

# Master Response 15

## Procedural Considerations

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**Table MR15-1. Comments Addressed in Master Response 15**

Comment	Commenter
G2-2	U.S. Environmental Protection Agency (Goforth, Kathleen)
04-7	Center for Biological Diversity (Keats, Adam)
04-27	Center for Biological Diversity (Keats, Adam)
04-28	Center for Biological Diversity (Keats, Adam)
04-29	Center for Biological Diversity (Keats, Adam)
04-30	Center for Biological Diversity (Keats, Adam)
04-31	Center for Biological Diversity (Keats, Adam)
04-32	Center for Biological Diversity (Keats, Adam)
04-33	Center for Biological Diversity (Keats, Adam)
04-34	Center for Biological Diversity (Keats, Adam)
04-49	Center for Biological Diversity (Keats, Adam)
04-50	Center for Biological Diversity (Keats, Adam)
04-51	Center for Biological Diversity (Keats, Adam)
04-52	Center for Biological Diversity (Keats, Adam)
04-53	Center for Biological Diversity (Keats, Adam)
04-55	Center for Biological Diversity (Keats, Adam)
04-65A	Center for Biological Diversity (Keats, Adam)
04-68	Center for Biological Diversity (Keats, Adam)
04-69	Center for Biological Diversity (Keats, Adam)
04-70	Center for Biological Diversity (Keats, Adam)
04-71	Center for Biological Diversity (Keats, Adam)
04-71A	Center for Biological Diversity (Keats, Adam)
04-72	Center for Biological Diversity (Keats, Adam)
04-126A	Center for Biological Diversity (Keats, Adam)
04-131	Center for Biological Diversity (Keats, Adam)
04-138	Center for Biological Diversity (Keats, Adam)
04-146	Center for Biological Diversity (Keats, Adam)
04-177	Center for Biological Diversity (Keats, Adam)
04-180	Center for Biological Diversity (Keats, Adam)
04-191	Center for Biological Diversity (Keats, Adam)
04-205	Center for Biological Diversity (Keats, Adam)
04-208	Center for Biological Diversity (Keats, Adam)
04-240	Center for Biological Diversity (Keats, Adam)
04-244	Center for Biological Diversity (Keats, Adam)
04-260A	Center for Biological Diversity (Keats, Adam)
O10-6	TriCounty Watchdogs (de Leeuw, Jan)

Comment	Commenter
I527-1	Fry, Kenneth B.
I627-21	Hamber, Robert
I1210-3	Pinard, John W.
I1301-7	Risebrough, Bob
I1658-1b	Willer, Benjamin

## 15.1 Summary of Substantive Comments

The following summarizes the substantive comments received on the Draft EIS and Draft TU MSHCP that were related to the availability of management plans and the public disclosure of documents prior to permit issuance. Table MR15-1 provides a list of the commenters and a reference to the individual comment, as summarized below. The parenthetical reference after each summary bullet indicates where a response to that comment is provided.

Comments on the availability of management plans for public review include the following:

- Many of the mitigation measures in the TU MSHCP identify management plans that need to be developed. Because these plans would affect biological resources, they need to be included for public review and determination of consistency with the TU MSHCP. Similarly, reliance on future management plans that have not been developed and that are not available for public review makes it impossible to identify whether effects on various species would be adequately avoided, minimized, and mitigated. (Response provided in Section 15.2.1, Availability of Management Plans for Public Review.)
- Management plans to be submitted to the Service after the permit has been issued may have environmental effects of their own, and without being able to review them in advance of the permit, there is no basis for the finding that the applicant minimized and mitigated effects to the maximum extent practicable. (Response provided in Section 15.2.2, Identification of Effects from Management Plans.)
- A fire management plan needs to be developed, and the fuel management plan, which is part of the Ranchwide Agreement, is too myopic to cover all fire issues. (Response provided in Section 15.2.3, Development of a Fire Management Plan.)
- A weed management plan needs to be developed and provided for public review, as exotic invasive plants are a threat. (Response provided in Section 15.2.4, Development of Weed Management Plan.)

Comments on the disclosure of documents for public review include the following:

- The Service has not met its obligations to disclose documents as provided for in the Federal Endangered Species Act (ESA) and National Environmental Policy Act (NEPA), and withholding documents under the Protective Order is inconsistent with those statutes. (Responses specific provided in Section 15.2.5.1, Disclosure Requirements under ESA and NEPA.)
- A 1999 Memorandum of Agreement (MOA) disclosed in response to a Freedom of Information Act (FOIA) request should have been disclosed with the incidental take permit (ITP) application, and is predecisional, as it protects the Tejon Ranchcorp (TRC) development goals over conservation of the species. (Responses specific provided in Section 15.2.5.1, Disclosure Requirements under ESA and NEPA.)

- The Protective Order prevented the public from obtaining important California condor data that contradict the conclusions in the TU MSHCP. (Responses specific provided in Section 15.2.5.1, Disclosure Requirements under ESA and NEPA.)

## 15.2 Responses to Substantive Comments

### 15.2.1 Availability of Management Plans for Public Review

One commenter stated that the Draft TU MSHCP identifies management plans that need to be developed, and that those management plans, including a grazing management plan, integrated pest management plan (IPMP), European starling management plan, and public access plan, need to be included for public review. The commenter further stated that unless and until the management plans are made available for public review, there is no basis for the required findings under NEPA and ESA.

The commenter is correct that Section 4.4, California Condor - Avoidance, Minimization, and Mitigation Measures, and Section 7.2, Other Covered Species - Avoidance, Minimization, and Mitigation Measures, in the TU MSHCP, require that a grazing management plan, IPMP, and public access plan be developed, and that a European starling management plan be developed *if* determined necessary due to effects on purple martin. The initial grazing management and pest management plans approved by the Tejon Ranch Conservancy and by Kern County (as part of the certified TMV EIR), as well as the public access plan adopted by the Tejon Ranch Conservancy, are attached to the revised TU MSHCP as part of the Interim Ranchwide Management Plan (RWMP) (Tejon Ranch Company 2009) (Appendix F of the TU MSHCP). These plans have been reviewed and considered in the effects analysis presented in Chapter 4, Environmental Consequences, in Volume I of this Supplemental Draft EIS. For the lands managed by the Tejon Ranch Conservancy (i.e., Established Open Space and Existing Conservation Easement Areas), the Interim RWMP identifies the current best management practices (BMPs) for the existing ranch uses, consistent with the stewardship standard required by the Ranchwide Agreement, and establishes a process and timeline—including the identification of information needs—to further develop a comprehensive management plan. It is a first step toward implementing a comprehensive RWMP that would be reviewed and approved by the Service to ensure that it is consistent with the TU MSHCP, ESA, and any applicable conservation easement restrictions. As part of the TMV Project, Kern County also made the grazing management plan and pest management plan applicable to the TMV Planning Area Open Space (Kern County 2009). In addition, on September 18, 2009, as part of the Interim RWMP, the Tejon Ranch Conservancy approved the initial Public Access Plan, which continues to allow docent-led tours only on existing roads and trails and sets a process by which broader public access activities would be reviewed and approved. These plans are incorporated into the revised TU MSHCP. If the Service issues an ITP for the TU MSHCP Covered Activities, the management plans would be revised as necessary to conform to the ITP and the final TU MSHCP, and would be reviewed and approved by the Service as set forth in the Implementing Agreement Sections 5.1.1(d) and 5.2.4.

The Service disagrees with the comment that NEPA requires that the management plans that would implement the TU MSHCP be completed at the time of project approval and included in the EIS. With respect to mitigation generally, NEPA requires a "reasonably complete discussion of possible mitigation measures," demonstrating that the agency took a "hard look" at possible mitigating measures (*Robertson v. Methow Valley Citizens Council et al.*, 490 U.S. 332, 352 [1989]). A "perfunctory description" or a "mere listing" of mitigating measures is insufficient (*Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 [9th Cir. 2000]). However, a mitigation plan "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural

requirements." (*National Parks Conservation Ass'n. v. U.S. Dept. of Transportation*, 222 F.3d 677, 681 [9th Cir. 2000]). The EIS meets the standards outlined above. Tables 2-3 and 2-4 in Chapter 2, Proposed TU MSHCP and Alternatives, in Volume I of this Supplemental Draft EIS list avoidance, minimization, and mitigation measures and a number of species-specific objectives designed to lessen effects on California condors and other Covered Species under the Proposed TU MSHCP Alternative. Detailed biological goals and objectives and avoidance, minimization and mitigation measures that address potential effects on the Covered Species are also set forth in the Section 4, California Condor, and Section 7, Other Covered Species, of the TU MSHCP. All future management plans and revisions to the current management plans would be required to adhere to the biological goals, objectives, and measures in the final TU MSHCP and undergo review and approval by the Service. The existing management plans attached to the TU MSHCP, combined with the detailed requirements contained in the TU MSHCP for future management plans and revisions to current plans, provides ample information to the public and to the Service for review of the TU MSHCP.

## 15.2.2 Identification of Effects from Management Plans

One commenter stated that each of the management plans has the potential to have environmental effects of their own, including potential effects on biological resources proposed for conservation under the TU MSHCP. The commenter stated that the failure to identify or analyze effects from the omitted management plans themselves makes it impossible to evaluate the adequacy of the mitigation. The commenter also stated that because the management plans would be submitted to the Service after approval of the TU MSHCP, the harm would have already occurred through issuance of an ITP.

Under the proposed TU MSHCP, grazing and pest management would continue in accordance with existing practices. Tejon Ranch's existing grazing and ranching activities have been in place for nearly 100 years and have resulted in the existing mosaic of habitat types and species distribution on the ranch. However, to ensure continued successful operation of the grazing and ranching activities that support a healthy cattle population, while protecting the Covered Species and their habitats, the TU MSHCP requires that management plans related to those activities, including plans for the ongoing activities such as grazing, be developed, reviewed and approved by the Service. Additionally, grazing would be subject to the compliance and effectiveness monitoring and adaptive management program prescribed under the TU MSHCP, and summarized in Chapter 2, Proposed TU MSHCP and Alternatives, in Volume I of this Supplemental Draft EIS, which allows adjustments over time to protect against adverse effects.

The public access plan would similarly document existing BMPs for the public's use of the Covered Lands, and would require that the selection of access points, trails, and facilities be consistent with the TU MSHCP, ESA, and any applicable conservation easement restrictions, subject to the approval by the Service.

Because the location of these facilities must be consistent with the TU MSHCP and ESA, such facilities may not result in additional effects on Covered Species or other sensitive resources without triggering additional environmental review and subsequent mitigation.

With respect to the IPMP, all such plans must meet the requirements set forth in Section 7.2.1 of the TU MSHCP, including that the plan avoid and minimize potential effects related to fertilizers, pesticides, and water quality, and provide guidelines for eradication of nonnative invasive species.

Revisions to these plans must implement the performance standards set forth in the mitigation measures, and the Services' review and approval per the terms of the Implementing Agreement would be required to ensure that management activities in the Covered Lands are carried out in accordance with take avoidance, minimization, and mitigation measures and other conservation measures for Covered Species. (Implementing Agreement, Section 5.1.1(d)). Thus, the management

plans would simply ensure that Covered Activities comply with the TU MSHCP, and are not anticipated to result in any effects independent from those already analyzed in this Supplemental Draft EIS.

With respect to the European starling plan, proposed management requirements are set forth as Objective 8-1 in Section 7.1.1.2.7, Purple Martin, of the TU MSHCP. Specifically, European starling monitoring, removal, and management methods would be implemented if determined necessary by a Service-approved biologist, based on monitoring results and the abundance of the species within 500 feet of suitable habitat for purple martin during the breeding season, or the presence of large winter flock sizes. Thus, the need for the European starling management plan would be based on the results of the monitoring program, with standards for that management plan set forth in the TU MSHCP. No new indirect or direct effects are anticipated to result from this measure.

Finally, as discussed above, the grazing and pest management plans are meant to ensure the continuation of existing practices, and to preserve (and potentially improve) existing conditions. These plans would be revised in the future per the schedule set forth in the Ranchwide Agreement (Implementing Agreement Section 5.1.1(d)), and review and approval by the Service would be required to ensure that future revisions to management plans are consistent with the TU MSHCP and ESA. Thus, no new direct or indirect adverse environmental effects are anticipated to result from implementation of the grazing or pest management plans.

### 15.2.3 Development of a Fire Management Plan

One commenter stated that a fire management plan needs to be developed, and that the fuel management plan, which is part of the Ranchwide Agreement, is too myopic to cover all fire issues. Further, the commenter stated that habitat clearance for fires can significantly degrade habitat and affect species; therefore, a thorough analysis of a fire plan and its effects on each species is required.

Fire management is addressed in both the EIS and TU MSHCP, including consideration of fire management for public safety and potential effects of fire management activities on the Covered Species. Fuel management, as the term is used in the TU MSHCP and considered in the EIS, is a Plan-Wide Activity defined in Section 2.2.1.2, Activities Considered in the Analysis, in Volume I of this Supplemental Draft EIS, and in Section 2.2.1, Plan-Wide Activities, of the TU MSHCP. As described in those sections, fuel management activities would consist primarily of grazing. They also could include maintenance of existing roads, irrigation, and vegetation clearing around existing structures (within 120 feet), and coordination with state or local agencies for mowing or other fire protection measures along fire-prone areas (e.g., highways). These practices are representative of existing conditions and fuel management practices, and are expected to continue in the future.

As discussed above, grazing is an existing activity on the ranch and the ongoing effects of grazing are reflected in baseline conditions, as described for the No Action Alternative (Section 4.0.2.1) in Chapter 4, Environmental Consequences, of this Supplemental Draft EIS. Existing grazing and fire BMPs are documented in the Interim RWMP, and summarized in this Supplemental Draft EIS. Grazing is also a Covered Activity under the TU MSHCP and is analyzed in this Supplemental Draft EIS as part of the effects analysis for the Proposed TU MSHCP Alternative. Grazing activities under the TU MSHCP would be carried out in accordance with BMPs prescribed in the RWMP to be approved by the Service, and must balance species and fire protection as outlined in the grazing management plan. The Service's review and approval of the grazing management plan and fuel management plan would ensure that no additional effects on the Covered Species due to grazing or fire management would occur beyond those analyzed in this Supplemental Draft EIS.

With respect to fuel management related to the development in the TMV Planning Area, Section 2.2.1, Plan-Wide Activities, of the revised TU MSHCP clarifies that fuel modification in the TMV Planning Area, including the 1,773 -acre fuel modification zone, would follow the Kern County Fire

Protection Plan (Dudek 2008) approved as part of the TMV Project Approvals (attached as Appendix D to Appendix B-1 of the Tejon Mountain Village Environmental Impact Report [TMV EIR]). The anticipated effects of the proposed fire management activities, including those associated with the fire protection plan, on Covered Species are considered in Section 4.1, Biological Resources, in Volume I of this Supplemental Draft EIS, and further discussed in Master Response 7, Edge Effects, Fuel Modification, and Wildlife Habitat Connectivity, in Volume II of this Supplemental Draft EIS.

## 15.2.4 Development of Weed Management Plan

One commenter stated that a weed management plan needs to be developed and provided for public review, as exotic invasive plants are a threat.

The IPMP proposed under the TU MSHCP would provide guidelines for "the eradication of non-native, invasive species," as described in Section 7.2.1, Measures to Avoid and Minimize Impacts, in the TU MSHCP. As clarified in Chapter 2, Proposed TU MSHCP and Alternatives, in Volume I of this Supplemental Draft EIS, the IPMP would also address invasive plants. Additionally, grazing is anticipated to provide weed management in open space areas. In the event that problems arise from weed competition, the annual monitoring reports prescribed under the TU MSHCP would identify significant problems or successes that may necessitate alterations to the monitoring and management programs; recommend such changes/revisions to the programs; document changes that have occurred in the prior year and describe how they were addressed; and discuss adaptive management triggers and how adaptive management was implemented. Thus, any significant problems that arise from weed competition or lack of conformance with the grazing management plan would result in recommendations for changes or revisions to BMPs and/or the grazing management plan to rectify the specific problem identified. A separate weed management plan is not necessary.

## 15.2.5 Document Disclosure and Transparency

Several commenters raised issues regarding disclosure of documents as part of the public review process. As discussed in more detail below, the Service supports full disclosure of documents relevant to its review of the TU MSHCP under ESA and NEPA. The Protective Order put into place following settlement of a lawsuit filed by TRC in 1997 was vacated on August 25, 2009. Specific comments are summarized and responded to below.

### 15.2.5.1 Disclosure Requirements under ESA and NEPA

One commenter stated that the Service has not met its obligations to disclose documents as provided for in the ESA and NEPA, and that withholding documents under the Protective Order was inconsistent with those statutes. In support of this contention, the commenter cites the ESA's requirement in Section 10(c) that "[i]nformation received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding" (16 United States Code [U.S.C.]1539(c)). The commenter also cites the Council on Environmental Quality's (CEQ) NEPA regulations, which state that the lead agency must "[m]ake environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of FOIA (5 U.S.C. 552)" (40 Code of Federal Regulations [CFR] 1506.6(f)). Another commenter stated that "secret, backroom deals" should not have a role in the government review and approval process.

As described in more detail below, the ESA requires that documents submitted as part of an ITP application be made available to the public for review. The Service has complied with this statutory mandate. The ITP application was made available to the public, as was the Draft TU MSHCP, Draft

Implementing Agreement, and Draft EIS during the public comment period in 2009 (74 FR. 6050 [Feb. 4, 2009]). In addition, pursuant to FOIA requirements, all ITP application documents were made available to the public following the release of the Draft EIS on February 4, 2009. In general, documents requested under FOIA were released consistent with FOIA and the restrictions of the Protective Order. Since the Protective Order was vacated, the Service has released all responsive documents requested under FOIA in accordance with applicable FOIA requirements and limitations.

## 1997 Lawsuit and Protective Order

In 1997, TRC filed suit to require the Service to issue a 10(j) Rule under the ESA to continue to release California condors in southern California under the California Condor Recovery Program, similar to the 10 (j) Rule issued in 1996 for the condor release program in Arizona. Under Section 10(j) of the ESA, the Service may designate a population of a listed species as a “nonessential experimental population” and relax the statutory protections otherwise applicable to the population to encourage landowners and other third parties to support recovery actions for the species. The Service disagreed that issuance of a 10(j) Rule was required or appropriate for condors released in California. Before and after filing the lawsuit, the parties worked together to reach a mutually agreeable solution. In 1999, the parties reached a settlement agreement under which TRC agreed to work with the Service, with court oversight, to complete a habitat conservation plan (HCP) that would support issuance of an ITP. As a result of the settlement, for the past 10 years, the Service has been providing technical assistance to TRC in the development of an HCP. That effort resulted in the release of the Draft TU MSHCP, and associated Draft EIS analysis, on February 4, 2009, as well as the subsequent release of the revised TU MSHCP and this Supplemental Draft EIS.

While TRC and the Service were working toward development of an HCP, a commenter filed a FOIA request in 2002 that resulted in the release of approximately 431 pages of documents. In response to the commenter's 2002 FOIA request, and to protect the ongoing confidentiality of settlement negotiations between the Service and TRC, TRC filed and obtained a Protective Order. Specifically, the Protective Order provided:

"That, except for any Habitat Conservation Plan and accompanying documents that are formally submitted to the U.S. Fish and Wildlife Service in an application for the issuance of an Incidental Take Permit...all documents and records created and produced *in relation to and for the purposes of settlement* of the instant action shall be treated as confidential and shall not be disclosed to any person other than the Plaintiffs and the Defendants or used in any other litigation." [Emphasis added.]

Contrary to one comment, there is nothing in the Protective Order that undermines the public process provided for in the ESA and NEPA. The Service is required to adhere to all the public comment requirements in those statutes and support its decision pursuant to NEPA and Administrative Procedures Act.

The Protective Order specifically excludes from its coverage "any Habitat Conservation Plan and accompanying documents that are formally submitted to the U.S. Fish and Wildlife Service *in an application for the issuance of an Incidental Take Permit* pursuant to Section 10 of the Endangered Species Act consistent with Section 10(c) of FESA", which applies to "[i]nformation received by the Secretary *as part of any application*" for an ITP. Consistent with ESA Section 10(c), the Service released the application as well as the Draft TU MSHCP and Draft Implementing Agreement to the commenter (U.S. Fish and Wildlife Service FOIA responses to the Center for Biodiversity's January 23, 2009, FOIA request sent April 8, 2009 and April 27, 2009). The Service has also released condor location data to the commenter on an ongoing basis in response to several FOIA requests. As noted earlier, the Protective Order was vacated in August 25, 2009. TRC and the Service have since made available for release under FOIA all documents formerly protected by the order. While these

documents are not part of the application required to be made available under the ESA, they are appropriate for release under FOIA.

As discussed further below, the Service complied with the ESA and NEPA document disclosure requirements.

### **Federal Endangered Species Act**

As noted above, the ESA requires that "[i]nformation received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding" (ESA 10(c), 16 U.S.C. 1539(c)). In *Gerber v. Norton*, the only case found that interprets Section 10(c) in this context, the Court of Appeals for the District of Columbia interpreted the statute to require disclosure of documents "received by" the Service "as part of" an ITP application" (294 F.3d 173, 179, [D.C. Cir. 2002]). Although the document in question in *Gerber* (a map) was not physically attached to the ITP application, it had been submitted to the Service as part of the application and was made part of the final HCP; as a result, it should have been made available to the public. *Id.*

Here, the Service fully complied with *Gerber* by providing the commenter with copies of all documents submitted by TRC in conjunction with its application for an ITP in response to commenter's January 23, 2009 FOIA request. All relevant maps are incorporated into the documents. Nothing in *Gerber* requires that the Service, pursuant to Section 10(c) of ESA, release correspondence between the Service and TRC that preceded the ITP application. Nonetheless, as noted above, the Service has made all relevant past communications and documents available for release under FOIA, consistent with limitations of that statute.

### **National Environmental Policy Act**

The CEQ NEPA regulations at 40 CFR 1506.6(f) state that the lead agency must "[m]ake environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act". The Service fully supports the disclosure policy reflected in the CEQ regulations and since the Protective Order was vacated, has made available for release underlying documents relevant to the TU MSHCP application in accordance with, and subject to the limitations of, FOIA. The Service points out that the U.S. Supreme Court has held that information may not be obtained under FOIA when the agency holding the requested material has been precluded from disclosing it by a Federal district court (*GTE Sylvania, Inc. et al. v. Consumers Union of the U.S., Inc. et al.*, 445 U.S. 375, 386-87 [1980] [holding that the agency did not improperly refuse to release documents subject to a FOIA request when those documents were subject to an existing injunction preventing disclosure]). Here, the Protective Order approved by the Federal court initially prevented the Service from releasing materials associated with the settlement under FOIA.

Since the Protective Order was vacated in August 2009, the Service has made all communications and other related documents available for release, consistent with the requirements of FOIA, including those generated prior to August 2009.

### **Disclosure of 1999 Memorandum of Agreement**

A commenter stated that the MOA between the Service and TRC should have been disclosed with the ITP application and is predecisional, as it protects the TRC development goals over the conservation of the species.

As noted above, the MOA and all related court filings from the lawsuit filed in 1997 are and have remained available for public review as part of the court docket (U.S. Fish and Wildlife Service

1999). The formal ITP application for the TU MSHCP was submitted to the Service on October 15, 2008. The MOA is not part of the ITP application and there is no legal requirement that the MOA be submitted with the application, nor is there any requirement in statute, regulation, or guidance that requires that all documents referenced in a draft HCP be included with the application. However, the MOA was released by the Service in April 8, 2009 in response to the Center for Biological Diversity's January 23, 2009 FOIA request. The MOA is not predecisional because, as stated in the Stipulation for Stay, it merely sets forth a "negotiated framework for development of a Habitat Conservation Plan (HCP) for the Condor that would support issuance of the ITP."

The commenter also indicated that, pursuant to the MOA, the Service was "obligated" to provide take coverage for future Tejon Ranch development in exchange for TRC agreeing to stay a lawsuit brought against the Service by Tejon Ranch. The comment seems to imply that the Service agreed to issue an ITP in order to avoid a lawsuit. However, the MOA simply memorializes the results of discussions between TRC and the Service for development of an HCP for the California condor pursuant to the ESA, and includes the parameters to be included in the ITP, including, but not limited to:

- A 75-year term of the permit
- The California condor would be the only Covered Species in the HCP
- A definition of the Covered Lands
- A definition of the Covered Activities
- The HCP operating program
- Assurances under the "No Surprises" rule
- Compliance with Section 7 of the ESA.

Nothing in the MOA purports to eliminate or constrain the Service's statutory duty to evaluate the ITP application under the ESA and NEPA and to render an independent decision on the ITP application based on permit issuance criteria in ESA Section 10 and the results of its internal consultation under ESA Section 7. Thus, while the MOA acknowledges that the decision by the Service to reject the application would enable TRC to reactivate the lawsuit, the MOA did not in any manner constrain the Service's independent review of the ITP application under the ESA or NEPA. Rather the MOA expressly acknowledges that the "understandings in this MOA concerning issuance to Tejon of a Condor ITP and preparation of supporting documentation are preliminary proposals and subject to change upon further review under NEPA and ESA, which shall include an opportunity for public review and comment on the proposed HCP and EA, and compliance with all other applicable laws" (U.S. Fish and Wildlife Service 1999, p. 6 ).The assertion that the MOA predetermined issuance of an ITP is incorrect.

The Service notes that subsequent to the MOA, TRC elected to limit the requested ITP term to 50 years, to seek coverage for multiple species rather than just the California condor, and to restrict the Covered Lands to the upland portions of Tejon Ranch. In addition, the Service determined that an EIS should be prepared in connection with the ITP application. As evidenced by the above summary, the development of the TU MSHCP has been an evolving and dynamic process, and the MOA has not constrained, nor was it intended to, the Service's review of the ITP application or final permit decision.

## **Disclosure of Documents Relating to the 1997 Lawsuit between TRC and the Service**

Commenters questioned both TRC's and the Service's motivations in issuing the TU MSHCP. One commenter asserted that TRC has "historically bought politicians" to support TRC's profit-making

intentions. Another commenter questioned generally the intentions of "developers and investors." One commenter questioned TRC's and the Services motivations based on the 1997 lawsuit, and requested disclosure of documents related to the 1997 lawsuit. With respect to the lawsuit filed by TRC, one commenter stated that when TRC stock was purchased by real estate investment funds, TRC became hostile to the California Condor Recovery Program, and filed a suit against the Service in 1997 "attempting to halt the release of California condors near Tejon Ranch." The commenter claimed that the lawsuit was "virtually meritless," but that the Service agreed to a stipulated stay of the case, wherein the Service stated its desire to issue an ITP to TRC. The commenter asserted that TRC's filing of the lawsuit was a "hostile action" by TRC. As further evidence, the commenter summarized comments on the contents of a 1994 letter from TRC to the Service, which according to commenter, indicated that TRC would only permit limited access to the ranch for assistance to the Condor Recovery Program. The commenter further questioned the reasons behind a redacted paragraph from a 1998 memorandum discussing access to ranch lands received as part of the 2002 FOIA release, and because it appears TRC restricted access to its site in the early 1990s, the commenter questions the ability of TRC to be "trusted" to have the condors' best interests in mind. The commenter requested that all aspects of the TRC lawsuit be made public and that the TU MSHCP be revised to reflect this history of hostility by TRC.

The comments regarding TRC's political activity and motivations for pursuing an HCP represent the individual commenter's speculation and opinion and are not relevant to the adequacy of the TU MSHCP or EIS. The comments on the 1997 lawsuit similarly reflect the individual commenter's personal opinion on the merits of the lawsuit and conjecture about TRC's motivations.

The contents of the lawsuit, the relationship between the ranch and Service in implementing the Recovery Program, and whether TRC permitted unrestricted access to the ranch in the 1990s are irrelevant to the adequacy of the proposed ITP and TU MSHCP application, which must meet the requirements of the ESA and the Service's ITP permit issuance regulations at 50 CFR 13, 17.22(b) and 17.32(b). The Service does not make ITP permit decisions based on "trust"; the decision to issue a permit to TRC will be based on the evaluation of the adequacy of the TU MSHCP under the ESA and the assurances incorporated into the plan to ensure it will be fully implemented. The Service welcomes public review and comment on the adequacy of these documents.

With regard to future implementation of the TU MSHCP, the ITP, if issued, would incorporate the TU MSHCP and Implementing Agreement as permit conditions. Failure to adhere to the requirements of the permit can trigger suspension or revocation of the ITP (as set forth in the Implementing Agreement, Appendix A of the TU MSHCP), and subject the permittee to civil and criminal penalties under Section 11 of the ESA. Proper implementation of the plan would also be assured through monitoring requirements incorporated into the TU MSHCP pursuant to Section 10(a)(1)(B). As described in Section 7.3, Monitoring Measures, of the TU MSHCP, monitoring would include compliance monitoring (Section 7.3.1) and effectiveness monitoring (Section 7.3.2). Compliance monitoring would be conducted to ensure that TRC is carrying out the terms of the TU MSHCP and Implementing Agreement, including administrative tasks, such as monitoring, and quantifying effects on the Covered Species, and evaluating the status of TU MSHCP Mitigation Lands; implementing avoidance and minimization measures, preconstruction training and construction monitoring reports; and expenditure of funds on management and monitoring. Effectiveness monitoring of the Covered Species and their habitats would be conducted to determine the effectiveness of the conservation plan and management measures in achieving the biological goals and objectives of the plan, and may include updates related to vegetation communities in the Covered Lands, on-the-ground monitoring for exotic species invasions, and evaluation of whether objectives related to Plan-Wide Activities (e.g., grazing, recreation, film production) are being met.

With respect to TRC's motivation, the Draft TU MSHCP states that TRC has been involved in detailed conservation planning efforts in coordination and partnership with the Service, major

environmental organizations, and the Tejon Ranch Conservancy to develop a conservation program that allows limited development, while preserving and managing the vast majority (90%) of the ranch. No clarification to the Draft TU MSHCP or Draft EIS is necessary.

In addition to TRC's motivations, another commenter questioned the Services motivations, stating that, since 1997, TRC and the Service have been in litigation over the ITP and TU MSHCP, and over the status and protection of the California condor, and notes that the 1999 MOA between TRC and the Service requires the parties to work cooperatively to prepare appropriate documents in support of an HCP. The commenter asserts that it is impossible for the public to understand the precise relationship between the Service and TRC, and to confirm to what degree the Service can independently represent the public interest, without having access to the settlement documents from the 1997 lawsuit. Another commenter stated that "government approval authorities do not owe them [developers and investors] a profit" but should instead be representing the interests of the people.

TRC and the Service have not been in litigation over the ITP and TU MSHCP; indeed there has been no final agency action on the TU MSHCP that would trigger any such litigation. The contention that the 1999 MOA is unlawful in its agreement for the TRC and Service to work "cooperatively" in TRC's pursuit of an HCP is without merit. The ESA provides a mechanism for applicants to obtain permits from the Service that authorize take of listed species incidental to an otherwise lawful activity. While the Service must make an independent, objective decision on each permit application, the Service encourages a cooperative approach by applicants and routinely provides technical assistance to applicants during the HCP development process, as has been the case with the proposed TU MSHCP.

As noted above, issuance of an ITP is governed by an independent legal framework that includes checks and balances, including public review and an independent ESA Section 7 process, designed to ensure that the requirements of the ESA are met, independent of individual party motivations or whether the applicant earns a profit. A statement in the Stipulation for Stay setting forth TRC's decision to seek an ITP under ESA Section 10 and the Services' agreement to consider issuance of an ITP under ESA Section 10 does not indicate or imply that the Service would skip any of the required steps, or that the Service would issue an ITP if the requirements under the ESA are not met.

### **Disclosure of Information Related to the California Condor**

One commenter stated that the Protective Order has prevented the public from obtaining information related to the importance of Tejon Ranch to the California condor. The comment cites to four sets of documents, specifically naming "The Significance of Tejon Ranch to the Conservation of the California Condor," and states that these documents provide important California condor data that contradict the conclusions in the TU MSHCP.

The document entitled, "The Significance of Tejon Ranch to the Conservation of the California Condor," was considered in the Draft TU MSHCP and is included as a reference to that original document. A copy of this paper is included as an appendix to the commenter's letter, cited as USFWS 2002b.

With respect to the documents cited as USFWS 2009a in the commenter's letter, those references consist of the April 8, 2009, FOIA response from the Service providing the commenter with access to the Draft TU MSHCP application (and three other documents) and the April 27, 2009 FOIA response from the Service providing 41 additional documents and 10 attachments that related generally to California condors. These documents provided in USFWS 2009a do not discuss the importance of Tejon Ranch to the California condor and do not contradict the Draft TU MSHCP.

With respect to the documents cited as USFWS 2009b, those documents include a number of letters from TRC's attorneys at the time, Hewitt & McGuire, LLP, and the Service from 1994 to 1998,

regarding TRC's position that an ESA Section 10(j) Rule was warranted, the Services' position that a 10(j) rule was not appropriate and that an HCP would be a better approach, the text of the Arizona 10(j) Rule, documents regarding the 60-day notice from TRC for the Services' failure to issue a 10(j) Rule, and correspondence regarding the settlement of the 1997 lawsuit. None of these documents discuss the Service's or other California condor experts' views of the importance of Tejon Ranch to the California condor, nor do they contradict the Draft TU MSHCP or Draft EIS.

None of the documents cited as USFWS 2009c contradict the Draft TU MSHCP or Draft EIS. The Draft TU MSHCP and the Draft EIS included updated California condor information and provide for the protection of a larger area of the Tejon Ranch than considered in the late 1970s and early 1980s. The 1970s and 1980s documents referenced as USFWS 2009c include the following:

- A slope analysis from 2002, which does not contradict the slope analysis provided in the Draft TU MSHCP or this Supplemental Draft EIS.
- A monthly record of California condor movement on Tejon Ranch from 1996 to 2000, which is specifically considered as part of the geographic information system (GIS) signal data analyzed for the Draft TU MSHCP and incorporated in the revised TU MSHP.
- A paper entitled Commentary on Released California Condors in Arizona, dated 2003, which addresses the Arizona population, and concludes that the Arizona program is on schedule. Conclusions regarding threats to California condors reflect the discussion in the Draft TU MSHCP and Draft EIS and have been carried through in the revised TU MSHCP and this Supplemental Draft EIS.
- A biological ascertainment report from 1972 and related correspondence that considers whether 100,000 acres of Tejon Ranch should be purchased to support California condor recovery, and which states that "[n]ot all of the 290,000 acre Ranch is considered primary condor habitat". The area considered to be primary condor habitat is generally consistent with the areas to be proposed to be conserved under the TU MSHCP (the proposed conservation measures provided in the TU MSHCP alone would permanently preserve approximately 129,318 acres).
- A document entitled Tejon Ranch and Survival of the California Condor, dated July 1972, which states that "[s]ome development of the Ranch appears inevitable, and the condor can probably live with considerable change if it is done in certain ways and restricted to certain areas." This report reflects the type of analysis that was performed for the Draft TU MSHCP, which used data updated from 1972, and carried through in the analysis in this Supplemental Draft EIS.
- A series of correspondence in 1974 and 1975 regarding the Condor Recovery Plan draft and acquisition possibilities for portions of Tejon Ranch.
- An environmental assessment from 1979 on the same proposed acquisition of the 100,000-acre area of the Ranch.
- Various correspondence from 1980 also regarding exploring the possibility of Federal acquisition of a portion of the ranch.

The document cited as USFWS 2009d is the MOA between TRC and Service that was released to commenter (as stated in commenter's letter) and is attached to the Stipulation for Stay and is publicly available as discussed above.

With respect to the documents cited as USFWS 2009e, most of the documents are duplicative of those provided in USFWS 2009c (e.g., the 1972 biological ascertainment report is included (with pictures), as well as correspondence regarding the potential acquisition). In addition, USFWS 2009e includes correspondence between Kern County and the Service from 1979 in which the Service stated that while they were not prepared to make specific comments on any proposed development

plan for Tejon Ranch, "we can say that if the overall plan includes the basic elements required for condor preservation – in effect, a large central core area that remains relatively undeveloped and lightly utilized, with livestock and deer populations sufficient to provide condor food—then specific proposals could be evaluated on a case by case basis." The TU MSHCP and Supplemental Draft EIS reflect analysis based on a real proposal for an MSHCP and based on updated data and information. The commenter further conjectured that TRC is motivated to "keep relevant documents from public scrutiny" to avoid the possibility of disclosing any evidence of lead poisoning incidents on Tejon Ranch. As discussed above, the Protective Order has been vacated, and all relevant documents requested under FOIA have been released.

### **Disclosure of Ranchwide Agreement**

One commenter stated that the Ranchwide Agreement is not included in full in either the Draft TU MSHCP or Draft EIS. The commenter stated that this limits the public's ability to review the proposed TU MSHCP.

In response to comments, a copy of the Ranchwide Agreement is attached as an appendix to the TU MSHCP.