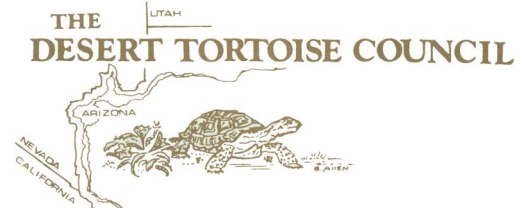




Desert Tortoise Preserve  
Committee, Inc.

4067 Mission Inn Avenue  
Riverside, California 92501



May 1, 2005

U.S. Department of the Interior  
Director, Bureau of Land Management (210)  
Attn: Brenda Williams  
1620 "L" Street, NW, Suite 1075  
Washington, D.C. 20036

By Fax to: "BLM Protest Coordinator" (202) 452-5112.

RE: Protest Of Final Environmental Impact Report and Statement for the West Mojave Plan  
dated January 2005

Dear Director Clark:

The Desert Tortoise Preserve Committee and the Desert Tortoise Council formally protest the Final Environmental Impact Report and Statement for the West Mojave Plan dated January 2005 (herein after referred to as the FEIRS).

The Desert Tortoise Preserve Committee and the Desert Tortoise Council have actively participated throughout the more than decade-long West Mojave Plan planning process. The name, address, and telephone number of the person filing this protest for the Desert Tortoise Preserve Committee and the Desert Tortoise Council is as follows:

Michael J. Connor, Ph.D., Executive Director  
Desert Tortoise Preserve Committee  
Desert Tortoise Council  
4067 Mission Inn Avenue, Riverside, CA 92501  
(951) 683-3872

### **Statement of the Issues Being Protested**

We are filing this protest because we find the FEIRS and proposed plan:

- (1) lacks basic information required for full public review;
- (2) includes changes and new additions with significant environmental impacts that have not been made available for public review;
- (3) fails to address public comment;
- (4) fails to adequately characterize the effects of the proposed actions on desert tortoise and the Mohave ground squirrel conservation;
- (5) will not conserve and recover listed species.

Because of these failings, we believe the proposed Plan would violate the State and Federal Endangered Species Acts, the National Environmental Policy Act, and the Federal Land Policy Management Act. The preparation of a supplemental EIRS is required to deal with these deficiencies.

We discuss the issues being protested in detail below. We have raised many of these issues previously at public meetings and in written comments. We incorporate all such comments into this protest by reference. Specific written comments on the DEIRS include:

(i) Letter to Ms. Linda Hansen dated May 1, 2003 RE: Environmental Assessment and Draft CDCA Plan Amendment Western Mojave Desert Off Road Vehicle Designation Project (prepared by the Bureau of Land Management March 2003). (Herein referred to as Route Comments)

(ii) Letter to Director, Bureau of Land Management dated June 19, 2003 RE: Protest Of Proposed CDCA Plan Amendment, Western Mojave Desert Off Road Vehicle Designation Project May 2003. (Herein referred to as Route Protest)

(iii) Letter to Mr. William Haigh dated September 11, 2003 RE: Draft Environmental Impact Report and Statement for the West Mojave Plan: A Habitat Conservation Plan and California Desert Conservation Area Plan Amendment. (Herein referred to as DEIRS Comments)

## **(1) The DEIRS Lacks Basic Information Required For Full Public Review**

### **(i) The FEIRS Should Describe What Proposed Action the BLM Is Considering and Include A Full Range of Alternatives**

The FEIRS reviews two component actions – proposed amendments to the existing Federal CDCA Plan and a proposed HCP to cover activities impacting listed species on private land. The CEQ’s NEPA implementing regulations encourage agencies to tier off when preparing environmental documents to reduce needless paperwork and costs. However, when doing so it is obviously important to be clear of purpose to ensure that the public and affected parties understand the actions that are being proposed. Unfortunately, the FEIRS is unclear as to what decision the BLM will be making.

According to the document, the proposed action is Alternative A, Habitat Conservation Plan. However, in order to satisfy the specific requirements of USFWS and CDFG with regards to Section 10(a) and 2081 permit procedures, a final HCP and Implementation Agreement must be submitted along with formal applications by local government (FEIRS, 1-7). Until that stand-alone HCP and the Implementation Agreement are finalized, the FEIRS proposed action (i.e. Alternative A, Habitat Conservation Plan) is not available.

Under CEQ Regulation Section 1507.2, Agency Capability To Comply: “Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements

enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it.” (40 CFR 1507.2). “Agencies shall: (d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources regardless of whether an EIS is required for the proposal (Section 102(2)(E)).” (40 CFR 1507.2(d)).

BLM is not capable of complying with all the terms of the HCP on its own, and relies on local implementing authorities for a majority (75%) of the funding. (FEIRS, Appendix C at 1). Therefore, any BLM Record of Decision on a proposed CDCA plan amendment signed prior to finalization of the HCP and the Implementation Agreement would appear to have to be based on Alternatives B (BLM Only) or G (No Action). But this is a wholly inadequate range of alternatives on which to base a meaningful decision. Neither of these alternatives fully implements the recommendations of the 1994 Desert Tortoise Recovery Plan. Neither alternative will accomplish the stated biological goals for the desert tortoise. Neither alternative will satisfy the ESA requirement of Federal agencies to work to recover listed species. We commented on this issue in our letter on the DEIRS:

“In general, this Alternative would benefit from the wholesale inclusion of all the relevant measures considered in Alternative C: Tortoise Recovery Plan. Without including them, the Alternative will fall short of fulfilling the obligations mandated on Federal agencies by FESA.” (DEIRS comments at 9)

We note that this comment was not addressed in the FEIRS documents.

We also commented on deficiencies in the DEIRS with respect to the “No Action” alternative (DEIRS comments at 10) for which no response was forthcoming. These comments focused on the lack of analysis of current management, the declining tortoise population, and CDFG desert tortoise and Mohave ground squirrel conservation measures. Because the FEIRS has changed the “No Action” alternative from that described in the DEIRS to include a new route designation that has never been implemented on the ground (see 2iii below), it is not even clear from the document that the FEIRS has actually analyzed no action as required by NEPA.

#### (ii) Consultation With USFWS

The 1998 ESA Section 7 Consultation Handbook, specifies that “[j]eopardy analyses may be based on an assessment of impacts to distinct population segments (DPS) of a species documented per the Services’ joint policy on DPS (1995) in a final listing rule, or to a DPS as identified in a NMFS recovery plan, or to recovery units when those units are documented as necessary to both the survival and recovery of the species in a final recovery plan...” (4-36). The West Mojave Recovery Unit was designated as such in the Desert Tortoise Recovery Plan.

The FEIRS is unclear as to what proposed action forms the basis for the BLM’s Section 7 consultation with the USFWS. No Record of Decision can be signed until the Section 7 consultation is concluded because changes in the proposed action may be required following the Service’s review. Because the proposed plan would determine the fate of the entire West

Mojave Recovery Unit we expect that the USFWS will make recommendations to enhance the proposed conservation measures. If changes are required will there be opportunity for further public input? This process should have been fully explained in the FEIRS.

## **(2) Changes and New Additions Made in the FEIRS With Significant Environmental Impacts Have Not Been Made Available For Public Review**

### **(i) Modifications to the Proposed Pisgah Crater ACEC**

The draft Environmental Impact Report and Statement for the West Mojave Plan (DEIRS) was criticized for not having a single alternative that would achieve all objectives of desert tortoise biological goal 3. In the final WMP, the Pisgah Crater ACEC western boundary has been moved east and no longer connects to the Ord Rodman DWMA. The resulting decreased connectivity makes achieving goal 3 even more unlikely. This decreased opportunity for connectivity has not been addressed in the FEIRS.

### **(ii) Elimination of Biological Transition Areas**

The concept of the Biological Transition Areas around the tortoise DWMA arose as a mechanism to minimize impacts from highly deleterious developments that could have impacts extending well into the conservation areas. Biological Transition Areas included areas around the DWMA that were adjacent or close to urbanizing areas, as well as all Federally designated Critical Habitat that was outside a DWMA boundary.

The West Mojave Team has made a decision to eliminate the Biological Transition Areas without public review. Clearly, expanding the DWMA boundaries to include adjacent Biological Transition Areas has a conservation benefit; however, the West Mojave Team has taken an arbitrary approach to determining which Biological Transition Areas to incorporate into the DWMA and which to simply eliminate. They have excluded the 14,840-acre parcel of federal land west of Highway 395 that is designated critical habitat (area 2 in table X-1) and that is part of the Mohave ground squirrel habitat conservation area. This nearly 15,000-acre area has been the subject of much discussion and controversy because the BLM allows sheep grazing to occur in tortoise habitat there. Sheep grazing is incompatible with desert tortoise survival and recovery as evidenced by the USFWS 1991 jeopardy finding<sup>1</sup>. Although this area is largely public land, a compromise was forged among Task Group 1 members to include it as a BTA rather than part of the DWMA. This is a large area of occupied habitat bounded by highway 395 on the east. California Department of Transportation has floated a proposed realignment of Highway 395 to the east that would make this area even larger. The FEIRS states that this area is excluded from the DWMA because it would need to be fenced to keep sheep out if it was part of the DWMA (FEIRS Appendix X). The FEIRS does not propose fencing off any other part of the Cantil allotment, or any other sheep allotment that abuts a DWMA, and in fact allows sheep grazing in parts of Shadow Mountain and Cantil-Commons allotments that are in DWMA (FEIRS at 2-132). This illustrates the capricious and arbitrary character of the decision to exclude this area.

<sup>1</sup> Fish and Wildlife Service, USDI. 1991. Biological Opinion for Ephemeral Sheep Grazing in the Western Mojave and Northern Colorado Deserts of California (6850 CA-932.5) (1-6-91-F-18)

This area of critical habitat should be made part of the DWMA. The public should be allowed the opportunity to review all the deleted Biological Transition Areas.

(iii) BLM Route Designation – No Action route network changed to BLM June 30, 2003 Decision Record.

In the DEIRS, Alternative G (the No Action Alternative) named the “1985-87 route designations and other current management measures” as the no action baseline. (DEIRS at 2-197). We commented at length on this portion of the No Action alternative analysis because of its importance to desert tortoise conservation and recovery. (DEIRS Comments at 10).

However, the FEIRS for the West Mojave Plan changes the environmental baseline in the No Action alternative to ORV route designations “adopted by the BLM on June 30, 2003.” (FEIRS at 2-225). This designation will only go into effect on the signing of a Record Of Decision for the West Mojave Plan. Because this route designation network has never been implemented on the ground, the FEIRS has a so called “No Action” alternative that differs markedly from what would occur if no action were taken.

This change in analytical baseline violates NEPA because it denies the public the opportunity to make meaningful comment on a critical change in the environmental analysis, and also denies the public the opportunity to comment on the real environmental effects the proposed actions. NEPA requires federal agencies to prepare a detailed EIS for “all major actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “NEPA ‘ensures that the agency . . . will have available and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.’” *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

The change in environmental baseline has a huge effect on the analysis of impacts to the desert tortoise and other species because it masks a massive increase in the number of miles of authorized dirt roads through the supposed desert tortoise and Mohave ground squirrel conservation areas. We described some of these impacts in our comment letter on the Environmental Assessment and Draft CDCA Plan Amendment Western Mojave Desert Off Road Vehicle Designation Project, portions of which are included below:

“The proposed action would designate as open 659 miles of route more than the no action alternative. The document does not allow us to determine exactly how many of the additional 659 miles are in desert tortoise critical habitat. However, the location of the subregions listed in the table indicates that at least 455 miles of the additional open routes to be designated are in desert tortoise critical habitat. To put this in context, this is more than three times the miles of open routes in the highly controversial Rand Mountains Fremont Valley Management Area.” (Route Comments at 3).

“The document does not determine the effects of the 659 miles of additional open route on the other listed and sensitive species in the planning area.” (Route Comments at 3).

Our comments on the Western Mojave Desert Off Road Vehicle Designation Project Alternative D (the No Action alternative) also help to illustrate our understanding of the No Action alternative baseline in the DEIRS for the West Mojave Plan:

“Adequacy of Alternatives: Alternative “D”

Our calculations show that this alternative would close 2,896 miles of route, mostly through desert tortoise critical habitat; which is 659 miles more than the Proposed Action. The current CDCA Plan directives to implement on-the-ground route closure actions would remain in place. The No Action Alternative also continues the original CDCA Plan prescription of not recognizing routes less than 4 feet in width or single-use routes, such as single-use motorcycle trails. Given the increased miles of route closure and the maintenance of the current CDCA Plan route width restrictions and requirements to obliterate and barricade closed routes, it would appear that the No Action alternative offers significant conservation benefits to the desert tortoise and other sensitive species that have not been analyzed in the EA. Open Route Miles: 3451 (54%); Closed Route Miles: 2896 (46%); Single-use Motorcycle Route Miles: 0 (0% of open route network).” (Route Comments at 3).

We further described these impacts in our Protest Of Proposed CDCA Plan Amendment, Western Mojave Desert Off Road Vehicle Designation Project May 2003 Road Vehicle Designation Project, portions of which are included below:

“In our May 1, 2003 letter, we expressed concern that none of the alternatives sought full implementation of the recommendations of the 1994 Desert Tortoise (Mojave Population) Recovery Plan. This significant comment is dismissed in the Plan Amendment with the statement “Disagree. Consistent with the Recovery Plan, the proposed route network limits vehicle access to designated routes, does not propose creation of new routes, and provides a program for rehabilitating closed routes (the “Ord Mountain” program)” (page 17). But as the Bureau knows, the plan adds at least 650 miles to the inventory of open routes. Furthermore, the claim that no new routes are proposed in the Plan Amendment is flatly contradicted in comments made to the media by the Bureau. According to the Riverside Press Enterprise (June 19, 2003) BLM spokeswoman Jan Bedrosian said “The plan increases by about 15 percent the total miles of roads across the West Mojave.”” (Routes Protest at 2).

“CEQ Regulations for implementing the procedural provisions of NEPA, section 1508.27 requires that the significance of actions be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. However, because the EA failed to quantify the effects of the newly designated routes on the listed desert tortoise no meaningful analysis in the contexts of the affected region or affected interests could have been performed.” (Route Protest at 2).

“In addition, we are troubled by the response that “Route mileage differences among alternatives are not sufficient to support a “significance” finding; rather, network design and route location is more important to a significance determination.” This

misrepresents what constitutes a significance determination. The negative impacts on desert tortoise populations of routes through their habitat are well established. The EA itself baldly asserts that negative impacts of routes on the desert tortoise are proportional to miles of route. Any claim that an additional 659 miles of route (as calculated from the data in the original EA for the proposed action versus no action alternatives; the Bureau has not made the actual mileage known) lacks significance needs to be based on a full, detailed and adequate environmental analysis.” (Routes Protest at 4).

The change in the “No Action” alternative has evidently confused the authors of the FEIRS too, for portions of the FEIRS Chapter 4 analysis are now inconsistent with the stated “No Action” alternative baseline. For example, when discussing the environmental consequences of adopting the “No Action” alternative the FEIRS reads: “Large blocks would remain in the central and eastern regions. Without route designation, these blocks are subject to fragmentation by dirt roads and trails over time, although the magnitude of these impacts is unknown.” (FEIRS at 4-252). The same section also states: “Without route designation on public lands and participation of the local jurisdiction in conservation planning, gradual degradation of natural communities would proceed without restraint.” (FEIRS at 4-253). Similar sentiments are expressed in the Cumulative Impacts section (FEIRS at 4-281). These quotations appear to be referring to the “No Action” alternative described in the DEIRS, where the 1985-87 designations were to act as the baseline, and not the June 30, 2003 route designations. In contrast, in Table 4-63 (Tortoise Impacts of Alternative G) the claim is made that the impacts of the Motorized Vehicle Access Network for the No Action alternative will be the same as in Alternatives A and B for both benefits and residual impacts. (FEIRS at 4-258).

The June 30, 2003 route designation cannot become the baseline for the No Action alternative in the FEIRS simply because a Decision Record was signed after the DEIRS had been published and was out for comment. If BLM is going to make such changes, it must publish a Supplemental EIRS and allow full public review.

#### (iv) Land Acquisition Within the HCA

The basic purpose of obtaining replacement habitat is to accomplish an overall benefit for the species being impacted. Lists of “Non-biological Criteria” and “Biological Criteria” have been added to the section “Land Acquisition Within the HCA” (FEIRS at 2-55). The Implementation Team would be expected to use these criteria to determine priority of land acquisitions. Unfortunately, the document fails to provide any analysis of the environmental impacts of these criteria. Several of the listed criteria are inappropriate elements to consider in judging the conservation value of replacement habitat. The criterion “[p]arcels that facilitate other programs, particularly motorized vehicle access by the public...” is particularly troublesome since it is this very access that is responsible for so much habitat degradation. The FEIRS needs to be revised to evaluate the criteria. We do not believe these lists of criteria would be acceptable to the permitting agencies.

### **(3) FEIRS Fails To Adequately Characterize The Effects Of The Proposed Actions On Desert Tortoise and Mohave Ground Squirrel Conservation**

(i) Status of the Desert Tortoise

The USFWS 1994 Desert Tortoise (Mojave Population) Recovery Plan recognized “six distinct population segments or recovery units” within the range of the Mojave population based on genetics, morphology, behavior, ecology, and habitat use<sup>2</sup>. One of these “distinct population segments or recovery units” is the West Mojave desert tortoise population. Recognition of distinct tortoise Recovery Units was important because it established a biological basis for delisting segments of the Mojave population [Executive Summary, i]. In 2003, the USFWS established an Assessment Team to assess the 1994 Recovery Plan. The Assessment Team issued a draft report in March 2004<sup>3</sup> and a final report in October 2004<sup>4</sup>. The Assessment Team found that the 1994 Recovery Plan remained scientifically sound and identified specific items that warranted updating in view of new information. One of the items raised by the Team was the use of the term Recovery Unit as identified in the 1994 Plan. The 1994 plan had been promulgated two years prior to the release of the USFWS’s formulated DPS policy<sup>5</sup>. For the original Desert Tortoise Recovery Team, the term Recovery Unit was synonymous with Distinct Population Segment<sup>6</sup>. Based on rigorous analysis using the most recent data, the Assessment Team recognized that the desert tortoises of the West Mojave do indeed constitute a distinct population segment (DPS).

Given the continued recognition by biologists that the West Mojave desert tortoise population constitutes a unique DPS, the West Mojave desert tortoise population must be treated as a DPS for the purposes of the Section 10(a) consultation for the HCP component of the plan and reviewed as such in the EIRS.

(ii) The Proposed Plan Will Result In A Massive Net Loss Of Habitat

According to data in the FEIRS, the desert tortoises’ range in the West Mojave region covers 7.1-7.2 million acres. The proposed action, Alternative A, would establish an incidental take area for desert tortoises encompassing some 2 million acres of the tortoises’ range. We cannot be more specific because the environmental documents fail to include a statement of the size of the take area that includes so called “no survey areas”. According to FEIRS Appendix C, “mitigation fees would be used primarily for habitat enhancement rather than land acquisition”. Exhibit C.1 Implementation Task, Priorities and Costs allocates only \$2,770,000 to be spent on land acquisition (task HCA-36) for all plan components for the entire 30 years of the plan. This

<sup>2</sup> FWS. 1994. Chapter F. Distinct Population Segments of the Desert Tortoise. Desert Tortoise (Mojave Population) Recovery Plan.

<sup>3</sup> Tracy, C.R., R. Averill-Murray, W. Boarman, D. Delehanty, J. Heaton, E. McCoy, D. Morafka, K. Nussear, B. Haggerty, P. Medica. 2004. Desert Tortoise Recovery Plan Assessment (Working Draft, March 15, 2004).

<sup>4</sup> Tracy, C.R., R. Averill-Murray, W. I. Boarman, D. Delehanty, J. Heaton, E. McCoy, D. Morafka, K. Nussear, B. Haggerty, P. Medica. 2004. Desert Tortoise Recovery Plan Assessment.

<sup>5</sup> Department Of The Interior, Fish & Wildlife Service and Department Of Commerce, National Oceanic & Atmospheric Administration. 1996. Policy Regarding The Recognition Of Distinct Vertebrate Population Segments Under The Endangered Species Act. Federal Register 61(26) February 7, 1996.

<sup>6</sup> FWS. 1994. Desert Tortoise (Mojave Population) Recovery Plan. Executive Summary, page i, states: “Genetics, morphology, behavior, ecology, and habitat use define six distinct population segments or recovery units’ within the range of the Mojave population: Northern Colorado, Eastern Colorado, Upper Virgin River, Eastern Mojave, Northeastern Mojave, and Western Mojave”.

sum is sufficient to acquire only 2,000-4,000 acres, and is 3 orders of magnitude smaller than the incidental take area. The FEIRS fails to explain how this habitat enhancement and minimal acquisition of replacement habitat would achieve the fully mitigate (the CESA standard) or minimize and mitigate to the maximum extent practicable (the ESA standard) the impacts occurring in the 2 million acre incidental take area.

The FEIRS itself explains why habitat acquisition is so important when it compares Alternative B, BLM only to Alternatives A, C and D viz.:

“Alternatives A through D share the common characteristics of establishing four DWMA’s, with at least one that is 1,000 mi<sup>2</sup>, and incorporating the appropriate reserve design criteria given in Objective 1.3. This is not true for the BLM-only alternative. Although the alternative maintains the external, larger DWMA boundary, private lands are excluded, undermining the adequate DWMA size and configuration (i.e., lack of conservation on private land, checkerboard ownership pattern within the DWMA would undermine conservation efforts).” [FEIRS at ES-6]

Obviously, in the absence of a substantial land acquisition program, “lack of conservation on private land, checkerboard ownership pattern within the DWMA” would continue to undermine conservation efforts. In the absence of a habitat acquisition program appropriate in scale to the habitat taken, we do not see how the proposed HCP can comply with either Federal or state Endangered Species Acts.

### (iii) Cumulative Impacts

The Cumulative Impacts analyses remain substantially deficient and in need of extensive revision. The NEPA implementing regulations define cumulative effects as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions (40 CFR ~ 1508.7).” Therefore, the Cumulative Impacts section needs to consider effects of other actions not covered by the Plan such as those listed in Table 2-10 “Activities Covered and Not Covered by the Incidental Take Permit”.

Specific items of concern relating to the Cumulative Impacts sections include:

- The FEIRS analysis of vehicle impacts apparently reference the DEIRS “No Action” alternative not the FEIRS “No Action” alternative.
- The cumulative impacts analyses for all the alternatives fail to consider the conservation value of designated critical habitat. Without consideration of critical habitat there is no adequate environmental baseline established to bolster the claim that large new conservation areas being established.
- Statements in the FEIRS such as “[c]umulatively the habitat loss within the ITA would reduce populations of many species in a very substantial way” are troublesome and need analysis and explanation.

- The FEIRS does not specify how large the Incidental Take Area actually is. Consequently, the public is deprived of the opportunity to determine what the full cumulative impacts are on the human environment.
- The Fort Irwin expansion has not been addressed in the cumulative impacts analysis. The FEIRS does not even document what some of these cumulative impacts are likely to be, such as translocation of desert tortoises into private lands in the Superior-Cronese DWMA. (see also 4iii below)

#### **(4) The FEIRS Has Not Addressed Comments Made On the Draft**

We note that our comments on the DEIRS and those of several other organizations including California Native Plants Society, California Cattlemen’s Association and Defenders Of Wildlife were not included with the FEIRS. This makes it impossible for other reviewers to compare your responses to actual comments. This omission violates CEQ Regulation Section 1503.4(b)<sup>7</sup>.

Below we offer rebuttals to specific BLM responses to comments made in our DEIRS comments letter. The topics follow the order used by BLM.

##### **(i) Topical Comment 1: Funding the West Mojave Plan**

The proposed plan alternative appears to violate ESA section 10(a)(2)(b)(iii) and Fish and Game code section 2081 by not ensuring adequate funding or full mitigation in the final plan.

Under the federal Endangered Species Act (ESA), one of the requirements for approval of an HCP is that "the applicant will ensure that adequate funding for the plan will be provided." (ESA Sec. 10(a)(2)(B)(iii)). The USFWS can suspend the incidental take permit if adequate funding is not appropriated.

Under the California Endangered Species Act (CESA) Fish & Game Code Section 2081, CDFG may only issue an incidental take permit if “adequate funding is provided to implement the required minimization and mitigation measures and to monitor compliance with, and the effectiveness of, the measures.” (Fish and Game Code Sec. 2081).

The FEIRS claims that “[t]he mitigation fee program has been designed to generate the moneys necessary to fund the implementation of the West Mojave plan.” (page 6-54). However, a close look at the proposed mitigation fee program reveals that neither the requirements of the ESA nor CESA are met.

The most glaring inadequacy with BLM’s proposed funding structure is that it equates an acre of habitat taken with an acre created, enhanced, or restored, rather than with acre of habitat acquired. Exhibit C.1 of Appendix C states that “[b]ecause the large majority of lands within the Habitat Conservation Area are already on public lands held by BLM, CDFG, and other

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<sup>7</sup> “All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.” 40 CFR §1503.4(a)-(b).

entities, mitigation fees collected by local jurisdictions would be used primarily for habitat enhancement rather than land acquisition.” (FEIRS, Appendix C at 1). It is completely unrealistic to rely on restoration or enhancement of existing habitat on public lands to make up for the habitat authorized for take under the HCP. BLM never discusses exactly what habitat it plans to enhance or restore, much less does it give an assessment of this habitat’s current condition. Further, where exactly does BLM plan to create habitat? How will habitat be created within already existing habitat?

A second omission in the HCP funding structure is the lack of an explanation of how the mitigation fee program will make up for the loss of the now existing enhancement and endowment funds. The Plan seems to argue that increased funds collected by local jurisdictions will make up for this loss. In fact, Appendix C projects 75% of the total projected implementation costs will come from these implementing authorities. (FEIRS, Appendix C at 1). However, these local jurisdictions are already statutorily required under CESA and the ESA to collect such mitigation for projects. So how does the Plan improve on what the law already requires?

As explained in the FEIRS, the HCP must ensure sufficient funding for all agencies’ (local, state and federal) implementation responsibilities and should comply with the 1997 Equitable Precept’s goal of “realistic fiscal considerations, with identified sources.” (FEIRS at 6-7,8). We expressed our concern that the DEIRS failed to explain the HCP’s funding mechanism. BLM responded by referring to Appendix C, Exhibit C.1, which includes “possible” funding sources, as well as a summary of implementation tasks, and the costs of each task. BLM claims this exhibit has been revised and clarified in the Final Plan to include an estimate of annual funds available, implementation priorities, and also referred to a year-to-year schedule of tasks that could be completed, given available funding and priorities. (FEIRS at 6-8).

However, BLM’s response still provides no assurance of funding, and only further specifies what will be done with funds, if available.

Appendix C assumes “1994-2004 BLM appropriation funding and compensations will not greatly increase or decrease.” However, federal appropriated funds cannot be ensured for more than what has been appropriated in the most recently passed federal budget. BLM cannot firmly rely on these funds to continue at any specific level. Therefore, BLM needs to develop alternative sources of funding to compensate for the possibility that federally appropriated funds will be reduced or eliminated at some point during the Plan’s implementation.

Further, Exhibit C.1 gives specific cost estimates and assigns priorities to each task, but when it comes to identification of funding sources, the category is titled “Possible Funding Source,” and lists BLM, IA, etc. This structure by no means ensures that funding will be available for these activities, mainly because the funding sources are labeled as “possible.” The problem with such speculative funding is exacerbated by the fact that so many of the implementation tasks are labeled as “Priority 1.” (FEIRS Appendix C, Exhibit C.1). The sheer amount of such tasks renders BLM’s priority system ineffective at ensuring the most important tasks receive available funding first.

Additionally, in justifying mitigation ratios versus “in-kind” mitigation, BLM states “pooling mitigation fees and setting implementation priorities, adjusted annually by the implementing authority, is a more effective means of ensuring that fees are effectively applied to multi-species conservation than a relatively inflexible and narrowly-focused provision for “in-kind” mitigation could ever be”. (FEIRS at 6-54). BLM’s response misses the point and ignores the importance of “in-kind” mitigation. The concern is less with what funds are being used, but rather with what habitat is being protected in place of what is being taken. As it stands, BLM’s mitigation ratio structure does not ensure that equally suitable habitat will be acquired, as would be the case with “in-kind” mitigation. While the proposed plan might facilitate development projects, it fails to meet the requirements of both CESA and the ESA that take be mitigated.

For the above stated reasons the proposed HCP fails to meet the requirements of both ESA Section 10(a)(2)(B)(iii) and CESA Section 2081 because it lacks the required assurances of adequate funding. The funding sources and mechanisms offered are highly speculative and in some cases already statutorily required. The BLM must revise the funding structure in order to ensure that the Plan is able to provide the funding necessary to meet its obligations.

(ii) Response 188-2 - Biological Goals

“Comment noted” is a wholly inadequate response to our comment “ES-6 states ‘Unfortunately, the ability to realize Goal 2, for all alternatives, is hampered by the likelihood of catastrophic die-offs that could ultimately extirpate tortoises regardless of proactive conservation management. It would also appear that distance sampling, which is suggested as the means of monitoring the population, might fail in its ability to detect increases or decreases in the population.’ Statements like these are inappropriate in a science-based HCP planning exercise. The original Desert Tortoise Recovery Team addressed the likelihood of success in the 1994 Recovery Plan. The West Mojave planning team should do likewise. Statistical power calculations should have been used to compare the ability of different monitoring methodologies to discern different levels of change in populations.”

Nowhere in the document have the planners explained “the ability to realize Goal 2, for all alternatives, is hampered by the likelihood of catastrophic die-offs that could ultimately extirpate tortoises”. The unfounded implication seems to be that catastrophic die-offs are a certainty. This pessimism has no place in what should be a science-driven plan to conserve and recover a listed species.

In view of the crucial importance of monitoring, the planners have a clear obligation to present the ability and limitations of the proposed monitoring methodologies in an objective manner. As we have stated in our DEIRS comments, the planning team should use statistical power calculations to compare the abilities of the proposed monitoring methodologies to discern levels of change in the tortoise population.

(iii) Response 188-4 - Biological Goals

We commented on the failure of the planning team to propose methods to address the goal of ensuring connectivity between populations (Goal 3). Despite this, the connectivity issue has been worsened in the FEIRS by the elimination of the western portion of the proposed Pisgah Crater ACEC that was adjacent to the Ord-Rodman DWMA (see 2 (i) above). We were given no opportunity to comment on this.

The FEIRS did incorporate our comments on manual translocation of desert tortoises or their eggs as potential methods to achieve goal 3, and we agree with the planning team that this requires more research and data. However, the USFWS is currently considering a massive translocation of desert tortoises from Fort Irwin into the Superior-Cronese DWMA. This is likely to precede the completion of the final HCP and IA. The FEIRS needs to deal with the translocation issue.

(iv) Response 188-6 – Tortoise Life History

We suggested incorporating data from a number of literature references and, contrary to the bizarre statement in the response 188-6, gave the references in the text! Here is the paragraph from page 3 of our original comment letter:

“Because it helps establish rationales for conservation recommendations this is an extremely important section of the document. It is unfortunate therefore that scant attention seems to have been paid to it. The section begins with the blanket statement that the information is taken from U.S. Fish and Wildlife Service 2002 (sic). This reference is not listed but the reference section does include a U.S. Fish and Wildlife Service 2002c, this being the controversial 2002 Biological Opinion for the CDCA Plan; so controversial, that it is the subject of ongoing legal action over its apparent inadequacies. Like the Biological Opinion, the DEIS would benefit from more use of primary references, the incorporation of significant recent research findings, and the judicious elimination of conjecture. A review of Jennings’ paper “Comparative flowering phenology of plants in the western Mojave Desert” [Madrono, 48: 36, 162-171, 2001] might help shed light on the relationship between precipitation and growth of annuals (paragraph 1, p. 372); the physiological basis of the seasonal reproductive cycles of the desert tortoise have been well characterized e.g. Rostal, D.C. et al., Herpetological Monographs 8: 72-82, 1994 (paragraph 2, p. 372); the winter activity of juvenile desert tortoises in the Mojave Desert is characterized in Wilson et al., J. Herpetol. 33: 496-501, 1999 (paragraph 4, p. 372); the assertion “these anecdotal accounts may represent a small fraction of adult animals in the population, and most animals may remain in their burrows through the winter” needs justification since the obvious conclusion is that it would appear that any tortoise may take advantage of favorable conditions (paragraph 4, p. 372); other publications by Henen and Nagy’s group explain the relationships between resource availability and egg production; Oftedahl has explored the implications of livestock grazing on the availability of essential plants in several published works. We recommend that the planning team read the December 2002 issue of Chelonian Research and Conservation and recent Proceedings of the Annual Symposia of the Desert Tortoise Council for updates on trends in desert tortoise research.”

In addition, prior to the release of the FEIRS the biological opinion referenced by the BLM was indeed ruled deficient by Judge Illston. The Plan's references to this document are inapplicable.

(v) Responses 188-7 to 188-10 Survey Data *et alia*

The key issue relating to the West Mojave tortoise surveys is what quantitative conclusions can really be drawn from this unpublished data. The FEIRS should label the claimed correlations as Dr. Kryzysik's or the West Mojave planning team's opinion as appropriate, and not simply as scientific fact.

(vi) Response 188-11 No Survey Areas

The FEIRS defines "Survey Areas" as areas where there is some likelihood that tortoises occur, and "No Survey Areas" as areas that would require neither presence absence surveys nor clearance surveys (FEIRS at 2-63). However, despite our repeated objections because of the high risk of take, the proposed action still has "No Survey Areas" immediately adjacent to desert tortoise conservation areas.

According to response 188-11, "No Survey Areas are intended to be synonymous with no habitat areas" and fenced facilities at Harper Lake Road and Kramer Junction are offered as examples of such areas. We agree that tortoises may be absent from cleared areas that have been fenced with barrier fencing (although as experience from the American Honda site at Cantil has proven, this is not an absolute given the propensity for tortoises to dig and the vagaries of survival of fencing in the desert). However, such is not the case for areas where barrier fences are absent. Tortoise clearance surveys are required in such areas to avoid take.

The designation of a "No Survey Area" to the immediate northwest of the Desert Tortoise Natural Area is of particular offense. We appreciate that a dry lake occupies part of that zone (the small scale map provided is inadequate for reviewers to determine precise parameters). However, occupied desert tortoise habitat fringes the lake edge and tortoises are still likely to cross the playa. While the "No Survey Area" may be fixed on a map, the lake edge is fluid and fluctuates as the prevailing climatic conditions vary. It is likely to continue to do so over the 30 years of the plan. This "No Survey Area" also includes the fenced area around the American Honda Test Track site. Tortoises are frequently found inside that fenced area (and duly reported to the BLM's Ridgecrest Field Office).

The presence of "No Survey Areas" within the city limits of California City are also galling given repeated findings of desert tortoises on proposed development sites (such as the High School site) in recent years.

Compounding the problem, the FEIRS states that "[d]evelopment of No Survey areas would be tracked, but authorized development would not constitute loss of habitat i.e. take" (FEIRS at 2-46).

In establishing “No Survey Areas” in areas where it is likely that desert tortoises will occur, the proposed action violates Federal and state take-minimization requirements.

(vii) Response 188-12 to 188-13 DWMA Boundaries

Several of the boundary adjustments that we had commented on were corrected in the FEIRS. However, consideration should be made to:

(a) adjusting the boundary of the main conservation areas to reconnect the tangentially isolated parcel of Mohave ground squirrel habitat that includes Saddleback Butte State Park at the southern end of the Fremont-Kramer DWMA; and,

(b) including the critical habitat in the “doughnut” around the Randsburg/Red Mountain region back in the Fremont-Kramer DWMA to ensure an adequate wildlife corridor on the southern flanks of the Rand Mountains.

(viii) Response 188-14 Alternatives

Response noted. Also, see comment 1(i) above regarding the range of alternatives.

(ix) Response 188-16 Mechanisms

We expressed concern that “there is no mechanism to ensure against injudicious take or impacts to other sensitive species that occur only at specific localities within the DWMA”. The response that the Implementing Authority will determine acquisition priorities does not address our comment that there is no mechanism to ensure that injudicious take or impacts to other sensitive species does not occur. The new set of criteria listed for prioritizing land acquisition by the Implementing Authority includes measures to promote off-road vehicle use. Such use is not compatible with meaningful conservation (see comment 2(iv) above) and is unacceptable.

(x) Response 188-17 Habitat Credit Component

According to the BLM’s response, “[c]redits will only be given to successful projects based on existing excepted (sic) biological standards.” However, this is not the standard proposed in the FEIRS Alternative A. In fact, the FEIRS defers determination of what the success standards will be and proposes giving partial credit for minimal rehabilitation actions such as removing structures. We do not believe that meaningful desert restoration is likely to occur during the 30-year life of the plan. Without knowing these “biological standards” the environmental consequences of this plan component are unknown and the habitat credit component should be deleted from the proposed action.

(xi) Responses 188-18 to 188-22 Livestock Grazing

DTPC was encouraged by the BLM to acquire the Pilot Knob grazing allotment to eliminate grazing for the benefit of the area’s desert tortoises, Mojave ground squirrels and other species that were being impacted. As the BLM is aware, the Pilot Knob grazing allotment as are most of the grazing allotments in the West Mojave, is outside the grazing district. Under the Taylor Grazing Act of 1934 it is the Secretary who is authorized to issue grazing leases on land

that is outside the grazing district (§ 315m) and there is no need for Congressional involvement. The FEIRS should explain explicitly why the Secretary cannot guarantee that grazing will not be authorized for the 30 year life of the plan. Without this guarantee, the conservation benefits of eliminating grazing cannot be considered as mitigation for impacts occurring elsewhere. This issue needs to be addressed in the cumulative impacts section.

(xii) Responses 188-24 and 188-26 Dual Sport Rides

Despite the threat to the tortoise and other sensitive species and in direct contravention to the Desert Tortoise Recovery Plan, the Final Plan authorizes the use of any designated open routes within conservation areas for dual sport events. Contending that “it is the intent of the plan to retain the existing requirement that dual sports event be evaluated on a case-by-case basis, including full NEPA compliance” (FEIRS at 6-123), the BLM does not fully evaluate the impacts of this action. However, elsewhere the BLM does recognize that there are cumulative effects. In response 185-6, the BLM boasts “future events may be less restrictive and expanded in scope as a result of the plan, as all open routes would be available for dual sport events”. (FEIRS at 6-103). The cumulative effects of this should have been addressed in the FEIRS.

In its response to our concern that the BLM is opening the Western Rand Mountains ACEC to dual sport events, BLM states: “Prescription HCA-41 allows dual sport events to occur within DWMA, so long as such events conformed to a list of guidelines set forth in this prescription. Dual sport events could take place in the Rand Mountains, which are located within the Fremont Kramer DWMA. This ensures that dual sport management is consistent throughout the four DWMA.” (FEIRS at 6-125). Citing “consistency” as a justification and basis for allowing dual sport events to take place in the Rand Mountain Fremont Valley Management Area where it was specifically prohibited is ridiculous and completely contradicts the biological importance of the area to the recovery of the desert tortoise.

BLM also points out that “[t]he Draft EIR/S evaluated this prescription, noting that dual sports events have “resulted in no known loss of tortoises,” and cites USFWS 2002 which concluded “that organized, non-speed events, such as dual sports rides in the western Mojave Desert, resulted in minimal habitat disturbance, if any, and they were unaware of any injuries or mortalities of desert tortoises that have occurred during these events.” (FEIRS at 6-124). However, this is contradicted by the CDCA Biological Opinion (March 31, 2005), which states: “The degree of threat posed to desert tortoises by recreation increases with the speed, weight, and numbers of recreational units. For example, a small group of hikers poses much less threat to the desert tortoise than a race involving numerous all-terrain vehicles.” (CDCA BO at 123).

In order to conform to the current CDCA Biological Opinion and the Desert Tortoise Recovery Plan, the risk should be eliminated by not allowing any dual sports events to occur within DWMA at any time.

(xiii) Response 188-25 Race Routes

It is completely inconsistent with the current CDCA Biological Opinion (March 31, 2005) and the Desert Tortoise Recovery Plan to have the Johnson to Parker competitive event

corridor abutting the boundary of the Ord-Rodman DWMA. As pointed out in the current CDCA Biological Opinion: “Riders may travel up to 100 feet from the centerline on the side away from the desert wildlife management area; this off-road travel is likely to kill or injure desert tortoises, if they are present in the area. The proximity of an off road event to the desert wildlife management area poses, at a minimum, an indirect threat to the stability of the area.” (CDCA BO at 164).

The Final Plan offers “[y]ellow flag controlled speed conditions” and “special permit conditions when approval of the event by BLM was considered.” The Final Plan gives no indication of how these measures would in any way be enough to minimize the above stated risk. (FEIRS at 6-123). Instead, the Final Plan should have included language clarifying that race corridors are incompatible uses both in and along the boundaries of conservation areas. Accordingly, Alternative A must be amended to eliminate this portion of the Johnson Valley Competitive Event Corridor in order to conform to the current CDCA Biological Opinion and the Desert Tortoise Recovery Plan. BLM must also abide by the portion of the CDCA Biological Opinion, which requires that “[p]rior to any specific event, the Bureau will prepare an environmental assessment to determine if any changes have occurred.” (CDCA BO at 32).

(xiv) Response 188-28 Shooting

In her well-known study published in 1986, Dr. Kristin Berry found 91 of 635 desert tortoise carcasses recovered from permanent study plots showed evidence of gunshots<sup>8</sup>. Because the firearms used to kill tortoises were not weapons generally carried by upland game hunters, upland game season coincides with tortoise hibernation periods, and the fact that the study plots were not located in prime hunting habitat it was concluded that it was target shooters or plinkers who were shooting the tortoises. Map 3-12 in the FEIRS indicates that of tortoise carcasses found during the tortoise surveys where cause of death was determined 10 had died from gunshots compared to 13 showing evidence of raven predation. Additional indirect impacts of shooting were outlined in our comment letter on the DEIRS. However, despite the overwhelming evidence of its potential negative impact of shooting on desert tortoises, the BLM is proposing to continue to allow paper target shooting in the DWMA.

The justification given by the BLM for this decision is astonishing. “The latter condition is the only difference between the Recovery Plan and Alternative A recommendations, and is not viewed as a significant difference. It is consistent with the approach agreed to in settlement of litigation between BLM and the Center for Biological Diversity, et al., in 2001”<sup>9</sup>. Given the BLM’s response, perhaps they feel that raven predation on tortoises is not a significant issue either – after all only 13 carcasses recovered by the West Mojave Team biologists showed evidence of raven predation? Allowing target shooting to continue in tortoise conservation areas is inconsistent with published literature, with the Recovery Plan, and with the Bureau’s own recent data. It is simply unacceptable for the BLM to ignore this impact in the face of clear evidence to the contrary.

<sup>8</sup> Berry, K. H. (1986) Incidence of gunshot deaths in desert tortoise populations in California. Wildl. Soc. Bull. 14: 127-132, 1986

<sup>9</sup> Yet the BLM took the position in the DEIRS of eliminating from consideration an alternative based on this very settlement agreement between BLM and the Center for Biological Diversity et al. (DEIRS at 2-198).

(xv) Response 188-28 Raven Management

Ravens require access to water in order to survive, nest and successfully and reproduce. In remote desert areas, ravens use man-made sources such as stock tanks and wildlife guzzlers as water sources. Despite this, not a single alternative in the FEIRS considered closing wildlife guzzlers to manage raven populations in remote areas -- even Alternative F: no DWMA aggressive disease and raven management. Because the FEIRS never considered the reasonable option of closing guzzlers, the BLM's response that closing guzzlers "may not be the best way to proceed" is simply irrelevant opinion. This action should be reviewed in the supplemental EIRS.

(xvi) Responses 188-32 Current CDFG Mitigation Program

In our DEIRS comments, we expressed concern that the enhancement and endowment fees currently required by CDFG would no longer be collected and that these conservation revenues would be lost to the potential detriment of listed species. The BLM's response seems to indicate that CDFG supports this. However, this is misleading as CDFG's comment letter on the DEIRS raised similar concerns about funding shortfalls. We appreciate the point made by the BLM that relatively small numbers of federal incidental take permits have been issued despite vast developments that have taken place in desert tortoise habitat. The federal agencies need to take a much more proactive stance to reduce incidences of unauthorized take.

Under the proposed plan, costs to developers would decline because they would no longer be required to pay acquisition, enhancement and endowment fees to fully mitigate for their impacts. Without these enhancement and endowment fees, conservation funds would also decline.

See 4(i) above for additional comments.

(xvii) Responses 188-33 Rand Mountain Fremont Valley ACEC Plan

In contrast to the BLM's response that no statements were ever made that ACEC plans could not be revisited, requests to revisit the Rand Mountains Fremont Valley Management Plan to improve conservation measures were repeatedly rebuffed. For example, according to the meeting notes of West Mojave Plan, Task Group 1, April 16, 2002 "Haigh indicated that the BLM will not propose any changes to the Rand Mountains/Fremont Valley Plan through the West Mojave Plan. Rather, the West Mojave Plan will be the vehicle to implement plan amendments called for in the Rand Plan."

Citing "consistency" as a justification and basis for allowing dual sport events to take place in an area like the Rand Mountain Fremont Valley Management Area where it had been specifically prohibited under a USFWS Biological Opinion is ridiculous and completely contradicts both the biological importance of the area to the recovery of the desert tortoise and the Desert tortoise recovery Plan. The Rand Mountain Fremont Valley Management Area Plan itself explicitly states that it should be modified to conform to the Desert Tortoise Recovery Plan. (see also 4xii above for related comments)

(xviii) Responses 188-34 Mohave ground squirrel

The heart of our comments on the Mohave ground squirrel revolves around that species' endemism in the West Mojave. The fact that a third of its entire biological range would become an Incidental Take Area is a serious and significant step for any species. Current conservation management centers on CDFG actions relating to 2081 incidental take permits. CDFG's current mitigation requirements exceed those outlined in the proposed action alternative. For example, the mitigation ratio for acquisition of replacement habitat for the recent Hyundai Test Track project located south of California City was 5:1 plus the CDFG required habitat enhancement and endowment funds. Under the proposed action outlined in the FEIRS, this would be reduced to 1:1 or 0.5:1 with no requirement for enhancement and endowment funds. The proposed action offers little in the way of other mitigating actions to offset this loss of conservation funds.

**(5) The Proposed Plan Will Not Conserve and Recover Listed Species**

There are two major driving forces behind the development of the West Mojave Plan. These are (a) the federally mandated requirement to conserve and recover the desert tortoise by the federal agencies, and (b) the avoidance of Federal listing of the Mohave ground squirrel. With respect to the (a), the analyses presented in the FEIRS are inadequate to determine if the proposed action offers more conservation benefits than current management let alone determine if it is likely to promote recovery of the desert tortoise. The change in the environmental baseline for routes in the FEIRS compared to that originally presented in the DEIRS takes route designation on public lands of the table as a mitigation measure for impacts on private land. Combined with the de-emphasis on habitat acquisition it seems unlikely that the proposed HCP is even viable. With respect to the Mohave ground squirrel, by establishing a blanket Incidental Take Area covering one third of its range, the proposed action would seem likely to propel and not avert a Federal listing of the Mohave ground squirrel.

We reserve the right to submit additional comments as time permits, and we incorporate by reference any and all comments made in materials we have submitted during the lengthy planning process. We thank you again for this opportunity to protest the Final Environmental Impact Report and Statement for the West Mojave Plan dated January 2005, and we look forward to reviewing a supplemental EIRS. Please keep us informed of any related decisions and actions. I can be reached by telephone at (951) 683-3872; by fax at (951) 683-3872; and by e-mail at <dtpc@pacbell.net>.

Sincerely,



Michael J. Connor, Ph.D.

**DESERT TORTOISE PRESERVE COMMITTEE  
DESERT TORTOISE COUNCIL**

Desert Tortoise Preserve Committee ● 4067 Mission Inn Avenue ● Riverside, CA 92501  
Tel 951-683-3873 ● Fax 951-683-6949 ● www.tortoise-tracks.org  
Desert Tortoise Council ● P.O. Box 5685 ● Sun City West, AZ 85376-5685 ● www.deserttortoise.org