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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MADDALENA, et al.,	
	Plaintiffs,
vs.	
UNITED STATES FISH AND WILDLIFE SERVICE, et al.,	Defendants.
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CENTER FOR BIOLOGICAL DIVERSITY, et al.,	Plaintiffs,
vs.	
UNITED STATES FISH AND WILDLIFE SERVICE, et al.,	Defendants.

CASE NO. 08-CV-02292-H (AJB)

ORDER:

**(1) GRANTING DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT**

**(2) DENYING MADDALENA
PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

**(3) DENYING CBD
PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

On December 10, 2008, Richard Maddalena and Duners for Equity (“Maddalena Plaintiffs”) filed a complaint against the United States Fish and Wildlife Service (“Service”), the Secretary of the Interior (“Secretary”), and the United States Department of Interior (together, “Defendants”). (Doc. No. 1.) On January 14, 2009, the Center for Biological Diversity, Public Employees for Environmental Responsibility, and Desert Survivors (“CBD Plaintiffs”) filed a complaint against Defendants in the United States District Court for the

1 Northern District of California. See Ctr. for Biological Diversity v. U.S. Fish & Wildlife
2 Serv., Civ. No. 09-0170 JSW (N.D. Cal.). Both lawsuits challenge Defendants' designation
3 of critical habitat for the Peirson's milk-vetch ("PMV"), a plant listed as "threatened" under
4 the Endangered Species Act ("ESA"). On March 4, 2009, CBD Plaintiffs and Defendants
5 jointly moved to transfer their case to the Southern District of California and the case was
6 transferred on March 9, 2009. See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.,
7 No. 09-CV-0465 H AJB (S.D. Cal.). On August 31, 2009, the Court consolidated the two
8 matters on the joint motion of all parties to both cases and permitted each set of Plaintiffs to
9 intervene as Defendants in the other Plaintiffs' lawsuit. (Doc. No. 33.)

10 On March 30, 2010, CBD Plaintiffs filed a motion for summary judgment. (Doc. No.
11 52.) On April 1, 2010, Maddalena Plaintiffs filed a motion for summary judgment. (Doc. No.
12 53.) On May 12, 2010, Defendants filed a motion for summary judgment and a response in
13 opposition to CBD Plaintiffs and Maddalena Plaintiffs' motions for summary judgment. (Doc.
14 Nos. 56, 57.) On June 11, 2010, Maddalena Plaintiffs and CBD Plaintiffs filed oppositions to
15 the other parties' motions for summary judgment. (Doc. Nos. 59, 60, 61.) On June 25, 2010,
16 Defendants filed a reply in support of their motion for summary judgment. (Doc. No. 62.) On
17 July 9, 2010, Maddalena Plaintiffs and CBD Plaintiffs filed replies in support of their motions
18 for summary judgment. (Doc. Nos. 63, 64.) The Court held a hearing on the parties' cross
19 motions for summary judgment on August 2, 2010 at 10:30 a.m. in courtroom 13. David
20 Hubbard appeared on behalf of Maddalena Plaintiffs, Bethany Cotton and Brendan Cummings
21 appeared on behalf of CBD Plaintiffs, and Ethan Carson Eddy appeared on behalf of
22 Defendants. For the reasons set forth below, the Court grants Defendants' motion for summary
23 judgment and denies CBD Plaintiffs' and Maddalena Plaintiffs' motions for summary
24 judgment.

25 BACKGROUND

26 On July 27, 2007, the Service issued a proposed critical habitat designation for the PMV
27 identifying 16,108 acres of critical habitat. (AR at 6048-74.) On February 14, 2008, the
28 Service published a final rule designating 12,105 acres of critical habitat for the PMV ("2008

1 Rule”). (AR at 15297-335.) CBD Plaintiffs’ and Maddalena Plaintiffs’ motions for summary
2 judgment challenge the validity of the 2008 Rule.

3 The controversy over the PMV began with the Service’s October 1998 decision to list
4 the species as threatened under the ESA. (AR at 1.) The PMV is a stout, short-lived perennial
5 plant reaching eight to twenty-seven inches tall. (AR at 15298.) The stems and leaves are
6 covered with fine hairs and the leaves are two to six inches long, with small oblong leaflets and
7 purple flowers. (AR at 4.) The PMV grows on the slopes and hollows of windblown dunes.
8 (AR at 15298.) It is anchored by its unusually long taproot, an adaptation that allows it to
9 reach the deep, moister sands. (Id.) The PMV depends on the long-term maintenance and
10 persistence of its seed bank for continued germination and reproduction. (Id.) A seed bank
11 forms when wind-dispersed seed pods are covered with sand, where they remain dormant for
12 up to five years, until a wetter-than-average season triggers germination. (Id.) The PMV is
13 known to occur in the United States only at the Algodones Dunes in Imperial County. (AR at
14 4.)

15 The Algodones Dunes lie within the Imperial Sand Dunes Recreation Area (“ISDRA”),
16 which is located in southeastern California, approximately twenty-five miles west of the
17 Colorado River and immediately north of the border between the United States and Mexico.
18 (AR at 15299.) The ISDRA is comprised of approximately 167,000 acres of land, covering
19 an area more than forty miles long and averaging five miles in width. (AR at 15303.) The
20 Algodones Dunes are the preeminent feature of the ISDRA, and create one of the largest sand
21 dune fields in North America. (AR at 15299.)

22 The Algodones Dunes is the most popular off-road vehicle (“ORV”) area in the
23 southwestern United States. (AR at 15093.) In the 2006 season, almost 1.5 million people
24 visited the dunes. (AR at 15093-94.) In its decision to list the PMV as threatened, the Service
25 stated that the primary threat to the species is “destruction of individuals and dune habitat from
26 [ORV] use and the recreational development associated with it.” (AR at 5.)

27 The ISDRA has been the subject of several lawsuits over the past decade. In March
28 2000, the Center for Biological Diversity sued the Bureau of Land Management (“BLM”)

1 alleging, among other things, that the BLM violated section 7 of the ESA by failing to consult
2 with the Service regarding the potential impacts of recreational activities at the ISDRA on the
3 PMV. (AR at 346-347.) The litigation resulted in a settlement agreement that was formalized
4 into a consent decree on November 3, 2000. (AR at 347.) The consent decree required BLM
5 to close approximately 49,000 acres of PMV habitat to ORV use until BLM complied with the
6 ESA's consultation requirements. (Id.) The closures reflect the current status quo at the
7 Algodones Dunes and BLM has classified them as "administrative closures." (AR at 1800.)

8 On August 5, 2003, following an order from the U.S. District Court for the Southern
9 District of California in Center for Biological Diversity v. Norton, Civ. No. 01-2101 (S.D.
10 Cal., July 1, 2001), the Service published a proposed designation of critical habitat for the
11 PMV. (AR at 791.) The proposed designation identified 52,780 acres of PMV critical habitat.
12 (AR at 791-808.) On August 4, 2004, the Service issued a final critical habitat rule designating
13 21,836 acres of the Algodones Dunes as critical habitat for the PMV. (AR 945-67.) In 2005,
14 CBD Plaintiffs challenged the 2004 designation as inadequate. See Ctr. for Biological
15 Diversity v. Bureau of Land Mgmt., 422 F. Supp. 2d 1115 (N.D. Cal. 2006). The court agreed
16 that the designation was invalid and remanded the decision to the Service. Id.

17 On September 8, 2005, BLM produced a new study analyzing the distribution and
18 abundance of the PMV across the Algodones Dunes. (AR at 17635.) The Service believes this
19 study presents the best available information on the distribution and range of the PMV. (AR
20 at 15316.) Relying on this new data, the Service issued a proposed revised critical habitat
21 designation for the PMV on July 27, 2007. (AR at 6048-74.) The proposed designation
22 identified 16,108 acres of PMV critical habitat. (AR at 6048-74.) On February 14, 2008, the
23 Service published a final rule designating 12,105 acres of critical habitat for the PMV. (AR
24 at 15297-335.) CBD Plaintiffs and Maddalena Plaintiffs both challenge the validity of the
25 2008 Rule. CBD Plaintiffs argue that, as a result of flaws in the administrative process, the
26 Service designated too little land as PMV critical habitat. (See Doc. No. 52-1.) Maddalena
27 Plaintiffs argue that, due to different flaws in the rule-making process, the Service designated
28 too much land as PMV critical habitat. (See Doc. No. 53-1.)

1 **DISCUSSION**

2 **I. Legal Framework**

3 **A. Summary Judgment**

4 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil
5 Procedure if the moving party demonstrates the absence of a genuine issue of material fact and
6 entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).
7 A fact is material when, under the governing substantive law, it could affect the outcome of
8 the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine
9 if a reasonable jury could return a verdict for the nonmoving party. Id.

10 A party seeking summary judgment always bears the initial burden of establishing the
11 absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party can
12 satisfy this burden in two ways: (1) by presenting evidence that negates an essential element
13 of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to
14 establish an essential element of the nonmoving party's case on which the nonmoving party
15 bears the burden of proof at trial. See id. at 322-23. "Disputes over irrelevant or unnecessary
16 facts will not preclude a grant of summary judgment." T.W. Elec. Serv., Inc. v. Pacific Elec.
17 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Once the moving party establishes the
18 absence of genuine issues of material fact, the burden shifts to the nonmoving party to set forth
19 facts showing that a genuine issue of disputed fact remains. Matsushita Elec. Indus. Co. v.
20 Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The nonmoving party cannot oppose a
21 properly supported summary judgment motion by "rest[ing] upon mere allegation or denials
22 of his pleading." Anderson, 477 U.S. at 256. When ruling on a summary judgment motion,
23 the court must view all inferences drawn from the underlying facts in the light most favorable
24 to the nonmoving party. Matsushita, 475 U.S. at 587. The court does not make credibility
25 determinations with respect to evidence offered. See T.W. Elec., 809 F.2d at 630-31.

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1 **B. Endangered Species Act**

2 Congress enacted the ESA in 1973 “to provide a means whereby the ecosystems upon
3 which endangered species and threatened species depend may be conserved” and “to provide
4 a program for the conservation of such endangered species and threatened species.” 16 U.S.C.
5 § 1531(b). The Supreme Court noted that “the plain intent of Congress in enacting this statute
6 was to halt and reverse the trend toward species extinction, whatever the cost.” Tenn. Valley
7 Auth. v. Hill, 437 U.S. 153, 184 (1978). The ESA requires that the Service protect imperiled
8 species by listing them as “threatened” or “endangered.” 16 U.S.C. § 1533. Once a species
9 is listed, section 7(a)(2) requires the Secretary to “insure that any action authorized, funded,
10 or carried out by [an] agency . . . is not likely to jeopardize the continued existence of [the
11 species].” 16 U.S.C. § 1536(a)(2).

12 Concurrently with listing a species as threatened or endangered, the Secretary must
13 designate the species’ “critical habitat.” Id. § 1533(b)(2). The ESA defines critical habitat as:

14 (i) the specific areas within the geographical area occupied by a species, at the
15 time it is listed in accordance with [the Act], on which are found those physical
16 or biological features (I) essential to the conservation of the species and (II) that
17 may require special management considerations or protection; and (ii) specific
18 areas outside the geographical area occupied by a species at the time it was listed
19 . . . upon a determination that such areas are essential for the conservation of the
20 species.

21 Id. § 1532(5)(A). Designations must be made “on the basis of the best scientific data available
22 and after taking into consideration the economic impact, the impact on national security, and
23 any other relevant impact, of specifying any particular area as critical habitat.” Id. §
24 1533(b)(2). An area may be excluded from critical habitat if “the benefits of such exclusion
25 outweigh the benefits of specifying such area as part of the critical habitat,” but not if the
26 exclusion would “result in the extinction of the species.” Id. Once designated, critical habitat
27 enjoys concrete regulatory protection under section 7(a)(2) of the ESA, which prohibits federal
28 agency action that results in the “destruction or adverse modification” of the designated
29 habitat. Id. § 1536(a)(2).

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1 **C. Administrative Procedure Act**

2 Because the ESA does not contain an internal standard of review, judicial review is
3 governed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 *et seq.* Aluminum
4 Co. of Am. v. Adm’r, Bonneville Power Admin., 175 F.3d 1156, 1160 (9th Cir. 1999) (“The
5 [APA] governs judicial review of administrative decisions involving the [ESA].”). The APA
6 provides that “[a]gency action made reviewable by statute and final agency action for which
7 there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704.
8 The reviewing court “shall” set aside any agency decision that it finds is “arbitrary, capricious,
9 an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The
10 APA precludes the trial court from considering any evidence outside of the record that was
11 available to the agency at the time of the challenged decision. See 5 U.S.C. § 706(2)(E);
12 Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); Havasupai Tribe v.
13 Robertson, 943 F.2d 32, 34 (9th Cir. 1991).

14 Under the APA, the Court must determine whether the agency decision “was based on
15 a consideration of the relevant factors and whether there has been a clear error of judgment.”
16 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), abrogated on other
17 grounds by Califano v. Sanders, 430 U.S. 99 (1977). The Supreme Court has explained that
18 an agency action is arbitrary and capricious if:

19 the agency has relied on factors which Congress has not intended it to consider,
20 entirely failed to consider an important aspect of the problem, offered an
21 explanation for its decision that runs counter to the evidence before the agency,
22 or is so implausible that it could not be ascribed to a difference in view or the
product of agency expertise.

23 Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

24 Although courts should defer to agency expertise, they may not merely “rubber stamp . . .
25 decisions that they deem inconsistent with a statutory mandate or that frustrate the
26 congressional policy underlying a statute.” Bureau of Alcohol, Tobacco & Firearms v.
27 F.L.R.A., 464 U.S. 89, 97 (1983).

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1 **II. Critical Habitat and Recovery Standard**

2 CBD Plaintiffs contend that the 2008 Rule fails to provide for the recovery of the
3 species because it allows significant ORV use in PMV habitat. (Doc. No. 52-1 at 13-15.) In
4 Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, the Ninth Circuit explained that
5 “the ESA was enacted not merely to forestall the extinction of species (i.e., promote a species
6 survival), but to allow a species to recover to the point where it may be delisted,” and that “the
7 purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not
8 only necessary for the species’ survival but also essential for the species’ recovery.” 378 F.3d
9 1059, 1070 (9th Cir. 2004). The record demonstrates that the Service did consider the recovery
10 of the species in its proposed critical habitat designation. (See AR at 15316-17.) See 50
11 C.F.R. § 402.02 (defining “recovery”). After its initial designation of critical habitat, the
12 Service has discretion to exclude an area from its final designation if it determines that “the
13 benefits of such exclusion outweigh the benefits of specifying such area as part of the critical
14 habitat,” so long as the exclusion would not “result in the extinction of the species.” 16 U.S.C.
15 § 1533(b)(2). Accordingly, the 2008 Rule may comply with the ESA even if it does not allow
16 for the PMV’s recovery, so long as it does not result in the extinction of the species.
17 Considering the record and the parties’ arguments, the Court concludes that the Service
18 properly applied the ESA’s recovery standard and that CBD Plaintiffs’ arguments to the
19 contrary lack merit.

20 **III. Best Scientific Data Available**

21 Under the ESA, the Secretary must designate critical habitat “on the basis of the best
22 scientific data available.” 16 U.S.C. § 1533(b)(2). CBD Plaintiffs contend that Defendants
23 failed to follow this legislative mandate. Specifically, CBD Plaintiffs argue that Defendants
24 (1) improperly relied on a single year of survey data, and (2) arbitrarily selected a high plant
25 density threshold. (Doc. No. 52-1 at 15-19.)

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1 **A. Reliance on 2005 Survey Data**

2 CBD Plaintiffs contend that the Service failed to designate PMV critical habitat on the
3 basis of the best scientific data available because the Service relied on PMV survey data from
4 a single year. (Doc. No. 52-1 at 15.) CBD Plaintiffs argue that, by relying on only one year
5 of survey data, the Service failed to account for the PMV's transitory nature and annual
6 population fluctuations. (Id. at 16.) Defendants contend that the Service did not ignore other
7 years of survey data, but considered all of the available information and made a reasoned
8 decision that the 2005 survey provides the most accurate picture of PMV populations across
9 the dunes. (See Doc. No. 62 at 11-14.)

10 The Service used data from the BLM's 2005 PMV population survey to identify the
11 physical location of core population areas. (AR at 15316.) It then used these core population
12 areas to identify the physical boundaries of the PMV's proposed critical habitat. (AR at
13 15317.) Defendants explain that the Service relied on the 2005 survey because, after
14 considering and comparing the other available data regarding PMV abundance and
15 distribution, the Service determined that BLM's 2005 survey data represented "the best
16 available information on the distribution and range of the [PMV]." (AR at 15316; see AR at
17 15299-300.) The Service noted that 2005 marked "the start of BLM's revised survey
18 methodology, which consisted of a more detailed survey approach and covered a larger portion
19 of the Dunes" and that the 2005 survey "occurred under the best possible growth and
20 germination conditions for the plant and covered the largest area and greatest number of
21 sample point locations." (AR at 15316.) Additionally, the Service explained that the "survey
22 data collected by BLM in 2005 . . . are more robust than the data used in the 2003 model,
23 primarily documenting occupancy over a larger area of the Dunes and at a finer spatial
24 resolution." (AR at 15313.)

25 CBD Plaintiffs concede that 2005 was a good year for the PMV and that BLM collected
26 more data in its 2005 survey than in any other year. (Doc. No. 61 at 12.) However, they point
27 to evidence in the administrative record indicating that relying on a single year of data may not
28 account for the transitory nature of PMV populations. (Doc. No. 52-1 at 16-18.) For example,

1 they note that the Service previously concluded that “[t]he number and location of standing
2 plants may vary considerably from year to year due to a number of factors including the
3 amount, timing and location of rainfall; temperature; soil conditions; and the extent and nature
4 of the seed bank.” (AR at 939.)

5 Defendants contend that the Service adequately considered the data regarding
6 population fluctuations and that its decision to rely on the 2005 study is entitled to deference.
7 (See Doc. No. 62 at 11-14.) The Court agrees. The Service assessed years of survey data and,
8 based on its expertise and experience, concluded that the 2005 data provided the most accurate
9 picture of PMV populations across the dunes. (See AR at 15316-17.) The Service did not
10 ignore other years of survey data, but considered them and determined that the 2005 study was
11 superior. During this process, the Service was “making predictions, within its area of special
12 expertise, at the frontiers of science.” See Baltimore Gas & Elec. Co. v. Natural Res. Def.
13 Council, Inc., 462 U.S. 87, 103 (1983). “When examining this kind of scientific determination,
14 as opposed to simple findings of fact, a reviewing court must generally be at its most
15 deferential.” Id.; see Lands Council v. McNair, 537 F.3d 981, 993-94 (9th Cir. 2008).
16 Because the Service made a reasoned, scientific determination that the 2005 survey represents
17 the best scientific data available, the Court concludes that its determination is entitled to
18 deference.

19 **B. Plant Density Threshold**

20 CBD Plaintiffs also argue that the Service failed to make its decision based on the best
21 scientific data available when it selected a plant density threshold of 480 plants per hectare.
22 (Doc. No. 52-1 at 18-19.) CBD Plaintiffs note that in the 2007 proposed rule, the Service cited
23 a density of 100 plants per hectare as a threshold for critical habitat, but that it used a plant
24 density of 480 plants per hectare for its final critical habitat designation. (Id.) CBD Plaintiffs
25 argue that the 480 plants per hectare figure has no biological justification and no support in the
26 record. (Id.) In the 2008 Rule, the Service explained that “the reference to 100 plants/ha was
27 an error in the proposed rule, and the actual density used was 480 plants/ha.” (AR at 15304.)
28 The 2008 Rule provided the following justification for use of the 480 plants per hectare

1 threshold:

2 Since no established density criteria exist for [the PMV], we chose the 480
3 plants/ha based on the qualitative observation that it captured the majority of
4 large clusters of standing plants and the belief that these densities are likely to
5 be correlated with high-quality habitat characteristics (e.g., suitable dune
6 morphology, soil moisture) and high-density seed banks.

7 (Id.) The Service also stated that it is “not aware of any published scientific information
8 providing quantified density requirements for this species.” (Id.)

9 Considering the record and the parties’ arguments, the Court concludes that CBD
10 Plaintiffs have failed to show that the Service’s selection of the 480 plants per hectare
11 threshold was arbitrary and capricious or that the agency failed to use the best available
12 scientific data. See 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1533(b)(2). CBD Plaintiffs have not
13 pointed to anything in the record to show that the 480 plants per hectare threshold runs counter
14 to the evidence before the agency or that its selection amounts to a clear error of judgment.
15 See State Farm, 463 U.S. at 43; Overton Park, 401 U.S. at 416. Confronted with a paucity of
16 scientific data regarding density requirements for the PMV, the Service used its experience and
17 expertise to select a plant density threshold to designate high-quality habitat and high-density
18 seed banks. (See AR at 15304.) This decision is entitled to the Court’s deference. See
19 Baltimore Gas & Elec., 462 U.S. at 102; Lands Council, 537 F.3d at 993 (“We are to be most
20 deferential when the agency is making predictions, within its area of special expertise, at the
21 frontiers of science.”).¹

22 **IV. Analysis of Economic Impacts**

23 The ESA directs the Service to designate critical habitat only “after taking into
24 consideration the economic impact, the impact on national security, and any other relevant
25 impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2). The
26 Secretary may exclude areas from a designation if “the benefits of such exclusion outweigh
27 the benefits of specifying such area as part of the critical habitat,” but not if the exclusion

28 ¹The Court notes that the ESA provides the Service with discretion to revise its critical
habitat designation, and that the agency may determine that such action is necessary in the
future. See 16 U.S.C. § 1533(a)(3)(A)(ii).

1 would “result in the extinction of the species.” Id. Both Maddalena Plaintiffs and CBD
2 Plaintiffs argue that Defendants impermissibly relied on a flawed economic analysis in
3 deciding to exclude over 4,000 acres of PMV habitat from the 2008 Rule.

4 **A. Consideration of Baseline Conditions**

5 CBD Plaintiffs contend that the Service failed to account for baseline conditions when
6 creating the final economic analysis (“FEA”), which the Service relied on to exclude land from
7 the PMV’s critical habitat designation.² (Doc. No. 52-1 at 19-20.) CBD Plaintiffs and
8 Defendants agree that, when determining whether to exempt proposed critical habitat from
9 designation under section 4(b)(2), the Service is required to measure the impacts of critical
10 habitat designation against the status quo or “baseline.” (See Doc. Nos. 61 at 20, 62 at 16.)
11 In Arizona Cattle Growers Association v. Salazar, the Ninth Circuit explained the baseline
12 approach as follows:

13 For example, suppose that the decision to list the owl as endangered resulted in
14 a ban on logging in a particular area, and that designating that area as critical
15 habitat would independently result in the same ban. Because the listing decision
16 would result in the logging ban even if the agency did not designate critical
17 habitat in that area, the baseline approach would not treat the ban as a burden
that was imposed by the critical habitat designation.

18 606 F.3d 1160, 1172 n.12 (9th Cir. 2010). CBD Plaintiffs contend that the FEA failed to
19 follow this approach because it ascribed costs to the PMV’s critical habitat designation that it
20 should have attributed to the listing of the species. (See Doc. No. 61 at 20-23.) CBD Plaintiffs
21 note that the administrative closures currently in place at the Algodones Dunes were
22 established before the designation of any critical habitat because BLM had failed to comply
23 with the requirements of section 7 of the ESA. (Id.) Section 7 requires a federal agency to
24 consult with the Service to ensure that federal actions are not likely to jeopardize the continued

25 ²Maddalena Plaintiffs originally argued that the Service erroneously used the baseline
26 approach to ascribe no economic cost to closure of the Adaptive Management Area. (See Doc.
27 No. 53-1 at 22-26.) Maddalena Plaintiffs later conceded that “after reviewing the briefs
28 submitted by the Service and the CBD plaintiffs, the Maddalena plaintiffs are persuaded that
(1) to the extent BLM chooses to restrict OHV use in the AMA, it will do so to prevent
jeopardy to the PMV (not adverse modification of habitat), and (2) the EIA properly excluded
the AMA from the cost analysis.” (Doc. No. 63 at 4-5.)

1 existence of any endangered or threatened species. See 16 U.S.C. § 1536(a)(2). Accordingly,
2 CBD Plaintiffs argue that the costs of prohibiting ORV use in the areas that are currently part
3 of the administrative closures may not be attributed to the critical habitat designation because
4 those areas would be closed regardless of any such designation. (See Doc. No. 61 at 20-23.)

5 Defendants argue that the Service conducted a proper baseline analysis that accounted
6 for the administrative closures. (Doc. No. 62 at 18-20.) They explain that the baseline for the
7 analysis of post-designation impacts in the FEA assumes that current closures will be lifted
8 after the new BLM management plan is finalized, but thereafter potentially closed again as a
9 result of future management actions BLM may undertake in response to the critical habitat
10 designation. (Id.) Defendants further explain that the FEA used an “upper bound / lower
11 bound” approach to assess the potential economic impacts of the critical habitat designation,
12 and that “the Service did in fact give consideration to the current status of the interim closures
13 and the possibility that some or all of the interim closures would be closed again to ORV use
14 by future BLM management actions.” (Doc. No. 62 at 19.)

15 Considering the record, the Court concludes that the Service properly applied the
16 baseline approach in its economic assessment. Significant uncertainty exists with respect to
17 future BLM management actions. (AR at 15079.) The Service accounted for this uncertainty
18 by presenting a range of potential economic impacts. (See AR at 15323.) The range takes into
19 account that some costs may be attributable to the species listing rather than to the designation
20 of critical habitat. Accordingly, the Court concludes that the Service applied the law correctly
21 and that its economic assessment methodology is entitled to deference.

22 **B. Assumptions Regarding Reduction in ORV Visitation**

23 CBD Plaintiffs contend that the FEA is flawed because it relies on an unsupported
24 assumption that the administrative closures at the Algodones Dunes caused a twenty-four
25 percent decrease in visits to the ISDRA. (Doc. No. 52-1 at 21-24.) Defendants, however,
26 explain that the FEA only used this allegedly unsupported figure in its retrospective analysis.
27 (Doc. No. 57-1 at 34.) The FEA did not use the figure in the analysis of prospective impacts,
28 which Defendants contend is the portion of the FEA that the Service considered in its

1 exclusion analysis under section 4(b)(2). (Id.) CBD Plaintiffs do not contest Defendants'
2 characterization of the Service's use of the figure and have not shown that the Service relied
3 upon the disputed percentage when deciding to exclude habitat from the 2008 Rule. (See Doc.
4 Nos. 61 at 23-25, 64 at 12-14.) Accordingly, the Court declines to invalidate the 2008 Rule
5 on this ground.

6 **C. Analysis of Costs Associated with Dune Buggy Flats Management Area**

7 Maddalena Plaintiffs contend that the Service improperly assumed that the proposed
8 critical habitat designation results in no economic impact to the Dune Buggy Flats management
9 area. (Doc. No. 53-1 at 19-22.) Maddalena Plaintiffs explain that Dune Buggy Flats is
10 primarily utilized as a camping and staging area for ORV use in the adjacent Ogilby
11 management area and that closure of Ogilby will have a negative economic impact on Dune
12 Buggy Flats. (Id.) Defendants argue that the Service considered the evidence in the record
13 and, in light of the limited nature of existing data, concluded that "the Service does not believe
14 it is possible to predict specific visitor behavior at the ISDRA in response to potential closures
15 of portions of the proposed critical habitat, such that resulting potential costs can be
16 quantified." (Doc. No. 57-1 at 41 (quoting AR at 15307).) Maddalena Plaintiffs dispute
17 Defendants' characterization of the record and argue that it contains sufficient evidence to
18 assess economic impacts associated with Dune Buggy Flats. (Doc. No. 60 at 4-6.)
19 Additionally, Maddalena Plaintiffs argue that the Service should have analyzed Dune Buggy
20 Flats and Ogilby as a single unit. (Id.)

21 Considering the record and the parties' arguments, the Court concludes that the
22 Service's decision to assign no costs to Dune Buggy Flats was not "arbitrary, capricious, an
23 abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(A). The
24 record shows that the Service considered the evidence and arguments advanced by Maddalena
25 Plaintiffs and, based on its experience and expertise, determined that the data was insufficient
26 to conduct the requested economic analysis. (See AR at 15307.) Additionally, based on the
27 evidence in the record, the Service concluded that considering the two areas as a single unit
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1 was not appropriate. (See id.) Accordingly, the Service’s decision is entitled to the Court’s
2 deference. See State Farm, 463 U.S. at 43.

3 **D. Consideration of Impact on Local Economy**

4 Maddalena Plaintiffs also contend that the FEA is flawed because it fails to assess the
5 economic impact of the critical habitat designation in the context of local economic conditions.
6 (Doc. No. 53-1 at 26-28.) Under Section 4(b)(2) of the ESA, the Service must consider the
7 economic and other relevant impacts of specifying particular areas as critical habitat prior to
8 any designation. 16 U.S.C. § 1533(b)(2). The Service’s regulations specify that the Service
9 must “consider the probable economic and other impacts of the designation upon proposed or
10 ongoing activities.” 50 C.F.R. § 424.19. Defendants argue that the FEA presented a detailed
11 analysis of potential economic impacts that was adequate under the agency’s statutory
12 mandate. (Doc. No. 57-1 at 43-46.) The Court agrees. The FEA assessed per vehicle trip
13 expenditures, vehicle maintenance and repair expenditures, lost hotel expenditures, and the
14 allocation of expenditures between Imperial and Yuma counties, among other factors. (See
15 AR at 15306.) Although the FEA did not compare these impacts to the economic baseline in
16 the region, Maddalena Plaintiffs cite no authority indicating that the Service is required to
17 undertake such a broad analysis.³ Accordingly, the Court rejects Maddalena Plaintiffs’
18 argument that the Service violated section 4(b)(2) of the ESA because it did not assess the
19 economic impact of the critical habitat designation in light of baseline economic conditions.

20 **E. Analysis of Cost Savings**

21 CBD Plaintiffs argue that the Service failed to adequately analyze the economic benefits
22 of designating critical habitat. (Doc. No. 52-1 at 27-28.) Defendants contend that the Service
23 considered the potential public cost savings associated with designation of critical habitat, and
24

25 ³Maddalena Plaintiffs cite several cases that discuss the importance of assessing
26 baseline conditions when conducting environmental assessments under the National
27 Environmental Policy Act (“NEPA”). (Doc. No. 53-1 at 26-27.) These cases analyze a
28 different statutory scheme and accordingly do not support Maddalena Plaintiffs’ contention
that the Service is required to measure the economic impacts of proposed critical habitat
designations against baseline economic conditions.

1 concluded that none were likely. (Doc. No. 57-1 at 38-40.) Specifically, the Service
2 concluded that, even if ORV visitation decreased because of extensive closures, local agencies
3 would not experience any cost savings because they are already underfunded and understaffed.
4 (AR at 15082.) Considering the record, the Court concludes that the Service adequately
5 examined the evidence regarding public cost savings and rationally concluded that none were
6 likely to occur. Accordingly, the Court concludes that the Service's decision to ascribe no cost
7 savings to inclusion of land in critical habitat is entitled to deference. See State Farm, 463 U.S.
8 at 43.

9 **F. Reliance on Uncertain Assumptions**

10 CBD Plaintiffs argue that the Service's reliance on the FEA was unreasonable because
11 the FEA admits to the existence of uncertainty in some of its assumptions and conclusions.
12 (Doc. No. 52-1 at 20-21.) Defendants contend the FEA expressly accounted for this
13 uncertainty by establishing ranges of economic impacts. (Doc. No. 57-1 at 33.) Moreover,
14 Defendants argue that the Service is permitted to make reasonable judgments based on
15 available information, even if that information is incomplete. (Id.) The Court agrees. See
16 Greenpeace Action v. Franklin, 14 F.3d 1324, 1337 (9th Cir. 1992) (upholding a biological
17 opinion despite uncertainty about the effectiveness of management measures because the
18 decision was based on a reasonable evaluation of the available data). Accordingly, the Court
19 concludes that the presence of some uncertainty in the FEA does not render the Service's
20 analysis arbitrary and capricious.

21 CBD Plaintiffs also argue that the FEA is invalid because its authors edited Dr. J.R.
22 DeShazo's review of economic studies and then relied heavily on the review. (Doc. No. 52-1
23 at 24 n.8.) Defendants contend that the FEA authors' feedback was designed to make the study
24 more understandable to a layperson and that it was merely suggestive. (Doc. No. 57-1 at 37.)
25 The Court concludes that CBD Plaintiffs' arguments do not render the FEA invalid or
26 unreliable.

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1 **V. Exclusion of Habitat**

2 CBD Plaintiffs contend that the Service abused its discretion by excluding over 4,000
3 acres from the PMV's final critical habitat designation. (Doc. No. 52-1 at 25-26, 28-29.) The
4 Court reviews the Service's decision to exclude areas pursuant to section 4(b)(2) "for abuse
5 of discretion." Bennett v. Spear, 520 U.S. 154, 172 (1997). "There is an abuse of discretion
6 when an agency's decision is based on an erroneous conclusion of law or when the record
7 contains no evidence on which it could have rationally based that decision." Mendenhall v.
8 Nat'l Transp. Safety Bd., 92 F.3d 871, 874 (9th Cir. 1996).

9 CBD Plaintiffs argue that the Service abused its discretion in excluding the Glamis
10 management area from the 2008 Rule because the FEA attributed no economic cost to its
11 closure. (Doc. No. 52-1 at 25-26.) Defendants do not dispute that the FEA assigned no cost
12 to closure of the Glamis management area. (Doc. No. 57-1 at 37.) Instead, Defendants argue
13 that considering the Glamis and Gecko areas together was within the Service's discretion under
14 section 4(b)(2). (See Doc. No. 62 at 22-23.) Defendants explain that, although ORV users do
15 not recreate at Glamis, they use it as a staging ground for activities at the Gecko management
16 area. (Id. at 22.) Because the closure of one area would affect the other, the Service analyzed
17 the two management areas a single unit. (Id.) In doing so, Defendants contend that the Service
18 properly considered "the economic impact, the impact on national security, and any other
19 relevant impact" and excluded both areas because the "benefits of such exclusion outweigh[ed]
20 the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533(b)(2).
21 (See AR 15324.) After considering the record, the Court concludes that the Service reasonably
22 applied the law to the facts before it and that its decision to exclude the Glamis management
23 area was not an abuse of discretion. See Mendenhall, 92 F.3d at 874.

24 CBD Plaintiffs also contend that Defendants impermissibly relied on management
25 considerations when deciding to exclude habitat from the 2008 Rule. (Doc. No. 52-1 at 28-
26 29.) Defendants argue that the Service's consideration of management challenges was
27 appropriate because section 4(b)(2) authorizes it to consider "other relevant impacts" of
28

1 proposed critical habitat designations. (Doc. No. 57-1 at 49 (citing 16 U.S.C. § 1533(b)(2)).)
2 The Court agrees and concludes that the Service did not abuse its discretion in considering
3 management challenges when excluding proposed critical habitat from the final designation.


4 Defendants' motion for summary judgment argues that Maddalena Plaintiffs lack
5 standing because they have not presented evidence showing that they have a justiciable case
6 or controversy. (Doc. No. 57-1 at 19-20.) On July 16, 2010, the Court issued an order
7 providing Maddalena Plaintiffs with leave to submit evidence establishing their standing.
8 (Doc. No. 65.) On July 21, 2010, Vincent Brunasso, a member of Duners for Equity,
9 submitted a declaration. (Doc. No. 66.) The Court concludes that the declaration is sufficient
10 to establish Duners for Equity's standing in this case. Richard Maddalena has not submitted
11 evidence that he has been or will be injured by the 2008 Rule. Accordingly, the Court
12 concludes that Richard Maddalena has failed to establish his standing without prejudice to a
13 further showing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Because
14 Duners for Equity has standing, all of Maddalena Plaintiffs' arguments are preserved.

15 **CONCLUSION**

16 For the reasons set forth above, the Court grants Defendants' motion for summary
17 judgment and denies Maddalena Plaintiffs' and CBD Plaintiffs' motions for summary
18 judgment. The Court commends the parties on the excellent briefs submitted in connection
19 with these motions.

20 **IT IS SO ORDERED.**

21 DATED: August 5, 2010

22 
23 _____
24 MARILYN L. HUFF, District Judge
25 UNITED STATES DISTRICT COURT

26 COPIES TO:

27 All parties of record
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