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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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The Wilderness Society, et al.,

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No. 09-CV-8010-PCT-PGR

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Plaintiffs,

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11

vs.

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ORDER

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United States Bureau of Land
Management, et al.,

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Defendants.

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Before the Court are the parties' motions for summary judgment. (Docs. 51, 63.)

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Plaintiffs, The Wilderness Society and other environmental groups, challenge Resource

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Management Plans ("RMPs") drafted by the Bureau of Land Management ("BLM") for the

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Grand Canyon-Parashant and Vermillion Cliffs National Monuments, an area encompassing

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1.3 million acres in the Arizona Strip District in northern Arizona.¹

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Plaintiffs filed an amended complaint on May 1, 2009. (Doc. 14.) BLM filed its

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answer on May 15, 2009. (Doc. 18.) Plaintiffs filed their motion for summary judgment on

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September 15, 2010. (Doc. 51.) BLM filed a cross-motion for summary judgment on

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December 3, 2010. (Doc. 63.) Oral argument was held September 28, 2011. Based on a

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review of the record and pleadings, Plaintiffs' motion for summary judgment is denied and

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BLM's cross-motion for summary judgment is granted.

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¹ A companion case, *Center for Biological Diversity v. BLM*, 09-CV-8011-PCT-

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PGR, raises challenges under the Endangered Species Act and the National Environmental Policy Act.

1 **I. BACKGROUND**

2 The Grand Canyon-Parashant and Vermilion Cliffs National Monuments were
3 established by President Clinton in 2000 pursuant to the Antiquities Act. *See* Proclamation
4 7265, Grand Canyon-Parashant, 65 Fed. Reg. 2825 (January 11, 2000); Proclamation 7374,
5 Vermilion Cliffs, 65 Fed. Reg. 69227 (November 9, 2000). In accordance with Federal Land
6 Policy and Management Act (“FLPMA”), BLM engaged in a land use planning process for
7 the purpose of making management decisions regarding the Monument lands under its
8 jurisdiction. BLM issued a Draft Resource Management Plan/Draft Environmental Impact
9 Statement (“DEIS”) for public comment in November 2005. (AR 58946.1.)² Following the
10 review of comments on the DEIS, BLM prepared a Proposed Resource Management
11 Plan/Final EIS (“FEIS”), which was issued in January 2007. In February 2008, after
12 additional public comment, BLM issued a Record of Decision (“ROD”) and RMPs for each
13 of the Monuments. AR 62315, 62585. The RMPs contain overall direction for the
14 management of the Monuments. AR 62325–27, 62596–97. They also implement BLM’s
15 decisions regarding the designation of routes for off-highway vehicle (“OHV”) travel within
16 the Monuments. AR 62327–28, 62597–99.

17 Plaintiffs allege that BLM violated the Proclamations establishing the Monuments,
18 the FLPMA and related regulations, the National Environmental Policy Act (“NEPA”), and
19 the National Historic Preservation Act (“NHPA”). Specifically, Plaintiffs claim that the
20 RMPs allow vehicle use and livestock grazing that will harm Monument objects and that the
21 BLM’s proposed mitigation efforts are inadequate to address those harms. Plaintiffs also
22 contend that BLM’s road designation process ignored applicable regulations and failed to
23 apply each of the required minimization criteria, and as a result the RMPs impermissibly
24 favor motorized use. Plaintiffs further assert that BLM failed to perform an adequate
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27 ² “AR” refers to BLM’s administrative record filed with the Court on June 3, 2010.
28 (Doc. 43.)

1 inventory of historic properties prior to making travel-management decisions for the
2 Monuments. Finally, Plaintiffs argue that BLM, relying on the so-called “Utah Wilderness
3 Settlement,” failed to consider the alternative of implementing Wilderness-level protections
4 for the Monuments.

5 BLM counters that it complied with the Proclamations and NEPA by managing the
6 Monuments in a manner that protects management resources, by analyzing mitigation to
7 prevent harm to such resources, and by prohibiting mechanized vehicles from traveling off
8 road. BLM argues that its satisfied FLPMA and NEPA with respect to management of lands
9 with wilderness characteristics by considering a range of alternatives for the protection of
10 such lands and selecting an alternative that maintains wilderness characteristics. Finally, it
11 contends that it complied with NHPA by conducting a reasonable inventory of cultural and
12 historic resources.

13 **II. STATUTORY FRAMEWORK**

14 **A. FLPMA**

15 BLM’s land management authority is governed by the FLPMA, which directs the
16 agency to manage public lands for multiple uses and sustained yield. The FLPMA declares
17 that “public lands be managed in a manner that will protect the quality of scientific, scenic,
18 historical, ecological, environmental, air and atmospheric, water resource, and archeological
19 values; that, where appropriate, will preserve and protect certain public lands in their natural
20 condition; that will provide food and habitat for fish and wildlife and domestic animals; and
21 that will provide for outdoor recreation and human occupancy and use.” 43 U.S.C. §
22 1701(a)(8). “In the FLPMA, Congress created a broad statutory framework setting forth the
23 goals and management requirements that it envisioned for public lands.” *Gardner v. BLM*,
24 638 F.3d 1217, 1222 (9th Cir. 2011).

25 To meet the directives of the FLPMA, BLM creates an RMP, which “describes, for
26 a particular area, allowable uses, goals for future condition of the land, and specific next
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1 steps.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004). Because the FLPMA
2 “does not prescribe discrete agency action that must be taken” in a particular case, *Gardner*,
3 638 F.3d at 1222, the RMP does not include a decision whether to undertake or approve any
4 specific action.

5 **B. NEPA**

6 NEPA requires federal agencies to consider the consequences of their actions on the
7 environment. NEPA’s mandate is “essentially procedural. . . . It is to insure a fully informed
8 and well considered decision.” *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S.
9 519, 558 (1978). “NEPA itself does not mandate particular results, but simply prescribes the
10 necessary process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).
11 Its goals are to ensure the agency will have detailed information on significant environmental
12 impacts when it makes its decisions and guarantee that this information will be available to
13 a larger audience. *Id.* at 349.

14 Under NEPA, an environmental impact statement (“EIS”) is required for “major
15 federal actions significantly affecting the quality of the human environment.” 42 U.S.C. §
16 4332(c). “A properly prepared EIS ensures that federal agencies have sufficiently detailed
17 information to decide whether to proceed with an action in light of potential environmental
18 consequences.” *Oregon Environmental Counsel v. Kunzman*, 817 F.2d 484, 492 (9th Cir.
19 1986).

20 When the adequacy of an EIS is challenged in court, the relevant inquiry is whether
21 the EIS takes a “hard look” at all potentially significant environmental effects. “The only role
22 for a court is to insure that the agency has taken a ‘hard look’ at environmental
23 consequences; it cannot interject itself within the area of discretion of the executive as to the
24 choice of the action to be taken.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

25 A challenge to an EIS evaluation of environmental effects is subject to deferential
26 review, with due consideration given to the agency’s expertise. *Salmon River Concerned*
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1 *Citizens v. Robertson*, 32 F.3d 1346 (9th Cir. 1994). A court should apply a “rule of reason”
2 and determine only whether the EIS “contains a reasonably thorough discussion of the
3 significant aspects of the probable environmental consequences.” *Half Moon Bay*
4 *Fishermans’ Ass’n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988); *see Or. Env’tl. Council*,
5 817 F.2d at 492 (explaining that “reviewing court may not ‘fly speck’ and EIS and hold it
6 insufficient on the basis of inconsequential, technical deficiencies.”). A court may not
7 substitute its judgment for that of the agency. *See Kleppe*, 427 U.S. at 410.

8 C. NHPA

9 The National Historic Preservation Act requires federal agencies to take into account
10 the effect of an undertaking on sites or structures that are included in or eligible for inclusion
11 in the National Register of Historic Places. 16 U.S.C. § 470f. Like NEPA, “NHPA is a ‘stop,
12 look, and listen’ provision that requires each federal agency to consider the effects of its
13 programs.” *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).
14 NHPA requires an agency to make a reasonable and good faith effort to identify historic
15 properties, assess the effects of the undertaking, and avoid or mitigate any adverse effects.
16 *Id.* The agency must confer with the State Historic Preservation Officer (“SHPO”) and seek
17 the approval of the Advisory Council on Historic Preservation.

18 III. STANDARD OF REVIEW

19 A motion for summary judgment must be granted when there is no genuine issue as
20 to any material fact and . . . the movant is entitled to judgment as a matter of law. Fed. R.
21 Civ. P. 56(c). Judicial review of final agency actions is governed by the Administrative
22 Procedure Act (“APA”), 5 U.S.C. § 701. *See Pyramid Lake Paiute Tribe of Indians v. U.S.*
23 *Dep’t of the Navy*, 898 F.2d 1410, 1413 (9th Cir. 1990). The court shall set aside any agency
24 decision that it finds “arbitrary, capricious, an abuse of discretion, or otherwise not in
25 accordance with law.” 5 U.S.C. § 706(2)(A).

26 The court must determine whether the agency decision “was based on a consideration
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1 of the relevant factors and whether there has been a clear error of judgment.” *Citizens to*
2 *Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). An action is arbitrary and
3 capricious if “the agency has relied on factors which Congress has not intended it to consider,
4 entirely failed to consider an important aspect of the problem, offered an explanation for its
5 decision that runs counter to the evidence before the agency, or is so implausible that it could
6 not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle*
7 *Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A court may not
8 substitute its judgment for that of the agency or merely determine that it would have decided
9 an issue differently. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989).
10 Although the arbitrary and capricious standard “is narrow and presumes the agency action
11 is valid . . . it does not shield agency action from a ‘thorough, probing, in-depth review.’”
12 *Northern Spotted Owl v. Hodel*, 716 F.Supp. 479, 481–82 (W.D.Wash. 1988) (quoting
13 *Overton Park*, 401 U.S. at 415).

14 **IV. DISCUSSION**

15 **A. Proclamations: Protection of Monuments objects**

16 Pursuant to the Proclamations, BLM is mandated to “protect” Monument objects. *See*
17 65 Fed. Reg. 2825 (Grand Canyon-Parashant); 65 Fed. Reg. 69227 (Vermillion Cliffs). The
18 Proclamations provide that, “The Secretary of the Interior shall manage the monument
19 through the Bureau of Land Management, pursuant to applicable legal authorities, to
20 implement the purposes of this proclamation.” 65 Fed. Reg. at 69229; *see* 65 Fed. Reg. at
21 2828.

22 As noted above, BLM manages federal land under the authority of the FLPMA. *See*
23 *Western Watersheds Project v. Bureau of Land Management*, 629 F.Supp.2d 951, 967
24 (D.Ariz. 2009); *In re Montana Wilderness Association*, --- F.Supp.2d ----, 2011 WL 3489699
25 at *3 (D. Mont. 2011). FLPMA states that BLM “shall manage the public lands under
26 principles of multiple use and sustained yield . . . except that where a tract of such public land
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1 has been dedicated to specific uses according to any other provisions of law it shall be
2 managed in accordance with such law.” 43 U.S.C. § 1732(a). The parties agree that BLM
3 was required to abide by the “other laws” set forth in the Proclamations, which mandate the
4 protection of Monument objects. *See* AR 62340. Beyond directing BLM manage the
5 Monuments pursuant to applicable authority, the Proclamations do not dictate a particular
6 approach to protecting Monument objects. As set forth below, the Court finds that BLM’s
7 management decisions did not violate the Proclamations.

8 Chapter 4 of the FEIS sets forth BLM’s analysis of the impacts of travel, vegetation
9 and fire management, recreation, and livestock grazing on Monument resources, including
10 air, water, soils, geology and paleontology, vegetation, fish and wildlife, special status
11 species, wild burros, cultural and visual resources, and wilderness characteristics. AR
12 60845–61233. The RMPs include management actions designed to protect these resources.
13 *See* AR 62373–74, 62665–66 (geology and paleontology), 62407–08, 62716–18 (cultural
14 resources), and 62388–406, 62687–715 (fish and wildlife).

15 The RMPs restrict allowable uses in the Monuments, particularly with respect to
16 transportation, grazing, and recreation. AR 62344–46, 62632–35. The RMPs close 89,598
17 acres in Vermillion Cliffs to motorized and mechanized vehicle use, and 285,647 acres in
18 Grand Canyon-Parashant. AR 62438–39, 62748–50. They also close 360 miles of routes that
19 were in use prior to the issuance of the RMPs. *See* AR 60576, 62439, 62749. This figure
20 represents approximately 18 per cent of the existing miles of routes in the Monument.

21 The Court finds that the RMPs’ management actions with respect to livestock grazing
22 adequately protect Monument resources. The Proclamations specifically allow continued
23 grazing. *See* 65 Fed. Reg. 2828. The RMPs do not designate any new grazing allotments, AR
24 62419, 62729, and make unavailable approximately 34,000 acres in Parashant that were
25 previously available for grazing. AR 60320, 62729. The RMPs also establish new standards
26 and management actions to protect rangeland health. *See* AR 62419–21, 62729–33.

1 Moreover, the RMPs do not authorize any specific grazing activity. Instead, in order to graze
2 livestock, ranchers must obtain permits from BLM, which are subject to additional regulatory
3 review. AR 60779–81.

4 Plaintiffs assert that the RMPs travel management decisions will result in “dramatic
5 and fundamental impacts” to Monument objects, including historical and archeological
6 resources. While the RMPs do not open new routes that would provide greater access to such
7 resources, BLM acknowledges that its travel management decisions would have a
8 “moderate” impact on archeological and historical objects, AR 61035; that is, the adverse
9 impact would be “measurable and perceptible” and “would change one or more character-
10 defining features” but not “diminish the integrity of the resource.” AR 61019. Impacts on
11 geological and paleontological resources would be “minor” (or “hardly perceptible”) to
12 “moderate.” AR 60906, 60899. Plaintiffs argue that these effects are not compatible with the
13 Proclamations’ mandate to protect Monument objects.

14 In drafting the RMPs, BLM explained that “[g]iven the broad mandate in the
15 Proclamations and the vast Monument lands that were placed under its management, [it] did
16 not interpret the Proclamations and its obligations under the [FLPMA] as requiring it to
17 prepare RMPs containing detailed plans for every single object in the Monuments.” (Doc.
18 73 at 3.) Instead, BLM adopted a “holistic” approach to managing the Monuments, with
19 management “goals that recognize important relationships and interdependencies among the
20 listed objects and the natural and cultural districts of which they are a part.” AR 61551.

21 The Court finds that this approach was reasonable. The Monuments consist of more
22 than a million acres of remote land which BLM is charged with managing under the
23 Proclamations and FLPMA. There is no controlling legal authority mandating that BLM
24 carry out its responsibilities in a particular way. Instead, the Court finds persuasive the
25 analysis offered by the district court in *Montana Wilderness Society*. 2011 WL 3489699. At
26 issue there were challenges to RMPs for the Upper Missouri Breaks National Monument in
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1 Montana. BLM had adopted a management approach that sought to “reconcile” the
2 requirements of the Proclamations and FLPMA’s multiple-use standard. *Id.* at *3. The court
3 paid deference to BLM’s interpretation of its responsibilities and concluded that “BLM did
4 not denigrate the Proclamation by choosing also to abide by multiple use principles. . . . The
5 interpretation that providing for multiple use was required so long as Monument objects were
6 protected was reasonable.” *Id.*

7 Finally, Plaintiffs assert that BLM was required to perform an “impairment analysis
8 to determine whether the RMPs will run afoul of the Proclamations.” (Doc. 52 at 9.)
9 Plaintiffs argue that this “substantive duty” to protect Monument objects represents a second
10 analytical step, in addition to the procedural requirements of NEPA. (*Id.*, n.5.) The Court is
11 unpersuaded. As previously noted, the Proclamations direct BLM to manage the Monuments
12 under “applicable legal authorities,” which for BLM is the FLPMA. They do not dictate that
13 BLM follow a particular course in fulfilling its duty to protect Monument objects.³

14 The Court concludes that BLM fulfilled its obligations under the Proclamations and
15 FLPMA by evaluating the potential impacts of the RMPs on Monument resources and
16 values. BLM took significant steps to reduce impacts of vehicle travel and grazing, the two
17 uses that Plaintiffs claim will harm Monument objects. Therefore, the RMPs establish a
18 management framework that fulfills the Proclamations’ mandate to protect Monument
19 objects.

20 **B. NEPA**

21 Under NEPA, an EIS must discuss “any adverse environmental effects which cannot
22 be avoided should the proposal be implemented.” *Robertson v. Methow Valley Citizens*
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24 ³ As BLM notes, the Proclamation establishing Grand Canyon-Parashant
25 Monument directed that the National Park Service (“NPS”) manage portions of the
26 Monument. 65 Fed. Reg. at 2828. Unlike BLM, NPS has a substantive duty under 16 U.S.C.
27 § 1 “to conserve the scenery and the natural and historic objects and the wild life therein and
28 to provide for the enjoyment of the same in such manner and by such means as will leave
them unimpaired for the enjoyment of future generations.”

1 *Council*, 490 U.S. 332, 351–52 (1989). Thus, an EIS needs to include “a reasonably complete
2 discussion of possible mitigation measures.” *Id.* at 352. NEPA does not contain, however,
3 “a substantive requirement that a complete mitigation plan be actually formulated and
4 adopted.” *Id.* Such a requirement “would be inconsistent with NEPA’s reliance on procedural
5 mechanisms.” *Id.* at 353.

6 A mitigation plan “need not be legally enforceable, funded or even in final form to
7 comply with NEPA’s procedural requirements.” *National Parks & Conservation Ass’n v.*
8 *United States Dep’t of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000). Instead, a court “need
9 only be satisfied that the agency took the requisite ‘hard look’ at the possible mitigating
10 measures. *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380
11 (9th Cir. 1998). However, a “perfunctory description” is not adequate to satisfy NEPA’s
12 requirements, *id.*, and a “mere listing” of mitigating measures, without supporting analytical
13 data, is likewise inadequate, *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir.
14 1998).

15 In *Methow Valley*, the Supreme Court analyzed the adequacy of an EIS that examined
16 the environmental impact of a proposed ski resort on National Forest land. 490 U.S. 332. The
17 EIS stated that the proposed project would not have a measurable effect on existing air
18 quality, but that the off-site development of private land would have a significant effect. The
19 EIS then identified potential actions that could be taken by county governments to mitigate
20 those adverse impacts, including the development of an air-quality management plan. The
21 Ninth Circuit Court of Appeals held that the EIS was inadequate because the effectiveness
22 of the mitigation measures had not been assessed and the measures themselves had yet to be
23 developed. The Supreme Court reversed. *Id.* at 353. While stating that an EIS without a
24 “reasonably complete discussion of possible mitigation measures would undermine the
25 ‘action-forcing’ function of NEPA,” the Court explained that “[t]here is a fundamental
26 distinction . . . between a requirement that mitigation be discussed in sufficient detail to
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1 ensure that environmental consequences have been fairly evaluated, on the one hand, and a
2 substantive requirement that a complete mitigation plan be actually formulated and adopted,
3 on the other.” *Id.* at 352. The Court concluded that, because the EIS predicted that the on-site
4 environmental impacts would be minimal, the proposed measures “cannot be deemed overly
5 vague or underdeveloped.” *Id.* at 358.

6 As the Ninth Circuit noted in *Okanogan Highlands Alliance v. Williams*, 236 F.3d
7 468, 473 (9th Cir. 2000), the difference between adequate and inadequate mitigation
8 discussions “appears to be one of degree.” For example, in *Cuddy Mountain* the court of
9 appeals rejected an EIS because it appeared that “the Forest Service *did not even consider*
10 mitigating measures for the creeks actually affected by the [timber] sale.” 137 F.3d at 1381
11 (emphasis added). By contrast, a review of the EIS at issue in *Okanogan* “suggest[ed] that
12 the Forest Service *did* consider and take a ‘hard look’ at the environmental effects and
13 mitigating measures,” notwithstanding the fact “that the mitigating measures are described
14 in general terms and rely on general processes, not on specific substantive requirements.” 236
15 F.3d at 473. The court concluded that, “Because the actual adverse effects are uncertain, and
16 the EIS considered extensively the *potential* effects and mitigation processes . . . the
17 discussion of mitigating measures in the EIS is adequate.” *Id.* The court explained that a
18 “mitigation plan ‘need not be legally enforceable, funded or even in final form to comply
19 with NEPA’s procedural requirements.’” *Id.* (quoting *National Parks & Conservation Ass’n*
20 *v. United States Dep’t of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000)).

21 In *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of*
22 *Interior*, 588 F.3d 718, 727 (9th Cir. 2009), the court reiterated that “NEPA, of course, does
23 not require that these harms actually be mitigated.” The court cautioned, however, that “[a]n
24 essential component of a reasonably complete mitigation discussion is an assessment of
25 whether the proposed mitigation measures can be effective. A mitigation discussion without
26 at least *some* evaluation of effectiveness is useless in making that determination.” *Id.*

1 Plaintiffs argue that BLM’s mitigation measures are not sufficiently developed and
2 that the agency may not rely upon an “adaptive mitigation” approach to satisfy NEPA. The
3 Court disagrees.

4 First, as BLM notes, with the exception of the route designations, the RMPs are
5 “general planning documents” which establish a framework for future actions but do not
6 authorize any specific activities. *See* AR 62325–28.⁴ In similar circumstances, courts have
7 consistently accepted a programmatic approaches to mitigation. *See Friends of Yosemite*
8 *Valley v. Norton*, 348 F.3d 789, 800–01 (9th Cir. 2003) (programmatic EIS prepared in
9 conjunction with creation of a land management plan for Yosemite was sufficient at the
10 implementation stage and provided guidelines for future actions); *Northern Alaska Env’tl. Ctr.*
11 *v. Lujan*, 961 F.2d 886 (9th Cir. 1992) (programmatic EIS prepared in conjunction with
12 approval of mining in Alaskan parks was adequate); *see also Jayne v. Rey*, --- F.Supp.2d ----,
13 2011 WL 337941, at *13 (D.Idaho January 29, 2011); *Western Organization of Resource*
14 *Councils v. Bureau of Land Management*, 591 F.Supp.2d 1206, 1240 (D.Wyo. 2008);
15 *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F.Supp.2d 1059, 1085–86
16 (N.D.Cal. 2007). As the Ninth Circuit explained in *Northern Alaska Environmental Center*:

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18 In *California v. Block*, [690 F.2d 753 (9th Cir. 1982)], we were also
19 confronted with the contention that a federal agency had failed to conduct an
20 adequate study of all the issues that should be considered under NEPA in
21 evaluating the first stage of a federal project. That project required additional
22 studies before any further action would be taken that had an impact on the
environment. In *Block* we held that in considering the adequacy of a largely
programmatic EIS for a large scale, multi-step project, detailed analysis should
be deferred until a “concrete development proposal crystallizes the dimensions
of a project’s probable environmental consequences.” We announced that when

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24 ⁴ BLM considered five alternatives and chose Alternative E, which it
25 “considered . . . to be the environmentally preferable alternative when taking into
26 consideration the human (social and economic) environment as well as the natural
27 environment” and “best meets . . . NEPA goals for the future management of the
28 Monument.” AR 62324. BLM explained that its preferred alternative provides “overall
direction for management of all resources on BLM-administered land in the Monument.” AR
62325.

1 a programmatic EIS is prepared, “site-specific impacts need not be fully
2 evaluated until a ‘critical decision’ has been made to act on site development.”

3 961 F.2d at 890–91 (interior citations omitted).

4 BLM argues that the use of monitoring and adaptive management allow it the
5 flexibility to address impacts at the time specific actions are implemented. Recognizing the
6 validity of this principle, courts have found that adaptive mitigation is permissible under
7 NEPA. *See Theodore Roosevelt Cons. P’ship v. Salazar* (“TRCP”), 616 F.3d 497, 515–17
8 (D.C. Cir. 2010) (upholding BLM’s utilization of an adaptive management plan with respect
9 to the approval of natural gas project); *see Western Watersheds Project v. Bureau of Land*
10 *Management*, No. 3:11-cv-00053-HDM-VPC, 2011 WL 1630789, *3 (D.Nev. April 28,
11 2011) (“NEPA specifically allows agencies to utilize adaptive management plans that . . .
12 monitor the real environmental effects of a project and allow the BLM to adapt its mitigation
13 measures in response to the trends observed.”); *Defenders of Wildlife v. Salazar*, 698
14 F.Supp.2d 141, 149 (D.D.C. 2010) (rejecting argument that adaptive mitigation strategy
15 constituted a “plan to make a plan” and was not a reasonably complete discussion of
16 mitigation). As the court explained in *TRCP*:

17 The procedural requirements of NEPA do not force agencies to make detailed,
18 unchangeable mitigation plans for long-term development projects. Through
19 the adaptive management plan, the Bureau plans to monitor the real effects of
20 the development it authorizes, and adapt its mitigation measures to specific
21 drilling proposals in response to trends observed. Allowing adaptable
22 mitigation measures is a responsible decision in light of the inherent
23 uncertainty of environmental impacts, not a violation of NEPA. It is certainly
24 not arbitrary or capricious.

25 *TRCP*, 616 F.3d at 517; *see Western Organization of Resource Councils v. Bureau of Land*
26 *Management*, 591 F.Supp.2d at 1240 (“The programmatic EIS and ROD at issue in this case
27 recognize that the process is not static and that it suffers from a certain amount of uncertainty
28 and imperfect predictive abilities. These items also suggest that the approach adopted in this
case, including requirements for further site-specific environmental analysis and mitigation,
is appropriate and will be employed to make future decisions . . .”); *Pacific Rivers Council*

1 *v. U.S. Forest Service*, 2:05-cv-00953-MCE-GGH, 2008 WL 4291209, at *14 (E.D.Cal.
2 September 18, 2008) (finding that “Forest Service is not prohibited from waiting until site-
3 specific actions are developed before analyzing mitigation measures in more detail.”).

4 The Court also concludes that the RMPs, notwithstanding their programmatic nature
5 and use of monitoring and adaptive strategies, contain a sufficient discussion of mitigation
6 measures. These are set forth in Chapter 2 (“Alternatives”) and Chapter 4 (“Environmental
7 Impacts”) of the FEIS, AR 60378–614, 60855–61233, and include mitigation with respect
8 to land health standards, conservation measures to mitigate effects on special status species,
9 and reclamation stipulations for surface-disturbing activity.

10 The RMPs specifically propound and analyze mitigation measures with respect to
11 travel and grazing. For example, to protect Monument objects the RMPs limit all vehicular
12 travel to designated routes. BLM also retains “management discretion to limit or close a route
13 . . . to protect Monument objects.” AR 60573; *see* AR 60575–78. Moreover, “[r]outes created
14 by unauthorized use would be immediately obscured and rehabilitated,” with barriers
15 installed to prevent unauthorized use, and “[r]outes causing resource damage or with safety
16 concerns could be rerouted and/or reclaimed.” AR 60579.

17 The RMPs also contain specific provisions to protect biological and cultural resources.
18 *See, e.g.*, AR 62403 (“Roads and trails used by OHVs within riparian areas, or areas with the
19 potential to support riparian vegetation, will be closed and rehabilitated.”); AR 62407
20 (“Monument objects [] will be identified, conserved, protected, stabilized, or restored, and
21 maintained in good or better condition.”); AR 62408 (“Protective measures will be taken to
22 preserve significant sites, such as monitoring through patrol, signing, fencing, data recovery
23 to mitigate vandalism, and stabilizing undamaged deposits, and preserving at risk features
24 such as standing walls or historic structures.”); AR 62702, 62730 (limiting grazing to prevent
25 harm to biological resources).

26 As BLM notes, the FEIS contains an extensive discussion of its management of
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1 grazing in the Monuments. The FEIS sets out the rangeland health standards described in
2 Arizona Standards for Rangeland Health and Guidelines for Grazing Administration. AR
3 60357–61, 61597–608. These standards outline management practices and actions for the
4 protection of soils, wetlands, and wildlife. AR 60358–62, 61602–08. BLM implements the
5 Arizona rangeland health standards in conjunction with state and local entities and tracks the
6 progress in implementing the standards. AR 61607–08, 61619–23. Management practices are
7 to be reviewed and evaluated to determine whether the rangeland standards are being met,
8 and appropriate management actions are to be taken where standards are not being met. AR
9 60509. Further, portions of Parashant will be managed as a “forage reserve,” meaning that
10 “any livestock use would be on a temporary basis . . . at BLM’s discretion and would be
11 designed to complement management of other resources and to provide rest and deferment
12 on other allotments.” AR 60509. The FEIS also describes a number of other restrictions and
13 limitations on particular allotments in the Monuments. AR 60509–15.

14 The FEIS also discusses the effectiveness of the mitigation measures applicable to
15 livestock grazing. *See, e.g.*, AR 60871 (“Closing sensitive areas to grazing would help
16 improve water quality and return riparian areas to proper functioning conditions.”); AR
17 60885 (closing certain grazing allotments “would reduce the amount of surface disturbance,
18 compaction, and erosion from grazing activities.”); AR 60916 (“[s]eason of use restrictions
19 may lessen the effects of grazing”); AR 60971 (“Grazing would be managed in accordance
20 with Arizona Standards for Rangeland Health, reducing impacts to minor levels on all lands
21 within the Monument.”).

22 The FEIS includes discussions of the effectiveness of these mitigation measures in its
23 analysis of other environmental impacts. *See, e.g.*, AR 60864 (“Overall, impacts [to air
24 quality], however, would be reduced as the public would have access to fewer miles of
25 unpaved roads and a number of roads would be closed and rehabilitated, decreasing the
26 potential for fugitive dust throughout the Monuments.”); AR 60900 (prohibition of off-road
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1 vehicle use will “reduce erosion, trampling, vandalism, and other surface disturbing impacts
2 that damage geological and paleontological resources.”); *see also* AR 60856–57 (prohibiting
3 OHV use and limiting travel on designated roads would “limit impacts to air quality”; use
4 of watering and chemical suppressants would “greatly reduce the amount of dust emissions
5 from maintenance and on haul roads”); AR 60869 (“The application of specific mitigation
6 measures identified in activity level planning and NEPA level review would reduce or
7 prevent impacts to water quality.”); AR 60883 (“Restoration and vegetation treatment
8 projects aimed at improving vegetation health and cover would reduce erosion potential and
9 increase soil productivity.”); AR 60958 (use restrictions on recreational activities and
10 camping “should reduce or eliminate adverse effects to wildlife”); AR 60998-61002
11 (“Restricting surface-disturbing activities to the non-breeding season for Southwestern
12 Willow Flycatchers would eliminate disturbance effects from noise and dust. Direct impacts
13 from loss of habitat would be limited or eliminated as a result of floodplain restrictions”).

14 The mitigation described in the FEIS is sufficient to meet BLM’s legal obligations
15 under NEPA. BLM was not required to have a completed mitigation plan in place when it
16 drafted the RMPs. *See Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps*
17 *of Eng’rs*, 524 F.3d 938, 955 (9th Cir. 2008). As already noted, the RMPs are general
18 planning documents and, except for the route designations, BLM did not implement any
19 specific decisions or approve any projects.⁵

20 Plaintiffs cite *South Fork Band Council of W. Shoshone of Nevada*, 588 F.3d at 727,
21 and *Neighbors of Cuddy Mountain*, 137 F.3d at 1381, in support of their argument that BLM
22 failed to adequately discuss the effectiveness of the proposed mitigation. In those cases,
23 however, BLM was responsible for administering land on which specific actions were
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26 ⁵ As BLM notes, future actions, such as approval of permits for livestock
27 grazing, will undergo further NEPA analyses to assess mitigation specific to those actions.
28 (*See* AR 61233.)

1 proposed—the expansion of a gold-mine operation and timber sales in a national forest,
2 respectively. Therefore, a programmatic approach to mitigation was not appropriate, and
3 BLM violated NEPA by failing to propose and analyze the effectiveness of specific
4 mitigation measures to address the effects of the new activities. Here, by contrast, BLM was
5 not required to analyze the effectiveness of mitigation measures for site specific actions
6 because none were approved in the RMPs.

7 In sum, BLM satisfied NEPA by taking a hard look at the impacts of grazing and
8 OHV use. “While it may have been possible to explore impacts more vigorously and discuss
9 them more thoroughly, reality of process requires the agency to make a decision. It has done
10 so here.” *Montana Wildlife Association*, 2011 WL 3489699 at *9–10 (concluding that
11 “Plaintiffs have failed to demonstrate that the impacts analysis within the over 1,200-page
12 FEIS failed to take the requisite hard look.”).

13 C. Route designations

14 Plaintiffs assert that the route designations promulgated by BLM violate the
15 Proclamations, OHV regulations, and NEPA. Specifically, Plaintiffs contend that the route
16 designations favor motorized uses and fail to consider minimization criteria. The Court
17 disagrees.

18 The Proclamations prohibit “all motorized and mechanized use off road.” *See* 65 Fed.
19 Reg. 2827. The Proclamations do not define the word “road.”

20 The RMPs do not allow vehicle use off of designated roads. Instead, OHV travel is
21 allowed only on “roads” and “primitive roads.” Plaintiffs first contend that by allowing travel
22 on primitive roads as well as roads, the RMPs violate the Proclamations’ prohibition on OHV
23 use. (*See* Doc. 52 at 9–13.)

24 BLM’s current definition of road is set forth in the 2006 Roads Report, which defines
25 a road as “a linear route declared a road by the owner, managed for use by low-clearance
26 vehicles having four or more wheels, and maintained for regular and continuous use.” AR
27

1 42201. Prior to the 2006 report, routes were classified as either roads or trails.⁶ Because these
2 definitions were not consistently applied, BLM established a third category, “primitive
3 roads.” AR 42198–99. A “primitive road” is a “linear route managed for use by four-wheel
4 drive or high-clearance vehicles.” AR 42201.

5 BLM’s definitions of road and primitive road are entitled to deference and may be
6 overruled only if clearly erroneous. *See Montana Wildlife Association*, 2011 WL 3489699
7 at *5; *see also Al Haramain Islamic Foundation, Inc. v. U.S. Dept. of Treasury*, 585
8 F.Supp.2d 1233, 1248 (D.Or. 2008) (“Courts give deference to an agency’s interpretation of
9 the executive orders it is charged with administering.”) (citing *American Fed’n of Gov’t*
10 *Employees v. Fed. Labor Relations Auth.*, 204 F.3d 1272, 1274–75 (9th Cir. 2000), and
11 *Kester v. Campbell*, 652 F.2d 13, 15–16 (9th Cir. 1982)). In *Montana Wildlife Association*,
12 the district court rejected the plaintiff’s argument that BLM’s definition of road, which
13 included unmaintained, user-created two-track routes, was insufficiently restrictive. 2011 WL
14 3489699 at *5. Noting that “[t]here is no suggestion . . . that the President intended BLM to
15 define a road based upon definitions outlined by Plaintiffs,” the court concluded that “BLM
16 was free to choose the definition as it deemed most appropriate” and that the plaintiff had
17 made no showing that “the chosen definition is unreasonable, rendering it arbitrary and
18 capricious.” *Id.*

19 Similarly, BLM’s definition of roads and primitive roads is entitled to deference.
20 There has been no showing that these definitions conflict with the Proclamations’ prohibition
21 of off-road motor vehicle use. The court concludes that the BLM definition of primitive road,
22 which is similar to the definition of road in *Montana Wilderness Society*, is reasonable.⁷
23

24 ⁶ In a BLM’s Engineering Manual road was defined as “a transportation facility
25 used primarily by vehicles having four or more wheels . . . and maintained for regular and
26 continuous use.” AR 41333.

27 ⁷ The Court rejects Plaintiffs’ argument that BLM’s route designations will harm
28 Monument objects by allowing travel on trails. The RMPs, as revised, expressly prohibit

1 Plaintiffs next claim that BLM's route designation process resulted in a violation of
2 regulations governing OHV use pursuant to 43 C.F.R. § 8342.1. Plaintiffs' critique centers
3 on BLM's use of a so-called Route Evaluation Tree ("RET") in making its route
4 designations.

5 BLM describes its route-designation process as follows:

6 First, BLM gathered information about the routes and identified: resource
7 constraints and access needs, geographical units defined by common issues or
8 management goals, areas where resource constraints and public access
9 conflicted, and priority subregions. Second, BLM refined the data, identified
10 any deficiencies in the data, and prioritized the resolution of those deficiencies.
11 Third, BLM prepared for Route Evaluation by mapping the regions and
12 reviewing the effects of motorized routes on resources. Fourth, BLM then used
the RET to evaluate routes. Fifth, BLM reviewed and recorded the RET's
recommendations, and decided whether they were appropriate. Finally, the
route designations were reviewed during the NEPA process as part of the
RMPs. Thus, the RET is but one step in an extensive process designed to
consider all of the minimization criteria.

13 (Doc. 64 at 16 (citations omitted).) *See* AR 61748–49.

14 Plaintiffs contend that the RETs did not allow for the proper application of the
15 minimization criteria set forth in § 8342.1, which provides:

16 The authorized officer shall designate all public lands as either open, limited,
17 or closed to off-road vehicles. All designations shall be based on the protection
18 of the resources of the public lands, the promotion of the safety of all the users
of the public lands, and the minimization of conflicts among various uses of
the public lands; and in accordance with the following criteria:

19 (a) Areas and trails shall be located to minimize damage to soil, watershed,
20 vegetation, air, or other resources of the public lands, and to prevent
impairment of wilderness suitability.

21 (b) Areas and trails shall be located to minimize harassment of wildlife or
22 significant disruption of wildlife habitats. Special attention will be given to
protect endangered or threatened species and their habitats.

23 (c) Areas and trails shall be located to minimize conflicts between off-road
24 vehicle use and other existing or proposed recreational uses of the same or
25 neighboring public lands, and to ensure the compatibility of such uses with
existing conditions in populated areas, taking into account noise and other
factors.

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OHV travel on trails. AR 62330. (*See* Doc. 64 at 14.)

1 (d) Areas and trails shall not be located in officially designated wilderness
2 areas or primitive areas. Areas and trails shall be located in natural areas only
3 if the authorized officer determines that off-road vehicle use in such locations
will not adversely affect their natural, esthetic, scenic, or other values for
which such areas are established.

4 Specifically, Plaintiffs claim that the RETs “shed no light on how each route was
5 located to minimize impacts” and “at no point in the route evaluation process did [BLM]
6 claim to have actually minimized the impact of ORV routes.” (Doc. 70 at 12.) They also
7 argue that BLM was required to consider all minimization criteria, but the RETs did not
8 explicitly consider noise and air. (Doc. 52 at 14–15.) BLM counters that the route
9 designation process taken as whole, which consisted of application of the RETs followed by
10 NEPA review, included a consideration of each of these criteria, including noise and air.

11 In support of its argument that the route designation process properly accounted for
12 the OHV criteria, BLM notes that the Environmental Issues/Special Resources section of the
13 RET directs BLM to “consider” the effect of routes on “special status species’ habitat”;
14 “wildlife migration routes or movement/dispersal corridors, critical winter range, etc.”;
15 “floodplains, wetlands, ephemeral or perennial creeks, streams, springs, seeps, or other
16 natural water sources or bodies”; “cryptobiotic, highly erodible, or other sensitive or
17 important soils”; “dry or wet meadows”; “specially-protected resources”; and “Monument
18 objects.” AR 61753–54. It also asks whether a “route degrade[s] wilderness values or the
19 roadless character so as to disqualify an area from further consideration as a Wilderness
20 Study Area,” AR 61753, and directs BLM to “[e]mphasize closure or minimization of the use
21 of routes through the habitat of any special status species when closure would likely result
22 in benefit to the species.” *Id.*

23 The minimization criteria also require that routes “not be located in officially
24 designated wilderness areas or primitive areas.” 43 C.F.R. § 8342.1(d). The RET directed
25 BLM to evaluate whether a route would “provide access to and/or pass through, cross over,
26 intersect, or otherwise affect . . . Wilderness.” AR 61753. The RMPs do not allow OHV use
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1 by the public in designated wilderness areas. AR 62444, 62754.

2 The RET also complies with the requirement to “minimize conflicts between off-road
3 vehicle use and other existing or proposed recreational uses,” 43 C.F.R. § 8342.1(c), by
4 directing BLM to consider whether “non-motorized types of recreation uses [are] impacted
5 by the presence of routes and vehicles.” AR 61756. Moreover, the RET requires BLM to
6 consider additional management options, such as seasonal limitations or group size
7 restrictions, for the purpose of minimizing harm to the environment. AR 61754.

8 BLM acknowledges that the RET does not explicitly discuss the effect of the route
9 designations on air quality and noise. It contends, however, that the issue was considered
10 during the NEPA process, which occurred before the route designations were finalized, so
11 that the final RMPs evaluated the impact of the route designations on air quality as required
12 by 43 C.F.R. § 8342.1(a).

13 The Court agrees. The record indicates that during the NEPA process BLM
14 considered the impacts of its route designation decisions on air quality. *See* AR 62083–84,
15 60855–56, 62663, 62371. BLM concluded, however, that impacts from route designations
16 on air quality would be “negligible to minor” and “localized [to] short-term” and concluded
17 that they could be minimized by closing routes, limiting routes to administrative routes, and
18 mitigation measures such as watering and dust suppressants. AR 60857. Mitigation measures
19 are an acceptable means of minimizing the impacts of routes in accordance with 43 C.F.R.
20 § 8342.1. *See Sierra Club v. Clark*, 774 F.2d 1406, 1409–10 (9th Cir. 1985).

21 Likewise, BLM considered noise but determined that it was not “an important factor
22 in minimizing conflicts with other recreational uses and ensuring the compatibility of those
23 uses with existing conditions in populated areas, *see* 43 C.F.R. § 8342.1(c), because the
24 Monuments were already ‘naturally quiet’ with existing motorized uses, and there are no
25 populated areas within the Monuments.” *See* AR 60753–55. The Court finds that BLM acted
26 within its discretion when it concluded that noise was not a factor in minimizing conflicts
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1 between uses, and that its determination was not unreasonable. *See Thomas Jefferson*
2 *University v. Shalala*, 512 U.S. 504, 512 (1994).

3 Plaintiffs rely on *Center for Biological Diversity v. U.S. Bureau of Land Management*
4 (*"CBD"*), 746 F.Supp.2d 1055 (N.D. Cal. 2009), *vacated in part*, 2011 WL 337364 (N.D.
5 Cal. 2011), and *Idaho Conservation League v. Guzman*, 766 F.Supp.2d 1056 (D.Idaho 2011),
6 for their argument that the RET process favors motorized use by failing to adequately
7 consider minimization criteria. In *CBD*, the district court ruled that BLM's final FEIS failed
8 to adequately consider the effects of its proposed redesign of OHV routes on wildlife, soils,
9 vegetation, and other resources, in violation of 43 C.F.R. § 8342.1. *Id.*

10 In *CBD*, BLM used a Decision Tree as part of its route designation process. The court
11 noted that the Decision Tree made no explicit reference to the minimization criteria of §
12 8342.1, and "[t]he only resource related questions . . . concern[ed] sensitive species and
13 sensitive species' habitat, and several questions ask indirectly about soil erosion." *Id.* at
14 1076. As a result, application of the Decision Tree allowed routes to be classified as "open"
15 without taking into account all of the minimization criteria set forth § 8342.1. *Id.* at 1077.

16 The court further explained that the Decision Tree dictated that a route could only be
17 closed, "regardless of the level of impact on sensitive species or potential to mitigate
18 cumulative effects, unless it either: (a) does not contribute to recreational opportunities,
19 dispersed use, connectivity, public safety, etc.; or (b) . . . is redundant with other routes that
20 provide the same opportunity." *Id.* The court cited BLM's approval of a particular route
21 despite the fact that the route impacted the habitat of a sensitive species and its closure was
22 likely to lead to increased conservation of sensitive species. *Id.* Pursuant to the Decision
23 Tree, the route remained open because the following question was answered in the negative:
24 "Are the commercial or private uses of this route adequately met by another route(s) that
25 avoid or minimize the impact to occupied habitat of sensitive species?" *Id.*

26 The district court also rejected BLM's contention that other parts of the record
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1 indicated that it applied the minimization criteria, explaining that neither the Decision Tree,
2 its footnotes, nor the records for each designated route “reflect or document any analysis of
3 the § 8342.1 minimization criteria.” *Id.* at 1080.

4 BLM contends that unlike the Decision Tree at issue in *CBD*, the RET does not favor
5 motorized use. It distinguishes the RET process from the Decision Tree by noting that the
6 latter favored keeping routes open by posing questions regarding the benefits of closing a
7 route (*e.g.*, “is route closure likely to lead to increased conservation of sensitive species?”).
8 *CBD*, 746 F.Supp.2d at 1077. Thus, the questions asked by the Decision Tree allowed route
9 designation decisions “without the minimization of environmental impacts and conflicts
10 between uses” and therefore were “almost certain to skew route designation decision-making
11 in favor of ORV use.” *Id.* (quoting *American Motorcyclist Ass’n v. Watt*, 543 F.Supp. 789,
12 797 (C.D.Cal 1982)).

13 By contrast, the RET used here to designate routes in the Monuments posed questions
14 regarding the consequences of keeping a route open—for example, “[m]ight the continued
15 use of this route impact State or Federal status species?” AR 61753. Under the RET, route
16 closures do not need to be justified by showing that they are “likely to lead to increased
17 conservation.” *CBD*, 746 F.Supp.2d at 1077. Instead, a route may be closed, for example, if
18 keeping it “[m]ight” impact listed species. AR 61753. This shift in approach means that the
19 RETs disfavored motor vehicle use, resulting in the closure of routes based on the
20 minimization criteria, even if the routes provided recreational access that was not available
21 on other routes. *See, e.g.*, AR 52871–72.

22 In *Idaho Conservation League*, the district court held that the Forest Service’s travel
23 management plan failed to implement the minimization criteria of § 8342.1. 766 F.Supp.2d
24 at 1074.⁸ The court explained

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27 ⁸ The Travel Management Rule under which the Forest Service operated was
28 substantively indistinguishable from 43 C.F.R. § 8342.1. 766 F.Supp.2d at 1074.

1 that the whole goal or purpose of the exercise is to select routes in order to
2 minimize impacts in light of the agency's other duties. Simply listing the
3 criteria and noting that they were considered is not sufficient to meet this
4 standard. Instead, the Forest Service must explain how the minimization
5 criteria were applied in the route designation decisions.

6 The court noted, as the court did in *CBD*, that "there is no evidence reflecting how the Forest
7 Service applied the minimization criteria." *Id.*

8 Here, by contrast, there is evidence that BLM applied the minimization criteria. This
9 is reflected in the reports prepared for each route. (Doc. 77 at 4–5.) Each Route Evaluation
10 Report ("RER") considered whether the continued use of the route would impact, directly
11 or indirectly, "special resources," including, for example, special status species or their
12 habitat. *See, e.g.*, AR 53858. The RER then asked whether impacts to the those resources can
13 be "avoided, minimized or mitigated" and records BLM's response. *Id.* Finally, the RER
14 documents BLM's decision regarding the route—i.e., close, mitigate limit, limit, mitigate
15 open, or open the route. AR 53859. Based on this process, BLM closed certain routes and
16 imposed conditions on other routes to minimize or mitigate impacts. *See, e.g.*, AR 52885–87,
17 53303–04, 53858–59.⁹

18 ⁹ BLM cites instances in which it limited access to minimize the impacts of
19 routes. Several RERs reveal that BLM identified impacts to sensitive resources but
20 determined that they could "be avoided, minimized or mitigated" through "adaptive
21 management monitoring of status/integrity of identified sensitive resources or special status
22 species and/or cultural resources as their condition might relate to intensity and type of public
23 use." For example, with respect to route V1003J, BLM determined that the route impacted
24 Monument objects and other resources identified in the route designation criteria, such as
25 wildlife and recreational uses. AR 52885–87. BLM then determined that impacts to sensitive
26 resources could be avoided, minimized or mitigated, and specified that the route would only
27 be open to administrative and grazing permittee use. *Id.*

28 BLM also closed routes after considering their impacts on Monument objects and
resources listed in the designation criteria. For example, BLM determined that route V1121B
impacted plants, primitive recreation, wilderness areas, and Monument objects. AR 53858.
BLM closed the route. AR 53859. Similarly, the RER for route V1028A shows that BLM
determined that route closure or some other form of mitigation would address cumulative
effects on habitat fragmentation. AR 53303–04. BLM then closed the route to all uses. *Id.*;

1 BLM met the standard set by the courts in *CBD* and *Idaho Conservation League*. The
2 RERs show that BLM considered impacts to Monument objects and other resources
3 described in § 8342.1, and that it took action to minimize the impacts of routes on those
4 resources by closing the routes or adopting mitigating measures.

5 **D. NHPA**

6 Plaintiffs claim that BLM violated Section 106 of the National Historic Preservation
7 Act, which directs any federal agency with “jurisdiction over a proposed or federally assisted
8 undertaking to . . . take into account the effect of the undertaking on any . . . site . . . that is
9 included in or eligible for inclusion in the National Register.” 16 U.S.C. § 470f; *see* 36 C.F.R.
10 § 800.4(b)(1).

11 Plaintiffs contend that BLM failed to make a good faith effort to inventory historic
12 properties in the Monuments because it relied on a “Class I” inventory, or a review of
13 existing data. According to Plaintiffs, under this approach BLM, when it issued its RMPs,
14 “had no information on historic properties for over 95% of the Monuments” and the
15 information it had regarding other five percent was “dated and scientifically inadequate
16 data.” (Doc. 70 at 18.)

17 In support of their argument that BLM’s the cultural inventory was inadequate,
18 Plaintiffs cite a 2006 report prepared by Peter Bungart, who opined that BLM’s route
19 designation plan will harm cultural resources in the Monuments. AR 54510. However, while
20 BLM considered the Bungart report when assessing site-specific impacts and the necessity
21 for additional field inventories, AR 36548, 61321, it was entitled to rely on the opinions of
22 its own experts who determined, based on the available data on cultural resources, that the
23 impacts on cultural resources would be “moderate.” AR 61026, 61035. *See Lands Council*,
24 537 F.3d at 993 (“[W]e are to conduct a ‘particularly deferential review’ of an ‘agency’s
25 predictive judgments about areas that are within the agency’s field of discretion and expertise
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27 *see also* AR 52872 (closing route V1003A), 52931 (closing route V1007A).

1 . . . as long as they are reasonable.”); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291,
2 1301 (9th Cir. 2003) (“When specialists express conflicting views, an agency must have
3 discretion to rely on the reasonable opinions of its own experts, even if a court may find
4 contrary views more persuasive.”) (citing *Marsh*, 490 U.S. at 378).

5 Plaintiffs also criticize BLM for relying on a phased approach to identifying historic
6 properties. Again, this argument is misplaced. NHPA regulations provide that “[w]here the
7 alternatives under consideration consist of corridors or large land areas, . . . the agency
8 official may use a phased process to conduct identification and evaluation efforts.” 36 C.F.R.
9 § 800.4(b)(2). This regulation allows BLM to postpone the process of identifying sites until
10 it chooses between the alternatives. *Id.* “The agency official may also defer final
11 identification and evaluation of historic properties if it is specifically provided for in a
12 memorandum of agreement.” *Id.* BLM’s route designations satisfy these criteria for phased
13 identification. They involve a large land area, and BLM has entered into a national
14 programmatic agreement with the ACHP and a specific protocol with the Arizona SHPO
15 regarding § 106 compliance. AR 64106, AR 64118.

16 Section 800.4(b)(2) directs the agency to institute a process that would “establish the
17 likely presence of historic properties within the area of potential effects . . . through
18 background research, consultation and an appropriate level of field investigation” and to
19 consider the views of the SHPO. This process is set forth in Instruction Memorandum 2007-
20 030. *See* AR 42267–71. The Memorandum requires a Class I inventory of the area of
21 potential effect, additional inventories where cultural resources are likely to be affected, and
22 consultation with the SHPO. AR 42267-69. A comprehensive Class III inventory, entailing
23 the identification of all historic sites, is not required for route designations that simply allow
24 continued use of existing routes or close routes. Finally, the Memorandum states that a
25 “Class II inventory, or development and field testing of a cultural resources probability
26 model, followed by Class III inventory in high potential areas and for specific projects, may
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1 be appropriate for larger planning areas for which limited information is currently available.”
2 AR 42268.

3 Contrary to Plaintiffs’ assertions, BLM’s approach was consistent with IM 2007-030.
4 “Class II or III inventories are not necessary if the status quo remains, restricts use, travel has
5 not concentrated, or the analysis is done at the planning level.” *Montana Wilderness*
6 *Association*, 2011 WL 3489699, at *11. This is the approach adopted by BLM with respect
7 to the Monuments. Moreover, in addition to conducting a Class I inventory, BLM reviewed
8 existing Class III inventory data, AR 62328, 62598, and recommended Class III inventories
9 and deferred route designations in 10 “high potential areas.” AR 62599.

10 The RMPs do not open any new routes or designate any non-route areas open to OHV
11 use. AR 62327–28, 62598. BLM also considered whether closing routes or authorizing
12 continued use on existing routes could have adverse effects on historic properties by
13 concentrating travel on other routes, thus requiring more detailed surveys pursuant to IM
14 2007-030. AR 62327–28, 62598; *see* AR 42268. Finally, the RMPs do not approve any
15 specific projects, and provide that any such projects proposed in the future will be subject to
16 § 106 compliance. *See* AR 61020.

17 Plaintiffs further contend that a phased inventory approach is impermissible because
18 the route designations were final with the issuance of the RMPs and no additional inventories
19 will be carried out before vehicle use is permitted. Plaintiffs cite *New Mexico ex rel.*
20 *Richardson v. BLM*, 459 F. Supp. 2d 1102, 1125 (D.N.M. 2006), *rev’d on other grounds*, 565
21 F.3d 683 (10th Cir. 2009), which held that under the NHPA “an agency must consider the
22 impacts of a project . . . before any action is taken to make that specific project a reality.” The
23 district court in *Richardson* held that BLM, which had authorized a lease for oil and gas
24 development on protected land, was required to complete the § 106 process before a lease
25 was issued. *Id.* The present case is distinguishable. As previously noted, although BLM
26 designated routes, the RMPs do not open any new routes in the Monuments but instead close
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1 hundreds miles of routes to the public. *See* AR 62439, 62749–50. Thus, the approval of the
2 route designations in the Monuments is distinct from situations in which agencies have
3 approved development actions that would affect cultural resources.

4 In addition, BLM notes that the route designations are subject to change where there
5 is the potential for harm to cultural resources. The Memorandum recognizes BLM’s
6 “continuing management responsibilities,” and specifically provides that BLM will monitor
7 motorized vehicle routes, and where potential effects are noted recommend mitigation to
8 prevent harm to such resources. AR 42267, 42270. The RMPs also provide that routes
9 causing resource damage are to be rerouted or reclaimed. AR 62440, 62750. Finally, BLM
10 will continue to conduct inventories to meet its NHPA obligations. *See* AR 62328, 62599.

11 Under these circumstances, BLM has made a reasonable and good faith effort to
12 inventory historic properties within the Monuments. Therefore, BLM’s route designations
13 do not violate the NHPA.

14 **E. The Wilderness Settlement**

15 The Wilderness Settlement is an agreement entered into by the State of Utah and the
16 Department of the Interior in 2003. *See* AR 64037. The Settlement terminated BLM’s
17 authority under FLPMA § 603 to designate Wilderness Study Areas. *Id.* It also provided,
18 however, that “nothing herein shall be construed to diminish the Secretary’s authority under
19 FLPMA to . . . utilize the criteria in Section 202(c) to develop and revise land use plans,
20 including giving priority to the designation and protection of areas of critical environmental
21 concern.” AR 64049.

22 The Ninth Circuit has explained that the FLPMA “interacts with the Wilderness Act
23 to provide the BLM with broad authority to manage areas with wilderness characteristics
24 contained in the federally owned land parcels the [BLM] oversees, including by
25 recommending these areas for permanent congressional protection.” *Oregon Natural Desert*
26 *Ass’n v. Bureau of Land Management* (“*ONDA*”), 625 F.3d 1092, 1114–15 (9th Cir. 2010)

1 (noting that “Wilderness values are among the resources which BLM can manage”); *see also*
2 *Utah v. Norton*, No. 2:96-CV-0870, 2006 WL 2711798, *23 (D. Utah Sept. 20, 2006) (“The
3 Settlement allows for the BLM to exercise the full extent of its discretion under section 202’s
4 multiple-use and sustained-yield policy.”), *aff’d on other grounds, Utah v. U.S. Dep’t of the*
5 *Interior*, 535 F.3d 1184 (10th Cir. 2008).

6 Plaintiffs raise an as-applied challenge to the Wilderness Settlement, arguing that
7 BLM interpreted the Settlement as prohibiting it from applying wilderness level protections
8 in violation of NEPA and the FLPMA. BLM counters that notwithstanding the Wilderness
9 Settlement it “may consider information on wilderness characteristics,” such as solitude and
10 opportunities for primitive and unconfined recreation, when preparing land use plans. AR
11 41969–70. Thus, BLM policy provides that “[l]ands with wilderness characteristics may be
12 managed to protect and/or preserve some or all of those characteristics.” AR 41969 ; *see*,
13 *e.g.*, AR 36577.¹⁰ Pursuant this policy, the RMPs identify 140,949 acres in Parashant and
14 36,018 acres in Vermillion that would be protected to maintain wilderness characteristics.
15 AR 61092; *see* AR 60486–89 (summarizing alternatives considered by BLM for the
16 protection of lands with wilderness characteristics); AR 61075–94 (analyzing the potential
17 impacts of the alternatives proposed on lands with wilderness characteristics).

18 These circumstances distinguish *ONDA*, where the court rejected BLM’s argument
19 that “wilderness characteristics have no independent vitality” under FLPMA. 625 F.3d at
20 1111. Instead, the RMPs manage the Monuments to protect wilderness characteristics
21 “without requiring complete, permanent non-impairment of wilderness values. *Id.* at 1114.
22 Therefore, Plaintiffs’ as-applied challenge fails.

23
24 ¹⁰ According to Plaintiffs, BLM has acknowledged that its “hands were tied” with
25 respect to imposing wilderness level protections on lands in the Monuments. In the passages
26 cited, BLM simply acknowledged that after the Wilderness Settlement it “must not manage
27 areas . . . to maintain wilderness characteristics ‘as if they are or may become congressionally
28 designated wilderness areas.’” AR 36577. BLM explained, however, that “it may manage
them using special protections to protect wilderness characteristics.” *Id.*

1 **V. CONCLUSION**

2 Plaintiffs have failed to carry their burden under the APA to show that the RMPs
3 should be set aside as arbitrary and capricious. *See* 5 U.S.C. 706(2)(a).

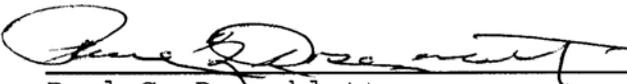
4 Accordingly,

5 **IT IS ORDERED** that Plaintiffs' motion for summary judgment (Doc. 51) is **denied**.

6 **IT IS FURTHER ORDERED** that Defendants' motion for summary (Doc. 63) is
7 **granted**.

8 **IT IS FURTHER ORDERED** that the Clerk of Court shall enter judgment
9 accordingly.

10 Dated this 30th day of September, 2011.

11 
12 _____
13 Paul G. Rosenblatt
14 United States District Judge