IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants.
/

No. C 03-02509 SI

ORDER RE: DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT AND PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

On November 12, 2004, the Court heard oral argument on the federal defendants' motion to alter or amend the judgment and plaintiffs' motion for injunctive relief. Having carefully considered the arguments of counsel and the papers submitted, the Court hereby PARTIALLY GRANTS and PARTIALLY DENIES both motions.

BACKGROUND

On August 3, 2004, this Court issued an order granting and denying the parties' cross-motions for partial summary judgment in this case, C 03-2509 SI, and a related case, C 03-3807 SI. The Court held that the U.S. Fish & Wildlife Service ("FWS" or "the Service") had relied on an invalid regulatory definition of "adverse modification" in completing its biological opinion for the Mojave desert tortoise. It vacated and remanded the biological opinion with instructions to FWS to reissue it after applying the appropriate definition of the term, which the Court stated "is: 'a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for either the survival or the recovery of a listed species.'" Am. Motorcycle Ass'n Dist. 37 v. Norton, Center for Biological Diversity v. BLM, 2004 U.S. Dist. LEXIS 15662 at *35 (N.D.

Cal. Aug. 3, 2004). The Court declined to order further briefing on whether the biological opinion should be vacated, opting to follow "the normal rule of vacatur" during remand. August 3, 2004 Order at 16 n. 8.

Now before the Court are: (1) federal defendants' motion to alter or amend the judgment and (2) plaintiffs' motion for injunctive relief.

LEGAL STANDARD

1. Rule 59(e)

Motions to alter or amend a judgment "are appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." See School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), cert. denied, 114 S. Ct. 2742 (1994). Clear error exists when a court has a definite and firm conviction that a mistake has occurred. Milenbach v. Comm'r of Int'l Revenue, 318 F.3d 924, 935 (9th Cir. 2003).

2. Injunctive relief under the ESA

The traditional test for injunctive relief is actual success on the merits, irreparable injury, and inadequacy of legal remedies. Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1988). The court must balance any competing claims of injury and the effect that injunctive relief would have on the parties and the public interest. The traditional test, however, does not apply in ESA cases. Congress has restricted the equitable discretion of the courts to balance the parties' competing interests in injunction proceedings under the ESA. National Wildlife Federation v. Burlington Northern R.R., 23 F.3d 1508, 1511 (9th Cir. 1994). Congress predetermined that the balance of hardships and the public interest tips heavily in favor of protected species. TVA v. Hill, 437 U.S. 153 (1978).

///

DISCUSSION[1]

1. Defendants' motion to alter or amend the judgment

Defendants seek an order under Federal Rule of Civil Procedure 59(e) to alter or amend the August 3, 2004 Order. The parties dispute whether a Rule 59(e) motion is the appropriate procedural mechanism for review of the Order, or whether defendants' request constitutes a motion for reconsideration under N.D. Cal. Civil L.R. 7-9. Defendants contend that the Court's grant of partial summary judgment and remand to FWS is an immediately appealable order because (1) it is a final decision for purposes of appeal and (2) it has the practical effect of an injunction.

The Court agrees. To be appealable as an interlocutory order, a district court ruling (1) must have the practical effect of entering an injunction, (2) have serious, perhaps irreparable, consequences, and (3) be such that an immediate appeal is the only effective way to challenge it. Calderon v. U.S. Dist. Ct., 137 F.3d 1420, 1422 n. 2 (9th Cir. 1998). A remand order is final if (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable. Collord v. U.S. Dep't of Interior, 154 F.3d 933, 935 (9th Cir. 1998). Under the standards of Collord and Calderon, the Court's August 3, 2004 remand order is immediately appealable, and Rule 59(e) is the appropriate procedural mechanism to change it.

Defendants seek two amendments to the August 3, 2004 Order: (1) a change in the language of the paragraph articulating the proper regulatory definition of "destruction or adverse modification"; and (2) a limitation on vacatur to the "no adverse modification" finding and analysis only, rather than vacatur of the entire biological opinion.

A. Appropriate scope of Court's authority to define "adverse modification"

Defendants argue that the Court exceeded its authority under the Administrative Procedures Act ("APA") by prescribing a regulatory definition of "destruction or adverse modification" and ordering FWS to

[1] Defendant-Intervenors Desert Vipers Motorcycle Club et al. have filed a brief opposing plaintiffs' motion for permanent injunction and in support of the federal defendants' motion.

apply that definition. Defendants contend that this amounts to "imposition of a judicially-crafted regulatory definition" on FWS, infringing on the Secretary of the Interior's discretion to modify the regulation or adopt a new one. It appears that, because of the Ninth Circuit's recent decision in Gifford Pinchot Task Force v. United States, 378 F.3d 1059 (9th Cir. 2004), the Service and the Department of Interior intend to address the issue of new regulatory language by focusing primarily on the Gifford Pinchot ruling. Defs.' Mot. at 3:6-17.[2]

According to defendants, the APA only allows the Court to remedy a violation by remanding an agency's decision to the agency for reconsideration and a new decision. Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). Defendants therefore request that the Court amend its August 3, 2004 Order to simply remand the biological opinion to FWS, where the agency "will be able to address the issue by focusing primarily on the Ninth Circuit's ruling in Gifford Pinchot." Defs.' Mot. at 3:16-17. Plaintiffs agree that the order should be clarified, but suggest an alternative amendment.

The language at issue is:

> The Court finds that the proper definition of "destruction or adverse modification" is: "a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for either the survival or the recovery of a listed species." The Court hereby VACATES and REMANDS the biological opinion to the Service and orders the Service to reconsider its biological opinion of the CDCA Plan in light of the appropriate standard.

Am. Motorcycle Ass'n v. Norton at *35. Defendants propose that the following paragraph be substituted for the above (Defs.' Mot. at 3:26-28):

> The Court finds that the regulatory definition of "destruction or adverse modification" is invalid because it imposes a higher standard for "adverse modification" than the ESA permits. Because the Service's June 17, 2002 biological opinion relied on the invalid regulation, the "adverse modification" finding is in turn invalid and should be remanded to the Service for reconsideration consistent with this opinion.

Plaintiffs argue that defendants' language changes the substance of the Court's Order, substituting a "vague and ambiguous 'higher standard' test" for the Court's more explicit finding that the FWS' definition does not

---

[2] In Gifford Pinchot, the Ninth Circuit found that the existing regulation "would drastically narrow the scope of protection commanded by Congress under the ESA. To define 'destruction or adverse modification' of critical habitat to occur only when there is appreciable diminishment of the value of the critical habitat for both survival and conservation fails to provide protection of habitat when necessary only for species' recovery. The narrowing construction implemented by the regulations is regrettably, but blatantly, contradictory to Congress' express command." 378 F.3d at 1070. In so holding, the Ninth Circuit agreed with the Fifth Circuit's reasoning in Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 441-42 (5th Cir. 2001) and the Tenth Circuit's analogous reasoning in N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1283 (10th Cir. 2001).

comport with the ESA.[3] Plaintiffs instead propose the following changes to the Order:

> The Court finds, *for example*, that *a* proper definition of "destruction or adverse modification" *would be* "a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for either the survival or recovery of a listed species."

Pls.' Br. at 11:13-15.

In Gifford Pinchot, the Ninth Circuit did not prescribe a regulatory definition for the Service to implement; rather, it held that "the regulatory definition of 'adverse modification' gives too little protection to designated critical habitat." In light of Gifford Pinchot, and the Service's expressed intention to revise the regulatory definition in a manner consistent with the decisions of three Courts of Appeals, the Court partially GRANTS defendants' motion to amend the language of its August 3, 2004 Order. It adopts the language proposed by plaintiffs. The paragraph will now read:

> The Court finds, for example, that a proper definition of "destruction or adverse modification" would be "a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for either the survival or recovery of a listed species." The Court hereby VACATES and REMANDS the biological opinion to the Service and orders the Service to reconsider its biological opinion of the CDCA Plan in light of the appropriate standard.

B. Vacatur of the entire biological opinion

Defendants also contend that the Court committed a manifest error of law by vacating the entire June 17, 2002 biological opinion, because only the Service's "destruction or adverse modification" finding was the subject of the Court's decision, while the "jeopardy" finding and the Incidental Take Statement ("ITS") were not addressed. They argue that these sections of the biological opinion are severable from the "adverse modification" findings and should remain effective during the period of re-consultation. For this proposition, defendants rely on the Ninth Circuit's analytical approach in Gifford Pinchot, in which the Court of Appeals treated the "no jeopardy" and "no adverse modification" findings separately.

Plaintiffs argue that the various findings within a biological opinion are not severable because Section 7 of the ESA requires formal consultation before any agency action begins, and thus there can be no "partial"

---

[3] This "higher standard" language appears to be taken from Sierra Club, where the Fifth Circuit held that "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits." Sierra Club, 245 F.3d at 441-42.

consultations. Pls.' Mot. at 10:4-5. In addition, they contend that the Court specifically declined to examine the rest of the biological opinion in its August 3, 2004 Order, and thus defendants are not asking the Court to "amend" the order but rather to decide issues it has not yet reached.

Plaintiffs are correct that the Court has not ruled on the Service's jeopardy finding, and it finds Gifford Pinchot distinguishable in this regard. The Ninth Circuit in Gifford Pinchot reached the jeopardy analysis because the district court in that case examined and upheld six biological opinions.

Here, this Court stated that "[b]ecause of the biological opinion's reliance on an invalid regulation, this Court will not examine it further, except to note that the opinion uses the best available scientific data as discussed in Part B, above." Am. Motorcycle Ass'n at *34.

The Court agrees with defendants that, under circumstances similar to Gifford Pinchot, it might consider jeopardy and adverse modification findings separately. But is impossible to tell from this biological opinion which portions relate solely to adverse modification of critical habitat and which relate to jeopardy to the species. For example, throughout the biological opinion, the Service's conclusions pertain to apparently joint findings of no jeopardy or adverse modification. See, e.g., Biological Opinion at 34 ("[we considered other factors in our analysis of whether the Bureau's guidance and ongoing activities were likely to jeopardize the continued existence of the desert tortoise or adversely modify its critical habitat") ("a specific action may be proposed in the future that could result in a finding of jeopardy or adverse modification of critical habitat"); 60 ("it is our biological opinion that continued implementation of California Desert Conservation Area Plan, as modified by previous amendments, previous consultations on grazing, the proposed . . . bioregional plans, and the interim measures, is not likely to jeopardize the continued existence of the desert tortoise or to destroy or adversely modify its critical habitat"). The adverse modification finding permeates the biological opinion, and thus the Court's Order vacating the opinion necessarily vacates the jeopardy finding as well.

Consequently, defendants' motion to alter or amend the judgment by leaving the jeopardy finding intact is DENIED.

2. Plaintiffs' motion for injunctive relief

Plaintiffs argue that the Court's August 3, 2004 Order did not go far enough. They ask the Court to

issue an injunction ordering the BLM to (1) prohibit all grazing within the Desert Wildlife Management Areas ("DWMAs"); (2) prohibit all vehicular traffic in washes in the two DWMAs in the Northern and Eastern Colorado ("NECO") area; and (3) prohibit all use of vehicles beyond 15 feet from the centerline of designated routes in the five DWMAs in the NECO and Northern and Eastern Mojave ("NEMO") planning areas. Second, plaintiffs ask the Court to "clarify" that its vacatur order also vacates FWS' incidental take statement ("ITS"). Pls.' Br. & Opp'n at 1:16-17. Third, they ask the Court to vacate the portions of the CDCA Plan and the Record of Decision ("ROD") that authorize grazing in the DWMAs, off-highway vehicle ("OHV") traffic in washes in the NECO planning area DWMAs, and vehicle traffic more than 15 feet from the centerline of designated routes in all DWMAs.

A. Injunction regarding grazing and OHV use

Plaintiffs contend that because there has been an adjudication on the merits of two claims, they may now request permanent injunctive relief for these claims "consistent with both [the Court's] Order and the remedies sought in Plaintiffs' initial complaint." Pls.' Reply at 2:17-20; 26-27. They ask the Court to enjoin: (1) all grazing within the DWMAs; (2) all off-road vehicle use off of designated routes, particularly in all washes within the NECO DWMAs; and (3) all off-road vehicle travel beyond 15 feet from the centerline of designated routes in the DWMAs. The adverse impacts of grazing and OHV activities were recognized in the 1994 Recovery Plan for the tortoise, and the 15-foot restriction is discussed in the "Conservation Recommendations" section of the biological opinion.

Defendants oppose plaintiffs' request for injunctive relief on procedural grounds because it fails to comport with the requirements of Rule 59(e) or Local Rule 7-9. Second, they argue that the Court's August 3, 2004 decision found a violation of the APA, not a procedural violation of the ESA, and thus an injunction is not mandatory. Defendants also assert that, to merit an injunction, plaintiffs must "prove that there is a reasonable likelihood of future violations of the ESA; namely, of future harm to the desert tortoise and/or destruction or modification of its critical habitat." Defs.' Opp'n at 5:12-13. They argue that plaintiffs cannot meet this "future harm" standard because the BLM has already prepared an ESA "section 7(d)" analysis, which concludes that "BLM is not making an irreversible or irretrievable commitment of resources that would

foreclose options for the formulation and implementation of reasonable and prudent alternatives by allowing the uses authorized in the CDCA Plan . . . to continue while the Fish and Wildlife Service reconsiders [the] biological opinion . . . per Judge Illston's remand order." Hanson Decl., Ex. 4 at 7.

i. Procedural requirements

Plaintiffs argue that their request for injunctive relief is not governed by Rule 59(e) or Local Rule 7-9, and the Court agrees. A party may seek equitable relief from the Court any time prior to the entry of a final judgment on all claims. Federal Rule of Civil Procedure 54(b) provides that an "order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Here, the August 3, 2004 Order addressed only plaintiffs' first two claims for relief, and it did not address the request for injunctive relief made in the Complaint. See Compl. ¶ 7. There has been no final judgment on all the claims.[4] Thus, the Court has discretion to consider plaintiffs' request for injunctive relief.

ii. Injunctive relief

The traditional test for injunctive relief is actual success on the merits, irreparable injury, and inadequacy of legal remedies. Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1988). A court must balance any competing claims of injury and the effect that injunctive relief would have on the parties and the public interest. In ESA cases, however, this test does not apply, because Congress has restricted the courts' traditional equitable discretion to balance the parties' competing interests when faced with a violation of section 7 of the ESA. See TVA v. Hill, 437 U.S. 153, 173, 98 S. Ct. 2279 (1978); Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987). In TVA v. Hill, the Supreme Court noted that the "language, history, and structure" of the ESA "indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." Hill, 437 U.S. at 174. "In Congress's view, projects that jeopardized the continued existence of endangered species threatened incalculable harm: accordingly, it decided that the balance of hardships and the

[4] The Court's finding that the August 3, 2004 Order is immediately appealable as a final order does not alter this conclusion, because that Order is not a final judgment on the merits of all claims.

public interest tip heavily in favor of endangered species." Marsh, 816 F.2d at 1383, citing Hill, 437 U.S. at 187-88.

Defendants contend that the Court is not required to issue an injunction in this case because it found only a violation of the APA and not a violation of the ESA. The Ninth Circuit has held that when either a substantive or a substantial procedural violation of the ESA occurs, the "remedy must be an injunction of the [federal] project pending compliance with the ESA." Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985); Marsh, 816 F.2d at 1384 ("[we conclude that the Sierra Club is entitled to injunctive relief if the COE violated a substantive or procedural provision of the ESA"). This is so because "if a project is allowed to proceed without substantial compliance with the procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." Peterson, 753 F.2d at 764. Plaintiffs argue that the APA violation here *is* a violation of the ESA ("the reviewing court shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The Court agrees, and finds that Thomas and Marsh govern this case.

The parties also dispute whether Thomas and Marsh make an injunction mandatory pending compliance with the ESA, or whether plaintiffs must make some showing of future harm to the tortoise. Defendants cite National Wildlife Federation v. Burlington N. R.R., 23 F.3d 1508 (9th Cir. 1994), which involved a preliminary injunction to prevent a "taking" of grizzly bears in violation of ESA section 9.[5] In Burlington, the Ninth Circuit observed that: "[f]ederal courts are not obligated to grant an injunction for every violation of the law. The plaintiff must make a showing that a violation of the ESA is at least likely in the future." Id. at 1511. Plaintiffs argue that such a showing is not required, but if it is, they put forth declarations from two scientists stating that grazing and OHV use are "virtually certain to harm Desert Tortoises" and likely to "diminish the tortoise's chances of recovery." Stewart Decl. ¶ 8; Avery Decl. ¶ 13. Defendants submit a "section 7(d) analysis," which they contend demonstrates that plaintiffs cannot make this showing.

The Court finds that until the Service issues a biological opinion that comports with the ESA, there is an ongoing violation of the Act. See Natural Resources Defense Council v. Evans, 279 F. Supp. 2d 1129,

[5] Defendant-intervenors Desert Vipers Motorcycle Club join in defendants' opposition, also pointing out that there must be some showing that "a violation of the ESA is at least likely in the future." NWF v. Burlington Northern, 23 F.3d at 1511.

1189 (N.D. Cal. 2003); Greenpeace v. Mineta, 122 F. Supp. 2d 1123, 1137 (D. Haw. 2000). Thus, the Court concludes that it must issue some form of an injunction to protect the desert tortoise pending re-consultation. However, the scope of that injunction must be tailored to the likelihood of future harm to the tortoise. Consequently, the Court considers the parties' submissions regarding the effects of grazing and OHV use as proposed under the NECO and NEMO amendments.[6]

a. Livestock grazing

At oral argument, the Court asked the parties to describe the status quo in the CDCA. According to the parties, grazing is taking place only in one of the seven grazing allotments in the NEMO and NECO DWMAs, the "Lazy Daisy" allotment, 235,529 acres of which are in the 874,843-acre Chemehuevi DWMA. Hansen Decl. ¶ 5. There are 110 head of cattle in this allotment. Id. The BLM has stated that six of the seven grazing allotments in the NEMO and NECO DWMAs are inactive and five of these are in the process of being cancelled or relinquished. Plaintiffs now request an injunction only for the grazing in the Lazy Daisy allotment. Pls.' Reply at 15:11-15.

Defendants characterize the Lazy Daisy allotment as "lightly stocked" with cattle, and point out that grazing does not take place in portion of the Lazy Daisy allotment in the DWMA during summer months or from March 15 to June 15 if forage production is less than 230 pounds/acre. Hansen Decl. ¶ 5. Their section 7(d) declarant, Linda Hansen, concludes that "[t]he site-level constituent elements of critical habitat for nesting, foraging, sheltering, and dispersal will be maintained within the short-term, pending completion of consultation." Id.

Plaintiffs submit the declaration of Dr. Harold W. Avery, who opines that grazing by 100 cattle in the

[6] Contrary to defendants' assertions, their section 7(d) analysis does not dispose of the issue of future harm to the tortoise. Section 7(d) provides: "[a]fter initiation of consultation . . . the Federal 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 subsection (a)(2)." 16 U.S.C. § 1536(d). The Court agrees with plaintiffs that ESA section 7(d) is not a substitute for the consultation process. The Ninth Circuit has observed: "section 7(d) does not amend section 7(a) to read that a comprehensive biological opinion is not required before the initiation of agency action so long as there is no irreversible or irretrievable commitment of resources. Rather, section 7(d) clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process." Conner v. Burford, 848 F.2d 1441, 1455 n. 34 (9th Cir. 1988). Thus, defendants' section 7(d) analysis is not controlling, and it is not an adequate substitute for a new biological opinion.

Lazy Daisy allotment will have "significant concentrated impacts on tortoises and their habitat," including competition for forage between tortoises and cattle in spring, probability of trampling of tortoise burrows and possibility of direct trampling of tortoises. Avery Decl. ¶ 6. He concludes that "continued cattle grazing in tortoise critical habitat . . . likely will harm the tortoise and its critical habitat and diminish the tortoise's chances of recovery," and "in order to best promote the tortoise's chances of recovery, it is essential that all cattle be removed from areas of tortoise critical habitat." Avery Decl. ¶ 13. However, Dr. Avery incorrectly states that the grazing impacts "may be significantly deleterious . . . [in the NECO area] because approximately 75 percent of the Lazy Daisy grazing allotment is within the Chemehuevi DWMA, and the Chemehuevi DWMA is the only DWMA in the NECO." Id. at ¶ 7. In fact, the Chuckwalla DWMA is also in the NECO planning area, and no grazing is allowed in the Chuckwalla DWMA..

Thus, given the cancellation and relinquishment of grazing in most of the allotments, grazing by 110 head of cattle is presently allowed on 235,529 acres of the 874,843-acre Chemehuevi DWMA, and on none on the 820,077 acres of the Chuckwalla DWMA. The Court finds that an injunction of all grazing in the Lazy Daisy allotment is not required to adequately protect the tortoise pending re-issuance of a new biological opinion.

Accordingly, it DENIES plaintiffs' request for an injunction prohibiting all grazing in the NECO area.

b. OHV use in the washes

Plaintiffs ask the Court to order the BLM to prohibit all vehicle use in any washes within the NECO DWMAs. Under the NECO amendment, OHV use in washes in the NECO planning area will be allowed on 218,711 acres of the 874,843 in the Chemehuevi DWMA, approximately 25%, and 352,633 of the 820,077 acres of the Chuckwalla DWMA, or 43%. Hansen Decl. ¶ 6. Apparently, this OHV use is substantially reduced from that allowed under the CDCA Plan for the last 20 years, when 66% and 58% of the washes were open to vehicles in the Chemehuevi and Chuckwalla DWMAs, respectively. Id.

Defendants consider this vehicle use to be "low" and state that "[t]he effects of desert wash vehicle travel on the constituent elements of critical habitat (nesting, foraging, sheltering, or dispersal) are minimal from a habitat perspective." Id.; Defs.' Opp'n at 7:7-9. Plaintiffs submit the declaration of Dr. Glenn R. Stewart,

who describes the "inordinate amount of time" tortoises spend in washes, cites research to this effect, and opines that "it is very likely that continued OHV use within washes of DWMAs designated in the NECO bioregion . . . is significantly harming and will significantly harm the Desert Tortoise's recovery both in the short and long term." Stewart Decl. ¶¶ 12, 16.

The Court is most concerned with the "actual situation on the ground," see Defs.' Opp'n at 6:20, and finds that OHV use must be enjoined in the NECO planning area during the period of re-consultation. Defendants state that the seasons of highest vehicular use, fall and winter, are "outside the above-ground portion of the tortoise life cycle." Hansen Decl. ¶ 6a. However, as plaintiffs point out, Hansen does not offer any support for this assertion, and the weight of scientific authority suggests that adult tortoises forage during the fall and hatchlings and yearlings emerge during the late fall and winter months. Based on the parties' submissions, the Court finds that plaintiffs have shown that OHV use on 25% of the Chemehuevi DWMA and 43% of the Chuckwalla DWMA may threaten the desert tortoise during the period of re-consultation.

The Court hereby ENJOINS OHV use in the NECO planning area pending re-issuance of a new biological opinion.

c. OHV use on designated routes

Under the NECO and NEMO plans, stopping or parking off designated routes is allowed within the 100 feet of the centerline in the DWMAs. Plaintiffs seek to prohibit all vehicle use more than 15 feet from the centerline. The source of this 15-feet figure is the "Conservation Recommendations" in the biological opinion, and plaintiffs have simply argued that they "[f]ind[] the Conservation Recommendation reasonable."

The Court declines to order this reduction from 100 feet to 15 feet. It is not persuaded that the "reasonableness" of the Conservation Recommendation should dictate the scope of the injunction. Moreover, the NECO and NEMO amendments reduce this distance to 100 feet from 300 feet, and thus constitute an improvement over the status quo.

Consequently, plaintiffs' motion for an injunction prohibiting stopping or parking more than 15 feet from the centerline of designated routes in the DWMAs is DENIED.

B. Vacatur of incidental take statement

Plaintiffs also ask the Court to vacate the Incidental Take Statement ("ITS") on grounds that an ITS is issued "after consultation," and thus cannot stand if the section 7 consultation process is not yet complete. 16 U.S.C. § 1536(b)(4). Plaintiffs "believe the Court's existing order for FWS to vacate the BO also vacates the ITS," and ask the Court for this vacatur "to eliminate any potential confusion regarding the status of the ITS." Pls.' Br. & Opp'n at 8:7-10.

Defendants contend that the ITS is severable and should remain in effect. They argue that the "adverse modification" analysis is "fundamentally different" from the taking analysis under the ESA. Defs.' Opp'n at 10:23. To constitute take (defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect), a habitat modification must be "significant, must significantly impair essential behavioral patterns, and must result in actual injury to a protected wildlife species." Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1238 (9th Cir. 2001).

The ITS appears to be two pages at the end of the biological opinion. See Biological Opinion at 61-62. Neither party cites authority expressly holding that an ITS is entirely severable or non-severable; defendants assert that Gifford Pinchot stands for severability of all parts of the biological opinion, and plaintiffs maintain that the ESA contemplates issuance of an ITS only after consultation is complete. However, defendants are correct that the "taking" analysis is different from the jeopardy and adverse modification findings, and Gifford Pinchot suggests that the Court should assess the ITS separately from the rest of the biological opinion. Moreover, the Court did not reach the issue of the adequacy of the ITS in its August 3, 2004 Order, and it did not invalidate the biological opinion on that ground.

Consequently, the Court DENIES plaintiffs' motion to vacate the ITS and makes no decision regarding its validity.

C. Vacatur of CDCA Plan

Plaintiffs ask the Court to order the BLM to vacate those portions of the CDCA Plan that directly contradict the 1994 Tortoise Recovery Plan and the biological opinion's Conservation Recommendations to prevent harm to the tortoise pending the agencies' compliance with the Court's Order. Plaintiffs also allege that

the agencies are biased toward preserving the existing CDCA Plan decisions regarding grazing and OHV use because the section 7(d) analysis "clearly shows that the agency's mind is made up that the CDCA Plan's allowance of grazing in DWMAs and OHV use in undesignated wash routes within DWMAs amounts to 'beneficial management for the desert tortoise and its habitat.'" Pls.' Reply at 9:18-20. Defendants argue that plaintiffs' request is improper because the CDCA Plan and amendments were not before the Court on summary judgment, and the only authority for plaintiffs' significant request is the Court's footnote: "[f]ailing to vacate the biological opinion, thus allowing the CDCA Plan to go forward *pendente lite*, might have irreversible consequences for the desert tortoise." August 3, 2004 Order at 16 n. 8.

Because the CDCA Plan itself and the ROD were not before the Court on summary judgment, the August 3, 2004 Order does not reach them. The Court DENIES plaintiffs' request to vacate the CDCA Plan and the ROD.

///

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby PARTIALLY GRANTS and PARTIALLY DENIES defendants' motion to alter or amend the judgment, and PARTIALLY GRANTS and PARTIALLY DENIES plaintiffs' motion for injunctive relief. The Court hereby ENJOINS all OHV use in the washes of the NECO planning area pending issuance of a new biological opinion. [Docket # 100, 105]

Dated: December 30, 2004

S/Susan Illston
SUSAN ILLSTON
United States District Judge