046814, authorizes 600 Animal Unit Months (AUM)s of forage, equivalent to 50 head of cattle year-long on the Harper Lake Allotment. The allotment encompasses 26,314 total acres, 4,712 acres of private land, and 21,602 acres of BLM land. On the BLM administered land within the allotment, there are 16,482 acres of critical habitat for the desert tortoise and 5,120 acres of desert tortoise non-critical habitat within the allotment.

This final grazing decision, effectively immediately, for the Harper Lake Allotment, modifies the terms and conditions of your grazing permit, modifies the way cattle can use the allotment to protect desert tortoise and its critical habitat, establishes the period for this modification, and sets parameters for cattle use.

This final grazing decision, effective immediately, modifies the way your livestock use this

allotment to protect the desert tortoise and its habitat, enhances forage conditions, establishes the period for this modification, and sets parameters for livestock use.

## **BACKGROUND**

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species. Instead of litigating the case, the BLM entered into five stipulated agreements. On January 29, 2001, the stipulation respecting livestock grazing became effective.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations and reached agreement regarding interim actions to avoid litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the endangered and threatened species in accordance with 7(a) of the ESA and avoid making irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA.

On April 9, 2001, you were sent the Environmental Assessment # 610-01-02 (EA) and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. A final grazing decision was issued on May 15, 2001. On June 12, 2001, I received an appeal filed from

the Budd-Falen Law Offices, P.C. on your behalf. On June 15, 2001, Secretary of the Interior Gale Norton, took jurisdiction of the appeal and assigned it to Administrative Law Judge Harvey C. Sweitzer. Judge Sweitzer was directed to render a final written decision on behalf of the Department of the Interior by August 24, 2001. A hearing concerning the appealed decisions commenced on July 23, 2001 and lasted 13 days. Testimony during the hearing fully portrayed the issues under appeal and the subject of this decision.

### **Judge Sweitzer's Decision**

On August 24, 2001, BLM received Judge Sweitzer's decision (Blincoe, et. al. v. BLM, CA-690-01-01, CA-690-01-02, CA-690-01-03, CA-690-01-04, CA-680-01-03, CA-680-01-04, CA-680-01-05, CA-680-01-06, Decision, August 24, 2001). Judge Sweitzer concluded the following:

- (1) The EA and Decision Record are legally sufficient under NEPA;
- (2) The final grazing decisions are not arbitrary and capricious, are not an abuse of discretion, are supported upon a rational basis, and are otherwise in accordance with the law, except as provided in conclusion (4) below;
- (3) The final grazing decisions are consistent with section 7 of the ESA; and
- (4) BLM complied with the grazing regulations when it issued the final grazing decisions, except that BLM failed to comply with the requirement of consultation, cooperation, and coordination with the affected permittees and therefore the final grazing decisions are hereby set aside and the matters remanded to BLM for further action consistent with this Decision.

### **Additional Efforts to Engage in Consultation, Cooperation, and Coordination (CCC)**

On August 31, 2001, you and interested parties were sent a letter in accordance with Judge Sweitzer's decision and consistent with 43 CFR subparts 4110 and 4130 of the grazing regulations. That letter invited you to participate in a consultation, cooperation, and coordination (CCC) workshop on September 6 and 7, in Barstow, California. The purpose of the CCC workshop was to seek your advice and exchange views regarding implementation of the court approved stipulated agreement. In addition, BLM requested your advice and views on relevant issues and proposed management actions related to the grazing decision. Through your attorney, you indicated you were not available for the September 6 and 7 workshop but were available to meet at a later date. BLM also offered you the opportunity to submit written advice and comment. When we learned that you were not available to meet, through your attorney, we afforded you the opportunity to participate in a conference call on September 5, or 6, 2001. We did not receive advice or comments from you, nor did a conference call take place.

Beginning on August 31, 2001 the BLM also telephoned each lessee to determine whether they were available to participate in the meetings. On August 31, 2001, Barstow Field Office staff, Ms. O'Neill, phoned Mrs. Smith at home and left a message indicating that she wanted to talk

about initiating CCC for Harper Lake Allotment. Barstow Field Office Staff asked Ms. Smith to call back at her earliest convenience. Another Barstow Field Office staff member phoned Mrs. Smith on August 31, 2001, to inform her of the CCC workshop scheduled for September 6 and 7. Mrs. Smith inform Barstow Field Office staff that she was going to be out of town but thought she could make the meeting on September 6. She asked if any “real” input would occur at this meeting. On September 5, Barstow Field Office staff phoned and left a message reminding Mrs. Smith about the September 6 and 7 meeting. Mrs. Smith did not attend the September 6 or 7 meeting.

On August 31, 2001, after a number of telephone calls to counsel for lessees, the Office of the Regional Solicitor, on behalf of BLM, also wrote to the lessees’ counsel informing her of the September 6 and 7 meeting dates. Counsel for lessees wrote indicating that the vast majority of the lessees were not available on September 6 or 7, but that some could meet on September 13 and 14, 2001, and raised certain issues respecting the scope of CCC. On September 5, 2001, another letter was issued by the Regional Solicitor’s Office which addressed those issues raised by counsel for the lessees, and which encouraged their participation in CCC. In that same letter it was explained that BLM intended to issue decisions on September 7, 2001, which would be effective immediately based upon resource needs as documented in the grazing hearings and Judge Sweitzer’s decision. This determination of imminent likelihood was based upon the extensive administrative record compiled in the grazing hearings, and upon Judge Sweitzer’s decision of August 24, 2001. BLM telephoned each lessee to determine whether they were available to participate in the meetings. Some of the lessees indicated that they were available and might attend.

Staff from the California Department of Fish and Game and California State Lands Commission were contacted by my staff about issuing a final grazing decision on this allotment. We explained the need for the grazing decision and the requirement (43 CFR §4110.3-3(a) and §4130.3-3) to contact the State under these conditions. The CDFG stated they had earlier concerns about potential excess grazing use on portions of the allotment when areas are seasonally excluded from cattle use. After conveying there would be weekly field visits to the allotment, those concerns seemed alleviated. Staff from State Lands Commission appreciated the opportunity to contribute to this effort, but did not have any additional information to offer.

California District Manager Tim Salt telephoned San Bernardino County Supervisor Bill Postmus and invited him or a representative to the September 6 and 7 meeting. Tim Salt called Gerry Hillier, who had represented the County during the grazing hearings, to inform him about the scope of the September 6 and 7 workshop.

On August 31, 2001, after a series of conference calls with counsel for the Center (including the Center for Biological Diversity, PEER, and the Sierra Club), the Office of the Regional Solicitor issued a letter again inviting the Center to attend the meeting scheduled for September 6 and 7, in Barstow. Because the Center had initially stated it would not attend, it was also offered the opportunity to participate by telephone. The Center did not attend the meetings scheduled for

September 6 or 7, nor was a conference call held.

BLM was present in Barstow on September 6 and 7, in furtherance of its offer and attempt to meet with lessees, interested parties, the Center and county officials. Only County Supervisor Postmus' representative Bob Smith, and Gerry Hillier attended the meeting on September 6. BLM was ultimately informed by letter dated September 6, 2001, from lessees' counsel that none of the lessees would be able to attend those meetings.

### **FIELD MANAGER'S FINAL DECISION EFFECTIVE IMMEDIATELY**

With the above additional CCC, the analysis presented in the EA, the testimony presented and documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3(b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is my final decision, effective immediately in accordance with 4110.3-3(b), that livestock grazing is not authorized in the seasonal exclusion area which encompasses 16,482 acres of critical habitat for the desert tortoise. This area is shown on the enclosed map. In order to protect desert tortoise and its habitat, this decision shall modify the way your livestock use the Harper Lake Allotment by establishing the period for this modification, and setting parameters for livestock use. This area will be excluded from cattle grazing from March 1 to June 15 and from September 7 to November 7. Grazing use on the Harper Lake Allotment shall not exceed 17,033 animal (cattle) days for the year. The permitted use for this allotment shall be temporarily reduced to 560 AUMs, with a maximum stocking rate of 46 head of cattle. These modifications to grazing use on the Harper Lake Allotment shall be incorporated in to the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

If during the periods of exclusion cattle are found in the exclusion areas you will have 48 hours after notification to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Harper Lake Allotments will be denied. No temporary non-renewable grazing permits will be issued in habitat for the desert tortoise.

The seasonal exclusion will be in effect until the receipt of a Biological Opinion from the FWS that addresses the effects of grazing activities covered in the CDCA Plan on the Mojave population of the desert tortoise and the implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or on January 31, 2002 whichever is later. The Harper Lake Allotment is not within the NEMO and NECO planning area boundaries.

### **RATIONALE**

The imminent likelihood of significant resource damage for desert tortoise and its habitat as determined by the hearing record and reflected in Judge Sweitzer's decision, caused the BLM to make this decision immediately effective to meet the fall closure date, which begins September 7. The BLM made reasonable attempts at CCC within the constraints of the immediacy of the fall grazing season and the requirement of the settlement agreement that grazing not be authorized from September 7 through November 7. Because the fall and spring closures are of critical importance to desert tortoise biology and because cattle grazing impacts desert tortoise and its habitat, BLM determined that this decision should be effectively immediately.

### Decline of Desert Tortoise Populations

During the hearings conducted by Judge Sweitzer, July 23 through August 7, 2001, in Barstow, California, and in his August 24 decision, it became clear that continued grazing use posed an imminent likelihood of significant damage to desert tortoise and its habitat. Various desert tortoise experts testified as to the physiological needs of the desert tortoise, the deterioration and loss of its habitat, declines in various populations, and the factors which adversely affect the tortoise and its habitat. (Sweitzer Decision, 22) "The recent severe and catastrophic declines in desert tortoise populations in California signal a need for new and immediate action to reduce all sources of mortality and to stabilize populations." (Sweitzer Decision, 26)

At the hearing, all desert tortoise experts agreed that the tortoise's plight has worsened over the decade since it was listed and described findings from various surveys showing declines in tortoise throughout its range in California. The testimonies of Dr. Kristin Berry, a USGS wildlife biologist, and Edward LaRue, a BLM biologist, show a near total collapse of tortoise populations in the Mojave Desert. (Sweitzer Decision, 32)

Field work Dr. Berry supervised in spring 2001 indicated recent declines in Ivanpah Valley. She was unable to identify any moderate to high density, robust, stable or increasing California population of desert tortoises at that time. "The new declines in Fenner, Ward, and Chemehuevi valleys are new developments since 1994, when the Desert Tortoise Recovery Plan was published. Study sites exhibited population declines in the 1980's, such as Fremont Valley, the Desert Tortoise Research Natural Area, Fremont Peak, Kramer Hills, Lucerne Valley, and Johnson Valley." (Sweitzer Decision, 23) The Fremont Valley plot was resurveyed in spring 2001 and show marked declines in numbers since 1991. "Dr. Berry observed in a study plot in Chemehuevi that 'the decline between 1992 and 1999 \* \* \* was 84%'. A study plot near Goffs showed that 'in comparisons of gross numbers of registered tortoises, there has been a decline of 94-95% of the female tortoises of breeding size.' " (Sweitzer Decision, 32)

"The testimony of Mr. LaRue is equally grim". (Sweitzer Decision, 32) In 1984 there were 237 square miles of the West Mojave that were believed to support 250 tortoises or more per square mile. "By 1999 that number was down to 7 square miles. Mr. LaRue described a 'region-wide die off of tortoises [in the West Mojave] that is generally bounded by the Calico Mountains to the southeast, Goldstone to the northeast, eastern Superior Valley to the northwest, and the Mud

Hills to the southwest.’ ” (Sweitzer Decision, 32)

“Dr. Foreman observed that declines in tortoise populations have been severe in the far western Mojave, specifically the Fremont-Kramer Critical Habitat Unit and the western portion of the Superior-Cronese Critical Habitat Unit, and portions of the Chuckwalla Critical Habitat Unit. Large declines in Lucerne Valley and Johnson Valley have also occurred. Recently, sharp declines in the eastern desert, specifically Chemehuevi and Ward Valleys have been observed. Due to the small number of plots, population trends are not known everywhere. He concluded that declines are continuing in the West Mojave and southern desert and that large declines are now occurring in previously stable areas of the East Mojave.” (Sweitzer Decision, 32)

#### Affects of Livestock Grazing on Desert Tortoises

“Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats.” (Sweitzer Decision, 25) Impacts include “trampling of tortoises; trampling of or damage to cover sites; reduction in the thermal and canopy cover provided by shrubs; changes in composition of perennial and annual plants; creation of fragmented habitat, open spaces and cleared areas from wallows, bedding, watering, loading and unloading areas; attraction and concentration of predators (such as ravens) to livestock watering areas; crushing of tortoises on and off roads by watering trucks or other vehicles used to maintain livestock facilities and monitor livestock; reduction of key forage items available to tortoises whether through direct consumption of forage or by trampling of plants used for forage; contributions to the establishment and invasion of alien plant species; and damage to desert [microbiotic soil] crusts.” (Sweitzer Decision, 25)

Raymond Bransfield, a FWS biologist, described the effects of livestock grazing on the desert tortoise and its habitat. “A desert tortoise must consume its annual forage requirement during its active period, which can range from six weeks to five months out of the year (March to June and occasionally during September and October). If forage has not been produced or is of poor nutritive quality during this period, the opportunity for the desert tortoise to meet its nutritional needs cannot be met until the next year. Therefore, desert tortoises are highly dependent upon productive native plant communities and may be susceptible to increased mortality during poor years. Changes in perennial and native vegetation, including alteration of species composition and reduction in cover of shrubs and perennial grasses, are believed to be the result of long-term livestock grazing. The loss of cover can result in increased exposure to predators and decreased opportunities to use the shade of shrubs for thermoregulation. Native annual plants and perennial grasses are essential in meeting the nutritional needs of the desert tortoise. Nonnative plant species, such as red brome (*Bromus rubens*), filaree (*Erodium cicutarium*), and split grass (*Schismus arabicus*), have become widely established in the Mojave Desert. In some areas, these alien plants are often more common than native annual species. The disturbance of soils associated with livestock grazing likely promotes the spread of these non-native species. Abundant large herbivores can alter [microbiotic soil] crusts that are normally found in many areas of the desert and can disrupt normal germination of native species. Introduced annual

grasses remain in place after drying and create a fuel source sufficient to carry fire across large areas. Desert shrubs are not fire-adapted; therefore, once a large area has been burned, the shrubs are killed. This change further decreases the value of habitat for the desert tortoise. Because of its slow growth, the shrub component of the desert may take many decades to return to pre-fire conditions. . . Grazing animals can crush burrows and nests of desert tortoises and trample young desert tortoises. The degree and nature of impacts from cattle grazing are dependent upon the habitat type, grazing history, seasons of use, stocking rates, and density of the desert tortoise population.” (Sweitzer Decision, 30, 31)

### Seasonal Exclusion

“ The Decision Record and grazing decisions state that BLM took action in the form of the Proposed Action for several purposes: (1) to meet this § 7(a)(2) duty to ensure protection of the tortoise and its critical and non-critical habitat until BLM implements the applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable prudent measures to be identified in the biological opinion to be issued by FWS, (2) to avoid making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives to be identified during consultation under § 7(d), and (3) to contribute to the conservation of the species pursuant to § 7(a)(1). For the reasons set forth below, this decision concludes that the terms of the grazing decisions rationally further the legitimate objective of fulfilling the mandate of § 7(a)(2), as well as the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), and therefore are supported on a rational basis and are consistent with the ESA.” (Sweitzer Decision, 81)

Based on testimony at the hearing, Judge Sweitzer found support for the seasonal closures. “Doctors Berry and Morafka also testified to the negative impacts of cattle during the period coinciding with the fall exclusion period established in the grazing decisions. In addition to potential disruption of mating activity, which is only effective from late July to early October, there are potential impacts to vulnerable neonates which hatch during the fall:

[D]uring September and October tortoise hatchlings emerge from egg nests and disperse, typically 100-1000 ft across local landscapes, eventually selecting small rodent burrows for winter hibernation. During this period, the largest number of neonate tortoises are concentrated in the smallest of areas, at a time when they themselves are both smallest and physically most vulnerable to the crushing effects of cattle hoofs. These young tortoise are not only at their smallest, but their protective shells are least calcified, and their first burrows, those abandoned by small rodents, are most easily collapsed under the impacts of cattle “traffic”. Furthermore, such losses may be rarely recorded because juvenile tortoises would be killed underground in burrows indistinguishable from those of rodents during the first several months of their occupation by tortoises.” (Sweitzer Decision, 91 & 92)

“Dr. Morafka’s testimony highlights the importance of the spring seasonal exclusion period to

juvenile tortoises, but that period is important to adult tortoises too. Doctors Berry and Morafka testified that the benefits of the spring exclusion include better access to preferred forage providing more nutrition and energy to grow and produce eggs, avoidance of trampling of cover sites and eggs, and avoidance of disruption to nesting activities.” (Sweitzer Decision, 91)

Judge Sweitzer states “...the formulation of the exclusion area boundaries was based on the goals of minimizing the impact to any one livestock operator while maximizing the acreage of critical habitat protected. This balancing of interests is an appropriate exercise of BLM’s discretion, and the location of critical habitat is certainly data upon which BLM may reasonably rely to avoid adverse impacts to tortoise habitat and thus help maintain the status quo.” (Sweitzer Decision, 94)

“Non-critical habitat was reasonably included in the exclusion areas in an attempt to apportion the “pain” and leave each permittee with some prospect of continuing operation over the short time frame of the decisions. Also, protecting non-critical habitat assists in maintaining the status quo as well. Doctors Berry and Morafka and Mr. Bransfield all testified to the value of non-critical habitat. Non-critical habitat areas may contain healthy individuals necessary for repopulation of other areas with populations that have been temporarily decimated. They may promote gene flow from one area to another. Genetically diverse populations may exist there which are important to the species’ survival.” (Sweitzer Decision, 95)

“The caps on active permitted use are also rationally related to the legitimate management objectives of maintaining the status quo and thus protecting the tortoise against potentially greater use that might have occurred under lease terms of higher permitted use. The caps were reasonably based upon the average annual active use for the last three years for which BLM had available data: 1997, 1998, and 1999. As BLM personnel testified, this determination provides a measure of stability to the Appellants with respect to their actual use, while protecting the tortoise.” (Sweitzer Decision, 96)

“The grazing decisions also provided that if, during the seasonal exclusion periods, cattle are found in the exclusion areas, an additional day will be added to the period of exclusion for every day cattle are found inside the exclusion areas and the grazing permittee will have 48 hours after notification from BLM to remove them. If they are not removed within 48 hours, BLM will initiate trespass procedures.” (Sweitzer Decision, 96)

Based on the foregoing as well as additional information found in the decision, hearing record, and testimony, Judge Sweitzer concluded these “... decisions are rationally designed to maintain, as much as possible, the status quo for the desert tortoise in accordance with § 7(a)(2) pending completion of consultation with FWS on the CDCA Plan, and to further BLM’s management objectives regarding the protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants’ with the opportunity to continue their operations on the short term. To the extent that the decisions cause economic injury, that injury does not render the decisions unreasonable because, under statutory mandate, protection of the desert tortoise is paramount.” (Sweitzer Decision, 101).

Judge Sweitzer states: “In light of the foregoing lengthy discussion and recitation of evidence regarding the criticality of the spring and fall seasons to the tortoise and the likely effects of grazing on the tortoise during those seasons, no further discussion is warranted to justify holding the seasonal exclusion periods are supported by a rational basis.” (Sweitzer Decision, 94)

Information provided in testimony during the grazing hearing regarding desert tortoise declines and livestock grazing impacts to desert tortoise and its habitat provide the immediacy for this decision. This information includes, but is not limited to, Mr. LaRue’s recitation of desert tortoise declines between 1970 and 1999; Dr. Berry’s information respecting significant declines in East Mojave populations; and Dr. Morofka’s testimony relating to neonate and juvenile tortoise impacts from trampling by livestock.

### Finding of No Significant Impact

I have determined that this grazing decision would not result in significant environmental impacts on the human environment; therefore, an environmental impact statement is not required. EA No. CA-610-01-02 was prepared for a prior grazing decision remanded under Judge Sweitzer's decision of August 24, 2001. BLM has reviewed that EA , along with the August 24, 2001 decision and the results of consultation, cooperation, and coordination with the affected permittee. BLM concludes that the existing information is relevant to this grazing decision and no further environmental analysis is required.

### **AUTHORITY**

The authority for this decision includes but is not limited to:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this

section.”

43 CFR 4100.0-5: ...Consultation, cooperation, and coordination means interaction of the purpose of obtaining advice, or exchanging opinions on issues, plans, or management actions.

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4110.3-3 (b): “When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an imminent likelihood of significant resource damage, after consultation with, or reasonable attempt to consult with, affected permittees or lessors, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provision of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorize grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decision shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use

authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3.”

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.”

43 CFR 4180.1 (d): “Habitats are, or are making significant process toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed Categories 1 and 2, Federal candidate and other special status species.”

## **RIGHT OF APPEAL**

This decision is effectively immediately. If you, or other individuals, believe you are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

### **Standards for Obtaining a Stay**

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;

- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/ \_\_\_\_\_

Tim Read  
Field Manager

cc: Tim Salt, District Manager  
Members of Interested Public

Enclosures:

Map



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

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Needles, California 92363  
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email: ca690@ca.blm.gov

In Reply Refer To:  
4100(P)  
09007  
(CA.690.21)

CERTIFIED MAIL NO. 7000 0520 0024 9683 3887  
RETURN RECEIPT REQUESTED

9/7/01

### **NOTICE OF FINAL GRAZING DECISION EFFECTIVE IMMEDIATELY**

#### **INTRODUCTION**

The Horsethief Springs Allotment, #09007, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046907, authorizes 2,424 animal unit months (AUMs) or 202 cattle year long. The allotment encompasses 158,606 acres of private, State, and BLM (public) administered lands. Within the allotment, the BLM administers 150,140 acres of public land, of which 50,965 acres are desert tortoise non-critical habitat.

This final grazing decision, effective immediately, modifies the terms and conditions of your grazing permit, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, and establishes the period for this modification, and sets parameters for livestock use.

## BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species. Instead of litigating the case, the BLM entered into five stipulated agreements. On January 29, 2001, the stipulation respecting livestock grazing became effective.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations and reached agreement regarding interim actions to avoid litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the endangered and threatened species in accordance with 7(a) of the ESA and avoid making irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA.

On April 9, 2001, you were sent the Environmental Assessment # 610-01-02 (EA) and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. A final grazing decision was issued on May 15, 2001. On June 12, 2001, I received an appeal filed from the Budd-Falen Law Offices, P.C. on your behalf. On June 15, 2001, Secretary of the Interior Gale Norton took jurisdiction of the appeal and assigned it to Administrative Law Judge Harvey C. Sweitzer. Judge Sweitzer was directed to render a final written decision on behalf of the

Department of the Interior by August 24, 2001. A hearing concerning the appealed decisions commenced on July 23, 2001 and lasted 13 days. Testimony during the hearing fully portrayed the issues under appeal and the subject of this decision.

### **Judge Sweitzer's Decision**

On August 24, 2001, BLM received Judge Sweitzer's decision (Blincoe, et. al. v. BLM, CA-690-01-01, CA-690-01-02, CA-690-01-03, CA-690-01-04, CA-680-01-03, CA-680-01-04, CA-680-01-05, CA-680-01-06, Decision, August 24, 2001). Judge Sweitzer concluded the following:

- (1) The EA and Decision Record are legally sufficient under NEPA;
- (2) The final grazing decisions are not arbitrary and capricious, are not an abuse of discretion, are supported upon a rational basis, and are otherwise in accordance with the law, except as provided in conclusion (4) below;
- (3) The final grazing decisions are consistent with section 7 of the ESA; and
- (4) BLM complied with the grazing regulations when it issued the final grazing decisions, except that BLM failed to comply with the requirement of consultation, cooperation, and coordination with the affected permittees and therefore the final grazing decisions are hereby set aside and the matters remanded to BLM for further action consistent with this Decision.

### **Additional Efforts to Engage in Consultation, Cooperation, and Coordination (CCC)**

On August 31, 2001, you and interested parties were sent a letter in accordance with Judge Sweitzer's decision and consistent with 43 CFR subparts 4110 and 4130 of the grazing regulations. That letter invited you to participate in a consultation, cooperation, and coordination (CCC) workshop on September 6 and 7, in Barstow, California. The purpose of the CCC workshop was to seek your advice and exchange views regarding implementation of the court approved stipulated agreement. In addition, BLM requested your advice and views on relevant issues and proposed management actions related to the grazing decision. Through your attorney, you indicated you were not available for the September 6 and 7 workshop but were available to meet on September 13 and 14. BLM also offered you the opportunity to submit written advice and comment. When we learned that you were not available to meet, through your attorney, we afforded you the opportunity to participate in a conference call on September 5 or 6, 2001. We did not receive advice or comments from you, nor did a conference call take place.

Beginning on August 31, 2001 the BLM also telephoned each lessee to determine whether they were available to participate in the meetings. On August 31, 2001, Ms. Brady, Needles Field Office Manager, called Mr. Kemper about the meeting in Barstow September 6 and 7. He stated he did not feel that six days was enough time to prepare for the meeting, and he was concerned about whether all the ranchers could attend. He proposed alternative dates for the meeting. On September 4, 2001, Ms. Brady talked with Mr. Kemper about the proposed dates of September 13 and 14 for the meeting. On September 5, 2001, Ms. Brady asked Mr. Kemper again if he could attend the September 6 meeting, and he stated he could not make it due to his schedule. Mr. Kemper did not attend the September 6 and 7 meeting in Barstow.

On August 31, 2001, after a number of telephone calls to counsel for lessees, the Office of the Regional Solicitor, on behalf of BLM, also wrote to the lessees' counsel informing her of the September 6 and 7 meeting dates. Counsel for lessees wrote indicating that the vast majority of the lessees were not available on September 6 or 7, but that some could meet on September 13 and 14, 2001, and raised certain issues respecting the scope of CCC. On September 5, 2001, another letter was issued by the Regional Solicitor's Office which addressed those issues raised by counsel for the lessees, and which encouraged their participation in CCC. In that same letter it was explained that BLM intended to issue decisions on September 7, 2001, which would be effective immediately based upon resource needs as documented in the grazing hearings and Judge Sweitzer's decision. This determination of imminent likelihood was based upon the extensive administrative record compiled in the grazing hearings, and upon Judge Sweitzer's decision of August 24, 2001. BLM telephoned each lessee to determine whether they were available to participate in the meetings. Some of the lessees indicated that they were available and might attend.

Staff from the California Department of Fish and Game (CDFG) and California State Lands Commission were contacted by my staff about issuing a final grazing decision on this allotment. We explained the need for the grazing decision and the requirement (43 CFR §4110.3-3(a) and §4130.3-3) to contact the State under these conditions. The CDFG stated they had earlier concerns about potential excess grazing use on portions of the allotment when areas are seasonally excluded from cattle use. After conveying there would be weekly field visits to the allotment, those concerns seemed alleviated. Staff from State Lands Commission appreciated the opportunity to contribute to this effort, but did not have any additional information to offer.

California District Manager Tim Salt telephoned San Bernardino County Supervisor Bill Postmus and invited him or a representative to the September 6 and 7 meeting. Tim Salt called Gerry Hillier, who had represented the County during the grazing hearings, to inform him about the scope of the September 6 and 7 workshop.

On August 31, 2001, after a series of conference calls with counsel for the Center (including the Center for Biological Diversity, PEER, and the Sierra Club), the Office of the Regional Solicitor issued a letter again inviting the Center to attend the meeting scheduled for September 6 and 7, in Barstow. Because the Center had initially stated it would not attend, it was also offered the opportunity to participate by telephone. The Center did not attend the meetings scheduled for September 6 or 7, nor was a conference call held.

BLM was present in Barstow on September 6 and 7, in furtherance of its offer and attempt to meet with lessees, interested parties, the Center and county officials. Only County Supervisor Postmus' representative Bob Smith, and Gerry Hillier attended the meeting on September 6. BLM was ultimately informed by letter dated September 6, 2001, from lessees' counsel that none of the lessees would be able to attend those meetings.

## **FIELD MANAGER'S FINAL DECISION EFFECTIVE IMMEDIATELY**

With the above additional CCC, the analysis presented in the EA, the testimony presented and documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3(b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is my final decision, effective immediately in accordance with 4110.3-3(b), that livestock grazing is not authorized on approximately 47,581 acres of the 50,965 acres of desert tortoise non-critical habitat within the Horsethief Springs Allotment. This area will be excluded to cattle grazing from March 1 to June 15 and from September 7 to November 7. This area is shown on the enclosed map. In order to protect the desert tortoise and its habitat, this decision modifies the way livestock can use the Horsethief Springs Allotment. These modifications on the Horsethief Springs Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect.

If during the seasonal exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see authority section). Reduction in the number of animal days per year would occur when livestock are found a second time in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

This decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert bio-regional plan amendment, or January 31, 2002, whichever shall be later.

Applications received to graze during years of approved non-use on the Horsethief Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

## **RATIONALE**

The imminent likelihood of significant resource damage for desert tortoise and its habitat as determined by the hearing record and reflected in Judge Sweitzer's decision caused the BLM to make this decision immediately effective to meet the fall closure date, which begins September 7. The BLM made reasonable attempts at CCC within the constraints of the immediacy of the fall grazing season and the requirement of the settlement agreement that grazing not be authorized from September 7 through November 7. Because the fall and spring closures are of critical importance to desert tortoise biology and because cattle grazing impacts desert tortoise and its habitat, BLM determined that this decision should be effective immediately.

## Decline of Desert Tortoise Populations

During the hearings conducted by Judge Sweitzer, July 23 through August 7, 2001, in Barstow, California, and in his August 24 decision, it became clear that continued grazing use posed an imminent likelihood of significant damage to desert tortoise and its habitat. Various desert tortoise experts testified as to the physiological needs of the desert tortoise, the deterioration and loss of its habitat, declines in various populations, and the factors which adversely affect the tortoise and its habitat. (Sweitzer Decision, 22) “The recent severe and catastrophic declines in desert tortoise populations in California signal a need for new and immediate action to reduce all sources of mortality and to stabilize populations.” (Sweitzer Decision, 26)

At the hearing, all desert tortoise experts agreed that the tortoise’s plight has worsened over the decade since it was listed and described findings from various surveys showing declines in tortoise throughout its range in California. The testimonies of Dr. Kristin Berry, a USGS wildlife biologist, and Edward LaRue, a BLM biologist, show a near total collapse of tortoise populations in the Mojave Desert. (Sweitzer Decision, 32)

Field work Dr. Berry supervised in spring 2001 indicated recent declines in Ivanpah Valley. She was unable to identify any moderate to high density, robust, stable or increasing California population of desert tortoises at that time. “The new declines in Fenner, Ward, and Chemehuevi valleys are new developments since 1994, when the Desert Tortoise Recovery Plan was published. Study sites exhibited population declines in the 1980’s, such as Fremont Valley, the Desert Tortoise Research Natural Area, Fremont Peak, Kramer Hills, Lucerne Valley, and Johnson Valley.” (Sweitzer Decision, 23) The Fremont Valley plot was resurveyed in spring 2001 and show marked declines in numbers since 1991. “Dr. Berry observed in a study plot in Chemehuevi that ‘the decline between 1992 and 1999 \* \* \* was 84%’. A study plot near Goffs showed that ‘in comparisons of gross numbers of registered tortoises, there has been a decline of 94-95% of the female tortoises of breeding size.’ ” (Sweitzer Decision, 32)

“The testimony of Mr. LaRue is equally grim”. (Sweitzer Decision, 32) In 1984 there were 237 square miles of the West Mojave that were believed to support 250 tortoises or more per square mile. “By 1999 that number was down to 7 square miles. Mr. LaRue described a ‘region-wide die off of tortoises [in the West Mojave] that is generally bounded by the Calico Mountains to the southeast, Goldstone to the northeast, eastern Superior Valley to the northwest, and the Mud Hills to the southwest.’ ” (Sweitzer Decision, 32)

“Dr. Foreman observed that declines in tortoise populations have been severe in the far western Mojave, specifically the Fremont-Kramer Critical Habitat Unit and the western portion of the Superior-Cronese Critical Habitat Unit, and portions of the Chuckwalla Critical Habitat Unit. Large declines in Lucerne Valley and Johnson Valley have also occurred. Recently, sharp declines in the eastern desert, specifically Chemehuevi and Ward Valleys have been observed. Due to the small number of plots, population trends are not known everywhere. He concluded that declines are continuing in the West Mojave and southern desert and that large declines are now occurring in previously stable areas of the East Mojave.” (Sweitzer Decision, 32)

## Affects of Livestock Grazing on Desert Tortoises

“Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats.” (Sweitzer Decision, 25) Impacts include “trampling of tortoises; trampling of or damage to cover sites; reduction in the thermal and canopy cover provided by shrubs; changes in composition of perennial and annual plants; creation of fragmented habitat, open spaces and cleared areas from wallows, bedding, watering, loading and unloading areas; attraction and concentration of predators (such as ravens) to livestock watering areas; crushing of tortoises on and off roads by watering trucks or other vehicles used to maintain livestock facilities and monitor livestock; reduction of key forage items available to tortoises whether through direct consumption of forage or by trampling of plants used for forage; contributions to the establishment and invasion of alien plant species; and damage to desert [microbiotic soil] crusts.” (Sweitzer Decision, 25)

Raymond Bransfield, a FWS biologist, described the effects of livestock grazing on the desert tortoise and its habitat. “A desert tortoise must consume its annual forage requirement during its active period, which can range from six weeks to five months out of the year (March to June and occasionally during September and October). If forage has not been produced or is of poor nutritive quality during this period, the opportunity for the desert tortoise to meet its nutritional needs cannot be met until the next year. Therefore, desert tortoises are highly dependent upon productive native plant communities and may be susceptible to increased mortality during poor years. Changes in perennial and native vegetation, including alteration of species composition and reduction in cover of shrubs and perennial grasses, are believed to be the result of long-term livestock grazing. The loss of cover can result in increased exposure to predators and decreased opportunities to use the shade of shrubs for thermoregulation. Native annual plants and perennial grasses are essential in meeting the nutritional needs of the desert tortoise. Nonnative plant species, such as red brome (*Bromus rubens*), filaree (*Erodium cicutarium*), and split grass (*Schismus arabicus*), have become widely established in the Mojave Desert. In some areas, these alien plants are often more common than native annual species. The disturbance of soils associated with livestock grazing likely promotes the spread of these non-native species. Abundant large herbivores can alter [microbiotic soil] crusts that are normally found in many areas of the desert and can disrupt normal germination of native species. Introduced annual grasses remain in place after drying and create a fuel source sufficient to carry fire across large areas. Desert shrubs are not fire-adapted; therefore, once a large area has been burned, the shrubs are killed. This change further decreases the value of habitat for the desert tortoise. Because of its slow growth, the shrub component of the desert may take many decades to return to pre-fire conditions. . . Grazing animals can crush burrows and nests of desert tortoises and trample young desert tortoises. The degree and nature of impacts from cattle grazing are dependent upon the habitat type, grazing history, seasons of use, stocking rates, and density of the desert tortoise population.” (Sweitzer Decision, 30, 31)

## Seasonal Exclusion

“The Decision Record and grazing decisions state that BLM took action in the form of the Proposed Action for several purposes: (1) to meet this § 7(a)(2) duty to ensure protection of the

tortoise and its critical and non-critical habitat until BLM implements the applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable prudent measures to be identified in the biological opinion to be issued by FWS, (2) to avoid making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives to be identified during consultation under § 7(d), and (3) to contribute to the conservation of the species pursuant to § 7(a)(1). For the reasons set forth below, this decision concludes that the terms of the grazing decisions rationally further the legitimate objective of fulfilling the mandate of § 7(a)(2), as well as the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), and therefore are supported on a rational basis and are consistent with the ESA.” (Sweitzer Decision, 81)

Based on testimony at the hearing, Judge Sweitzer found support for the seasonal closures. “Doctors Berry and Morafka also testified to the negative impacts of cattle during the period coinciding with the fall exclusion period established in the grazing decisions. In addition to potential disruption of mating activity, which is only effective from late July to early October, there are potential impacts to vulnerable neonates which hatch during the fall:

[D]uring September and October tortoise hatchlings emerge from egg nests and disperse, typically 100-1000 ft across local landscapes, eventually selecting small rodent burrows for winter hibernation. During this period, the largest number of neonate tortoises are concentrated in the smallest of areas, at a time when they themselves are both smallest and physically most vulnerable to the crushing effects of cattle hoofs. These young tortoise are not only at their smallest, but their protective shells are least calcified, and their first burrows, those abandoned by small rodents, are most easily collapsed under the impacts of cattle “traffic”. Furthermore, such losses may be rarely recorded because juvenile tortoises would be killed underground in burrows indistinguishable from those of rodents during the first several months of their occupation by tortoises.” (Sweitzer Decision, 91 & 92)

“Dr. Morafka’s testimony highlights the importance of the spring seasonal exclusion period to juvenile tortoises, but that period is important to adult tortoises too. Doctors Berry and Morafka testified that the benefits of the spring exclusion include better access to preferred forage providing more nutrition and energy to grow and produce eggs, avoidance of trampling of cover sites and eggs, and avoidance of disruption to nesting activities.” (Sweitzer Decision, 91)

Judge Sweitzer states “...the formulation of the exclusion area boundaries was based on the goals of minimizing the impact to any one livestock operator while maximizing the acreage of critical habitat protected. This balancing of interests is an appropriate exercise of BLM’s discretion, and the location of critical habitat is certainly data upon which BLM may reasonably rely to avoid adverse impacts to tortoise habitat and thus help maintain the status quo.” (Sweitzer Decision, 94)

“Non-critical habitat was reasonably included in the exclusion areas in an attempt to apportion the “pain” and leave each permittee with some prospect of continuing operation over the short time frame of the decisions. Also, protecting non-critical habitat assists in maintaining the status

quo as well. Doctors Berry and Morafka and Mr. Bransfield all testified to the value of non-critical habitat. Non-critical habitat areas may contain healthy individuals necessary for repopulation of other areas with populations that have been temporarily decimated. They may promote gene flow from one area to another. Genetically diverse populations may exist there which are important to the species' survival." (Sweitzer Decision, 95)

"The caps on active permitted use are also rationally related to the legitimate management objectives of maintaining the status quo and thus protecting the tortoise against potentially greater use that might have occurred under lease terms of higher permitted use. The caps were reasonably based upon the average annual active use for the last three years for which BLM had available data: 1997, 1998, and 1999. As BLM personnel testified, this determination provides a measure of stability to the Appellants with respect to their actual use, while protecting the tortoise." (Sweitzer Decision, 96)

"The grazing decisions also provided that if, during the seasonal exclusion periods, cattle are found in the exclusion areas, an additional day will be added to the period of exclusion for every day cattle are found inside the exclusion areas and the grazing permittee will have 48 hours after notification from BLM to remove them. If they are not removed within 48 hours, BLM will initiate trespass procedures." (Sweitzer Decision, 96)

Based on the foregoing as well as additional information found in the decision, hearing record, and testimony, Judge Sweitzer concluded these "... decisions are rationally designed to maintain, as much as possible, the status quo for the desert tortoise in accordance with § 7(a)(2) pending completion of consultation with FWS on the CDCA Plan, and to further BLM's management objectives regarding the protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants' with the opportunity to continue their operations on the short term. To the extent that the decisions cause economic injury, that injury does not render the decisions unreasonable because, under statutory mandate, protection of the desert tortoise is paramount." (Sweitzer Decision, 101).

Judge Sweitzer states: "In light of the foregoing lengthy discussion and recitation of evidence regarding the criticality of the spring and fall seasons to the tortoise and the likely effects of grazing on the tortoise during those seasons, no further discussion is warranted to justify holding the seasonal exclusion periods are supported by a rational basis." (Sweitzer Decision, 94)

Information provided in testimony during the grazing hearing regarding desert tortoise declines and livestock grazing impacts to desert tortoise and its habitat provide the immediacy for this decision. This information includes, but is not limited to, Mr. LaRue's recitation of desert tortoise declines between 1970 and 1999; Dr. Berry's information respecting significant declines in East Mojave populations; and Dr. Morofka's testimony relating to neonate and juvenile tortoise impacts from trampling by livestock.

#### Finding of No Significant Impact

I have determined that this grazing decision will not result in significant environmental impacts

on the human environment; therefore, an environmental impact statement is not required. EA No. CA-610-01-02 was prepared for a prior grazing decision remanded under Judge Sweitzer's decision of August 24, 2001. BLM has reviewed that EA , along with the August 24, 2001 decision and the results of consultation, cooperation, and coordination with the affected permittee. BLM concludes that the existing information is relevant to this grazing decision and no further environmental analysis is required.

### **AUTHORITY**

The authority for this decision includes but is not limited to:

16 U.S.C. 1536(a)(1): "...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title."

16 U.S.C. 1536(a)(2): "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

16 U.S.C. 1536(d): "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

43 CFR 4100.0-5: "...Consultation, cooperation, and coordination means interaction of the purpose of obtaining advice, or exchanging opinions on issues, plans, or management actions.

4110.3-3 (a): "After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section."

43 CFR 4110.3-3 (b): "When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an

imminent likelihood of significant resource damage, after consultation with, or reasonable attempt to consult with, affected permittees or lessees, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provision of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorize grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decision shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 b (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice ro the alleged violator to show that there has been no violation or to make settlement under 4150.3

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.

43 CFR 4180.1 (d): “Habitats are, or are making significant process toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed Categories 1 and 2, Federal candidate and other special status species.”

## **RIGHT OF APPEAL**

This decision is effective immediately. If you, or other individuals, believe you are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the

Needles Field Office, 101 West Spikes Road, Needles, CA 92363 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/ \_\_\_\_\_

Molly Brady  
Needles Field Office Manager

cc: Tim Salt, District Manager  
Members of Interested Public

Enclosures:  
Map



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

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CERTIFIED MAIL NO.  
RETURN RECEIPT REQUESTED

### **NOTICE OF FINAL GRAZING DECISION EFFECTIVE IMMEDIATELY**

9/7/01

#### **INTRODUCTION**

The Lazy Daisy Allotment, #9076, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046976, authorizes 266 cattle year long, or 3,192 animal unit months (AUMs) on the Lazy Daisy Allotment. The allotment encompasses 332,886 acres, including private, State lands, and BLM (public) lands. Public land administered by the BLM totals 325,686 acres. Within the Lazy Daisy Allotment, there are 260,025 acres of desert tortoise critical habitat and 72,861 acres of non-critical habitat.

This final grazing decision for the Lazy Daisy Allotment modifies the terms and conditions of your grazing permit, modifies the way cattle can use the allotment to protect desert tortoise and its critical habitat, establishes the period for this modification, and sets parameters for cattle use.

## BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species. Instead of litigating the case, the BLM entered into five stipulated agreements. On January 29, 2001, the stipulation respecting livestock grazing became effective.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations and reached agreement regarding interim actions to avoid litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the endangered and threatened species in accordance with 7(a) of the ESA and avoid making irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA.

On April 9, 2001, you were sent the Environmental Assessment # 610-01-02 (EA) and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. A final grazing decision was issued on May 15, 2001. On June 12, 2001, I received an appeal filed from the Budd-Falen Law Offices, P.C. on your behalf. On June 15, 2001, Secretary of the Interior Gale Norton took jurisdiction of the appeal and assigned it to Administrative Law Judge Harvey C. Sweitzer. Judge Sweitzer was directed to render a final written decision on behalf of the Department of the Interior by August 24, 2001. A hearing concerning the appealed decisions

commenced on July 23, 2001 and lasted 13 days. Testimony during the hearing fully portrayed the issues under appeal and the subject of this decision.

### **Judge Sweitzer's Decision**

On August 24, 2001, BLM received Judge Sweitzer's decision (Blincoe, et. al. v. BLM, CA-690-01-01, CA-690-01-02, CA-690-01-03, CA-690-01-04, CA-680-01-03, CA-680-01-04, CA-680-01-05, CA-680-01-06, Decision, August 24, 2001). Judge Sweitzer concluded the following:

- (1) The EA and Decision Record are legally sufficient under NEPA;
- (2) The final grazing decisions are not arbitrary and capricious, are not an abuse of discretion, are supported upon a rational basis, and are otherwise in accordance with the law, except as provided in conclusion (4) below;
- (3) The final grazing decisions are consistent with section 7 of the ESA; and
- (4) BLM complied with the grazing regulations when it issued the final grazing decisions, except that BLM failed to comply with the requirement of consultation, cooperation, and coordination with the affected permittees and therefore the final grazing decisions are hereby set aside and the matters remanded to BLM for further action consistent with this Decision.

### **Additional Efforts to Engage in Consultation, Cooperation, and Coordination (CCC)**

On August 31, 2001, you and interested parties were sent a letter in accordance with Judge Sweitzer's decision and consistent with 43 CFR subparts 4110 and 4130 of the grazing regulations. That letter invited you to participate in a consultation, cooperation, and coordination (CCC) workshop on September 6 and 7, in Barstow, California. The purpose of the CCC workshop was to seek your advice and exchange views regarding implementation of the court approved stipulated agreement. In addition, BLM requested your advice and views on relevant issues and proposed management actions related to the grazing decision. Through your attorney, you indicated you were not available for the September 6 and 7 workshop but would be available at a later date. BLM also offered you the opportunity to submit written advice and comment. When we learned that you were not available to meet, through your attorney, we afforded you the opportunity to participate in a conference call on September 5 or 6, 2001. We did not receive advice or comments from you, nor did a conference call take place.

Beginning on August 31, 2001, the BLM also telephoned each lessee to determine whether they were available to participate in the meetings. After receiving the letter, Milton Blair contacted the Needles Field Office and stated he was willing to meet any time or place. On September 5, 2001, Bernice McProud, Needles Field Office, Rangeland Management Specialist contacted Mr. Blair by phone to arrange a meeting out on the Lazy Daisy Allotment. Mr. Blair was agreeable and a tentative date and time was set. Two more conversations were held the same day to change the date and time of the meeting. In one conversation Mr. Blair stated that his counsel had recently advised him not to meet or talk about the matter. He said he might be able to meet and talk in a couple of days, however. Mr. Blair did not attend the September 6 or 7 meeting.

On August 31, 2001, after a number of telephone calls to counsel for lessees, the Office of the Regional Solicitor, on behalf of BLM, also wrote to the lessees' counsel informing her of the September 6 and 7 meeting dates. Counsel for lessees wrote indicating that the vast majority of the lessees were not available on September 6 or 7, but that some could meet on September 13 and 14, 2001, and raised certain issues respecting the scope of CCC. On September 5, 2001, another letter was issued by the Regional Solicitor's Office which addressed those issues raised by counsel for the lessees, and which encouraged their participation in CCC. In that same letter it was explained that BLM intended to issue decisions on September 7, 2001, which would be effective immediately based upon resource needs as documented in the grazing hearings and Judge Sweitzer's decision. This determination of imminent likelihood was based upon the extensive administrative record compiled in the grazing hearings, and upon Judge Sweitzer's decision of August 24, 2001. BLM telephoned each lessee to determine whether they were available to participate in the meetings. Some of the lessees indicated that they were available and might attend.

Staff from the California Department of Fish and Game (CDFG) and California State Lands Commission were contacted by my staff about issuing a final grazing decision on this allotment. We explained the need for the grazing decision and the requirement (43 CFR §4110.3-3(a) and §4130.3-3) to contact the State under these conditions. The CDFG stated they had earlier concerns about potential excess grazing use on portions of the allotment when areas are seasonally excluded from cattle use. After conveying there would be weekly field visits to the allotment, those concerns seemed alleviated. Staff from State Lands Commission appreciated the opportunity to contribute to this effort, but did not have any additional information to offer.

California District Manager Tim Salt telephoned San Bernardino County Supervisor Bill Postmus and invited him or a representative to the September 6 and 7 meeting. Tim Salt called Gerry Hillier, who had represented the County during the grazing hearings, to inform him about the scope of the September 6 and 7 workshop.

On August 31, 2001, after a series of conference calls with counsel for the Center (including the Center for Biological Diversity, PEER, and the Sierra Club), the Office of the Regional Solicitor issued a letter again inviting the Center to attend the meeting scheduled for September 6 and 7, in Barstow. Because the Center had initially stated it would not attend, it was also offered the opportunity to participate by telephone. The Center did not attend the meetings scheduled for September 6 or 7, nor was a conference call held.

BLM was present in Barstow on September 6 and 7, in furtherance of its offer and attempt to meet with lessees, interested parties, the Center and county officials. Only County Supervisor Postmus' representative Bob Smith, and Gerry Hillier attended the meeting on September 6. BLM was ultimately informed by letter dated September 6, 2001, from lessees' counsel that none of the lessees would be able to attend those meetings.

#### **FIELD MANAGER'S FINAL DECISION EFFECTIVE IMMEDIATELY**

With the above additional CCC, the analysis presented in the EA, the testimony presented and documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his

decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3(b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is my final decision, effective immediately in accordance with 4110.3-3(b), that livestock grazing is not authorized in the area of exclusion, which encompasses 108,020 acres of the 260,025 acres critical habitat for the desert tortoise. This area is shown on the enclosed map. This area will be closed to cattle grazing from March 1 to June 15 and from September 7 to November 7. Grazing use on the Lazy Daisy Allotment shall not exceed 1,300 animal (cattle) days for the year. On order to protect the desert tortoise and its habitat, these modifications on the Lazy Daisy Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect.

If, during the total exclusion, cattle are found in the exclusion area, you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see Authority section). Reduction in the number of animal days per year would occur when livestock are found a second time in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

This final grazing decision will be effective until either receipt by the BLM of the biological opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Colorado Desert (NECO) bio-regional plan amendment or January 31, 2002, whichever shall be later.

Applications received to graze during years of approved non-use on the Lazy Daisy Allotment Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

In the Lazy Daisy Allotment, grazing use of available temporary non-renewable perennial forage shall not occur. My authority to modify current grazing practices and reduce permitted use is contained in 43 CFR 4110.3-2 (b) and 4130.3-3 (a).

## **RATIONALE**

The imminent likelihood of significant resource damage for desert tortoise and its habitat as determined by the hearing record and reflected in Judge Sweitzer's decision caused the BLM to make this decision immediately effective to meet the fall closure date, which begins September 7. The BLM made reasonable attempts at CCC within the constraints of the immediacy of the fall grazing season and the requirement of the settlement agreement that grazing not be authorized from September 7 through November 7. Because the fall and spring closures are of critical importance to desert tortoise biology and because cattle grazing impacts desert tortoise and its habitat, BLM determined that this decision should be effective immediately.

## Decline of Desert Tortoise Populations

During the hearings conducted by Judge Sweitzer, July 23 through August 7, 2001, in Barstow, California, and in his August 24 decision, it became clear that continued grazing use posed an imminent likelihood of significant damage to desert tortoise and its habitat. Various desert tortoise experts testified as to the physiological needs of the desert tortoise, the deterioration and loss of its habitat, declines in various populations, and the factors which adversely affect the tortoise and its habitat. (Sweitzer Decision, 22) “The recent severe and catastrophic declines in desert tortoise populations in California signal a need for new and immediate action to reduce all sources of mortality and to stabilize populations.” (Sweitzer Decision, 26)

At the hearing, all desert tortoise experts agreed that the tortoise’s plight has worsened over the decade since it was listed and described findings from various surveys showing declines in tortoise throughout its range in California. The testimonies of Dr. Kristin Berry, a USGS wildlife biologist, and Edward LaRue, a BLM biologist, show a near total collapse of tortoise populations in the Mojave Desert. (Sweitzer Decision, 32)

Field work Dr. Berry supervised in spring 2001 indicated recent declines in Ivanpah Valley. She was unable to identify any moderate to high density, robust, stable or increasing California population of desert tortoises at that time. “The new declines in Fenner, Ward, and Chemehuevi valleys are new developments since 1994, when the Desert Tortoise Recovery Plan was published. Study sites exhibited population declines in the 1980’s, such as Fremont Valley, the Desert Tortoise Research Natural Area, Fremont Peak, Kramer Hills, Lucerne Valley, and Johnson Valley.” (Sweitzer Decision, 23) The Fremont Valley plot was resurveyed in spring 2001 and show marked declines in numbers since 1991. “Dr. Berry observed in a study plot in Chemehuevi that ‘the decline between 1992 and 1999 \* \* \* was 84%’. A study plot near Goffs showed that ‘in comparisons of gross numbers of registered tortoises, there has been a decline of 94-95% of the female tortoises of breeding size.’ ” (Sweitzer Decision, 32)

“The testimony of Mr. LaRue is equally grim”. (Sweitzer Decision, 32) In 1984 there were 237 square miles of the West Mojave that were believed to support 250 tortoises or more per square mile. “By 1999 that number was down to 7 square miles. Mr. LaRue described a ‘region-wide die off of tortoises [in the West Mojave] that is generally bounded by the Calico Mountains to the southeast, Goldstone to the northeast, eastern Superior Valley to the northwest, and the Mud Hills to the southwest.’ ” (Sweitzer Decision, 32)

“Dr. Foreman observed that declines in tortoise populations have been severe in the far western Mojave, specifically the Fremont-Kramer Critical Habitat Unit and the western portion of the Superior-Cronese Critical Habitat Unit, and portions of the Chuckwalla Critical Habitat Unit. Large declines in Lucerne Valley and Johnson Valley have also occurred. Recently, sharp declines in the eastern desert, specifically Chemehuevi and Ward Valleys have been observed. Due to the small number of plots, population trends are not known everywhere. He concluded that declines are continuing in the West Mojave and southern desert and that large declines are now occurring in previously stable areas of the East Mojave.” (Sweitzer Decision, 32)

## Effects of Livestock Grazing on Desert Tortoises

“Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats.” (Sweitzer Decision, 25) Impacts include “trampling of tortoises; trampling of or damage to cover sites; reduction in the thermal and canopy cover provided by shrubs; changes in composition of perennial and annual plants; creation of fragmented habitat, open spaces and cleared areas from wallows, bedding, watering, loading and unloading areas; attraction and concentration of predators (such as ravens) to livestock watering areas; crushing of tortoises on and off roads by watering trucks or other vehicles used to maintain livestock facilities and monitor livestock; reduction of key forage items available to tortoises whether through direct consumption of forage or by trampling of plants used for forage; contributions to the establishment and invasion of alien plant species; and damage to desert [microbiotic soil] crusts.” (Sweitzer Decision, 25)

Raymond Bransfield, a FWS biologist, described the effects of livestock grazing on the desert tortoise and its habitat. “A desert tortoise must consume its annual forage requirement during its active period, which can range from six weeks to five months out of the year (March to June and occasionally during September and October). If forage has not been produced or is of poor nutritive quality during this period, the opportunity for the desert tortoise to meet its nutritional needs cannot be met until the next year. Therefore, desert tortoises are highly dependent upon productive native plant communities and may be susceptible to increased mortality during poor years. Changes in perennial and native vegetation, including alteration of species composition and reduction in cover of shrubs and perennial grasses, are believed to be the result of long-term livestock grazing. The loss of cover can result in increased exposure to predators and decreased opportunities to use the shade of shrubs for thermoregulation. Native annual plants and perennial grasses are essential in meeting the nutritional needs of the desert tortoise. Nonnative plant species, such as red brome (*Bromus rubens*), filaree (*Erodium cicutarium*), and split grass (*Schismus arabicus*), have become widely established in the Mojave Desert. In some areas, these alien plants are often more common than native annual species. The disturbance of soils associated with livestock grazing likely promotes the spread of these non-native species. Abundant large herbivores can alter [microbiotic soil] crusts that are normally found in many areas of the desert and can disrupt normal germination of native species. Introduced annual grasses remain in place after drying and create a fuel source sufficient to carry fire across large areas. Desert shrubs are not fire-adapted; therefore, once a large area has been burned, the shrubs are killed. This change further decreases the value of habitat for the desert tortoise. Because of its slow growth, the shrub component of the desert may take many decades to return to pre-fire conditions. . . Grazing animals can crush burrows and nests of desert tortoises and trample young desert tortoises. The degree and nature of impacts from cattle grazing are dependent upon the habitat type, grazing history, seasons of use, stocking rates, and density of the desert tortoise population.” (Sweitzer Decision, 30, 31)

## Seasonal Exclusion

“ The Decision Record and grazing decisions state that BLM took action in the form of the Proposed Action for several purposes: (1) to meet this § 7(a)(2) duty to ensure protection of the tortoise and its critical and non-critical habitat until BLM implements the applicable terms and

conditions, reasonable and prudent alternatives, and/or reasonable prudent measures to be identified in the biological opinion to be issued by FWS, (2) to avoid making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives to be identified during consultation under § 7(d), and (3) to contribute to the conservation of the species pursuant to § 7(a)(1). For the reasons set forth below, this decision concludes that the terms of the grazing decisions rationally further the legitimate objective of fulfilling the mandate of § 7(a)(2), as well as the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), and therefore are supported on a rational basis and are consistent with the ESA.” (Sweitzer Decision, 81)

Based on testimony at the hearing, Judge Sweitzer found support for the seasonal closures. “Doctors Berry and Morafka also testified to the negative impacts of cattle during the period coinciding with the fall exclusion period established in the grazing decisions. In addition to potential disruption of mating activity, which is only effective from late July to early October, there are potential impacts to vulnerable neonates which hatch during the fall:

[D]uring September and October tortoise hatchlings emerge from egg nests and disperse, typically 100-1000 ft across local landscapes, eventually selecting small rodent burrows for winter hibernation. During this period, the largest number of neonate tortoises are concentrated in the smallest of areas, at a time when they themselves are both smallest and physically most vulnerable to the crushing effects of cattle hoofs. These young tortoise are not only at their smallest, but their protective shells are least calcified, and their first burrows, those abandoned by small rodents, are most easily collapsed under the impacts of cattle “traffic”. Furthermore, such losses may be rarely recorded because juvenile tortoises would be killed underground in burrows indistinguishable from those of rodents during the first several months of their occupation by tortoises.” (Sweitzer Decision, 91 & 92)

“Dr. Morafka’s testimony highlights the importance of the spring seasonal exclusion period to juvenile tortoises, but that period is important to adult tortoises too. Doctors Berry and Morafka testified that the benefits of the spring exclusion include better access to preferred forage providing more nutrition and energy to grow and produce eggs, avoidance of trampling of cover sites and eggs, and avoidance of disruption to nesting activities.” (Sweitzer Decision, 91)

Judge Sweitzer states “...the formulation of the exclusion area boundaries was based on the goals of minimizing the impact to any one livestock operator while maximizing the acreage of critical habitat protected. This balancing of interests is an appropriate exercise of BLM’s discretion, and the location of critical habitat is certainly data upon which BLM may reasonably rely to avoid adverse impacts to tortoise habitat and thus help maintain the status quo.” (Sweitzer Decision, 94)

“Non-critical habitat was reasonably included in the exclusion areas in an attempt to apportion the “pain” and leave each permittee with some prospect of continuing operation over the short time frame of the decisions. Also, protecting non-critical habitat assists in maintaining the status quo as well. Doctors Berry and Morafka and Mr. Bransfield all testified to the value of non-critical habitat. Non-critical habitat areas may contain healthy individuals necessary for

repopulation of other areas with populations that have been temporarily decimated. They may promote gene flow from one area to another. Genetically diverse populations may exist there which are important to the species' survival.” (Sweitzer Decision, 95)

“The caps on active permitted use are also rationally related to the legitimate management objectives of maintaining the status quo and thus protecting the tortoise against potentially greater use that might have occurred under lease terms of higher permitted use. The caps were reasonably based upon the average annual active use for the last three years for which BLM had available data: 1997, 1998, and 1999. As BLM personnel testified, this determination provides a measure of stability to the Appellants with respect to their actual use, while protecting the tortoise.” (Sweitzer Decision, 96)

“The grazing decisions also provided that if, during the seasonal exclusion periods, cattle are found in the exclusion areas, an additional day will be added to the period of exclusion for every day cattle are found inside the exclusion areas and the grazing permittee will have 48 hours after notification from BLM to remove them. If they are not removed within 48 hours, BLM will initiate trespass procedures.” (Sweitzer Decision, 96)

Based on the foregoing as well as additional information found in the decision, hearing record, and testimony, Judge Sweitzer concluded these “... decisions are rationally designed to maintain, as much as possible, the status quo for the desert tortoise in accordance with § 7(a)(2) pending completion of consultation with FWS on the CDCA Plan, and to further BLM’s management objectives regarding the protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants’ with the opportunity to continue their operations on the short term. To the extent that the decisions cause economic injury, that injury does not render the decisions unreasonable because, under statutory mandate, protection of the desert tortoise is paramount.” (Sweitzer Decision, 101).

Judge Sweitzer states: “In light of the foregoing lengthy discussion and recitation of evidence regarding the criticality of the spring and fall seasons to the tortoise and the likely effects of grazing on the tortoise during those seasons, no further discussion is warranted to justify holding the seasonal exclusion periods are supported by a rational basis.” (Sweitzer Decision, 94)

Information provided in testimony during the grazing hearing regarding desert tortoise declines and livestock grazing impacts to desert tortoise and its habitat provide the immediacy for this decision. This information includes, but is not limited to, Mr. LaRue’s recitation of desert tortoise declines between 1970 and 1999; Dr. Berry’s information respecting significant declines in East Mojave populations; and Dr. Morofka’s testimony relating to neonate and juvenile tortoise impacts from trampling by livestock.

### Finding of No Significant Impact

I have determined that this grazing decision will not result in significant environmental impacts on the human environment; therefore, an environmental impact statement is not required. EA No. CA-610-01-02 was prepared for a prior grazing decision remanded under Judge Sweitzer's decision of August 24, 2001. BLM has reviewed that EA , along with the August 24, 2001

decision and the results of consultation, cooperation, and coordination with the affected permittee. BLM concludes that the existing information is relevant to this grazing decision and no further environmental analysis is required.

### **AUTHORITY**

The authority for this decision includes but is not limited to:

16 U.S.C. 1536(a)(1): “...All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4100.0-5: ...Consultation, cooperation, and coordination means interaction of the purpose of obtaining advice, or exchanging opinions on issues, plans, or management actions.

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4110.3-3 (b): “When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an imminent likelihood of significant resource damage, after consultation with, or reasonable attempt to consult with, affected permittees or lessors, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or

modify authorized grazing use notwithstanding the provision of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorize grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decision shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice ro the alleged violator to show that there has been no violation or to make settlement under 4150.3

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.

43 CFR 4150.2(d): “The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

43 CFR 4180.1 (d): “Habitats are, or are making significant process toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed Categories 1 and 2, Federal candidate and other special status species.”

## **RIGHT OF APPEAL**

This decision is effective immediately. If you, or other individuals, believe you are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the

Needles Field Office, 101 West Spikes Road, Needles, CA 92363 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/ \_\_\_\_\_

Molly Brady  
Needles Field Office Manager

cc: Tim Salt, District Manager  
Members of Interested Public

Enclosures

Record of Decision  
Lazy Daisy Allotment Map



United States Department of the Interior  
BUREAU OF LAND MANAGEMENT



BARSTOW FIELD OFFICE  
2601 BARSTOW ROAD  
BARSTOW, CA 92311  
(760) 252-6000  
[www.ca.blm.gov/barstow](http://www.ca.blm.gov/barstow)

*IN REPLY REFER TO:*  
4160 (P)  
CA-680.36

CERTIFIED MAIL # 70993220000132561932  
RETURN RECEIPT REQUESTED

**NOTICE OF FINAL GRAZING DECISION  
EFFECTIVE IMMEDIATELY**

9/7/01

**INTRODUCTION**

The Ord Mountain Allotment, #08005, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize grazing of ephemeral forage and an established perennial forage allocation. Your current permit #046804, authorizes 3,632 Animal Unit Months (AUM)s of forage, equivalent to 307 head of cattle and 4 horses year-long on the Ord Mountain Allotment. The allotment encompasses 154,848 total acres, approximately 18,660 acres of state and private land, and 136,188 acres of BLM-administered public land. On the BLM-administered public land within the allotment, there are 102,141 acres of desert tortoise critical habitat and 34,047 acres of desert tortoise non-critical habitat within the allotment.

This final grazing decision, effectively immediately, modifies the terms and conditions of your grazing permit, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, and establishes the period for this modification, and sets parameters for livestock use.

## BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species. Instead of litigating the case, the BLM entered into five stipulated agreements. On January 29, 2001, the stipulation respecting livestock grazing became effective.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations and reached agreement regarding interim actions to avoid litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the endangered and threatened species in accordance with 7(a) of the ESA and avoid making irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA.

On April 9, 2001, you were sent the Environmental Assessment # 610-01-02 (EA) and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. A final grazing decision was issued on May 15, 2001. On June 12, 2001, I received an appeal filed from the Budd-Falen Law Offices, P.C. on your behalf. On June 15, 2001, Secretary of the Interior Gale Norton, took jurisdiction of the appeal and assigned it to Administrative Law Judge Harvey

C. Sweitzer. Judge Sweitzer was directed to render a final written decision on behalf of the Department of the Interior by August 24, 2001. A hearing concerning the appealed decisions commenced on July 23, 2001 and lasted 13 days. Testimony during the hearing fully portrayed the issues under appeal and the subject of this decision.

### **Judge Sweitzer's Decision**

On August 24, 2001, BLM received Judge Sweitzer's decision (Blincoe, et. al. v. BLM, CA-690-01-01, CA-690-01-02, CA-690-01-03, CA-690-01-04, CA-680-01-03, CA-680-01-04, CA-680-01-05, CA-680-01-06, Decision, August 24, 2001). Judge Sweitzer concluded the following:

- (1) The EA and Decision Record are legally sufficient under NEPA;
- (2) The final grazing decisions are not arbitrary and capricious, are not an abuse of discretion, are supported upon a rational basis, and are otherwise in accordance with the law, except as provided in conclusion (4) below;
- (3) The final grazing decisions are consistent with section 7 of the ESA; and
- (4) BLM complied with the grazing regulations when it issued the final grazing decisions, except that BLM failed to comply with the requirement of consultation, cooperation, and coordination with the affected permittees and therefore the final grazing decisions are hereby set aside and the matters remanded to BLM for further action consistent with this Decision.

### **Additional Efforts to Engage in Consultation, Cooperation, and Coordination (CCC)**

On August 31, 2001, you and interested parties were sent a letter in accordance with Judge Sweitzer's decision and consistent with 43 CFR subparts 4110 and 4130 of the grazing regulations. That letter invited you to participate in a consultation, cooperation, and coordination (CCC) workshop on September 6 and 7, in Barstow, California. The purpose of the CCC workshop was to seek your advice and exchange views regarding implementation of the court approved stipulated agreement. In addition, BLM requested your advice and views on relevant issues and proposed management actions related to the grazing decision. Through your attorney, you indicated you were not available for the September 6 and 7 workshop but were available to meet on September 13 and 14. BLM also offered you the opportunity to submit written advice and comment. When we learned that you were not available to meet, through your attorney, we afforded you the opportunity to participate in a conference call on September 5 or 6, 2001. We did not receive advice or comments from you, nor did a conference call take place.

Beginning on August 31, 2001, the BLM also telephoned each lessee to determine whether they were available to participate in the meetings. On August 31, 2001, Barstow Field Office staff, Ms. O'Neill, phoned Mr. Fisher to inform him that he would soon be receiving a letter inviting him to a CCC workshop scheduled for September 6 and 7 in Barstow. He asked what would be discussed at this meeting. Ms. O'Neill informed him that BLM wanted his ideas on how to better implement the decision. He informed Ms. O'Neill that he could not make either the September 6 or 7 dates, but could meet on September 13 or 14. He asked her to call on September 11 to

check on his availability. He wanted to know if the Center was going to be there and if anyone else would be there. She indicated the Center was not going to attend and that so far only the Wettermans made indications of attending on September 6. He again asked about what kind of input the BLM was looking for. She indicated that BLM needed his input on how he thought we could better implement the decision. He wanted to know who from the BLM would be there. She indicated that Tim Read, Barstow Field Manager, and other key staff would be in attendance. He indicated that he thought this meeting was important and thanked Ms. O'Neill for calling.

On September 5, 2001, Ms. O'Neill called Mr. Fisher. She explained to him that she knew that the BLM and lessees' counsel were discussing the CCC situation over, but she reminded him of the meeting on September 6. He indicated that he was still unavailable this week. Mr. Fisher did not attend the September 6 or 7 meeting in Barstow.

On August 31, 2001, after a number of telephone calls to counsel for lessees, the Office of the Regional Solicitor, on behalf of BLM, also wrote to the lessees' counsel informing her of the September 6 and 7 meeting dates. Counsel for lessees wrote indicating that the vast majority of the lessees were not available on September 6 or 7, but that some could meet on September 13 and 14, 2001, and raised certain issues respecting the scope of CCC. On September 5, 2001, another letter was issued by the Regional Solicitor's Office which addressed those issues raised by counsel for the lessees, and which encouraged their participation in CCC. In that same letter it was explained that BLM intended to issue decisions on September 7, 2001, which would be effective immediately based upon resource needs as documented in the grazing hearings and Judge Sweitzer's decision. This determination of imminent likelihood was based upon the extensive administrative record compiled in the grazing hearings, and upon Judge Sweitzer's decision of August 24, 2001. BLM telephoned each lessee to determine whether they were available to participate in the meetings. Some of the lessees indicated that they were available and might attend.

Staff from the California Department of Fish and Game and California State Lands Commission were contacted by my staff about issuing a final grazing decision on this allotment. We explained the need for the grazing decision and the requirement (43 CFR §4110.3-3(a) and §4130.3-3) to contact the State under these conditions. The CDFG stated they had earlier concerns about potential excess grazing use on portions of the allotment when areas are seasonally excluded from cattle use. After conveying there would be weekly field visits to the allotment, those concerns seemed alleviated. Staff from State Lands Commission appreciated the opportunity to contribute to this effort, but did not have any additional information to offer.

California District Manager Tim Salt telephoned San Bernardino County Supervisor Bill Postmus and invited him or a representative to the September 6 and 7 meeting. Tim Salt called Gerry Hillier, who had represented the County during the grazing hearings, to inform him about the scope of the September 6 and 7 workshop.

On August 31, 2001, after a series of conference calls with counsel for the Center (including the Center for Biological Diversity, PEER, and the Sierra Club), the Office of the Regional Solicitor issued a letter again inviting the Center to attend the meeting scheduled for September 6 and 7, in

Barstow. Because the Center had initially stated it would not attend, it was also offered the opportunity to participate by telephone. The Center did not attend the meetings scheduled for September 6 or 7, nor was a conference call held.

BLM was present in Barstow on September 6 and 7, in furtherance of its offer and attempt to meet with lessees, interested parties, the Center and county officials. Only County Supervisor Postmus' representative Bob Smith, and Gerry Hillier attended the meeting on September 6. BLM was ultimately informed by letter dated September 6, 2001, from lessees' counsel that none of the lessees would be able to attend those meetings.

### **FIELD MANAGER'S FINAL DECISION EFFECTIVE IMMEDIATELY**

With the above additional CCC, the analysis presented in the EA, the testimony presented and documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3(b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is my final decision,

effective immediately in accordance with 4110.3-3(b), that livestock grazing is not authorized in the seasonal exclusion area which encompasses 54,000 acres of critical habitat for the desert tortoise. This area is shown on the enclosed map. In order to protect desert tortoise and its habitat this decision modifies the way your livestock use the Ord Mountain Allotment, by establishing the period for this modification, and sets parameters for livestock use. This area will be excluded from livestock grazing from March 1 to June 15 and from September 7 to November 7. Grazing use on the Ord Mountain Allotment shall not exceed 62,842 animal (cattle) days for the year. The permitted use for this allotment shall be temporarily reduced to 2,066 AUMs, with a maximum stocking rate of 172 animals. If domestic horses are turned out on public lands within the allotment, the equal number of cattle shall be removed. Livestock shall be prohibited from use of the developed springs if located within the exclusion area during the excluded seasons through the construction of water control fencing which shall enclose the trough(s). These modification to grazing use on the Ord Mountain Allotment shall be incorporated into the current grazing lease as terms and conditions for grazing use as long as this decision is in effect.

If during the periods of exclusion cattle are found in the exclusion areas you will have 48 hours after notification to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Ord Mountain Allotment will be denied. No temporary non-renewable grazing permits will be issued in habitat for the desert tortoise.

The construction of both riparian enclosure and water control fence shall be implemented at all developed springs located on public land within the allotment in order to improve riparian habitat conditions.

As stated in the court-approved settlement agreement, this Final Grazing Decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation or January 31, 2002, whichever shall be later.

## **RATIONALE**

The imminent likelihood of significant resource damage for desert tortoise and its habitat as determined by the hearing record and reflected in Judge Sweitzer's decision, caused the BLM to make this decision immediately effective to meet the fall closure date, which begins September 7. The BLM made reasonable attempts at CCC within the constraints of the immediacy of the fall grazing season and the requirement of the settlement agreement that grazing not be authorized from September 7 through November 7. Because the fall and spring closures are of critical importance to desert tortoise biology and because cattle grazing impacts desert tortoise and its habitat, BLM determined that this decision should be effectively immediately.

### Decline of Desert Tortoise Populations

During the hearings conducted by Judge Sweitzer, July 23 through August 7, 2001, in Barstow, California, and in his August 24 decision, it became clear that continued grazing use posed an imminent likelihood of significant damage to desert tortoise and its habitat. Various desert tortoise experts testified as to the physiological needs of the desert tortoise, the deterioration and loss of its habitat, declines in various populations, and the factors which adversely affect the tortoise and its habitat. (Sweitzer Decision, 22) "The recent severe and catastrophic declines in desert tortoise populations in California signal a need for new and immediate action to reduce all sources of mortality and to stabilize populations." (Sweitzer Decision, 26)

At the hearing, all desert tortoise experts agreed that the tortoise's plight has worsened over the decade since it was listed and described findings from various surveys showing declines in tortoise throughout its range in California. The testimonies of Dr. Kristin Berry, a USGS wildlife biologist, and Edward LaRue, a BLM biologist, show a near total collapse of tortoise populations in the Mojave Desert. (Sweitzer Decision, 32)

Field work Dr. Berry supervised in spring 2001 indicated recent declines in Ivanpah Valley. She was unable to identify any moderate to high density, robust, stable or increasing California population of desert tortoises at that time. "The new declines in Fenner, Ward, and Chemehuevi valleys are new developments since 1994, when the Desert Tortoise Recovery Plan was published. Study sites exhibited population declines in the 1980's, such as Fremont Valley, the Desert Tortoise Research Natural Area, Fremont Peak, Kramer Hills, Lucerne Valley, and Johnson Valley." (Sweitzer Decision, 23) The Fremont Valley plot was resurveyed in spring 2001 and show marked declines in numbers since 1991. "Dr. Berry observed in a study plot in Chemehuevi that 'the decline between 1992 and 1999 \* \* \* was 84%'. A study plot near Goffs showed that 'in comparisons of gross numbers of registered tortoises, there has been a decline of 94-95% of the female tortoises of breeding size.' " (Sweitzer Decision, 32)

“The testimony of Mr. LaRue is equally grim”. (Sweitzer Decision, 32) In 1984 there were 237 square miles of the West Mojave that were believed to support 250 tortoises or more per square mile. “By 1999 that number was down to 7 square miles. Mr. LaRue described a ‘region-wide die off of tortoises [in the West Mojave] that is generally bounded by the Calico Mountains to the southeast, Goldstone to the northeast, eastern Superior Valley to the northwest, and the Mud Hills to the southwest.’ ” (Sweitzer Decision, 32)

“Dr. Foreman observed that declines in tortoise populations have been severe in the far western Mojave, specifically the Fremont-Kramer Critical Habitat Unit and the western portion of the Superior-Cronese Critical Habitat Unit, and portions of the Chuckwalla Critical Habitat Unit. Large declines in Lucerne Valley and Johnson Valley have also occurred. Recently, sharp declines in the eastern desert, specifically Chemehuevi and Ward Valleys have been observed. Due to the small number of plots, population trends are not known everywhere. He concluded that declines are continuing in the West Mojave and southern desert and that large declines are now occurring in previously stable areas of the East Mojave.” (Sweitzer Decision, 32)

### Affects of Livestock Grazing on Desert Tortoises

“Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats.” (Sweitzer Decision, 25) Impacts include “trampling of tortoises; trampling of or damage to cover sites; reduction in the thermal and canopy cover provided by shrubs; changes in composition of perennial and annual plants; creation of fragmented habitat, open spaces and cleared areas from wallows, bedding, watering, loading and unloading areas; attraction and concentration of predators (such as ravens) to livestock watering areas; crushing of tortoises on and off roads by watering trucks or other vehicles used to maintain livestock facilities and monitor livestock; reduction of key forage items available to tortoises whether through direct consumption of forage or by trampling of plants used for forage; contributions to the establishment and invasion of alien plant species; and damage to desert [microbiotic soil] crusts.” (Sweitzer Decision, 25)

Raymond Bransfield, a FWS biologist, described the effects of livestock grazing on the desert tortoise and its habitat. “A desert tortoise must consume its annual forage requirement during its active period, which can range from six weeks to five months out of the year (March to June and occasionally during September and October). If forage has not been produced or is of poor nutritive quality during this period, the opportunity for the desert tortoise to meet its nutritional needs cannot be met until the next year. Therefore, desert tortoises are highly dependent upon productive native plant communities and may be susceptible to increased mortality during poor years. Changes in perennial and native vegetation, including alteration of species composition and reduction in cover of shrubs and perennial grasses, are believed to be the result of long-term livestock grazing. The loss of cover can result in increased exposure to predators and decreased opportunities to use the shade of shrubs for thermoregulation. Native annual plants and perennial grasses are essential in meeting the nutritional needs of the desert tortoise. Nonnative plant species, such as red brome (*Bromus rubens*), filaree (*Erodium cicutarium*), and split grass (*Schismus arabicus*), have become widely established in the Mojave Desert. In some areas, these alien plants are often more common than native annual species. The disturbance of soils

associated with livestock grazing likely promotes the spread of these non-native species. Abundant large herbivores can alter [microbiotic soil] crusts that are normally found in many areas of the desert and can disrupt normal germination of native species. Introduced annual grasses remain in place after drying and create a fuel source sufficient to carry fire across large areas. Desert shrubs are not fire-adapted; therefore, once a large area has been burned, the shrubs are killed. This change further decreases the value of habitat for the desert tortoise. Because of its slow growth, the shrub component of the desert may take many decades to return to pre-fire conditions. . . Grazing animals can crush burrows and nests of desert tortoises and trample young desert tortoises. The degree and nature of impacts from cattle grazing are dependent upon the habitat type, grazing history, seasons of use, stocking rates, and density of the desert tortoise population.” (Sweitzer Decision, 30, 31)

### Seasonal Exclusion

“ The Decision Record and grazing decisions state that BLM took action in the form of the Proposed Action for several purposes: (1) to meet this § 7(a)(2) duty to ensure protection of the tortoise and its critical and non-critical habitat until BLM implements the applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable prudent measures to be identified in the biological opinion to be issued by FWS, (2) to avoid making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives to be identified during consultation under § 7(d), and (3) to contribute to the conservation of the species pursuant to § 7(a)(1). For the reasons set forth below, this decision concludes that the terms of the grazing decisions rationally further the legitimate objective of fulfilling the mandate of § 7(a)(2), as well as the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), and therefore are supported on a rational basis and are consistent with the ESA.” (Sweitzer Decision, 81)

Based on testimony at the hearing, Judge Sweitzer found support for the seasonal closures. “Doctors Berry and Morafka also testified to the negative impacts of cattle during the period coinciding with the fall exclusion period established in the grazing decisions. In addition to potential disruption of mating activity, which is only effective from late July to early October, there are potential impacts to vulnerable neonates which hatch during the fall:

[D]uring September and October tortoise hatchlings emerge from egg nests and disperse, typically 100-1000 ft across local landscapes, eventually selecting small rodent burrows for winter hibernation. During this period, the largest number of neonate tortoises are concentrated in the smallest of areas, at a time when they themselves are both smallest and physically most vulnerable to the crushing effects of cattle hoofs. These young tortoise are not only at their smallest, but their protective shells are least calcified, and their first burrows, those abandoned by small rodents, are most easily collapsed under the impacts of cattle “traffic”. Furthermore, such losses may be rarely recorded because juvenile tortoises would be killed underground in burrows indistinguishable from those of rodents during the first several months of their occupation by tortoises.” (Sweitzer Decision, 91 & 92)

“Dr. Morafka’s testimony highlights the importance of the spring seasonal exclusion period to juvenile tortoises, but that period is important to adult tortoises too. Doctors Berry and Morafka testified that the benefits of the spring exclusion include better access to preferred forage providing more nutrition and energy to grow and produce eggs, avoidance of trampling of cover sites and eggs, and avoidance of disruption to nesting activities.” (Sweitzer Decision, 91)

Judge Sweitzer states “...the formulation of the exclusion area boundaries was based on the goals of minimizing the impact to any one livestock operator while maximizing the acreage of critical habitat protected. This balancing of interests is an appropriate exercise of BLM’s discretion, and the location of critical habitat is certainly data upon which BLM may reasonably rely to avoid adverse impacts to tortoise habitat and thus help maintain the status quo.” (Sweitzer Decision, 94)

“Non-critical habitat was reasonably included in the exclusion areas in an attempt to apportion the “pain” and leave each permittee with some prospect of continuing operation over the short time frame of the decisions. Also, protecting non-critical habitat assists in maintaining the status quo as well. Doctors Berry and Morafka and Mr. Bransfield all testified to the value of non-critical habitat. Non-critical habitat areas may contain healthy individuals necessary for repopulation of other areas with populations that have been temporarily decimated. They may promote gene flow from one area to another. Genetically diverse populations may exist there which are important to the species’ survival.” (Sweitzer Decision, 95)

“The caps on active permitted use are also rationally related to the legitimate management objectives of maintaining the status quo and thus protecting the tortoise against potentially greater use that might have occurred under lease terms of higher permitted use. The caps were reasonably based upon the average annual active use for the last three years for which BLM had available data: 1997, 1998, and 1999. As BLM personnel testified, this determination provides a measure of stability to the Appellants with respect to their actual use, while protecting the tortoise.” (Sweitzer Decision, 96)

“The grazing decisions also provided that if, during the seasonal exclusion periods, cattle are found in the exclusion areas, an additional day will be added to the period of exclusion for every day cattle are found inside the exclusion areas and the grazing permittee will have 48 hours after notification from BLM to remove them. If they are not removed within 48 hours, BLM will initiate trespass procedures.” (Sweitzer Decision, 96)

Based on the foregoing as well as additional information found in the decision, hearing record, and testimony, Judge Sweitzer concluded these “... decisions are rationally designed to maintain, as much as possible, the status quo for the desert tortoise in accordance with § 7(a)(2) pending completion of consultation with FWS on the CDCA Plan, and to further BLM’s management objectives regarding the protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants’ with the opportunity to continue their operations on the short term. To the extent that the decisions cause economic injury, that injury does not render the decisions unreasonable because, under statutory mandate, protection of the desert tortoise is paramount.” (Sweitzer Decision, 101).

Judge Sweitzer states: “In light of the foregoing lengthy discussion and recitation of evidence regarding the criticality of the spring and fall seasons to the tortoise and the likely effects of grazing on the tortoise during those seasons, no further discussion is warranted to justify holding the seasonal exclusion periods are supported by a rational basis.” (Sweitzer Decision, 94)

Information provided in testimony during the grazing hearing regarding desert tortoise declines and livestock grazing impacts to desert tortoise and its habitat provide the immediacy for this decision. This information includes, but is not limited to, Mr. LaRue’s recitation of desert tortoise declines between 1970 and 1999; Dr. Berry’s information respecting significant declines in East Mojave populations; and Dr. Morofka’s testimony relating to neonate and juvenile tortoise impacts from trampling by livestock.

### Finding of No Significant Impact

I have determined that this grazing decision would not result in significant environmental impacts on the human environment; therefore, an environmental impact statement is not required. EA No. CA-610-01-02 was prepared for a prior grazing decision remanded under Judge Sweitzer's decision of August 24, 2001. BLM has reviewed that EA , along with the August 24, 2001 decision and the results of consultation, cooperation, and coordination with the affected permittee. BLM concludes that the existing information is relevant to this grazing decision and no further environmental analysis is required.

### **AUTHORITY**

The authority for this decision includes but is not limited to:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4100.0-5: ...Consultation, cooperation, and coordination means interaction of the purpose of obtaining advice, or exchanging opinions on issues, plans, or management actions.

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4110.3-3 (b): “When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an imminent likelihood of significant resource damage, after consultation with, or reasonable attempt to consult with, affected permittees or lessees, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provision of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorize grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decision shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3.”

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.”

43 CFR 4180.1 (d): “Habitats are, or are making significant process toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed Categories 1 and 2, Federal candidate and other special status species.”

### **RIGHT OF APPEAL**

This decision is effectively immediately. If you, or other individuals, believe you are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

#### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/ \_\_\_\_\_

Tim Read  
Field Manager

cc: Tim Salt, District Manager  
Members of Interested Public

Enclosures:  
Map



United States Department of the Interior  
BUREAU OF LAND MANAGEMENT

BARSTOW FIELD OFFICE  
2601 BARSTOW ROAD  
BARSTOW, CA 92311  
(760) 252-6000  
[www.ca.blm.gov/barstow](http://www.ca.blm.gov/barstow)



*IN REPLY REFER TO:*  
4160(P)  
CA-680.36

CERTIFIED MAIL NO. 70993220000132561925  
RETURN RECEIPT REQUESTED

9/7/01

**NOTICE OF FINAL GRAZING DECISION  
EFFECTIVE IMMEDIATELY**

**INTRODUCTION**

The Rattlesnake Canyon Allotment, #08003, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046803, authorizes 1,081 animal unit months (AUMs), equivalent to 84 head of cattle and 4 horses year-long on the Rattlesnake Canyon Allotment. The allotment encompasses 28,757 acres, 1,925 acres of state and private land, and 26,832 acres of BLM land. There are 12,800 acres of non-critical habitat for the desert tortoise within the allotment.

This final grazing decision, effectively immediately, modifies the terms and conditions of your grazing permit, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, and establishes the period for this modification, and sets parameters for livestock use.

## BACKGROUND

In 1990 the Mojave population of the desert tortoise was listed as a threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species. Instead of litigating the case, the BLM entered into five stipulated agreements. On January 29, 2001, the stipulation respecting livestock grazing became effective.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations and reached agreement regarding interim actions to avoid litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the endangered and threatened species in accordance with 7(a) of the ESA and avoid making irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA.

On April 9, 2001, you were sent the Environmental Assessment # 610-01-02 (EA) and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. A final grazing decision was issued on May 15, 2001. On June 12, 2001, I received an appeal filed from the Budd-Falen Law Offices, P.C. on your behalf. On June 15, 2001, Secretary of the Interior

Gale Norton, took jurisdiction of the appeal and assigned it to Administrative Law Judge Harvey C. Sweitzer. Judge Sweitzer was directed to render a final written decision on behalf of the Department of the Interior by August 24, 2001. A hearing concerning the appealed decisions commenced on July 23, 2001 and lasted 13 days. Testimony during the hearing fully portrayed the issues under appeal and the subject of this decision.

### **Judge Sweitzer's Decision**

On August 24, 2001, BLM received Judge Sweitzer's decision (Blincoe, et. al. v. BLM, CA-690-01-01, CA-690-01-02, CA-690-01-03, CA-690-01-04, CA-680-01-03, CA-680-01-04, CA-680-01-05, CA-680-01-06, Decision, August 24, 2001). Judge Sweitzer concluded the following:

- (1) The EA and Decision Record are legally sufficient under NEPA;
- (2) The final grazing decisions are not arbitrary and capricious, are not an abuse of discretion, are supported upon a rational basis, and are otherwise in accordance with the law, except as provided in conclusion (4) below;
- (3) The final grazing decisions are consistent with section 7 of the ESA; and
- (4) BLM complied with the grazing regulations when it issued the final grazing decisions, except that BLM failed to comply with the requirement of consultation, cooperation, and coordination with the affected permittees and therefore the final grazing decisions are hereby set aside and the matters remanded to BLM for further action consistent with this Decision.

### **Additional Efforts to Engage in Consultation, Cooperation, and Coordination (CCC)**

On August 31, 2001, you and interested parties were sent a letter in accordance with Judge Sweitzer's decision and consistent with 43 CFR subparts 4110 and 4130 of the grazing regulations. That letter invited you to participate in a consultation, cooperation, and coordination (CCC) workshop on September 6 and 7, in Barstow, California. The purpose of the CCC workshop was to seek your advice and exchange views regarding implementation of the court approved stipulated agreement. In addition, BLM requested your advice and views on relevant issues and proposed management actions related to the grazing decision. Through your attorney, you indicated you were not available for the September 6 and 7 workshop but were available to meet on September 13 and 14. BLM also offered you the opportunity to submit written advice and comment. When we learned that you were not available to meet, through your attorney, we afforded you the opportunity to participate in a conference call on September 5, or 6, 2001. We did not receive advice or comments from you, nor did a conference call take place.

On August 31, 2001, Barstow Field Office staff, Gail O'Neill, phoned Mr. Mitchell to inform him of the CCC workshop scheduled for September 6 and 7. Julie Austin answered and informed Ms. O'Neill that Mr. Mitchell was at work and would be home around 4:30. Ms. O'Neill informed Ms. Austin that BLM wanted to initiate CCC with Mr. Mitchell. She said that

she understood and that Ms. O'Neill could call back around 4:30. On September 4, 2001, Ms. O'Neill called Mr. Mitchell. She left a message on Mr. Mitchell's answering machine to let her know if he was going to attend the CCC meeting at the Barstow Field Office on September 6 and 7. She asked Mr. Mitchell to call her back at work and let her know his intentions. On September 5, 2001, Mr. Mitchell left a message on Ms. O'Neill's voice mail indicating that his counsel had set up a meeting for September 13, but wanted clarification regarding those dates. On September 6, 2001, Mr. Mitchell left another message on Ms. O'Neill voice mail and stated that he could not make the meeting on September 6 or 7. He asked if Ms. O'Neill could call him back and check if he was available on September 13 or 14. He indicated that he wanted to participate in CCC but just could not attend the September 6 or 7 meeting. Mr. Mitchell did not attend the September 6 or 7 meeting.

On August 31, 2001, after a number of telephone calls to counsel for lessees, the Office of the Regional Solicitor, on behalf of BLM, also wrote to the lessees' counsel informing her of the September 6 and 7 meeting dates. Counsel for lessees wrote indicating that the vast majority of the lessees were not available on September 6 or 7, but that some could meet on September 13 and 14, 2001, and raised certain issues respecting the scope of CCC. On September 5, 2001, another letter was issued by the Regional Solicitor's Office which addressed those issues raised by counsel for the lessees, and which encouraged their participation in CCC. In that same letter it was explained that BLM intended to issue decisions on September 7, 2001, which would be effective immediately based upon resource needs as documented in the grazing hearings and Judge Sweitzer's decision. This determination of imminent likelihood was based upon the extensive administrative record compiled in the grazing hearings, and upon Judge Sweitzer's decision of August 24, 2001. BLM telephoned each lessee to determine whether they were available to participate in the meetings. Some of the lessees indicated that they were available and might attend.

Staff from the California Department of Fish and Game (CDFG) and California State Lands Commission were contacted by my staff about issuing a final grazing decision on this allotment. We explained the need for the grazing decision and the requirement (43 CFR §4110.3-3(a) and §4130.3-3) to contact the State under these conditions. The CDFG stated they had earlier concerns about potential excess grazing use on portions of the allotment when areas are seasonally excluded from cattle use. After conveying there would be weekly field visits to the allotment, those concerns seemed alleviated. Staff from State Lands Commission appreciated the opportunity to contribute to this effort, but did not have any additional information to offer.

California District Manager Tim Salt telephoned San Bernardino County Supervisor Bill Postmus and invited him or a representative to the September 6 and 7 meeting. Tim Salt called Gerry Hillier, who had represented the County during the grazing hearings, to inform him about the scope of the September 6 and 7 workshop.

On August 31, 2001, after a series of conference calls with counsel for the Center (including the Center for Biological Diversity, PEER, and the Sierra Club), the Office of the Regional Solicitor

issued a letter again inviting the Center to attend the meeting scheduled for September 6 and 7, in Barstow. Because the Center had initially stated it would not attend, it was also offered the opportunity to participate by telephone. The Center did not attend the meetings scheduled for September 6 or 7, nor was a conference call held.

BLM was present in Barstow on September 6 and 7, in furtherance of its offer and attempt to meet with lessees, interested parties, the Center and county officials. Only County Supervisor Postmus' representative Bob Smith, and Gerry Hillier attended the meeting on September 6. BLM was ultimately informed by letter dated September 6, 2001, from lessees' counsel that none of the lessees would be able to attend those meetings.

### **FIELD MANAGER'S FINAL DECISION EFFECTIVE IMMEDIATELY**

With the above additional CCC, the analysis presented in the EA, the testimony presented and documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3(b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is my final decision, effective immediately in accordance with 4110.3-3(b), that livestock grazing is not authorized in the seasonal exclusion area which encompasses 6,600 acres of non-critical habitat for the desert tortoise. This area is shown on the enclosed map. In order to protect the desert tortoise and its habitat, this decision shall modify the way your livestock use the Rattlesnake Canyon Allotment, establishes the period for this modification, and sets parameters for livestock use. This area will be excluded from cattle grazing from March 1 to June 15 and from September 7 to November 7. The permitted use for this allotment shall be temporarily reduced to 541 AUMs, with a maximum stocking rate of 45 animals. If domestic horses are turned out on public lands within the allotment, the equal number of cows shall be removed.

The trailing of livestock through Rattlesnake Canyon shall cease until further notice. The installation of cattleguards and gap fence shall be developed within the canyon to facilitate this action. These modification to grazing use on the Rattlesnake Canyon Allotment shall be incorporated in to the current grazing lease as terms and conditions for the duration of this decision.

If during the periods of exclusion cattle are found in the exclusion areas you will have 48 hours after notification to remove them. If they are not removed within 48 hours, trespass action according to 43 CFR §4150.2(a),(b) will be taken and an additional day will be added onto the exclusion period for every day they remain in trespass.

Applications received to graze during years of approved non-use on the Rattlesnake Canyon Allotment will be denied. No temporary non-renewable grazing permits will be issued in habitat for the desert tortoise.

The modification to other grazing use on the Rattlesnake Canyon Allotment set forth in this grazing decision will cease upon the receipt of a Biological Opinion from the FWS that addresses the effects of grazing activities covered in the CDCA Plan on the Mojave population of the desert tortoise and the implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation, or on January 31, 2002 whichever is later. The Rattlesnake Canyon Allotment are not within the NEMO and NECO planning area .

## **RATIONALE**

The imminent likelihood of significant resource damage for desert tortoise and its habitat as determined by the hearing record and reflected in Judge Sweitzer's decision, caused the BLM to make this decision immediately effective to meet the fall closure date, which begins September 7. The BLM made reasonable attempts at CCC within the constraints of the immediacy of the fall grazing season and the requirement of the settlement agreement that grazing not be authorized from September 7 through November 7. Because the fall and spring closures are of critical importance to desert tortoise biology and because cattle grazing impacts desert tortoise and its habitat, BLM determined that this decision should be effectively immediately.

### Decline of Desert Tortoise Populations

During the hearings conducted by Judge Sweitzer, July 23 through August 7, 2001, in Barstow, California, and in his August 24 decision, it became clear that continued grazing use posed an imminent likelihood of significant damage to desert tortoise and its habitat. Various desert tortoise experts testified as to the physiological needs of the desert tortoise, the deterioration and loss of its habitat, declines in various populations, and the factors which adversely affect the tortoise and its habitat. (Sweitzer Decision, 22) "The recent severe and catastrophic declines in desert tortoise populations in California signal a need for new and immediate action to reduce all sources of mortality and to stabilize populations." (Sweitzer Decision, 26)

At the hearing, all desert tortoise experts agreed that the tortoise's plight has worsened over the decade since it was listed and described findings from various surveys showing declines in tortoise throughout its range in California. The testimonies of Dr. Kristin Berry, a USGS wildlife biologist, and Edward LaRue, a BLM biologist, show a near total collapse of tortoise populations in the Mojave Desert. (Sweitzer Decision, 32)

Field work Dr. Berry supervised in spring 2001 indicated recent declines in Ivanpah Valley. She was unable to identify any moderate to high density, robust, stable or increasing California population of desert tortoises at that time. "The new declines in Fenner, Ward, and Chemehuevi valleys are new developments since 1994, when the Desert Tortoise Recovery Plan was published. Study sites exhibited population declines in the 1980's, such as Fremont Valley, the Desert Tortoise Research Natural Area, Fremont Peak, Kramer Hills, Lucerne Valley, and Johnson Valley." (Sweitzer Decision, 23) The Fremont Valley plot was resurveyed in spring

2001 and show marked declines in numbers since 1991. “Dr. Berry observed in a study plot in Chemehuevi that ‘the decline between 1992 and 1999 \* \* \* was 84%’. A study plot near Goffs showed that ‘in comparisons of gross numbers of registered tortoises, there has been a decline of 94-95% of the female tortoises of breeding size.’ ” (Sweitzer Decision, 32)

“The testimony of Mr. LaRue is equally grim”. (Sweitzer Decision, 32) In 1984 there were 237 square miles of the West Mojave that were believed to support 250 tortoises or more per square mile. “By 1999 that number was down to 7 square miles. Mr. LaRue described a ‘region-wide die off of tortoises [in the West Mojave] that is generally bounded by the Calico Mountains to the southeast, Goldstone to the northeast, eastern Superior Valley to the northwest, and the Mud Hills to the southwest.’ ” (Sweitzer Decision, 32)

“Dr. Foreman observed that declines in tortoise populations have been severe in the far western Mojave, specifically the Fremont-Kramer Critical Habitat Unit and the western portion of the Superior-Cronese Critical Habitat Unit, and portions of the Chuckwalla Critical Habitat Unit. Large declines in Lucerne Valley and Johnson Valley have also occurred. Recently, sharp declines in the eastern desert, specifically Chemehuevi and Ward Valleys have been observed. Due to the small number of plots, population trends are not known everywhere. He concluded that declines are continuing in the West Mojave and southern desert and that large declines are now occurring in previously stable areas of the East Mojave.” (Sweitzer Decision, 32)

#### Affects of Livestock Grazing on Desert Tortoises

“Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats.” (Sweitzer Decision, 25) Impacts include “trampling of tortoises; trampling of or damage to cover sites; reduction in the thermal and canopy cover provided by shrubs; changes in composition of perennial and annual plants; creation of fragmented habitat, open spaces and cleared areas from wallows, bedding, watering, loading and unloading areas; attraction and concentration of predators (such as ravens) to livestock watering areas; crushing of tortoises on and off roads by watering trucks or other vehicles used to maintain livestock facilities and monitor livestock; reduction of key forage items available to tortoises whether through direct consumption of forage or by trampling of plants used for forage; contributions to the establishment and invasion of alien plant species; and damage to desert [microbiotic soil] crusts.” (Sweitzer Decision, 25)

Raymond Bransfield, a FWS biologist, described the effects of livestock grazing on the desert tortoise and its habitat. “A desert tortoise must consume its annual forage requirement during its active period, which can range from six weeks to five months out of the year (March to June and occasionally during September and October). If forage has not been produced or is of poor nutritive quality during this period, the opportunity for the desert tortoise to meet its nutritional needs cannot be met until the next year. Therefore, desert tortoises are highly dependent upon productive native plant communities and may be susceptible to increased mortality during poor years. Changes in perennial and native vegetation, including alteration of species composition

and reduction in cover of shrubs and perennial grasses, are believed to be the result of long-term livestock grazing. The loss of cover can result in increased exposure to predators and decreased opportunities to use the shade of shrubs for thermoregulation. Native annual plants and perennial grasses are essential in meeting the nutritional needs of the desert tortoise. Nonnative plant species, such as red brome (*Bromus rubens*), filaree (*Erodium cicutarium*), and split grass (*Schismus arabicus*), have become widely established in the Mojave Desert. In some areas, these alien plants are often more common than native annual species. The disturbance of soils associated with livestock grazing likely promotes the spread of these non-native species. Abundant large herbivores can alter [microbiotic soil] crusts that are normally found in many areas of the desert and can disrupt normal germination of native species. Introduced annual grasses remain in place after drying and create a fuel source sufficient to carry fire across large areas. Desert shrubs are not fire-adapted; therefore, once a large area has been burned, the shrubs are killed. This change further decreases the value of habitat for the desert tortoise. Because of its slow growth, the shrub component of the desert may take many decades to return to pre-fire conditions. . . Grazing animals can crush burrows and nests of desert tortoises and trample young desert tortoises. The degree and nature of impacts from cattle grazing are dependent upon the habitat type, grazing history, seasons of use, stocking rates, and density of the desert tortoise population.” (Sweitzer Decision, 30, 31)

### Seasonal Exclusion

“ The Decision Record and grazing decisions state that BLM took action in the form of the Proposed Action for several purposes: (1) to meet this § 7(a)(2) duty to ensure protection of the tortoise and its critical and non-critical habitat until BLM implements the applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable prudent measures to be identified in the biological opinion to be issued by FWS, (2) to avoid making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives to be identified during consultation under § 7(d), and (3) to contribute to the conservation of the species pursuant to § 7(a)(1). For the reasons set forth below, this decision concludes that the terms of the grazing decisions rationally further the legitimate objective of fulfilling the mandate of § 7(a)(2), as well as the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), and therefore are supported on a rational basis and are consistent with the ESA.” (Sweitzer Decision, 81)

Based on testimony at the hearing, Judge Sweitzer found support for the seasonal closures. “Doctors Berry and Morafka also testified to the negative impacts of cattle during the period coinciding with the fall exclusion period established in the grazing decisions. In addition to potential disruption of mating activity, which is only effective from late July to early October, there are potential impacts to vulnerable neonates which hatch during the fall:

[D]uring September and October tortoise hatchlings emerge from egg nests and disperse, typically 100-1000 ft across local landscapes, eventually selecting small rodent burrows for winter hibernation. During this period, the largest number of neonate tortoises are

concentrated in the smallest of areas, at a time when they themselves are both smallest and physically most vulnerable to the crushing effects of cattle hoofs. These young tortoise are not only at their smallest, but their protective shells are least calcified, and their first burrows, those abandoned by small rodents, are most easily collapsed under the impacts of cattle “traffic”. Furthermore, such losses may be rarely recorded because juvenile tortoises would be killed underground in burrows indistinguishable from those of rodents during the first several months of their occupation by tortoises.” (Sweitzer Decision, 91 & 92)

“Dr. Morafka’s testimony highlights the importance of the spring seasonal exclusion period to juvenile tortoises, but that period is important to adult tortoises too. Doctors Berry and Morafka testified that the benefits of the spring exclusion include better access to preferred forage providing more nutrition and energy to grow and produce eggs, avoidance of trampling of cover sites and eggs, and avoidance of disruption to nesting activities.” (Sweitzer Decision, 91)

Judge Sweitzer states “...the formulation of the exclusion area boundaries was based on the goals of minimizing the impact to any one livestock operator while maximizing the acreage of critical habitat protected. This balancing of interests is an appropriate exercise of BLM’s discretion, and the location of critical habitat is certainly data upon which BLM may reasonably rely to avoid adverse impacts to tortoise habitat and thus help maintain the status quo.” (Sweitzer Decision, 94)

“Non-critical habitat was reasonably included in the exclusion areas in an attempt to apportion the “pain” and leave each permittee with some prospect of continuing operation over the short time frame of the decisions. Also, protecting non-critical habitat assists in maintaining the status quo as well. Doctors Berry and Morafka and Mr. Bransfield all testified to the value of non-critical habitat. Non-critical habitat areas may contain healthy individuals necessary for repopulation of other areas with populations that have been temporarily decimated. They may promote gene flow from one area to another. Genetically diverse populations may exist there which are important to the species’ survival.” (Sweitzer Decision, 95)

“The caps on active permitted use are also rationally related to the legitimate management objectives of maintaining the status quo and thus protecting the tortoise against potentially greater use that might have occurred under lease terms of higher permitted use. The caps were reasonably based upon the average annual active use for the last three years for which BLM had available data: 1997, 1998, and 1999. As BLM personnel testified, this determination provides a measure of stability to the Appellants with respect to their actual use, while protecting the tortoise.” (Sweitzer Decision, 96)

“The grazing decisions also provided that if, during the seasonal exclusion periods, cattle are found in the exclusion areas, an additional day will be added to the period of exclusion for every day cattle are found inside the exclusion areas and the grazing permittee will have 48 hours after notification from BLM to remove them. If they are not removed within 48 hours, BLM will

initiate trespass procedures.” (Sweitzer Decision, 96)

Based on the foregoing as well as additional information found in the decision, hearing record, and testimony, Judge Sweitzer concluded these “... decisions are rationally designed to maintain, as much as possible, the status quo for the desert tortoise in accordance with § 7(a)(2) pending completion of consultation with FWS on the CDCA Plan, and to further BLM’s management objectives regarding the protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants’ with the opportunity to continue their operations on the short term. To the extent that the decisions cause economic injury, that injury does not render the decisions unreasonable because, under statutory mandate, protection of the desert tortoise is paramount.” (Sweitzer Decision, 101).

Judge Sweitzer states: “In light of the foregoing lengthy discussion and recitation of evidence regarding the criticality of the spring and fall seasons to the tortoise and the likely effects of grazing on the tortoise during those seasons, no further discussion is warranted to justify holding the seasonal exclusion periods are supported by a rational basis.” (Sweitzer Decision, 94)

Information provided in testimony during the grazing hearing regarding desert tortoise declines and livestock grazing impacts to desert tortoise and its habitat provide the immediacy for this decision. This information includes, but is not limited to, Mr. LaRue’s recitation of desert tortoise declines between 1970 and 1999; Dr. Berry’s information respecting significant declines in East Mojave populations; and Dr. Morofka’s testimony relating to neonate and juvenile tortoise impacts from trampling by livestock.

#### Finding of No Significant Impact

I have determined that this grazing decision would not result in significant environmental impacts on the human environment; therefore, an environmental impact statement is not required. EA No. CA-610-01-02 was prepared for a prior grazing decision remanded under Judge Sweitzer's decision of August 24, 2001. BLM has reviewed that EA , along with the August 24, 2001 decision and the results of consultation, cooperation, and coordination with the affected permittee. BLM concludes that the existing information is relevant to this grazing decision and no further environmental analysis is required.

#### **AUTHORITY**

The authority for this decision includes but is not limited to:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4100.0-5: ...Consultation, cooperation, and coordination means interaction of the purpose of obtaining advice, or exchanging opinions on issues, plans, or management actions.

43 CFR 4110.3-2 (b): “When monitoring or field observations show grazing use or patterns of use are not consistent with the provision in subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when the use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce the permitted grazing use or otherwise modify management practices.”

43 CFR 4110.3-3 (a): “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section.”

43 CFR 4110.3-3 (b): “When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an imminent likelihood of significant resource damage, after consultation with, or reasonable attempt to consult with, affected permittees or lessees, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provision of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorize grazing use may be issued as final decisions effective upon issuance or on the date specified in the

decision. Such decision shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.”

43 CFR 4130.3: “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 (b)(1) (ii)(iii): “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2:

In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized, or in an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice for the alleged violator to show that there has been no violation or to make settlement under 4150.3.”

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.”

43 CFR 4180.1 (d): “Habitats are, or are making significant process toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed Categories 1 and 2, Federal candidate and other special status species.”

## **RIGHT OF APPEAL**

This decision is effectively immediately. If you, or other individuals, believe you are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Barstow Field Office, 2601 Barstow Road, Barstow, CA 92311 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in

error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/ \_\_\_\_\_

Tim Read  
Field Manager

cc: Tim Salt, District Manager  
Members of Interested Public

Enclosures:  
Map



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Needles Field Office  
101 West Spikes Road  
Needles, California 92363  
Phone: (760)326-7000 Fax: (760)326-7099  
email: ca690@ca.blm.gov

In Reply Refer To:  
4100(P)  
09009  
(CA.690.21)

CERTIFIED MAIL NO. 7000 0520 0024 9683 3900  
RETURN RECEIPT REQUESTED

9/7/01

### **NOTICE OF FINAL GRAZING DECISION EFFECTIVE IMMEDIATELY**

Dear Mr. \_\_\_\_\_ :

#### **INTRODUCTION**

The Valley Wells Allotment, #9009, is an ephemeral/perennial allotment with potential forage production to enable the Bureau of Land Management (BLM) to authorize ephemeral forage and an established perennial forage allocation. Your current lease, #046909, authorizes 3,808 animal unit months (AUMs) year long on the BLM administered Valley Wells Allotment. The allotment encompasses 237,127 acres of private, State, and BLM lands. The BLM lands are comprised of 222,120 acres within the allotment. Within the Valley Wells Allotment, 111,099 acres are desert tortoise critical habitat and 126,028 acres are non-critical habitat.

This final grazing decision, effective immediately, modifies the terms and conditions of your grazing permit, modifies the way your livestock use this allotment to protect the desert tortoise and its habitat, and establishes the period for this modification, and sets parameters for livestock use.

## BACKGROUND

In 1990, the Mojave population of the desert tortoise was listed as threatened species under the Endangered Species Act (ESA).

On March 16, 2000, the Center for Biological Diversity, et al. (Center) filed for injunctive relief in U.S. District Court, Northern District of California (Court) against the Bureau of Land Management (BLM) to immediately prohibit all grazing activities that may affect listed species. The Center alleges the BLM was in violation of Section 7 of the Endangered Species Act (ESA) by failing to enter into formal consultation with the U.S. Fish and Wildlife Service (FWS) on the effects of adoption of the California Desert Conservation Area Plan (CDCA Plan), as amended, upon threatened and endangered species. On August 25, 2000, the BLM acknowledged through a court stipulation that activities authorized, permitted, or allowed under CDCA Plan may adversely affect threatened and endangered species, and that the BLM is required to consult with the FWS to insure that adoption and implementation of the CDCA Plan is not likely to jeopardize the continued existence of threatened and endangered species or to result in the destruction or adverse modification of critical habitat of listed species. Instead of litigating the case, the BLM entered into five stipulated agreements. On January 29, 2001, the stipulation respecting livestock grazing became effective.

Although BLM has received Biological Opinions on selected activities, including livestock grazing, consultation on the overall Plan will ensure consideration of the cumulative effects of all the activities authorized by the CDCA Plan. Until the FWS completes its analysis of the total impacts of the Plan, the impacts of individual activities such as grazing, when added together with the impacts of other activities in the desert, are not definitely known. The BLM entered into negotiations and reached agreement regarding interim actions to avoid litigation of plaintiffs' request for injunctive relief and the serious threat of an injunction prohibiting all activities authorized under the plan. These interim agreements have allowed BLM to continue to authorize activities throughout the planning area during the lengthy consultation process while providing appropriate protection to the desert tortoise and others in the short term. By taking interim actions as allowed under 43 CFR Part 4100, we will contribute to the conservation of the endangered and threatened species in accordance with 7(a) of the ESA and avoid making irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives which might be required as a result of the consultation on the CDCA plan in accordance with 7(d) of the ESA.

On April 9, 2001, you were sent the Environmental Assessment # 610-01-02 (EA) and my Notice of Proposed Decision regarding modifications of the way your cattle can use the allotments to protect desert tortoise and its critical habitat, establishment of the period for this modification, and parameters for cattle use. A timely protest of the proposed decision was received on April 24, 2001, from the Budd-Falen Law Offices, P.C. on your behalf. A final grazing decision was issued on May 15, 2001. On June 12, 2001, I received an appeal filed from the Budd-Falen Law Offices, P.C. on your behalf. On June 15, 2001, Secretary of the Interior Gale Norton took jurisdiction of the appeal and assigned it to Administrative Law Judge Harvey C. Sweitzer. Judge Sweitzer was directed to render a final written decision on behalf of the Department of the Interior by August 24, 2001. A hearing concerning the appealed decisions

commenced on July 23, 2001 and lasted 13 days. Testimony during the hearing fully portrayed the issues under appeal and the subject of this decision.

### **Judge Sweitzer's Decision**

On August 24, 2001, BLM received Judge Sweitzer's decision (Blincoe, et. al. v. BLM, CA-690-01-01, CA-690-01-02, CA-690-01-03, CA-690-01-04, CA-680-01-03, CA-680-01-04, CA-680-01-05, CA-680-01-06, Decision, August 24, 2001). Judge Sweitzer concluded the following:

- (1) The EA and Decision Record are legally sufficient under NEPA;
- (2) The final grazing decisions are not arbitrary and capricious, are not an abuse of discretion, are supported upon a rational basis, and are otherwise in accordance with the law, except as provided in conclusion (4) below;
- (3) The final grazing decisions are consistent with section 7 of the ESA; and
- (4) BLM complied with the grazing regulations when it issued the final grazing decisions, except that BLM failed to comply with the requirement of consultation, cooperation, and coordination with the affected permittees and therefore the final grazing decisions are hereby set aside and the matters remanded to BLM for further action consistent with this Decision.

### **Additional Efforts to Engage in Consultation, Cooperation, and Coordination (CCC)**

On August 31, 2001, you and interested parties were sent a letter in accordance with Judge Sweitzer's decision and consistent with 43 CFR subparts 4110 and 4130 of the grazing regulations. That letter invited you to participate in a consultation, cooperation, and coordination (CCC) workshop on September 6 and 7, in Barstow, California. The purpose of the CCC workshop was to seek your advice and exchange views regarding implementation of the court approved stipulated agreement. In addition, BLM requested your advice and views on relevant issues and proposed management actions related to the grazing decision. Through your attorney, you indicated you were not available for the September 6 and 7 workshop but were available to meet on September 13 and 14. BLM also offered you the opportunity to submit written advice and comment. When we learned that you were not available to meet, through your attorney, we afforded you the opportunity to participate in a conference call on September 5 or 6, 2001. We did not receive advice or comments from you, nor did a conference call take place.

Beginning on August 31, 2001 the BLM also telephoned each lessee to determine whether they were available to participate in the meetings. On August 31, 2001, Ms. Brady, Needles Field Office Manager, called Mr. Blincoe about the CCC meeting in Barstow. Mr. Blincoe stated he was concerned whether the other ranchers could attend, and said that he would get back to Ms. Brady with an answer by September 4, 2001. Mr. Blincoe indicated that it would be better for him if we met on September 13 or 14. On September 5, Ms. Brady called Mr. Blincoe and told him that we would be available to meet on September 6 and 7. He indicated that it would be impossible for him to be there on September 6 and nearly impossible on September 7. In a later call that same day, he confirmed that he could not attend on either day. Mr. Blincoe did not attend the Barstow meeting on September 6 or 7.

On August 31, 2001, after a number of telephone calls to counsel for lessees, the Office of the Regional Solicitor, on behalf of BLM, also wrote to the lessees' counsel informing her of the September 6 and 7 meeting dates. Counsel for lessees wrote indicating that the vast majority of the lessees were not available on September 6 or 7, but that some could meet on September 13 and 14, 2001, and raised certain issues respecting the scope of CCC. On September 5, 2001, another letter was issued by the Regional Solicitor's Office which addressed those issues raised by counsel for the lessees, and which encouraged their participation in CCC. In that same letter it was explained that BLM intended to issue decisions on September 7, 2001, which would be effective immediately based upon resource needs as documented in the grazing hearings and Judge Sweitzer's decision. This determination of imminent likelihood was based upon the extensive administrative record compiled in the grazing hearings, and upon Judge Sweitzer's decision of August 24, 2001. BLM telephoned each lessee to determine whether they were available to participate in the meetings. Some of the lessees indicated that they were available and might attend.

Staff from the California Department of Fish and Game (CDFG) and California State Lands Commission were contacted by my staff about issuing a final grazing decision on this allotment. We explained the need for the grazing decision and the requirement (43 CFR §4110.3-3(a) and §4130.3-3) to contact the State under these conditions. The CDFG stated they had earlier concerns about potential excess grazing use on portions of the allotment when areas are seasonally excluded from cattle use. After conveying there would be weekly field visits to the allotment, those concerns seemed alleviated. Staff from State Lands Commission appreciated the opportunity to contribute to this effort, but did not have any additional information to offer.

California District Manager Tim Salt telephoned San Bernardino County Supervisor Bill Postmus and invited him or a representative to the September 6 and 7 meeting. Tim Salt called Gerry Hillier, who had represented the County during the grazing hearings, to inform him about the scope of the September 6 and 7 workshop.

On August 31, 2001, after a series of conference calls with counsel for the Center (including the Center for Biological Diversity, PEER, and the Sierra Club), the Office of the Regional Solicitor issued a letter again inviting the Center to attend the meeting scheduled for September 6 and 7, in Barstow. Because the Center had initially stated it would not attend, it was also offered the opportunity to participate by telephone. The Center did not attend the meetings scheduled for September 6 or 7, nor was a conference call held.

BLM was present in Barstow on September 6 and 7, in furtherance of its offer and attempt to meet with lessees, interested parties, the Center and county officials. Only County Supervisor Postmus' representative Bob Smith, and Gerry Hillier attended the meeting on September 6. BLM was ultimately informed by letter dated September 6, 2001, from lessees' counsel that none of the lessees would be able to attend those meetings.

#### **FIELD MANAGER'S FINAL DECISION EFFECTIVE IMMEDIATELY**

With the above additional CCC, the analysis presented in the EA, the testimony presented and

documented in Judge Sweitzer's August 24, 2001 decision, findings one, two, and three of his decision, 43 CFR 4110.3-2 (a)(b), 4110.3-3(b), 4130.3, 4130.3-3, 4140.1(b)(1)(ii)(iii), and other authorities (as described in the Authority section of this decision), it is my final decision, effective immediately in accordance with 4110.3-3(b), that cattle grazing will not be authorized on 88,879 acres of the of desert tortoise critical habitat within the Valley Wells Allotment. This area will be excluded to cattle grazing from March 1 to June 15 and from September 7 to November 7. This area is shown on the enclosed map. In order to protect the desert tortoise and its habitat, this decision modifies the way your livestock use the Valley Well Allotment. It further establishes the period for this modification and sets parameters for livestock use. Grazing use on the Valley Wells Allotment shall not exceed 51,433 animal (cattle) days for the year. The permitted use for this allotment shall be temporarily reduced to 1,692 AUMs. Modifications on the Valley Wells Allotment shall be incorporated into the current grazing permit as terms and conditions as long as this decision is in effect.

If during the seasonal exclusion, cattle are found in the exclusion area you will have 48 hours after notification by the BLM to remove them. If they are not removed within 48 hours, trespass action will be taken according to 43 CFR § 4150.2(a)(b) (see authority section). Reduction in the number of animal days per year would occur when livestock are found a second time in the area of total exclusion. For each day that cattle are found in the exclusion area, the animal days authorized per year will be reduced by the number of animal days cattle are documented to be in the excluded areas.

This decision will be effective until either receipt by the BLM of the Biological Opinion on the effects of the CDCA plan on the Mojave population of the desert tortoise and implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and the signing of the record of decision (ROD) for the Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendment, or January 31, 2002, whichever shall be later. The Valley Wells Allotment lies within the NEMO planning area.

Applications received to graze during years of approved non-use on the Valley Wells Allotment will be denied. Temporary non-renewable grazing permits will not be issued in habitat for the desert tortoise, as described in the decision record.

## **RATIONALE**

The imminent likelihood of significant resource damage for desert tortoise and its habitat as determined by the hearing record and reflected in Judge Sweitzer's decision caused the BLM to make this decision immediately effective to meet the fall closure date, which begins September 7. The BLM made reasonable attempts at CCC within the constraints of the immediacy of the fall grazing season and the requirement of the settlement agreement that grazing not be authorized from September 7 through November 7. Because the fall and spring closures are of critical importance to desert tortoise biology and because cattle grazing impacts desert tortoise and its habitat, BLM determined that this decision should be effective immediately.

## Decline of Desert Tortoise Populations

During the hearings conducted by Judge Sweitzer, July 23 through August 7, 2001, in Barstow, California, and in his August 24 decision, it became clear that continued grazing use posed an imminent likelihood of significant damage to desert tortoise and its habitat. Various desert tortoise experts testified as to the physiological needs of the desert tortoise, the deterioration and loss of its habitat, declines in various populations, and the factors which adversely affect the tortoise and its habitat. (Sweitzer Decision, 22) “The recent severe and catastrophic declines in desert tortoise populations in California signal a need for new and immediate action to reduce all sources of mortality and to stabilize populations.” (Sweitzer Decision, 26)

At the hearing, all desert tortoise experts agreed that the tortoise’s plight has worsened over the decade since it was listed and described findings from various surveys showing declines in tortoise throughout its range in California. The testimonies of Dr. Kristin Berry, a USGS wildlife biologist, and Edward LaRue, a BLM biologist, show a near total collapse of tortoise populations in the Mojave Desert. (Sweitzer Decision, 32)

Field work Dr. Berry supervised in spring 2001 indicated recent declines in Ivanpah Valley. She was unable to identify any moderate to high density, robust, stable or increasing California population of desert tortoises at that time. “The new declines in Fenner, Ward, and Chemehuevi valleys are new developments since 1994, when the Desert Tortoise Recovery Plan was published. Study sites exhibited population declines in the 1980’s, such as Fremont Valley, the Desert Tortoise Research Natural Area, Fremont Peak, Kramer Hills, Lucerne Valley, and Johnson Valley.” (Sweitzer Decision, 23) The Fremont Valley plot was resurveyed in spring 2001 and show marked declines in numbers since 1991. “Dr. Berry observed in a study plot in Chemehuevi that ‘the decline between 1992 and 1999 \* \* \* was 84%’. A study plot near Goffs showed that ‘in comparisons of gross numbers of registered tortoises, there has been a decline of 94-95% of the female tortoises of breeding size.’ ” (Sweitzer Decision, 32)

“The testimony of Mr. LaRue is equally grim”. (Sweitzer Decision, 32) In 1984 there were 237 square miles of the West Mojave that were believed to support 250 tortoises or more per square mile. “By 1999 that number was down to 7 square miles. Mr. LaRue described a ‘region-wide die off of tortoises [in the West Mojave] that is generally bounded by the Calico Mountains to the southeast, Goldstone to the northeast, eastern Superior Valley to the northwest, and the Mud Hills to the southwest.’ ” (Sweitzer Decision, 32)

“Dr. Foreman observed that declines in tortoise populations have been severe in the far western Mojave, specifically the Fremont-Kramer Critical Habitat Unit and the western portion of the Superior-Cronese Critical Habitat Unit, and portions of the Chuckwalla Critical Habitat Unit. Large declines in Lucerne Valley and Johnson Valley have also occurred. Recently, sharp declines in the eastern desert, specifically Chemehuevi and Ward Valleys have been observed. Due to the small number of plots, population trends are not known everywhere. He concluded that declines are continuing in the West Mojave and southern desert and that large declines are now occurring in previously stable areas of the East Mojave.” (Sweitzer Decision, 32)

## Affects of Livestock Grazing on Desert Tortoises

“Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats.” (Sweitzer Decision, 25) Impacts include “trampling of tortoises; trampling of or damage to cover sites; reduction in the thermal and canopy cover provided by shrubs; changes in composition of perennial and annual plants; creation of fragmented habitat, open spaces and cleared areas from wallows, bedding, watering, loading and unloading areas; attraction and concentration of predators (such as ravens) to livestock watering areas; crushing of tortoises on and off roads by watering trucks or other vehicles used to maintain livestock facilities and monitor livestock; reduction of key forage items available to tortoises whether through direct consumption of forage or by trampling of plants used for forage; contributions to the establishment and invasion of alien plant species; and damage to desert [microbiotic soil] crusts.” (Sweitzer Decision, 25)

Raymond Bransfield, a FWS biologist, described the effects of livestock grazing on the desert tortoise and its habitat. “A desert tortoise must consume its annual forage requirement during its active period, which can range from six weeks to five months out of the year (March to June and occasionally during September and October). If forage has not been produced or is of poor nutritive quality during this period, the opportunity for the desert tortoise to meet its nutritional needs cannot be met until the next year. Therefore, desert tortoises are highly dependent upon productive native plant communities and may be susceptible to increased mortality during poor years. Changes in perennial and native vegetation, including alteration of species composition and reduction in cover of shrubs and perennial grasses, are believed to be the result of long-term livestock grazing. The loss of cover can result in increased exposure to predators and decreased opportunities to use the shade of shrubs for thermoregulation. Native annual plants and perennial grasses are essential in meeting the nutritional needs of the desert tortoise. Nonnative plant species, such as red brome (*Bromus rubens*), filaree (*Erodium cicutarium*), and split grass (*Schismus arabicus*), have become widely established in the Mojave Desert. In some areas, these alien plants are often more common than native annual species. The disturbance of soils associated with livestock grazing likely promotes the spread of these non-native species. Abundant large herbivores can alter [microbiotic soil] crusts that are normally found in many areas of the desert and can disrupt normal germination of native species. Introduced annual grasses remain in place after drying and create a fuel source sufficient to carry fire across large areas. Desert shrubs are not fire-adapted; therefore, once a large area has been burned, the shrubs are killed. This change further decreases the value of habitat for the desert tortoise. Because of its slow growth, the shrub component of the desert may take many decades to return to pre-fire conditions. . . Grazing animals can crush burrows and nests of desert tortoises and trample young desert tortoises. The degree and nature of impacts from cattle grazing are dependent upon the habitat type, grazing history, seasons of use, stocking rates, and density of the desert tortoise population.” (Sweitzer Decision, 30, 31)

## Seasonal Exclusion

“The Decision Record and grazing decisions state that BLM took action in the form of the Proposed Action for several purposes: (1) to meet this § 7(a)(2) duty to ensure protection of the tortoise and its critical and non-critical habitat until BLM implements the applicable terms and

conditions, reasonable and prudent alternatives, and/or reasonable prudent measures to be identified in the biological opinion to be issued by FWS, (2) to avoid making any irreversible or irretrievable commitment of resources which would foreclose any reasonable and prudent alternatives to be identified during consultation under § 7(d), and (3) to contribute to the conservation of the species pursuant to § 7(a)(1). For the reasons set forth below, this decision concludes that the terms of the grazing decisions rationally further the legitimate objective of fulfilling the mandate of § 7(a)(2), as well as the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), and therefore are supported on a rational basis and are consistent with the ESA.” (Sweitzer Decision, 81)

Based on testimony at the hearing, Judge Sweitzer found support for the seasonal closures. “Doctors Berry and Morafka also testified to the negative impacts of cattle during the period coinciding with the fall exclusion period established in the grazing decisions. In addition to potential disruption of mating activity, which is only effective from late July to early October, there are potential impacts to vulnerable neonates which hatch during the fall:

[D]uring September and October tortoise hatchlings emerge from egg nests and disperse, typically 100-1000 ft across local landscapes, eventually selecting small rodent burrows for winter hibernation. During this period, the largest number of neonate tortoises are concentrated in the smallest of areas, at a time when they themselves are both smallest and physically most vulnerable to the crushing effects of cattle hoofs. These young tortoise are not only at their smallest, but their protective shells are least calcified, and their first burrows, those abandoned by small rodents, are most easily collapsed under the impacts of cattle “traffic”. Furthermore, such losses may be rarely recorded because juvenile tortoises would be killed underground in burrows indistinguishable from those of rodents during the first several months of their occupation by tortoises.” (Sweitzer Decision, 91 & 92)

“Dr. Morafka’s testimony highlights the importance of the spring seasonal exclusion period to juvenile tortoises, but that period is important to adult tortoises too. Doctors Berry and Morafka testified that the benefits of the spring exclusion include better access to preferred forage providing more nutrition and energy to grow and produce eggs, avoidance of trampling of cover sites and eggs, and avoidance of disruption to nesting activities.” (Sweitzer Decision, 91)

Judge Sweitzer states “...the formulation of the exclusion area boundaries was based on the goals of minimizing the impact to any one livestock operator while maximizing the acreage of critical habitat protected. This balancing of interests is an appropriate exercise of BLM’s discretion, and the location of critical habitat is certainly data upon which BLM may reasonably rely to avoid adverse impacts to tortoise habitat and thus help maintain the status quo.” (Sweitzer Decision, 94)

“Non-critical habitat was reasonably included in the exclusion areas in an attempt to apportion the “pain” and leave each permittee with some prospect of continuing operation over the short time frame of the decisions. Also, protecting non-critical habitat assists in maintaining the status quo as well. Doctors Berry and Morafka and Mr. Bransfield all testified to the value of non-critical habitat. Non-critical habitat areas may contain healthy individuals necessary for

repopulation of other areas with populations that have been temporarily decimated. They may promote gene flow from one area to another. Genetically diverse populations may exist there which are important to the species' survival.” (Sweitzer Decision, 95)

“The caps on active permitted use are also rationally related to the legitimate management objectives of maintaining the status quo and thus protecting the tortoise against potentially greater use that might have occurred under lease terms of higher permitted use. The caps were reasonably based upon the average annual active use for the last three years for which BLM had available data: 1997, 1998, and 1999. As BLM personnel testified, this determination provides a measure of stability to the Appellants with respect to their actual use, while protecting the tortoise.” (Sweitzer Decision, 96)

“The grazing decisions also provided that if, during the seasonal exclusion periods, cattle are found in the exclusion areas, an additional day will be added to the period of exclusion for every day cattle are found inside the exclusion areas and the grazing permittee will have 48 hours after notification from BLM to remove them. If they are not removed within 48 hours, BLM will initiate trespass procedures.” (Sweitzer Decision, 96)

Based on the foregoing as well as additional information found in the decision, hearing record, and testimony, Judge Sweitzer concluded these “... decisions are rationally designed to maintain, as much as possible, the status quo for the desert tortoise in accordance with § 7(a)(2) pending completion of consultation with FWS on the CDCA Plan, and to further BLM’s management objectives regarding the protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants’ with the opportunity to continue their operations on the short term. To the extent that the decisions cause economic injury, that injury does not render the decisions unreasonable because, under statutory mandate, protection of the desert tortoise is paramount.” (Sweitzer Decision, 101).

Judge Sweitzer states: “In light of the foregoing lengthy discussion and recitation of evidence regarding the criticality of the spring and fall seasons to the tortoise and the likely effects of grazing on the tortoise during those seasons, no further discussion is warranted to justify holding the seasonal exclusion periods are supported by a rational basis.” (Sweitzer Decision, 94)

Information provided in testimony during the grazing hearing regarding desert tortoise declines and livestock grazing impacts to desert tortoise and its habitat provide the immediacy for this decision. This information includes, but is not limited to, Mr. LaRue’s recitation of desert tortoise declines between 1970 and 1999; Dr. Berry’s information respecting significant declines in East Mojave populations; and Dr. Morofka’s testimony relating to neonate and juvenile tortoise impacts from trampling by livestock.

### Finding of No Significant Impact

I have determined that this grazing decision will not result in significant environmental impacts on the human environment; therefore, an environmental impact statement is not required. EA No. CA-610-01-02 was prepared for a prior grazing decision remanded under Judge Sweitzer's decision of August 24, 2001. BLM has reviewed that EA , along with the August 24, 2001

decision and the results of consultation, cooperation, and coordination with the affected permittee. BLM concludes that the existing information is relevant to this grazing decision and no further environmental analysis is required.

### **AUTHORITY**

The authority for this decision includes but is not limited to:

16 U.S.C. 1536(a)(1): “All other Federal Agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section 1533 of this title.”

16 U.S.C. 1536(a)(2): “Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.... In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.”

16 U.S.C. 1536(d): “After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”

43 CFR 4100.0-5: ...Consultation, cooperation, and coordination means interaction of the purpose of obtaining advice, or exchanging opinions on issues, plans, or management actions.

43 CFR 4110.3-3 (a) “After consultation, cooperation and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing §4110.3-2 shall be issued as proposed decisions pursuant to §4160.1, except as provided in paragraph (b) of this section”.

43 CFR 4110.3-3 (b): “When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an imminent likelihood of significant resource damage, after consultation with, or reasonable attempt to consult with, affected permittees or lessees, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or

modify authorized grazing use notwithstanding the provision of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorize grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decision shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.”

43 CFR 4130.3 “Livestock grazing permits and leases contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.”

43 CFR 4140.1 b (ii)(iii) “Persons performing the following prohibited acts related to rangelands shall be subject to civil and criminal penalties set forth at 4170.1 and 4170.2: In violation of the terms and condition of the permit, lease, or other grazing use authorization including, but not limited to, livestock in excess of the number authorized. In an area or at a time different from that authorized.”

43 CFR 4150.2(a): “Whenever it appears that a violation exists and the owner of the unauthorized livestock is known, written notice of unauthorized use and order to remove livestock by a specified date shall be served upon the alleged violator or the agent of record, or both, by certified mail or personal delivery. The written notice shall also allow a specified time from receipt of notice ro the alleged violator to show that there has been no violation or to make settlement under 4150.3

43 CFR 4150.2(b): “Whenever a violation has been determined to be non-willful and incidental the authorized officer shall notify the alleged violator that the violation must be corrected, and how it can be settled, based upon the discretion of the authorized officer.

43 CFR 4150.2(d)“The authorized office may temporarily close areas to grazing by specified kinds or class of livestock for a period not to exceed 12 months when necessary to abate unauthorized grazing use.”

43 CFR 4180.1 (d): “Habitats are, or are making significant process toward being, restored or maintained for Federal threatened and endangered species, Federal Proposed Categories 1 and 2, Federal candidate and other special status species.”

## **RIGHT OF APPEAL**

This decision is effective immediately. If you, or other individuals, believe you are adversely affected by this final decision, you may file an appeal of this grazing decision for the purpose of a hearing before an administrative law judge in accordance with 43 CFR Part 4.21, 4.470 and subpart 4160.4. You may also petition for a stay of the decision in accordance with 43 CFR 4.21, pending final determination on appeal. The appeal and petition for stay must be filed in the Needle Field Office, 101 West Spikes Road, Needles, CA 92363 within 30 days following receipt of the final decision.

The appeal shall state the reasons, clearly and concisely, why you think the final decision is in error. All reasons for error not stated in the appeal shall be considered as waived and may not be presented at the hearing. Any failure to meet this thirty (30) day appeal deadline will bar you from challenging this decision. If you wish to petition for stay you must include the stay petition with your appeal. You have the burden of proof to demonstrate why a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) the likelihood of the appellant's success on the merits;
- (3) the likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) whether the public interest favors granting the stay.

Sincerely,

/s/ \_\_\_\_\_

Molly Brady  
Needles Field Office Manager

cc: Tim Salt, District Manager  
Members of Interested Public

Enclosures:  
Map