

August 24, 2001

RICHARD BLINCOE and BLINCOE FARMS, INC.,	:	CA-690-01-01 (C 00-00927 WHA (N.D. Ca))
Appellants	:	
v.	:	Appeal of the Needles Field Manager's May 15, 2001, Final Grazing Decision for the Valley Wells Allotment and the Decision Record for Temporary Modification to Livestock Grazing Use in the California Desert Conservation Area, Environmental Assessment No. CA610- 01-02
BUREAU OF LAND MANAGEMENT,	:	
Respondent	:	
-----	:	
COUNTY OF SAN BERNARDINO,	:	
Intervenor	:	
CENTER FOR BIOLOGICAL DIVERSITY, SIERRA CLUB, and PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY,	:	
Intervenors	:	

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RON KEMPER,	:	CA-690-01-02
	:	(C 00-00927 WHA (N.D. Ca))
Appellant	:	
v.	:	Appeal of the Needles Field Manager's
	:	May 15, 2001, Final Grazing Decision for
BUREAU OF LAND MANAGEMENT,	:	the Horsethief Springs Allotment and the
	:	Decision Record for Temporary
Respondent	:	Modification to Livestock Grazing Use in
-----	:	the California Desert Conservation Area,
COUNTY OF SAN BERNARDINO,	:	Environmental Assessment No.
	:	CA610-01-02
Intervenor	:	
CENTER FOR BIOLOGICAL	:	
DIVERSITY, SIERRA CLUB, and PUBLIC	:	
EMPLOYEES FOR ENVIRONMENTAL	:	
RESPONSIBILITY,	:	
Intervenors	:	

MIKE and MARK BLAIR,	:	CA-690-01-03
	:	(C 00-00927 WHA (N.D. Ca))
Appellants	:	
v.	:	Appeal of the Needles Field Manager's
	:	May 15, 2001, Final Grazing Decision for
BUREAU OF LAND MANAGEMENT,	:	the Lazy Daisy Allotment and the Decision
	:	Record for Temporary Modification to
Respondent	:	Livestock Grazing Use in the California
-----	:	Desert Conservation Area, Environmental
COUNTY OF SAN BERNARDINO,	:	Assessment No. CA610-01-02
	:	
Intervenor	:	
CENTER FOR BIOLOGICAL	:	
DIVERSITY, SIERRA CLUB, and PUBLIC	:	
EMPLOYEES FOR ENVIRONMENTAL	:	
RESPONSIBILITY,	:	
Intervenors	:	

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DAVE THORNTON,	:	CA-690-01-04
	:	(C 00-00927 WHA (N.D. Ca))
Appellant	:	
v.	:	Appeal of the Needles Field Manager's
	:	May 15, 2001, Final Grazing Decision for
BUREAU OF LAND MANAGEMENT,	:	the Valley Wells Allotment and the
	:	Decision Record for Temporary
Respondent	:	Modification to Livestock Grazing Use in
-----	:	the California Desert Conservation Area,
COUNTY OF SAN BERNARDINO,	:	Environmental Assessment No.
	:	CA610-01-02
Intervenor	:	
CENTER FOR BIOLOGICAL	:	
DIVERSITY, SIERRA CLUB, and PUBLIC	:	
EMPLOYEES FOR ENVIRONMENTAL	:	
RESPONSIBILITY,	:	
Intervenors	:	

DAVE FISHER,	:	CA-680-01-03
	:	(C 00-00927 WHA (N.D. Ca))
Appellant	:	
v.	:	Appeal of the Barstow Field Manager's
	:	May 15, 2001, Final Grazing Decision for
BUREAU OF LAND MANAGEMENT,	:	the Ord Mountain Allotment and the
	:	Decision Record for Temporary
Respondent	:	Modification to Livestock Grazing Use in
-----	:	the California Desert Conservation Area,
COUNTY OF SAN BERNARDINO,	:	Environmental Assessment No.
	:	CA610-01-02
Intervenor	:	
CENTER FOR BIOLOGICAL	:	
DIVERSITY, SIERRA CLUB, and PUBLIC	:	
EMPLOYEES FOR ENVIRONMENTAL	:	
RESPONSIBILITY,	:	
Intervenors	:	

WILLIAM MITCHELL,	:	CA-680-01-04
	:	(C 00-00927 WHA (N.D. Ca))
Appellant	:	
v.	:	Appeal of the Barstow Field Manager's
	:	May 15, 2001, Final Grazing Decision for
BUREAU OF LAND MANAGEMENT,	:	the Rattlesnake Canyon Allotment and the
	:	Decision Record for Temporary
Respondent	:	Modification to Livestock Grazing Use in
-----	:	the California Desert Conservation Area,
COUNTY OF SAN BERNARDINO,	:	Environmental Assessment No.
	:	CA610-01-02
Intervenor	:	
CENTER FOR BIOLOGICAL	:	
DIVERSITY, SIERRA CLUB, and PUBLIC	:	
EMPLOYEES FOR ENVIRONMENTAL	:	
RESPONSIBILITY,	:	
Intervenors	:	

CATHEY SMITH,	:	CA-680-01-05
	:	(C 00-00927 WHA (N.D. Ca))
Appellant	:	
v.	:	Appeal of the Barstow Field Manager's
	:	May 15, 2001, Final Grazing Decision for
BUREAU OF LAND MANAGEMENT,	:	the Harper Lake Allotment and the
	:	Decision Record for Temporary
Respondent	:	Modification to Livestock Grazing Use in
-----	:	the California Desert Conservation Area,
COUNTY OF SAN BERNARDINO,	:	Environmental Assessment No.
	:	CA610-01-02
Intervenor	:	
CENTER FOR BIOLOGICAL	:	
DIVERSITY, SIERRA CLUB, and PUBLIC	:	
EMPLOYEES FOR ENVIRONMENTAL	:	
RESPONSIBILITY,	:	
Intervenors	:	

TOM and JEANNE WETTERMAN,	:	CA-680-01-06
	:	(C 00-00927 WHA (N.D. Ca))
Appellants	:	
	:	Appeal of the Barstow Field Manager's
v.	:	May 15, 2001, Final Grazing Decision for
	:	the Cronese Lake and Cady Mountain
BUREAU OF LAND MANAGEMENT,	:	Allotments and the Decision Record for
	:	Temporary Modification to Livestock
Respondent	:	Grazing Use in the California Desert
-----	:	Conservation Area, Environmental
COUNTY OF SAN BERNARDINO,	:	Assessment No. CA610-01-02
	:	
Intervenor	:	
	:	
CENTER FOR BIOLOGICAL	:	
DIVERSITY, SIERRA CLUB, and PUBLIC	:	
EMPLOYEES FOR ENVIRONMENTAL	:	
RESPONSIBILITY,	:	
	:	
Intervenors	:	
	:	

DECISION

Appearances: Karen Budd-Falen, Esq., and Brandon L. Jensen, Esq., Cheyenne, Wyoming, for all Appellants

Erica L. B. Niebauer, Esq., Clementine Berger, Esq., and Amy L. Aufdemberge, Esq., Sacramento, California, for Respondent

John C. Nolan, Esq., Robin C. Cochran, Esq., and Dennis Tilton, Esq., San Bernardino, California, for Intervenor County of San Bernardino

James Jay Tutchton, Esq., Denver, Colorado (Brendan Cummings, Esq., Berkeley, California, with him on the Brief), for Intervenors Center for Biological Diversity, et al.

Before: Administrative Law Judge Sweitzer

Statement of Facts

Background and Procedural History

This proceeding involves eight consolidated appeals of seven separate final grazing decisions issued by Respondent Bureau of Land Management (BLM) on May 15, 2001. Each decision temporarily modifies the terms and conditions of permitted cattle grazing use on the public lands within one or more grazing allotments in the California Desert Conservation Area (CDCA) and the jurisdiction of BLM's California Desert District Office.

Five of the eight affected allotments, the Ord Mountain, Rattlesnake Canyon, Harper Lake, Cady Mountains, and Cronese Lake allotments (Barstow allotments), are administered by the BLM Barstow Field Office (Ex. DT8). The remaining three, the Lazy Daisy, Horsethief Springs, and Valley Wells allotments (Needles allotments), are administered by BLM's Needles Field Office (Ex. DT10).

The Field Manager of the Barstow office issued four of the grazing decisions (Barstow decisions), one to Appellants Tom and Jeanne Wetterman, grazing permittees for the Cronese Lake and Cady Mountain allotments, one to Appellant Dave Fisher, grazing permittee for the Ord Mountain allotment, one to Appellant William Mitchell, grazing permittee for the Rattlesnake Canyon allotment, and one to Appellant Cathey Smith, grazing permittee for the Harper Lake allotment. The Field Manager of the Needles office issued three of the grazing decisions (Needles decisions), one to Appellants Richard Blincoe and Blincoe Farms, Inc., grazing permittees for the Valley Wells allotment and to Appellant Dave Thornton, transferee applicant for that allotment, one to Appellant Ron Kemper, grazing permittee for the Horsethief Springs allotment, and one to Appellants Mike and Mark Blair, grazing permittees for the Lazy Daisy allotment.

The temporary modifications imposed by the grazing decisions had been analyzed by BLM as part of the Proposed Action in an Environmental Assessment (EA) signed on behalf of the District Manager of BLM's California Desert District on April 9, 2001 (Ex. 9), and in a subsequent Decision Record for that EA issued on May 15, 2001 (Ex. 10). The Decision Record approved the Proposed Action. Both the EA and Decision Record include a Finding of No Significant Impact (FONSI) in which the District Manager concluded that the potential impacts of the Proposed Action "are not significant, and an environmental impact statement is not required." Each appeal challenges the legal sufficiency not only of the pertinent grazing decision, but also of the EA and Decision Record.

All of the allotments are located in San Bernardino County, California, with the exception of a large portion of the Horsethief Springs allotment which lies in Inyo County, California (Ex. QH). All are within the Mojave Desert, except for the Lazy Daisy allotment which is situated in the Colorado Desert adjacent to the southern border of the Mojave Desert.

The land use plan for the CDCA (CDCA Plan) was issued in 1980. At that time, BLM did not consult with the United States Fish and Wildlife Service (FWS) regarding the effects of the plan on any species listed as threatened or endangered under the Endangered Species Act (ESA) (federally listed species) because BLM understood that the policy of FWS was that consultation in conformance with § 7 of the ESA should be initiated at the project implementation stage, not at the land use planning stage (Ex. DT1, ¶ 11).¹

Thereafter, many species found within the CDCA, including the Mojave population of the desert tortoise, were listed as either threatened or endangered under the ESA (Ex. DT1, ¶ 13). All of the subject allotments contain habitat for the Mojave population of the desert tortoise, which population occupies those portions of the Mojave and Colorado Deserts north and west of the Colorado River in California, southern Nevada, southwestern Utah, and northwestern Arizona (Exs. 27, 28).

Since the issuance of the CDCA Plan, BLM has formally consulted with FWS pursuant to § 7 of the ESA approximately 180 times, but each of these consultations was limited in its scope to addressing the effects of a specific project or program on the continued existence of one or more federally listed species (Ex. DT1, ¶¶ 11-12). They did not address the effects of all programs or of all future actions which could potentially be authorized under the CDCA Plan or the actions necessary to achieve recovery of the listed species (Ex. DT1, ¶ 12).

The initial listing of the desert tortoise was made by FWS on August 4, 1989 (Ex. 26). In response to a petition to list the desert tortoise, FWS listed it as endangered on an emergency basis (Ex. 26). On April 2, 1990, the FWS changed the listing status to threatened (Ex. 27). The listing including livestock grazing as one of many factors in habitat deterioration. FWS found that:

- Grazing by livestock has occurred on most if not all of the Mojave Desert within the range of the desert tortoise.
- Livestock can harm tortoises by crushing individuals and also by destroying burrows.

¹Under § 7(a)(2) of the ESA and implementing regulations, the action agency (BLM in this case) must consult with the appropriate consulting agency (FWS in this case) whenever its actions “may effect” a federally listed species. See 50 C.F.R. § 402.14(a). If the action agency subsequently determines that its action is “likely to adversely affect” a federally listed species, it must engage in formal consultation. Id. Formal consultation requires that the consulting agency issue a biological opinion determining whether the action is likely to jeopardize the listed species and describing, if necessary, reasonable and prudent alternatives that will avoid a likelihood of jeopardy. See 16 U.S.C. § 1535(b)(3)(A).

- Livestock can also harm tortoises by reducing the shrub cover needed by tortoises for thermoregulation and for protection from predators.
- Livestock grazing has altered the species composition and abundance of herbaceous vegetation in the Mojave Desert because livestock tend to graze selectively on native forbs with high nutritional content.
- Livestock grazing has caused the introduction and proliferation of non-native annual grasses. Grazing also appears to have reduced the abundance of perennial grasses.
- These alien grasses may not meet the nutritional needs of the tortoise, especially during critical periods of growth and reproduction.
- Additionally, dried non-native annual grasses provide a means for fire to spread over large areas, killing shrubs that are an important component of tortoise habitat.
- With the development of water sites in recent years throughout the Mojave Desert, livestock now graze more areas of the desert than in historical times.
- The full recovery of desert shrubs, forbs, and perennial grasses from past overgrazing practices to their ecological potential likely requires several decades. Tortoise populations likely will respond to the improved habitat conditions very slowly, because of their low reproductive and recruitment potential.

55 Fed. Reg. 12178 at 12184-85 (Ex. 27). See also Ex. DT4, ¶¶ 5-15 (describing the factors that led to the listing of the species).

That same year FWS commissioned a team of eight scientists to develop a recovery plan for the desert tortoise (Ex. DT3, ¶ 10). Two of the witnesses in this case, Dr. Kristin Berry and Dr. Kenneth Morafka, were members of that team.

In June of 1994 FWS completed a recovery plan for the desert tortoise (Recovery Plan) (Ex. 29). That plan presents to Federal agencies a strategy and set of recommended management actions to achieve recovery and delisting of the tortoise and to meet their obligations under § 7(a)(1) of the ESA to carry out conservation programs for the benefit of the species (Ex. DT4, ¶¶ 40-42).

The Recovery Plan identifies six evolutionarily significant units (otherwise referred to as recovery units) of the desert tortoise within the Mojave region (Ex. DT4, ¶ 31). Four of the six recovery units are contained within the CDCA, and a small portion of the fifth recovery unit

occurs on the CDCA as well (Ex. 29, p. 36; see also Ex. DT4, ¶¶ 27-42 (describing formulation and content of the Recovery Plan and its implications on BLM management)). Conservation of all these recovery units will help ensure that the dynamic process of evolution in this species will not be unduly constrained in the future (Ex. DT4, ¶ 31).

A key component of the Recovery Plan is the establishment of at least one Desert Wildlife Management Area (DWMA) for each of the six recovery units (Ex. DT4, ¶ 30). The Recovery Plan explicitly calls for the removal of all livestock grazing within the DWMA: “**The following activities should be prohibited throughout all DWMA because they are generally incompatible with desert tortoise recovery and other purposes of DWMA: * * * domestic livestock grazing * * ***” (Ex. 29, p. 56 (emphasis in original)). Additionally, the Recovery Plan classifies removing livestock as a “Priority 1” action. Priority 1 actions are actions “that must be taken to prevent extinction or to prevent the species from declining irreversibly in the foreseeable future.” Id. at 63 (emphasis in original).

On February 8, 1994 FWS designated critical habitat for the desert tortoise. 59 Fed. Reg. 5820 (Ex. 28). The critical habitat rule also recognized the impacts of livestock grazing on the desert tortoise:

Possible direct impacts from grazing include trampling of both tortoises and shelter sites; possible indirect impacts include loss of plant cover, reduction in number of suitable shelter sites, change in vegetation, compaction of soils, reduced water infiltration, erosion, inhibition of nitrogen fixation in desert plants, and the provision of a favorable seed bed for exotic annual vegetation. Habitat destruction and degradation are especially evident in livestock watering, bedding, loading, and unloading areas.

59 Fed. Reg. 5820 at 5824 (Ex. 28).

The critical habitat rule relied heavily upon the recommendations developed in the Draft Recovery Plan and is consistent with the recommendations in the Final Recovery Plan (Ex. 29, pp. 55-56). The area designated as critical habitat² is virtually identical to the proposed DWMA recommended by the Recovery Plan (Ex. 29, pp. 55-56, F1-F18, F28-F39, and H1-H19). The close relationship between the Recovery Plan and the critical habitat designation is further explained in the final Recovery Plan:

The regulation of activities within critical habitat through section 7 (of the

² The critical habitat units located within the CDCA are the Fremon-Kramer, Superior-Cronese, Ord-Rodman, Chuckwalla, Pinto Mountain, Chemehuevi, Ivanpah, and Piute-Eldorado (California) units (Ex. 29, pp. H1-H19).

Endangered Species Act) consultation will be based on recommendations in this Plan (Section II C.1.). Critical habitat does not accomplish the same goals or have as dramatic an effect upon tortoise conservation as does a recovery plan because critical habitat does not apply a management prescription to designated areas. However, designation of critical habitat does provide protection of desert tortoise habitat until such time as the Desert Tortoise Recovery Plan is implemented and DWMA management is employed.

(Ex. 29, pp. 55-56; see also Ex. DT4, ¶¶ 16-26 (describing the critical habitat designation process and the constituent elements of the habitat)).

BLM is presently in the process of developing four bio-regional CDCA Plan amendments to define the actions the BLM will take to implement the Recovery Plan, to achieve recovery for all federally listed species, and to address the effects of all programs and of all future actions that could potentially be authorized under the CDCA Plan (Ex. DT1, ¶ 14). Those plan amendments are the CDCA Plan Amendments for the Northern and Eastern Mojave Planning Area (NEMO) (Ex. 118), the Northern and Eastern Colorado Desert Coordinated Management Plan (NECO) (Ex. 119), the West Mojave Coordinated Management Plan (WEMO), and the Coachella Valley Multi-species Plan (Ex. DT1, ¶ 14; DT3, ¶ 12).

BLM began developing WEMO approximately 10-12 years ago and NEMO and NECO approximately 6 years ago (Tr. 2529-30). Drafts of NEMO and NECO were completed in early 2001 and presented to the public for comment on the detailed actions and alternatives (Ex. DT4, ¶ 51). A draft of WEMO is expected within a year (Ex. DT4, ¶ 51). On January 31, 2001, BLM initiated consultation with FWS under § 7 of the ESA regarding the CDCA Plan and the proposed amendments thereto (NEMO and NECO) (Ex. DT11).

Issuance of the final grazing decisions was precipitated by a series of events, beginning with the filing of a lawsuit in Federal court in March 2000 by the following parties who are now intervenors in this proceeding: the Center for Biological Diversity, Sierra Club, and Public Employees For Environmental Responsibility (hereinafter collectively referred to as the "Center").³ (Ex. DT1, ¶ 16) The Center alleged that BLM failed to consult with the FWS regarding the cumulative effects of the actions authorized by the CDCA Plan on federally listed

³In this proceeding the Center is aligned with BLM, as it supports upholding the final grazing decisions and the Decision Record for the EA. Another intervenor in this proceeding, the County of San Bernardino (County), is aligned with the Appellants because it challenges the validity of the final grazing decisions and the Decision Record. References herein to arguments made by Appellants refer to arguments made by either or both the Appellants and the County and references to arguments made by BLM refer to arguments made by either or both BLM and the Center.

species in violation of § 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2) (Ex. DT1, ¶ 17). Further, the Center alleged that BLM was violating the ESA by allowing those activities to continue in the absence of consultation with FWS, citing Pacific Rivers v. Thomas, 30 F.3d 1050 (9th Cir. 1994) (Ex. DT1, ¶¶ 17, 18).

In that case the Ninth Circuit Court found (1) that the United States Forest Service's land use management plans (comparable to BLM's CDCA Plan) constitute continuing agency action requiring consultation under § 7(a)(2), id. at 1053-56, and (2) that activities authorized under such plans which "may effect" a federally listed species must be enjoined until the Forest Service complies with the consultation requirements, id. at 1056-1057. As relief the Center sought an injunction against all activities authorized under the CDCA Plan and an order directing BLM to initiate and complete consultation on programmatic effects of the CDCA Plan on all federally listed species (Ex. DT1, ¶ 19).

The Department of Justice (DOJ), in consultation with BLM, decided to attempt to achieve a negotiated settlement of the case because (1) BLM had not consulted with the FWS at the land use plan level regarding the cumulative effects of all the activities authorized by the CDCA Plan but, rather, it had only engaged in a series of programmatic level consultations regarding the isolated effects of selected activities, (2) it appeared likely to DOJ and BLM, in light of the conclusions in the Pacific Rivers case, that if the matter was litigated, all activities authorized under the CDCA Plan would be enjoined for BLM's failure to consult on the cumulative effects of all authorized activities, and (3) the Center was prepared to litigate (Ex. 10, p. 5; Ex. DT1, ¶ 21; Tr. 1626-27). Eventually, the Center and BLM executed a total of five court-approved, settlement agreements (Exs. 3, 4, 5, 6, 7, and 8) requiring BLM to take various actions regarding a wide-range of activities authorized under the CDCA Plan in order to protect the desert tortoise and other listed species.

The first settlement agreement (Stipulation 1) (Ex. 3), executed on August 23, 2000, and approved by the Court on August 25, 2000, contains BLM acknowledgments that activities authorized under the CDCA Plan may adversely affect federally listed species and that 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 those species or to result in the destruction or adverse modification of critical habitat. Stipulation 1 also established a schedule by which the BLM would initiate consultation on the CDCA Plan.

In early September, after approval of Stipulation 1, the presiding judge, Federal District Court Judge William Alsup, assigned Magistrate Judge Joseph Spero to facilitate settlement negotiations (Ex. DT1, ¶ 22). The negotiations were limited to the parties to the lawsuit and Judge Spero gave instructions on several occasions that the parties were not permitted to discuss the subject of the negotiations with non-parties. Numerous individuals and organizations petitioned for intervenor status, including Appellant Dave Fisher. All of the petitions, except for one from a coalition of outdoor recreation groups, were denied. (Ex. DT1, ¶ 22; Ex. DT2, ¶ 5)

The other settlement agreements of particular import to this proceeding are the third one (Stipulation 3) (Ex. 5), executed on December 22, 2000, and approved by the Court on January 29, 2001 (Ex. 9, p. 5), and the fifth one (Stipulation 5) (Exs. 7, 8). Stipulation 3 addressed livestock (both sheep and cattle) grazing activities in desert tortoise habitat.

Stipulation 5 contains a provision which states that, “[i]n complying with the terms of this agreement, BLM shall be subject to all applicable federal statutes or regulations, and nothing in this agreement shall be construed to require BLM to take any actions in contravention of any such applicable statutes or regulations.” (Ex. 7, ¶ 56). On January 26, 2001, during a hearing to address whether Stipulation 3 should be approved, counsel for the Government explained to Judge Alsup that this provision meant that BLM would have to comply with NEPA and any other applicable laws (Ex. ABPP, pp. 57-58).

During the same hearing, the parties also clarified their intent that the stipulations preserved and did not prejudice the right of ranchers, such as Appellants, as established by statute and regulation, to pursue administrative appeals and subsequent judicial review of actions taken by BLM to implement the terms of the stipulations (Ex. ABPP). Counsel for the Center further pointed out the existence of a provision known as the reopening clause which is found at paragraph 50 of Stipulation 5. Stipulation 3 contains a nearly identical reopening clause which reads as follows:

Plaintiffs and BLM agree that the terms of this Stipulation are enforceable. BLM represents that it intends to make every effort to comply with its terms in good faith. If, however, through unforeseen circumstances, events should change after the agreement is executed, BLM will notify the Plaintiffs as soon as reasonably possible of the change and the reason therefore. The parties agree to attempt to work reasonably toward a mutually acceptable solution. If the parties are unable to agree, Plaintiffs reserves [sic] the right to renew [their] motion for injunctive relief with regard to the allotment(s) in question.

(Ex. 5, ¶ 9). Counsel for the Center acknowledged that, under these reopening clauses, renegotiations would be necessary if an administrative tribunal found BLM’s implementing actions to be arbitrary (Ex. ABPP, pp. 19-20).

A key provision of Stipulation 3 is the seasonal exclusion of cattle from a portion of the public lands identified as desert tortoise habitat within each of 11 grazing allotments, including the ones at issue, from March 1 to June 15 and from September 7 to November 7. Those portions of land from which cattle are to be seasonally excluded are referred to as the seasonal exclusion areas. Stipulation 3 specifies the acreage of desert tortoise habitat to be included in each exclusion area but not the precise location.

Because cattle remained within the seasonal exclusion areas after March 1, 2001, in

violation of the court-approved settlement agreements, the Center filed in March 2001, a motion with the Federal District Court to find BLM in contempt of court. To resolve the matter, Ann R. Klee, Counselor to the Secretary, submitted a plan for bringing BLM into compliance with the settlement agreements.

That plan contemplated issuance of grazing decisions to implement the livestock grazing terms of the settlement agreements, with opportunity for the affected permittees to appeal the decisions pursuant to the appeals procedures found at 43 C.F.R. §§ 4.470-4.477. In accordance with the plan, the Secretary then took jurisdiction over the appeals filed and they were assigned to me for hearing and issuance of a decision, which will be final for the Department, in accordance with 43 C.F.R. §§ 4.470-4.475(a), 4.478(a).⁴ The plan set a deadline of August 24 for issuance of the final decision so that if the May 15, 2001, decisions were upheld, there would be sufficient time for the grazing permittees to remove their cattle from the exclusion areas by September 7, the beginning of the next exclusion period.

Meanwhile, on approximately January 9 or 10, 2001, Tim Salt, the California Desert District Manager, informed his staff that they could begin talking to the permittees about Stipulation 3 (Tr. 1636-37). On February 20, 2001, the BLM began developing the EA to analyze the potential social, economic, and environmental impacts of temporarily modifying livestock grazing (both sheep and cattle) on 42 allotments, including the Appellants' allotments, in conformance with the livestock grazing terms of the court-approved settlement agreements (Ex. DT2, ¶ 9). Along with this Proposed Action, BLM analyzed a No Action alternative, which would continue then current grazing management, and Alternative 1, which would continue the then current grazing management for many allotments, including Cady Mountain, Horsethief Springs, and Rattlesnake Canyon,⁵ while implementing the terms of the Proposed Action for the remaining allotments, including Cronese Lake, Valley Wells, Lazy Daisy, Ord Mountain, and Harper Lake (Ex. 9).

The EA also contained an evaluation of the 42 allotments to determine whether conditions warranted emergency action pursuant to 43 C.F.R. § 4110.3-3(b). The EA concluded:

⁴By my Order dated July 20, 2001, two appeals were bifurcated from the consolidated appeals at issue. The Order directed that those two appeals should be processed in accordance with the normal appeals procedures found at 43 C.F.R. part 4. This action was pursuant to a stipulation among the two concerned Appellants, BLM, and the County, and over objection of the Center to bifurcation of one of the appeals (the Center agreed to bifurcation of the other appeal).

⁵One provision of the Proposed Action would apply to Rattlesnake Canyon under Alternative 1, namely that fencing of the riparian vegetation in Rattlesnake Canyon would be completed.

that conditions, while serious, do not constitute an emergency at this time. Continued grazing does not pose an “imminent likelihood of significant resource damage” to soils, wildlife habitat, vegetation, and other critical values in the 42 allotments. The BLM has been actively involved in modification of grazing practices since 1991 that has led to improved conditions for the desert tortoise and its habitat over many [of] these allotments. The proposed action would be an additional step to alleviate resource damage from continued livestock grazing.

Upon completion of the EA on April 9, 2001, the BLM immediately distributed it to the Appellants and other interested parties and posted on its website the EA and proposed grazing decisions to implement the Proposed Action of the EA. BLM also provided notice of a 15-day protest and public comment period for the proposed decisions and EA. Numerous protests and comments were received, including many from the Appellants.

On May 1, 2001, the BLM California State Director submitted to FWS a request for concurrence on the positive effects of Proposed Action on the desert tortoise and its critical habitat (Ex. QQCC). By memorandum dated May 15, 2001, FWS concurred (Ex. DT4, ¶ 55).

On May 15, 2001, the California Desert District Manager issued the Decision Record approving the Proposed Action of the EA. That same day the final grazing decisions in question were issued. Both the Decision Record and the final decisions contain responses to the comments and/or protests. In those responses and/or the Authority sections of the final decisions, the following laws are cited as support for the decisions: 16 U.S.C. §§ 1536(a)(1), (a)(2), and (d), and 43 C.F.R. §§ 4110.3-2, 4110.3-2(b), 4110.3-3(a), 4120.3-1(c), 4120.3-2(a), 4130.3, 4130.3-3, 4140.1(b)(1)(ii) and (ii), 4150.2(a), 4150.2(b), 4150.2(d), and 4170.1(a).

The Proposed Action, as approved in the Decision Record, consisted of the following components (see Ex. 9, pp. 9-10, 28-32, & Table 1; Ex. 10, pp. 2-4) which closely track the provisions of Stipulation 3:

(1) The Proposed Action will be implemented through the issuance of final grazing decisions which will be temporary in nature in that they are to remain effective only until either (1) receipt by the BLM from the FWS of a biological opinion addressing the effects of grazing activities covered in the CDCA Plan on 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 records of decision for the NECO and NEMO bio-regional plan amendments, or (2) January 31, 2002, whichever is later.

(2) A permittee may request grazing non-use for the entire allotment during the period the grazing decisions are effective. If non-use is approved, BLM will not approve any subsequent application for grazing use of the allotment from other qualified applicants during that time period.

(3) Except as modified by the final grazing decisions, grazing use may continue under current management, including approved allotment management plans, biological opinions, and National Fallback Standards and Guidelines applicable to the allotment.

(4) BLM will monitor compliance with the Decision Record at least once every week on the allotments at issue to determine whether livestock are present in seasonal exclusion areas. Results of this periodic compliance monitoring will be documented.

(5) Cattle will be excluded from May 1 to June 15 and from September 7 to November 7 from a portion of the public lands acreage identified as either critical or non-critical habitat for the desert tortoise within each allotment as follows:

<u>Allotment</u>	<u>Public Land Acreage</u>	<u>Total Acreage</u>	<u>Exclusion Area Acreage</u>	
			<u>Critical Habitat</u>	<u>Non-critical Habitat</u>
Cronese Lake	54,250	65,304	18,000	
Harper Lake	21,602	26,314	16,482	
Ord Mountain	136,188	154,848	54,000	
Valley Wells	223,120	237,127	88,879	
Lazy Daisy	325,686	332,886	108,020	
Cady Mountain	160,104	231,897		88,320
Rattlesnake Canyon	26,832	28,757		6,600
Horsethief Springs	150,140	158,606		47,581

(6) 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.

(7) The annual amount of permitted cattle use for each of the Cronese Lake, Harper Lake, Lazy Daisy, Ord Mountain, and Valley Wells allotments would be capped at the average number of animal unit months (AUMs) actually used for the 1997, 1998, and 1999 billing years, reducing the permitted use for those allotments, respectively, from 500 to 445, from 600 to 564, from 3,192 to 1,300, from 3,632 to 2,064, and from 3,808 to 1,692.

(8) In the Rattlesnake Canyon Allotment, trailing of cattle through Rattlesnake Canyon will no longer be permitted and an area of the canyon will be fenced by June 30, 2001, to exclude cattle use and trailing within the canyon. The active permitted use will be reduced from 1,081 AUMs to 562 AUMs to account for forage in the excluded areas which will be unavailable.

(9) In the Cady Mountain Allotment, grazing use will be eliminated from the riparian and flood plain habitat located along the Mojave River in Afton Canyon and approximately 0.5 miles

of fence adjacent to the existing fenced riparian enclosure in Afton Canyon will be constructed at the eastern and western ends of the canyon by January 1, 2002, to close the water gaps which now allow access to the Mojave River. This exclusion will remain in effect until the signing of the record of decision for the West Mojave bio-regional plan amendment (Ex. DT8, ¶ 21e). Also, the Hidden Valley Well within the exclusion area will be inactivated during the exclusion periods.

(10) In the Ord Mountain Allotment, both water control fences will be constructed at all developed springs located on public land within the allotment in order to reduce potential cattle drifting into the exclusion area and to improve riparian habitat conditions. Testimony at the hearing made clear that BLM would shoulder the burden of construction of those fences.

In turn, the final grazing decisions incorporate the components of the Proposed Action, with a couple of slight differences. First, the duration of the decisions for the Ord Mountain, Rattlesnake Canyon, and Harper Lake Allotments differs from component (1) in that there are no references to “the signing of the records of decision for the NECO and NEMO bio-regional plan amendments” because those allotments are not within those planning regions. Second, there is a difference between each of the Needles decisions and component (6) in that a reduction in the number of animal days per year would not occur until the occasion of a second violation of the seasonal exclusion of livestock from the exclusion areas.

In the Decision Record, BLM provided the following rationale⁶ for the decision to approve the Proposed Action:

BLM engaged in settlement discussions and ultimately agreed to stipulated provisions contained in the Stipulations and Orders (see Background section) because of its acknowledged lack of consultation on the overall California Desert Conservation Plan as required by the ESA. Although BLM has consulted with the FWS on the effects of grazing on desert tortoise, it has not consulted on the effects of all uses of the desert on listed species. Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS to “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 critical habitat (16 U.S.C. 1536(a)(2)). In addition, subsection (a)(1) of section 7 requires that agencies utilize their authorities to further the purposes of the ESA (16 U.S.C. 1536(a)(1)).

Use of BLM-administered lands in the desert is wide and varied, and may have an impact on any number of threatened and endangered species. In order to comply

⁶This rationale is repeated nearly verbatim in each of the subject grazing decisions.

with the ESA, as well as to preclude the potential for a desert wide injunction against these various uses of desert land, BLM chose to address the underlying litigation through the settlement agreements. These agreements provide that BLM take action to insure that all of the uses in the desert authorized by the BLM do not jeopardize, nor adversely modify any designated threatened or endangered species habitat. 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 Colorado Desert (NECO) and Northern and Eastern Mojave Desert (NEMO) bio-regional plan amendments, or January 31, 2002, whichever shall be later. Because the BLM had not, at the time, initiated nor concluded consultation on the overall species effects, it has utilized its independent authorities under, for example, the Taylor Grazing Act, as amended, and implementing regulations, to provide additional protection to listed species until consultation is complete and the BO implemented. These grazing decisions are a result of BLM's understanding of its requirements under the ESA.

BLM approves the Proposed Action as identified in this decision record to ensure protection of the desert tortoise and critical and non-critical desert tortoise habitat, until BLM implements the requirements identified in the applicable Biological Opinion, which will be issued by FWS. BLM's decision will also ensure additional protection of BLM California sensitive wildlife species including the Mojave ground squirrel, Bendire's thrasher, Le Conte's thrasher, spotted bats, Townsend's big-eared bats, pallid bats, yellow-blotched salamanders, and yellow-eared pocket mouse; 29 special status plant species; as well as a variety of other common plant and animal species; and soils. Additionally, the decision will help prevent further spread of invasive, non-native species which reduce the availability of native forbs for the desert tortoise and other wildlife species and increase the occurrence of wildfire.

The BLM's decision is a temporary modification to current livestock grazing administration pending completion of a Biological Opinion on the affects of the CDCA Plan and implementation of any applicable requirements.

The BLM's decision will provide the highest level of protection for the desert tortoise and its habitat of any option analyzed in the EA. The cumulative impact of reducing sheep and cattle grazing on 42 allotments will result in a slight improvement in the existing resource conditions for the tortoise and other listed and sensitive species until the Biological Opinion is prepared and BLM can review and implement its requirements. The restrictions imposed on grazing as

described in the grazing decisions will partially offset adverse impacts that occur from off-highway vehicle (OHV) use, mining and other activity in the desert.

BLM recognizes that the affected allotments provide a source of income and employment to the ranching community and contribute goods and services to the area.

The lessees may be able to move their livestock to other areas of the allotments during the seasonal closure with a minimum disruption to existing operations. The lessees may also utilize other options including placing livestock on private pastures, if available, or removing all of their livestock from the allotments and later replacing the livestock after the time period of the exclusion ends.

(Ex. 10, pp. 5-6).

In the Background section of the Decision Record, BLM elaborated further:

[The] interim [settlement] agreements [with the Center] allowed BLM to continue appropriate levels of activity throughout the planning area during the lengthy consultation process while providing protection to the desert tortoise and other listed species in the short term. By taking interim actions as allowed under 43 CFR Part 4100, BLM contributes to the conservation of the endangered and threatened species in accordance with [§] 7(a)(1) of the ESA. BLM also avoids making any 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.⁷

(Ex. 10, pp. 4-5).

Mr. Salt explained how the primary provisions of the settlement agreement were determined. During settlement negotiations the Center demanded full implementation of the Recovery Plan, i.e. the elimination of livestock grazing from DWMAs or, pending identification of DWMAs, all critical habitat. BLM did not agree to the Center's demands. Instead, BLM negotiated a compromise that provided for limited exclusion of livestock during periods critical to the desert tortoise (spring and fall) in both critical and non-critical habitat. BLM also assured the Center that use would not change significantly from that experienced in recent years. In crafting the terms of the grazing settlement agreement BLM attempted to minimize the impact to any one livestock operator while maximizing the acreage of critical habitat protected. BLM did

⁷This language is also repeated nearly verbatim in the grazing decisions.

this by ensuring that no active grazing allotment was totally closed and by providing for use at the same levels as had been used over the last three years. BLM personnel considered existing range improvements and used their best professional judgment about manageability to exclude use on portions of the affected allotments during the critical spring and fall seasons. (Ex. DT1, ¶ 28)

To accomplish this, Mr. Salt directed Larry Morgan, the Rangeland Management Specialist for the California Desert District Office, to contact the appropriate Rangeland Management Specialist in each field office and ask them to identify the lands to be seasonally excluded from livestock grazing. The parameters to be considered in the identification of these lands were: (1) what lands within the allotment contain desert tortoise habitat that could be protected by seasonal exclusion of livestock, (2) could exclusion of these lands be managed using existing range improvements or other management practices, (3) would the remaining portion of the allotment allow for continued grazing use. Ultimately, the acreage agreed upon was a compromise from the plaintiffs desire for full closure of all critical habitat. (Ex. DT1, ¶ 28)

Prior to hearing in this proceeding, the parties submitted nearly all of the direct testimony in written form. That testimony is cited herein by reference either to the exhibit number of the testimony or to surname of the witness.

The hearing in the matter was held in Barstow, California, on July 24-28, 30, and 31, and August 1-4, 6, and 7, 2001. At hearing the parties identified by stipulation the following issues to be determined: (1) whether the EA and Decision Record are legally sufficient under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, (2) whether the final grazing decisions are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law, (3) whether the final grazing decisions are consistent with section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, and (4) whether BLM complied with the grazing regulations when it issued the final grazing decisions.⁸

⁸There were also discussions regarding a fifth issue as to whether the final grazing decisions should be stayed. Each appeal requested that the pertinent decision be stayed pursuant to 43 C.F.R. § 4.21, which allows for the stay of an appealed grazing decision pending final resolution of the appeal by the Department. This issue has not and will not be addressed because BLM represented that the decisions would not be made effective unless and until the decisions were upheld in this proceeding and because this decision finally resolves each of the appeals, rendering moot the requests for stay.

Another issue raised in each appeal - that the pertinent grazing decision constitutes a “taking” of private property - was not identified in the parties’ stipulation as an issue to be determined, presumably because this office does not have jurisdiction to consider a takings⁸(cont.) claim. See Klump v. Bureau of Land Management, 124 IBLA 176, 180 n.5 (1992); George H. Ruth, 121 IBLA 131, 136 (1991). If any of Appellants’ property rights have been

Posthearing briefs were submitted by each party on August 11, 2001. Because of the short time frame for issuance of a decision, portions of the written testimony and briefs may be appear verbatim herein without attribution.

The Desert Tortoise

Various witnesses testified as to the physiological needs of the desert tortoise, the deterioration and loss of its habitat, declines in various populations of desert tortoises, and the factors which adversely affect the tortoise and its habitat. Chief among them was Dr. Kristin Berry, a biologist who has been studying the desert tortoise, tortoise habitat, and desert ecosystems since 1971, who was a member of the Desert Tortoise Recovery Team which prepared the Recovery Plan, and who has been employed by the Department since 1974, the first 19 years with BLM (Ex. DT5, Ex. DT4, ¶ 29).

In the 1970's and early 1980, while working for BLM, she established 27 such study plots (each ≥ 1 square mile) for the desert tortoise in the Mojave and Colorado deserts of California as part of the BLM's California Desert Plan Program. The plots were part of an overall program to determine distribution, relative abundance, population characteristics, and status and trends in California. In 1980, she and other biologists (including Dr. Larry Foreman, BLM California District Wildlife Biologist) selected 15 of the 27 plots for long-term monitoring of status and trends. The 15 plots had sufficient sample sizes for monitoring status and trends. (Ex. DT5, ¶ 5a)

For example, the numbers and densities of potentially breeding female tortoises constitute an important measure of population health and status. Another indicator of health is the presence of several cohorts of juvenile and immature tortoises (an indication of successful reproduction, survival of young, and eventual incorporation of young tortoises into the breeding population). (Ex. DT5, ¶ 5a)

Between the 1970's and 1989, the plots provided a wealth of information on population attributes and trends at the 15 study sites. The plot data were one of many sources of information used by FWS to list the desert tortoise as a threatened species in April of 1990. (Ex. DT5, ¶ 5a)

In 1989, because of population declines and appearance of two types of disease, additional research components were added to field work on and near the 15 study plots. This new data supported research on pathology and epidemiology of diseases, provided additional information to biologists and land managers about the status of tortoise populations, and

infringed, they may seek just compensation in the courts in a properly pled takings action, through which they would be afforded appropriate due process. Duval Ranching Company, S & D v. Glickman, 965 F.Supp. 1427, 1447 (D. Nev. 1997).

provided information on why tortoise populations were or were not thriving. (Ex. DT5, ¶ 5a)

During the 11 years since the federal listing of the desert tortoise as a threatened species, tortoise populations have continued to decline in California. Of particular concern are the rapid and severe declines in previously stable or increasing populations in the Fenner, Ward, and Chemehuevi valleys (Exhibits 7, 8, 9, and 10). There are also indications of recent declines in Ivanpah Valley from the field work Dr. Berry supervised in spring 2001. In fact, she can point to no moderate to high density, robust, stable or increasing California population of desert tortoises at this time. The new declines in Fenner, Ward, and Chemehuevi valleys are new developments since 1994, when the Recovery Plan was published. (Ex. DT5, ¶ 5a)

Other examples of declines in tortoise populations can be found at study sites in the western and southern Mojave, as well as on the Chuckwalla Bench in the eastern Colorado Desert (Exs. 35, 38). Some of these areas and 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. The Fremont Valley plot was surveyed in spring 2001 and shows marked declines in numbers since 1991. (Ex. DT5, ¶ 5a)

Another series of data, including demographic data from 20 desert tortoise study sites at the National Training Center, Ft. Irwin, and Goldstone Deep Space Communications Complex, exist for the period 1996-2001 (Ex. 39). Most plots were established between 1997 and 1999, and the demographic data provide a status report on population condition and recent trends. Two of the plots are within critical habitat and another small group is very close to the border of critical habitat in the Superior-Cronese area. Virtually all sites show evidence of either very low tortoise densities or recent declines in live tortoises, as well as higher than normal mortality rates. (Ex. DT5, ¶ 5a)

Numerous causes of mortality have been identified, and most of these causes have been summarized in the Recovery Plan (Ex. 24). Threats and known causes of population loss and mortality include, but are not limited to: vehicle kills on and off road; vandalism; illegal collecting; predation by ravens; predation by domestic and/or feral dogs; wildfires; trampling by livestock; disease; and habitat degradation and alteration from many sources. Locally and regionally, there is usually no single cause or one major cause of declines. Instead, many factors interact, often in very complex ways, producing abnormally high mortality rates that in turn drive population declines. (Ex. DT5, ¶ 5b)

In recent years, specifically in the last 15 years, diseases have emerged as a new group of threats to desert tortoises. Some of the more common diseases are upper respiratory tract disease (URTD), which is also called mycoplasmosis, at least two shell diseases (cutaneous dyskeratosis and shell necrosis), and urolithiasis (Exs. 30-32, 38, 40). Elevated levels of heavy metals and other elements also have been implicated in poor health of desert tortoises (e.g., Ex. 41). (Ex. DT5, ¶ 5b)

Ill, dying, and recently dead tortoises from eastern Mojave and Colorado Desert study sites such as Goffs, Chemehuevi Valley, Ward Valley, and Chuckwalla Bench, have some common clinical, laboratory, histological and toxicological findings. The findings include, but are not limited to: shell diseases such as cutaneous dyskeratosis, shell necrosis and/or fungal infiltration of the shell; thyroid degeneration and dysplasia; hepatic, pancreatic, and/or testicular degeneration or atrophy; atrophy or degeneration of skeletal muscle; clinical signs and/or positive laboratory tests for mycoplasmosis or herpes virus; and elevated levels of one or more toxicants. Such findings are consistent with nutritional deficiencies, metabolic diseases, and toxicities (Exs. 30, 36, 37, 40, 41 unpublished necropsy reports). (Ex. DT5, ¶ 5)

Most desert tortoise habitats in California have experienced a wide array of human uses, ranging from construction of roads, railways, and energy corridors to mining and military maneuvers (Ex. 29). Urban and agricultural developments have consumed thousands of acres and continue to exert negative influences on nearby critical habitats from dumping, domestic dogs, vandalism, illegal collecting of tortoises, unauthorized vehicle use, invasion of new alien plants, and wildfires. (Ex. DT5, ¶ 5c)

Desert tortoises are most likely to thrive where surface disturbances to the topography, soils, soil crusts, perennial and annual vegetation are minimal. Where cover of perennial vegetation is high and where shrubs are dense, tortoises of all sizes have greater thermal protection as well as hiding cover from predators. Sites with dense canopies of shrubs are ideal for placement of burrows (~70% of all burrows are placed under shrubs) (Exs. 42, 43). Tortoises exhibit fidelity to cover sites (burrows, dens in washes), often returning to re-use them (Ex. 42). They know where the burrows are and rely on the burrows being intact and available when they want to use them. (Ex. DT5, ¶ 5c)

Desert tortoises prefer specific native annual and herbaceous perennial species, cacti, and grasses over alien species for forage (e.g., Exs. 44, 45). Desert tortoises also demonstrate other preferences for forage plants. They prefer succulent to dry species, and certain groups of forage plants, such as herbaceous perennials and legumes (e.g., Exs. 44, 45). Habitats with low densities and biomass of alien species are more likely to be favorable for tortoises than those with high densities and biomass of aliens. Alien forbs (*Erodium cicutarium*) and grasses (*Bromus* sp., *Schismus* sp.) compose from 15 to ~65 percent of the biomass of annual plants throughout much of tortoise critical habitat in California (e.g., Ex. 46, unpublished data from study plots). Alien annual plants, such as the forb *Erodium cicutarium* and grasses (*Bromus* sp., *Schismus* sp.) are successful competitors with the native plants used by tortoises for food (Exhibit 47). (Ex. DT5, ¶ 5c)

Tortoises often select plants that are rare within the habitat as forage (Ex. 45), and some of the species may be located primarily near, on the edges or on the floor of small washes and drainages (Ex. 48). Disturbances to these washes and small drainages by livestock and vehicles deleteriously affect prime food sources for the tortoises. Alien plants can more easily invade the

washes (Ex. 47), thereby degrading tortoise habitat. (Ex. DT5, ¶ 5c)

Livestock grazing is one land use affecting tortoises. Livestock grazing has numerous direct and indirect impacts on tortoises and their habitats (Ex. 29). These impacts include but are not limited to 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 crusts, creation of blowing dust. (Ex. DT5, ¶ 5d)

Tortoises have a better opportunities to thrive in areas without livestock grazing. For example, in Ivanpah Valley, cattle trample a portion of the tortoise burrows or “cover sites.” Dr. Berry and a field worker tallied active burrows that recently were damaged by cattle both inside and outside a cattle enclosure in 1994. Subsequently the fieldworker evaluated burrows in an area encompassing 0.47 square mile. Inside the fenced enclosure only one of 162 burrows (0.6%) had a hole or damage to the burrow roof from livestock trampling. In contrast, outside the enclosure, 16 of 342 (4.7%) had such holes, almost an eight-fold difference. Since tortoises show a high-degree of fidelity to specific burrows (Exhibit 15), they will expend unnecessary energy in digging out damaged burrows or in digging a new replacement burrows. (Ex. DT5, ¶ 5d)

Juvenile and immature tortoises are better protected from ravens and other predators where cover of shrubs and perennial grasses is higher. For example within the cattle enclosure in Ivanpah Valley, the native perennial galleta grass is tall and grass clumps create small, dense canopy cover. In contrast, outside the enclosure, the clumps are closely cropped, producing less shade and thermal cover for the small tortoises than inside the enclosure. Drs. Geffen and Mendelsohn described (personal communication, Ex. 50) how ravens in Israel were less successful in preying on the Kleinmann’s tortoise in habitats with dense cover of shrubs. (Ex. DT5, ¶ 5d)

One of the key issues for maintaining a stable and/or increasing desert tortoise population is good nutrition: plenty of high quality forage and water at the appropriate times of year. Desert tortoises are probably no different than many other vertebrate species. Healthy animals, including tortoises, are less likely to become ill and succumb to infectious and other diseases than animals (e.g., tortoises) experiencing malnutrition, lack of food or poor quality food, and insufficient water (e.g., Ex. 51). Also, reduced food intake may compromise immune systems and increase susceptibility to some poisons (e.g., Ex. 51). The appearance and invasion of alien plants in California desert landscapes is a serious problem for desert tortoises and their habitats.

Aliens can and do successfully compete and replace the native plant species preferred by tortoises for food, thereby degrading tortoise habitat. One method of reducing opportunities for invasion and spread of aliens is to reduce anthropogenic disturbances to habitats. (Ex. DT5, ¶ 5d)

Desert tortoises have a considerable range of behavioral and physiological flexibilities and can tolerate some degree of starvation and dehydration (Exs. 33, 52). This species occupies a wide variety of desert habitats and has existed under periods of drought for thousands of years. Droughts occur with great frequency in the Mojave and Colorado deserts, often at about 3 year intervals (see National Oceanic and Atmospheric Administration Climate records). Nevertheless, when natural processes such as periodic droughts are coupled with degraded habitats and other anthropogenic sources of mortality, the complex interactions of environmental variables and anthropogenic activities result in negative impacts on the species. (Ex. DT5, ¶ 5d)

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. With the significant losses of breeding adults in several areas, especially breeding females, the situation is particularly acute. Recovery of populations with even 50% loss of breeding females will require decades. Those sites with a 70-90% loss of breeding females are likely to require centuries. (Ex. DT5, ¶ 5e)

Recovery efforts need to focus not only on the tortoises themselves but on their habitats. Protection and management of tortoise habitat are important issues, particularly protection of native forage plants and increasing the amount and quality of canopy cover. (Ex. DT5, ¶ 5e)

Dr. David Morafka, one of the authors of the Recovery Plan, also testified for BLM. He is an expert in the ecological requirements and vulnerabilities of neonatal and juvenile desert tortoises.

He testified that cattle grazing constitutes a particular threat to these age classes for the following reasons:

1. Microhabitats
2. Limited Season “window” for activity
3. Limited physical access to forage
4. Constraints on acceptable forage imposed by PEP values and basal nitrogen requirements
5. The Demographic importance of juvenile age classes to population recruitment and stabilization

Microhabitats: Our studies at Ft. Irwin (Joyner, 1991, Wilson et al 1999; Chelonian Conservation & Biology 3(3):6pp and Wilson et al 1999, Journal of Herpetology 33(3):496-450 and those of others (Rautenstrauch et al 1998:62-98-107)) confirm that the great majority

juvenile tortoises use small shallow burrows, not those formed by adults. In most cases these burrows are less than a foot deep. They are typically abandoned rodent burrows. As a result, hoofed animal traffic is far more likely to collapse a juvenile tortoise burrow than one of an adult. Several sources document higher erosion in heavily grazed areas. When this erosion is considered along with the shallowness of these short, small, and narrow burrows, increases vulnerability to winter flooding and exposure to predators would be expected. (Ex. I-1, ¶ 1)

Limited Season “window” for activity: Again referred journal publications based on studies at Ft. Irwin (Wilson et al, 1999a 1999b, prev. cit.) confirm that late winter surface activity is common in juvenile tortoises and may reach its annual peak by February. Generally, the range of the threatened Mojave desert tortoise populations lies west of reliable monsoonal summer rain patterns. As result neonates emerge with sufficient yolk based stores to survive only through a Fall dispersion and winter hibernation (Lance and Morafka, In Press. Herpetological Monograph 2001). Thus, they must feed in late winter and early spring to compensate for these exhausted nutrient stores and to maintain growth. Late January through early May is the only time window in which young tortoises may obtain sufficient succulent vegetation, especially forbs, to satisfy their caloric and essential nutrition needs and to complete rehydration for the entire year (see below). This winter spring forage is also most attractive to grazing cattle. (See also Attach, B, C to Ex. IAI). (Ex. I-1, ¶ 2)

During 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 juveniles tortoises would be killed underground in burrows indistinguishable from those of rodents during the first several months of their occupation by tortoises. (Ex. I-1, ¶ 2)

Limited physical access to forage: Commonly defenders of the practice of grazing cattle on tortoise habitat cite the abundance of plant biomass, arguing that it is calorically sufficient to satisfy the needs of both organisms. In fact the total plant biomass is largely irrelevant to the issue in question. Adult tortoises have access only to the first 6" - 10" of vertical vegetation. Neonate/small juvenile tortoises (<100mm mid plastron length) have their access reduced to only the first 2-3" of vertical growth. Even among these plants only herbaceous species or new shots

of a few perennials are sufficiently pliable for ingestion by young tortoises. (Ex. I-1, ¶ 3)

Constraints on acceptable forage imposed by PEP (Potassium Excretion Potential) values and basal nitrogen requirements: Studies by Avery et al, 1993 *Physiological Zoology* 66:902-925; Adest et al 1989 *Vida Silvestre Neotropical*:2(1) 14-20 have confirmed that a dietary protein content greater than 12-16% is needed to sustain growth in young chelonians. In the second study the protein content of forage selected by juveniles was double that selected by adults (16% versus 8%). The primary source of this higher protein forage are spring forbs, species which would be more subject to crushing by cattle hoofs and, are in some instances, the preferred forage of the cattle themselves. In addition studies by Oftedal, Hillard, and Morafka (Submitted, *Chelonian Conservation & Biology* 2001) confirm the predictions of Oftedal's PEP hypothesis (Dr. Olav Oftedal is affiliated with Las Vegas Desert Tortoise Research Center, National Zoo, and Smithsonian Institution). The PEP hypothesis predicts that tortoise will select among available forage for species rich in protein and water, but lower in potentially toxic potassium content. Potassium is abundant in many desert plants, but its toxic effect may be reduced in a water and nitrogen rich diet. Again, the availability of acceptable forage cannot be predicted from local densities of plant biomass or their caloric content, but rather from low lying succulent forbs which are some of the very species most affected by cattle grazing (see the USGS Avery study). (Ex. I-1, ¶ 4)

The demographic importance of juvenile age classes to population recruitment and stabilization: Neonatal (= first year) and other juvenile age class survival is critical to recruitment, growth, and stabilization of tortoise populations. Contrary to the popular image of massive mortality of young turtles and tortoises, annual survivorship of even neonates is generally greater than 50% (see Heppell et al, *Copeia* 1998: 367-375, Morafka et al 1997 *Proceedings: conservation, restoration, and management of turtles & tortoises-Int. conference*; 147-165). When annual survivorship is compounded over the 15 years necessary to achieve reproductive adults, the net total survivorship is only a few percent. However, Congdon et al (1993 *Conservation Biology* 7:826-833) used the demographic model of a 30 year study of another long-lived, slow maturing turtle, Blanding's turtle, to demonstrate that the mean annual survivorship of all age classes needed to exceed 70% in order to sustain sufficient replacement of adults in a stable population. This means that populations may not tolerate dramatic die-offs of juvenile tortoises in any given year without suffering significant decline. Such mortality should be expected when cattle collapse their shallow burrows, erodes sustaining soils, and suppress or denude key forb vegetation which is vital to juvenile tortoise growth and survival. (Ex. I-1, ¶ 5)

Dr. Morafka opined that when the 1994 USFWS Desert Tortoise Recovery Plan is reconsidered in light of the five issues just cited, the risks of combining cattle grazing with tortoise conservation in DWMA's is inappropriate. The Recovery Plan clearly opted for caution, and called for additional experimental and empirical evidence. In fact the available evidence compiled since 1994 suggests that such grazing activities would compromise the potential success of the DWMA's in achieving their primary goal of protecting healthy stable tortoise

populations and fostering their recovery. I have seen no credible evidence to the contrary. Measures of total desert plant biomass do not demonstrate forage sufficient for both organisms. Rather such citations in the past have ignored the issue of physical accessibility, temporally availability, and the equally serious variable of nutritional quality. Only pliable vegetation a few inches off the ground is available to any tortoise. Only relatively frail grasses and forbs growing within two inches of ground surface are accessible to neonates and young juveniles. These critical forage components are available for no more than 100 days between February and May. Hoofs impacts both forage and burrows. Grazing differentially removes forbs necessary to sustain survival and growth. Temporally, these livestock activities are concentrated when young tortoise are most vulnerable, physically (in the Fall), nutritionally (in the late winter and Spring), and when most in need of compensatory forage (Spring). Spatially, grazing cattle and tortoises may both concentrate around localized clusters of new grass and forb growth, since uneven desert rainfall patters led to germination of attractive forage in patches, even within single valleys. We must anticipate ensuing interactions in which tortoise survival, growth, and recruitment is compromised. These scenarios involve well established trends and casual relationships. While the degree of harm may vary at specific sites, the evidence available to me indicates that cattle grazing at DWMA's compromise their primary purpose, and this practice does so unnecessarily. (Ex. I-1, p. 3)

Raymond Bransfield, who has been a biologist for FWS since 1983, has prepared approximately 100 biological opinions regarding the effects of various activities upon the desert tortoise, and participated in the development of the FWS final rule designating desert tortoise critical habitat, testified similarly that there are many factors contributing to the decline of tortoise and its habitat and that livestock grazing is one of those factors. (Ex. DT4, ¶¶ 6-14).

He described the effects of livestock grazing on the desert tortoise and its habitat as follows. 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 crusts that are normally found in many areas of the desert

and 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. Fire in the Mojave Desert is a recent phenomenon. 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. (Ex. DT 4, ¶ 10).

Dr. Foreman provided further testimony as to the effects of cattle grazing. Cattle grazing conflicts with the maintenance of desert tortoise population by directly crushing tortoises or burrows or indirectly by altering habitat and competing for forage. Numerous studies have shown an overlap in the diet of cattle and tortoises and many others have documented food of cattle or of desert tortoise. Avery (1998) found that competition for forage (mostly annual grasses and forbs and perennial grasses) occurs in early spring and late spring of years of low rainfall and annual plant production. He found that tortoise foraging (i.e., behavior and food selection) was altered in areas where cattle were present. Tracy (1996, as summarized in Boarman, 1999) found that in years of low rainfall, and hence annual plant production, cattle grazing may reduce tortoise forage sufficiently to cause tortoises to lay fewer eggs, thereby reducing reproductive potential. Cattle grazing potentially reduces plant cover. Plant cover is used by tortoises for thermoregulation (i.e., shade) and predator avoidance, especially by hatchling and juvenile tortoises. Durfee (1988 as summarized by Boarman, 1999) found less bare ground, more introduced plants, and more perennial plants in ungrazed areas along fenced highways. However, Avery (1998) found that the differences are more complex with some plants (e.g., creosotebush) being larger and others (e.g., Galleta grass) being smaller in grazed areas. Other studies have shown the effects of heavy grazing, but grazing intensity in allotments in the CDCA is generally light, except around water sites. Negative effects of grazing on soil temperature, soil chemistry and soil nutrients are possible but more difficult to assess from the literature. Potentially, cattle can step on tortoises and injure or kill them. The likelihood of this is greater for hatchling or juvenile tortoises that are small and presumably difficult for cattle to see. Similarly, cattle can potentially cave in burrows, thereby disturbing essential thermal cover or even entrapping a tortoise within. Avery and Neibergs (1997) (Exhibit 120), comparing inside and outside of an enclosure, found significantly more damaged burrows and found that tortoises spent more nights in the open outside of a cattle grazing enclosure (see Boarman, 34-47). (Ex. DT3, ¶ 15c).

Dr. Foreman also echoed Dr. Berry's concerns over the recent declines in desert tortoise populations, as evidenced by data from the 15 study plots established by Dr. Berry. Exhibit 24 shows the locations of the 15 desert tortoise permanent study plots in relation to the subject cattle allotments and critical habitat.

Dr. Foreman noted that the spread of URTD across the west Mojave and into the Central

and East Mojave has been followed by analysis of randomly collected, freshly dead or sick tortoises. At this time, all areas have URTD, although only a few specimens have been analyzed in the eastern and southern deserts. (Ex. DT3, ¶ 20)

Dr. Foreman observed that declines in tortoise populations have been most 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. (Ex. DT3, ¶ 19) 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. (Ex. DT3, ¶ 21)

In fact, all the desert tortoise experts agree that the tortoise's plight has worsened over the decade since it was listed (see, e.g., Ex. DT5, ¶ 5a; Ex. DT7 (describing findings from various surveys showing declines in tortoise throughout its range in California)). The testimony of Dr. Berry and Edward LaRue, a BLM biologist, shows a near total collapse of tortoise populations in the Mojave.

For example, Dr. Berry observed in a study plot in Chemehuevi that "the decline between 1992 and 1999 * * * was 84%." (Ex. DT5, ¶ 5a). 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." (Ex. DT5, ¶ 5a).

The testimony of Mr. LaRue is equally grim. For example, in 1984 there were 237 square miles of the West Mojave known to support an estimated 250 tortoises or more per square mile. By 1999 that number was down to 7 square miles. (Ex. DT7, ¶ 22). Mr. LaRue describes 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." (Ex. DT7, ¶ 33)

On March 15, 2000, the BLM released the report of a panel of tortoise experts addressing the current status of the species in the West Mojave in relation to the proposed expansion of Fort Irwin (Ex. KR). The report states that "[t]he current status of the tortoise is further from recovery than when first listed in 1990," and "[i]t is apparent that substantially fewer tortoises occur now than were estimated to occur in 1990 when the tortoise was listed or in 1994 when the Recovery Plan for this species was completed." The report further states that "this panel concludes that the desert tortoise in the West Mojave Recovery Unit is more appropriately characterized as "endangered" than "threatened * * *." (Ex. KR; see also Ex. DT7, ¶ 24 (describing conclusions of Fort Irwin panel)).

BLM Tortoise Management

In response to the plight of the desert tortoise, the BLM has taken many actions with regard to management of the desert tortoise, including some of the aforementioned monitoring studies and actions itemized in the testimony of Dr. Foreman (Ex. DT3), Timothy Salt, the District Manager of BLM's California Desert District (Ex. DT1, ¶ 36), and Tim Read, the Field Manager for the Barstow Field Office (Ex. DT9, ¶¶ 5, 6). Those actions date back to designation in the CDCA Plan of eight tortoise "crucial habitat areas" where further planning for tortoise conservation would take place (DT3, ¶ 5).

The BLM Tortoise Rangeland Plan, a policy established by the BLM Director in November 1988 (Ex. 18), and a CDCA Plan amendment in 1990 replaced the crucial habitat concept with a three-tier designation of tortoise habitat categories. Under the Rangeland Plan, tortoise habitat on BLM-administered lands was categorized according to four criteria: (1) importance of the habitat to maintaining viable populations, (2) resolvability of conflicts, (3) tortoise density, and (4) population trend. The following goals were specified for each habitat category:

- (1) Category I Goal: Maintain stable, viable [desert tortoise] populations and protect existing tortoise habitat values; increase [tortoise] populations, where possible.
- (2) Category II Goal: Maintain stable, viable [desert tortoise] populations and halt further declines in tortoise habitat values.
- (3) Category III Goal: Limit tortoise habitat and population declines to the extent possible by mitigating impacts.

A related goal for Category III habitat was to minimize impacts to tortoises through humane, low level mitigation and compensation requirements. The Rangeland Plan also directed each BLM state organization to develop a strategy for implementing the policies in the Rangeland Plan with the goal of no net loss in quantity or quality of habitat in Category I and II areas to the extent practical.

In response to the direction given in the Rangeland Plan, The BLM California State Director signed the *California Statewide Desert Tortoise Management Policy* (Statewide Tortoise Policy) in October 1992 (Ex.19), which supplements the Rangeland Plan. In 1993, a mapping of the BLM-administered lands into the three habitat categories was incorporated into the CDCA Plan by amendment (see Ex. 25).

Those habitat categories have been referenced in numerous consultations with the FWS and in FWS biological opinions, with the amount of compensation or off-site mitigation required to offset residual, unmitigated impacts of projects being determined using the BLM habitat categories (Ex. DT3, ¶ 11). Those biological opinions include two pertaining to BLM's interim cattle grazing program, one issued on July 13, 1993 (Ex. 12), and one issued on March 14, 1994

(Ex. 13), which amends the July 13, 1993, biological opinion (BO) (Exs. 12, 13). BLM also consulted with FWS regarding the effects of other programs on the desert tortoise, including dual sport motorcycle touring rides, small mines, other small disturbances, and OHV open areas (Ex. DT3, ¶ 11).

The two cattle grazing BO's pertained to the effects on the desert tortoise of proposed interim grazing activities within approximately 25 allotments, including the subject allotments, described reasonable and prudent measures which are necessary and appropriate to minimize incidental taking of the tortoise, imposed mitigating terms and conditions upon that proposed grazing use, and concluded that such use, as modified by the terms and conditions, was not likely to jeopardize the continued existence of the tortoise (see Exs. 12, 13).

The July 13, 1993 BO was issued in response to BLM's submission of a biological evaluation of the effects of a proposed interim cattle grazing program on the desert tortoise, pending development of long-term management methods and development of the Desert Tortoise Recovery Plan and possible CDCA Plan amendments (Ex. QQB). That evaluation considered alternatives to the proposed grazing program, including extensive development of fences and water sources to maintain cattle use within prescribed areas and time periods. That alternative was eliminated due to prohibitive costs associated with construction of these facilities and the poor potential for locating alternative use areas in most allotments (Ex. QQB, p. 7).

A second alternative involving restriction of cattle from grazing in Category I and II desert tortoise habitat from March to June was also rejected. BLM explained the rejection as follows:

This [alternative] could be accomplished [by] moving the cattle (probably to higher elevations) or removing them from the range altogether. Moving cattle to higher elevation range (outside of tortoise habitat) during the spring places the cattle into bighorn sheep habitat not only in the spring, but also in the summer when the forage in the valley floors has dried up. This will result in excessive use of this higher country and eventual loss of the area for both cattle and bighorn. Total removal of cattle from the range is not feasible because of 1) the difficulty in gathering all the cattle on a yearly basis, 2) the difficulty in cattle adjusting physiologically to alternating native forage and hay, 3) the high cost of maintaining the mother herd on hay during the spring, and 4) the loss of weight gain on calves in the spring which is the economic basis for the grazing activity.

(Ex. QQB, pp. 7-8).

The July 13, 1993 BO did not address the effects of the interim grazing program on desert tortoise critical habitat because FWS had not yet designated critical habitat. After FWS made the designation in February 1994 (Ex. 28), another BO issued on April 26, 1994, addressing the

effects of BLM's interim grazing program on designated critical habitat, imposing mitigating terms and conditions, and concluding that the grazing program, as mitigated, was not likely to destroy or adversely modify it (Ex. DT2, ¶ 25b; Ex. QQH). That BO was replaced with another BO issued on March 25, 1997, and containing the same conclusion (Ex. 14). That BO recommended elimination of cattle grazing from critical habitat within the subject allotments as a conservation measure available to BLM to meet its duty under § 7(a)(1) of the ESA to conserve listed species (Ex. 14).

After the FWS issued these BO's, the BLM issued "full force and effect" grazing decisions pursuant to the grazing regulations to immediately institute mitigation measures for grazing activities on desert tortoise habitat. These decisions were issued on an emergency basis in order to bring the existing leases and permits into compliance with the issued BO's. (Ex. DT2, ¶ 25d).

On May 17, 1999, FWS, at the request of BLM, extended the expiration dates for the March 14, 1994 BO and the March 25, 1997 BO (Ex. DT4, ¶ 54). On September 3, 2000, FWS extended the expiration dates through the completion of NECO, NEMO, and WEMO, three of the four bio-regional plan amendments to the CDCA Plan (Ex. 14B).

Through the bio-regional amendments, BLM intends to implement key elements of the FWS Recovery Plan for the desert tortoise, including designation of DWMA's and prescriptions for them, and provide for the recovery of other State and federally listed species (Ex. DT4, ¶ 49; Ex. DT3, ¶¶ 12, 23). The boundaries covered by the bio-regional plans were based upon the recovery units described in the Recovery Plan (Ex. DT1, ¶ 14).

The Recovery Plan (Ex. 29) recommended the creation of at least one DWMA in each of six recovery units throughout the range of the tortoise. The Recovery Plan suggested general locations for the recommended tortoise DWMA's, but left the task of identifying the boundaries and developing appropriate management prescriptions to the cooperating land management agencies. With the exception of the Rattlesnake Canyon Allotment, a portion of each of the subject allotments is within the present proposed boundaries for one or more DWMA's (Ex. QE, QF). The minimum recommended DWMA size is 1,000 square miles; a total of 14 DWMA's were proposed. The Recovery Plan listed five recovery criteria for delisting of each of the distinct population segments (ESU's) of the tortoise identified as a recovery unit. The criteria are summarized as follows:

- (1) Upward or stationary trend within a recovery unit for at least 25 years;
- (2) At least one DWMA with reserve level management of 1,000 square miles or more, except under unusual circumstances;
- (3) A population lambda [discrete growth rate] of at least 1.0 in each DWMA;
- (4) Regulatory mechanisms and land management commitments are adequate and in place to ensure long-term habitat protection; and

(5) The population is likely to remain stable or increase in the future.

The Recovery Plan recommended that management plans are to be developed to determine the size, location, and boundaries of the DWMA. DWMA's are to have management prescriptions that limit impacts from human uses and activities to the extent required to meet the purposes of the DWMA. To assist agencies in this, recommendations were presented for reducing levels of conflicting activities and addressing other issues within the DWMA's. The Recovery Plan includes "domestic livestock grazing" in a list of "activities [that] should be prohibited throughout all DWMA's because they are generally incompatible with desert tortoise recovery and other purposes of the DWMA's." (Ex. 29, pp. 56-57)

Actions being proposed in the bio-regional plan amendments have been crafted in an attempt to eliminate the competition for forage and minimize other impacts to desert tortoise without eliminating livestock grazing (Ex. DT1, ¶ 15). In contrast, livestock grazing has been or is being eliminated on 38 allotments in the Las Vegas Resource Management Plan, 5 allotments in the Arizona Strip Resource Management Plan area, and the DWMA portions of 4 year-round and 7 spring grazing allotments in the Dixie Resource Management Plan in Utah (Ex. DT1, ¶ 15).

The planning decisions for NECO, NEMO, and WEMO are being made on a collaborative basis, involving all interested and responsible parties. As an example, the WEMO — which covers 9.5 million acres of Federal, State, and private lands in the western Mojave Desert -- involves three counties, 11 incorporated towns and cities, several State and Federal agencies, and numerous private interests and local stakeholders (Ex. DT3, ¶ 12). BLM began developing the WEMO approximately 10-12 years ago and has not yet completed a draft plan (Tr. 2529-30). On January 31, 2001, BLM submitted to FWS and initiated consultation on a biological evaluation of the effects on the desert tortoise of the terms and conditions of the existing BO's for livestock grazing in the West Mojave, certain interim measures, and the CDCA Plan, as proposed to be amended by the preferred alternatives of the draft NEMO and NECO plan amendments (Ex. QQY; Ex. DT11, ¶ 8). In early 2001, BLM did complete drafts of the NEMO and NECO amendments to the CDCA Plan.

Critical Habitat

Critical habitat is defined in § 3(5)(A) of the ESA, 16 U.S.C. § 1532(5)(A), as "(i) the specific areas within the geographic area occupied by the species on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the

geographical areas occupied by the species * * * essential for the conservation of the species."⁹ Such physical and biological features (referred to as the primary constituent), as stated in 50 C.F.R. § 414.12, include, but are not limited to: space for individual and population growth, and for normal behavior; food, water, or other nutritional or physiological requirements; cover or shelter, sites for breeding, reproduction, rearing of offspring; and generally, habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species (page 5822 of the critical habitat final rule). (Ex. DT4, ¶ 23).

The primary constituent elements of desert tortoise critical habitat are: sufficient space to support viable populations within each of the six recovery units and provide for movement, dispersal, and gene flow; sufficient quantity and quality of forage species and the proper soil conditions to provide for the growth of such species; suitable substrates for burrowing, nesting, and overwintering; burrows, caliche caves, and other, shelter sites; sufficient vegetation for shelter from temperature extremes and predators; and habitat protected from disturbance and human-caused mortality (page 5822 of the critical habitat final rule). (Ex. DT 4, ¶ 24).

BLM's Category III tortoise habitat approximates "non-critical habitat", a term which BLM uses to refer to that portion of suitable or occupied habitat of a species that has not been designated as critical habitat by the FWS (Ex. DT3, ¶ 9). The term "suitable" generally refers to areas that provide the constituent elements of nesting, sheltering, foraging, dispersal, and gene flow (Ex. DT4, ¶ 25). BLM has classified as non-critical habitat many areas which FWS did not classify as critical habitat because the areas may be an important component of BLM's fulfillment of its responsibilities under section 7(a)(1) of the ESA (Ex. DT3, ¶ 9).

Section 7(a)(1) provides that "All other Federal agencies shall * * * utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species * * * ." BLM has interpreted this section as imposing responsibilities to develop and implement actions to recover federally listed species.

Status Of And Likely Effects On The Appellants, Their Cattle Operations, And The Regional Economy

There are certain characteristics common to all of the grazing operations (see, generally, declarations of the Appellants). Within each allotment, the State and private lands are intermingled with and unfenced from the federal lands. Because the cattle are spread out over a

⁹Use of the term "conservation" in the definition of critical habitat indicates that its designation should identify lands that may be needed for a species' eventual recovery and delisting. Section 3 further states that, in most cases, the entire range of a species should not be encompassed within critical habitat (page 5821 of the critical habitat final rule). (Ex. DT4, ¶ 19).

large area, the operators do not see or check on every animal every day. Instead, cattle management focuses on checking and maintaining the water sources so that the cattle have water, while the cattle are left to their own instincts to find the best and most fresh forage available. Desert cattle will walk long distances (6 or 7 miles) and go without water for a few days in search of forage. Each allotment is an ephemeral/perennial allotment in which the availability of forage varies from month to month, year to year, and location to location based, in large part, upon the variability and dramatic effects of rainfall. Cattle which are born and raised on an allotment are best able to find the forage, but any cattle native to the desert will do well, especially if they are placed on an allotment with other cattle familiar with the allotment (see, e.g., Tr. 116-18, 124, 147). Cattle not native to the desert do not fair well on the subject allotments.

Each of the Appellants testified similarly as to potential options for responding to the limitations placed upon his or her operation by the applicable grazing decision. Those options may include fencing, herding, and/or water source development or management to prevent drift into the exclusion areas, placing some or all of their cattle on private property owned or controlled by the lessee, purchasing or leasing private pasture, acquiring other grazing allotments for placement of cattle, feeding the cattle hay, taking them to a feedlot, selling a certain number of cattle immediately before one or both exclusion periods and then replacing them at the conclusion of the exclusion period(s), and selling all their cattle or enough cattle to reach a number sustainable throughout the year under the limitations and, if necessary, supplement their income by other means until the temporary grazing decision terminates.

Each Appellant testified that he or she will be forced out of business because the applicable grazing decision will force removal of some or all of his or her cattle from the allotment and:

- (1) He or she does not own or lease enough private property on which to graze the cattle while they are not on the grazing allotment.
- (2) There is very little, if any, private pasture available to purchase or lease in the surrounding communities.
- (3) It is both cost-prohibitive and bad livestock management to feed the cows hay during the seasonal exclusion periods.
- (4) It is not economically feasible to run a quality ranching operation while selling most of the herd twice each year.
- (5) Running the number of cattle which is sustainable year round would not be economically feasible.

All also testified that if they are forced out of business, they will leave the area, leading to an increase in vandalism, a greater risk of fire because the vegetation will be left ungrazed, and less water available to wildlife because the water improvements on the allotments will not be maintained. Nearly all stated that they spend most of their income in Riverside and/or San

Bernardino Counties. The difficulty of locating and removing cattle from such a large exclusion area within 48 hours of notice was also mentioned by each Appellant. Each also asserted that the pertinent grazing decision amounts to a taking of private property because he or she will be denied access or use during the exclusion periods to private property and/or water sources for which they own water rights within the exclusion area and/or because his or her base property will be diminished in value and impossible to sell without a viable ranching operation.

John Husing, an economist, testified that if the ranches close, the direct and secondary economic impact and loss of monies they bring to San Bernardino County, plus the lost household income by unrelated families and the additional costs that the San Bernardino Sheriff's Office would incur to beef up patrol of the vacated allotment areas, would be \$950,468 (Ex. IAC).¹⁰ His estimate was based upon the assumption that the Appellants spend all their income in San Bernardino County (Tr. 2183). When questioned about the importance of this loss of economic activity to the County, he gave an answer which implied that the loss was not especially significant (Tr. 2187-88).

Further, the assumption that all the ranches will close either temporarily or permanently likely is not accurate. As discussed below, certain options may be available to at least some of them to avoid temporary or permanent closure. Further, it is troubling that they have not supported their testimony of economic hardship with concrete cost estimates and financial data, or analyzed potential options in more detail. To the extent economic hardship may be relevant, it is the Appellants' burden to establish and define the costs associated with adjusting to the grazing decisions and thus show the severity of the economic injury to be considered. Cf. Smigel, 155 IBLA at 170 (Appellants had burden to establish and define costs of fencing and thus show that requirement to construct fences to be unreasonable).

In support of the Appellants' testimony that they will be forced out of business, they presented evidence as to the unique characteristics of desert cattle and the difficulties of taking them off the desert or replacing them. Desert cattle, in order to live full and healthy lives, and to be productive livestock, must be able to withstand extremely high and variable temperatures and be able to walk for miles over rough, rocky, and broken ground to reach water. To withstand the intense heat and rough terrain, desert cattle possess feet that are much harder than the feet of average cattle. Cattle that are raised in the desert typically have much harder feet. (Wagner, ¶ 5)

If removal of cattle from an allotment becomes a necessity because of the provisions of

¹⁰There is evidence of additional detriments to the regional economy, but the detriments are minuscule: approximately \$4,500 in lost possessory interest tax levied on the grazing authorizations and approximately \$6,000-\$9,000 in lost monies which the County would otherwise expect to receive under a formula providing to the County a portion of the grazing fees collected by BLM in the County. (Ex. IAD, IAE)

one of the final grazing decisions, it is highly unlikely that private pasture would be available for placement of the cattle (see, generally, declarations of the Appellants). If cattle have to be sold, it would not be workable to replace them with non-desert cattle, according to the Appellants, because those cattle would not be acclimated to the temperature variations, vegetation, hard ground, and the need to travel long distances for food and water. Consequently, they will lose weight and, even if they survive, they likely will be in poor health, not breed well, or earn a fair return for many years. (Declarations of lessees; Wagner, ¶ 17, 18)

For instance, Mr. Wetterman testified that he did purchase some seed stock that were not native to the desert but that it did not work out very well. Apparently, they produced calves but some of the seed stock died (Tr. 137, 146-47).

Alternatively, if cattle, which are acclimated to the desert environment, are removed from an allotment and placed in a feedlot, their feet will begin to soften because of the softer ground in a feedlot (Wagner, ¶ 8). In as little as two weeks, their feet may soften to the point that they may experience soreness and lameness if they are then returned to the desert environment of the allotment (Wagner, ¶ 9). Treating cattle for problems associated with softened feet is not practical, both because of high costs and the difficulty of gathering them for treatment. The cattle's willingness and ability to venture far from water sources to forage, which is essential in the desert environment, may be adversely affected and they may lose weight and cease to be productive cattle (Wagner, ¶ 9).

However, as discussed below, several of the Appellants have taken cattle off their allotments and then returned them to the desert range without much apparent difficulty. Especially for younger animals with less weight on their feet, placing them in a feedlot-like situation does not represent a substantial risk of soreness and lameness.

Removal of cattle to a feedlot is problematic for the additional reason that the cattle may be introduced to bacterial, viral, and parasitic diseases to which they have not developed any resistance and are highly susceptible. These diseases can then be spread to other cattle or wildlife. (Wagner, ¶¶ 11-13)

Gathering and shipping the cattle to market, feedlots, grass pastures, or elsewhere during each seasonal exclusion period would stress the cattle, causing weight loss, sickness, and even death. Because the seasonal exclusion periods coincide with typical calving and breeding seasons, the effects of the stress will also include abortion of unborn calves, death and malnutrition of calves as a result of stress to the mother cows, and less breeding (Wagner, ¶ 15, 16). However, there was testimony that the calving and breeding seasons can be manipulated through management, although nothing was said as to whether such manipulations could be accomplished in a short-time frame.

All of the lessees testified that if the grazing decisions necessitated the sale of cattle

raised on their ranches, it would be impossible to replace them with cattle which are not acclimated to the rough desert environment. While this may be true, it begs at least several questions: (1) Would they need to sell cattle? If so, (2) how many and (3) would and could they replace them with desert-acclimated cattle either each season or once the temporary decision terminates?

Many or all of the Appellants testified that it is, and would be, difficult to locate desert-acclimated cattle for purchase, especially if they were all looking to purchase at the same time. This appears correct, although it is reasonable to assume that at least some would be available at times because several of them have purchased such cattle in the past.

Furthermore, none of the lessees, despite the short-term nature of the grazing decisions, provided any financial data or other evidence to show how much potential short-term economic hardship (either in terms of amount or duration) they could sustain and still remain in the cattle business. Nor did the lessees discuss the feasibility or availability of short-term financing.

Mr. Kemper, who is on the grazing District Advisory Board, expressed concern that the decisions would be made permanent because of lack of funding to implement the CDCA Plan once the bio-regional plan amendments are approved. However, Mr. Salt testified that BLM has sufficient funding.

Many or all of the lessees also testified that fencing of the exclusion areas to prevent cattle drifting therein was not economically feasible. Yet, none of them provided cost estimates for fencing or financial data to show how fencing costs would affect the “bottom line.”

The BLM’s economic analysis likewise suffers from deficiencies. In the decision record, BLM estimates the total direct and indirect regional costs to be approximately \$327,500 (Ex. 10, p. 7). This is likely low, given Mr. Husing’s testimony and some costs BLM did not take into account, as described below. However, BLM’s conclusions are accurate.

Those conclusions are:

- (1) “Uses of the allotments, including livestock grazing, recreation, and other uses contribute goods or services to the area. These goods and services minimally contribute to the regional economy.” (Ex. 9, p. 35)
- (2) “Economic impacts to individual ranching operations would not be regionally significant.” (Ex. 9, p. 38)

This is evident from the fact that total economy for San Bernardino and Riverside Counties is \$77 billion (Tr. 2195-96), while the potential economic detriment to the region of implementing the grazing decisions is likely not much more than \$1 million, assuming, arguendo, that all of the Appellants go out of business and do not otherwise cause monies to flow into the County from

other economic activity.

The contributors to BLM's economic analysis were the Rangeland Management Specialists for the California District Office and each of the four affected field offices: the Barstow Field Office, Needles Field Office, Ridgecrest Field Office, and Palm Springs-South Coast Field Office. Those specialists are, respectfully, Larry Morgan, Anthony Chavez, Bernice McProud, Kim Allison, and Hunter Seim (Tr. 2858). None of them has expertise in economics.

Table 5 on page 40 of the EA (Ex.9) itemizes the estimated costs of the Proposed Action for each of the five allotments with a reduction in head of cattle in the applicable grazing decision. References contacted to develop the estimated costs are listed on pages 46-47 of the EA (Ex. 9). Larry Morgan canvassed hay producers and trucking companies regarding the cost of hay and trucking cattle. Canvassing was done regarding private pasture leasing as well. The Appellants were not contacted for the economic analysis. (See, e.g., Tr. 2859-61, 3061, 3063).

Based upon the reduction in head of cattle, estimates specific to each of these allotments were made for maximum gross revenue lost, grazing fees reduction, and loss of county revenue from grazing fee reductions. Low average and high average estimates were provided for feeding hay, leasing private pasture, and the cost of one transport of cattle. Not included in the economic analysis are costs of labor and corral rental associated with hay feeding, costs to haul water, insurance costs for transportation of cattle, costs of potentially necessary water source or fencing improvements, additional employees, or seasonal sales and purchases of cattle to adjust to the seasonal exclusions and other limitations in the grazing. More specific analysis of the potential effects for each allotment were not conducted because each Appellant's financial and operational situations were different, the course of action for each in response to the grazing decisions could be different, and BLM personnel did not have sufficient information regarding these items to conduct specific analyses. (See, e.g., Tr. 2859-61, 2882, 3057, 3060-61, 3064-65).

Appellants expressed consternation that BLM only calculated the cost of transporting cattle once, because if an Appellant decided to remove cattle from an allotment during each exclusion period and then move them back or replace them afterwards, a total of four moves would be required. BLM personnel adequately responded that Appellants have many options open to them, and if one wanted to know the estimated cost of the four-move option, then the one-move estimate can simply be multiplied by four.

Appellants presented evidence as to the cost of hay, ranging from \$1.25/head/day (Mrs. Smith) to \$2.00/head/day to \$4.00/head/day (Mr. Thornton). BLM's estimate was approximately \$2.00/head/day.

Mr. Thornton's estimate included many other costs associated with feeding hay to cattle, including labor costs for various activities. His estimate was part of his analysis of the costs of gathering, trucking to a feedlot, and feeding cattle during each of the exclusion periods. He

concluded that it would cost over \$1,000 per head for the two exclusion periods and therefore that it was not economical to do so. (Ex. SE)

Because Mr. Thornton worked in the feedlot business in the 1980's, more weight might ordinarily be given to his estimate. However, as discussed later in this decision, Mr. Thornton was less than forthright in testifying regarding his consultations with BLM as to the boundaries of the exclusion area for the Valley Wells Allotment. This calls into question the accuracy of his remaining testimony.

In short, while BLM likely underestimated numerically the economic impacts of the grazing decisions and the cattle operations' contributions to the regional economy, those inaccuracies do not undermine its conclusion that those impacts and contributions were regionally insignificant.

William Mitchell, Jr. (Rattlesnake Canyon Allotment)

William Mitchell, Jr., is the lessee of Rattlesnake Canyon Allotment. He has been a cowboy and rancher in the California Mojave Desert his entire life. Cattle have grazed on the Rattlesnake Canyon Ranch since 1907. An unpaid agent of Mr. Mitchell resides on the base property, while Mr. Mitchell resides in Barstow and spends two or three days each week at the ranch. (Tr. 89-90; Mitchell, ¶¶ 3, 4)

Mr. Mitchell purchased the Rattlesnake Canyon Ranch in 1995, paying \$140,000 for the BLM permit and \$25,000 for the base property. Just before buying the ranch, he bought some local cows to place with cows native to the ranch, and the purchased cows successfully adapted to the peculiarities of his ranch (Tr. 116-18, 124; Mitchell, ¶¶ 3, 10)

Mr. Mitchell currently maintains six developed springs and 13-15 miles of fencing on the allotment at a cost of \$150 per month. He pays his fiancée an average of \$1,500 per year for assistance on the ranch. The ranch earned a gross income of \$3,500, \$13,211, and \$10,552 in 1998, 1999, and 2000, respectively. He also earns income as a heavy equipment operator. Those earnings, as compared to his ranch earnings, were higher in 1998 and 2000, about equal in 1999, and less in 1997. (Mitchell, ¶ 9-12, 23, 24; Tr. 88, 100-01, 104).

Rattlesnake Canyon allotment encompasses 28,757 total acres of land. Ninety-three percent (93%) of Rattlesnake Canyon allotment, or 26,832 acres, are public lands, while 2,765 acres of the allotment are private lands. Mr. Mitchell owns or control 5 acres of the private lands. (Mitchell, ¶ 5)

The Rattlesnake Canyon Allotment is located at the base of and within the Bighorn Mountain Range. The season for cattle use is year-long. The allotment is topographically divided into the desert pasture, Rattlesnake Canyon, and the mountain pasture. The allotment

contains seven developed springs, four located in the desert pasture and the remaining three located in the mountain pasture. Cattle use is primarily seasonal, with most of the grazing use in the winter and spring occurring in the desert pasture while summer and fall grazing use occurs in the mountain pasture. Rattlesnake Canyon is primarily used to trail cattle between the desert and mountain pastures. (Ex. 9, p. 25)

The desert pasture, essentially the northern half of the allotment, has 12,800 acres of desert tortoise non-critical habitat, where desert tortoise densities are probable low. The southern half is not desert tortoise habitat. Rattlesnake Canyon within the allotment is a wide, five mile long canyon with steep walls and a rocky to sandy bottom. The canyon stretches from the desert floor and rises in elevation to over 5,000 feet. The lower portion of the Rattlesnake Canyon may support low densities of desert tortoises, however above 4,000 feet it is unlikely to support tortoises. (Ex. 9, p. 25; Mitchell, ¶ 33)

Mr. Mitchell's grazing lease has an active permitted use of 84 head of cattle and 4 head of horses, or 1,081 AUMs. The season of use is from March 1 through February 28. Mr. Mitchell has utilized his entire authorized use for the last several years. The grazing decision temporarily reduces his permitted use to 45 head or 541 AUMs. (Ex. DT8; Ex. 9, p. 42; Mitchell, ¶ 22)

In the biological opinion issued in 1993, the Rattlesnake Canyon Allotment was included in Group 1 (with no desert tortoise habitat or only category III habitat). A key term and condition applicable to this allotment is limiting utilization to 40 % of current years growth. (Ex. DT8)

In the EA, BLM analyzed the effects of the grazing decision as follows :

The proposed action would be a measurable negative impact to the current cattle grazing operation for the Rattlesnake Canyon Allotment because this alternative would exclude 6,600 acres of desert tortoise non-critical habitat from grazing use in the spring and fall. The 6,600-acre exclusion within the [northeastern] portion[] of the desert pasture would preclude cattle using at two developed springs. There would be a 23 percent reduction in available rangelands with a corresponding reduction in permitted use from 1,081 AUMs to 832 AUMs. * * * Under this alternative, the trailing of cattle through Rattlesnake Canyon would be terminated and the lessee would be required to truck animals to and from the desert and mountain pastures. Management of the lessee's cattle would be greatly encumbered by spending many days trucking animals instead of directly working to manage and efficiently distribute foraging cattle. There would have to be an additional 25 percent reduction in permitted use with the closure of Rattlesnake Canyon (see Table 1 and Map 8) [so that the total temporary reduction would be from 1,081 to 541 AUMs]. With the canyon closed to trailing the mountain and desert pasture would be geographically distinct grazing units, each having approximately equal carrying capacities. To ensure adherence to

established utilization threshold and to maintain rangeland health, substantial reductions in the stocking rate[from 84 to 45 head] would be necessary. The inactivation of developed springs within the exclusion area, and increased herding of cattle would be the most effective method of implementing the closure by the lessee. The expense and time to truck cattle added to the temporary reduction in permitted use would economically hamper the lessee's ability to maintain a viable livestock operation.

(Ex. 9, pp. 30-31; see also Ex. DT8; Ex. 9, p. 42).

This means that each spring Mr. Mitchell will not have access to a large portion of the lower elevation spring pasture. However, his authorized AUMs and total number of head were reduced to account for this fact.

Mr. Chavez explained that the boundaries of the exclusion area were designed, in part, to be manageable, inasmuch as the north is fenced, the east and south are steep enough to discourage drift, and the west has "two-hole" springs nearby, a recognizable feature. He implied that if "two-hole" springs were deactivated during the exclusion periods, that drift would be less likely over the west boundary as well. (Tr. 2910-12)

Mr. Mitchell testified that cattle would drift into the exclusion area from the top via trails because the area is not fenced off from the exclusion area (Ex. DT8; Tr. 71-72, 74, 118-19; Mitchell, ¶ 53). However, he acknowledged that his regular routine is to gather cattle year round because of the rugged terrain (Tr. 79-80) and did not explain why such gathering could not be used to prevent drift.

He testified that either or both running a herd of 45 head and having to truck cattle between the two pastures would be cost-prohibitive (Mitchell, ¶¶ 47, 49; Tr. 75). However, his estimate of trucking costs was obviously excessive (see Tr. 113-14; Mitchell, ¶ 40; compare Ex. 9, p. 42).

In summary, one is left wondering if there is not a reasonable probability that Mr. Mitchell could continue working as a heavy equipment operator, possibly retain some cattle, and survive economically until the temporary grazing decision terminates, at which time he could rebuild his herd.

Tom and Carol Wetterman (Cronese Lake and Cady Mountain Allotments)

Tom and Carol Wetterman are the lessees of the Cronese Lake and Cady Mountain Allotments. They acquired the ranch related to these allotments in 1993. The ranch has existed since 1871. (Wetterman, ¶¶ 12, 13; Ex. DT8)

Mr. Wetterman has been a rancher in the Mojave Desert all of his life. He is a third generation California Desert rancher, and he has worked on most of the ranches in the Barstow area. Mrs. Wetterman has been ranching in the Mojave Desert for 16 years. All of their children were raised on the ranch and own cows that run on the ranch. The Wettermans wish to pass the ranch on to their children. (Wetterman, ¶ 3; Ex. DT8)

The Wettermans spend approximately \$1,000-\$1,500 per month maintaining range improvements. They annually pay seasonal employees approximately \$12,000-\$18,000 in barter (cows). Over the last three years, 1998-2000, the ranch has annually earned an average gross income of approximately \$50,000 and an average net income of approximately \$23,000. Mr. Wetterman testified that there no flexibility in their economics to hire additional employees to help keep cattle out of the exclusion areas. The ranch is Mr. Wetterman's primary means of earning a living, although he does sometimes work as a PCF firefighter (Wetterman, ¶¶ 14, 26, 27, 62; Tr. 148, 149-54)

The Cronese Lake Allotment is comprised of 65,304 total acres, of which 54,250 (83%) are public lands. The Wettermans own or control 20 acres of private land within the allotment. The southwest portion of the allotment, including 55% (30,080 acres) of the allotment's public lands, is critical desert tortoise habitat. The remaining half of the allotment is non-critical desert tortoise habitat. The majority of grazing use occurs in the eastern portion of the allotment associated with developed water. (Exs. DT8, CG; Mitchell, ¶¶ 5, 37)

The active permitted use for the Cronese Lake Allotment is 42 head of cattle and 500 AUMs. The season of use is from March 1 through February 28. In the biological opinion issued in 1993, the Cronese Lake Allotment was included in Group 3 (with large amounts of category I and/or II habitat). A specific term and condition (#32) states: "Authorization of grazing in the Cronese Lake Allotment is based on temporary, non-renewable use only. * * * However, the stocking rate shall not exceed 500 AUMs." The average annual, actual use of the allotment for the years 1997-99 was 37 AUMs. (Ex. DT8; Tr. 140)

The seasonal exclusion area on the Cronese Lake Allotment is approximately 18,000 acres of primarily desert tortoise critical habitat, and approximately 33 % of the allotment's public land acres. The exclusion area encompasses the southwestern portion of the allotment. Because of the lack of developed water, the exclusion area is infrequently used by cattle. The grazing decision for the Cronese Lake Allotment also included a cap on the amount of livestock use, reducing the number of head from 42 to 36 and the number of AUMs from 500 to 444, based on the average actual use for the years 1997-99. (Exs. DT8, CG; Tr. 2868)

BLM analyzed the effects of the grazing decision for the Cronese Lake Allotment as follows:

The proposed action would be a minor negative impact on the grazing

operation of the Cronese Lake Allotment, primarily due to the loss of grazing areas. This reduces the lessee's ability to appropriately adjust cattle operations as need dictates. The 18,000-acre exclusion would encompass the western portion of the allotment. This exclusion would equate to a 28 percent reduction in available rangelands during the interim exclusion period (see Table 1 and Map 2). However, the proposed action would cause minor disruption to the current operation because the majority of grazing use occurs outside of the exclusion area, and the only developed stockwater occurs outside the exclusion area. There are no anticipated needs to reduce permitted use because current cattle use has been reduced to a level that should maintain rangeland conditions.

(Ex. 9, p. 31).

The boundaries of the exclusion area were drawn to include critical habitat and avoid private land. Mr. Chavez confirmed that operations on the Cronese Lake Allotment could easily assimilate to the temporary changes. (Tr. 2868, 2915)

Mr. Wetterman expressed a general concern that the exclusion area was unfenced and that he would not be able to keep cattle out of there, but didn't refute that that portion of the allotment receives little use and has no water source. Consequently, it seems likely that drift into the exclusion area would only be a minor problem. The EA states the costs of additional riding, gathering, and driving would be minimal. (Tr. 136; Ex. 9, p. 43)

Mr. Wetterman also testified that he would be forced out of business by either or both the reduction in AUMs and the lack of sufficient water to sustain his cattle because the Hidden Valley Well is located in the exclusion area for the Cady Mountain Allotment. However, it appears that cattle are not transferred between the two allotments (see Tr. 147). Consequently, there is no water availability problem on the Cronese Lake Allotment and the reduction in AUMs is minimal on that allotment.

The Cady Mountain Allotment is separated from the Cronese Lake Allotment by Interstate 15 to the north. The Cady Mountain Allotment is comprised of 231,897 total acres, of which 160,104 are public lands. 137,064 acres (86 %) of the public lands on the Cady Mountain Allotment are non-critical desert tortoise habitat. There is no critical habitat within the allotment. The majority of the grazing use occurs in the western and central portions of the allotment in association with two active wells and water along the Mojave River at Afton Canyon. Two other wells are not active. (Ex. DT8; Tr. 2917-22)

The active permitted use for the allotment is 171 head of cattle, and 0 AUMs (authorization on a temporary, non-renewable basis). The season of use is from March 1 through February 28. (Ex. DT8)

In the biological opinion issued in 1993, the Cady Mountain Allotment was included in Group 1 (with no desert tortoise habitat or only category III habitat). A key term and condition applicable to this allotment is limiting utilization to 40 % of current year growth. (Ex. DT8)

The seasonal exclusion area on the Cady Mountain Allotment is approximately 88,320 acres of desert tortoise non-critical habitat located in the southeast portion of the allotment and comprising approximately 55 % of the allotment's public lands. The grazing decision also provides for exclusion of grazing from the riparian and flood plain habitat along the Mojave River in Afton Canyon (Exs. DT8, CG; Ex. 9, p. 25)

Mr. Chavez testified that the boundaries of the exclusion area were based upon several factors. The area included Hidden Valley Well because it was not meeting rangeland health standards. The rest of the area around, but outside the immediate vicinity of, the well was included because the majority of it was not frequently used. The western boundary was located near a road and the western toe slope for easy recognition and manageability. Mr. Wetterman testified that he won't be able to keep cattle out the unfenced exclusion area and that fencing the huge area was cost prohibitive (Tr. 135-36, 2917-22).

The EA analyzes the impacts of the grazing decision for the Cady Mountain Allotment as follows:

Approximately 98 percent of the Cady Mountain Allotment is within desert tortoise non-critical habitat where desert tortoise densities are probably low. The proposed action would exclude 88,320 acres from grazing use in the spring and fall. The 88,320-acre exclusion would encompass the eastern portion of the allotment, and would preclude cattle use of water from one well in the spring and fall (see Table 1 and Map 1). This exclusion would equate to a 38 percent reduction in available rangelands. The proposed action would also exclude a portion of the Mojave River at Afton Canyon. The exclusion of grazing use in Afton Canyon would be a permanent change to grazing use on the allotment. The exclusions would have a moderate impact to the current grazing operation because it reduces the lessee's ability to use rangelands associated with this well and eliminates grazing use in Afton Canyon thereby limiting available livestock water sources in the allotment. However, the majority of cattle use occurs outside the proposed exclusion area. The well at Hidden Valley would be inactivated and active herding of cattle by the lessee would be implemented during the exclusion periods to ensure that cattle would not graze the exclusion area. Because the well at Hidden Valley would be reactivated and made available to cattle during time outside the seasonal closure, it is expected that minor drift into the exclusion may occur for a few days after the well is inactivated. The stocking rates on this allotment have been historically low and are anticipated to remain so during this interim period there would be no restriction on stocking rates during the interim

period.

(Ex. 9, p. 30). Mr. Chavez testified that operations on the Cady Mountain Allotment could easily assimilate to the temporary changes and the EA states additional costs to the lessees would be minimal, consisting primarily of costs associated with riding, gathering, and driving. (Ex. 9, p. 43; Tr. 2868)

However, during the seasonal exclusion, only one active well would remain available and it does not produce enough water for all the cattle, as Mr. Wetterman testified. He did not, however, estimate how many cattle could be watered by the well.

Further, Mr. Chavez testified that repairing and reactivating other wells was an option, and that the Nine Mile Well was in the process of being redeveloped (Tr. 2919-20). This would provide more water and discourage drift into the exclusion area.

The evidence shows that there is a reasonable likelihood that the Wettermans can continue operations on both their allotments, especially Cronese Lake, at somewhat reduced numbers.

Cathey Smith (Harper Lake Allotment)

Cathey Smith is the lessee of the Harper Lake Allotment. She has been a rancher in the Mojave Desert since the early-1980s when her husband, Danny Smith, and she leased their first ranch together. They purchased the Harper Lake Ranch in 1989. They paid \$57,000 for the range improvements. Before Mr. Smith died in 1999, they had five children, all of whom grew up on the ranch. Three of their children currently live in the area and hope to one day jointly own the ranch and continue the family's ranching legacy started by their parents. (Smith, ¶¶ 3, 10, 76)

In the biological opinion issued in 1993, the Harper Lake Allotment was included in Group 3 (with large amounts of category I and/or II habitat). A specific term and condition (#32) states: "A two-pasture rotational grazing system shall be implemented in the Harper Lake Allotment which will improve the condition of desert tortoise habitat in the north pasture." The Harper Lake Allotment has a north pasture and a south pasture, with a partial drift fence in between. (Tr. 167-68; Ex. DT8)

When Mr. Smith became very ill, the Smiths sold all of their cattle and Mrs. Smith went to work at night as a nurse to meet expenses because they had no health insurance (Tr. 169-70). The herd was slowly built back up by buying cows locally and from a cattle sale in Ontario, California (Tr. 178, 180-81). Several years ago they grazed no livestock on the allotment for almost three years. Mrs. Smith testified that it cost \$75 per day to feed hay to 50 head of cattle. For six years, only the south pasture was grazed, until November 1999, when fences were completed to keep the cattle from drifting onto private property from the North Pasture. (Tr. 167,

178-79; Smith, ¶ 29; Ex. DT8).

Mrs. Smith now spends approximately \$1,000 per month maintaining range improvements and \$600 per year on seasonal employees. In 1999 and 2000, while Mrs. Smith was busy taking care of her husband and managing personal family affairs after his death, the ranch earned approximately \$15,000 in gross income per year. (Smith, ¶¶ 12, 25, 26)

The Harper Lake Allotment is comprised of 26,314 total acres, of which 21,602 are public lands and 4,712 are private lands. The public land acreage includes 16,482 acres (76 %) of critical desert tortoise habitat and 5,120 acres of non-critical habitat. The grazing use occurs throughout the allotment associated with developed waters. The seasonal exclusion area consists of approximately 16,482 acres of desert tortoise critical habitat and 2,200 acres of non-critical desert tortoise habitat in the northern portion of the allotment. (Ex. DT8, Smith, ¶ 41)

The two-pasture grazing system cited in the 1993 biological opinion mimics the exclusion periods and locations within the allotment contained in the final grazing decision for this allotment. There is one developed well on public land outside of the exclusion area and one developed well on private land within the exclusion area. Until November 1999, the exclusion area had been in a voluntarily non-use status since the mid-1990s due to livestock drift problems. (Ex. DT8)

The exclusion area boundaries were located to encompass the large northern area of critical habitat and to extend southward to a recognizable and manageable boundary, which was a fence trending east-west that extends part way across the allotment, and to provide adequate water sources (Tr. 2901-04). Mrs. Smith misleadingly stated that “all 25.75 miles of the exclusion area are unfenced from the remainder of the allotment.” (Smith, ¶ 45)

The active permitted use for the allotment is 50 head of cattle and 600 AUMs. The season of use is from March 1 through February 28. The grazing decision caps the active permitted use at 46 head and 560 AUMs based upon the average annual, actual use for the years 1997-99. However, Mrs. Smith testified that she would have to reduce her herd to 25 head during the seasonal exclusion periods because of insufficient forage in the remaining portions of the allotment, and that running such a small herd was not economically feasible. (Ex. DT8; Smith, ¶¶ 52, 58, 60)

Her testimony regarding the necessity to reduce the herd to 25 head is confirmed in the EA. In its analysis of the effects of the proposed action on the Harper Lake Allotment, the EA contemplates a reduction in the herd to 24 head during the seasonal exclusion period, yet the final grazing decision makes no mention of it. The EA states:

The proposed action would require the implementation of a two-pasture system for Harper Lake Allotment. This is also a term and condition from the

current BO. The north pasture which contains tortoise critical habitat would be deferred from grazing use in the spring and fall. The north pasture would be grazed during summer and winter. The implementation of the proposed action would exclude the 16,482 acres in the north pasture from grazing use during spring and fall for 5½ months. The exclusion would reduce available rangelands by 63 percent (see Map 3). The two-pasture system would continue after the proposed action interim period ceases. To ensure utilization of perennial forage does not exceed 40 percent and maintain rangeland health for the south pasture, the maximum stocking rate would be temporarily reduced from 50 cows to 24 cows for 6½ months. There would be an overall reduction of 6 percent in permitted use (see Table 1). However, permitted use would have to be reduced by an additional 57 percent when cattle are move to the southern pasture which only represents 37 percent of available rangelands. Because the south pasture contains the only developed stockwater on public land, there is a low probability of drift into the exclusion area. The lessee would have to deactivate the well located on private land in the north pasture to ensure this level of compliance. In addition, the two pasture are partially separated by internal fencing, furthering the probability of compliance with the proposed action. There may be some level of delay in the reduction of the stocking rate on the allotment because the lessee would probably have to sell off 28 cows, however this delay is not anticipated to be protracted. This substantial reduction in permitted use and the potential dramatic fluctuation of the cattle herd on the allotment from one season to another constitutes a substantial negative economic impact to this cattle operation.

(Ex. 9, pp. 31-32)

Left unexplained, however, is why it is not possible for Ms. Smith to sell approximately half her herd, continue grazing with the other half, alternating between pastures or remaining exclusively in the south pasture, and remain financially viable by working more hours as a nurse. She still works as a nurse “a minimum amount of time to have insurance” (Tr. 171) The fact that she considers her ranch to be her “primary financial security”(Tr. 171) would not preclude her from adapting temporarily during the short duration of the grazing decision.

There is a concern that cattle might drift into the exclusion area (Tr. 168), but a dry lake bed separates the two pastures, which, according to Ms. Smith is typically “bare of forage and the terrain makes it difficult for cattle, especially calves, to cross.” (Smith, ¶ 17)

Ron Kemper (Horsethief Springs Allotment)

Ron Kemper is the lessee of the Horsethief Springs Allotment. He is a member of the grazing District Advisory Board. He is also an asset manager for a lender and acquired the lease and base property in 1998 after a foreclosure. (Ex. DT10; Tr. 183, 190-91)

Mr. Kemper began building a herd by purchasing 35 head from an existing desert herd. He built his herd slowly because there are few desert cows on the market. In February of 2000, he stocked 51 head of cattle on the Horsethief Springs Allotment. By June 2001, he had increased the herd to 119 cattle. He has not earned any income the last three years because he is not selling the cows and calves, but building up the herd. The active permitted use is 202 head of cattle and 2,424 AUMs. (Ex. DT10; Tr. 193-94; Kemper, ¶¶ 23, 31)

He has expended \$1,004,776 on the base property, grazing lease, preference rights, and stocking, improving, and maintaining both the allotment and the base property. The base property is a superfund site in Barstow that he is trying to clean up. He would not attempt to apportion the money spent between the base property and the allotment. He has spent \$40,000 on range improvements and spends approximately \$1,000 per month maintaining them. He spends \$12,000 annually to pay to ranch employees. (Kemper, ¶ 12, 14, 28; Tr. 209-11, 228-32)

Cattle graze year-long on the Horsethief Springs Allotment. The allotment is 158,606 acres in size, of which 50,965 acres is desert tortoise non-critical habitat and the rest is not tortoise habitat. Public land acres total 150,140 acres. The allotment was included in Group 1 (allotments which contain no desert tortoise habitat or contain only category III habitat) in the 1994 biological opinion. Under the BO, term and condition number 21 directs that utilization of key species shall not exceed 30% because the allotment is included in the fair condition category. (Ex. 9, p. 24; Ex. DT10; Kemper, ¶ 46).

The allotment has natural barriers and fencing that divide the allotment into four pastures. The east side, the lower elevation, the west side or California Valley (which is mostly ephemeral rangeland), and the Kingston Mountain are the four pastures of the allotment. The northern portion of the California Valley pasture and northern portions of the other three pastures overlap desert tortoise non-critical habitat which covers about 30 percent of the allotment (see Table 1 and Map 4). The period of use and amount of grazing use of the pastures varies with rain fall and temperature. Currently, most grazing occurs outside tortoise habitat on the east side and lower elevation pastures. (Ex. 9, p. 24)

Water is supplied by pipelines or natural springs located both within and outside of non critical habitat. Mr. Kemper maintains range improvement and has enhanced some improvements so cattle evenly distribute throughout the pastures. The EA states that the east side, lower elevations, west side or California Valley (which is mostly ephemeral rangeland), and the Kingston Mountains make up four pastures of the allotment. However, Mr. Kemper characterized the allotment as having only three pastures: the east side, west side, and Kingston Mountains (with cattle avoiding the steeper portions of the mountains). The northern portion of the pastures overlap desert tortoise habitat. The main use areas on the Horsethief Springs Allotment are in the lower elevation and east side pastures, near water sources supplied by pipelines or springs. (Ex. DT10; Tr. 198-99, 217; Ex. 9, p. 24; Kemper, ¶ 16)

The seasonal exclusion area on the Horsethief Springs covers 47,581 acres of non-critical desert tortoise habitat, or 32% of the public lands within the allotment. The exclusion area lies mostly within the California Valley pasture, in the north west portion of the allotment. Factors considered to reach the recommendation for the exclusion area boundary line included the following.

1. A portion in the north west corner of the allotment does not overlap desert tortoise non-critical habitat.
2. The boundary of the non-critical desert tortoise habitat overlaps a portion of the allotment which receives slight use by cattle, and is separated from the main use areas of the allotment by topographical features.
2. The boundary of the non-critical desert tortoise habitat overlaps a range improvement and water source at Tule Springs (#9190).
3. Other range improvements with water sources and main use areas of the Horsethief Springs Allotment are located outside of desert tortoise non-critical habitat.

The north west portion of the allotment was included in the seasonal exclusion area since it would have been isolated from the rest of the allotment otherwise. (Ex. DT10)

In 1968, the BLM declared Horsethief Springs a Public Water Reserve in order to protect the water resources for wildlife. All of the active water developments and corrals are located outside the area of seasonal exclusion on the Horsethief Springs Allotment. (Kemper, ¶ 8; Ex. DT10)

Mr. Kemper testified that it was not economically feasible to build the 15-20 miles of fence necessary to fence off the exclusion area and therefore that his cattle would continually drift into the exclusion, despite the fact that all the active waters are outside the exclusion. He therefore concluded that he would have to remove his cattle from the allotment and would be forced out of business. (Tr. 188-90; Kemper, ¶¶ 50, 74)

The EA's analysis of the effects of the Proposed Action on the Horsethief Springs Allotment lends support to Mr. Kemper's testimony. It provides:

Under this alternative, the Horsethief Springs lessee would not be able to distribute cattle into 47,581 acres of 30 percent of the allotment during the exclusion periods (see Table 1 and Map 4). Otherwise impacts to Horsethief Springs Allotment are similar to those impacts discussed for Lazy Daisy and Valley Wells Allotments, except the lessee would not be restricted from running full permitted numbers. Fenced pasture boundaries within the Horsethief Springs Allotment are not complete and do not coincide with the boundary of the excluded area, and each of the pastures has a portion of the exclusion thereby reducing effectiveness of exclusion in the tortoise non-critical habitat. There is no

developed water inside the excluded area, but under favorable ephemeral conditions cattle may go for several days without water and it could be difficult to restrict drift into any particular excluded area. During the spring seasonal exclusion period, if ephemeral production is high, cattle could drift into the northwest portion of the allotment including California Valley with is within non-critical desert tortoise habitat. During the fall seasonal exclusion period, forage may exhibit more vigor especially if there has been late summer precipitation, and cattle could also range further away from water. If cattle do not remain out of the interim seasonal exclusion area, they would have to be removed from the allotment.

(Ex. 9, pp. 29-30).

Richard Blincoe and Dave Thornton (Valley Wells Allotment)

Richard Blincoe is the lessee of the Valley Wells Allotment and Valley View Allotment. He purchased the grazing lease for Valley View Allotment in 1978 and for the Valley Wells Allotment in 1988. He has been a rancher and farmer all of his life. While he and his family live in Idaho, they work on the ranch on a regular basis and enjoy the California Mojave Desert. (Tr. 277; Blincoe, ¶ 3)

Tim Overson has managed the two allotments for him as one grazing operation, but the Valley View Allotment is not at issue in this proceeding. The Valley Wells portion of the operation has lost money in recent years because cattle use has been reduced because of drought. It did earn a profit, although not a substantial one, approximately five years ago. (Tr. 265, 278, 286-89)

Because Mr. Overson is leaving the area, Mr. Blincoe decided to sell the lease and related items to Appellant Dave Thornton. Early in 2001, a transfer to Dave Thornton was initiated to split the portion of the permitted use and assign it (approximately 82%) to base property now located outside the Mojave National Preserve. The transfer is still pending. Their agreement for sale was in escrow and ready to close at the time the final grazing decision was issued, but Mr. Thornton then put the deal on hold pending resolution of the proceeding. (Tr. 286, 312, 479, 486, 494, 529; Blincoe, ¶ 3; Ex. DT10)

The ranch is owned by a family corporation of which Mr. Blincoe is the president. While Mr. Blincoe's written testimony indicates that having the ranch owned by the corporation will keep the ranch in the family, this is belied by the impending sale of the Valley Wells Allotment and his oral testimony that they may not keep either allotment but would keep the money from the sale thereof in the corporation. (Tr. 311-12; Blincoe, ¶ 4)

Approximately 1000 hours are spent each year to maintain improvements in the two

allotments. Total operating expenses were more than \$291,245, with \$98,013 being paid to employees. In the last three years his ranching activities in San Bernardino County have had an average gross income of \$361,589. Mr. Blincoe only spends a portion of his ranch's income in San Bernardino County. (Blincoe, ¶¶ 16, 31, 32; Tr. 259, 307)

Mr. Thornton has been in the cattle business since 1979. He also occasionally rounds up burros and markets them for the National Park Service and BLM. He is interested in finding additional grazing leases to purchase to make a cattle operation on the Valley Wells Allotment more viable if he acquires the lease for that allotment. He was interested in the Valley Wells grazing lease because he recently lost a lease elsewhere. He presently has 195 head of cattle on the Valley Wells Allotment, while Mr. Blincoe had no cattle on the allotment (Tr. 275, 480, 485, 486, 495-96, 529)

Cattle graze year-long on the Valley Wells Allotment. The allotment is 237,127 acres in size of which 111,099 acres is desert tortoise critical habitat and 126,028 acres (53%) is tortoise non-critical habitat (Ex. 9, Table 1, Map 11). The allotment is relatively flat in the middle with hills or mountains on the western and eastern flanks. This type of topography affords cattle access to most of the allotment. The enormity of the allotment lends itself to specific areas of cattle and burro use. Numerous water troughs adjacent to a pipeline running generally north and south through the middle of Shadow Valley supplies supply water to cattle. Cattle graze hills to the west of Shadow Valley because of water sources near Interstate 15. Some water troughs are enclosed with a corral used to handled cattle, and these troughs and corrals are located within tortoise critical habitat. There are natural springs that supply water to the western and eastern sides of the allotment. Those on the eastern side are located within a portion of the Mojave National Preserve. Wild burros are present on the allotment and their population is in excess of the herd management area's appropriate management level and they have free access to natural and developed water sources. (Ex. 9, pp. 24-25)

The active permitted use for the Valley Wells Allotment is 387 head of cattle and 3,791 AUMs. The season of use is from March 1 through February 28. (Ex. DT10; Blincoe, ¶ 20) The grazing decision for the Valley Wells Allotment included a cap on the amount of use of 1,692 AUMs or 141 head of cattle. This cap was based upon the average annual actual use of 141 head for 1997, 1998, and 1999. (Ex. DT10; final grazing decision)

In Biological Opinion 1-8-94-F17, the Valley Wells Allotment is included in Group 3 (with large amounts of category I, and/or II habitat). Term and condition number 21 from Biological Opinion 1-8-94-F-17 directs that utilization of key species shall not exceed 30%. (Ex. DT10)

The seasonal exclusion area on the Valley Wells Allotment is approximately 88,879 acres of the public land acres. The exclusion area was adjusted to approximately 40% of the public lands within the allotment. The boundary line of the seasonal exclusion areas was drawn around

the critical desert tortoise habitat located in the central portion of the Valley Wells Allotment, but several separate areas were left out of the exclusion area. Factors considered to reach the recommendation for the boundary line included the following.

1. There are 111,099 public land acres of desert tortoise critical habitat (49%) within the Valley Wells Allotment. The boundary of the critical desert tortoise habitat overlaps several main use areas of the allotment, including Shadow Valley.
2. Wild burros are present on the Valley Wells Allotment and utilize the water sources.
3. Range improvements and water sources are widely scattered within the allotment, but most are located within Shadow Valley. Most of these range improvements and spring sources are located adjacent to or within the desert tortoise critical habitat boundary.
4. Several areas within the critical desert tortoise habitat are distant from water sources. Cattle distribution is light within these areas.
5. Dave Thornton provided a recommendation on the location of the boundary line, based on his observations of cattle distribution within the allotment.

Considering these factors, the exclusion boundary was adjusted around several main use areas within the allotment, and some of the range improvements and spring sources were left out of the exclusion area. (Ex. DT10)

Both Mr. Blincoe and Mr. Thornton testified that they would not be able to keep cattle out of the exclusion areas because most of the water sources are located there and there is no fencing to keep them out. Fencing was not an option because then the cattle would not have enough water. As a consequence, they would have to remove the cattle from the allotment and the operation would not be viable. Both testified that the operation would not be viable even without the exclusion periods because of the reduction in permitted use. (Tr. 266, 272, 273, 327, 537; Blincoe, ¶¶ 61, 67)

The EA's analysis of the effects of the grazing decision on the Valley Wells Allotment lends support to their testimony. It states:

The Valley Wells Allotment would receive a 57 percent temporary reduction in cattle use and a temporary 37 percent reduction in area of grazing use. The exclusion covers 80 percent of desert tortoise critical habitat, but 22,220 acres of tortoise critical habitat are available for grazing use (see Table 1 and Map 11), mainly located around water sources. All desert tortoise non-critical habitat (126,028 acres) is available for grazing use. The seasonal exclusion would be very difficult to maintain regardless of ephemeral forage quantity because most of the water sources are located in the middle of Shadow Valley are surrounded by tortoise critical habitat. As cattle move to different foraging areas and water

sources located within the allotment such as along the pipeline in Shadow Valley, they would enter excluded areas. As cattle trail out long distances surrounding water sources such as Hallaoran Springs or other springs on the west side of the allotment, they could also enter the area of exclusion. If the pipeline was turned off in Shadow Valley, cattle as well as wild burros would move to the west and upper side of the allotment. If cattle do not remain out of the interim seasonal exclusion area, they would have to be removed from the allotment. If removal efforts were initiated, cattle would be gathered or trapped in small groups at facilities located next to water sources.

(Ex. 9, p. 29).

Mike and Mark Blair (Lazy Daisy Allotment)

Mike and Mark Blair and family own the Lazy Daisy Ranch which includes the grazing lease for the Lazy Daisy Allotment. On average, the Blairs spend \$3,000 per year for seasonal help. The Blairs' father, Milton Blair, currently manages the ranch for his sons. (Blair, ¶¶ 3, 21)

Milton Blair purchased the Lazy Daisy Ranch in approximately 1974. He raised fourteen children on the ranch and has ten grandchildren that spend time on the ranch on a regular basis. Livestock grazing has occurred on the ranch since the 1910's. (Blair, ¶¶ 5, 7)

The active permitted use for the Lazy Daisy Allotment is 266 head of cattle or 3,192 AUMs. The season of use is from March 1 through February 28. The grazing decision for the Lazy Daisy Allotment caps the permitted use at 108 head or 1,300 AUMs per year based on the average annual actual use for 1997, 1998, and 1999. In 2000 actual use was reported to be 100 head of cattle. (Ex. DT10; Ex. 9, p. 24, Table 1)

The lessees of the Lazy Daisy Allotment have voluntarily reduced cattle numbers for years due to lack of rain and poor forage conditions. Approximately eight years ago the cattle were fed hay at corrals for a couple of years because of severe drought. (Ex. 9, p. 24; Tr. 921, 925)

The Lazy Daisy Allotment is comprised of 332,886 total acres, of which 260,025 acres are critical desert tortoise habitat and 72,861 acres are non-critical habitat. Of the 325,686 acres of public land in the allotment, 250,834 acres (78%) are critical habitat. In Biological Opinion 1-8-94-F17, the Lazy Daisy Allotment is included in Group 3 (with large amounts of category I and/or II habitat). Milton Blair has seen numerous desert tortoises in the critical habitat areas to the northwest and northeast. (Ex. DT10; Tr. 908-10; Ex. 9, Table 1)

Cattle graze mostly in the center of the Lazy Daisy Allotment, usually being found in three different areas: the south end of the Little Piutes, the north end of the Old Woman Mountains,

and the Sunflower Springs-Painted Rock area. Cattle do not often graze in the higher elevations on the south and west side of the allotment (outside desert tortoise critical habitat) because of the rough topography and lack of water. The southwest mountainous region has not been grazed in years. Because there are no natural barriers or fenced pastures, the allotment is operated as one unit. Cattle distribute throughout the allotment depending on available water, temperature, and forage conditions. Except for trailing back and forth across Ward Valley to Homer Wash for palatable shrubs, cattle tend to graze the lower elevations on the northwest and southeast sides of the allotment (critical habitat) in spring and move closer to the mountain ranges as forage starts to dry. Most existing natural water sources and active wells on the allotment are located within critical habitat and have been incorporated into corrals for capturing cattle. The lessees gather and process cattle a few at a time by trapping them in corrals or facilities set up around the water sources. There are several proposed range facilities slated for construction to enhance cattle distribution. (Ex. DT10; Ex. 9, p. 24; Tr. 901-02)

The seasonal exclusion area on the Lazy Daisy Allotment is 108,020 acres of desert tortoise critical habitat, which is approximately 33% of the public lands within the allotment. Factors considered to reach the recommendation for the exclusion area boundary lines included the following.

1. Most of the range improvements and spring sources are located within the central portion of the allotment outside the exclusion area.
2. Many areas on the allotment are without water sources, including the lower elevations within the exclusion area. Cattle distribution is light within these areas during years with average or lower precipitation.
3. The lessees had informed BLM that cattle trail back and forth across Ward Valley to Homer Wash.

Considering these factors, the exclusion boundary on the Lazy Daisy Allotment was drawn so that the excluded area would overlap portions of the lower elevations within the allotment. The line was also located around most of the range improvements and spring sources on the allotment, so that cattle will be able to access most range improvements and water sources during the seasonal exclusion periods with the boundary as drawn. The line was also drawn so that a portion of Homer Wash would not be excluded. (Ex. DT10)

The EA analyzes the effects of the grazing decision upon the Lazy Daisy Allotment as follows:

Under the proposed action, the Lazy Daisy Allotment would receive a 66 percent temporary reduction in forage use and a temporary 33 percent reduction in area of grazing use, or 108,000 acres (see Table 1 and Map 5). Because of the lack of fencing and natural barriers in the Lazy Daisy Allotment, it would be difficult to continue the current management situation while implementing the

seasonal exclusions and reduction of cattle forage use. During the spring seasonal exclusion period, if ephemeral production is high, cattle would drift into the southeast and the northwest portions of the allotment which are within desert tortoise critical habitat and the excluded areas. Under favorable ephemeral conditions cattle may go for several days without water and it would be difficult to restrict them from drifting into any particular excluded area. During the fall seasonal exclusion period, the forage may show more vigor especially if there has been late summer precipitation and cattle would also tend to range further away from water. Cattle would drift across Ward Valley to graze palatable shrubs in Homer Wash and in the Piute Mountains within desert tortoise critical habitat and may enter excluded areas. If the forage on the allotment is not enhanced by precipitation prior to or during either of the seasonal exclusion periods, cattle would remain closer to the mountains and reliable water sources, but cattle could occasionally drift into the excluded areas. If cattle do not remain out of the interim seasonal exclusion area, they would have to be removed from the allotment. Depending on the extent of favorable forage conditions, complete removal of the entire herd may be the only effective means to prevent cattle movement into areas of exclusion. If removal efforts were initiated, cattle would be gathered or trapped in small groups at facilities located next to water sources. This method of gathering would time consuming and more difficult to complete during the spring and fall or when cattle do not need to stay as close to reliable water sources.

(Ex. 9, pp. 28-29).

Milton Blair's testimony is consistent with this analysis (see Tr. 901-925; Blair, ¶ 54). He emphasized that he would not be able to keep cattle out of the exclusion area because it is not fenced and because "ten cowboys" could not keep them out (Tr. 902-05).

Dave Fisher (Ord Mountain Allotment)

Dave Fisher is the lessee of the Ord Mountain Allotment. His grandchildren are fifth generation ranch raised in the California desert. He and his wife are the owners of the Shield F Ranch. The Shield F Ranch is made up of 3,225 fee simple acres, 6,400 acres of leased land, and associated BLM lands. The ranch has two grazing allotments, the Ord Mountain allotment and the Valley Well Allotment. The Valley Well allotment is not at issue in this proceeding.

Mr. Fisher testified that the ranch is his only means of making a living. The ranch earned approximately \$17,000 in 1999, but sustained a loss of approximately \$24,000 in 2000. (Fisher, ¶¶ 1-4, 41, 83)

The Ord Mountain Allotment contains 154,848 acres, of which 3,225 acres are owned by the Fishers in fee simple and 136,188 acres are public lands. Mr. Fisher has developed and

appropriated numerous surface water rights. Three of the five wells on the allotment are on his private property. (Fisher, ¶¶ 4, 10, 11)

On most days, Mr. Fisher travels by truck or his small airplane over 100 miles to check on waters. He has to be out on his allotment “constantly” to manage his cattle and waters. He sometimes shuts off water sources to gather cattle. (Fisher, ¶ 34; Tr. 947-48)

His private property within the allotment includes the Midwell Camp, which includes 120 acres of fenced land. The well there produces large quantities of water that are used to farm and irrigate a 27-acre pasture. That pasture would provide enough forage for Mr. Fisher’s entire herd, which currently is 400 head, for only 3-4 days. (Tr. 945-46, 975, 977, 984)

Mr. Fisher has, in the past, adapted to changes in forage conditions by increasing or decreasing the number of cattle on the allotment by hundreds of head from one month to the next. He is able to do so by culling and selling many cattle during droughts and by occasionally placing cattle, including yearlings, on his private lands to await better forage conditions. Those private lands include his headquarters site where he has feeding bins in a feedlot-like setting to sustain his cattle. (Tr. 995-1001, 1034, 1050)

He also regularly places calves in this setting for feeding for three to five weeks each year, beginning in late October, to wean them from their mothers. Some of the calves are then sold and others are placed back on the allotment with little or no problems of foot soreness. Mr. Fisher explained that calves did not experience much foot soreness from being on the soft ground and then being returned to the hard desert conditions because they weigh less (350-475 pounds) than a full grown cow. (Tr. 1090-93)

On another occasion Mr. Fisher took an opportunity to buy approximately 100 underweight cattle, truck them to his headquarters feeding bins, fatten them up at the bins, and sell them (Tr. 1035-36).

Of the 136,188 acres of public lands within the allotment, 102,141 acres (75%) are critical desert tortoise habitat and 34,040 acres are non-critical habitat. The Ord Mountain Allotment, along with the western portion of the proposed expansion area for Fort Irwin, has the highest perennial plant diversity in desert tortoise habitat in the West Mojave. The majority of grazing use occurs in the western and central portions of the allotment, within critical habitat associated with developed waters. (Ex. DT8; Ex. ABO, p. 8)

The active permitted use is 307 head of cattle and 8 head of horses or 3,632 AUMs. The season of use is from March 1 through February 28. The grazing decision for the Ord Mountain Allotment caps the amount of livestock use at 172 head or 2,066 AUMs per year based on the average annual actual use for 1997, 1998, and 1999.

In the biological opinion issued in 1993, the Ord Mountain Allotment was included in Group 3 (with large amounts of category I, and/or II habitat). A specific term and condition (#37) states “cattle use of category II habitat on the west end of the Ord Mountain Allotment shall be discouraged through management of water sources, including development of new waters in category III habitat or outside of desert tortoise habitat.” (see Ex.12) This term was not followed. This is the same area that would be seasonally excluded from livestock grazing by the final decision. (Ex. DT8; Tr. 2936-37)

The seasonal exclusion area on the Ord Mountain Allotment is approximately 54,000 acres of primarily desert tortoise critical habitat, approximately 40% of the allotment’s public land acres. The map of the exclusion area on the Ord Mountain Allotment (see Exhibit 77) shows that the exclusion area encompasses the western portion of the allotment. Mr. Chavez testified that the boundaries were designed to include desert tortoise critical habitat which would benefit the most from the exclusions, including a desert tortoise emphasis zone in the northwest portion of the allotment, to incorporate the Camp Rock Road as a recognizable and manageable boundary, to allow access to some of his water sources (several wells and 9 of the 18 springs on the allotment), and to account for rangeland health determinations to a minor extent. (Tr. 986, 2878, 2923-25)

Rangeland monitoring has documented numerous violations of the 40% utilization threshold since the issuance of the 1993 biological opinion, principally occurring in the exclusion area. Furthermore, the rangeland health assessment conducted in 1999 documented degraded habitat for the desert tortoise, again predominately occurring in the exclusion area. Approximately ten percent of the allotment, approximately half within the exclusion area, has been determined to be in non-conformance with 43 CFR 4180.2 for upland habitat. (DT 8).

Mr. Fisher testified that the exclusion area is not fenced, that he will not be able to keep his cattle out of the exclusion area without fencing, and that the option of fencing was “ludicrous” and physically impossible. (Tr. 971-72)

The EA analyzes the effects of the Proposed Action on the Ord Mountain Allotment as follows:

There would be measurable negative effects to the grazing operation of the Ord Mountain Allotment as a result of implementing the proposed action. The exclusion area for the Ord Mountain Allotment is comprised of 54,000 acres of critical desert tortoise habitat located in the western portion of the allotment. Five developed springs during 5½ months through spring and fall would be unavailable (see Table 1 and Map 6). By ensuring that these waters are unavailable to livestock, this portion of the allotment would be unavailable. This would result in a 35 percent reduction in available rangelands, however, permitted use would be reduced by 43 percent based on the proposed action (see Table 1). The immediate

construction of water control fences around developed springs would greatly reduce potential cattle drifting into the area of exclusion and protect riparian habitat outside of the exclusion period. The lessee's most effective method in keeping his cattle out of the exclusion area would constitute a substantial increase in herding, either on horseback or by motorized means. The large acreage of lessee owned and controlled private land should contain the cattle removed from the allotment with the 43 percent reduction during the seasonal closure. Depending on the lessee's financial situation, cattle restricted to private land would be feed for the interim period or sold as needed. These actions would constitute a substantial economic impact to this grazing operation.

In light of Mr. Fisher's testimony regarding his use of his private lands to adapt to different situations, this analysis appears fairly accurate.

Discussion

I.

Burden of Proof and Scope of Review

Appellants argue that this office should review de novo BLM's grazing decisions, giving no deference to them, citing to a provision of the Administrative Procedures Act (APA) found at 5 U.S.C. § 557. Relying on another provision of the APA, 5 U.S.C. § 556(d), they argue that the burden of proof rests upon BLM because BLM is allegedly the proponent of the rule or order with regard to an appeal of a grazing decision issued by BLM.

Appellants' arguments cannot be sustained. The latter argument has been explicitly rejected by the Board. See West Cow Creek Permittees v. BLM, 142 IBLA 224, 236 (1998).

As to the first argument, it is generally true that the Secretary, or a tribunal with authority to act as fully and finally as might the Secretary, may review de novo decisions by subordinate officers and employees, such as BLM officials. See United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983); see also Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364 (9th Cir. 1976). Further, the Secretary has delegated such authority to me in this proceeding,

The scope of appellate review by or on behalf of the Secretary can be limited only by the Secretary in a duly promulgated regulation, or by the Congress through enacted law. United States Fish & Wildlife Service, 72 IBLA at 221. With regard to the adjudication of grazing preference, such a limiting regulation exists, as explained by the Board in Smigel v. BLM, 155 IBLA 158, 164 (2001):

[BLM, as the Secretary's delegate,] enjoys broad discretion in determining how to

manage and adjudicate grazing preferences. Yardley v. BLM, 123 IBLA [80,] 90 [(1992)]. Under 43 CFR 4.478(b), BLM's adjudication of a grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with the Departmental grazing regulations found at 43 CFR Part 4100. In this manner, the Department has considerably narrowed the scope of review of BLM grazing decisions by an administrative law judge and by this Board, authorizing reversal of such a decision as arbitrary, capricious, or inequitable only if it is not supportable on any rational basis. Yardley v. BLM, 123 IBLA at 90. This scope of review recognizes the highly discretionary nature of the Secretary's responsibility for Federal range lands. Kelly v. BLM, [131 IBLA 146, 151 (1994);] Claridge v. BLM, 71 IBLA 46, 50 (1983).

The standard of proof to be applied in considering an appeal of a grazing decision issued by BLM is the preponderance of evidence test. Kelly v. BLM, *supra*; Eason v. BLM, 127 IBLA 259, 262-63 (1993). If a decision determining grazing privileges has been reached in the exercise of administrative discretion, "the appellant seeking relief therefrom bears the burden of showing by a preponderance of the evidence that the decision is unreasonable or improper." Kelly v. BLM, *supra*.

II.

Are The EA and Decision Record Legally Sufficient Under NEPA?

Appellants argue that BLM failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, in several respects. According to the Board,

[a] BLM [Decision Record] and FONSI will be affirmed where the Appellant fails to establish that BLM did not adequately consider matters of environmental concern. The party challenging a BLM decision has the burden of showing by objective proof that the determination was premised on a clear error of law or a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion or disagreements do not suffice to establish that BLM's analysis is inadequate, and provide no basis for reversal. The Ecology Center, 147 IBLA 66 (1998).

Concerning BLM's environmental responsibilities, this Board has said that

[a] Federal agency must take a "hard look" at the environmental consequences of its proposed actions. * * * In reviewing whether

BLM has taken a "hard look," the Board examines whether the record establishes that BLM [**26] made a careful review of environmental issues, identified relevant areas of environmental concern, and whether its final determination was reasonable.

Vulcan Power Co., 143 IBLA 10 (1998). See Friends of the Nestucca Coast Association, 144 IBLA 341, 356-57 (1998), appeal filed sub nom. Coast Range Assoc. v. Shuford, Civ. No. 98-819-JO (D. Or. July 7, 1998).

* * * * *

As noted above, the burden is on Appellant, as the party challenging BLM's decision, to support its allegations with evidence showing error. Conclusory allegations of error or differences of opinion, standing alone, do not suffice. Southern Utah Wilderness Alliance, 128 IBLA 382, 390 (1994). The Department is entitled to rely on the reasoned analysis of its experts in matters within their realm of expertise. King's Meadows Ranches, 126 IBLA 339, 342 (1993), and cases there cited. Thus, where BLM has evaluated the feasibility of [a proposed] project * * *, and has considered the objections [thereto], it is not enough that Appellant offers a contrary opinion. In order to prevail, Appellant must demonstrate by a preponderance of the evidence that BLM erred in evaluating the data provided in reaching its conclusions. King's Meadows Ranches, *supra* at 342.

Rocky Mountain Pipeline Trades Council, 149 IBLA 388, 398-99 (1999).

In deciding whether an EIS or EA promotes informed decisionmaking, it is well settled that a rule of reason will be employed; thus, the question becomes whether an EIS or EA contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed [action]. State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (quoting Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)).

Colorado Environmental Coalition, et al., 149 IBLA 154, 157.

A.

Was The Timing of BLM's Environmental Evaluation Appropriate?

First, Appellants argue that BLM conducted its environmental evaluation of the temporary modifications to livestock grazing use too late in the decision making process. For the reasons set forth below, that argument is rejected.

The pertinent regulations provides that “[a]gencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values * * *,” 40 C.F.R. § 1501.2, and that an EIS “shall be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.” 40 C.F.R. § 1502.5. While the latter provision refers to an EIS rather than an EA (which is what BLM prepared), there is no difference between an EA and an EIS in terms of the importance of their timing and value to achievement of the goals of NEPA. See Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000).

The parties agree that environmental review documents must be prepared prior to any irreversible and irretrievable commitment of resources. Friends of Southeast’s Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998); Union Oil Co. of California, et al., 102 IBLA 187, 191 (1988). Appellants argue that BLM, by executing Stipulation 3, entered into an agreement or contract that committed it to a particular course of action and that such conduct is considered by the courts to be an irreversible and irretrievable commitment of resources. Metcalf, 214 F.3d at 1143-45.

In Metcalf the contract executed by the Federal agency “amounted to a surrender of the Government’s right to prevent activity in the relevant area,” id. at 144, and thus the court concluded that it had made an irreversible and irretrievable commitment of resources. In so holding, the court noted that the Federal agency could have made, but did not make, its contractual promise conditional upon a NEPA determination that the pertinent activity would not significantly affect the environment. Id.

Unlike the situation in Metcalf, the BLM’s contractual commitment to the Center was conditioned upon its compliance with NEPA. Stipulation 5 contains a provision which states that, “[i]n complying with the terms of this agreement, BLM shall be subject to all applicable federal statutes or regulations, and nothing in this agreement shall be construed to require BLM to take any actions in contravention of any such applicable statutes or regulations.” (Ex. 7, ¶ 56). On January 26, 2001, during a hearing to address whether Stipulation 3 should be approved, counsel for the Government explained to Judge Alsup that this provision meant that BLM would have to comply with NEPA and any other applicable laws (Ex. ABPP, pp. 57-58).¹¹ Where, as here, a Government contract is contingent upon NEPA compliance, there is no irreversible commitment because if the Government does not approve an environmental evaluation allowing it to proceed with the actions which are the subject of the contract, the Government may not commit to those actions. See Colorado River Water Conservation Dist. v. United States, 593

¹¹Furthermore, Stipulation 3 contains a reopening clause which contemplates renegotiation in the event of unforeseen circumstances, which might include changes in the Proposed Action or the timing of its implementation made necessary by NEPA analysis.

F.2d 907, 910 (10th Cir. 1977).

While preparation and consideration of an environmental evaluation should precede the adoption of the actual federal action proposed, it does not follow that an agency cannot formulate a proposed action, or even decide that it wishes to take the proposed action, before preparation of the evaluation. Natural Resources Defense Council v. Hodel, 624 F.Supp. 1045, 1049 (D. Nev. 1985). In Metcalf, the Ninth Circuit recognized that an agency does not have to be subjectively impartial; but the law does require that it objectively evaluate the proposed action. 214 F.3d at 1142. An agency can formulate a proposal or even identify a preferred course of action before completing an environmental evaluation. Id. at 1145. In fact, the regulations actually encourage identification of a preferred course of action. Id. (citing 40 C.F.R. § 1502.14(e)).

Requiring BLM to commit its resources to preparation of an environmental evaluation at some time prior to execution and court approval of Stipulation 3 is not logical. It would have been a waste of time and money to initiate the process before BLM decided exactly what actions to include in the stipulation and the court approved it. There was no proposed action to evaluate before that time. It is precisely BLM's determination to go forward with the proposals in the stipulation (upon court approval) that occasions the environmental assessment. See Metcalf, 214 F.3d at 1150 (Kleinfeld, J., dissenting); see also Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1243 (1980) (“{O}nly when an agency reaches the point in its deliberations when it is ready to propose a course of action need it be ready to produce an impact statement.”).

B.

Did BLM Take A “Hard Look”?

Appellants argue that BLM violated NEPA by preparing the EA to merely rubber-stamp a previously made decision rather than taking the requisite “hard look” at the Proposed Action. See Metcalf, 214 F.3d at 1143. In support thereof, they cite to the testimony of Anthony Chavez, the Rangeland Management Specialist for the Barstow Field Office, and Tim Read, the Field Manager for the Barstow office, for the proposition that BLM, by executing Stipulation 3, was left with no discretion to choose the No-action Alternative, Alternative One, or any other course of action other than that laid out in the stipulation.

The referenced testimony does not support this proposition. What it does show is that Stipulation 3 established the parameters for the Proposed Action (Tr. 2844-45), that the probability of the No-action Alternative being selected was low (Tr. 2844-45), and that Alternative One was not wholly consistent with Stipulation 3 and therefore, if it had been selected, BLM would have had to renegotiate with the Center under the reopening clause of Stipulation 3 (Tr. 3192-33).

In fact, both Mr. Salt and Mr. Morgan testified that some renegotiation was possible

under the reopening clause, although it might prove difficult. Mr. Salt specifically mentioned that they might have been able to renegotiate slight differences in the number of acres to be included in the exclusion areas (Tr. 1573). Further, Stipulation 3 did not specify the location of each of the exclusion areas. Rather, BLM determined those. As the Center points out, if Stipulation 3 truly predetermined the result, BLM would have declared the existence of an emergency situation and issued the grazing decisions as “full force and effect” decisions so as to comply with the Stipulation’s spring closure provision beginning in March 2001.

Further, acceptance of Appellants’ argument risks discouraging settlements designed to avoid greater and more disruptive injunctive relief. However, Appellants argue that cattle grazing was not causing any irreversible and irretrievable commitments of resources and that such on-going projects and programs which are not causing such commitments would not have been enjoined.

In support of this argument, Appellants cite to the Pacific Rivers case for the proposition that when an agency fails to consult with FWS regarding the effects of a land use plan on federally listed species, on-going activities authorized under the plan which are not causing irreversible or irretrievable commitments of resources may continue. This is not correct.

The court in Pacific Rivers was interpreting §§ 7(a) and 7(d) of the ESA. Section 7(d) provides: “After initiation of consultation required under [§ 7(a)(2)], the [action] agency * * * 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 [§ 7(a)(2)].” In Pacific Rivers, the court stated that § 7(d) does not amend § 7(a) to read that consultation and issuance of a biological opinion are not required before the initiation of agency action so long as there is no irreversible and irretrievable commitment of resources. Rather, § 7(d) clarifies the requirements of § 7(a), ensuring that the status quo will be maintained during the consultation process.¹² 30 F.3d at 1056 n.14.

The court then reached the following conclusions. First, where an agency has not consulted with FWS regarding a land use plans, a determination that on-going activities authorized thereunder “may affect” a listed species is sufficient reason to enjoin them. Id. at 1056. Second, [o]nly after the [agency] complies with §7(a)(2) can any activity that may affect the [listed species] go forward.” Id. at 1056-57.

The court then remanded the matter to the trial court with instructions that, if the agency initiates consultation on the land use plans, the trial court must decide if ongoing or announced

¹²Maintenance of the status quo clearly refers to the status of the species and its habitat rather than to the status of current activities.

activities can proceed during the consultation period. Id. at 1057. These instructions might be interpreted as meaning that once the agency initiates consultation on the land use plans, certain activities might proceed if the trial court finds that they do not violate § 7(d). Pacific Rivers Council v. Thomas, 936 F.Supp. 738, 749 (D. Idaho 1996). Or, the instructions could be interpreted as meaning that the trial court could prohibit any activity authorized by the plans until consultation is complete. Id.

A review of decisions addressing whether some portion of ongoing activities authorized under resource management plans may proceed during consultation on the plans with FWS, or whether portions of an action may proceed during consultation on that action, reveals various approaches and a high likelihood that the portions may be enjoined until completion of the consultation. See, e.g., id. at 745-51 (discussing some approaches); Greenpeace Foundation v. Mineta, 122 F.Supp.2d 1123, 1137 (D. Ha. 2000); Pacific Rivers Council v. Thomas, 873 F.Supp. 365, 370-74 (D. Idaho 1995). Among other things, courts have expressed concern that reasonable and prudent alternative measures are identified during the consultation process and therefore it is difficult to determine if activities would foreclose them before FWS actually determines what they are. Pacific Rivers, 936 F.Supp. at 749. Another factor is whether the action agency has had direct oversight from FWS regarding the steps the agency has decided to take prior to completion of consultation. Id. at 747. Interpreting § 7(d), one court expected an action agency to stipulate to enjoining all ongoing and announced activities, which are identified as “likely to adversely affect” or “may adversely affect” a listed species, during consultation on the authorizing land use plan. Pacific Rivers, 873 F.Supp. at 372.

A primary concern is that failure to consult on a land use plan is a substantial procedural violation which necessarily implicates compliance with the substantive requirements of the ESA because the consultation process is the only means by which the substantive mandate of the statute is met. Greenpeace v. National Marine Fisheries Service, 106 F.Supp. 1066, 1074 (W.D. Wash. 2000) (citing Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985)). In the absence of consultation on the land use plan that comports with § 7, there is no assurance that ongoing implementation of the land use plan will not harm the listed species. Greenpeace Foundation v. Mineta, 122 F.Supp. 1123, 1137 (D. Ha. 2000) (citing Thomas, 753 F.2d at 764).

BLM personnel thought the threat of injunction was high, especially for activities in critical habitat (see, e.g., Tr. 2552-54), which is reasonable in light of the § 7(a)(2) mandate to insure that activities do not adversely modify critical habitat. In sum, BLM reasonably assumed that an injunction of all activities authorized under the CDCA Plan was likely if it litigated the Federal court action, and its efforts to reach compromise under such circumstances should not be discouraged based upon the evidence presented.

Appellants raise one additional ground for contending that BLM did not take a “hard look” at the potentially significant environmental consequences of its decisions. They contend that BLM’s analysis of the economic impacts of the decisions was inadequate. Citing to 40

C.F.R. § 1508.14, they argue that economic effects are to be considered in cases where an environmental effect is disclosed.

That regulation provides in pertinent part:

[E]conomic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

Appellants have focused on the second sentence which applies when an EIS is prepared. In the present case, BLM's analysis of whether an EIS should be prepared is at issue and therefore the applicable sentence is the first.

The first sentence is consistent with the pronouncements of the United States Supreme Court in the case of Metropolitan Edison Co. et al. v. People Against Nuclear Energy et al., 460 U.S. 766 (1983). In that case, the Court emphasized that NEPA was designed to protect against impacts to the physical environment.

In Goodman Group, Inc. v. Dishroom, 679 F.2d 182, 185 (9th Cir. 1982), the court found that there are sound reasons for § 1508.14:

Economic, social, esthetic, or cultural effects are difficult to define in the context of NEPA. Relating project impact to effects on the physical environment, such as water, air, and ecosystems, implements the intent of Congress in enacting the statute. Maryland National Capital Park and Planning Commission v. U. S. Postal Service, 159 U.S. App. D.C. 158, 487 F.2d 1029, 1037-39 (D.C.Cir.1973). The reference point of physical environmental effects serves also to confine scarce resources for EIS preparation to those cases where they are most needed, a goal our circuit has identified as an appropriate one. Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 at 858 (9th Cir. 1982). Because physical effects on the environment are more readily ascertainable and definable within the NEPA framework than are cultural and economic ones, an agency has more discretion in rejecting this latter category from the initial consideration of whether an EIS is required. Thus, although factors other than the physical environment may be considered, this generally is appropriate only when it is a primary impact on the physical environment that generates the EIS. Breckinridge v. Rumsfeld, 537 F.2d 864, 866 (6th Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 785, 50 L. Ed. 2d 777 (1977).

In the present case, BLM concluded in the EA that the economic impacts to individual

ranching operations would not be regionally significant and that uses of the grazing allotments contribute goods and services to the area which only minimally contribute to the regional economy (Ex. 9, pp. 35, 38). While BLM likely underestimated numerically the economic impacts of the grazing decisions and the operations' contributions to the regional economy, those inaccuracies do not undermine its factual conclusion that those impacts and contributions were regionally insignificant.

San Bernardino and Riverside Counties have a combined economy of approximately \$77 billion. Even if all of the Appellants' cattle operations cannot remain viable during the short period during which the decisions will remain effective, the loss of economic activity in San Bernardino County would only amount to approximately \$1 million. While the potential economic impact to the Appellants should not be trivialized, that impact is not significant in the larger scheme of things.

BLM's determination is based on a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the Proposed Action and two alternatives. This analysis demonstrates that the Proposed Action for cattle grazing will positively affect the federally threatened desert tortoise and its habitat and other sensitive species (Ex. 9, pp. 65-69). BLM reasonably found, on the basis of its analyses in the EA of the Proposed Action and other alternatives, that there were no significant environmental effects from the proposed action and that, therefore, no EIS was required. The EA provides a discussion of the potential economic and social impacts from the Proposed Action and other alternatives (Ex. 9, pp. 35-46). While these economic and social impacts may be substantial for some or all of the individual Appellants, these "economic or social effects are not intended by themselves to require preparation of an environmental impact statement [EIS]," 40 C.F.R. § 1508.14, and they are insignificant to the region in any event. In the absence of significant environmental impacts which would require the preparation of an EIS, it was appropriate for BLM to make a Finding of No Significant Impact.

Appellants argue, however, that BLM should have prepared an EIS because of the controversial nature of BLM's Decision Record, primarily in terms of the intense opposition to the decision from the ranchers, County, and local politicians. In their brief Appellants state:

Basically, the BLM has decided to implement a decision which, by its own admissions, will dramatically affect the lives of several ranchers while providing little or no benefit to the endangered species that the action was designed to protect. The response to the decision has been extensive and divided. As a result of the Stipulation, the San Bernardino County sheriff canceled a law enforcement "Memorandum of Understanding" with the BLM. (Ex. IAA). Local politicians sent a letter to the Department of the Interior decrying the "taking" of private property. (See attachment to Exhibit AK). San Bernardino County intervened on behalf of the Ranchers in fighting the decisions, and a significant amount of press coverage has occurred. A proverbial "line in the sand" has been drawn between

environmentalists and the users of the public lands and the eventual outcome of this case could have lasting effects in the Mojave Desert. Given the nature and effect of the BLM's decision on the communities in southern California, the much more thorough EIS should have been prepared. The BLM's failure to prepare an EIS renders the NEPA process inadequate.

There is no doubt that “[t]he existence of a public controversy over the effect of an agency action is one factor in determining whether an agency should prepare [an EIS].” Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992). In other words, “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial” is one factor in determining how “significantly” a proposed action affects the quality of the environment. 40 C.F.R. § 1508.27(b)(4).

However, “the term ‘controversial,’ for purposes of NEPA, concerns disputes about the ‘size, nature, or effect’ of the proposed action rather than disputes about whether the action should be allowed in general.” Northwest Environmental Defense Center (NEDC) v. Wood, 947 F.Supp. 1371, 1384 (D. Or. 1996) (quoting Foundation for North Am. Wild Sheep v. U.S.D.A., 681 F.2d 1172, 1182 (9th Cir. 1982)). “Moreover, the controversy must exist at the time the agency renders its decision: the agency is not responsible for considering controversies which arise after the agency renders its decision.” NEDC, 947 F.Supp. at 1384.

Appellants reference many facts which simply show that there were disputes about whether the Proposed Action should be allowed in general. This does not show the existence of a public controversy within the meaning of NEPA and the implementing regulations.

Further, Appellants have not attempted to marshal facts or argument to analyze the many other factors that bear upon whether the impacts of the Proposed Action are significant. See 40 C.F.R. § 1508.27(b)(4). They have failed to show that BLM's FONSI determination was unreasonable.

C.

Was The Scope Of The Environmental Evaluation Appropriate?

Appellants further contend that the plethora of actions in the five stipulations between the Center and BLM are a “suite” of actions to protect the desert tortoise and other listed species which constitute a region-wide plan of action for the CDCA. As such, these numerous actions should be evaluated together for their environmental impacts, according to Appellants’ interpretation of Kleppe v. Sierra Club, 427 U.S. 390 (1976). They conclude that BLM unlawfully engaged in “piecemealing” to avoid the obligation of preparing an EIS, i.e., that BLM segmented this suite of actions, which might have significant environmental impacts collectively, into smaller components, one being livestock grazing, which might have insignificant impacts

individually. See Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985); Save Barton Creek Association v. FHA, 950 F.2d 1929, 1940 (1992); Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (1988).

In Kleppe, the Supreme Court found:

We [agree] with respondent’s basic premise that § 102(2)(C) [of NEPA, 42 U.S.C. § 4332(2)(C),] may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time. * *
* Thus, where several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered.

* * * * *

Agreement to this extent with respondent’s premise, however, does not require acceptance of their conclusion that all proposed coal-related actions in the Northern Great Plains region are so “related” as to require their analysis in a single comprehensive impact statement.

427 U.S. at 409-10.

The CEQ regulations define which actions are so related. Under the CEQ regulations an agency is required to consider more than one action in a single EIS if they are “connected actions.” Northwest Resource Info. Ctr. (NRIC) v. National Marine Fisheries Serv., 56 F.3d 1060, 1067 (9th Cir. 1995) (citing to 40 C.F.R. § 1508.25). Connected actions are those which:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

Id. The purpose of this regulation “is to avoid segmenting interrelated projects such that cumulatively significant environmental impacts are overlooked or deliberately ignored in violation of section 102(2)(C) of NEPA.” Larry Thompson, et. al., 151 IBLA 208, 213 (1999).

Two actions are connected actions when they are “inextricably intertwined,” such that one action cannot proceed without the other. Thomas v. Peterson, 753 F.2d at 759. In Thomas, the plaintiffs claimed that the United States Forest Service should have considered both timber sales and construction of a road in the same EIS. Id. The Ninth Circuit found that the two actions

were “connected actions” under 40 C.F.R. § 1508.25(a)(1) since “[i]t is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales.” Id. at 758. This finding was supported by the EA’s characterization of the road as necessary for the logging activity. Save the Yaak Committee v. Block, 840 F.2d 714, 720 (9th Cir. 1988) (citing to Thomas, 753 F.2d at 758-759). Similarly, in Save the Yaak, the Ninth Circuit found that the harvest of trees infested with mountain pine beetle and construction of a road were also connected actions where there was “a clear nexus between the timber contracts and the improvement of the road.” Save the Yaak Committee v. Block, 840 F.2d at 720.

However, two actions are not connected actions if “each could exist without the other, although each would benefit from the other’s presence.” Sylvester v. U.S. Army Corps of Eng’rs, 884 F.2d 394, 400 (9th Cir. 1989). In Sylvester, the Ninth Circuit found that the effects of a proposed golf course and the accompanying proposed resort in the same geographic area did not have to be considered within the same EIS. Id. The court distinguished this case from Thomas by characterizing connected actions as “links in the same bit of chain,” whereas the proposed golf course and resort were “separate segments of chain.” Id. The Board has also considered whether a decision will “foreclose or compel choices with respect to future actions,” in determining whether the actions are connected under 40 C.F.R. § 1508.25(a)(1). Emerald Trail Riders Ass’n, 152 IBLA 210 (2000).

The present case is similar to the NRIC case. Like that the actions at issue in that case, BLM’s actions are related to protection of a listed species. Thus, each case involves actions which are unique to some extent in comparison to the types of actions typically addressed in EAs or EISs. The actions are intended to benefit the environment. 56 F.3d at 1069. Ideally, in each case, the actions together should have less of an impact on the environment. Id. By contrast, the Ninth Circuit precedents deal with connected actions that have adverse impacts on the environment. Id.

In NRIC, the Ninth Circuit rejected a trial court finding that the measures to protect the federally listed species were “so interdependent as parts of the larger action of improving the survival [of the listed species] that they must be addressed in the same NEPA document.” Id. Instead, the court found that the measures had “independent utility” in that either, standing alone, would benefit the listed species. Id. at 1068-69. In rejecting the argument that a single EIS was necessary, the court noted that “[w]hile we cannot allow an agency to segregate its actions in order to support a contention of minimal environmental impact, we also cannot force an agency to aggregate diverse actions to the point where problems must be tackled from every angle at once. To do so risks further paralysis of agency decisionmaking.” Id. at 1069 (citation omitted).

The same rationale applies to the instant case, especially as agencies should be given “considerable discretion” in defining the scope of an EIS. Id. at 1067. BLM chose settlement of litigation over the potential for wholesale shutdown of all desert activities. As a result, stipulated settlement provisions cover a wide variety of activities for a variety of protected species over a

large expanse of federal lands. Generally, the stipulated provisions do not depend upon the others for their existence. Each has independent utility and thus they are not connected actions and need not be analyzed in one comprehensive EIS. See id. at 1068-69; Custer County Action Assoc. v. Garvey, 2001 U.S. App. LEXIS 16094 (10th Cir., July 19, 2001) at 32.

D.

Did BLM Exercise Its Discretion Appropriately Regarding Provision Of A Public Comment Period?

In its brief the County makes brief reference to the alleged inadequacy of the 15-day period for submission of public comments after issuance of the EA and FONSI. The CEQ regulations provide in pertinent part: "The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing [EAs]." 40 C.F.R. § 1501.4(b).

The Board has recently addressed the nature of BLM's obligations regarding the allowance of public comment during the EA process.

BLM's NEPA Handbook does not require a public comment period in all instances when an EA is finalized. The responsible BLM decisionmaker "must determine if the EA and FONSI should be made available for public review (usually a 30-day review period) before making a final determination on the [proposed] action." (NEPA Handbook at IV-6 (emphasis added).) The primary purpose of public review is to allow the public to comment on BLM's determination that no significant impact is likely to occur. "A public review of the EA and FONSI is usually only necessary under certain limited circumstances as defined in CEQ [(Council on Environmental Quality)] regulations (40 C.F.R. §§ 1501.4(e)(2))." (NEPA Handbook at IV-6.) The regulation at that section sets out when a FONSI (and supporting EA) must be made available for public review:

- (i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to [40 C.F.R.] §§ 1507.3, or
- (ii) The nature of the proposed action is one without precedent.

40 C.F.R. §§ 1501.4(e)(2); see Southern Utah Wilderness Alliance, 122 IBLA at 341.

* * * Further we have found no independent requirement, in either the regulation or NEPA Handbook, requiring public review and comment upon the underlying

EA before BLM may make a final determination on the proposed action.

Notwithstanding this finding, section 102(2)(C) of NEPA[, 42 U.S.C. § 4332(2)(C),] and its implementing regulations generally require BLM to encourage and facilitate public involvement in its NEPA process. Therefore BLM should demonstrate a "compelling reason for not providing any public comment period during the EA process." Southern Utah Wilderness Alliance, 122 IBLA at 342 (citing 40 C.F.R. §§ 1500.2(d)).

Klamath-Siskiyou Wildlands Center, 153 IBLA 110, 120-21 (2000).

In the present case, BLM was not required by regulation to provide a public comment period because the Proposed Action was not similar to actions which normally require an EIS nor was the nature of the Proposed Action without precedent. Proposed modifications to livestock grazing permits do not typically require an EIS. NEPA requirements are generally satisfied by preparation of an EA for permit modification since the environmental impacts of such actions are rarely significant (*see, e.g.*, Tr. 3586-87). In addition, livestock permit modifications are not unprecedented actions. BLM's statutory authority, regulations, and permit conditions all foresee that livestock grazing permit modifications may occur.

Nevertheless, BLM did provide a public comment period, albeit a brief one. Mr. Morgan explained that BLM does not allow for public comment on the vast majority of environmental assessments (Tr. 2557).¹³ If a comment period is allowed, the period is typically longer (Tr. 2531-32). However, BLM had to move quickly because Judge Alsup determined that BLM must comply with the fall exclusion provisions of the settlement (Tr. 2531-32). This was an appropriate exercise of its discretion to encourage and facilitate at least some public involvement in its NEPA process, especially in light of the time constraint to complete the NEPA process, issue grazing decisions, and allow for administrative review of those decisions before the fall exclusion period was scheduled to commence (*see, e.g.*, Ex. 10, p. 8).

III.

Are The Grazing Decisions Supported On A Rational Basis And Are They Consistent With § 7 Of The ESA?

¹³Other BLM personnel, including Mr. Salt, testified that BLM typically does not allow for public comment on an EA.

Because the following two issues identified by the parties are intertwined, they are addressed together in this decision: (1) whether the final grazing decisions are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law, and (2) whether the final grazing decisions are consistent with § 7 of the ESA, 16 U.S.C. § 1536. With regard to the first issue, a BLM grazing decision is arbitrary, capricious, or inequitable only if it is not supported on any rational basis. Yardley, 123 IBLA at 90.

In addressing the issue of whether the grazing decisions were based upon a proper exercise of discretion under the Taylor Grazing Act (TGA), the Federal Lands Policy and Management Act (FLPMA), Public Rangelands Management (PRIA), and the implementing regulations, Appellants emphasize that the TGA mandates that grazing privileges be adequately safeguarded, 43 U.S.C. § 315b, and that the purpose of the TGA is “to stabilize, preserve, and protect the use of public lands for livestock grazing purposes * * * .” Barton v. United States, 609 F.2d 977, 979 (10th Cir. 1979). They conclude that, “[u]nder the TGA, grazing must occur.”

However, the Supreme Court has stated that:

the [TGA] qualifies the duty to “safeguard” by referring directly to the Act’s various goals and the Secretary’s efforts to implement them. The full subsection says:

“So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest or estate in or to the lands.” 43 U.S.C. § 315b (emphasis added).

The words “so far as consistent with the purposes ... of this subchapter” and the warning that “issuance of a permit” creates no “right, title, interest or estate” make clear that the ranchers’ interest in permit stability cannot be absolute; and that the Secretary is free reasonably to determine just how, and the extent to which, “grazing privileges” shall be safeguarded, in light of the Act’s basic purposes. Of course, those purposes include “stabiliz[ing] the livestock industry,” but they also include “stop[ping] injury to the public grazing lands by preventing overgrazing and soil deterioration,” and “provid[ing] for th[e] orderly use, improvement, and development” of the public range. [43 U.S.C. § 315a].

Public Lands Council v. Babbitt, 529 U.S. 728, 741-42 (2000). Consistent with the foregoing, the Court recognized the Secretary’s well-established powers to cancel, modify, or decline to review individual grazing permits for various reasons. Id. at 735.

Those powers are recognized in the following regulations cited in the grazing decisions as

authority for the temporary modifications to cattle grazing use: 43 C.F.R. §§ 4110.3-2, 4110.3-2(b), 4110.3-3(a), 4120.3-1(c), 4120.3-2(a), 4130.3, 4130.3-3, 4140.1(b)(1)(ii) and (ii), 4150.2(a), 4150.2(b), 4150.2(d), and 4170.1(a). Section 4130.3 provides: Livestock grazing permits and leases shall 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.” (Emphasis added.).

Subpart 4180 requires BLM to modify existing grazing management practices if it determines that modification is necessary to ensure that “[h]abitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species * * *.” 43 C.F.R. § 4180.1(d). Also, it is clear from the evidence that BLM’s management objectives included protection of the desert tortoise and its habitat.

The grazing decisions also cite as authority sections 7(a)(1), 7(a)(2), and 7(d) of the ESA, 16 U.S.C. §§ 1536(a)(1), (a)(2), and (d). As more fully discussed below, the decisions are not only consistent with these provisions, but also rationally related to fulfilling the mandate of § 7(a)(2) and the goals of 43 C.F.R. §§ 4130.3 and 4180.1(d), i.e., to achieve the management objective of protecting the desert tortoise and its habitat and to ensure that habitats are, or are making significant progress toward being, restored or maintained for the desert tortoise, a threatened species.

When interpreting these provisions, it is important to keep in mind the purpose of the ESA, which is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). The Supreme Court’s review of the Act’s “language, history, and structure” convinced the Court “beyond a doubt” that “Congress intended endangered species to be afforded the highest of priorities.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978). As the Court found, “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184 (emphasis added).

The ESA is designed to conserve threatened and endangered species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b). To this end, Section 7(a)(2) of the ESA requires every federal agency to consult with FWS to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered . . . or threatened species or . . . [their critical habitat].” 16 U.S.C. § 1536(a)(2) (Section 7 consultation). A federal agency must complete Section 7 consultation with FWS for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Land management plans such as the CDCA Plan are considered agency actions under the ESA. Pacific Rivers, 30 F.3d at 1057.

The formal consultation process commences when a federal agency determines through the preparation of a biological assessment (sometimes called a “biological evaluation”) that a proposed federal action “may affect listed species or critical habitat,” 50 C.F.R. §402.14(a). The consultation process concludes when the expert agency (here FWS) issues a biological opinion determining whether the proposed action is likely to jeopardize a listed species or destroy or adversely modify its critical habitat.¹⁴ 16 U.S.C. § 1536(b)(3)(A). When a proposed action may affect a protected species, consultation must occur and be completed before the federal action may take place. See Pacific Rivers, 30 F.3d at 1056; Thomas v. Peterson, 753 F.2d 754, 764-65 (9th Cir. 1985). If an agency fails to consult on an action that affects listed species, all activities that “may affect” the species must be enjoined. Pacific Rivers, 30 F.3d at 1056-57.

Congress also recognized that the obligation to insure against jeopardy and adverse modification could be eroded by other actions taken during the consultation period even though the project itself could not proceed before completion of the consultation. Thus, Congress imposed further restrictions on agency actions during the consultation period through section 7(d) of the ESA. This section provides that once a federal agency initiates consultation on an action under the ESA, it “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.” 16 U.S.C. § 1536(d). The purpose of Section 7(d) is to maintain the ecological status quo during consultation, preventing the agency from undertaking activities that may harm protected species during consultation or taking actions that ultimately would preclude reasonable and prudent alternatives. Pacific Rivers, 30 F.3d at 1056; Conner v. Burford, 848 F.2d 1441, 1455 n. 34 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); Pacific Rivers Council v. Thomas, 936 F. Supp. 738 (D. Idaho 1996). Section 7(d) is strictly prohibitory in nature. Id.

During the course of consultation, FWS may “suggest modifications” to the action to “avoid the likelihood of adverse effects” to the listed species. 50 C.F.R. § 402.13. At the completion of consultation FWS issues a Biological Opinion (“BO”) that determines if the agency action is likely to jeopardize the species. See 50 C.F.R. § 402.02. If so, the agency may not proceed with any program, permit, or decision that would jeopardize a species’ survival unless the BO specifies reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b). See also Sierra Club v. Marsh, 816 F.2d 1376, 1384-86 (9th Cir. 1987) (enjoining highway construction because agency could not meet burden of absolute assurance that mitigation required to avoid jeopardy was possible).

¹⁴ If a federal agency determines through preparation of a biological assessment or informal consultation that the proposed action is “not likely to adversely affect” a listed species, formal consultation is not necessary as long as the FWS concurs. 50 C.F.R. §402.14(b).

Although procedural in nature, consultation is the backbone of the ESA. As the Ninth Circuit recognized, “[o]nly by requiring substantial compliance with the act’s procedures can we effectuate” congressional intent to protect species. Sierra Club v. Marsh, 816 F.2d at 1384. Generally, under this statutory structure, neither actions which may affect listed species or their critical habitat, nor other actions that have the effect of committing an agency to the proposed action may go forward unless and until the consultation process has been completed.

In addition to the proscriptive requirement that agencies ensure that their actions do not jeopardize listed species, Section 7 also places an affirmative obligation on agencies to take action to “conserve” listed species. 16 U.S.C. § 1536(a)(1); the term “conservation” in turn is defined to include “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary.” 16 U.S.C. § 1532(2); see also Sierra Club v. Glickman, 156 F.3d 606, 617 (5th Cir. 1998) (Section 7(a)(1) “contains a clear statutory directive (it uses the word ‘shall’) requiring the federal agencies to consult and develop programs for the conservation of” listed species); accord Florida Key Deer v. Stickney, 864 F.Supp. 1222, 1238 (S.D. Fla. 1994). An agency’s Section 7(a)(1) obligations are often implemented through the “Conservation Recommendations” sections of a biological opinion. See Bransfield Dec ¶¶ 48,49; see also BLM Exhibits 11-14.

For violations of the ESA, Congress has mandated a special standard of injunctive relief which has “foreclosed the exercise of the usual discretion possessed by a court of equity,” Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982), and which affords endangered species “the highest of priorities.” TVA v. Hill, 437 U.S. 153, 174 (1978). Under the ESA, the balance of the hardships has already been struck in favor of endangered species. Id. at 194; National Wildlife Federation v. Burlington Northern R.R., 23 F. 3d 1508 at 1511 (9th Cir. 1994); Sierra Club v. Marsh, 816 F. 2d 1376 at 1383 (9th Cir. 1987); Greenpeace v. NMFS, 106 F. Supp. 2d 1066 at 1071 (W.D. Wash. 2000). As the Supreme Court has said, “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” TVA v. Hill, 437 U.S. at 184.

The standard for injunctive relief for a violation of Section 7 of the ESA is well settled in the Ninth Circuit. “[G]iven a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA. * * * Irreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action.” Thomas v. Peterson, 753 F. 2d at 764.

Of course, as previously discussed, the situation is more complicated with respect to proposals to continue with some portion of ongoing activities for which consultation has been initiated but not completed. In such cases, it may be possible to continue some ongoing activities, depending upon the specific circumstances, without violating the ESA.

In the present case, BLM has not completed consultation with FWS regarding the CDCA Plan, the proposed bio-regional plan amendments, and the cumulative effects of all the activities authorized thereunder. Consequently, it has not been meeting its duty under § 7(a)(2) to insure that the cumulative effects of those activities, including cattle grazing, are not likely to jeopardize the continued existence of the desert tortoise or result in the destruction or adverse modification of its critical habitat.

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.¹⁵

BLM's ongoing failure to complete consultation on the CDCA Plan is a substantial procedural violation which necessarily implicates compliance with the substantive requirements of the ESA because the consultation process is the only means by which the substantive mandate of the statute is met. Greenpeace v. National Marine Fisheries Service, 106 F.Supp. 1066, 1074 (W.D. Wash. 2000) (citing Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985)). In the

¹⁵It should be noted, as Appellants point out, that the duties imposed by the ESA do not expand the powers conferred upon an agency by its enabling act. Platte River Whooping Crane Critical Habitat Maintenance v. Federal Energy Regulatory Commission (FERC), 962 F.2d 27, 34 (D.C. Cir. 1992). In that case, a statute provided that licenses issued thereunder could only be altered upon mutual agreement between the licensee and FERC. Id. at 32. Because the licensee would not agree to an alteration, FERC could not alter the license to include provisions for the protection of a listed species.

In this case BLM's actions to meet its duty under § 7(a)(2) are wholly consistent with achieving its management objective of protecting the desert tortoise and its habitat under 43 C.F.R. § 4130.3 and satisfying the regulatory mandate to maintain and restore its habitat and regulatory mandate pursuant to 43 C.F.R. § 4180.1(d).

The only limitations on BLM's well-established power to modify grazing use in this case are the provisions requiring that BLM consult with the affected permittees or lessees, see 43 C.F.R. §§ 4110.3-3, 4130.3-3, and that BLM have some field observations or data acceptable to the authorized officer to support its actions. See 43 C.F.R. §§ 4110.3, 4130.3-3. BLM's compliance (or lack thereof) with these requirements is addressed later in the decision.

absence of consultation on the CDCA Plan that comports with § 7(a)(2), there is no assurance that ongoing implementation of the plan will not harm the desert tortoise. Greenpeace Foundation v. Mineta, 122 F.Supp 1123, 1137 (D. Ha. 2000) (citing Thomas, 753 F.2d at 764).

Arguably, BLM could have directed that all cattle grazing cease pending completion of the consultation to insure that no jeopardy or destruction or adverse modification of habitat would occur from the cumulative effects of all ongoing activities authorized under the CDCA Plan. FWS has the responsibility and expertise to make determinations regarding jeopardy which can only be made upon completion of consultation.

Of particular relevance under these circumstances are the principles or factors which courts have considered in determining whether activities should be enjoined while an agency engages in consultation to comply with § 7(a)(2). The very fact that consultation is designed to provide the insurance required by § 7(a)(2) has made courts reluctant to allow ongoing activities to continue during consultation.

Given the purpose of consultation to resolve the uncertainties, or at least thoroughly analyze the situation, and set forth reasonable prudent alternative measures to insure against jeopardy, at least one court would enjoin, during consultation on a land use plan, any activity which is “likely to adversely affect” or “may adversely affect” a listed species. Pacific Rivers, 873 F.Supp. at 372. In this case, cattle grazing would fall into this category.

Courts often reference § 7(d), which prohibits the action agency, after initiation of consultation, from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures to be identified during consultation which would not violate § 7(a)(2). Indeed, BLM stated in the Decision Record that it was trying to avoid violating § 7(d).

Appellants fault BLM personnel for being unable to identify the “irreversible or irretrievable commitment of resources”¹⁶ that BLM was trying to avoid. Their inability to do so is not controlling.

It is difficult, to say the least, for an action agency (or a tribunal) to identify such commitments of resources when the reasonable and prudent alternative measures are to be determined by FWS in the future during consultation. This is especially true where, as here, the consultation involves a myriad of activities with differing impacts, varying from location to

¹⁶In fact, many witnesses had difficulty recalling or pronouncing the precise, tongue-twisting phraseology “irreversible or irretrievable,” offering some humorous respite for the dedicated attorneys who worked extremely long hours to prepare and participate in a hearing that included presentation of evidence on Saturdays.

location, on a species (the desert tortoise) that is widely distributed over a large area.

Appellants further argue that Raymond Bransfield, an FWS biologist, testified that ongoing cattle grazing does not foreclose the implementation of reasonable and prudent alternatives (citing pages 1982-83 of the hearing transcript). However, Appellants have failed to place his testimony in context.

Referring to the first consultation (in 1993) regarding BLM's proposed interim grazing program pending completion of the CDCA Plan amendments, he stated that grazing during that consultation did not amount to an irreversible and irretrievable commitment of resources (Tr. 1982-83). This testimony is guided by hindsight and is inapposite to the present situation in which BLM is consulting on a myriad of activities and the cumulative effects of all those activities.

More importantly, § 7(d) merely clarifies the requirements of § 7(a)(2), ensuring that the status quo will be maintained during the consultation process. Pacific Rivers, 30 F.3d at 1056 n.14. The section was amended into the ESA in 1978 because Congress recognized that the obligation to insure against jeopardy to a species and adverse modification of its critical habitat could be eroded by other actions taken during the consultation period even though the project itself could not proceed before completion of consultation. Thus, Congress imposed further restrictions on agency action during the consultation period through Section 7(d). The legislative history of Section 7(d) makes this clear: "The new section [7(d)] of the act would further strengthen the consultation process" H.R. Rep. No. 1625, 96th Cong., 2d Sess. (1978). Section 7(d) is strictly prohibitory in nature; "[S]ection 7(d) does not amend section 7(a) to read that a comprehensive biological opinion is not required so long as there is no irreversible or irretrievable commitment of resources." Conner, 848 F2d at 1455 n.34.

In two other cases involving cattle grazing, the courts have rejected arguments that ongoing grazing activities constituted the status quo. Pacific Rivers, 936 F.Supp. at 745; Pacific Rivers Council v. Thomas, Civ. No. 92-1322 (D. Ore., Oct. 20, 1996) at 13. Mr. Salt testified as to his belief that BLM's decisions are rationally related to preserving the status quo for the desert tortoise and its habitat and thus helping to insure compliance with § 7(a)(2), pending completion of consultation and a definitive biological opinion addressing jeopardy and destruction or adverse modification of critical habitat. This is a rational basis for the grazing decisions, given the adverse effects of grazing on the desert tortoise and its habitat and the continuing severe and wide-spread declines in tortoise populations and health, provided that the specific actions reasonably relate thereto.

Appellants, however, contend that the grazing decisions are not supported by adequate data in violation of 43 C.F.R. § 4110.3. This contention effectively raises the issue not only as to whether BLM complied with the grazing regulations when it issued the grazing decisions, but also whether the grazing decisions are supported on a rational basis. Consequently, it is

addressed in this section of the Decision.

Section 4110.3 requires that the modifications to the terms of their grazing permits “must be supported by monitoring, field observations, ecological site inventory or other data acceptable to the authorized officer.” This regulation evinces a broad concept of data, including field observations, contrary to the undertone of Appellants’ arguments in this case.

According to Appellants, BLM did not rely upon rangeland data, such as rangeland health assessments, to reach its decisions. Rather, it relied primarily upon studies, field observations, and other data regarding the desert tortoise and its habitat.

This is essentially correct, with certain exceptions discussed below. The EA, Decision Record, grazing decisions, and testimony all emphasize protection of the desert tortoise and its habitat. The EA barely mentions rangeland data. It states that the extent to which livestock grazing was currently affecting vegetation was identified through monitoring studies, including “condition and trend”, and rangeland health assessments conducted in 1999 and 2000 on the subject allotments to compare resource conditions to the National Fallback Standards (Ex. 9, pp. 50-51). Based upon the assessments, rangeland health determinations were then made for most of the allotments. The Cronese Lake, Lazy Daisy, and Valley Wells allotments all met the standards (Ex. 9, Table 2). One or more standards were not met on the Horsethief Springs Allotment, but it was determined that cattle grazing was not the cause (Ex. 9, p. 51). No determination was made for the Cady Mountain Allotment and standards were not being met for the remaining subject allotments (Ex. 9, Table 2).

Further, the testimony showed that the Needles Field Office personnel did not rely upon the rangeland health determinations or other rangeland data in formulating the grazing decisions for the Needles Allotments (see, e.g., Ex. DT10, ¶¶ 16, 18, 20; DT11, ¶ 22). As for the Barstow Allotments, the Mr. Chavez testified that he relied upon the rangeland health determinations (a draft version in the case of the Cady Mountain Allotment) in determining recommendations for the boundaries of the exclusions areas in the Ord Mountain, Rattlesnake Canyon, and Cady Mountain allotments (Ex. DT8, ¶¶ 17d, 19c, 21d; Tr. 2877-78, 2918-24). Mark DePoy, a former BLM employee, testified that he and Mr. Chavez determined the initial recommendations for those three allotments based primarily upon recognizable physical features and did not engage in any biological assessments (Tr. 3613-16, 3618). The testimony of Mr. Chavez confirms that recognizable and manageable boundaries was the most important, but not the only, consideration in trying to protect tortoise habitat while still allowing the cattle grazing operations to continue (Ex. DT8, ¶¶ 17d, 19c, 21d). Mr. Chavez did note that Cronese Lake was meeting standards and that most of the Harper Lake exclusion area was meeting the standards and cattle grazing was not the primary cause for an area not meeting native species standards (Ex. DT8, ¶¶ 18f, 20g). He also mentioned violations of utilization standards on the Ord Mountain, Rattlesnake Canyon, and Cady Mountain allotments ((Ex. DT8, ¶¶ 17g, 19g, 21g). He did not rely on any other range monitoring data (Tr. 2900) and stated that even if all of the allotments had met all the rangeland

health and utilization standards, as was the case for the Cronese Lake Allotment, he still would have recommended the proposed exclusion areas (Tr. 2941).

The evidence demonstrates that any rangeland data was immaterial, with certain exceptions, to the decisions at issue. Additionally, for the most part, any violations of the standards were minor in terms of acreage, and that over-utilization of forage on the allotments was also infrequent and minor (see, e.g., Alexander, ¶¶ 6, 32-41, 43-56, 73, 74, 79).

The data which was material are the studies, field observations, and other data pertaining to the desert tortoise. Appellants argue that BLM's reliance upon that data was misplaced because there is no data showing that cattle grazing within the subject allotments was harming the desert tortoise or that conditions within the allotments jeopardized the continued existence of the species:

The only "data" presented by the BLM relating to the desert tortoise were the conclusions reached by Dr. Berry, Mr. LaRue and Dr. Avery. These "conclusions" are not sufficient to warrant the measures taken by the BLM.

* * * [T]he studies of Dr. Berry and Dr. Avery are inconclusive with regard to the effect that livestock grazing may or may not have on the desert tortoise. At best, the "data" presented by these witnesses demonstrate that: (1) under certain conditions existing in very dry years, cattle and tortoises may compete for forage; and (2) there is a potential, albeit supported with little direct evidence, that cattle could trample the tortoise or its burrow. Dr. Berry and Dr. Avery could not, however, quantify or qualify the above potential impacts and could not rank these potential impacts as greater or less than other impacts, including disease, OHV activity, predation, and vandalism.

No monitoring or other data was collected regarding the condition of the specific allotments in question as they relate to the tortoise. The BLM did not evaluate the quantity or quality of forage available to both cattle and tortoise. The agency did not examine tortoise burrows on the allotments to determine if there were signs of trampling or disturbance. The BLM did not consider weather patterns or precipitation data to determine if this year or next year would be periods of low rainfall. (TR. 3134, lines 18-25, p. 3135, lines 1-21). According to Dr. Avery's study, potential competition between cattle and desert tortoises is possible only in times of extremely low precipitation. Tim Read testified that rainfall was "good" this spring and that moisture would not be a factor on the allotments. (TR. p. 3205, lines 14-25).

In making its decisions, the BLM relied exclusively on conclusions of Dr. Berry and Dr. Avery that cattle grazing "could" "potentially" have an impact on

the desert tortoise. Dr. Berry's and Dr. Avery's extrapolated conclusions are not "data" within the meaning of the BLM regulations.

It appears that only real data used by the BLM was the actual use data used to determine the stocking levels for the allotment. As with the conclusions reached by the Dr. Berry and Dr. Avery, actual use data is not sufficient to support a modification of the terms and conditions of a grazing permit.

(Appellants' brief, pp. 23-24) (footnotes omitted).

Appellants presented some expert testimony in support of these contentions. The many disagreements between BLM's experts and Appellants' experts have been considered but not all are individually addressed in this decision. Only a few of them are addressed because mere professional disagreement by Appellants' expert witnesses with the findings and conclusions reached by BLM decision makers is insufficient to overturn a BLM decision. See Sierra Club et al., 104 IBLA 76, 84 (1988).

As explained by the Board:

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. West Cow Creek Permittees v. BLM, 142 IBLA 224, 238 (1998); Kings Meadow Ranches, 126 IBLA 339, 342 (1993); Animal Protection Institute of America, 118 IBLA 63, 76 (1991). A party challenging BLM's DR/FONSI must do more than offer a contrary opinion; an appellant must show by a preponderance of the evidence that BLM erred when [*244] collecting the underlying data, when interpreting that data, or when reaching its conclusion, and not simply that a different course of action is available. Animal Protection Institute of America, supra, and cases cited therein. Mere professional disagreement voiced by appellant does not suffice to establish error in a determination made by an expert BLM review team based upon all available data. See, e.g., Riddle Ranches, Inc. v. BLM, 138 IBLA 82, 85-86 (1997).

Southern Utah Wilderness Alliance 151 IBLA 237, 243-44 (1999). This is consistent with Supreme Court rulings that "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

Appellants' chief witness with regard to criticisms of the desert tortoise data was Dr. Kenneth Kingsley, a biologist who stated that he is not an expert on the desert tortoise but an expert in "interpreting biological information for non-biologists, conducting surveys for

threatened and endangered species, preparing biological evaluations * * *, [and] developing conservation plans * * *.” (Kingsley, ¶ 3) His testimony was based upon review of the scientific literature regarding the desert tortoise, as he has had almost no involvement in studies pertaining to the desert tortoise and does not participate in desert tortoise seminars, field work, or conferences (Tr. 834, 1230-35, 1288-89).

Because of the typical lag time from completion of a study to preparation, review, and publication of the results is 4-5 years (Tr. 862-63), and because of Dr. Kingsley’s lack of involvement in desert tortoise issues, his knowledge of desert tortoise data was not nearly as accurate, comprehensive, in-depth, or up-to-date as that of Dr. Berry and other BLM witnesses (see, e.g., Tr. 837-52, 864-65, 1243). For instance, he had not read any reports by Dr. Morafka (Tr. 1285-86).

Dr. Kingsley referenced published reports “that cast serious doubt on the validity of the process and the quality of the information used to support the determination that the desert tortoise is a threatened species,” citing specifically a peer-reviewed, published article by Bury and Corn (Ex. KG; Tr. 1243) published in 1995 (Kingsley, ¶ 7; see also Exs. KF, KH). That article “questioned the scenario of a long-term decline, pointing out severe flaws in the information, including Dr. Berry’s data from 1984 and 1989, that was used to support the scenario and offering alternative interpretations that were more consistent with the available information.” (Kingsley, ¶ 7) It questioned the estimates of tortoise populations densities in the 1800's and early to mid-1900's based on anecdotal evidence, concluding that data is virtually non-existent (Tr. 1244-49).

Mr. Bransfield noted that, at the time of listing, Dr. Berry’s data was the best available data and came from widely scattered, long-term plots showing declines of 15-60 % dead rather than the normal 2-6 % (Tr. 1965; see also Ex. KR (Dr. Berry’s data was “state-of-the-art”)). Further, there were many other factors which bore upon listing of the species, such as substantial loss of habitat throughout a significant portion of its range (Ex. DT4, ¶¶ 5-15; Ex. 27; Tr. 1947, 1965-66).

Aside from the fact that these criticisms of the old data amount to differences of opinion for the most part, they also suffer from a lack of focus on data which is more crucial: the more up-to-date data from Dr. Berry’s study plots and other sources showing consistently high mortality rates, the spread of diseases, and decline in health throughout most of the region. Dr. Kingsley did express less than full confidence in the results from Dr. Berry’s study plots because of insufficient replication, insufficient frequency, other unidentified technical reasons, and potential unidentified impacts caused to the study plots by the study process (Tr. 1235, 1268). Dr. Berry countered that she does use the marked recapture method which is scientifically credible for demographic research and that Dr. Kingsley supported his criticisms with an article based upon a false premise (Tr. 845-47, 864-65). Further, Dr. Kingsley did acknowledge that the Dr. Berry’s results are the best available information and constitute evidence of decline in the

tortoise (Tr. 1235).

Dr. Kingsley also pointed out that data are not currently available on the number of tortoises, or any other population measurements for tortoises, for the subject allotments (Kingsley, ¶ 14). According to Dr. Kingsley, “Without these data, it is not possible to evaluate the condition of the desert tortoise populations on these allotments.” (Kingsley, ¶ 14) He did not believe that the data from the small area (approximately 15 square miles) covered by Dr. Berry’s study plots could be extrapolated over the large Mojave region (Tr. 1265-69).

FWS biologist, Mr. Bransfield, countered that in the absence of site-specific information, reliance must be placed on the best available data, and that one should err in favor of the listed species (Tr. 1967). He further opined that extrapolation of the study plot data to a wider area, including the subject allotments, is appropriate, given that the data comes from widely scattered sites and none of the data appears to be anomalies (Tr. 1965, 1967).

Dr. Berry testified similarly that it was appropriate to extrapolate to the subject allotments the general decline in health and downward population trends based on the pervasiveness of downward trends at all the study plots as well as other studies and observations showing population declines, increased mortality, increases in severity and frequency of shell disease, and the spread of URTD to all areas, except areas south of Interstate 40 (Tr. 767-70, 785, 794-99). Those observations include recent ones made by her staff in the Lazy Daisy Allotment (Tr. 768-70). Interestingly, Dr. Kingsley was unaware that data was being collected from within the Lazy Daisy Allotment (Tr. 1271-72).

She noted that this data included a wealth of information gathered from sites on or near the subject allotment (Tr. 852). Indeed, many of the study plots are near the subject allotments (see Exs. 15b, 24), including Ward Valley, which borders the Lazy Daisy Allotment to the east (Tr. 2098), Goff, which lies a few miles north of the Lazy Daisy (Tr. 767-68), and Shadow Valley, which is within the Valley Wells Allotment (Ex. 24). Also, there are three plots (Johnson Valley, Lucerne Valley, and Stoddard Valley) close to the Ord Mountain Allotment (Ex. 24). All of these plots are showing population declines of 40-90% over study periods of six years or so, much higher than would be expected in a healthy population with roughly 2% of adults dying each year (Tr. 767-70).

Appellants fault BLM for the lack of other site-specific data or studies, such as evaluations of the quantity or quality of forage available on the subject allotments and examinations of burrows there for evidence of trampling. They also criticize BLM for failing to consider that rainfall for the rain year from July 1, 2000 to June 30, 2001 was near average with moderate ephemeral production (Tr. 2508, 2891) so that forage production would have been sufficient to forestall detrimental competition observed by Dr. Avery during the drought year of 1993. Additionally, they question the relevancy of Dr. Avery’s study because the study site in the Ivanpah Valley is not on one of the subject allotments.

However, the vegetation community at the Ivanpah Valley plot site is known as the Mojave Creosote Bush Scrub, which is the characteristic plant community of the Mojave Desert and one of the most common types in the area (Ex. 9, p. 48; Tr. 2147-48). Some of that plant community is found on all the subject allotments (Tr. 2148).

More importantly, Appellants fail to offer a persuasive argument as to why the site-specific data are needed to reasonably conclude that continued cattle grazing within the subject allotments will likely have adverse impacts on the desert tortoise. BLM may rely on the best available information. Requiring such site-specific studies before actions are taken to protect the tortoise will lead to delay and inaction, and might well prove its undoing, given the latest data of serious declines.

Dr. Berry testified as to the urgency of taking action and addressing the many adverse impacts to the tortoise at the same time (Tr. 810). She explained that over the last 20 years many different actions have been taken to improve tortoise habitat, but they have been limited in scope. “We’re now in a situation where we have a very reduced number of breeding females, animals that can help stabilize and recover the population. The longer we wait to do something, the more expensive it’s going to become.” (Tr. 810).

Furthermore, Appellants fail to adequately explain why moderate rainfall and spring ephemeral production for the rain year ending June 30, 2001, would be significant. The anticipated and actual date for issuance of the grazing decisions was May 15, 2001, with the seasonal exclusion provisions not to be implemented until the fall, provided the decisions were affirmed. By that time, it would be a new rainfall year and the spring ephemeral vegetation would be dried up and mostly gone.

Even if the biomass of forage on the subject allotments were sufficient to preclude direct application of Dr. Avery’s observations of competition in a drought year, Dr. Avery’s study pertained only to adult tortoises. As discussed below, juvenile tortoises have less choices for a healthy diet and therefore competition between them and cattle may be more prevalent than that between adult tortoises and cattle.

In any event, the biomass of forage is but one factor in the mix. Dr. Morafka minimized the importance of biomass as follows: “Commonly defenders of the practice of grazing cattle on tortoise habitat cite the abundance of plant biomass, arguing that it is calorically sufficient to satisfy the needs of both organisms. In fact the total plant biomass is largely irrelevant to the issue in question.” (Ex. I-1, p. 3; see also Tr. 432-33).

This is so for several reasons. First, juvenile tortoises have a limited seasonal window for foraging activity. Late January through early May is “the only time window in which young tortoises may obtain sufficient vegetation, especially forbs, to satisfy their caloric and essential nutrition needs and to complete rehydration for the entire year * * *. This winter spring forage is

also most attractive to grazing cattle.” (Ex. I-1, p. 3; see also Tr. 433).

Second, tortoises have limited physical access to forage. According to Dr. Morafka, “Adult tortoises have access only to the first 6"-10" of vertical vegetation. Neonate/small juvenile tortoises (<100 mid plastron length) have their access reduced to only the first 2-3" of vertical growth. Even among these plants only herbaceous species or new shoots of a few perennials are sufficiently pliable for ingestion by young tortoises.” (Ex. I-1, p. 3 & Attach. D). In short, even if plant biomass is abundant, tortoises are physically able to eat only certain species, many of which, according to Dr. Avery, are preferentially targeted by cattle.

Third, of those plants physically accessible to juvenile tortoises, only some contain the right nutritional values (enough nitrogen to remain healthy and grow and sufficient nitrogen and water to reduce the toxic effects of potassium which is abundant in many desert plants), so juveniles preferentially chose these plants - primarily spring forbs - for forage (Ex. I-1, p. 3; Tr. 399-402, 406-07). Several studies have shown that tortoises eating predominantly split grass (with a low nitrogen content) rather than the more nutritious plants actually lost weight (Tr. 2138). This gives added significance to Dr. Avery’s findings that, during late spring, as the desert dandelion (with a high nitrogen content) became scarce in grazed areas, tortoises in those areas ate 4½ times more split grass than tortoises within non-grazed areas where the dandelion was still available (Tr. 2133-38). In sum, “the availability of acceptable forage cannot be predicted from local densities of plant biomass or their caloric content, but rather from low lying succulent forbs which are some of the very species most affected by cattle grazing.” (Ex. I-1, p. 4)

The impacts that cattle may have on juvenile tortoises can have significant negative impacts on the population, since “populations may not tolerate dramatic die-offs of juvenile tortoises in any given year without suffering significant decline. Such mortality should be expected when cattle collapse their shallow burrows, erodes sustaining soils, and suppress or denude key forb vegetation which is vital to juvenile tortoise growth and survival.” (Ex. I-1, p. 5)

Appellants argue that Dr. Morafka’s testimony should not be considered because neither the EA, Decision Record, nor grazing decisions reference his work. However, both the EA and the Decision Record specifically mention protection of juvenile tortoises as part of the rationale for the Proposed Action (Ex. 9, pp. 67-68; Ex. 10, pp. 15, 16, 18). It is appropriate to consider Dr. Morafka’s testimony in support thereof.

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 (see, e.g. Tr. 443-45, 852-

53).

The accessibility, diversity, and native component of forage, all of which may be adversely affected by cattle grazing, are particularly important, as stated by Doctors Berry and Morafka. Dr. Berry testified, “one of the key issues for maintaining a stable and/or increasing desert tortoise population is good nutrition: plenty of high quality forage and water at the appropriate times of year. * * * Healthy animals, including tortoises, are less likely to become ill and succumb to infectious and other diseases than animals (e.g., tortoises) experiencing malnutrition, lack of food or poor quality food, and insufficient water.” (Ex. DT5, ¶ 5d).

Dr. Morafka spoke of newer studies showing that tortoises’ nutritional needs are much more narrow and specific than originally thought. He referenced the potassium excretion potential index, or PEP index, which pertains to the tortoises need for water and nitrogen from forage to offset the potential toxic effects of potassium that's so abundant in desert vegetation (Tr. 396-98).

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 (Tr. 842-43), 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.

(Ex. I-1, p. 2; Tr. 443-45). While there was general agreement that cattle are not likely to trample large (adult) tortoises (although there is some evidence of it), trampling of small (juvenile or neonate) tortoises is more likely because they are hard to see (Ex. 9, p. 68).

Dr. Berry summarized the impacts of cattle grazing as follows:

These impacts include but are not limited to 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 crusts, creation of blowing dust.

(Ex. DT5, ¶ 5d). These impacts are not just conjecture but are based on actual observation, as Dr. Berry testified:

I have personally observed all of the above listed livestock impacts to desert tortoise habitat in many areas within the California deserts. I have seen remains of tortoises trampled by livestock (Johnson Valley and other areas); winter and summer burrows trampled by livestock (e.g., Ivanpah Valley, 1994); open spaces and cleared areas from livestock activities (numerous locations); concentrations of predators and predator sign at windmills, water tanks, and cattle guards; one tortoise freshly crushed by a watering truck; reduction of key tortoise forage species in spring; high concentrations of alien plants at watering and bedding sites and along access roads; and blowing dust from livestock movements.

(Ex. DT5, ¶ 5d). The trampled tortoises were seen in 1994 at the southern edge of the Ord Mountain allotment (Tr. 715). Trampling of tortoises has also been observed in the similar arid climate of Israel (Tr. 811-12). Dr. Berry has collected tortoise skeletal remains evidencing death by trampling (Tr. 716). She elaborated that it is highly likely that the trampling of tortoises is undercounted because skeletal remains deteriorate or are altered by predators and because tortoises trampled within burrows would not be seen or counted (Tr. 806-07).

As for additional evidence of trampling of burrows, Dr. Berry described a study in which damaged burrows were eight times more prevalent in an area open to cattle grazing than in a protected area (Ex. DT5, ¶ 5d). The trampling of burrows not only poses a direct threat of trampling tortoises in their burrows, but also requires the expenditure of unnecessary energy in digging out damaged burrows or in digging a new replacement burrow, given the tortoises' high-degree of fidelity to specific burrows (Ex. DT5, ¶ 5d; Ex. 42). Dr. Avery provided similar testimony and concluding that trampling can influence the behavior of tortoises by increasing the time exposed to above-ground nocturnal predators in early spring (Ex. DT6, ¶ 8).

Appellants find the following established facts to be significant: (1) that there have been declines in tortoise populations in non-grazed areas, (2) that there is no identifiable single or major cause of decline of the tortoise, and (3) that BLM's experts could not quantify or qualify the impacts of grazing on the desert tortoise or rank them in comparison to the impacts of other activities such as off-road vehicle use, predation, vandalism, wildfires, and disease. It seems self-evident that these facts are not significant, as the truth of these matters does not show that

cattle grazing does not adversely affect the tortoise.

Addressing them briefly, item (2) explains item (1). As to item (3), both Dr. Berry and Mr. Bransfield explained that they could not rank the threats to the desert tortoise because those threats vary over location and time, because of the large area involved, and because of the complexity of the interaction of those threats and the tortoise's responses to them (Tr. 723, 830-31, 1953-54).

The scientific complexity certainly lends itself to disagreement. Dr. Kingsley concluded that "there is no biological evidence that the action of the BLM was warranted. Cattle grazing may or may not have an adverse impact on the desert tortoise, but the extent and immediacy of that impact have not been demonstrated. * * * There are no known Biological Opinions that support the notion that there is an emergency and that grazing at the current and recent levels will jeopardize the continued existence of any species of concern in the West Mojave." (Kingsley, ¶ 20)

This opinion is countered by several FWS and BLM experts, all of whom are more familiar with the data and the desert tortoise. BLM was entitled to rely upon the reasonable opinions of those Departmental experts. BLM's reliance upon those opinions was not arbitrary or capricious.

This is not to say that the scientific evidence regarding adverse impacts on the desert tortoise caused by cattle grazing is conclusive. From the time of listing, through preparation of the EA, to the time of hearing, Departmental experts have acknowledged that the data is not conclusive.

Neither the grazing regulations nor the ESA require definitive proof.

The ESA * * * only requires that decisions be made on the basis of the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). This standard requires "far less" than conclusive proof. See Defenders of Wildlife v. Babbitt, 958 F.Supp. [670,] 680 [(D.D.C. 1997)]. In fact, Congress intended that agencies give "the benefit of the doubt to the species." Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988) (citing H.R. Conf. Rep. No. 96-967, at 12, reprinted in 1979 U.S.C.C.A.N. 2572, 2576).

Greenpeace v. National Marine Fisheries Service, 55 F.Supp2d 1248, 1262 (W.D. Wash. 1999). Similarly, precedent regarding BLM's reliance upon its experts in making decisions under the grazing regulations focus upon whether the experts considered all the available data. See, e.g., Riddle Ranches, Inc. v. BLM, 138 IBLA 82, 85-86 (1997).

BLM has consistently complied with this standard, relying upon the best available

scientific evidence. While that evidence may be equivocal, BLM's experts provided a reasonable interpretation of that evidence, to which this tribunal must defer. Greenpeace v. National Marine Fisheries Service, 55 F.Supp.2d 1248, 1262 (W.D. Wash. 1999); see also Central Ariz. Water Conservation Dist. v. United States, 990 F.2d 1531, 1540 (9th Cir. 1993) (when scientific evidence is equivocal, a court is to defer to an agency's reasonable interpretation of that evidence).

Left to be decided is whether the specific actions of the grazing decisions are rational, given that I must defer to the BLM's expert's reasonable interpretations of the likely adverse effects of grazing on the desert tortoise. 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.

As for the exclusion area boundaries, Appellants sought to show at hearing that they were arbitrarily drawn without regard to any data but simply for ease of management in the sense of recognizable boundaries. They also took issue with the inclusion of non-critical habitat in the exclusion areas.

Appellants failed to make such a showing. As Mr. Salt testified, 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.

The Rangeland Management Specialist for each of the field offices was instructed to recommend an area or areas in critical habitat for seasonal exclusion under the following parameters: (1) what lands within the allotment contain desert tortoise habitat that could be protected by seasonal exclusion of livestock, (2) the area or areas must be recognizable and manageable for both the BLM and the lessee, and (3) would the remaining portion of the allotment allow for continued grazing use. In applying those parameters they considered several factors, including the location of critical habitat, the location of range improvements, cattle distribution patterns, and the use of recognizable and manageable boundaries on the ground for both BLM and the Appellants (Exs. DT8, DT10). It was reasonable to consider each of these factors. Mr. Chavez explained that they looked at maps of the desert tortoise habitat and tried to ensure that sufficient improvements, including water sources, remained outside the exclusion areas to sustain a viable operation (Tr. 2875-77).

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 (Tr. 439-42, 459-60, 808). 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. These are just some of the potential benefits. (Tr. 439-42, 459-60, 808).

The final rule designating critical habitat explained the importance of non-critical desert tortoise habitat:

Not all suitable desert tortoise habitat was included in critical habitat. The Service recognizes the importance of all lands, but did not incorporate all habitat within [Critical Habitat Units], primarily because most of these lands did not meet the designation criteria...This does not mean that lands outside of critical habitat do not play an important role in the tortoise's conservation. These lands are also important to providing nesting, foraging, sheltering, dispersal, and/or gene flow habitat for tortoises.

(Ex. 28, p. 5825).

Appellants make much of the findings of the biological opinions which have addressed BLM's interim grazing program in the past. Those opinions concluded that the program was not likely to jeopardize the continued existence of the species or destroy or adversely modify critical habitat.¹⁷

Mr. Bransfield noted that those biological opinions pertained to an interim grazing program which was only supposed to last a few years pending completion of CDCA Plan amendments. However, the amendments have taken much longer than expected, necessitating extensions of the opinions and delay in compliance with the consultation requirements of § 7(a)(2) with respect to the plan.

This is the crucial point, as those biological opinions only addressed the effects of livestock grazing and not the cumulative effects of the myriad of activities authorized under the CDCA Plan, which have yet to be analyzed through consultation with FWS. Many of those activities are threats to the desert tortoise and the interaction of those threats and the tortoise's response thereto, as previously mentioned, is complex. BLM has taken actions rationally related

¹⁷Notably, the March 25, 1997 BO recommended elimination of cattle grazing from critical habitat within the subject allotments as a conservation measure available to BLM to meet its duty under § 7(a)(1) of the ESA.

to maintaining the status quo, pending analysis of that complexity by FWS through formal consultation.¹⁸

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 (see, e.g., Tr. 2896).

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.

These provisions are rationally related to achieving the management objectives of maintaining the status quo for the tortoise and its habitat under § 7(a)(2) and 43 C.F.R. §§ 4130.3 and 4180.1(d). They encourage the Appellants to keep cattle out of the exclusion areas and to promptly react if cattle stray into those areas.

Appellants argued that the 48-hour provision is unreasonable because it likely would take longer than 48 hours to locate and retrieve cattle within the large acreages of land involved and because rounding up the cattle would cause more disturbance than allowing the cattle to remain well dispersed. Under the grazing regulations, whenever it appears that a violation exists (unauthorized use is occurring), BLM must serve upon the alleged violator written notice of the unauthorized use and order to remove livestock by a specified date and allow a specified time from receipt of notice to show that there has been no violation or to make settlement under 43 C.F.R. § 4150.3. See 43 C.F.R. § 4150.2(a). Until amounts are paid in settlement, BLM may initiate a trespass action under 43 C.F.R. § 4160.1 “to cancel or suspend grazing authorizations * * until such amounts have been paid.” 43 C.F.R. § 4150.3.

While the 48-hour provision is short, it is consistent with these regulations and a rational and proper exercise of BLM’s broad discretion in administering the grazing laws to protect the desert tortoise by encouraging the Appellants to minimize unauthorized cattle grazing in the exclusion areas. This is especially true because the 48-hour provision merely requires initiation of trespass procedures but does not dictate the outcome.

¹⁸Although not essential to this holding, there is post-biological opinions data showing more precipitous die-offs of tortoises (Tr. 1933-35).

An outcome is dictated by imposition of the provision for adding an additional day to the period of exclusion for every day cattle are found inside the exclusion areas. However, that provision is within BLM's authority under the grazing regulations, specifically 43 C.F.R. § 4150.2(d). That section states:

The authorized officer 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.

The necessity to protect the desert tortoise justifies and serves as a rational basis for imposition of the provision under this section.

There are also provisions in certain decisions regarding riparian areas and wells. Some of those actions are not based upon protection of the desert tortoise.

All of them are based, in whole or in part, upon field observations and rangeland health assessments and determinations of an interdisciplinary BLM team which found that rangeland health standards were not being met. That interdisciplinary team included Mr. Chavez, Tom Egan, a BLM Wildlife Management Biologist and one-time riparian coordinator knowledgeable in riparian management, and Jessica Walker, who has a background in botany (see, e.g., Tr. 2929)

In the Cady Mountain Allotment, grazing use will be eliminated from the riparian and flood plain habitat located along the Mojave River in Afton Canyon and approximately 0.5 miles of fence adjacent to the existing fenced riparian enclosure in Afton Canyon will be constructed at the eastern and western ends of the canyon by January 1, 2002, to close the water gaps which now allow access to the Mojave River. This exclusion will remain in effect until the signing of the record of decision for the West Mojave bio-regional plan amendment. Also, the Hidden Valley Well within the exclusion area will be inactivated during the exclusion periods.

Mr. Chavez explained the need for these actions. He testified that “[t]he 2000 rangeland health assessment determined that native species (upland) standard was not being achieved on rangelands in and around Hidden Valley Well. Riparian and flood plain habitats, as well as water quality are being negatively impacted along the Mojave River where livestock have access.” Also, the EA notes the importance of deactivating the Hidden Valley Well to lessen the likelihood of drift into the exclusion area. (Ex. DT8, ¶ 21h; Ex. 9, p. 30; Tr. 2918-19).

Mr. Chavez explained that preventing cattle impacts to water quality and riparian habitat rather than to the desert tortoise and its habitat was the basis for the Afton Canyon fencing (Tr. 2818). Both Mr. Chavez and Mr. Egan testified as to their efforts over the last nine years to restore the riparian area in Afton Canyon (Tr. 2819, 2955-57, 3438). The BLM has spent approximately \$1,000,000 on the riparian restoration project (Tr. 2956, 3438).

Mr. Chavez stated that the water gaps were a compromise to allow cattle access to the river water, but that the riparian habitat and water quality could no longer sustain the impacts from the cattle continuously entering the enclosure (Tr. 2822, 2956-57; Ex. 132). Closure of the water gaps would greatly reduce livestock presence in the area and thus reduce unacceptable cattle related impacts both within and without the enclosure (Ex. 133). Mr. Chavez opined that closure of the water gaps would improve the riparian habitat and water quality (Tr. 2956). The foregoing evidence establishes a rational basis for the fencing in Afton Canyon and inactivation of the Hidden Valley Well.

In the Rattlesnake Canyon Allotment, trailing of cattle through Rattlesnake Canyon will no longer be permitted and an area of the canyon will be fenced by June 30, 2001, to exclude cattle use and trailing within the canyon. The active permitted use will be reduced from 1,081 AUMs to 562 AUMs to account for forage in the excluded areas which will be unavailable.

Mr. Chavez testified that Rattlesnake Canyon was being fenced because the riparian/wetland standard under 43 C.F.R. § 4180.2 is not being achieved (Ex. DT8, ¶ 19d). No substantial contrary evidence was submitted. Consequently, BLM's decision to fence the canyon is rational.

In the Ord Mountain Allotment, both water control fences will be constructed at all developed springs located on public land within the allotment in order to reduce potential cattle drifting into the exclusion area and to improve riparian habitat conditions. Testimony at the hearing made clear that BLM would shoulder the burden of construction of those fences.

Mr. Chavez testified that all of the developed springs within the exclusion area are currently not achieving the riparian/wetland standard under 43 C.F.R. § 4180.2 (Ex. DT8, ¶ 17g). The rangeland health determination for the Ord Mountain Allotment states that the riparian/wetland standard is not being met and provides the following supporting rationale:

The water sources that support the above listed developed springs are not fenced to prevent negative impacts from soil compaction and excessive utilization to the surrounding riparian and upland vegetation. Strategies have been developed to enhance riparian values at each of the springs (see recommendations). Utilization of vegetation by cattle surrounding the spring will be eliminated and the potential for that site will be allowed to flourish.

(Ex. 129).

The recommendations for riparian habitat states:

The previously mentioned developed spring sites would be modified to enhance riparian values in the following order of priority: Willow, Kane, Aztec, Fisher,

Badger and Quill. * * * These modifications could include fencing * * *. Ramps or floats will be placed in every trough to allow maximum access to water for wildlife. Although the source at Quill Spring has been fenced, this spring development needs to be reconstructed with a design that minimizes resource impacts.

(Ex. 129). Again, BLM has established a rational basis for its action.

The foregoing conclusions were reached after considering the following testimony in opposition to the actions. Jack Alexander III, a range management consultant, testifying for Appellants, criticized BLM's reliance upon the rangeland health assessments.

He testified that in November 2000 an interagency team published Technical Reference (TR) 1734-6, a qualitative method for assessing rangeland health (Ex. MM). He opined that the health assessments regarding riparian/wetland areas are not in accordance with TR 1734-6 because that reference includes no means of assessing riparian, wetland, or stream morphology objectives. It pertains to upland range assessments. According to Mr. Alexander, riparian objectives should be monitored with appropriate monitoring techniques. (Alexander, ¶ 38).

Mr. Alexander further testified that the rangeland health assessments should be properly conducted in accordance with TR 1734-6 and/or qualitative monitoring should be installed to assess resource conditions. He opined that BLM erred in using the assessments to identify the cause of resource concerns and make grazing decisions because TR 1734-6 states that assessments should not be used for these purposes. (See, e.g., Alexander, ¶ 38).

TR 1734-6 is nothing more than a technical reference that applies to upland rangeland health assessments. It does not have the force and effect of law. An interdisciplinary team made field observations and collected data and determined, using their professional judgment, that the actions were necessary. Mr. Chavez compared their assessments to "apparent trend", essentially one-point-in-time observations and measurements (Tr. 2927). Appellants' own expert, Mr. Burkhardt, opined as to the legitimacy of relying upon such "apparent trend" observations and measurements (Tr. 2719-20).

Mr. Alexander's assertion that other methodologies should have been used is merely a difference of opinion. BLM may reasonably rely on the team's findings, provided they are otherwise reliable.

Mark DePoy, the former supervisory of the interdisciplinary team had visited Afton Canyon and the Ord Mountain springs, except Willow Springs, and opined that the conditions were good or excellent (Tr. 3607-11). He questioned the findings that the interdisciplinary team's findings that those riparian areas were not meeting standards because (1) Aztec Spring was intermittent and lacked surface water and riparian obligate vegetation, and therefore was not

a riparian area,¹⁹ (2) some or all of the assessments on the Ord Mountain springs were conducted in the fall or winter when the vegetation had shutdown, (3) quantitative data regarding soil and species diversity did not support the qualitative judgments made by the interdisciplinary team, and (4) the team was using the assessment process for the first time and was thus learning how to use it as they conducted the assessments on Ord Mountain (Tr. 3583-95, 3602-04, 3655).

However, he did not partake in the field assessments of those springs but relied upon the materials submitted by the team upon completion of the assessments and his own field observations the next summer (Tr. 3654-66, 3677, 3695, 3708). Furthermore, he only worked in the Barstow office for approximately two years, whereas Mr. Chavez and Mr. Egan each had many more years of experience in the Mojave desert.

Mr. DePoy's testimony raises some substantial concerns as to the reliability of the assessments. Nevertheless, to a great extent, his testimony amounts to a difference of opinion with the entire interdisciplinary team which included the more Mojave desert-wise Messrs. Chavez and Egan. The weight of the evidence shows that BLM reasonably relied upon the field observations and rangeland health assessments to justify the aforementioned actions.

Another rational basis for the fencing of the springs is that the fencing reduces the likelihood of drift into the exclusion area to protect the desert tortoise and its habitat. This is so because cattle will no longer have access to the springs and therefore will not be drawn to them.

A final contention of Appellants is that the grazing decisions are not rational because the harm to the Appellants far outweighs the benefit to the tortoise. By BLM's own admission, the grazing decisions only provide a slight benefit to the desert tortoise in comparison to the pre-decisions grazing program (Ex. 9, p. 86; Ex. 10, p. 11; Ex. 17, p. 2). In contrast, Appellants may arguably go out of business.

The fault in this argument is three-fold. First, while the harm to Appellants and the regional economy should not be minimized, the fact is that that harm is not significant to the regional economy. Second, under the grazing regulations, "even severe economic injury to a grazer does not invalidate [a] BLM[] decision, but is only one consideration bearing on the reasonableness of that determination. If BLM's decision has a reasonable basis, it must be affirmed." Yardley, 123 IBLA at 93. More definitively, under the ESA, federally listed species are to be afforded the highest of priorities and protected, whatever the cost. Tennessee Valley Authority, 437 U.S. at 174, 184. Third, Appellants ignore an important and substantial benefit. That is the maintenance of the status quo, to the greatest extent possible, for a threatened species where there is a violation of the procedural provisions designed to insure that no substantive violations of the ESA occur.

¹⁹Mr. Fisher does have a section 4 permit for Aztec Spring (Tr. 988).

In the present case, BLM's grazing 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 protection of the desert tortoise and maintenance of its habitat, while attempting to afford Appellants with the opportunity to continue their operations in 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.

IV.

Did BLM Meet The Requirement Of Consultation, Cooperation, and Coordination?

Appellants contend that the grazing regulations required BLM to engage in consultation, cooperation, and coordination with the affected permittee or lessee prior to imposing the temporary modifications of grazing use at issue, see 43 C.F.R. §§ 4110.3-3, 4130.3-3, and that BLM failed to comply with this mandate.²⁰ Appellants are correct.

The grazing regulations clearly require BLM to engage in consultation, cooperation, and coordination with the affected permittee or lessee prior to issuance of a proposed decision. See 43 C.F.R. §§ 4110.3-3, 4130.3-3. "*Consultation, cooperation, and coordination* means interaction for the purpose of obtaining advice, or exchanging opinions on issues, plans, or management action." 43 C.F.R. § 4100.0-5.

Each of the Appellants, except Mr. Thornton, testified that BLM did not provide him or her with the opportunity to assist in developing alternatives in the EA, and most also stated that BLM never asked for, nor solicited his or her opinions, suggestions, concerns, comments, or involvement in any manner (Blair, ¶ 27; Ex. A, ¶ 46; Blincoe, ¶ 42; Smith, ¶ 31; Mitchell, ¶ 28; Kemper, ¶ 36; Wetterman, ¶ 31). Mr. Thornton testified that he was asked to suggest alternatives, that he suggested a different grazing scheme (which he did not identify in his testimony), and that BLM personnel did not seriously consider it but merely responded that it couldn't be done (Tr. 520-21).

²⁰In their appeals, Appellants also alleged that BLM failed to consult with the County. 43 C.F.R. § 4120.3-3 requires consultation not only with the affected permittee, but also with "the State having lands or responsible for managing resources within the area, and the interested public." "Interested public" is defined at 43 C.F.R. § 4100.0-5. It is unclear whether this regulation would apply to the County. In any event, on January 24, 2001, Mr. Salt met with two County Supervisors and their staffs to discuss the terms of the settlement agreements and their effects on the County (Ex. DT1, ¶ 42).

BLM's own evidence shows that its contacts with the affected permittees prior to issuance of the proposed decisions were limited. Bernice McProud, the Rangeland Management Specialist for the Needles Field Office, whose responsibilities included consultation with Appellants, handled most of the communications for that office.

Prior to issuance of the proposed decisions she had no discussions with Appellants regarding the economic impacts of the Proposed Action on their cattle operations, such as the costs likely to be incurred, or the ability of Appellants to assimilate their operations to the proposed changes and keep them viable (Tr. 3061, 3063). Rather, she simply spelled out generally the changes being contemplated (Tr. 3063).

On January 19, 2001, she telephoned Appellant Ron Kemper and left a message on his answering machine saying she needed to talk about the Center's lawsuit, and that the Horsethief Springs Allotment was going to be affected. He called back, and pursuant to his request for a map of the tortoise habitat, she faxed one to his office. (Ex. DT10, ¶ 19G; Ex. 113).

Ms. McProud contacted Appellant Mike Blair on January 12, 2001, about the anticipated grazing decision on the Lazy Daisy Allotment and left him a message. She mentioned that they needed to talk about the allotment and the Center's lawsuit. On January 19, 2001 she talked with Mike Blair about the lawsuit and told him about the map BLM was trying to develop, and asked if they could meet the following week. After more discussion Mike said he would contact his co-Appellant Milton Blair to see if they could both meet with her. They did not meet before the final grazing decision was issued. (Ex. DT10, ¶ 15I; Ex. 111).

On January 5, 2001, at Appellant Dave Thornton's request, Molly Brady, Gary Sharpe and Ms. McProud met with him at the Needles Field Office to discuss the Center's lawsuit and how it would affect the Valley Wells Allotment. Mr. Thornton requested another meeting and they met again on January 12, 2001. During these meetings Mr. Thornton said he was considering cancelling his escrow agreement for prospective purchase of the grazing permit for the allotment because of all the restrictions that would be imposed on grazing use within the allotment. He later informed BLM on February 12, 2001, that he still wanted to go through with the purchase and transfer of the permit to him. At one of the meetings Mr. Thornton was provided a map with suggested boundary lines for the exclusion area on the Valley Wells Allotment. He took it home, and at the next meeting, he brought it back, saying the exclusion boundaries were not workable. He had drawn polygons on the map indicating where he thought he should be able to graze, but the acreage was too much so BLM initially rejected his alternative. At Mr. Thornton's request, a meeting was held on March 21, 2001, to go over the forms for transferring the Valley Wells grazing lease. At some point he discussed with Ms. McProud the possibility of moving cattle from the Valley Wells Allotment to adjacent allotments for which Mr. Thornton had applied to acquire the grazing permits. (DT10, ¶ 17I; Ex. 112; Tr. 3063-64, 308-82)

Mr. Thornton testified that his input regarding the location of the exclusion area was offered in jest to a BLM employee working on the exclusion area map on a computer. While Mr. Thornton was waiting to meet with Molly Brady, he purportedly directed the employee in jest where to move the lines on the computer “so that when people drive down the road and see cattle, they can’t tell if they are inside the enclosure or not.” He also testified that BLM personnel did not take him seriously. However, he acknowledged that the final exclusion area boundaries actually reflected his input. (Tr. 505-06, 518-21)

Ms. McProud called Appellant Richard Blincoe, the actual permittee for the Valley Wells Allotment, on April 2, 2001, to discuss the necessary forms for completing the transfer to Mr. Thornton. They briefly discussed the Center’s lawsuit but not in great detail. Ms. McProud also called Clay Overson, ranch manager for Mr. Blincoe, on March 3, 2001. (DT10, ¶ 17I; Ex. 112).

Molly Brady, the Needles Field Office Manager, had numerous contacts and discussions with Ron Kemper, lessee for the Horsethief Springs Allotment, prior to the final decision. They discussed the proposed interim seasonal closures as well as the long term grazing management strategy being evaluated in the Northern and Eastern Mojave plan amendments. (Ex. DT11, ¶ 43). The precise timing of these contacts and discussions is not identified.

Ms. Brady also had numerous contacts and discussions with Appellant Dave Thornton, transfer applicant for the Valley Wells Allotment, prior to the final decision. They discussed the proposed interim seasonal closures as well as the long term grazing management strategy being evaluated in the Northern and Eastern Mojave plan amendments. (Ex. DT11, ¶ 46).

Communications between the Barstow Field Office personnel and the Appellants within its jurisdiction were even more limited. The BLM Rangeland Management Specialist for the Barstow Field Office, Anthony Chavez, had minimal contact with the permittees prior to issuance of the proposed decisions. He acknowledged that he had no discussions with Appellants regarding the economic impacts of the Proposed Action on their cattle operations, the EA alternatives, the acreage or location of the seasonal exclusion areas, the seasonal exclusion periods, or the caps on grazing use (Tr. 2866, 2869, 2881, 2895, 2939).

Prior to the issuance of the proposed decisions, his contacts with Appellant Cathey Smith consisted of several phone conversations. He informed her of the basic actions BLM would be proposing in the proposed decision for her allotment (Ex. DT8, ¶ 18g).

Mr. Chavez left messages for Appellant William Mitchell and spoke to his fiancée, Julie Austin, by phone on several occasions prior the issuance of the proposed decisions. They discussed payment of the grazing fees and he informed her of the basic actions in the proposed decision and recommended that they move livestock prior to the issuance of the final decision. (Ex. DT8, ¶ 19h).

Mr. Chavez attempted to communicate with Appellant Jeanne Wetterman just prior to the issuance of the proposed decision. She told him that, because of the potential for legal action, she was refraining from speaking to him and that he should go through her attorney. (Ex. DT8, ¶ 20h).

Because Mr. Chavez and Appellant Dave Fisher had communication problems, another Barstow Field Office employee, Mark Depoy, was BLM's point of contact for Mr. Fisher until Mr. Depoy left BLM's employ in October 2000 (Ex. DT9, ¶ 17). Mr. Chavez has had no communications with Appellant Dave Fisher since October 2000, when Mr. Fisher asked him to leave his private property located within the allotment (Ex. DT8, ¶ 17h).

At the District Office level, the following communications with Appellants occurred. District Manager Salt spoke briefly to Karen Budd-Falen, counsel for the Appellants, after the Federal court hearing on January 26, 2001, and informed her that there was an opportunity to propose alternatives at the proposed decision stage (Ex. DT1, ¶ 42). He got the impression that Appellants were not interested in discussing or pursuing alternatives (Tr. 1759-61).

On January 31, 2001, Mr. Salt called Appellant Ron Kemper to congratulate him on his appointment to the California Desert District Advisory Council and discuss the settlement agreement. According to Mr. Salt's written testimony, he informed Mr. Kemper that there was an opportunity upon issuance of the proposed decisions for him and other lessees to offer alternatives to the specific terms of the settlement agreement to accomplish the same goals (Ex. DT1, ¶ 42).

Mr. Kemper indicated to Mr. Salt that he spoke for all the permittees and stated that they had no intention to offer alternatives and that they would settle this in court (Ex. DT1, ¶ 42). However, Mr. Salt did not know whether Mr. Kemper had authority to speak for the other permittees. Further, there is no evidence that Mr. Salt communicated this rebuff or his negative impression of his conversation with Ms. Budd-Falen to anyone in the field offices, including the BLM Rangeland Management Specialist in each field office who is assigned the responsibility to consult with the permittees in that jurisdiction.

In a telephone conversation initiated by Mr. Kemper sometime between February 15 and March 15, 2001, he also declined an offer from Mr. Morgan, the Rangeland Management Specialist for the District Office, to work with BLM to create alternative exclusion area boundaries for his allotment (Horsethief Springs). Mr. Morgan made the offer in response to Mr. Kemper's statement that the exclusion area boundaries (apparently on the map given to him by Ms. McProud) were not workable. Mr. Morgan reported Mr. Kemper's concern to Ms. McProud, and she responded that the boundaries were satisfactory. (Tr. 2238-39, 2245, 2298-99)

In summary, the preponderance of the evidence shows that BLM did not comply, or even substantially comply, with its duty to consult, coordinate, and cooperate with the Appellants,

except with respect to Mr. Thornton. BLM personnel had only limited contact with the Appellants prior to the proposed decision and the substance of those contacts fails to indicate that BLM “interact[ed] for the purpose of obtaining advice, or exchanging opinions on issues, plans, or management action.” 43 C.F.R. § 4100.0-5. With two exceptions, there is little or no evidence that BLM personnel sought the Appellants’ advice or exchanged opinions. Rather, they merely informed some of the Appellants as to what was happening or going to happen, or as to the opportunity to provide input after the proposed decisions were issued.

The two exceptions are the contacts with Mr. Thornton and Mr. Kemper. While the communications with Mr. Kemper were more substantial than with most of the Appellants, they did not amount to serious exchanges of advice and opinions. Mr. Kemper twice rebuffed invitations to offer alternatives, but there is no evidence that these rebuffs were communicated to Ms. McProud, who was responsible for consulting with him. When Ms. McProud was told by Mr. Morgan of Mr. Kemper’s dissatisfaction with the exclusion area boundaries, she did not attempt to contact him regarding his dissatisfaction. A good faith effort to consult requires more.

Despite Mr. Thornton’s testimony to the contrary, the weight of the evidence shows that he was afforded the opportunity to provide serious input regarding the Valley Wells Allotment prior to issuance of the proposed decisions. He was provided with a map of the exclusion area, which he took home, marked with polygons, and brought back to BLM for review. His failure to mention that he actually took a map home and marked it up, and subsequent characterization of his input as moving lines on a map on a computer, was less than forthright. BLM met its duty to consult with Mr. Thornton to the extent such a duty applies to a person who is not the permittee but merely a transfer applicant.

However, BLM failed to adequately consult with the actual permittee of the Valley Wells Allotment, Mr. Blincoe. Mr. Blincoe knew that Mr. Thornton had met with BLM but testified that Mr. Thornton did not have permission to speak for him (Tr. 297-99). Consultation with Mr. Thornton did not satisfy the consultation requirement with respect to Mr. Blincoe under the circumstances.

The Center argues that it is “absurd” “[f]or Appellants to claim that BLM’s decisions are flawed because the agency failed to engage in ‘consultation, cooperation, and coordination’ with them * * *, when the Appellants themselves have rebuffed efforts by BLM at engaging in dialogue.” It is certainly true that Appellant Fisher contributed to communication problems with BLM personnel and that Appellant Kemper rebuffed overtures to offer alternatives. However, as previously stated, there is no evidence that these rebuffs were communicated to the field office personnel responsible for consulting with Mr. Kemper. BLM should have at least made a good faith effort to seek the advice and opinions of each permittee, including Messrs. Fisher and Kemper, but it failed to do so, with the exception of Mr. Thornton.

The question becomes what relief, if any, is appropriate for the failure to consult in light

of the following Board precedents. In Rudnick v. BLM, 93 IBLA 89, 92 (1986), the BLM failed to follow the regulatory requirement to issue a proposed decision and allow for 15-day protest period prior to issuance of a final decision. That final decision evaluated competing applications for a grazing lease filed by the appellant and John Bidart and awarded the lease to Mr. Bidart. The basis for the decision was that the grazing regulations directed that preference be given to owners or other lawful occupants of contiguous lands and Mr. Bidart owned such lands and the appellant did not own or control any.

The Board held that the procedural error rendered the final decision voidable, but that it was still necessary for a party challenging that decision to advance some reason beyond its procedural irregularity to justify voiding the decision. See BLM v. Thoman, 139 IBLA 48, 51 (1997) (characterizing the holding of Rudnick). Because the appellant did not obtain ownership or control over contiguous property within 15 days after issuance of the decision, the Board found that the procedural error was not prejudicial, a remand would serve no purpose, and the decision should be upheld. Rudnick, 93 IBLA at 96.

A case more similar to the present case is John L. Falen, 149 IBLA 347 (1999). In that case, BLM failed to consult with a grazing permittee regarding the placement and design of a fence prior to issuing a decision assigning fence maintenance responsibilities to the permittee. The permittee was concerned that the placement and design made the fence difficult and costly to maintain. The Board concluded that BLM had violated 43 C.F.R. § 4130.6-3 (1993), id. at 353, the consultation, cooperation, and coordination requirement of the grazing regulations in existence before the 1995 amendments to those regulations.

The Board then set aside BLM's decision and remanded the matter to BLM for consideration of the proper placement and design of the fence after consultation with the permittee. Id. at 354. The Board prefaced this grant of relief with the observation that the appellant proved at hearing that maintenance of the fence would have been acceptable to it if the fence had been constructed in the same manner as another fence maintained by the appellant and constructed with the appellant's input. Id. One interpretation of this observation is that the Board was implying that the remand would serve a useful purpose.

The present case is troubling because Appellants have presented no direct evidence, such as suggested alternative locations for the seasonal exclusion areas, to show that a remand would serve a useful purpose. On the other hand, the facts are not as they were in Rudnick, where there was no possibility of a different outcome.

Also to be recognized is the fact that the Appellants were effectively foreclosed from the negotiating process by which the actions in the stipulations were formulated so that the opportunity for subsequent participation in defining the actions to be taken was very limited, as a practical matter, because of the need to renegotiate most refinements or alternatives. This is not intended as a criticism of the determination to restrict participation in the negotiations but, rather, as an acknowledgment of the predicament faced by Appellants.

A final consideration tips the balance in favor of remanding this matter to BLM.²¹ That consideration is the importance the Board has placed upon a grazer's or other public land user's participation in the act of defining the Federal action being proposed and in the act of gathering the best available data. See, e.g., Blake v. BLM, 145 IBLA 154, 164-66 (1998).

Consultation is an important component of an informed and rational decision making process. Appellants should be afforded a real opportunity to contribute information and shape the actions to be taken for the mutual benefit of all parties and the affected resources.

Conclusion

Based upon the foregoing, I conclude that:

- (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.

In conformance with delegation of authority from the Secretary of the Interior, this Decision is final for the Department.

Harvey C. Sweitzer
Administrative Law Judge

See page 104 for distribution.

²¹In so holding, I am aware that the Board has implied that a failure to consult might be excused upon a showing that circumstances precluded consultation. Falen, 149 IBLA at 353. However, there has been no such showing in this case.

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