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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, et al.,  
Plaintiffs,  
v.

No. C 03-02509 SI

**ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT**

BUREAU OF LAND MANAGEMENT, et al.,  
Defendants, and  
AMERICAN SAND ASSOCIATION, et al,  
Defendant-Intervenors.

On February 28, 2014, the Court held a hearing on the parties’ cross-motions for summary judgment. For the reasons set forth below, the parties’ cross-motions for summary judgment are GRANTED IN PART and DENIED IN PART.

**BACKGROUND**

This dispute marks the continuation of plaintiffs’ challenge to the administration by the Bureau of Land Management (“BLM”) of the Imperial Sand Dunes Recreation Area (“ISDRA” or “Dunes”), and the biological opinions related to the Dunes prepared by the U.S. Fish and Wildlife Service (“FWS”) in accordance with the Endangered Species Act (“ESA”). The lengthy factual and procedural history of FWS and BLM’s management actions related to the Dunes and plaintiffs’ prior claims is set forth in this Court’s March 14, 2006 Order granting in part and denying in part each side’s motion for summary judgment. *See Ctr. for Biological Diversity (“CBD”) v. BLM*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006).<sup>1</sup>

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<sup>1</sup> The Court incorporates that history by reference.

1 In that decision, the Court held that FWS's 2005 biological opinion ("BiOp") for the 2003  
2 ISDRA Recreation Area Management Plan (the "2003 RAMP") violated the Endangered Species Act  
3 in various respects with regard to two listed species, the Peirson's milk-vetch ("PMV") and the desert  
4 tortoise. *Id.* at 1121-22. The Court also held that FWS unlawfully excluded certain areas when it  
5 designated critical habitat for the PMV in 2004. *Id.* at 1122. Finally, the Court held that the BLM  
6 violated the National Environmental Policy Act by failing to consider interim off-highway vehicle  
7 ("OHV") closures<sup>2</sup> when it considered alternatives in the Environmental Impact Statement for the 2003  
8 RAMP, and by failing to adequately examine the impact of the 2003 RAMP on endemic invertebrates.  
9 *Id.*

10 In response to the Court's 2006 opinion, in 2008 FWS issued a new critical habitat designation  
11 for the PMV. 73 Fed. Reg. 8748 (Feb. 14, 2008). Plaintiffs and other groups unsuccessfully challenged  
12 the new critical habitat designation. *See Maddalena v. FWS*, No. 3:08-cv-02292-H-AJB, 2010 WL  
13 9915002 (S.D. Cal. Aug. 5, 2010). In June 2013, the BLM also issued a new Record of Decision  
14 adopting a new Recreation Area Management Plan (the "2013 RAMP") for the Dunes. Under the 2013  
15 RAMP, the 26,000 acre North Algodones Dunes Wilderness remains closed to OHVs, as will an  
16 additional 9,261 acres of PMV critical habitat. The remainder of the Dunes – over 127,000 acres – will  
17 be opened to OHV use. Prior to issuing the Record of Decision, the BLM prepared a new  
18 Environmental Impact Statement (the "2013 EIS") analyzing the 2013 RAMP. Finally, after engaging  
19 in consultation pursuant to Section 7(a)(2) of the ESA, in November 2012, FWS issued a new BiOp  
20 concluding that implementing the 2013 RAMP is not likely to jeopardize the continued existence of the  
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22 <sup>2</sup> In March of 2000, the Center for Biological Diversity, the Sierra Club, and Public Employees  
23 for Environmental Responsibility filed a complaint alleging that the BLM was in violation of Section  
24 7 of the ESA, 16 U.S.C. § 1536(a)(2), because it had failed to enter into formal consultation with the  
25 Service on the effects of the adoption of the CDCA Plan, as amended by the 1987 RAMP, on threatened  
26 and endangered species. *Center for Biological Diversity et al. v. BLM*, Case No. 00-0927 WHA-JCS  
27 (N.D. Cal.). Several groups of recreationists in the CDCA area were granted status as defendant-  
28 intervenors, and the parties ultimately entered into a settlement that established interim actions to be  
taken to provide temporary protection for endangered and threatened species pending completion of  
consultation between BLM and the Service on the CDCA Plan. *See* ROD AR Sec.3 at 15997. Pursuant  
to the stipulations, BLM temporarily closed five areas in the ISDRA, totaling approximately 49,000  
acres, to OHV and other recreational use to protect the Peirson's milk-vetch, and temporarily closed to  
camping a 25,600 acre area to protect the desert tortoise. *See* BO AR Doc. # 128. These closures were  
to remain in place until BLM signed the decision document implementing the new RAMP for the  
ISDRA.

1 PMV or the desert tortoise.

2 On September 16, 2013, plaintiffs filed a third amended complaint challenging the 2013 RAMP,  
3 the 2013 EIS and 2012 BiOp under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*,  
4 the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, the Federal Land Policy  
5 and Management Act of 1976 (“FLPMA”), 43 U.S.C. §§ 1701-1785, and the Administrative Procedure  
6 Act (“APA”), 5 U.S.C. § 706 *et seq.*. Plaintiffs allege that: (1) the 2012 BiOp is deficient because it  
7 does not include an Incidental Take Statement for the PMV; (2) FWS has unreasonably delayed issuance  
8 of a recovery plan for the PMV under Section 4(f) of the Endangered Species Act.; (3) the 2013 EIS  
9 violates the National Environmental Policy Act (“NEPA”) by failing to take a hard look at impacts on  
10 wilderness areas; and (4) BLM violated NEPA, FLPMA and the Clean Air Act by failing to properly  
11 evaluate the alleged impacts of the 2013 RAMP on air quality.<sup>3</sup>

12 Plaintiffs generally allege that the PMV is particularly threatened by OHV recreational use in  
13 the Dunes, and that the 2013 management plan for the Dunes does not contain sufficient safeguards to  
14 ensure against jeopardizing the continued existence of these species. Defendants are the Bureau of Land  
15 Management (“BLM”), which manages the ISDRA, and the U.S. Fish and Wildlife Service (“FWS” or  
16 “Service”), which consults with the BLM and is required to evaluate BLM actions that affect the  
17 Peirson’s milk-vetch. Defendant-intervenors are a number of organizations representing OHV  
18 recreationists.

19  
20 **LEGAL STANDARD**

21 “Neither the ESA nor NEPA supply a separate standard for our review, so we review claims  
22 under these Acts under the standards of the APA.” *San Luis & Delta-Mendota Water Authority v.*  
23 *Jewell*, \_\_\_ F.3d \_\_\_, 2014 WL 975130, at \*9 (9th Cir. Mar. 13, 2014). Pursuant to Section 706 of the  
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25 <sup>3</sup> The federal defendants and the intervenor defendants note that plaintiffs do not allege that the  
26 agencies have failed to correct any of the deficiencies identified by the Court in its 2006 summary  
27 judgment order, and they assert that all of the new claims are raised for the first time at this stage of the  
28 litigation and could have been raised before. While it is unclear whether the NEPA claims (such as the  
air quality claim) could have been raised before, it is true that the 2005 BiOp did not contain an ITS for  
the PMV, and plaintiffs did not previously contend that FWS was required to prepare an ITS for the  
PMV.

1 Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, the court “shall” set aside any agency  
2 decision that the Court finds is “arbitrary, capricious, an abuse of discretion, or otherwise not in  
3 accordance with law.” 5 U.S.C. § 706(2)(A). The APA precludes a trial court reviewing an agency  
4 action from considering any evidence outside of the administrative record available to the agency at the  
5 time of the challenged decision. *See* 5 U.S.C. § 706(2)(E); *Florida Power & Light Co. v. Lorion*, 470  
6 U.S. 729, 743-44 (1985); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991). “Because this  
7 is a record review case, we may direct that summary judgment be granted to either party based upon our  
8 *de novo* review of the administrative record.” *Oregon Natural Desert Ass’n v. Bureau of Land*  
9 *Management*, 625 F.3d 1092, 1108 (9th Cir. 2010); *Riddell v. Unum Life Ins. Co. of Am.*, 457 F.3d 861,  
10 864 (8th Cir. 2006) (explaining that judgment on the administrative record “is a form of summary  
11 judgment”).

12 The Court must determine whether the agency decision “was based on a consideration of the  
13 relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton*  
14 *Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S.  
15 99 (1977). The Supreme Court has explained that an agency action is arbitrary and capricious if “the  
16 agency has relied on factors which Congress has not intended it to consider, entirely failed to consider  
17 an important aspect of the problem, offered an explanation for its decision that runs counter to the  
18 evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or  
19 the product of agency expertise.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463  
20 U.S. 29, 43 (1983). “Although our inquiry must be thorough, the standard of review is highly  
21 deferential; the agency’s decision is ‘entitled to a presumption of regularity,’ and we may not substitute  
22 our judgment for that of the agency.” *San Luis & Delta-Mendota Water Authority*, \_\_\_ F.3d \_\_\_, 2014  
23 WL 975130, at \*9 (internal citation omitted). “Where the agency has relied on ‘relevant evidence [such  
24 that] a reasonable mind might accept as adequate to support a conclusion,’ its decision is supported by  
25 ‘substantial evidence.’” *Id.* (internal citation omitted). “Even “[i]f the evidence is susceptible of more  
26 than one rational interpretation, [the court] must uphold [the agency’s] findings.” *Id.* (internal citation  
27 omitted).

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**DISCUSSION**

**I. Endangered Species Act - Incidental Take Statement**

For any federal action that may affect a threatened or endangered species (or its habitat), Congress has required by statute that the agency contemplating the action (here the BLM) must consult pursuant to Section 7(a) of the ESA with the consulting agency (here the FWS) to “insure” that the federal action “is not likely to [1] jeopardize the continued existence of any endangered species or threatened species or [2] result in the destruction or adverse modification” of the designated critical habitat of such species. 16 U.S.C. § 1536(2). After the agencies engage in the consultation process, the consulting agency issues a BiOp.

Under Section 7(b)(4) of the ESA, “[t]he FWS must issue an Incidental Take Statement if the BiOp concludes no jeopardy to listed species or adverse modification of critical habitat will result from the proposed action, but the action is likely to result in incidental takings.” *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007) (citing 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i); and *Ariz. Cattle Growers’ Ass’n*, 273 F.3d 1229, 1242 (9th Cir. 2001)). “Both the BiOp and the Incidental Take Statement must be formulated by the FWS during the formal consultation process; indeed, the regulations specifically require the FWS to provide the Incidental Take Statement ‘with the biological opinion.’” *Id.* (quoting 50 C.F.R. § 402.14(g), (i)(1)). Incidental take in compliance with the terms and conditions in the ITS “shall not be considered to be a prohibited taking of the species concerned.” 16 U.S.C. § 1536(o)(2). Section 7 consultation must be reinitiated when the amount or extent of taking specified in the ITS is exceeded, as well as when new information reveals impacts of the action on listed species that were not previously considered or when the agency action is changed in a way that causes impacts on listed species that were not previously considered. *See* 50 C.F.R. § 402.16(a)-(c).

Section 7(b)(4) provides,

(b) Opinion of Secretary

...

1 (4) If after consultation under subsection (a)(2)<sup>4</sup> of this section, the Secretary concludes  
2 that—

3 (A) the agency action will not violate such subsection, or offers reasonable and  
4 prudent alternatives which the Secretary believes would not violate such subsection;

5 (B) the taking of an endangered species or a threatened species incidental to the  
6 agency action will not violate such subsection; and

7 (C) if an endangered species or threatened species of a marine mammal is  
8 involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

9 the Secretary shall provide the Federal agency and the applicant concerned, if any,  
10 with a written statement that—

11 (i) specifies the impact of such incidental taking on the species,

12 (ii) specifies those reasonable and prudent measures that the Secretary  
13 considers necessary or appropriate to minimize such impact,

14 (iii) in the case of marine mammals, specifies those measures that are  
15 necessary to comply with section 1371(a)(5) of this title with regard to such taking,  
16 and

17 (iv) sets forth the terms and conditions (including, but not limited to,  
18 reporting requirements) that must be complied with by the Federal agency or applicant  
19 (if any), or both, to implement the measures specified under clauses (ii) and (iii).

20 16 U.S.C. § 1536(b)(4).

21 The 2012 BiOp does not contain an ITS for the PMV. Plaintiffs contend that FWS was required  
22 to prepare an ITS for the PMV, while defendants contend that an ITS is only required for listed fish and  
23 wildlife, not for listed plants. The parties' dispute involves the interplay of Sections 7 and 9 of the ESA.  
24 Section 9 of the ESA and its implementing regulations prohibit the "take" of "any endangered species  
25 of fish or wildlife," and provides separate protections for endangered plants. *See* 16 U.S.C. §  
26 1538(a)(1); 50 C.F.R. § 17.31. Section 9, titled "Prohibited Acts," states,

27 § 1538. Prohibited acts

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28 <sup>4</sup> Section 7(a)(2) provides, "Each Federal agency shall, in consultation with and with the  
assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency  
(hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued  
existence of any endangered species or threatened species or result in the destruction or adverse  
modification of habitat of such species which is determined by the Secretary, after consultation as  
appropriate with affected States, to be critical, unless such agency has been granted an exemption for  
such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements  
of this paragraph each agency shall use the best scientific and commercial data available." 16 U.S.C.  
§ 1536(a)(2).

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(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, *with respect to any endangered species of fish or wildlife* listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, *with respect to any endangered species of plants* listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

16 U.S.C. § 1538(a)(1)-(2) (emphasis added). Thus, Section 9(a)(1) prohibits the “take” of endangered fish or wildlife, while Section 9(a)(2) does not use the term “take,” but contains a range of other protections for endangered plants. The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

1 Pursuant to Section 4(d) of the ESA, FWS may by regulation extend the Section 9(a)(1) “take”  
2 prohibition to threatened fish or wildlife, and may extend the protections of Section 9(a)(2) to threatened  
3 plants. *Id.* § 1533(d).<sup>5</sup>

4 Plaintiffs argue that an ITS is required for plants because Section 7(b)(4) ties the ITS  
5 requirement to the conclusion of a consultation under Section 7(a)(2), and Section 7(a)(2) provides that  
6 consultation is required for federal actions affecting “any endangered species or threatened species,”  
7 regardless of whether the species is plant or wildlife. 16 U.S.C. § 1536(a)(2). Plaintiffs emphasize the  
8 fact that Section 7(b)(4) – the provision requiring the preparation of an ITS – also refers to “any  
9 endangered species or threatened species.” Plaintiffs argue that “if an action triggers consultation on  
10 a listed plant under section 7(a)(2), nothing in the ESA’s language suggests that the resulting BiOp need  
11 not contain an ITS.” Docket No. 236 at 7-8. Plaintiffs argue that it is irrelevant that Section 9’s  
12 prohibition of “take” only applies to wildlife because the plain language of Section 7 requires an ITS  
13 for “any endangered species or threatened species.”

14 Plaintiffs also rely on *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012).  
15 In that case, the FWS prepared an ITS for the threatened polar bear, and the plaintiffs challenged the ITS  
16 as inadequate because it did not specify a numerical limit for permissible take. The FWS argued, *inter*  
17 *alia*, that it was not even required to prepare an ITS because when the FWS listed the polar bear as  
18 threatened, the FWS also issued a Section 4(d) rule that applied most of the Section 9 prohibitions to  
19 the polar bear, but not the prohibition on take. The Section 4(d) rule stated that “[n]othing in this special  
20 rule affects the issuance or contents of the biological opinions for polar bears or the issuance of an  
21 incidental take statement, although incidental take resulting from activities that occur outside of the  
22 current range of the polar bear is not subject to the taking prohibition of the ESA.” *Id.* at 911 (quoting  
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24 <sup>5</sup> Section 4(d) of the ESA, titled “Protective Regulations” provides, “Whenever any species is  
25 listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such  
26 regulations as he deems necessary and advisable to provide for the conservation of such species. The  
27 Secretary may by regulation prohibit with respect to any threatened species any act prohibited under  
28 section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the  
case of plants, with respect to endangered species; except that with respect to the taking of resident  
species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative  
agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been  
adopted by such State.” 16 U.S.C. § 1533(d).



1 73 Fed. Reg. 76,249, 76,252 (Dec. 16, 2008)). The Ninth Circuit rejected the FWS’s argument that an  
2 ITS was not required, holding that “exemption from Section 9 take liability is irrelevant to the Service’s  
3 Section 7 obligations to prepare a BiOp and ITS. . . . The ESA requires an ITS for ‘the taking of an  
4 endangered species or a threatened species incidental to the agency action,’ 16 U.S.C. § 1536(b)(4)(B)  
5 (emphasis added), not the prohibited taking.” *Id.* at 910. The Ninth Circuit noted that “[t]he  
6 Association’s argument fails to recognize that exemption from Section 9 take liability is not the sole  
7 purpose of the ITS. If the amount or extent of taking specified in the ITS is exceeded, reinitiation of  
8 formal consultation is required.” *Id.* at 911 (internal quotations and citation omitted). Plaintiffs rely on  
9 this language to argue that FWS has an obligation to prepare an ITS for the PMV under Section 7  
10 regardless of that fact that Section 9 take liability does not apply to listed plants.

11 Defendants assert – and plaintiffs do not deny – that no court has ever held that Section 7  
12 requires an ITS for listed plants, and that the one court that has addressed this question held that an ITS  
13 is not required for listed plants. *See California Native Plant Society v. Norton*, No. 01CV1742 DMS  
14 (JMA), 2004 WL 1118537, at \*8 (S.D. Cal. Feb. 10, 2004).<sup>6</sup> Defendants argue that an ITS is not  
15 required under Section 7 of the ESA “because the Incidental Take Statement’s primary function is to  
16 authorize the taking of animals incidental to the execution of a particular proposed action.” *Oregon*  
17 *Natural Resources Council*, 476 F.3d at 1036. Defendants argue that because Section 9 only prohibits  
18 the take of listed fish or wildlife, there is no requirement under Section 7 to prepare an ITS for a listed  
19 plant. Defendants contend that plaintiffs’ argument is also foreclosed by the Ninth Circuit’s holding that  
20 “the definition of ‘taking’ in Sections 7 and 9 of the ESA are identical in meaning and application.”  
21 *Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1237 (9th Cir. 2001). In that  
22 case, the Ninth Circuit held,

23 The structure of the ESA and the legislative history clearly show Congress’s  
24 intent to enact one standard for ‘taking’ within both Section 7(b)(4), governing the  
25 creation of Incidental Take Statements, and Section 9, imposing civil and criminal  
26 penalties for violation of the ESA. In 1982, Congress amended the ESA to include  
27 Section 7(b)(4) to resolve the conflict between Sections 7 and 9. *See* H.R.Rep. No.  
28 97–567, at 15 (1982). As noted in the legislative reports, the

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<sup>6</sup> Plaintiffs argue that *California Native Plant Society* is unpersuasive because it predated the Ninth Circuit’s decision in *Salazar*. The Court discusses *Salazar* *infra*.

1 purpose of Section 7(b)(4) and the amendment to Section 7(o) is to  
 2 resolve the situation in which a Federal agency or a permit or license  
 3 applicant has been advised that the proposed action will not violate  
 4 Section 7(a)(2) of the Act but the proposed action will result in the  
 taking of some species incidental to that action—a clear violation of  
 Section 9 of the Act which prohibits any taking of a species.

5 H.R.Rep. No. 97–567, at 26 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2826.  
 Absent an actual or prospective taking under Section 9, there is no “situation” that  
 requires a Section 7 safe harbor provision.

6 *Id.* at 1239-40.

7  
 8 Defendants also rely on *Northern California River Watch v. Wilcox*, 547 F. Supp. 2d 1071 (N.D.  
 9 Cal. 2008). In that case, Judge Breyer noted that “[S]ection 10 – allowing a private party to apply for  
 10 an incidental take permit – applies only to fish and wildlife – there is no section 10 incidental take  
 11 permit provision for endangered plants.” *Id.* at 1075.<sup>7</sup> Defendants argue that Section 7’s ITS provisions  
 12 cannot be interpreted differently than those of Section 10 because the take provisions of Sections 7 and  
 13 10 were enacted at the same time to address the same issue: the situation where an action is non-  
 14 jeopardizing but “remain[s] subject to the Section 9 prohibition against taking individual specimens of  
 15 endangered or threatened species of fish or wildlife.” H.R. Conf. Rep. 97-835 (1982), reprinted in 1982  
 16 U.S.C.C.A.N. 2860, 2868. Defendants assert that the ESA does not prohibit “incidental” harm to listed  
 17 plants that could require incidental take authorization under Sections 7 or 10, and instead that the limited  
 18 prohibitions for listed plants in Section 9(a)(2) require malicious or deliberate conduct.

19 Defendants also note that the FWS has always defined “incidental take” as “take of *listed fish*  
 20 *or wildlife species* that results from, but is not the purpose of, carrying out an otherwise lawful activity.”  
 21 *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference*  
 22 *Activities Under Section 7 of the Endangered Species Act*, at xv (1998) (“*ESA Handbook*”) (emphasis  
 23 added), available at <http://www.fws.gov/endangered/esa-library/>. Defendants contend that the agency’s  
 24 interpretation is rational, consistent with the statute, and entitled to deference under *Chevron U.S.A., Inc.*  
 25 *v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

26 The *Chevron* inquiry requires a two-step analysis. At step one, the Court asks “whether

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27 <sup>7</sup> In that case, the question was whether “areas under Federal jurisdiction” in ESA Section  
 28 9(a)(2)(B) encompassed wetlands adjacent to navigable waterways and were therefore subject to the  
 requirements of the Clean Water Act.

1 Congress has directly spoken to the precise question at issue.” *Id.* “If the intent of Congress is clear,  
2 that is the end of the matter; [and we] . . . must give effect to the unambiguously expressed intent of  
3 Congress.” *Id.* at 842-43. “[I]nquiry into congressional intent encompasses both statutory language and  
4 legislative history.” *Edwards v. McMahon*, 834 F.2d 796, 799 (9th Cir. 1987) (citation omitted). “If,  
5 however, the statute is silent or ambiguous, prior to step two, we must decide how much weight to  
6 accord an agency’s interpretation.” *McMaster v. U.S.*, 731 F.3d 881, 889 (9th Cir. 2013) (internal  
7 quotation marks and citations omitted). “If we determine that *Chevron* deference applies, then we move  
8 to step two, where we will defer to the agency’s interpretation if it is ‘based on a permissible  
9 construction of the statute.’” *Id.* (quoting *Chevron*, 467 U.S. at 843).

10 The Court concludes under the first step of the *Chevron* inquiry that the statutory language and  
11 the legislative history demonstrate that the Section 7 requirement to prepare an ITS does not apply to  
12 listed plants. Section 9(a)(1) prohibits the take of endangered “fish and wildlife,” and not of plants,  
13 while Section 9(a)(2) provides a variety of protections to endangered plants and does not protect against  
14 incidental take. As defendants note, the Section 9(a)(2) prohibitions for plants require deliberate or  
15 malicious conduct, whereas “incidental” take can occur without such intent. An ITS “must specify  
16 whether any ‘incidental taking’ of protected species will occur, specifically ‘any taking otherwise  
17 prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful  
18 activity.’” *Ariz. Cattle Growers’ Ass’n*, 273 F.3d at 1239 (quoting 16 U.S.C. § 1536(b)(4) and 50  
19 C.F.R. § 17.3) (emphasis added).<sup>8</sup> The only taking “otherwise prohibited” is take of listed “fish or  
20 wildlife.” 16 U.S.C. § 1538(a)(1). Thus, while an ITS serves as a regulatory trigger for reinitiating  
21 Section 7 consultation, 50 C.F.R. § 402.16, *Ariz. Cattle Growers*, 273 F.3d at 1249, an ITS is only  
22 required in the first instance when the proposed action is likely to take listed fish or wildlife. “A plain  
23 reading of the statute reveals that the Act prohibits the ‘take’ of fish or wildlife, but not the ‘take’ of  
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25 <sup>8</sup> This Court recognizes that there is arguably tension between *Salazar* and *Arizona Cattle*  
26 *Growers*, and that plaintiffs’ argument finds support in some of the broad language in *Salazar*.  
27 However, in *Salazar* the Ninth Circuit was not addressing the question of whether an ITS is required  
28 for listed plants, but rather whether FWS was required to prepare an ITS for the polar bear where a  
Section 4(d) regulation provided that “[n]othing in this special rule affects the issuance or contents of  
the biological opinions for polar bears or the issuance of an [ITS].” *Salazar*, 695 F.3d at 911. The Court  
finds that *Salazar* is distinguishable on these grounds and that *Salazar* does not compel the result  
plaintiffs seek.

1 plant species. . . . In the absence of a prohibition on the ‘take’ of plant species, . . . such take cannot  
2 occur, and no incidental take statement is needed.” *California Native Plant Society*, 2004 WL 1118537,  
3 at \*8 (internal quotation marks and citations omitted).

4 Plaintiffs emphasize the fact that the statutory definition of “take” does not distinguish between  
5 wildlife and plants. *See* 16 U.S.C. § 1532(19). However, as defendants note, the “take” definition was  
6 part of the ESA when it was originally enacted in 1973, prior to the 1982 amendments adding the  
7 incidental take provisions of Sections 7 and 10. *See* P.L. 93-205 § 3(14), 87 Stat. 884 (Dec. 28, 1973).  
8 Thus, “take” was defined in the original enactment of the ESA to explain the meaning of “take” in  
9 Section 9(a), which only applies to fish and wildlife.

10 Interpreting Section 7 as requiring an ITS for fish and wildlife but not plants is also consistent  
11 with the take provision in Section 10, which only applies to listed animals. It is a “fundamental canon  
12 of statutory construction that the words of a statute must be read in their context and with a view to their  
13 place in the overall statutory scheme.” *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989).  
14 “A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit,  
15 if possible, all parts into an harmonious whole.” *Food & Drug Admin. v. Brown & Williamson Tobacco*  
16 *Corp.*, 529 U.S. 120, 133 (2000) (citations omitted).

17 In addition, the legislative history of the 1982 amendments makes clear that Section 7’s  
18 incidental take provisions do not apply to listed plants because plants are not subject to take under  
19 Section 9:

20 Under the existing provisions of the Act, Federal agencies that receive  
21 favorable biological opinions which conclude that the agency action would not violate  
22 section 7(a)(2) remain subject to the section 9 prohibition against take of individual  
specimens of endangered species of fish or wildlife....

23 [The bill] would address this problem by amending section 7(b) of the Act to  
24 require the Secretary, in cases where he has concluded that the agency action would  
25 not violate section 7(a)(2), to provide a written statement specifying (1) the extent of  
26 take incidental to the agency action that would not violate section 7(a)(2); and (2) those  
27 reasonable and prudent measures that must be followed to minimize such takings. If  
28 a Federal or private action that is in compliance with the measures specified to  
minimize takings results in the taking of specimens of a species that was the subject  
of the biological opinion, such action will not be considered a “taking” for purposes  
of section 9 of the Act. Actions that are not in compliance with the specified measures,  
however, remain subject to the prohibition against takings that is contained in section  
9.

1 S. Rep. No. 97-418 (1982) (Docket No. 232-1 at 20-21).

2 Accordingly, the Court concludes that FWS was not required to prepare an ITS for the PMV,  
3 and GRANTS summary judgment in favor of defendants on this issue.

## 4 5 **II. Endangered Species Act – Recovery Plan**

6 Plaintiffs bring a claim under the Endangered Species Act challenging FWS’s failure to prepare  
7 a final recovery plan for the PMV. Section 4 of the ESA provides that “[t]he Secretary shall develop  
8 and implement plans (hereinafter in this subsection referred to as ‘recovery plans’) for the conservation  
9 and survival of endangered species and threatened species listed pursuant to this section, unless he finds  
10 that such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f). “The recovery  
11 plan, once prepared, provides [a] ‘basic road map to recovery, i.e., the process that stops or reverses the  
12 decline of a species and neutralizes threats to its existence.’” *Ctr. for Biological Diversity v.*  
13 *Kemphorne*, 607 F. Supp. 2d 1078, 1088 (D. Ariz. 2009) (quoting *Defenders of Wildlife v. Babbitt*, 130  
14 F. Supp. 2d 121, 131 (D.D.C. 2001)). “A recovery plan must contain three essential elements: (1) a  
15 description of site specific management actions that may be necessary to recover the species; (2)  
16 objective and measurable criteria which, when met, would result in a determination that the species be  
17 removed from the list; and (3) estimates of the time and cost required to carry out those measures needed  
18 to recover the species and to achieve intermediate steps towards that goal.” *Ctr. for Biological*  
19 *Diversity*, 607 F. Supp. 2d at 1087-88 (citing 16 U.S.C. § 1533(f)(1)(B)(i)-(iii)). While the ESA  
20 imposes specific deadlines for certain actions, *see, e.g.*, 16 U.S.C. § 1533(b)(3), (5)-(6), it prescribes no  
21 deadline for completing a recovery plan, *id.* § 1533(f). The FWS listed the Peirson’s milk-vetch in  
22 1998, but has yet to issue a recovery plan. 63 Fed. Reg. 53,596 (Oct. 6, 1998). Plaintiffs contend that  
23 the agency’s delay in issuing a recovery plan is unreasonable and requires judicial intervention.

24 As an initial matter, the federal defendants and defendant-intervenors argue that FWS does not  
25 have a duty to issue a recovery plan and thus that the Court cannot grant the relief that plaintiffs seek.  
26 Defendants argue that FWS does not have a duty to issue a recovery plan because Section 1533(f) states  
27 that the Secretary “shall develop and implement [recovery plans] . . . , *unless* he finds that such a plan  
28 will not promote the conservation of the species.” 16 U.S.C. § 1533(f) (emphasis added). Defendants

1 argue that this language vests FWS with discretion to either prepare a recovery plan or determine that  
 2 a recovery plan will not promote conservation of the species, and thus that this Court cannot require  
 3 FWS to prepare a recovery plan.<sup>9</sup>

4 As support, defendants cite cases interpreting the APA and holding that courts may not review  
 5 an agency's failure to make a completely discretionary decision. *See S. Utah Wilderness Alliance v.*  
 6 *Norton*, 542 U.S. 55, 64 (2004) (claim under APA "can proceed only where a plaintiff asserts that an  
 7 agency failed to take a discrete agency action that it is required to take."); *Drakes Bay Oyster Co. v.*  
 8 *Salazar*, 921 F. Supp. 2d 972, 988 (N.D. Cal. 2013) (holding there was no judicial review over agency's  
 9 discretionary decision to deny permit), *aff'd* \_\_\_ F.3d \_\_\_, 2014 WL 114699 (9th Cir. Jan. 14, 2014).  
 10 However, plaintiffs bring their claim directly under the ESA, not the APA. The ESA authorizes citizen  
 11 suits to challenge "a failure of [FWS] to perform any act or duty under section 4 [of the ESA] which is  
 12 not discretionary." 16 U.S.C. § 1540(g)(1)(C); *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1034  
 13 (9th Cir. 2005) ("suits to compel agencies to comply with the substantive provisions of the ESA arise  
 14 under the ESA citizen suit provision, and not the APA").

15 Defendants do not cite any cases interpreting Section 1533(f) as conferring discretionary  
 16 authority on the FWS to issue a recovery plan in the absence of a determination that a recovery plan will  
 17 not promote the conservation of the species.<sup>10</sup> In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme

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18  
 19 <sup>9</sup> As discussed *infra*, FWS has prepared a draft recovery plan and anticipates that it can complete  
 20 the recovery plan by July 31, 2019.

21 <sup>10</sup> Intervenor defendants cite *National Wildlife Federation v. National Park Service*, 669 F.  
 22 Supp. 384 (D. Wyo. 1987), and *Conservation Northwest v. Kempthorne*, No. C04-1331-JCC, 2007 WL  
 23 1847143 (W.D. Wash. 2007). In both cases, the FWS had prepared recovery plans for the grizzly bear,  
 24 and the plaintiffs brought suit challenging the agency's delay in implementing those plans. In *National*  
 25 *Wildlife Foundation*, the court held that "the Secretary is required to develop a recovery plan only  
 26 insofar as he reasonably believes that it would promote conservation," and concluded that "[t]his Court  
 27 will not attempt to second guess the Secretary's motives for not following the recovery plan." *National*  
 28 *Wildlife Federation*, 669 F. Supp. at 388-89. In *Conservation Northwest*, the court found that the  
 "discretionary nature of the time line of implementation of recovery plans" divested the court of  
 jurisdiction to review the claim of unreasonable delay. *Conservation Northwest*, 2007 WL 1847143,  
 at \*4.

26 The Court finds that these cases are factually distinguishable in that they involve the  
 27 implementation of recovery plans, and not the failure to prepare a recovery plan. To the extent that  
 28 either case holds more broadly that the Secretary has the discretion not to prepare a recovery plan  
 without also finding that a recovery plan will not promote the conservation of a species, this Court  
 disagrees with that interpretation of Section 1533(f).

1 Court analyzed a similar provision in the ESA directing that “[t]he Secretary shall designate critical  
2 habitat . . . . [and] [t]he Secretary may exclude any area from critical habitat if he determines that the  
3 benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat  
4 . . . .” 16 U.S.C. § 1533(b)(2). The Court held that “the terms of § 1533(b)(2) are plainly those of  
5 obligation rather than discretion.” *Bennett*, 520 U.S. at 172. The Court further explained,

6 It is true that this is followed by the statement that, except where extinction of the  
7 species is at issue, “[t]he Secretary *may* exclude any area from critical habitat if he  
8 determines that the benefits of such exclusion outweigh the benefits of specifying  
9 such area as part of the critical habitat.” However, the fact that the Secretary’s  
10 ultimate decision is reviewable only for abuse of discretion does not alter the  
11 categorical requirement that, in arriving at his decision, he “tak[e] into consideration  
12 the economic impact, and any other relevant impact,” and use “the best scientific  
13 data available.” It is rudimentary administrative law that discretion as to the  
14 substance of the ultimate decision does not confer discretion to ignore the required  
15 procedures of decisionmaking. Since it is the omission of these required procedures  
16 that petitioners complain of, their § 1533 claim is reviewable under § 1540(g)(1)(C).

17 *Id.* (internal citations omitted) (emphasis in original).

18 As with the provision at issue in *Bennett*, Section 1533(f) states that the Secretary “shall”  
19 develop a recovery plan, and the Court finds that the terms of this section are “those of obligation rather  
20 than discretion.” *Id.* The Court finds that Section 1533(f) requires FWS to either issue a recovery plan  
21 or determine that a recovery plan will not promote the conservation of the species, and does not permit  
22 the FWS the discretion to do neither. *See Brower v. Evans*, 257 F.3d 1058, 1067 n.10 (9th Cir. 2001)  
23 (“‘Shall’ means shall.”); *see also United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using “shall”  
24 “Congress could not have chosen stronger words to express its intent that forfeiture be mandatory.”).  
25 Defendants do not assert that FWS has determined that a recovery plan will not promote conservation  
26 of the PMV, and to the contrary, the evidence in the record shows that FWS has not made such a  
27 determination. Thus, the Court agrees with plaintiffs that, absent an express determination that a  
28 recovery plan will not promote conservation, FWS is required to issue a recovery plan for the PMV.

Because the ESA “contains no internal standard of review,” the Ninth Circuit has held that the  
standards provided under Section 706 of the APA govern in ESA cases. *W. Watersheds Project v.*  
*Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). Section 706 of the APA requires that a court “shall  
. . . compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1); *see also*

1 *id.* § 555(b) (agency must “conclude a matter presented to it . . . within a reasonable time”). Pursuant  
2 to Section 706, “even though agency action may be subject to no explicit time limit, a court may compel  
3 an agency to act within a reasonable time.” *Houseton v. Nimmo*, 670 F.2d 1375, 1377 (9th Cir. 1982);  
4 *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1186 (10th Cir. 1998) (in ESA case, finding “if an agency  
5 has no concrete [statutory] deadline . . . and instead is governed only by general timing provisions – such  
6 as the APA’s general admonition [to] conclude matters . . . ‘within a reasonable time,’” a court may  
7 compel delayed action).

8 To determine whether delay is “unreasonable” under APA Section 706, courts apply the factors  
9 set forth by the Court of Appeals for the District of Columbia Circuit in *Telecommunications Research*  
10 *& Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (“*T.R.A.C.*”). See *Independence Mining Co. v.*  
11 *Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (adopting *T.R.A.C.* factors); *Biodiversity Legal Found. v.*  
12 *Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002) (noting *T.R.A.C.* factors apply “in the absence of  
13 a firm deadline”). Under these factors, the Court considers the following guidelines to determine  
14 whether an agency’s delay is unreasonable:

15 1) a “rule of reason” governs the time agencies take to make decisions; 2) delays where  
16 human health and welfare are at stake are less tolerable than delays in the economic  
17 sphere; 3) consideration should be given to the effect of ordering agency action on  
18 agency activities of a competing or higher priority; 4) the court should consider the  
19 nature of the interests prejudiced by delay; and 5) the agency need not act improperly  
20 to hold that agency action has been unreasonably delayed.

21 *Towns of Wellesley, Concord, and Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (citing  
22 *T.R.A.C.*, 750 F.2d at 80).

23 Plaintiffs contend that FWS’s delay – which they measure from the date that the PMV was listed  
24 – has been unreasonable, and they seek an order requiring FWS to issue a recovery plan within two  
25 years. Plaintiffs cite a number of cases in which courts found that a delay of several years was  
26 unreasonable and warranted court intervention. See, e.g., *Defenders of Wildlife v. Browner*, 909 F.  
27 Supp. 1342 (D. Ariz. 1995); *Hells Canyon Preserv. Council v. Richmond*, 841 F. Supp. 1039 (D. Or.  
28 1995).

FWS argues that it has not unreasonably delayed in preparing a recovery plan for the PMV, and  
that no judicial intervention is required. FWS also asserts that the cases cited by plaintiffs are



1 inapplicable because here FWS has shown that the additional time it requires to prepare a recovery plan  
2 is reasonable in light of the agency's increasingly limited resources and competing priorities. In the  
3 alternative, FWS asserts that if the Court finds that judicial intervention is necessary, the Court should  
4 adopt the July 31, 2019 date identified by FWS as the date by which a PMV recovery plan could be  
5 completed.

6 FWS has submitted the Declaration of Ren Lohofener, Regional Director for FWS's Pacific  
7 Southwest Region (Region 8).<sup>11</sup> Docket No. 223. Mr. Lohofener states that Region 8 has the lead  
8 responsibility for more than 290 listed species, and that funding for recovery plans and other statutory  
9 obligations related to species recovery is limited. *Id.* ¶¶ 2-5. Mr. Lohofener states that because funding  
10 is limited, Region 8 must prioritize recovery actions. *Id.* ¶¶ 4-5. Using a ranking system finalized in  
11 1983, FWS has given the PMV a recovery priority number of 9 on a scale of 1-18 (with one being the  
12 highest priority and 18 the lowest), "indicating a moderate degree of threat and high recovery potential."  
13 *Id.* ¶¶ 6-7. Mr. Lohofener states that Region 8 has completed recovery plans for 202 listed species for  
14 which it is responsible and drafted plans for an additional 17 species. *Id.* ¶ 3. Region 8's Carlsbad Fish  
15 and Wildlife Field Office ("CFWO"), which has responsibility for the PMV, issued a contract in 2003  
16 for the preparation of a PMV recovery plan, and received a draft plan in 2007. *Id.* ¶ 8. Mr. Lohofener  
17 states that "Region 8's limited staff has been unable to revise or finalize the draft due to higher priority  
18 recovery work." *Id.*

19 Mr. Lohofener provides as an example of higher priority recovery work a settlement that FWS  
20 entered into in 2005 in *Cal. State Grange v. Norton*, No. 2:05-cv-00560 (E.D. Cal. filed March 22,  
21 2005). That settlement required FWS to complete statutorily-required five-year status reviews on 194

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22  
23 <sup>11</sup> Plaintiffs did not object to the submission of Mr. Lohofener's declaration, and stated in their  
24 opposition papers that they reserved the right to seek discovery or further testimony from Mr.  
25 Lohofener prior to the summary judgment hearing. *See* Docket No. 236 at 3:20-23. Plaintiffs did not  
26 supplement the record with regard to Mr. Lohofener's declaration. Although judicial review of an  
27 agency decision generally focuses on the administrative record in existence at the time of the decision,  
28 "[r]eview may, however, be expanded beyond the record . . . (1) if necessary to determine whether the  
agency has considered all relevant factors and has explained its decision, (2) when the agency has relied  
on documents not in the record, or (3) when supplementing the record is necessary to explain technical  
terms or complex subject matter." *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100  
F.3d 1443, 1450 (9th Cir. 1996) (internal quotation marks and citations omitted). The Court finds that  
Mr. Lohofener's declaration is necessary to determine whether the agency has considered all relevant  
factors and explained its decision not to prepare a recovery plan thus far.

1 listed species, with Region 8 serving as the lead for all but two. *Id.* ¶ 9. Mr. Lohofener states that  
2 “[d]uring the eight-year period covered by the agreement, much of Region 8’s recovery efforts and  
3 funding were devoted to completing these status reviews, including one for the PMV (completed  
4 September 30, 2008).” *Id.* In September 2013, FWS completed the last status reviews required under  
5 the settlement agreement. *Id.*

6 Mr. Lohofener states that as a result of the 2005 settlement and other priorities, Region 8 has  
7 only recently been able to increase its efforts on developing recovery plans. *Id.* ¶ 14. In May 2013,  
8 Region 8 revised its Recovery Plan Work Activity Guidance (“WAG”), identifying 29 high-priority  
9 species for recovery plan development during fiscal years 2013-2017. *Id.* ¶¶ 14-18 & Exs. A-B. Mr.  
10 Lohofener states CFWO did not plan to develop a recovery plan for the PMV during this time period  
11 based on CFWO’s determination that “recovery might be more effectively realized through  
12 implementation of BLM’s ISDRA RAMP.” *Id.* ¶ 16. Mr. Lohofener states,

13 Of the 29 species identified for recovery plan development in the FY13-FY17 WAG,  
14 only three species in the WAG have RPNs of 9 [the same as the PMV]. All other  
15 species in the FY13-FY17 WAG have “higher” RPNs (RPNs between 1 and 8) and  
16 are therefore a higher priority for plan development than Peirson’s milk-vetch. Each  
17 of the three species in the current WAG with recovery priorities equal to that of  
18 Peirson’s milk-vetch have been included in the WAG due to a special circumstance.  
19 *Cordylanthus mollis* subsp. *mollis* (Soft bird’s beak) (RPN = 9C) is part of the  
20 ecosystem-based Tidal Marsh Recovery Plan which also includes higher-priority  
21 species. Santa Catalina Island fox (*Urocyon littoralis catalinae*) (RPN = 9) is part  
22 of the multi-species Island Fox Recovery Plan which also includes higher-priority  
23 species. Recovery plan development for a third species in the WAG with an RPN  
24 of 9C, the California tiger salamander (*Ambystoma californiense*), is moving forward  
25 only because it is part of a separate court-approved settlement agreement which was  
26 entered into prior to the finalization of the FY13-FY17 WAG.

27 *Id.* ¶ 19.

28 Mr. Lohofener also states that much of Region 8’s recovery effort and funding have been  
devoted to important recovery work for the PMV, including responding to two delisting petitions,  
conducting two separate status reviews, conducting two field studies which resulted in a peer-reviewed  
publication and a published note, and developing a seed bank sampling protocol with BLM. *Id.* ¶¶  
10-11 (citing FW5927-6016). In addition, in 2009 FWS issued a “Spotlight Species Action Plan” for  
the PMV specifying actions to advance species recovery, *id.* ¶ 12 (citing FW527-32), and in the fall of  
2012, CFWO staff worked with BLM to develop a monitoring protocol to assess the stability of PMV

1 populations in the ISDRA. *Id.* (citing ISD40884-89). Field sampling to evaluate the protocol was  
2 conducted in February 2013. *Id.*

3 Mr. Lohofener also states that, in light of this litigation, FWS anticipates it could “submit to  
4 the Federal Register a notice of availability of a final recovery plan by July 31, 2019, subject to  
5 workload constraints and available appropriations. The July 31, 2019 date is a reasonable projection  
6 based on our current workload that would result in a final recovery plan for Peirson’s milk-vetch without  
7 compromising our ability to develop recovery plans for the higher priority species in our current 5-year  
8 [Regional Recovery Plan Work Activity Guidance (WAG)].” *Id.* ¶ 21.

9 Applying the *T.R.A.C.* factors, the Court concludes that it is appropriate to adopt the July 31,  
10 2019 date identified by FWS as the deadline to complete a PMV recovery plan, unless FWS “finds that  
11 such a plan will not promote the conservation of the [PMV].” 16 U.S.C. § 1533(f)(1). The Court is very  
12 concerned about the FWS’s failure to issue a recovery plan for the PMV. However, the delay does not  
13 involve human health and welfare, and in recent years the FWS has devoted resources to recovery work  
14 for the PMV, such as responding to two delisting petitions, preparing two status reviews, and preparing  
15 the seed bank sampling protocol. The Court also notes that the 2013 RAMP closes to OHV use all PMV  
16 critical habitat, which encompasses 85% of the known overall PMV population and areas “containing  
17 high-density core populations, a large extent of high-quality habitat, a large seed bank, and therefore,  
18 areas important for the recovery of the species.” FW1735-36, FW1760, FW1766; ISD31621-22.<sup>12</sup>

19 The Court is also mindful that although courts may compel an agency to “act within a reasonable  
20 time,” *Houseton v. Nimmo*, 670 F.2d 1375, 1377 (9th Cir. 1982), courts are “ill-suited to review the  
21 order in which an agency conducts its business” and “hesitant to upset an agency’s priorities by ordering  
22 it to expedite one specific action.” *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987). The  
23 Court finds it significant there are 29 species identified for recovery plan development in the FY2013-  
24 2017 WAG, and the Court is reluctant to “reorder[] agency priorities. The agency is in a unique—and  
25 authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its  
26 resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for

27 \_\_\_\_\_  
28 <sup>12</sup> “FW\_\_\_\_\_” refers to FWS’s administrative record for the 2012 BiOp, and “ISD\_\_\_\_\_” refers  
to BLM’s administrative record for the 2013 ROD, RAMP and EIS.

1 [courts] to hijack.” *In re Barr Labs.*, 930 F.2d 72, 75 (D.C. Cir. 1991). If the Court ordered the FWS  
2 to complete the PMV recovery plan within two years, as plaintiffs request, the PMV would be  
3 prioritized over these other species, thus impeding FWS’s duty to prioritize recovery planning for the  
4 species most likely to benefit. *See* 16 U.S.C. § 1533(f)(1). The Court finds that the July 31, 2019  
5 deadline is reasonable because it will not disrupt the FWS’s other recovery work, but will also set a date  
6 certain by which the FWS will be required to take action.

7 Accordingly, the Court GRANTS IN PART plaintiffs’ motion for summary judgment on this  
8 issue and ORDERS FWS to complete a PMV recovery plan by July 31, 2019, unless FWS “finds that  
9 such a plan will not promote the conservation of the [PMV].” 16 U.S.C. § 1533(f)(1).

### 10 11 **III. National Environmental Policy Act - Wilderness Values**

12 The National Environmental Policy Act (“NEPA”) requires federal agencies to analyze the  
13 environmental impacts of a proposed action before proceeding with that action. *See* 42 U.S.C.  
14 § 4332(2)(C). Under NEPA and the regulations promulgated thereunder by the Council on  
15 Environmental Quality (“CEQ”), federal agencies must prepare and circulate to the public a  
16 comprehensive environmental impact statement (“EIS”) so that the environmental impacts can be  
17 considered and disclosed to the public during the decision-making process. *See* 40 C.F.R. §§ 1501.2,  
18 1502.5. In the EIS, the agency must identify direct, indirect, and cumulative impacts of the proposed  
19 action, consider alternative actions (including the alternative of taking no action) and their impacts, and  
20 identify all irreversible and irretrievable commitments of resources associated with the action. *See* 42  
21 U.S.C. § 4332(2); 40 C.F.R. § 1502.14(d). Plaintiffs contend that BLM violated NEPA by failing  
22 adequately to address in the Final EIS (“FEIS”) the impacts of the 2013 RAMP on the wilderness  
23 characteristics of a portion of the South Algodones Dunes known as “WCU 1,” which would largely be  
24 opened up to OHV use under the 2013 RAMP.

25 In 1964 Congress passed the Wilderness Act with the purpose “to assure that an increasing  
26 population, accompanied by expanding settlement and growing mechanization, does not occupy and  
27 modify all areas within the United States and its possessions, leaving no lands designated for  
28 preservation and protection in their natural condition.” 16 U.S.C. § 1131(a). The Wilderness Act defines

1 “wilderness,” “in contrast with those areas where man and his own works dominate the landscape,” as:

2 an area where the earth and its community of life are untrammelled by man, where  
 3 man himself is a visitor who does not remain. An area of wilderness is further  
 4 defined to mean in this chapter an area of undeveloped Federal land retaining its  
 5 primeval character and influence, without permanent improvements or human  
 6 habitation, which is protected and managed so as to preserve its natural conditions  
 7 and which (1) generally appears to have been affected primarily by the forces of  
 8 nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding  
 opportunities for solitude or a primitive and unconfined type of recreation; (3) has  
 at least five thousand acres of land or is of sufficient size as to make practicable its  
 preservation and use in an unimpaired condition; and (4) may also contain  
 ecological, geological, or other features of scientific, educational, scenic, or  
 historical value.

9 16 U.S.C. § 1131(c).

10 The Wilderness Act did not directly address the BLM's management of its lands. The Federal  
 11 Land Planning Management Act “interacts with the Wilderness Act to provide the BLM with broad  
 12 authority to manage areas with wilderness characteristics contained in the federally owned land parcels  
 13 the Bureau oversees, including by recommending these areas for permanent congressional protection.”  
 14 *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 625 F.3d 1092, 1097 (9th Cir. 2010)  
 15 (“*ONDA*”). “[T]he FLPMA makes clear that wilderness characteristics are among the values which the  
 16 BLM can address in its land use plans, and hence, needs to address in the NEPA analysis for a land use  
 17 plan governing areas which may have wilderness values.” *Id.* at 1112.

18 Pursuant to the FLPMA, BLM established two Wilderness Study Areas (“WSAs”) for the  
 19 purpose of identifying and recommending areas for preservation as wilderness: (1) the North Algodones  
 20 Dunes; and (2) the South Algodones Dunes. Congress designated the North Algodones Dunes, but not  
 21 the South Algodones Dunes, as a wilderness area through the California Desert Protection Act of 1994.  
 22 ISD3178.<sup>13</sup> Wilderness Characteristic Unit 1 (“WCU 1”) is a subset of the South Algodones Dunes.  
 23 WCU 1 is composed of 42,083 acres of BLM administered lands and has been closed to OHVs since  
 24 November 2000 as part of the interim closures. In the FEIS, BLM stated that WCU 1 “appears  
 25 essentially untrammelled by humans” and “offers numerous opportunities for primitive forms of

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26  
 27 <sup>13</sup> According to defendants, the South Algodones Dunes were considered not suitable for  
 28 wilderness designation, in part, because “motorized vehicle activity has severely reduced much of the  
 natural vegetative cover” in the north, and human presence is “substantially noticeable” in the south.  
 ISD39868; *see also* ISD38209.

1 recreation in the form of hiking, backpacking, and nature studies.” ISD3179. BLM identified this area  
 2 as having wilderness characteristics, and formally designated it as “WCU 1,” or “Wilderness  
 3 Characteristics Unit 1” for planning purposes. *Id.* Under the 2013 RAMP, the portion of WCU 1 that  
 4 overlaps with PMV critical habitat, 5663 acres, would remain closed to OHVs, while the remaining  
 5 36,420 acres would be opened to OHVs. Plaintiffs contend that the FEIS provides no meaningful  
 6 analysis of the impacts on the portion of WCU 1 that would be opened to OHVs.

7 “We review an Environmental Impact Statement under the ‘rule of reason’ to determine whether  
 8 it contains ‘a reasonably thorough discussion of the significant aspects of the probable environmental  
 9 consequences.’” *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1150 (9th Cir.  
 10 1997) (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)). “We  
 11 make ‘a pragmatic judgment whether the [Environmental Impact Statement’s] form, content and  
 12 preparation foster both informed decision-making and informed public participation.’” *City of Carmel-*  
 13 *By-The-Sea*, 123 F.3d at 1150-51 (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).  
 14 “Once satisfied that a proposing agency has taken a ‘hard look’ at a decision’s environmental  
 15 consequences, [our] review is at an end.” *Id.* at 1151.

16 Plaintiffs assert that the only analysis in the FEIS about wilderness characteristics consists of  
 17 a “few generic statements on the relative impacts of the different alternatives.” Docket No. 231 at 15:8-  
 18 9. Plaintiffs identify the following two excerpts as “the entire extent” of BLM’s analysis of projected  
 19 effects on WCU 1:

20 Differences in impacts to special designations would potentially vary by alternative.  
 21 Alternatives providing more acreage for OHV recreation, camping, construction  
 22 activities, as well as renewable energy and geothermal leasing activities would result  
 23 in greater adverse impacts (Table 4-14). Alternatives providing more acreage for  
 resource protection, such as areas closed to OHV recreation, closed or with [no  
 surface occupancy] for surface disturbing activities related to geothermal, solar, and  
 wind energy, would result in greater beneficial effects on special designation areas.

24 ISD3363.

25 Under Alternatives 2 and 3, 42,083 acres would be closed to OHV recreation in  
 26 WCU 1. These alternatives would have the highest acres closed to OHV recreation,  
 27 and the most beneficial impacts to the wilderness characteristics and values of WCU  
 1.....Under Alternative 8, 25,473 acres would be open, 5,663 acres would be closed,  
 28 and 10,947 would be limited to OHV recreation in the WCU 1 designation. This  
 alternative would have the lowest acres of closed OHV recreation and the highest  
 acres designated as limited OHV recreation use.

1 ISD3367. Plaintiffs argue that BLM’s “purported ‘hard look’ boils down to the completely self-evident  
2 and uninformative statement that the alternative with the fewest acres of WCU 1 closed to OHVs will  
3 ‘result in greater adverse impacts.’” Docket No. 231 at 15:23-25.

4 Defendants respond that the FEIS contains a “reasonably thorough discussion” of the wilderness  
5 characteristics of WCU 1 and the potential impacts to that area, which is all that NEPA requires. *See*  
6 *City of Carmel-By-The-Sea*, 123 F.3d at 1150. The Court agrees. In the “Affected Environment”  
7 section, the FEIS includes a discussion of “Lands with Wilderness Characteristics.” ISD3177-3179.  
8 The FEIS states that BLM evaluated the wilderness characteristics of “current lands and lands acquired  
9 outside of, or adjacent to designated wilderness, since passage of the CDPA in 1994.” ISD3178. This  
10 included WCU 1. The FEIS describes WCU 1 as follows:

11 The WCU 1 contains 42,083 acres of public lands. The area’s west boundary follows  
12 the edge of the dune system, whereas the east boundary follows Wash Road adjacent  
13 to the UPRR tracks. The north and south boundaries indicate the limit of  
14 substantially noticeable impacts resulting from OHV use. The WCU 1 is completely  
15 surrounded by public lands and has a 640-acre section of private lands in the middle.  
16 Although WCU 1 may be traversed by a limited number of OHVs in the winter, and  
17 small portions of the landscape include trails which are 20- to 50-foot-wide strips  
18 devoid of vegetation, the area appears essentially untrammelled by humans . . . . The  
19 undulating topography shields recreationists from each other and provides ample  
20 opportunities for solitude. OHV and military aircraft noise periodically disrupt these  
21 perceptions of solitude. The WCU 1 offers numerous opportunities for primitive  
22 forms of recreation in the form of hiking, backpacking and nature studies.

23 ISD3179.

24 The FEIS also explains that impacts on wilderness characteristics “are those actions that reduce  
25 or enhance the wilderness characteristics of naturalness and opportunities for solitude or primitive forms  
26 of recreation.” ISD3361. The FEIS states that OHV recreation has the potential to disturb the  
27 “naturalness and solitude” of wilderness: “These characteristics and values could be impacted by the  
28 use of motor vehicles and installation of structures causing surface disturbance and evidence of the  
human-caused modifications of the area.” *Id.* The FEIS identifies measures that would promote and  
preserve wilderness characteristics, such as dust control measures, and states that “[r]estoration of  
previously disturbed areas could improve wildlife habitat and reduce instances of illegal incursion

1 within the ACECs<sup>14</sup> and wilderness.” *Id.* The FEIS also states that “any closures resulting from special  
2 status species management could enhance the protection for the wilderness and ACEC values, and visual  
3 resource management “could increase scenic quality values of the wilderness and ACECs.” *Id.*

4 In addition, the FEIS discusses how the different alternatives will affect ACECs and special  
5 designation areas such as WCU 1:

6 Differences in impacts to special designations would potentially vary by alternative.  
7 Alternatives providing more acreage for OHV recreation, camping, construction  
8 activities, as well as renewable energy and geothermal leasing activities would result  
9 in greater adverse impacts (Table 4-14). Alternatives providing more acreage for  
resource protection, such as areas closed to OHV recreation, closed or with NSO for  
surface-disturbing activities related to geothermal, solar, and wind energy, would  
result in greater beneficial effects on special designation areas.

10 *Id.* at ISD3363. With regard to WCU 1, the FEIS includes the following information: (1) under  
11 Alternatives 4, 5, 6, and 7, 42,083 acres of WCU 1 would be open to geothermal leasing, but there  
12 would be no geothermal leasing in WCU 1 under Alternatives 2, 3, and 8 (the proposed RAMP); and  
13 (2) under Alternative 7, 42,083 acres of WCU 1 would be available for solar and wind energy  
14 development, but would be closed to such development under Alternatives 1 through 6 and Alternative  
15 8. *Id.* at ISD3367. Plaintiffs assert that it is self-evident and therefore meaningless to conclude that  
16 reopening the central dunes to OHV use will diminish wilderness characteristics in WCU 1. However,  
17 it is not clear what further analysis plaintiffs contend should have been performed as the preferred  
18 alternative, Alternative 8, does not propose to install any structures or visitor amenities in the central  
19 dunes of WCU 1, and the only non-wilderness components that the RAMP introduces into WCU 1 are  
20 vehicles and their occupants.

21 The cases cited by plaintiffs are distinguishable. In *ONDA*, 625 F.3d 1092 (9th Cir. 2010), the  
22 BLM prepared an EIS that only evaluated wilderness characteristics in areas designated as wilderness  
23 study areas, and the BLM contended that it had no duty to inventory or analyze wilderness  
24 characteristics in non-wilderness areas. *Id.* at 1102, 1115. The Ninth Circuit disagreed, and invalidated  
25 the EIS for failing to evaluate wilderness characteristics in non-WSA areas. *Id.* at 1121.  
26 *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989 (9th Cir. 2004), did  
27

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28 <sup>14</sup> “ACEC” stands for Areas of Critical Environmental Concern.



1 not involve an assessment of wilderness characteristics at all. In *Klamath-Siskiyou*, the Ninth Circuit  
 2 invalidated environmental assessments where, *inter alia*, the discussion of cumulative impacts consisted  
 3 of a table with a list of environmental concerns, such as air quality, and “even though all of the boxes  
 4 are checked ‘No’ to indicate that the critical elements in question will not be affected, the report actually  
 5 states that fully half of the elements either would be or could be in fact ‘impacted,’ without giving any  
 6 details or explanation.” *Id.* at 995. Here, in contrast, the BLM assessed the wilderness characteristics  
 7 of WCU 1 and described the RAMP’s effects on those characteristics. *See* ISD3361-3367.

8 Accordingly, the Court GRANTS summary judgment in favor of defendants on this issue.  
 9

#### 10 **IV. Air Quality Analysis**

11 The federal Clean Air Act (“CAA”) establishes a comprehensive program for controlling and  
 12 improving the nation’s air quality through shared federal and state responsibility. The CAA authorizes  
 13 the Environmental Protection Agency (“EPA”) to establish national ambient air quality standards  
 14 (“NAAQSs”) for pollutants deemed by EPA to be “criteria” pollutants, including volatile organic  
 15 compounds (“VOCs”) and nitrogen oxides (“NOx”) – both of which are considered precursors to  
 16 ozone<sup>15</sup> – and particulate matter with a diameter greater than 10 microns (“PM-10”). 42 U.S.C. §§ 7407-  
 17 7410. EPA designates areas which fail to attain an NAAQS standard as “nonattainment areas.” *Id.*  
 18 §§ 7407(d)(1). Nonattainment areas are divided into five categories, based upon the severity of the  
 19 pollution: “Marginal,” “Moderate,” “Serious,” “Severe,” and “Extreme.” *Id.* § 7511.

20 The Imperial County Air Pollution Control District (“ICAPCD”), which includes the ISDRA,  
 21 is designated as a serious non-attainment area for PM-10 and a moderate non-attainment area for ozone.  
 22 ISD3283. The ICAPCD has promulgated regulations for the control of PM-10, which have been  
 23 approved by EPA. 78 Fed. Reg. 23,677 (Apr. 22, 2013). Pursuant to an ICAPCD rule governing  
 24 “fugitive dust,” BLM was required to submit a dust control plan for OHV use in the Dunes. ISD63050.  
 25 The ICAPCD approved the dust control plan in July 2013. ISD63027.

26 Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a), sets forth the process by which the  
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28 <sup>15</sup> The parties sometimes refer generally to “ozone,” and other times specifically to VOCs and  
 NOx.

1 states may develop their own regulatory programs, called “State Implementation Plans” (“SIPs”), that  
2 satisfy the minimum requirements of the Clean Air Act. *See generally* 42 U.S.C. § 7410(a). A SIP must  
3 specify emission limitations and other measures necessary to maintain the NAAQS for each pollutant.  
4 42 U.S.C. § 7410(a)(2)(A)-(M). Section 176(c)(1) of the CAA provides that no federal agency shall  
5 “engage in, support in any way or provide financial assistance for, license or permit, or approve, any  
6 activity which does not conform to [a SIP].” 42 U.S.C. § 7506(c)(1). This is referred to as the  
7 “conformity” requirement. Pursuant to EPA regulations regarding conformity, BLM was required to  
8 assess the RAMP’s “conformity” with California’s State Implementation Plan (SIP) applicable to  
9 Imperial County. 40 C.F.R. Part 93, Subpart B; *see also* ISD3282-3283. BLM is not required to  
10 conduct a conformity review, however, if the data establish that the RAMP will generate PM-10 and  
11 ozone in quantities below the Clean Air Act’s “de minimis” thresholds. *See* 40 C.F.R. § 93.153(b). For  
12 Imperial County, the de minimis thresholds for PM-10 and ozone are 70 tons per year and 100 tons per  
13 year, respectively, when measured as an increase over baseline conditions. BLM 3283 [Table 4-4]. In  
14 the FEIS, BLM determined that adopting the preferred alternative would not result in a greater than de  
15 minimis increase in emissions of PM10 and ozone compared with existing conditions. ISD3283-85. As  
16 a result, the BLM was not required to make a “conformity determination” under the CAA in order to  
17 adopt the 2013 RAMP.

18 Plaintiffs challenge BLM’s air quality analysis as flawed and in violation of the requirements  
19 of the Clean Air Act, the Federal Land Policy Management Act and NEPA. Plaintiffs note that in the  
20 Draft EIS (“DEIS”), BLM estimated that the increase in VOCs and PM-10 emissions from adopting the  
21 preferred alternative in the 2013 RAMP would greatly exceed the de minimis thresholds of the  
22 conformity regulations, and BLM acknowledged that if it adopted the proposed RAMP it would need  
23 to carry out a full conformity determination for ozone and PM-10. ISD30858-30859. Plaintiffs contend  
24 that, “[g]iven the very high emissions increases estimated in the DEIS, particularly of PM-10, it is highly  
25 unlikely, if not outright impossible, that BLM could have ultimately made a finding that its proposed  
26 RAMP conformed to ICAPCD’s SIPs and the relevant regulations.” Docket No. 231 at 19:4-6.

27 Between the DEIS and FEIS, BLM recalculated the emissions by changing several assumptions  
28 used in the DEIS, which significantly reduced both the total estimated emissions of PM-10 and VOCs,

1 as well as in the difference in emissions from current conditions that would result from adoption of the  
2 proposed alternatives. This analysis is described in Appendix Q to the FEIS and supporting emissions  
3 data spreadsheet. ISD3790-98, ISD63133-35.

4 The main factor contributing to the change in projected emissions between the DEIS and FEIS  
5 (an 80% reduction) is the use of actual soil data in the FEIS rather than the standard assumptions that  
6 were used in the DEIS. ISD17452. The FEIS states, “[i]n reviewing the results and techniques of the  
7 previous analysis [the DEIS], BLM determined the standard assumptions that were used greatly  
8 overestimated emissions. Since that time, BLM has been able to collect site samples and develop a more  
9 refined analysis.” ISD3795. BLM staff collected soil samples from the different recreation areas at the  
10 Dunes and determined the silt content, which is the component of the soil that contributes to PM-10  
11 emissions. *Id.* at ISD3796-98. Using the actual soil data in the FEIS, BLM found that adoption of the  
12 preferred alternative would result in a slight decrease in PM10 emissions from the baseline (Alternative  
13 2), *id.* at ISD3284, as a result of shifting OHV activities to areas of the Dunes with lower silt content,  
14 ISD3798, and implementing mitigation measures included in the preferred alternative, ISD3289.

15 Plaintiffs contend that the BLM used improper soil sampling methods because BLM did not  
16 comply with ICAPCD Rule 800. Plaintiffs argue that “the required sampling methods are in the  
17 county’s CAA PM-10 implementation plan in a rule denominated as ‘General Requirements for the  
18 Control of Fine Particulate Matter (PM-10),’ and do not in any way appear to be to be limited to dust  
19 control plans.” Docket No. 236 at 20:1-3. Plaintiffs argue that Rule 800 G.1.e, “Determination of Silt  
20 Content for Unpaved Roads and Unpaved Vehicle/Equipment Traffic Areas,” requires that silt content  
21 for unpaved roads and unpaved traffic areas be determined using a specific defined method or other  
22 equivalent method approved by EPA, and the state and local agency. Plaintiffs assert that “BLM did  
23 not use the Rule 800 method, has not claimed it has used an approved equivalent method, and remains  
24 unable to detail what method it actually employed. BLM’s reliance upon the soil analysis is arbitrary.”  
25 *Id.* at 20:7-9.

26 Defendants respond that the test method specified by ICAPCD Rule 800.G.1.e (the method  
27 identified in ICAPCD Rule 800 App. B, Section C), is used to determine whether an area has a  
28 “stabilized surface.” *See* ICAPCD Rule 800.G.1.e (“Observations to determine compliance with the

1 conditions specified for a stabilized surface, in any inactive disturbed surface area, whether at a work  
2 site that is under construction, at a work site that is temporarily or permanently inactive, or on an open  
3 area and vacant lot, shall be conducted in accordance with the test methods described in Appendix B  
4 of this rule.”). Defendants contend that this regulation is inapplicable because the purpose of BLM’s  
5 analysis was not to determine whether an area had a stabilized surface, but rather to determine the silt  
6 content. The Court agrees with defendants that on its face, this regulation does not apply to the soil  
7 sampling at issue, and thus plaintiffs have not shown that the soil sampling that BLM conducted is  
8 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.  
9 § 706(2)(A).<sup>16</sup>

10 Another major factor contributing to the change in projected emissions between the DEIS and  
11 FEIS is BLM’s determination that increasing the number of acres available to OHVs would not increase  
12 the number of visitors to the Dunes. In the DEIS, BLM assumed that the number of visitors was  
13 proportional to the available acreage, and thus that opening up more acreage to OHVs would cause a  
14 corresponding increase in vehicle-related emissions. ISD30936-30938, ISD30856-30859. Plaintiffs  
15 contend that the change in assumptions about number of visitors is unsupported and inconsistent with  
16 other parts of the FEIS, such as the sections describing social and economic impacts, which assumed  
17 that opening up more acres to OHVs would increase the number of OHV visitors.

18 The Court concludes that the assumption about number of visitors in the FEIS is supported by  
19 the record. As an initial matter, the Court notes that plaintiffs have not identified any data in the record  
20 showing that OHV use is proportional to available area, or that opening up the closed areas will lead to  
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24 <sup>16</sup> Plaintiffs also assert that BLM “failed to consider an important aspect of the problem”  
25 because “BLM did not analyze the increase in dust from destroying delicate soil crusts that have formed  
26 in the currently closed areas, despite EPA and ICAPCD calling for such analysis.” Docket No. 236 at  
27 20:18-21. As support, plaintiffs cite a comment from ICAPCD to the DEIS and a comment by EPA to  
28 the FEIS. *See* Docket No. 231 at 22:2-9 (citing ISD22874 and ISD2439). However, neither comment  
specifically calls for this type of analysis. In any event, the Court does not find that the agency acted  
in an arbitrary or capricious manner given the BLM’s conclusion that OHV ridership would not  
increase, as well as the soil sampling which addresses the fact that opening some closed areas may  
change where people choose to ride OHVs.

1 an increase in OHV visitors.<sup>17</sup> Indeed, earlier in this litigation plaintiffs successfully challenged 2004  
2 final rule designating critical habitat for the PMV by arguing that the economic analysis underlying that  
3 rule incorrectly assumed that the interim OHV closures had resulted in a 15% decline per year in  
4 visitation. *Ctr. for Biological Diversity v. BLM*, 422 F. Supp. 2d at 1148. The Court agreed with  
5 plaintiffs and found that there was “no data in the record linking the interim closures to any reduced  
6 OHV visitation levels at the Dunes.” *Id.* at 149. The Court noted, *inter alia*, that “the BLM itself did  
7 not observe a drop in visitation related to the closures, and indicated that the temporary closures likely  
8 had a minimal impact on visitation. . . . [and that] that there is no accurate pre-2002 visitation data due  
9 to the BLM’s methodology for counting visitation.” *Id.* at 148. Plaintiffs argue that this portion of the  
10 2006 summary judgment decision was focused on an entirely different issue and an entirely different  
11 record. While plaintiffs are correct that precise issue before the Court in 2006 was different, it is  
12 nevertheless true that the facts before the Court in 2006 and today are the same: there is no data in the  
13 record showing that the interim closures led to a decrease in OHV visitation, nor is there any data  
14 conversely showing that opening up acres to OHVs will increase OHV visitation.

15 Further, as defendants note, between the DEIS and FEIS, BLM analyzed visitor data, and that  
16 data showed that while the number of visitors fluctuated from year to year, those fluctuations were not  
17 associated with area closures. ISD36246-36249.<sup>18</sup> Plaintiffs assert that BLM is trying to “have it both

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18  
19 <sup>17</sup> The FEIS does find that increases in OHV use for the preferred alternative would be “similar  
20 to recent trends (approximately 3 percent per year, depending on economic conditions).” ISD3400. As  
21 defendants note, an increase due to a continuation of current visitation trends – as opposed to an increase  
22 due to opening the closed areas – is part of the baseline condition and is not as a result of the action  
23 under review, and thus is not relevant for determining emissions associated with that action.

24 <sup>18</sup> Plaintiffs cite a contractor’s 2008 economic analysis prepared for FWS regarding the revised  
25 critical habitat designation for the PMV, which states, *inter alia*, that there is a “generally accepted  
26 economic theory and studies from the economics literature which support the assumption that closure  
27 of a portion of a recreation area is likely to result in fewer visits to that area.” ISD36211. However, as  
28 defendants note, that same report repeatedly states that there is considerable uncertainty as to whether  
the proportional visitation assumption was applicable to the Dunes. *See e.g., id.* at n. 3 (“Due to the  
uncertainty inherent in estimating impacts of the temporary closures on visitation at the ISDRA, this  
economic analysis estimates a range of pre-designation for[] OHV visitation. Under the lower bound  
scenario, this analysis assumes that past closures did not affect visitation. In particular, as the BLM has  
previously indicated that the past closures had a minimal impact on visitation (personal communication  
with Knauf and Hamada, BLM October 17, 2003), the lower bound scenario accounts for this potential  
outcome.”); *see id.* at 36220 (“It is not possible, using existing data, to model the effect of closures of  
portions of the ISDRA on the behavior of OHV recreators at the ISDRA.”).

1 ways” by assuming no increased OHV visitation for the air quality analyses and assuming some increase  
2 in OHV visitation in the social and economic impacts sections. However, the FEIS concluded that  
3 “[n]o significant economic impacts were determined for any of the proposed alternatives.” ISD3409.  
4 On this record, the Court cannot conclude that BLM’s visitor assumptions underlying the air emissions  
5 analysis in the FEIS are arbitrary or capricious. *Cf. San Luis & Delta-Mendota Water Authority v.*  
6 *Jewell*, \_\_\_ F.3d \_\_\_, 2014 WL 975130, at \*15 (9th Cir. Mar. 13, 2014) (upholding agency’s action  
7 where “FWS acknowledged the uncertainty inherent to modeling the relation between OMR flows and  
8 smelt and chose a conservative model, a choice that is within the FWS’s discretion to make”).<sup>19</sup>

9 Finally, plaintiffs challenge BLM’s assumptions for number of OHVs, visitor days, average  
10 speed, and time spent riding OHVs. However, as defendants note, these assumptions apply equally to  
11 the baseline condition and the preferred alternative, and thus have no effect on BLM’s conclusion that  
12 the RAMP will not cause more than a de minimis increase in emissions given BLM’s determination that  
13 the chosen alternative will not cause an increase in the number of visitors.


14 Accordingly, the Court concludes that BLM complied with the CAA, FLPMA and NEPA, and  
15 GRANTS summary judgment in favor of defendants on these claims.

16  
17 **CONCLUSION**

18 For the foregoing reasons and for good cause shown, the Court hereby GRANTS in part and  
19 DENIES in part plaintiffs’ motion for summary judgment (Docket No. 231) and GRANTS in part and  
20 DENIES in part defendants’ motions for summary judgment (Docket Nos. 232 & 234).

21  
22 **IT IS SO ORDERED.**

23  
24 Dated: April 3, 2014

25   
26 \_\_\_\_\_  
27 SUSAN ILLSTON  
28 United States District Judge

27 <sup>19</sup> Plaintiffs also contend that the air quality analysis fails to account for emissions from “mother  
28 vehicles” and campfires. However, the number of mother vehicles and campfires is directly related to  
the number of visitors, and the FEIS determined that the 2013 RAMP will not increase visitorship.