APPENDIX B
AGUA CALIENTE BANDS OF CAHUILLA INDIANS, ET AL. V. NORTON ET AL., CASE NO. EDCV 05-187-VAP (OPX)

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Ref: 66064-0002

August 11, 2006

VIA FEDEX

Vicki Wood
Field Manager
Bureau of Land Management
El Centro Field Office
1661 S. 4th Street
El Centro, CA 92243

Re: Bighorn Sheep Critical Habitat Litigation – Court Order Entering Consent Decree with (1) Remand of Critical Habitat, and (2) Partial Vacatur

Dear Ms. Wood:

As attorneys for and on behalf of Granite Construction Company, Val-Rock, Inc., Pyramid Construction, and United States Gypsum Company ("Mining Operators"), we want to notify you of an important recent U.S. District Court decision that has changed the boundaries of land included within critical habitat for the Peninsular Bighorn sheep. Effective immediately, this decision removes from critical habitat those lands in Imperial County within which these Mining Operators currently operate.

Enclosed herewith are the following:

1. Amended Order Granting Motion for Approval of Consent Decree and Dismissal with Prejudice in *Agua Caliente Bands of Cahuilla Indians, et al. v. Norton et al.*, Case NO. EDCV 05-187-AP (Opx), entered by U.S. District Judge Virginia A. Phillips, U.S. District Court, Eastern District of California, on August 3, 2006. ***(The Order is attached hereto as Exhibit A.)***

2. Consent Decree, entered by the U.S. District Court, on August 2, 2006 ***(The Consent Decree is attached hereto as Exhibit B.)***

3. Detailed maps showing the precise location of the mining lands now excluded from critical habitat. These were not entered by the Court, but were prepared by the Mining Operators and track the property descriptions in Exhibits 1, 2, and 3 of the Consent Decree. ***(The Maps are attached hereto as Exhibit C.)***

By this Order, Judge Phillips affirmed a consent decree entered into by plaintiff, plaintiff-intervenors (including the Mining Operators), and the federal defendants, which provides for the following:

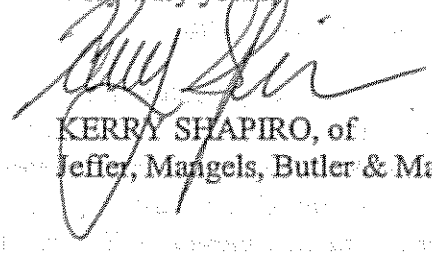
- The Service shall remand the February 1, 2001 final rule designating critical habitat for the Peninsular Bighorn sheep (66 Fed. Reg. 8650) based on errors in the Service's assessment of economic impacts associated with the final rule. Specifically, the consent decree and order require the U.S. Fish and Wildlife Service ("Service") to reconsider critical habitat for the species, and prepare a new rule within two years.

- In reconsidering the final rule, the Service shall address, *inter alia*, the economic impacts of designating critical habitat pursuant to Section 4 of the Endangered Species Act, 16 U.S.C. 1533(b)(2).

- During the remand period when the Service is promulgating a new critical habitat rule, the old rule will largely remain in place and be effective, except for specific lands omitted from the rule, including specific lands where the Mining Operators have existing or planned mining operations, as well as certain lands adjacent to these areas, which shall be immediately removed from critical habitat. Thus, as of the date of the Order, these lands are no longer within designated critical habitat boundaries, and thus are no longer subject to any legal requirements relating to designated critical habitat. Property descriptions of these lands are contained in the Consent Decree. (*See* Exhibit B, Consent Decree, at Exh. 2).

Please call me at the above number if you have any questions or comments regarding these court documents.

Very truly yours,



KERRY SHAPIRO, of
Jeffer, Mangels, Butler & Marmaro LLP

KS:sb
Enclosures

cc: Mike Pool, BLM State Director
Steve Kupferman, BLM-State Office
Rob Waiwood, BLM-Desert District
Larry LaPre, BLM-Desert District
Linda Self, BLM-El Centro
Daniel Steward, BLM El Centro
Kendra Nitta, U.S. Department of the Interior
Jurg Heuberger, County of Imperial

bcc: Jeff Mercer, Granite Construction
Richard Watts, Esq., Granite Construction
Larry Eskildsen, Val-Rock, Inc.
Daryl Dickerson, Pyramid Construction
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CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION BY DEPUTY

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AUG - 3 2006
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CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AGUA CALIENTE BAND OF CAHUILLA INDIANS, Plaintiff, v. GALE A. NORTON, SECRETARY OF THE INTERIOR; STEVEN A. WILLIAMS, DIRECTOR OF THE U.S.FISH AND WILDLIFE SERVICE; U.S. DEPARTMENT OF THE INTERIOR; U.S. FISH AND WILDLIFE SERVICE, Defendants.	Case No. EDCV 05-187-VAP(OPx) [Motion filed on May 8, 2006] **AMENDED ORDER GRANTING MOTION FOR APPROVAL OF CONSENT DECREE AND DISMISSAL WITH PREJUDICE**

DOCKETED ON CM
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BY 045

The Motion for Approval of Consent Decree and Dismissal with Prejudice came before the Court for hearing on July 17, 2006. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court grants the Motion.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(D).

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I. BACKGROUND

Plaintiff Agua Caliente Band of Cahuilla Indians ("Agua Caliente Band") filed this Complaint on March 7, 2005. Plaintiff Agua Caliente Band challenges the critical habitat designation for the bighorn sheep, issued in a final rule by the Secretary of the Interior on February 1, 2001, alleging that it was promulgated in violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1351, et seq.; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, et seq.; federal trust obligations under 25 U.S.C. § 1629; Executive Order 13175; Secretarial Order 3206; and other Federal laws and regulations. Specifically, Plaintiff Agua Caliente Band avers that Defendants P. Lynn Scarlett, H. Dale Hall, United States Department of the Interior, and United States Fish and Wildlife Service ("Service") (collectively, "Federal Defendants") used a methodology in designating a critical habitat designation that failed to: (1) identify the physical or biological features essential to the conservation of the species; (2) identify the specific areas where the essential physical or biological features are found; (3) identify the specific areas that may require special management considerations or protections; (4) identify the geographic areas occupied by the species; (5) consider the best scientific and commercial data available; (6) conduct a mandatory exclusion analysis; (7) provide

public notice; (8) adequately respond to public comments; (9) conduct a sufficient economic analysis; and (10) describe specifically the actual areas of critical habitat in violation of 16 U.S.C. § 1532(5)(A). [Joint Motion for Approval of Consent Decree and Dismissal with Prejudice ("Mot.") at 1-2.]

On June 7, 2005, the Court permitted the Building Industry Legal Defense Foundation, California Building Industry Association, California State Grange, and Desert Riders (collectively, "BILDF Plaintiffs") to intervene as Plaintiffs. [June 7, 2005, Order Granting Applicants' Motions to Intervene at 11.] On the same date, the Court permitted Granite Construction Company, Pyramid Construction, United States Gypsum Company, and Val-Rock, Inc. (collectively, "GCC Plaintiffs") to intervene as Plaintiffs as well. [Id.]

The Court permitted Sierra Club and Center for Biological Diversity (collectively, "CBD Defendants") to intervene as Defendants on June 7, 2005; however, the Court restricted their involvement to the remedial phase of this action. [Id.]

On May 8, 2006, Plaintiff Agua Caliente Band, the BILDF Plaintiffs, the GCC Plaintiffs, and the Federal Defendants filed a Joint Motion for Approval of Consent

Decree and Dismissal with Prejudice. The Proposed Consent Decree ("Decree") states, inter alia, that the critical habitat designation rule will be remanded to the Service to be considered in light of the Plaintiffs' allegations. [Decree at 2.] The Decree also states that equity demands the retention of the critical habitat designation pending promulgation of a new rule except in the following areas:

> (1) all lands within the exterior boundaries of the Agua Caliente Indian Reservation, including (a) lands title to which is held by the United States in trust for the Agua Caliente Band of Cahuilla Indians, (b) lands title to which is held in trust by the United States for a member of the Agua Caliente Band of Cahuilla Indians or any other Indian, and (c) lands title to which was formerly held in trust by the United States for a member of the Agua Caliente Band of Cahuilla Indians (collectively, "Tribal Lands") . . .; (2) certain lands adjacent to and within mining operations within the Coyote and Jacumba Mountains and within the Fish Canyon area (collectively, "Mining Lands") . . .; and (3)

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> certain private lands used by the Desert Riders (collectively, "Desert Riders Lands") . . . .

[Decree at 4.]

On May 26, 2006, the CBD Defendants filed an Opposition to Joint Motion for Approval of Consent Decree and Dismissal with Prejudice ("Opp'n"). On June 9, 2006, Plaintiff Agua Caliente Band filed a Reply In Support of Joint Motion ("Agua Caliente Band's Reply"); the BILDF Plaintiffs filed a Reply in Support of Joint Motion ("BILDF's Reply"); the GCC Plaintiffs filed a Reply in Support of Joint Motion ("GCC's Reply"); and the Federal Defendants filed a Reply in Support of Joint Motion ("Federal Defendants' Reply"). On account of new evidence in the Reply papers, the CBD Defendants filed a Sur-Reply ("CBD Defendants' Sur-Reply") on July 10, 2006.

II. LEGAL STANDARD

The purpose behind a consent decree is as follows:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of

> litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

United States v. Armour & Co., 402 U.S. 673, 681-682 (1971).

A proper consent decree must "spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based." Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004) (citing Firefighters v. Cleveland, 478 U.S. 501, 519 (1986)).

Courts should approve proposed consent decrees when they determine that it is "fair, reasonable and equitable and does not violate the law or public policy." Sierra

Club, Inc. v. Elec. Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990); United States v. State of Or., 913 F.2d 576, 580 (9th Cir. 1990) ("Before approving a consent decree, a district court must be satisfied that it is at least fundamentally fair, adequate and reasonable. . . . In addition, because it is a form of judgment, a consent decree must conform to applicable laws."). "[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.").

A court is to be mindful that a motion to approve a consent decree is not a dispositive motion on the merits; a court should not "reach any ultimate conclusions on the contested issues of fact and law which underlie the

merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." Officers for Justice, 688 F.2d at 625. Also, while a court must conduct a heightened scrutiny of a consent decree affecting public interest, "the court need not require that the decree be 'in the public's best interest' if it is otherwise reasonable." Oregon, 913 F.2d at 581 (citing SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984)).[1]

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[1] The CBD Defendants contend that "the focus of the court's attention in assessing the agreement should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement." [Opp'n at 6-7 (citing Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1125 (D.C. Cir. 1983).] Their reliance on this authority is unfounded, however. In Gorsuch, the complaint alleged that the Environmental Protection Agency ("EPA") did not properly implement certain provisions of the Clean Water Act ("CWA"). [Id. at 1120.] A consent decree was executed and approved by the district court and the issue on appeal was whether the consent decree could impose requirements on the EPA that were not specifically enumerated in the CWA. [Id. at 1122.] The court held that the provisions were proper as long as the court determined that the provisions were consistent with the purposes of the CWA. [Id. at 1125.]

Here, the Complaint alleges violations of several federal procedural requirements before enacting the critical habitat designation rule. The consent decree simply requires the Service to reconsider the critical habitat designation in light of the existing procedural requirements; it does not impose any "non-statutory" duties on the Service as did the consent decree in Gorsuch. Thus, the standard announced in Gorsuch does not apply here.

III. DISCUSSION

A. Reasonableness of the Decree

1. General Reasonableness

The Moving Parties contend that the Decree is reasonable because Plaintiffs receive some relief, i.e., a partial vacatur of the critical habitat designation, but not the complete relief requested in the Complaints.[2] [Mot. at 5-6.] The Moving Parties assert that while the Service will reconsider the critical habitat designation rule and issue a revised rule complying with the procedures set forth in the ESA, the Decree does not restrict the Service's discretion in issuing a new rule and does not contemplate any particular substantive result. [Id. at 6.]

The Moving Parties also argue that the CBD Defendants will not be prejudiced because (1) they were only permitted to intervene as to the remedies phase, (2) their interest in the critical habitat designation will not be harmed by the Decree because only about five percent of the designated area is being vacated and these vacated areas have other independent protections for the bighorn sheep, and (3) any harm suffered by the CBD Defendants does not rise to the level of prejudice and is outweighed by the benefit of avoiding protracted

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[2] Plaintiff will not receive declaratory relief or a full vacatur of the critical habitat designation rule.

litigation and the possibility of complete vacatur of the critical habitat designation. [Id. at 7.]

The CBD Defendants respond that the critical habitat designation rule provides significant protections for the bighorn sheep and that the Court should be concerned with "preventing 'undesirable consequences which we cannot now predict' when invalidating regulations during remand." [Opp'n at 14 (citing Western Oil & Gas v. EPA, 633 F.2d 803, 813 (9th Cir. 1980)).] The CBD Defendants argue that the burden of any alleged procedural defects in the critical habitat designation rule should fall on the Service, not the bighorn sheep. [Id. at 15.]

Plaintiff Agua Caliente Band counters that the Decree furthers the ESA's purpose of conserving the ecosystems of endangered species. [Agua Caliente Band's Reply at 3.] It argues that this Decree is reasonable in light of the possibility of the entire critical habitat designation rule being vacated. [Id.] Plaintiff Agua Caliente Band asserts that (1) the Federal Defendants are not contradicting their prior statements; (2) there is no evidence of collusion or overreaching; and (3) deference should be given to the Service's decision that the partial vacatur of the critical habitat designation rule is appropriate here. [Id. at 3-5.]

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Plaintiff Agua Caliente Band further contends that (1) the CBD Defendants have no definitive evidence that the partial vacatur of the critical habitat designation rule will damage the recovery of the bighorn sheep, (2) the CBD Defendants simply argue that the partial vacatur *may* harm the bighorn sheep, and (3) there are other protections for the bighorn sheep that will remain in effect despite the partial vacatur. [Id. at 6-8.]

The GCC Plaintiffs also assert that the CBD Defendants' position of opposing any settlement with a partial vacatur would make any potential settlement of this action untenable and obviate the purposes of having a consent decree. [GCC's Reply at 4.]

There is no allegation, or evidence, that this Decree was a product of fraud or collusion among the Moving Parties. Hence, the Decree should be approved if it is fair, reasonable, and equitable.

Moreover, while a court should examine the specific terms of a consent decree to ensure they are reasonable, a federal agency's decision to enter into a consent decree should be afforded deference. Randolph, 736 F.2d at 529 ("[C]ourts should pay deference to the judgment of the government agency which has negotiated and submitted the proposed judgment."), United States v. Montrose Chem.

Corp. of Cal., 50 F.3d 741, 746 (9th Cir. 1995) (". . . district court reviewing a proposed consent decree must refrain from second-guessing the Executive Branch.") "Such deference is appropriate given [t]hat so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree." Montrose, 50 F.3d at 746 (quotation marks and citations omitted). Moreover, there is a presumption that government agencies are performing their duties adequately. See United States v. Gregory, 534 U.S. 1, 10 (2001) (citing United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926)).

While the Court will address the specific provisions of the Decree below, the Decree generally appears to be a fair, reasonable, and equitable resolution of the case. Plaintiff Agua Caliente Band's Complaint alleged various improprieties in the enactment of the critical habitat designation final rule, and, as a remedy, sought the complete vacatur of the rule. After considering the allegations, and the possible defenses to those allegations, the Federal Defendants informed the Court before the filing of this Motion that they did not intend on contesting liability.

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If a consent decree had not been entered into, and the Federal Defendants conceded liability, the only remaining issue before the Court would be the appropriate remedy. The presumptive remedy would be to remand the critical habitat designation rule to the Service for reconsideration in light of the applicable laws and to vacate the final rule pending this reconsideration. 5 U.S.C. § 706(2)(A) (stating that a court should "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."); Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979) ("Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act."). The Court, however, can order that the improper remedy remain in force if equity demands. Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures.").

Without a consent decree, the parties would be faced with an all-or-nothing result and would have to expend significant resources, including the hiring of experts, to litigate this issue fully before the Court. Moreover, the Federal Defendants would have faced the heavy burden

of persuading the Court that the presumptive remedy should not be applied because the equities support the exception made in Babbitt. Faced with these challenges and the possible adverse results, a consent decree with a partial vacatur of the critical habitat designation rule is generally fair, reasonable, and equitable.

The CBD Defendants' arguments in opposition are unfounded, as they are not directed to the question before the Court here, i.e., whether the consent decree is fair, reasonable, and equitable. In other words, that the Federal Defendants may have plausible arguments for why the critical habitat designation should be upheld during remand is immaterial because the purpose of a consent decree or settlement is the elimination of the risk in testing the validity of these arguments in court. The CBD Defendants overlook the critical presumption that the entire critical habitat designation rule could be vacated in the absence of this consent decree.

Accordingly, the Decree is generally reasonable, fair, and equitable. The Court will now analyze whether the specific terms of the Decree are fair reasonable, and equitable.

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1. **Specific Terms of the Consent Decree**

a. **Applicable Law on Remand**

The CBD Defendants assert that the Decree "improperly directs the Service to revise the critical habitat designation in light of case law that is inconsistent with current Ninth Circuit precedent" by directing the Service to consider the decisions in New Mexico Cattle Growers v. United States, 248 F.3d 1277 (10th Cir. 2001) and Home Builders Association v. United States, 268 F. Supp. 2d 1197 (E.D. Cal. 2003) when revising the critical habitat designation rule. [Opp'n at 7-8.] The CBD Defendants argue that these decisions were called into question by the Ninth Circuit decision in Gifford Pinchot Task Force v. United States, 378 F.3d 1059 (9th Cir. 2004).[3] [Id. at 7-11.] The CBD Defendants also argue that plain language of the ESA and Gifford Pinchot support the use of a baseline approach to economic analysis. [Id. at 8-11.]

Plaintiff Agua Caliente Band contends that the decision in Gifford Pinchot does not overrule the decisions in New Mexico and Home Builders because neither decision relied solely on the regulatory definition of

[3] Specifically, the CBD Defendants argue that the decisions in New Mexico and Home Builders relied on a regulatory definition of "destruction or adverse modification," found in 50 C.F.R. § 402.02, which was found to be invalid in the Ninth Circuit's decision in Gifford Pinchot. [Opp'n at 7-8.]

"destruction or adverse modification." [Agua Caliente Band's Reply at 10-11.] Plaintiff Agua Caliente Band asserts that the Decree requires the Service (1) to consider the text of section 4(b)(2) of the ESA when considering the impact of a critical habitat designation, (2) to analyze the economic impact consistent with New Mexico and other applicable law, and (3) to reevaluate the critical habitat designation in light of Home Builders. [Id. at 12.] Plaintiff Agua Caliente Band also asserts that while the Decree provides guidance to the service on what law to apply, it is up to the Service to promulgate a rule consistent with the law. [Id., Federal Defendants' Reply at 4.]

The Replies by the other Moving Parties contend that (1) any discussion of the validity of New Mexico and Home Builders is an improper discussion on the merits, and (2) CBD Defendants are arguing the merits of the case, which they are not permitted to do under the June 7 Order limiting their participation to only the remedy phase. [BILDF's Reply at 1-2, Federal Defendants' Reply at 2-5, GCC's Reply at 5-7.]

While the CBD Defendants question the Federal Defendants' decision to enter into this Decree by arguing in vain that Ninth Circuit authority supports the Service's methodology, these arguments improperly exceed

the narrow scope of the CBD Defendants' permitted intervention in this action. It is also well established that in approving a consent decree, the Court does not delve into the merits of the case, but rather limits its review to determine if the settlement is fair, reasonable, and equitable. Officers of Justice, 688 F.2d at 625. Most critically, absent an allegation of collusion, it is not within the province of the Court to question the Federal Defendants' decision not to contest liability. Randolph, 736 F.2d at 529; Montrose, 50 F.3d at 746.

b. Vacatur of the Rule as to Certain Lands

The Moving Parties assert that the critical habitat designation is not the only protection for the bighorn sheep; there are various other federal and state laws that protect this species. [Mot. at 10.] For instance, the Moving Parties posit that Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the

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destruction or adverse modification of [a critical] habitat."[4] [Id. (citing 16 U.S.C. § 1536(a)(2)).]

i. Tribal Lands

The Moving Parties argue that the vacatur is appropriate on the Tribal Lands because:

> (1) the Tribal Lands comprise a small percentage (less than 1.6 percent) of the total acreage of bighorn sheep critical habitat;
>
> (2) Plaintiff [Agua Caliente Band] adopted a Tribal Habitat Conservation Plan [("Tribal HCP")] on or about November 11, 2002, . . . that includes a Conservation Strategy for the bighorn sheep; and
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> (3) Plaintiff [Agua Caliente Band] continues to work with the Service toward the development of a habitat conservation plan under ESA Section 10(a)(1)(B) . . . .

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[4] The other statutes mentioned by the Moving Parties are Section 9 of the ESA, prohibiting unauthorized "take" of endangered fish and wildlife species; and California Fish and Game Code § 4700(b)(2), prohibiting an endangered species from being taken or possessed. [Mot. at 11.] The Moving Parties also contend that the bighorn sheep will be protected by federal and state efforts to protect certain lands that happen to occupy the bighorn sheep, i.e., the Santa Rosa and San Jacinto Mountains National Monument Act of 2000, the Wilderness Act, and the California Desert Protection Act. [Id. at 11-12.]

[Id. at 9.] Concerning the Tribal HCP, the Moving Parties assert that it requires "conservation of at least 85% of bighorn sheep habitat identified by the Tribe on the Tribal Lands and 100% of bighorn sheep use areas and habitat linkages identified by the Tribe on Tribal Lands." [Id.]

The CBD Defendants respond that it is premature to vacate the critical habitat designation on Tribal Lands because the Tribal HCP has not been approved by the Service and an "incidental take" permit has not been granted. [Opp'n at 16.] The CBD Defendants contend that the Federal Defendants' statements that the Tribal HCP will provide adequate protection during the remand period are contrary to statements made by the Federal Defendants during the comment period of the critical habitat designation rule.[5] [Id. at 17.] The CBD Defendants argue that the Moving Parties state with no support that no harm will result to the bighorn sheep. [See id. at 18.] The CBD Defendants further argue that while the

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[5] The CBD Defendants contend that during the comment period the Federal Defendants found that the Tribal HCP needed "'to better avoid direct and indirect effects, and offset adverse effects with better definition/certainty.'" [Opp'n at 17 (citing Declaration of Lisa T. Belenky ("Belenky Decl.") at Ex. 1).] The CBD Defendants also assert that the Tribal HCP's "proposed Mountains and Canyons Conservation Area Strategy 'likely would result in levels of habitat fragmentation that would compromise the ecological suitability of remaining areas, such as those needed to support a secure bighorn population.'" [Id. (quoting Belenky Decl. at Ex. 1.]

Tribal Lands represent 1.6% of the total critical habitat, the actual critical habitat designation on the Tribal Lands covers nearly double the acreage, in a checkerboard pattern, and it includes several lambing areas and migration corridors.[6] [Id. at 18-19.]

Plaintiff Agua Caliente Band counters that there is no evidence to support the CBD Defendants' statements that the bighorn sheep will suffer harm if the critical habitat designation is vacated on Tribal Lands; indeed, Plaintiff Agua Caliente Band cites a peer-reviewed empirical research article for the proposition that 66% of the area in the Santa Rosa Mountains, where the Tribal Lands are located and that is covered by the critical habitat designation, will not be used by the bighorn sheep.[7] [Agua Caliente Band's Reply at 7, 7 n.3.] Plaintiff Agua Caliente Band asserts that the CBD Defendants do not address the other protections that remain in effect during the remand period, such as the take prohibition in the ESA, the designation of portions of the bighorn habitat as a national monument, and that part of the habitat is in a federal wilderness area and a state park. [Id. at 8.] Plaintiff Agua Caliente Band

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[6] The CBD Defendants argue that the Service found several defects in the Tribal HCP concerning the migration corridor and lambing areas. [Opp'n at 19.]

[7] The CBD Defendants' arguments that the Court should not give weight to this article lack merit.

also asserts that the Tribal HCP is sufficient protection for the bighorn sheep; that the plan has not been approved by the Service does not mean that its protections are insufficient from a biological perspective. [Id. at 8-10.]

The Federal Defendants contend that vacating the critical habitat designation rule on the Tribal Lands is appropriate because the Tribal HCP is sufficient protection for the bighorn sheep, the other protections for the bighorn sheep under federal and state law, and the Tribal Lands represent less than 1.6% of the critical habitat designation. [Federal Defendants' Reply at 8-9, Declaration of Renne Lohoefener ("Lohoefener Decl.") at ¶¶ 5-6.] The Federal Defendants argue the Service's comments concerning the Tribal HCP when it was reviewing the plan under Section 10 of the ESA are immaterial to the determination that the plan is sufficient for interim protection. [Federal Defendants' Reply at 9.]

The CBD Defendants counter that the assertion in Renne Lohoefener's ("Lohoefener") declaration that the Tribal Lands are surrounded by federally owned property is a misstatement because the Tribal Lands are interspersed with private property. [CBD Defendants' Sur-Reply at 2 (citing Declaration of Curtis Bradley at Ex. 13, Second Declaration of Lisa Belenky at Ex. 2.]

The CBD Defendants argue that Lohoefener's declaration makes several conclusions based on this incorrect statement -- i.e., that section 7 consultations will protect the bighorn sheep -- which the Court should not consider. [Id. at 3.]

The CBD Defendants contend that (1) the National Monument Act will not protect the bighorn sheep on private lands, (2) while the Tribal Lands are small relative to the critical habitat as a whole, the Tribal Lands consist of 20 square miles, and (3) the contract between Plaintiff Agua Caliente Tribe and the City of Palm Springs concerning project approvals on certain Tribal Lands does not trigger section 7 of the ESA and violates the Tribal HCP. [Id. at 4-9.]

As set forth above, the legal standard here is whether the Decree is fair, reasonable, and equitable; the Court need not determine whether the Decree could provide more protection than it does to the bighorn sheep. Hanlon, 150 F.3d at 1027. The Moving Parties have satisfied their burden that vacating the critical habitat designation on Tribal Lands is fair, reasonable, and equitable. While the other existing protections for the bighorn sheep might not be ideal, they are not so deficient that it would make the consent decree unfair, unreasonable, or inequitable. Additionally, the Court

must defer to the Federal Defendants' decision to enter into this Decree because there is no evidence that the Federal Defendants colluded with Plaintiffs or have any other improper motive for entering into this Decree. Randolph, 736 F.2d at 529.

Moreover, the CBD Defendants focus their arguments on how the bighorn sheep might be harmed by the Decree. Keeping in mind that the Court's review of a consent decree is extremely limited, evidence that the Decree could offer more protection to the bighorn sheep, or that some harm might result from a partial vacatur, does not transform the Decree into an unreasonable or inequitable one. Indeed, the CBD Defendants argue in vain that harm may or likely will result from the vacating of the critical habitat on Tribal Lands; however, they never state it would be unfair, unreasonable or inequitable to vacate the critical habitat designation on Tribal Lands. The CBD Defendants have not persuaded the Court that any threatened harm will be of a magnitude that would make the Decree unfair, unreasonable, or inequitable.

b. Mining Lands

The Moving Parties contend that a partial vacatur of the critical habitat designation on Mining Lands is appropriate and reasonable because:

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(1) the Mining Lands comprise only two percent of the total acreage of bighorn sheep critical habitat; and

(2) a large portion of the designated areas are on actively mined lands which do not support physical and biological features essential for the conservation of the bighorn sheep.

[Mot. at 9.] The Moving Parties further assert that a significant portion of the designated areas are on lands for which either:

(1) biological opinions are in place that conclude the mining operations will not result in jeopardy to the bighorn sheep, and identify reasonable and prudent measures, and terms and conditions, designed to minimize impacts to the species; or

(2) a draft EIS/EIR has been circulated that addresses impacts to bighorn sheep habitat and identifies appropriate mitigation measures.

[Id. (citing Declaration of Kerry Shapiro at Ex. 2).]

The CBD Defendants counter that while the Mining Lands constitute only 2% of the total acreage of the critical habitat, the loss of these areas would "increase

habitat fragmentation, disrupt movement corridors, and reduce the ability of bighorn [sheep] to adjust their distributions in response to the changing environment." [Opp'n at 20.] The CBD Defendants assert that the Moving Parties did not provide evidentiary support for their proposition that some of the lands do not support physical and biological features. [Id.] The CBD Defendants further assert that the biological opinions concerning the Mining Lands fail to support vacatur because the opinions identify "reasonable and prudent measures and terms and conditions to minimize the impacts to bighorn while allowing mining to go forward." [Id. (citing Ex. A at 31-34).]

The CBD Defendants further posit that the Moving Parties' reliance on the draft EIS/EIR is inappropriate because (1) the EIS/EIR only require that the mining companies consult with the service; the reports do not require the companies to actually adopt the conservation recommendations of the service, (2) it is unclear whether the Service will consider the conservation and recovery of the bighorn sheep in future consultations to the same extent as it would if the critical habitat rule remained in effect, and (3) there has not been sufficient public review and comment on the draft EIS/EIR. [Id. at 21.]

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The Federal Defendants respond that a partial vacatur of the critical habitat designation rule as to the Mining Lands is reasonable because (1) there is a small amount of acreage at issue, and (2) the lands consist of or are adjacent to active mines, and "do not provide features such as water sources, habitat for forage, remote sites for breeding, and linkages between ewe groups." [Federal Defendants' Reply at 9, Lohoefener Decl. at ¶ 8.]

The GCC Plaintiffs assert that there has been no evidence presented that the bighorn sheep have been located on any of the Mining Lands or how any actively mined lands would support the conservation and recovery of the bighorn sheep. [GCC's Reply at 7-8.] Further, the GCC Plaintiffs contend that there is no evidence that vacating the critical habitat designation on lands that are not actively mined would hurt the recovery and conservation of the bighorn sheep. [Id.] The GCC Plaintiffs argue that the Biological Opinions and draft EIS/EIR provide sufficient protections for the bighorn sheep during the remand period. [Id. at 8-9.]

The CBD Defendants contest Lohoefener's assertions regarding the proportion of Mining Lands in the entire critical habitat designation and active mining locations. [CBD Defendants' Sur-Reply at 10.] The CBD Defendants contend that while the lands that are being actively

mined do not support a habitat for the bighorn sheep, there is no evidence to support Lohoefener's declaration that the remainder of the Mining Lands likewise do not support a habitat. In fact, there is data to support a finding that bighorn sheep do use some of the Mining Lands. [Id. at 10-11 (citing Ex. 16)[8].]

The CBD Defendants also assert that Lohoefener's statement that the "anticipated activities on Mining . . . Lands during the remand period are likely to be small and incremental" [Lohoefener Decl. at ¶ 5] is unsupported. [CBD Defendants' Sur-Reply at 11.] The CBD Defendants argue that the U.S. Gypsum mine expansion is contrary to Lohoefener's statement. [Id. at 11-12.]

While some of the statements in Lohoefener's declaration are conclusory, the Moving Parties have satisfied their burden that the vacatur of the critical habitat designation on the Mining Lands is fair, reasonable, and equitable. They have presented evidence that the likely effect of vacating the critical habitat designation will be minimal and that there are other protections in place. Additionally, deference must be given to the Federal Defendants determination that it is appropriate to vacate the critical habitat designation on

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[8] While there was a tab for Exhibit 16, no materials were contained behind it.

these lands because there is no allegation that they are neglecting their duties. Randolph, 736 F.2d at 529.

Again, the CBD Defendants argue that vacating the critical habitat designation on the Mining Lands might cause harm to the bighorn sheep, but have not persuaded the Court that it would be unreasonable or inequitable to vacate the critical habitat designation. Moreover, the CBD Defendants have not persuaded the Court that the degree of harm which may be suffered by the bighorn sheep will make the Decree unfair, unreasonable, or inequitable. Accordingly, the Court finds that vacating the critical habitat designation rule on the Mining Lands is fair, reasonable, and equitable under the circumstances here.

c. Desert Riders Lands

The Moving parties assert that it is reasonable to vacate the critical habitat designation as to the Desert Riders Lands because "the area: (1) comprises an extremely small portion of the designated critical habitat (approximately 20 acres); and (2) is private land upon which the anticipated activities do not have an identifiable federal nexus under the ESA Section 7." [Mot. at 10.]

The CBD Defendants respond that (1) the Moving Parties did not state what the anticipated activities on the Desert Riders Lands is going to be, (2) human activities in this area such as noise and lighting, pets, hiking, biking, horseback riding, camping, hunting, and vehicles off-roading can disrupt the bighorn sheep behavior, (3) increased use of a small parcel may impact the recovery of the bighorn sheep, (4) the landowners have a responsibility to ensure their conduct does not result in the modification or destruction of the bighorn sheep habitat whether or not the land is part of a critical habitat or has a federal nexus, and (5) there is a risk to the bighorn sheep because water courses or stream beds might be altered for development and the Desert Riders Lands are near migration corridors. [Opp'n at 22.]

The Federal Defendants counter that the partial vacatur of the critical habitat designation rule on the Desert Riders Lands is appropriate because (1) the parcel at issue is small, (2) the expected use of the land is for equestrian activities, and (3) the equestrian activities will not interfere with the migration patterns of the bighorn sheep. [Lohoefener Decl. at ¶ 9.]

The Moving Parties have satisfied their burden that vacating the critical habitat designation rule on the

Desert Riders Lands is fair, reasonable, and equitable. The area comprising the Desert Riders Lands is an extremely small portion of the entire critical habitat designation and the equestrian use on the property likely will not harm the bighorn sheep. As discussed above, the Court must defer to the Federal Defendant's decision to enter into this consent decree. Randolph, 736 F.2d at 529.

While the CBD Defendants argue that there might be some harm to the bighorn sheep, they do not assert that the magnitude of the harm is sufficient to make the Decree unfair, unreasonable, or inequitable. Therefore, the Court finds that the vacating the critical habitat designation rule on the Desert Riders Lands is fair, reasonable, and equitable.

B. Mandatory Rulemaking Procedures

The CBD Defendants posit that the Decree should not be approved because the service cannot vacate any part of the critical habitat designation without complying with the proper rulemaking procedures. [Opp'n at 11.] The CBD Defendants assert that (1) "the critical habitat designation is a binding final decision under the APA," (2) "[p]usuant to the ESA and the APA, the Service must comply with mandatory statutory procedures before a duly promulgated critical habitat designation can be revised,"

(3) the Decree does not comply with the rulemaking procedures set forth in the ESA and APA. [Id. at 11-12.] The CBD Defendants argue (1) that it is improper for the Court to permit the Service to revise the critical habitat designation without following the rulemaking procedures. [Id. at 12.]

The Moving Parties counter that the CBD's argument that the Service must comply with the APA and ESA procedural requirements in vacating the rule is "novel" and "unsupported." [Agua Caliente Band's Reply at 5, Federal Defendants' Reply at 4-5, GCC's Reply at 10, BILDF's Reply at 2.] They argues that (1) the APA's requirement that a court find unlawful any agency action that is not in accordance with the law is unambiguous, [Agua Caliente Band's Reply at 5 (citing 5 U.S.C. § 706(2)(A))] and (2) that authority from other circuits have rejected such an argument. [Id. (citing New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006); Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998); Home Builders Ass'ns of N. Cal. v. Norton, 293 F. Supp. 2d 1, 5 (D.D.C. 2002)).] The Moving Parties contend that the approval of a consent decree and the remand of a final rule is a judicial act and not agency rulemaking. [Federal Defendants' Reply at 5, GCC's Reply at 10-11, BILDF's Reply at 3.]

The CBD Defendants' argument is unfounded. There is no authority to support the position that the Service must comply with the rulemaking procedures in vacating a rule it concedes was enacted in violation of federal law. Indeed, such an assertion is contrary to Supreme Court precedent that a regulation in violation of the APA cannot be afforded the "force and effect of law." Brown, 441 U.S. 281, 313 (1979) ("Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act."). Moreover, approval of the Decree is an judicial act, not an agency act; thus it is not subject to the requirements of 5 U.S.C. § 553. Home Builders Ass'ns of N. Cal., 293 F. Supp. 2d at 5 (D.D.C. 2002) (citing Gorsuch, 718 F.2d at 1125 (D.C. Cir. 1983). Therefore, the Service does not have to comply with the rulemaking procedures before remanding the critical habitat designation.

C. Time for Reconsideration of the Rule

The CBD Defendants assert that the Decree allows the Service more than two years to reconsider the critical habitat designation rule. [Opp'n at 23.] They argue that if the Court permits a partial vacatur of the critical habitat designation rule, the harm suffered by the bighorn sheep would make this time period unreasonable. [Id.] The CBD Defendants also argue that

under the ESA, the Service has a maximum of two years to revise a critical habitat designation, and in light of the amount of work already completed here, two years is not necessary. [Id.] The CBD Defendants request that the Court permit the Service no more than four months to revise the critical habitat designation rule.

The Federal Defendants respond that the timetable for a new rule is appropriate because of the "substantial effort that will be required to revisit the critical habitat designation and prepare a legally adequate and biologically sustainable critical habitat designation." [Federal Defendants' Reply at 10, Lohoefener Decl. at ¶¶ 10-19.] The Federal Defendants contend that while the prior critical habitat designation will provide some information, the Service will be required to obtain a significant amount of new information to create a critical habitat designation that complies with federal law. [Id. at 10-11.] Specifically, the four-month time period does not permit the Service enough time to: "(1) prepare a proposed rule; (2) provide a public comment period of at least 60 days on the proposed rule; (3) analyze and respond to public comments; (4) prepare a draft economic impacts analysis; (5) provide a 30-day comment period on the economic analysis; (6) finalize the economic analysis; and (7) prepare a final rule

designating critical habitat." [Id. (citing Lohoefener Decl. at ¶¶ 11-18.]

The time period in the Decree to issue a new rule is fair, reasonable, and equitable. Providing a four-month remand period likely will not permit the Service to comply with the required procedural rules, i.e., the public notice rules. Lohoefener's declaration sets forth the tasks that the Service will need to complete before issuing a revised rule and the proposed two year period is fair, reasonable, and equitable. [Lohoefener's Decl. at ¶¶ 10-19.]

IV. CONCLUSION

For the foregoing reasons, the Court approves the Decree and dismisses this action with prejudice.

Dated: August 2, 2006

Virginia A. Phillips
VIRGINIA A. PHILLIPS
United States District Judge

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THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(D).

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AGUA CALIENTE BAND OF CAHUILLA INDIANS, Plaintiff, and BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION; CALIFORNIA BUILDING INDUSTRY ASSOCIATION; CALIFORNIA STATE GRANGE; DESERT RIDERS, Plaintiff-Intervenors, and GRANITE CONSTRUCTION COMPANY; PYRAMID CONSTRUCTION; UNITED GYPSUM COMPANY; VAL-ROCK, INC., Plaintiff-Intervenors, vs. P. LYNN SCARLETT, in her official, capacity as Acting Secretary of the Interior;[1] H. DALE HALL, in his official capacity as Director of the U.S. FISH AND WILDLIFE SERVICE;[2] U.S. DEPARTMENT OF THE INTERIOR; U.S. FISH AND WILDLIFE SERVICE, Defendants, and CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB, Defendant-Intervenors.	Case No: EDCV 05-187 VAP (OPx) CONSENT DECREE Date: June 19, 2006 Time: 10:00 a.m. Courtroom: 2

[1] Ms. Scarlett is substituted for Gale Norton pursuant to Fed. R. Civ. P. 25(d)(1).

[2] Mr. Hall is substituted for Steven A. Williams pursuant to Fed. R. Civ. P. 25(d)(1).

WHEREAS, the Agua Caliente Band of Cahuilla Indians, as Plaintiff, commenced this action on or about March 7, 2005, against Gale Norton, then Secretary of the Interior, Steven A. Williams, then Director of the Fish and Wildlife Service, the U.S. Department of the Interior, and the U.S. Fish and Wildlife Service ("Service") (collectively, "Federal Defendants");

WHEREAS, by Order dated June 7, 2005, this Court granted the joint motion of Granite Construction Company, Pyramid Construction, United States Gypsum Company, and Val-Rock, Inc. to intervene as plaintiffs in this action, and granted the joint motion of Building Industry Legal Defense Fund, California Building Industry Association, California State Grange, and Desert Riders to intervene as plaintiffs in this action (collectively, "Plaintiff-Intervenors");

WHEREAS, by Order dated June 7, 2005, this Court granted the joint motion of Sierra Club and Center for Biological Diversity to intervene as defendants in this action but restricted their participation to the remedial phase of the action;

WHEREAS, Plaintiff and Plaintiff-Intervenors allege that the Federal Defendants unlawfully promulgated a final rule ("Rule") designating critical habitat for the Peninsular bighorn sheep ("bighorn sheep") in violation of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., and other laws, regulations, and policies by failing to identify the physical or biological features essential to the conservation of the species, failing to identify the specific areas where the essential physical or biological features are found, failing to identify the specific areas that may require special management considerations or protections, failing to identify the geographic areas occupied by the species, failing to consider the best scientific and commercial data available, failing to conduct a mandatory exclusion analysis, failing to provide adequate public notice, failing to adequately respond to public comments, failing to conduct a sufficient economic analysis, and failing to describe specifically the actual areas of critical habitat in violation of 16 U.S.C.

§ 1532(5)(A), and violating its Trust obligations under 25 U.S.C. § 1629, E.O. 13175, and Secretarial Order 3206;

WHEREAS, the United States Court of Appeals for the Tenth Circuit has issued a decision in New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service, 248 F.3d 1277 (10th Cir. 2001), that addresses the proper scope of the analysis of economic impacts under ESA Section 4(b)(2) in designating critical habitat;

WHEREAS, the U.S. District Court for the Central District of California in Natural Resources Defense Council v. Department of the Interior, 275 F. Supp. 2d 1136 (C.D. Cal. 2002), agreed with the reasoning in New Mexico Cattle Growers Ass'n, granting defendants' motion for voluntary remand to allow the Service to reconsider the critical habitat designations for the coastal California gnatcatcher and San Diego fairy shrimp;

WHEREAS, the U.S. District Court for the Eastern District of California in Home Builders Ass'n of Northern California v. Fish and Wildlife Service, 268 F. Supp. 2d 1197 (E.D. Cal. 2003), followed the reasoning in New Mexico Cattle Growers Ass'n in holding that the evaluation of economic impacts undertaken by the Service for the final rule designating critical habitat for the Alameda whipsnake was unlawful, and remanding the final rule to the Service;

WHEREAS, the Service's analysis of the potential economic impacts of designating bighorn sheep critical habitat is similar to the methodology ruled to be insufficient by the court in New Mexico Cattle Growers Ass'n;

WHEREAS, Federal Defendants have previously informed the Court that they do not intend to contest liability in this matter and will request that the Court remand the Rule to the Service;

WHEREAS, the Service agrees that, on remand, it will reconsider the critical habitat designation for the species in light of Plaintiff's and Plaintiff-Intervenors' allegations and conduct a revised economic impacts analysis pursuant to ESA Section 4(b)(2), consistent with New Mexico Cattle Growers Ass'n and other applicable law;

WHEREAS, the Plaintiff and Plaintiff-Intervenors have requested that the Service take into consideration in its revised consideration of economic and any other relevant impacts of designating a particular area as critical habitat in accordance with ESA Section 4(b)(2), all economic and other relevant impacts, which include, among other things: impacts to Federal Defendant's trust responsibilities; impacts to Plaintiff's use and governance of the Tribal Lands and other governmental interests; impacts to planned and on-going housing and infrastructure development within existing urban limit lines, boundaries, or similar demarcations; the specific area's housing and infrastructure needs; impacts to mining activities, building, and other industries dependent on mining; and the impact of reinitiation of consultation for those projects that have completed an ESA Section 7 consultation;

WHEREAS, Plaintiff's and Plaintiff-Intervenors' Complaints seek vacatur of the Rule;

WHEREAS, Section 706 of the APA states that "[t]he reviewing court shall … hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law," 5 U.S.C. § 706(2)(A);

WHEREAS, the Supreme Court has held that an agency action that cannot be sustained based on the administrative record "must be vacated," Camp v. Pitts, 411 U.S. 138, 143 (1973);

WHEREAS, the Supreme Court has held that "regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act," Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979);

WHEREAS, Plaintiff's and Plaintiff-Intervenors' positions are that the bighorn sheep Rule should be vacated because the plain language of the APA and Supreme Court precedent requires federal courts to vacate an agency action in violation thereof;

WHEREAS, the Ninth Circuit has held that, when equity demands, a regulation that violates the APA "can be left in place while the agency follows the necessary procedures," Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995);

WHEREAS, Federal Defendants' position is that equity demands that the Rule be retained in part pending promulgation of a new critical habitat designation;

WHEREAS, Federal Defendants have determined that the Rule should remain in place until a revised rule is issued, except as to certain portions of the designation identified by the Plaintiff and Plaintiff-Intervenors, and agreed to by Federal Defendants, which would be vacated pending the completion of a new critical habitat designation;

WHEREAS, the portions of the existing critical habitat designation that would be vacated consist of: (1) all lands within the exterior boundaries of the Agua Caliente Indian Reservation, including (a) lands title to which is held by the United States in trust for the Agua Caliente Band of Cahuilla Indians, (b) lands title to which is held in trust by the United States for a member of the Agua Caliente Band of Cahuilla Indians or any other Indian, and (c) lands title to which was formerly held in trust by the United States for a member of the Agua Caliente Band of Cahuilla Indians (collectively, "Tribal Lands") (described in Exhibit 1a and shown on Exhibit 1b); (2) certain lands adjacent to and within mining operations within the Coyote and Jacumba Mountains and within the Fish Canyon area ("Mining Lands") (described in Exhibit 2); and (3) certain private lands used by the Desert Riders ("Desert Riders Lands") (described in Exhibit 3), collectively set forth in Exhibit 4;

WHEREAS, Federal Defendants have determined that vacatur is appropriate with respect to the Tribal Lands because: (1) the Tribal Lands comprise less than 1.6 percent of the total acreage of bighorn sheep critical habitat; (2) Plaintiff has adopted a Conservation Strategy (as set forth in the Tribal Habitat Conservation Plan adopted by the Tribe on or about November 11, 2002) for the bighorn sheep to protect and manage bighorn sheep habitat on Tribal Lands; and (3) Plaintiff continues to work with the

Service toward the development of a habitat conservation plan under ESA Section 10(a)(1)(B), demonstrating Plaintiff's commitment to manage its lands in a manner consistent with the species' conservation and in cooperation with the Service;

WHEREAS, the Conservation Strategy requires conservation of at least 85 percent of bighorn sheep habitat identified by the Tribe on the Tribal lands and 100 percent of bighorn sheep use areas and habitat linkages identified by the Tribe on the Tribal Lands;

WHEREAS, Federal Defendants have determined that vacatur is appropriate with respect to the Mining Lands because (1) the Mining Lands comprise only two percent of the total acreage of bighorn sheep critical habitat; and (2) a large portion of the designated areas are on actively mined lands which do not support physical and biological features essential for the conservation of the bighorn sheep, see 16 U.S.C. § 1532(5)(A)(i) (defining "critical habitat");

WHEREAS, Federal Defendants have determined that vacatur is appropriate with respect to the Desert Riders Lands because the area: (1) comprises an extremely small portion of the designated critical habitat (approximately 20 acres); and (2) is private land upon which the anticipated activities do not have an identifiable federal nexus under ESA Section 7;

WHEREAS, Plaintiff, Plaintiff-Intervenors, and Federal Defendants note that there are a number of other sources providing substantial protection for the bighorn sheep, in addition to the critical habitat provisions of the ESA, including but not limited to:

- protections afforded by 16 U.S.C. § 1536 (ESA consultation provisions);
- protections afforded by 16 U.S.C. § 1538 (ESA take prohibition provisions);
- protections afforded by Cal. Fish & Game Code § 4700(b)(2) (California fully protected species statute, which prohibits take or possession of species by all persons subject to State authority except for necessary scientific research); and

- protections afforded by Cal. Fish & Game Code § 2050 et seq. and Cal. Code Regs. tit. 14, § 670.5(b)(6)(I) (listing bighorn sheep as a threatened species under California Endangered Species Act) with regard to activity by persons subject to State authority;

WHEREAS, it is in the interest of the public and the Parties, and judicial economy, to resolve the claims in this lawsuit without protracted litigation;

NOW THEREFORE, the Parties agree AND IT IS HEREBY ORDERED as follows:

1. Limited Partial Vacatur. The critical habitat rule adopted by the Service on February 1, 2001, 66 Fed. Reg. 8650, is vacated with respect to the Tribal Lands, Mining Lands, and Desert Riders Lands, as set forth on Exhibit 4, and remanded to the Service for a new rulemaking consistent with all applicable federal laws ("Revised Rule"). The critical habitat designation will remain in place with respect to all other areas pending completion of the Revised Rule.

2. Promulgation of the Revised Rule. The Revised Rule shall be based upon a revised consideration of economic impacts and any other relevant impacts of designating a particular area as critical habitat in accordance with ESA Section 4(b)(2) ("Revised Analysis of Economic Impacts"). 16 U.S.C. §§ 1532(5)(A), 1533(b)(2). The Service will conduct the Revised Analysis of Economic Impacts consistent with New Mexico Cattle Growers Ass'n and other applicable law. In addition, the Service will reevaluate the critical habitat designation in light of Home Builders Ass'n of Northern California v. Fish and Wildlife Service, 268 F. Supp. 2d 1197 (E.D. Cal. 2003).

3. Schedule for the Revised Rulemaking. The Service shall submit to the Federal Register a proposed Revised Rule by September 30, 2007, and a final Revised Rule by September 30, 2008.

In the promulgation of the Revised Rule, the Service shall provide a public comment period for any draft Revised Analysis of Economic Impacts on the proposed critical habitat for the bighorn sheep of no less than 30 days from publication of the

notice of availability of the draft Revised Analysis of Economic Impacts in the Federal Register, which shall run concurrently with the initial public comment period for the proposed Revised Rule or with a subsequent reopening of the comment period.

4. Conservation of Bighorn Sheep Habitat on Tribal Lands. Plaintiff agrees to continue to implement its Conservation Strategy for the bighorn sheep on Tribal Lands pending issuance of the Revised Rule, in accordance with the ESA and all applicable laws.

5. Voluntary Dismissal. Based on the representations and commitments herein, and remand to the Service, Plaintiff and Plaintiff-Intervenors hereby dismiss with prejudice, pursuant to Fed. R. Civ. P. 41(a)(2), all claims and causes of action raised in this challenge to the Rule.

6. Schedule Modifications. Any party may seek to modify the deadline for any actions specified in Paragraph 3 for good cause shown. In that event, or in the event that any party believes that another party has failed to comply with any term or condition of this Consent Decree, the parties shall use the dispute resolution procedures specified in Paragraph 7.

7. Dispute Resolution. The Order entering this Consent Decree may be modified by the Court upon good cause shown by written stipulation between the parties, filed with and approved by the Court, or upon written motion filed by one of the parties and granted by the Court. In the event that any party seeks to modify the terms of this Consent Decree, including the deadline for the actions specified in Paragraph 3, or in the event of a dispute arising out of or relating to this Consent Decree, or in the event that any party believes that another party has failed to comply with any term or condition of this Consent Decree, the party seeking the modification, raising the dispute, or seeking enforcement shall provide the other parties with written notice of the proposed modification. If a party seeks to modify a deadline, it shall provide written notice at least 45 days prior thereto, to the maximum extent practicable. The parties agree that they will meet and confer (in-person not required) at the earliest possible time after receipt of the

written notice in a good-faith effort to resolve the claim before bringing any matter to the Court.

8. No Precedence. No party shall use this Consent Decree or the terms herein as evidence of what does or does not constitute a reasonable timeline for reconsidering a critical habitat designation under 16 U.S.C. § 1533 in any other proceeding regarding the Service's implementation of the ESA.

9. Anti-Deficiency Act. Nothing in this Consent Decree shall be interpreted as or constitute a commitment or requirement that the Service obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

10. Statutory Obligations. No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that Federal Defendants take action in contravention of the ESA, the APA, or any other law or regulation, either substantive or procedural. Nothing in this Consent Decree shall be construed to limit or modify the discretion accorded to the Secretary by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determinations.

11. No Waiver of Rights. Plaintiff and Plaintiff-Intervenors do not waive any right they may have to bring suit against Federal Defendants for any violations of law which have arisen or may arise including, but not limited to, violations of the ESA, National Environmental Policy Act ("NEPA"), the APA, or the Federal Defendants' tribal trust responsibilities stemming from any future designation of critical habitat for the bighorn sheep or any other species, or any modification or reissuance of the existing bighorn sheep critical habitat designation. Further, by entering into this Consent Decree, Federal Defendants do not waive any claim or defense.

12. Attorneys' Fees. Plaintiff and Plaintiff-Intervenors intend to seek from Federal Defendants reimbursement of attorneys' fees and costs incurred in this litigation. Federal Defendants agree that Plaintiff and Plaintiff-Intervenors are entitled to an award of costs of litigation pursuant to ESA Section 11, which provides: "The court, in issuing

any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). The parties agree to attempt to resolve Plaintiff's and Plaintiff-Intervenors' claims for fees and costs expeditiously and without the need for Court intervention. The Court shall retain jurisdiction over the case for the purpose of resolving any dispute between the parties regarding Plaintiff's and Plaintiff-Intervenors' claims for an award of fees and costs. By this Consent Decree, Federal Defendants do not waive any right to contest fees claimed by Plaintiff or Plaintiff-Intervenors, including the hourly rate, in any continuation of the present action or any future litigation.

13. Severability; Court Acceptance. Wherever possible, each provision of this Consent Decree shall be interpreted in such a manner as to be effective and valid. If any provision of this Consent Decree is prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions hereof. However, in the event the Court does not accept any part of this Consent Decree, each party reserves the right to withdraw from the Consent Decree and proceed with the existing litigation.

14. Entire Agreement. The terms of this Consent Decree constitute the entire agreement of the parties, and no statement, agreement or understanding, oral or written, which is not contained herein shall be recognized or enforced.

15. Authorization. Each undersigned representative of the parties hereto certifies that he or she is fully authorized to enter into and execute the terms and conditions of this Consent Decree, and to legally bind such party to this Consent Decree.

16. Continuing Jurisdiction. Notwithstanding the dismissal of this action, the parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Consent Decree and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375

(1994). The remedy for any challenge to a Revised Rule that is completed in accordance with the Consent Decree shall be the filing of a new lawsuit after providing a 60-day notice of intent to sue, as may be required by 16 U.S.C. § 1540(g).

Respectfully submitted,

Dated: May 4, 2006

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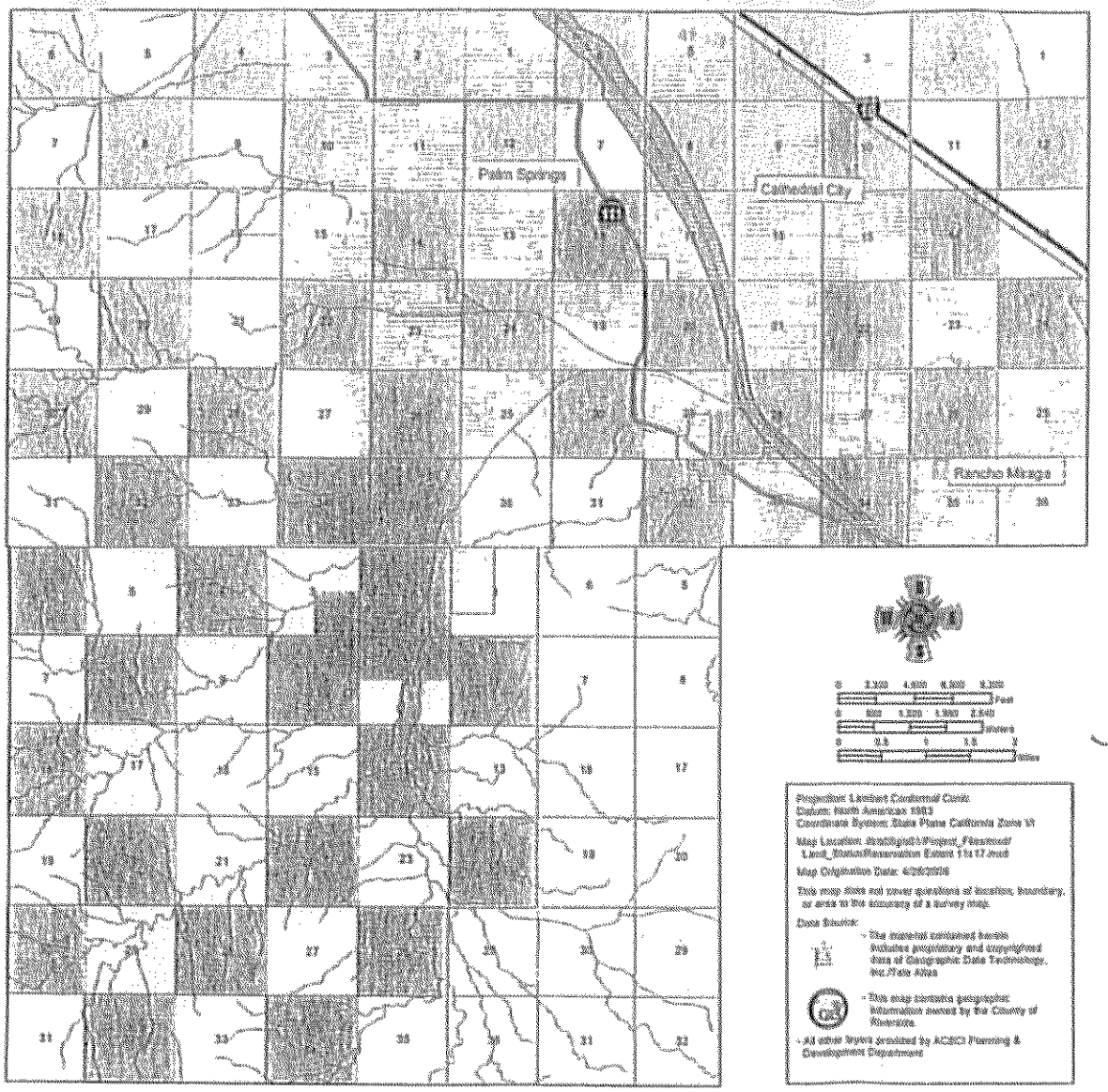
Exhibit 1a

Agua Caliente Band of Cahuilla Indians
Reservation Lands

Township 4 South., Range 4 East., SBM	Sections 2, 4, 6, 8, west half of 10, 12, 14, 18, 20, 22, 24, 26, 28, 30, 32, 34, and 35
Township 4 South., Rang 5 East., SBM	Sections 2, 4, 6, 8, 10, 12, 14, 18, 20, 22, 24, 26, 28, 30, 32, and 34
Township 5 South, Range 4 East, SBM	Sections 2, southeast quarter of 3, 4, 6, 8, 10, north half and middle third of south half of 11, 12, 14, 18, 20, 22, 24, 26, 28, 30, 32, and 34



AGUA CALIENTE INDIAN RESERVATION

- Political Jurisdictions
- Intermittent Streams
- Township Sections
- Road Centerline
- State Highway 111
- Interstate 10
- Railroad
- White Water River Channel
- Reservation Extent

Projection: Lambert Conformal Conic
Datum: North American 1983
Coordinate System: State Plane California Zone VI

Map Location: [illegible]

Map Origination Date: [illegible]

This map does not cover questions of location, boundary, or area to the accuracy of a survey map.

Data Source:

- The material contained herein includes proprietary and copyrighted data of Geographic Data Technology, Inc./Tele Atlas
- This map contains geographic information owned by the County of Riverside.
- All other layers provided by ACBCI Planning & Development Department

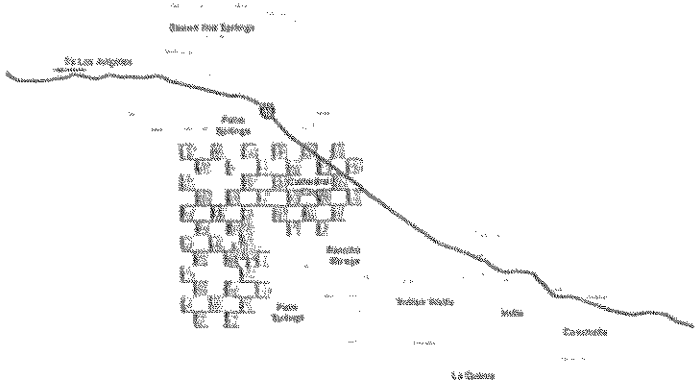


Exhibit 1b

Exhibit 2

Mining Lands

Fish Canyon

Township 13 South, Range 9 East	West Half of Sections 15, 22,27, and 34
Township 13 South, Range 9 East	Sections 16, 17, 19, 20, 21,28, 29, 30, 31, 32, 33
Township 13 South, Range 9 East	NE ¼ of NE ¼ of Section 18
Township 14 South, Range 9 East	Sections 4, 5, 6, West Half of Section 3, and North ¼ of Section 7

Ocotillo Sites

South Site:

Township 16 South, Range 9 East	Section 33, South Half of Section 28, East Half of Section 32

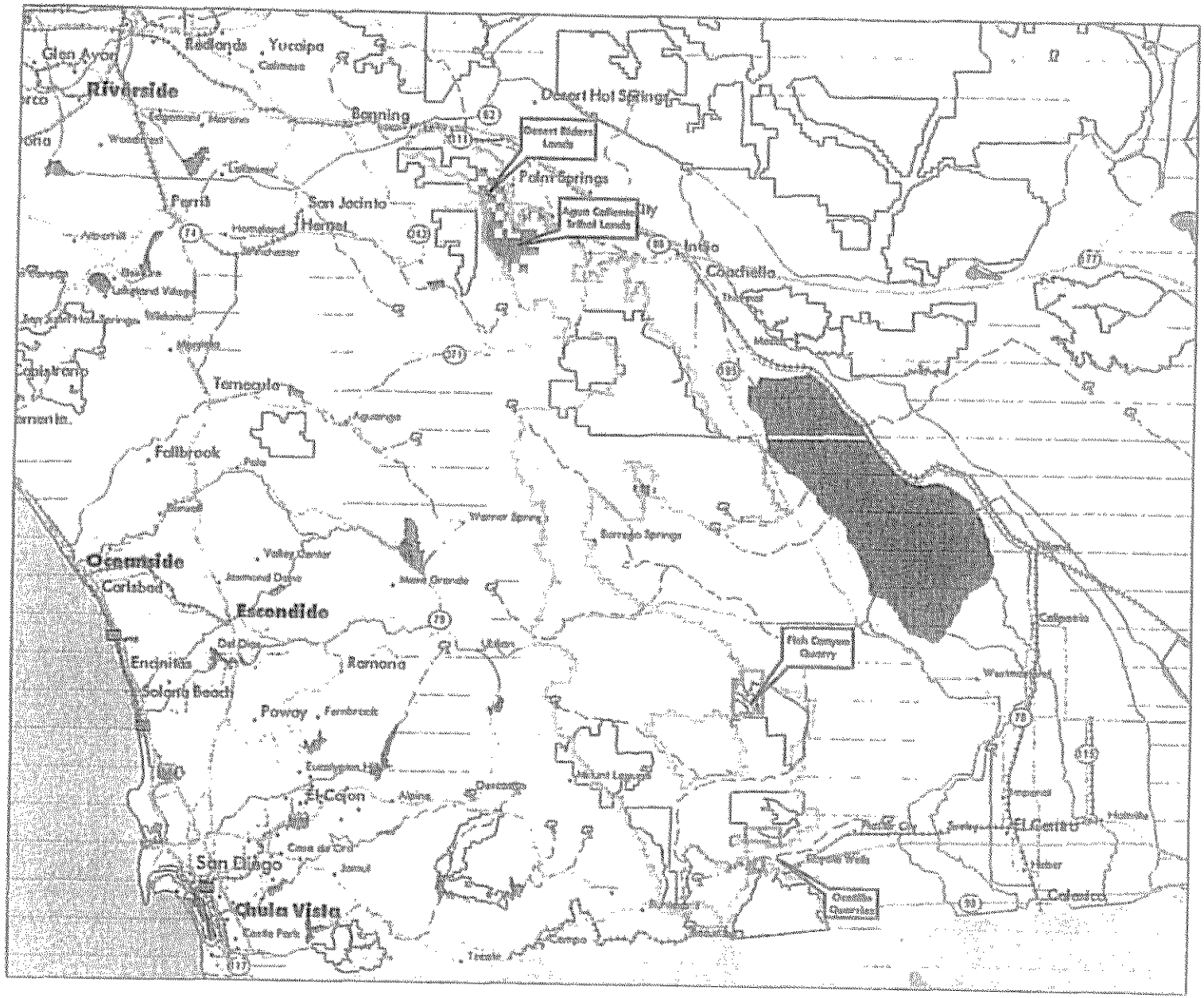
North Site:

Township 16 South, Range 9 East	Sections 8, 9, 10, 11 and 14; East Half and NW 1/4 of section 15, and the North Half of Sections 16 and 17.

Exhibit 3

Desert Rider Lands

Township 5 South, Range 4 East, SBM	West half of southwest quarter of northwest quarter of Section 25



Lands Excluded from PBS Critical Habitat During Promulgation of New Critical Habitat Rule

Agua Caliente Band of Cahuilla Indians v. Horton, EDCV 05-00187-VAP (SGLx)—Consent Decree

Legend

Final critical habitat for Peninsular Bighorn Sheep

Mining Operators' Lands excluded from Critical Habitat (approximate*)

Agua Caliente Tribal Lands excluded from Critical Habitat (approximate*)

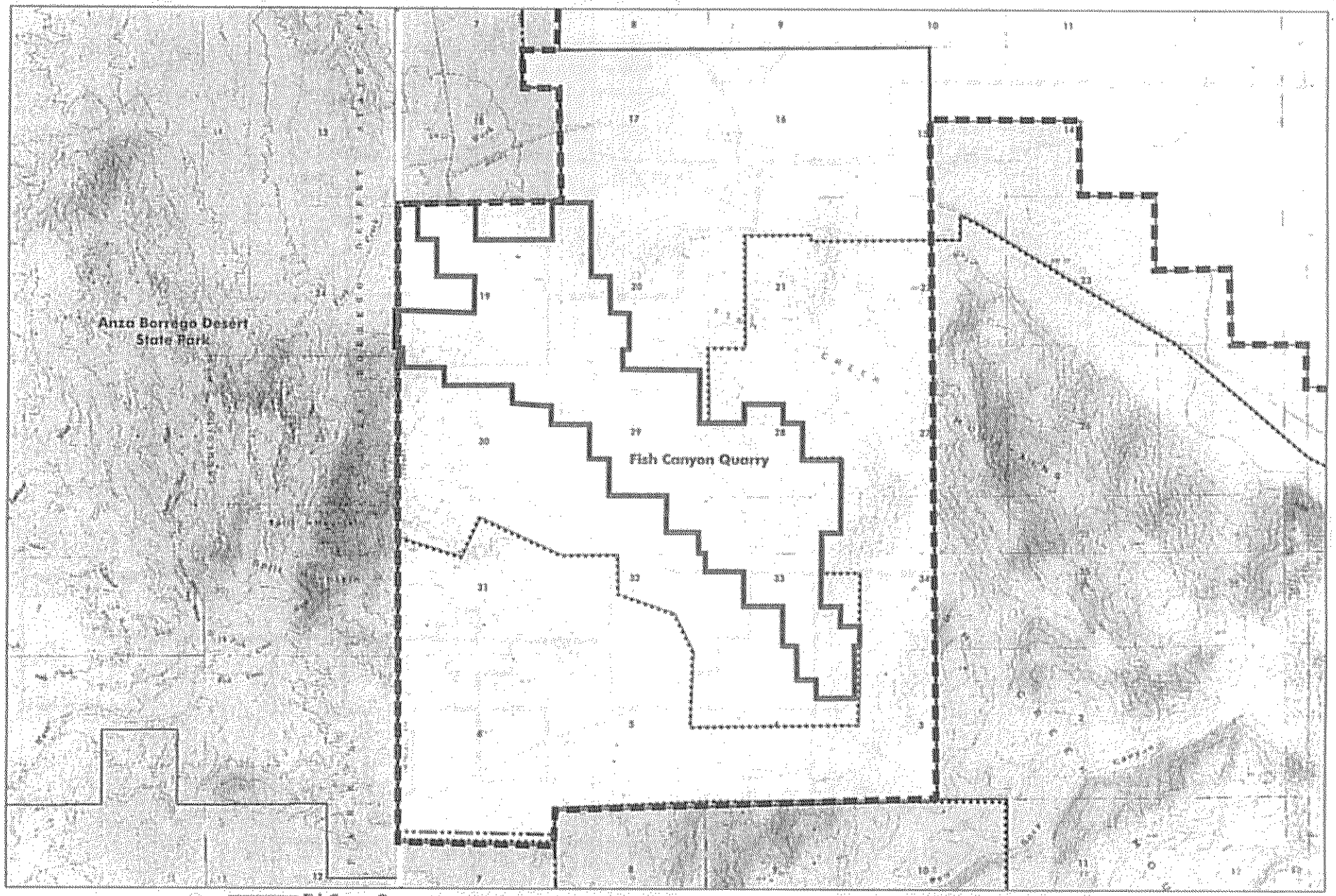
Desert Riders' Lands excluded from Critical Habitat (not to scale) (approximate*)

* Note: Precise descriptions of the lands to be excluded are provided in Exhibits 1, 2 and 3 to the Consent Decree.

Prepared by: Lilburn Corp., 04/08.
Base: USGS Topo Maps and Landsat 7, UTM-NAD 27

LILBURN CORPORATION

Exhibit A



N

0 5000
Feet
Source: USGS 7.5 min

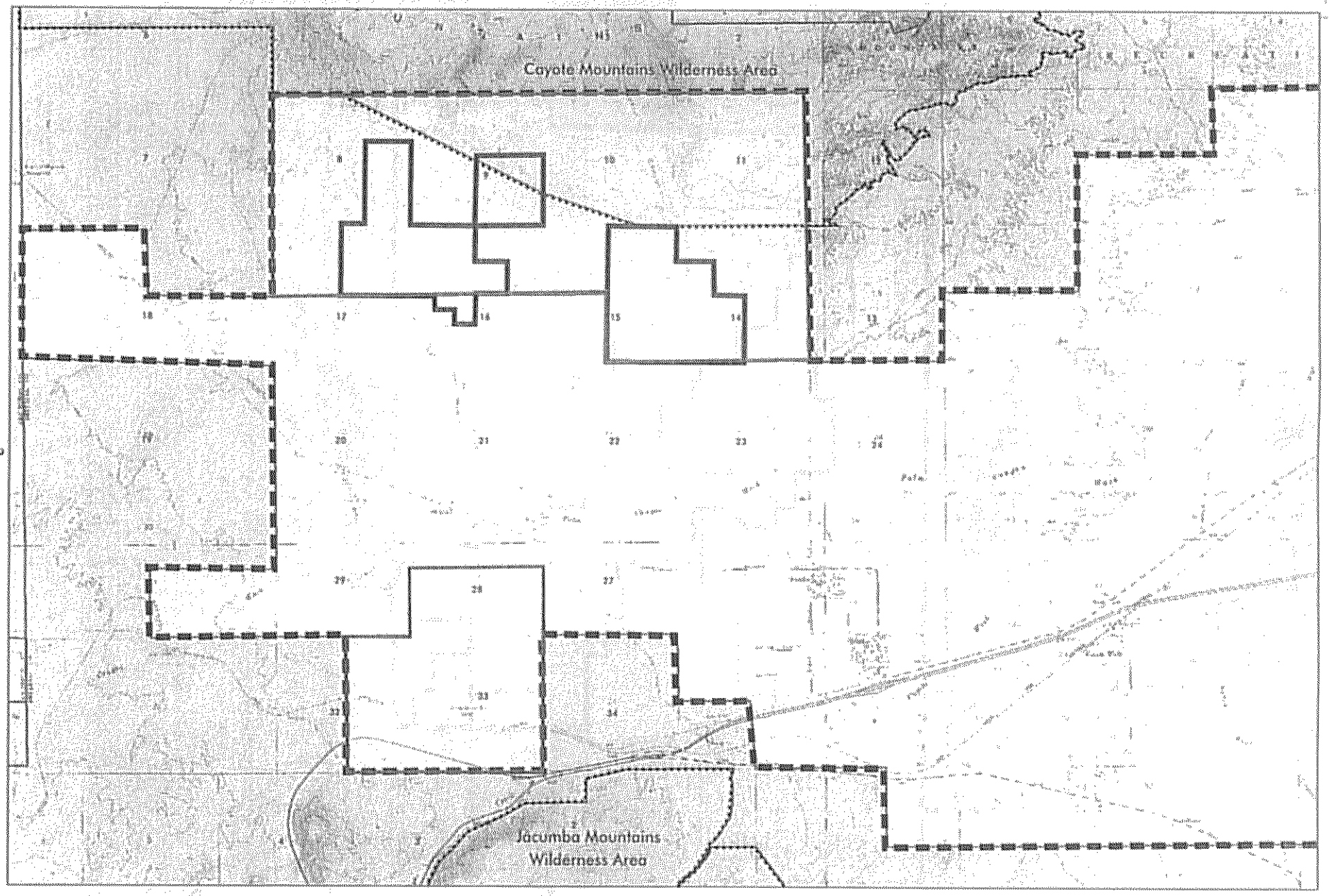
LILBURN CORPORATION

Fish Canyon Quarry
Sheep Critical Habitat
Modified Sheep Critical Habitat
Anza Borrego Desert State Park
Fish Creek Mountains Wilderness Area
Lands Excluded from Critical Habitat

Fish Canyon Quarry

Imperial County, California

Figure 1



LILBURN CORPORATION

Ocotillo Mineral Material Sites

Imperial County, California

Figure 2