

# Master Response 8

## Regulatory Considerations

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**Table MR8-1. Comments Addressed in Master Response 8**

Comment	Commenter
G2-17	Environmental Protection Agency
I1163-7	Palmer, Bruce K.
I1210-2	Pinard, John W.
I1300-13	Risebrough, Bob
I1300-14	Risebrough, Bob
I1350-1	Sachau, B.
I1563-1	Trudell, Heidi
I1567-1	Tuszynski, Jacek
I1607-2	Wallace, Sylvia
I293-10	Clendenen, David, et al.
I293-11	Clendenen, David, et al.
I293-40	Clendenen, David, et al.
I293-41	Clendenen, David, et al.
I293-44	Clendenen, David, et al.
I293-45	Clendenen, David, et al.
I293-5	Clendenen, David, et al.
I293-6	Clendenen, David, et al.
I293-7	Clendenen, David, et al.
I293-8	Clendenen, David, et al.
I293-9	Clendenen, David, et al.
I527-6	Fry, Kenneth
I73-1	Balbona, Gina
I73-2	Balbona, Gina
I73-3	Balbona, Gina
I73-6b	Balbona, Gina
I73-7b	Balbona, Gina
I746-1	Jay, Bonnie
I904-1	Lopez, Irene
I948-17	Manning, Jeffrey A.
I948-27	Manning, Jeffrey A.
I948-28	Manning, Jeffrey A.
I948-5	Manning, Jeffrey A.
I948-6	Manning, Jeffrey A.
I948-7	Manning, Jeffrey A.
I948-7	Manning, Jeffrey A.
I948-8	Manning, Jeffrey A.

Comment	Commenter
04-101	Center for Biological Diversity (Keats, Adam)
04-102	Center for Biological Diversity (Keats, Adam)
04-103	Center for Biological Diversity (Keats, Adam)
04-105	Center for Biological Diversity (Keats, Adam)
04-121	Center for Biological Diversity (Keats, Adam)
04-15	Center for Biological Diversity (Keats, Adam)
04-16	Center for Biological Diversity (Keats, Adam)
04-17	Center for Biological Diversity (Keats, Adam)
04-18	Center for Biological Diversity (Keats, Adam)
04-19	Center for Biological Diversity (Keats, Adam)
04-20	Center for Biological Diversity (Keats, Adam)
04-21	Center for Biological Diversity (Keats, Adam)
04-22	Center for Biological Diversity (Keats, Adam)
04-23	Center for Biological Diversity (Keats, Adam)
04-237	Center for Biological Diversity (Keats, Adam)
04-238	Center for Biological Diversity (Keats, Adam)
04-239	Center for Biological Diversity (Keats, Adam)
04-24	Center for Biological Diversity (Keats, Adam)
04-24	Center for Biological Diversity (Keats, Adam)
04-241	Center for Biological Diversity (Keats, Adam)
04-242	Center for Biological Diversity (Keats, Adam)
04-243	Center for Biological Diversity (Keats, Adam)
04-243	Center for Biological Diversity (Keats, Adam)
04-25	Center for Biological Diversity (Keats, Adam)
04-26	Center for Biological Diversity (Keats, Adam)
04-35	Center for Biological Diversity (Keats, Adam)
04-36	Center for Biological Diversity (Keats, Adam)
04-60	Center for Biological Diversity (Keats, Adam)
05-2A	Defenders of Wildlife (Flick, Pamela)
05-17	Defenders of Wildlife (Flick, Pamela)
05-18	Defenders of Wildlife (Flick, Pamela)
05-18	Defenders of Wildlife (Flick, Pamela)
05-25	Defenders of Wildlife (Flick, Pamela)
05-26	Defenders of Wildlife (Flick, Pamela)
05-27	Defenders of Wildlife (Flick, Pamela)
05-28	Defenders of Wildlife (Flick, Pamela)

## 8.1 Summary of Substantive Comments

The following summarizes the substantive comments received on the Draft EIS and Draft TU MSHCP regarding regulatory considerations. This master response begins with an overview of the incidental take permit (ITP) issuance process and a review of the Federal regulations relevant to the Draft EIS and the Draft TU MSHCP. Table MR8-1 provides a list of the commenters and a reference to the individual comment, as summarized in the following list. The parenthetical reference after each summary bullet indicates where a response to that comment is provided.

- Not all of the protected species are found on site. Many imperiled species are found on site and should be protected. (Response provided in Section 8.3.1, Identification and Protection of Covered and Imperiled Species.)
- The issuance of an ITP would not adequately protect species. (Response provided in Section 8.3.2, Criteria for Issuance of an ITP.)
- The designation and modification of critical habitat is not clear or at risk in the TU MSHCP. (Response provided in Section 8.3.3, Critical Habitat Designation.)
- The TU MSHCP should be consistent with the California Condor Recovery Plan and the TU MSHCP is not clear. (Response provided in Section 8.3.4, Role of the Condor Recovery Plan.)
- The Implementing Agreement has a narrower definition of take than the Federal Endangered Species Act (ESA), and is not authorized by the ESA. It does not give the Service sufficient authority. (Response provided in Section 8.3.5, Implementing Agreement.)
- The No Surprises Rule limits the scope of the Implementing Agreement. (Response provided in Section 8.3.6, No Surprises Rule.)
- The ITP and TU MSHCP may not be enforceable. (Response provided in Section 8.3.7, Enforceability of the ITP and TU MSHCP.)
- The ESA Section 7 Consultation process and biological opinion raises issues about the action area, adverse modification to critical habitat, and the potential for a "jeopardy" finding. (Response provided in Section 8.3.8, Section 7 Consultation Process and Biological Opinion.)
- Any take of bald or golden eagles is illegal. (Response provided in Section 8.3.9, Bald and Golden Eagle Protection Act.)

## 8.2 Regulatory Overview

### 8.2.1 Permit Application under ESA Section 10

Section 9 of the ESA prohibits the take of any fish or wildlife species listed under the ESA as endangered or threatened without a permit. *Take*, as defined by the ESA, means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Section 10 of the ESA provides a regulatory mechanism to permit the incidental take of federally listed fish or wildlife species by state, local, or private parties during lawful activities. ESA Section 10(a)(1)(B) allows the Service to issue an ITP to authorize the take of federally listed fish or wildlife if the take is incidental to otherwise lawful activities, including development. Before issuing an ITP, the Service must approve a habitat conservation plan (HCP) that describes the potential effects of the action and measures that the applicant will take to minimize and mitigate the effects of

take. Section 10(a)(2)(B) of the ESA provides statutory criteria that must be satisfied before an ITP can be issued. The Service must find that the effects of authorized incidental take are minimized and mitigated to the maximum extent practicable under the HCP, the take must not appreciably reduce the likelihood of the survival and recovery of the species in the wild, and adequate funding for a plan to minimize and mitigate the effects of take must be ensured. The overall purpose of an HCP, including the TU MSHCP, is not to authorize land development, but rather to ensure that the effects of the Covered Activities, which may include land development, on federally listed species are adequately minimized and mitigated. Any development to occur on the area covered by the HCP – the Covered Lands – must obtain local land use approvals through the appropriate local government process. Thus, ESA Section 10 provides a regulatory mechanism to permit the incidental take of federally listed fish and wildlife species by private interests during lawful land use activities.

## **8.2.2 The Role of the ESA Section 7 Consultation Process in the ITP Application Process**

Issuance of an ITP is also a Federal action subject to Section 7 of the ESA. The Section 7 consultation process for this proposed action has not been completed. Section 7(a)(2) requires the Service to consult internally to ensure that any action that the Service "authorizes, funds, or carries out" "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of the critical habitat of any listed species (ESA 1536(a)(2), 50 Code of Federal Regulations [CFR]402.14(g)(4)). Because the Section 7 consultation process is not complete, the Service have not yet formally determined whether a Section 10(a)(1)(B) ITP can be issued. Therefore, comments regarding whether the proposed action would "jeopardize" the species, or whether the proposed action would cause "adverse modification to habitat," raise issues that the Service has not yet formally addressed. This Supplemental Draft EIS and the TU MSHCP provide analysis relevant to these issues to assist the Service in making the formal determination.

## **8.2.3 The Role of NEPA in the ITP Application Process**

Issuance of an ITP is a Federal action subject to compliance with the National Environmental Policy Act (NEPA). The purpose of NEPA is to promote analysis and disclosure of the environmental issues surrounding a proposed Federal action and public participation in the review process to reach a decision that reflects a careful consideration of the environmental implications of a proposed action. Although Section 10 and NEPA requirements overlap considerably, the scope of NEPA goes beyond that of the ESA by considering the effects of a Federal action on the human environment, such as water quality, air quality, and cultural resources. Under NEPA, an environmental impact statement (EIS) is required when the Federal action, such as issuance of an ITP, would result in potentially significant effects on the quality of the human environment. The Service determined that an EIS is required for the issuance of an ITP associated with the Covered Activities under the TU MSHCP. This Supplemental Draft EIS, therefore, serves as an analytical tool to evaluate direct, indirect, and cumulative effects of the proposed action and to help the Service determine whether to issue an ITP.

## 8.2.4 The Role of the Bald and Golden Eagle Protection Act in the ITP Process

The Bald and Golden Eagle Protection Act (BGEPA), 16 United States Code (U.S.C.) 668 – 668d, prohibits take of eagles. *Take* as defined under the BGEPA, includes the actions to "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb" (16 U.S.C 668c). To *disturb* a bald or golden eagle means "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding or sheltering behavior" (50 CFR 22.3). The BGEPA "is not a habitat management law" (72 *Federal Register* [FR] 31132, June 5, 2007), and does not protect habitat per se, other than eagle nests. Therefore, permit coverage for eagles is not required for activities that modify habitat, unless the activities result in take of an eagle under one of the terms in the definition. The Service determined through recent rulemaking that ITPs pursuant to the ESA and its implementing regulations may be lawfully issued to cover take under the BGEPA (16 U.S.C. 1531 *et seq.*; 50 CFR 17.1 *et seq.*).

In 2008, the Service issued a Final Rule regarding authorization under the BGEPA for take of bald and golden eagles (73 FR 29075, May 20, 2008). This rule, which became effective on June 19, 2008, extended BGEPA take authorization to holders of existing ESA Section 10 permits and allowed take authorization to be extended to future Section 10 ITPs associated with HCPs for multiple species that include bald or golden eagles as Covered Species (50 CFR 22.11). The new regulations state that "a permit that covers take of bald eagles or golden eagles under [Section 10 of ESA and its implementing regulations at 50 CFR Part 17] for purposes of providing prospective or current ESA authorization constitutes a valid permit issued under this part for any take authorized under the permit under part 17 as long as the permittee is in full compliance with the terms and conditions of the permit issued under part 17" (50 CFR 22.11(a)). In general, the statutory and regulatory criteria for issuing ESA incidental take authorization include minimization, mitigation, or other conservation measures that also satisfy the statutory mandate under the BGEPA that authorized take be compatible with the preservation of the bald or golden eagle (73 FR 29075, May 20, 2008). The new regulation provides for revocation of the ITP as applied to bald and golden eagles if the Service determines that activities covered by the ITP are "incompatible with preservation of the bald eagle or golden eagle."

See discussion in Section 8.3.9, Bald and Golden Eagle Protection Act.

## 8.3 Responses to Substantive Comments

### 8.3.1 Identification and Protection of Covered and Imperiled Species

Comments relating to the identification of species to be covered by the TU MSHCP include the following:

- Of the 27 species proposed for incidental take coverage under the TU MSHCP, seven were not documented as occurring on the Covered Lands and should be excluded from the TU MSHCP until they can be located on the site.
- The development should be placed somewhere else because there are over 80 "imperiled" species of plants and animals in the Tehachapi Mountains that live nowhere else on earth.

- It is important to protect the over 80 "imperiled" species, including San Joaquin kit fox, California spotted owl, and Tehachapi slender salamander.
- Birds, not developers, should be protected.

Section 10 ITPs authorize the incidental take of wildlife species listed as endangered or threatened under Section 4 of the ESA. While an HCP must be developed for federally listed species that trigger the need for an ITP, HCPs can also cover other species. The inclusion of proposed, candidate, or unlisted species in an HCP is voluntary and is the decision of the applicant (U.S. Fish and Wildlife Service 1996a, Section 4.A). While including unlisted species can be challenging in terms of manageability and cost, addressing unlisted species in an HCP provides the permittee with additional regulatory certainty in the event of future species listings, and increases the biological value of HCPs through comprehensive multispecies or ecosystem planning. Here, as described in Section 1.4, Species to Be Covered by the Permit, of the TU MSHCP, the Covered Species are species of high conservation concern with the potential to be directly or indirectly affected by the Covered Activities. Most of the wildlife species are federally and/or state-listed, state Fully Protected, or potential candidates for Federal listing. Birds that are not listed or state Fully Protected are California Species of Special Concern. Plants that are not state or federally listed are California Rare Plant Rank 1B.1 species. All species addressed in an HCP, regardless if they are federally listed or not, must meet the same standard to be included in the ITP; i.e., the effects of the taking of such species must be minimized and mitigated to the maximum extent practicable (50 CFR 17.22 (b)(2)(B)).

As noted by the commenter, the TU MSHCP includes 27 Covered Species, including the California condor (Table 1-1 in Volume I of this Supplemental Draft EIS). With regard to the proposed coverage of six plant species under the TU MSHCP, the Service notes that take of listed plant species is not prohibited under Section 9 of ESA and thus is not authorized under an ITP. However, applicants for ITPs often provide conservation measures in HCPs for listed and sensitive plant species as part of their landscape or ecosystem planning efforts. The Service encourages voluntary conservation measures to protect listed and sensitive plant species in HCPs. The Service includes plant species in ITPs in recognition of the conservation provided for them under the plans and typically extend "no surprises" regulatory assurances to them under the Service's No Surprises Rule codified at 50 CFR 17.22(b)(5) and 17.32(b)(5). Use of the term *take* in this Supplemental Draft EIS with reference to covered plant species refers to effects on or loss of the plant species.

Initially, in addition to the California condor, 48 special-status species known or with the potential to occur in the inventory area were evaluated for coverage under the TU MSHCP. From this list, 27 species were identified for coverage on the basis of a variety of criteria, including current and potential sensitivity status, range and occurrence information, the potential to occur in the Covered Lands, taxonomy, seasonality, and specific habitat or other life history requirements. Excluded from the list of species covered by the TU MSHCP are species that have low potential to occur in the Covered Lands based on known ranges or on specific habitat or life history requirements. The list also excludes species that have unresolved taxonomic issues or life history traits that make coverage difficult. Finally, species that are not likely to be affected by the Covered Activities were also excluded from coverage (Section 1.4, Species to be Covered by the Permit, in the TU MSHCP).

One commenter specifically questioned why the western spadefoot, least Bell's vireo, southwestern willow flycatcher, yellow-billed cuckoo, valley elderberry longhorn beetle, ringtail, and Tejon poppy were included when they were not documented on the Covered Lands. To date, surveys have been conducted for the TMV Planning Area, not the full 141,886 acres of Covered Lands, so relying on survey occurrence data alone was not considered a sufficient criterion. Permittee staff, consultants, and Service biologists worked together to evaluate the special-status species to include in the TU MSHCP. Tejon Ranchcorp's (TRC's) coverage decisions were based on current and potential sensitivity status, range, occurrence information, taxonomy, seasonality, and specific habitat or life

history requirements, as well as whether Covered Activities could potentially affect the species. Any federally listed species that was considered to have some potential to occur on site and could be subject to incidental take was included. Of the species mentioned in the comment, least Bell's vireo, southwestern willow flycatcher, and valley elderberry longhorn beetle met these criteria. The western yellow-billed cuckoo is a Federal candidate for listing and therefore was included on the list. The ringtail is a California Fully Protected species and therefore has high sensitivity status. The western spadefoot's population has been in decline and may breed on site; although not detected in 2007 surveys, it breeds opportunistically in response to warm rains and may not be detectable during unfavorable conditions. Western spadefoot has a reasonably high likelihood of being listed in the future. Tejon poppy also has a reasonably high likelihood of being listed in the future and could be affected by the Covered Activities.

The TU MSHCP includes avoidance, minimization, and mitigation measures for each of the Covered Species, whether or not it is currently federally listed. These measures are summarized in Chapter 2, Proposed TU MSHCP and Alternatives, in Volume I of this Supplemental Draft EIS and Section 7, Conservation Plan for Other Covered Species, in the TU MSHCP. For a detailed description of the biology, status, and occurrence of each species, refer to Section 3.1, Biological Resources, in Volume I of this Supplemental Draft EIS and Section 4, California Condor, and Section 5, Other Covered Species, of the TU MSHCP. The standards set in the species-specific biological goals and objectives of the draft TU MSHCP for each of the species are intended to meet the Section 10(a) permit issuance requirements for avoiding, minimizing, and mitigating effects on a species-by-species basis, and are based on the species' individual conservation needs.

One commenter generally referenced "80 imperiled species" existing at the ranch and requested that they all be protected through the TU MSHCP, including specifically the San Joaquin kit fox, California spotted owl, and Tehachapi slender salamander. Other than the three species specifically named, it is unclear what species the commenter considers "imperiled." There is no regulatory definition of imperiled. However, as noted above, the applicant, with the technical assistance of the Service, reviewed relevant special-status species and determined that 27 of them merited inclusion in the TU MSHCP. The selection of Covered Species for inclusion in the TU MSHCP and ITP application is left up to the applicant under the ESA, and the criteria used by TRC in selecting which species to propose for coverage in the TU MSHCP are summarized above.

With respect to other species specifically identified in the comment, the San Joaquin kit fox does not occur in the Covered Lands. The upper elevation range for this species is about 2,000 feet above mean sea level, which is below the elevation of the Covered Lands. California spotted owl was evaluated for coverage but was not included in the TU MSHCP because it is not likely to be affected by the Covered Activities. California spotted owl (one female, one male) was documented in the TMV Planning Area in 2007 during wildlife surveys, but the documented individuals were concluded to be nonbreeders in accordance with the survey protocol. Because there is limited to no suitable California spotted owl habitat in the area proposed for commercial and residential development, and because Plan-Wide Activities, which generally consist of Existing Ranch Uses that have occurred in the Covered Lands for decades, are not expected to cause take, the California spotted owl was not included as a Covered Species. Nonetheless, the Service anticipates the TU MSHCP would benefit this species through preservation of habitat and implementation of avoidance and conservation measures prescribed for the Covered Species with similar oak woodlands and coniferous forest habitat preferences. The Service notes that the Tehachapi slender salamander is a Covered Species under the TU MSHCP.

With respect to the commenter's concerns that birds be protected, several species of birds are included as Covered Species in the TU MSHCP, including several species of falcons and song birds (Table 1-1 in Volume I of this Supplemental Draft EIS).

## 8.3.2 Criteria for Issuance of an ITP

Several commenters raised concerns about the Service's possible issuance of an ITP, including the following:

- No incidental take of condors or other species should be permitted because there is a potential for "irreversible effects" on threatened and endangered plants and wildlife.
- It is unclear how it could be determined that the loss of foraging habitat would not significantly adversely affect or cause "injury" or "harm" to condors or interfere with their behavioral patterns.
- The applicant should not be absolved of liability for the death of protected species.

Section 10(a) of ESA provides for the issuance of an ITP when the permit applicant submits an HCP that satisfies ESA Section 10(a)(2)(A) and the Service determines that the applicant has met the issuance criteria under Section 10(a)(2)(B). Those criteria are as follows:

- The taking will be incidental to an otherwise lawful activity.
- The effects of such take will be minimized and mitigated to the maximum extent practicable.
- Adequate funding to implement the conservation plan will be provided.
- The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.
- The HCP includes measures to ensure that any other necessary measures required by the Service are met, including those measures the Service believes are necessary or appropriate for purposes of plan implementation.

Thus, the regulatory standards under Section (10)(a)(1)(B) of the ESA do not prohibit, as some commenters suggest, "irreversible effects" or "harm" to habitat or wildlife. An ITP authorizes take of covered wildlife species, including take resulting from harm, provided that the take is minimized and mitigated to the maximum extent practicable and will not result in jeopardy to the Covered Species. In fact, the purpose of an ITP is to absolve the applicant of liability for take of protected species provided such take occurs incidental to otherwise lawful activities, is appropriately minimized and mitigated, and meets the other criteria under Section 10(a)(2)(B) of ESA. Each of the criteria for issuance of an ITP and comments relating to them are discussed further below.

### 8.3.2.1 The taking will be incidental to an otherwise lawful activity (ESA Section 10(a)(2)(B)(i)).

Many commenters stated that Service should not approve the TMV Project or any other development on the Covered Lands. Comments include the following:

- No incidental take of condors or other species by developers should be permitted.
- No development on Tejon Ranch should be permitted because there are not enough unfragmented, undeveloped tracts of land for crucial species such as antelope and the California condor.
- The proposed development would reflect poor planning because the plan would guarantee harm to condors, fragment habitat, and increase fire threats.
- The planning and permitting process should not allow the destruction of nature or of such a vital ecosystem.

The commenters' general objections to the TMV Project and development of Tejon Ranch are noted. The Service's statutory responsibility under Section 10 of ESA is to review an ITP application and to approve or reject such application based on whether it meets the standards for issuance of a permit under Section 10(a)(2)(B), and avoids jeopardy to any listed species and adverse modification of the critical habitat of any listed species under ESA Section 7. Section 10 of the ESA was specifically enacted to allow take by non-Federal parties incidental to otherwise lawful activities under certain conditions. To the extent the commenters urge the Service to reject the TMV Project or to reject development generally on Tejon Ranch, that concern misunderstands the role of the Service under ESA Section 10. The ESA does not authorize the Service to approve development. An ITP does not authorize development, rather it authorizes take incidental to otherwise lawful development. Development of the Covered Lands is governed by the local land use laws and approval processes of Kern County. Thus, approval of the proposed action—the TU MSHCP and issuance of an ITP—would not authorize the TMV Project or any other commercial or residential development. While approval of the ITP and TU MSHCP may facilitate development, the ITP authorizes only incidental take. In evaluating whether to issue an ITP to TRC, the Service carefully evaluates the potential effects of the TMV Project and other Covered Activities on the Covered Species, including potential habitat fragmentation and fire risk. An analysis of the effects of the Proposed TU MSHCP Alternative on Covered Species and their habitat is provided in Section 4.1, Biological Resources, in Volume I of this Supplemental Draft EIS.

### **8.3.2.2 The impacts will be minimized and mitigated to the maximum extent practicable (ESA Section 10(a)(2)(B)(ii)).**

Some commenters raised concerns regarding the standards for mitigation and minimization, including the following:

- The TU MSHCP relies on conservation but the reserve design appears to have been based on where development was not desirable rather than biology.
- It is inappropriate to consider compliance with an existing state law and maintenance of status quo activities to be mitigation for this Federal action.

Issuance criteria under Section 10 of the ESA require that the HCP applicant minimize and mitigate to the maximum extent practicable the effects of any incidental taking authorized by a Section 10 permit. The applicant proposes during the HCP development phase what measures to include in the HCP. However, the Service ultimately decides, at the conclusion of the ITP application processing phase, whether the mitigation program proposed in the HCP has satisfied this statutory issuance criterion. This finding typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented. To the extent that the level of mitigation provided under the proposed HCP is rationally related or proportional to the level of take likely to occur, i.e., the plan adequately offsets the effects of take or provides substantial benefits to the species, less emphasis is placed on the second factor (U.S. Fish and Wildlife Service 1996a, Section 7.B; *Nat'l Wildlife Fed'n v. Norton*, 306 F. Supp. 2d 920, 928 (E.D. Cal. 2004)). The ESA and implementing regulations do not establish specific rules for developing mitigation programs. Mitigation programs should be based on sound biological rationale; they should also be practicable and commensurate with the effects they address (U.S. Fish and Wildlife Service 1996a, Section 3.B.3). Contrary to one commenter's suggestion, neither the ESA nor its implementing regulations require an HCP to result in a net benefit to the Covered Species (U.S. Fish and Wildlife Service 1996a, p. 3-21). Nevertheless, as the HCP Handbook recognizes, HCP applicants are encouraged to develop HCPs that contribute to the recovery of, and provide benefits to, the affected species (U.S. Fish and Wildlife Service 1996a, pp. 3-20 to 3-21).

The conservation measures included in the TU MSHCP are analyzed in this Supplemental Draft EIS, and generally include measures to avoid effects on the Covered Species (e.g., conservation of open

space areas), measures to minimize and mitigate unavoidable effects on the Covered Species, and measures intended to contribute to Covered Species conservation and recovery (TU MSHCP Section 4, California Condor, and Section 7, Conservation Plan for Other Covered Species). Among other things, mitigation under the TU MSHCP requires preservation of the TU MSHCP Mitigation Lands, which includes Established Open Space, including the Condor Study Area, and the TMV Planning Area Open Space. The Service disagrees with assertions made in the comments that the ecosystem of the Covered Lands would be destroyed under the TU MSHCP. Under the TU MSHCP, approximately 91% of the Covered Lands would be protected from development in open space areas (Chapter 2, Proposed TU MSHCP and Alternatives, in Volume I of this Supplemental Draft EIS).

In general, the design of open space areas under the TU MSHCP takes into account the habitat preferences of the Covered Species and reflects general principles of conservation biology, such as conserving large blocks of habitat, minimizing fragmentation of sensitive lands, and ensuring connectivity. The planning effort evolved from a single species (the California condor) HCP to a multiple species conservation plan for other federally listed species and other species that may be considered for listing in the future (History of the Cooperative and Regulatory Relationship between TRC and the U.S. Fish and Wildlife Service in Section 1.1, Overview and Background, in the TU MSHCP). Master Response 1B, California Condor Critical Habitat, in Volume 2 of this Supplemental Draft EIS provides an extensive discussion of the planning process for identifying the open space system for the California condor, which was based on both historical (pre-1987) and recent (post-1996) occurrences of the condor on Tejon Ranch.

Some commenters suggested that mitigation measures would probably fail to maintain existing conditions. The TU MSHCP is intended to preserve most of the high quality condor habitat in the Covered Lands, to avoid any lethal take of condors, and to maintain habitat conditions for the other Covered Species on the vast majority of the Covered Lands that would be protected in perpetuity under the plan. The responsibility of the Service under Section 10 of ESA is to evaluate the adequacy of the plan in light of the current and future conservation needs of the condor and the other Covered Species and determine whether it meets the permit issuance criteria under the ESA. The statute does not require the maintenance of existing conditions per se; rather it requires that any take be minimized and mitigated to the maximum extent practicable, and that jeopardy to any listed species be avoided (16 U.S.C. 1539(a)(2)(B)(ii) and (iv)).

With respect to the mitigation measures set forth for each resource element in this Supplemental Draft EIS, which are distinct from the minimization and mitigation program reflected in the TU MSHCP, those measures relate to mitigating the secondary effects of the Covered Activities on other resource element areas. While the ITP and TU MSHCP may facilitate some level of development, the ITP authorizes only incidental take, not the activity that results in take. Any development to occur on the Covered Lands must obtain local approvals through the appropriate local process, and the NEPA mitigation measures in this Supplemental Draft EIS are geared to that process. A requirement that a permittee comply with existing law or regulations is legitimate mitigation under NEPA (*City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1032 [9th Cir. 1998][upholding EIS including mitigation measure requiring compliance with hazardous materials transport regulations]; *Tillamook County v. U.S. Army Corps of Eng'rs*, 288 F.3d 1140, 1144 [9th Cir. 2002][“The Corps adequately described specific mitigation measures in the environmental assessment and Section 404 permit, which require the permittee to comply with dam safety regulations established by the Oregon Water Resources Department, and to take certain steps to prevent erosion at wetland erosion sites and compensate for wetland loss caused by reservoir expansion.”]; *San Francisco Baykeeper v. U.S. Army Corps of Eng'rs*, 219 F.Supp.2d 1001, 1019 [N.D. Cal. 2002][upholding compliance with open ocean ballast discharge ordinance as valid mitigation to protect against invasive species, ordinance was not meaningless or redundant despite passage of state statute requiring open ocean ballast discharge that contained sunset provision]).

### 8.3.2.3 The applicant will ensure that adequate funding for the plan will be provided (ESA Section 10(a)(2)(B)(iii)).

A comment raised the issue of adequate funding for the TU MSHCP, as follows:

- The TU MSHCP must ensure there is reliable funding to implement the proposed mitigation measures.

The commenter correctly notes that an HCP must ensure there is adequate, assured funding to implement the proposed mitigation measures (U.S. Fish and Wildlife Service 1996a, Section 3.B.6). Section 9, Funding, of the TU MSHCP describes the funding assurances provided by TRC to implement the TU MSHCP and commits TRC to fully fund the plan. In addition, Section 8 of the Implementing Agreement requires assurances that such funding be in place. The Service notes that the primary mitigation measure provided under the plan is the conservation of the TU MSHCP Mitigation Lands through execution and recording of conservation easements. That measure does not require out-of-pocket funding by TRC. The provisions of the TU MSHCP that require additional funding include retention of one or more biologists by TRC on staff for the life of the ITP to monitor plan implementation; equipment and supplies for the biologists; environmental baseline surveys; pre-activity surveys for Plan-Wide Activities; preconstruction surveys; global positioning system (GPS) transmitters; reimbursement for Service technical assistance; and funding for the adaptive management program and changed circumstances provisions provided in the TU MSHCP. These funding requirements are estimated to result in a one-time cost of \$208,000, and an annual cost of \$429,000 (Table 9-2 in the TU MSHCP). Additionally, the costs for care and translocation of a single condor, if necessary, are approximately \$85,512 per bird per year (Table 9-1 in the TU MSHCP), and are included in the funding commitments provided in Section 9, Funding, of the TU MSHCP.

TRC, a wholly owned subsidiary of the Tejon Ranch Company, is a multimillion-dollar company with various funding sources, including but not limited to land sales, oil and gas revenues, filming, hunting, and agriculture, available to meet these funding obligations. In reviewing whether TRC has adequately assured funding to implement the TU MSHCP under Section 10(a)(2)(B)(ii), 50 CFR 17.22(b)(2)(C) and 17.32(b)(2)(C), the Service will consider TRC's funding commitment in light of the considerable assets of TRC described in Section 9, Funding, of the TU MSHCP and summarized above, and the additional specific funding guarantees discussed in the Implementing Agreement.

Under the TU MSHCP and Implementing Agreement, TRC's Chief Financial Officer or equivalent officer must provide annual written certifications to the Service that funds to implement TRC's obligations for the upcoming year have been budgeted and expenditure of the funds has been approved by all necessary corporate action (Section 8, Funding, of the Implementing Agreement, and Section 9, Funding, in the TU MSHCP). Funding for the care and translocation of any habituated condors (Table 9-1 in the TU MSHCP) would be paid for through a reimbursable agreement with Service, and assured through a rolling letter of credit. Funding for operations costs, as discussed above, would be assured through the annual certification by TRC's Chief Financial Officer, or equivalent, demonstrating that funds have been budgeted and approved for expenditure in an amount sufficient to provide the staffing necessary to carry out operations requirements. Section 8.0 of the Implementing Agreement, included as Appendix A to the TU MSHCP, further provides funding assurances, including, as noted in Implementing Agreement Section 8.2, specific funding security provisions.

### **8.3.2.4 The taking will not appreciably reduce the likelihood of the survival and recovery of the species (ESA Section 10(a)(2)(B)(iv)).**

Section 10 requires the Service to determine that the taking will not appreciably reduce the likelihood of the survival and recovery of the Covered Species. As summarized in Section 8.3.3, Critical Habitat Designation, below, commenters raised the concern that the Draft TU MSHCP failed to meet this standard because it did not adequately address effects on critical habitat or the role of the California Condor Recovery Plan. The standard in Section 10(a)(2)(B)(iv) of ESA is identical to the regulatory standard applicable to the Service's jeopardy determination under Section 7 of the ESA. As discussed above, because the issuance of an ITP is a Federal action under Section 7, the Service must complete an internal Section 7 consultation to determine whether the ITP and TU MSHCP is likely to jeopardize the continued existence of any of the Covered Species, or any other federally listed species. The jeopardy determination will consider the effects of the plan on condor habitat and condor recovery. The results of the formal Section 7 consultation will determine whether the permit issuance standard under Section 10(a)(2)(B)(iv) has been satisfied. As part of the internal Section 7 consultation, the Service will specifically analyze whether the proposed permit would adversely modify or destroy critical habitat of the California condor. In making an adverse modification determination, the Service will consider the effects, if any, of the proposed permit and TU MSHCP on the ability of critical habitat to carry out its intended conservation role and function, and will take into account all relevant information regarding the recovery needs of the species, including information in the California Condor Recovery Plan (U.S. Fish and Wildlife Service 1996b). The primary conservation role of the Tejon Ranch critical habitat unit is to provide foraging habitat for the condor and connectivity to other areas of the condor's range. As discussed in detail in Master Response 1B, California Condor Critical Habitat, and Master Response 1E, California Condor Loss of Foraging Habitat, the Service believes that Tejon Ranch would continue to provide connectivity between the western and eastern portions of the condor's historical California range and substantial foraging habitat to support the recovering California population of condors. The Service will make its formal determinations regarding jeopardy and adverse modification of critical habitat resulting from the TU MSHCP in its internal Section 7 biological opinion and Section 10 findings.

### **8.3.2.5 The applicant will ensure that any other measures required by the Service as necessary or appropriate for purposes of the plan will be included; and the Service has received any other requested assurances that the HCP will be implemented (ESA Section 10(a)(2)(A)(iv), 10(a)(2)(B)(v) and 50 C.F.R. 17.22(b)(2)(F) and 17.32(b)(2)(F)).**

Section 10 authorizes the Service to require the applicant to include in the plan additional measures deemed by the Service to be necessary or appropriate for the plan and to obtain "such other assurances as it may require that the plan will be implemented" (50 CFR 17.22(b)). Among the measures often required by the Service is an Implementing Agreement to help assure that the applicant will implement the mitigation program and other conditions of the HCP (U.S. Fish and Wildlife Service 1996a). An Implementing Agreement has been incorporated into TRC's ITP application to ensure implementation of the terms of the ITP and TU MSHCP. Additional measures may be required after further review by the Service and consideration of public comments.

Sections 8.3.5, Implementing Agreement, and 8.3.6, No Surprises Rule, below discuss implementation assurances identified in the TU MSHCP and Implementing Agreement that are extended under the No Surprises Rule. The Service also responds to comments on the enforceability of the ITP and TU MSHCP in Section 8.3.7, Enforceability of the ITP and TU MSHCP.

### 8.3.3 Critical Habitat Designation

Comments relating to the role of the critical habitat in the TU MSHCP include:

- Additional areas in the ranch could have been designated as critical habitat, including areas with frequently used cliffs and trees, and areas with favorable winds.
- The effects of the Federal action on critical habitat should be analyzed, and the Service should explain how the issuance of an ITP would be consistent with the designation of California condor critical habitat on the Covered Lands.
- Regardless of the location of critical habitat boundaries, critical habitat is the “force of law” and may not be disregarded.
- The TU MSHCP and Implementing Agreement do not adequately account for the adverse modification of California condor critical habitat due to the TMV Project, thus the Service must describe direct and indirect effects of the action with respect to all critical habitat in California and the influence of the Federal action on the function and conservation role of the affected critical habitat units.
- Legislation is in place to protect the California condor, and allowing development to proceed is a mockery of the legislation.

With respect to the comments that additional areas should be designated as critical habitat, the proposed action here is not designation of critical habitat under Section 4 of the ESA, but review of the TU MSHCP pursuant to Section 10 of the ESA. A revision of the critical habitat designation is beyond the scope of the proposed Federal action under review by the Service.

The Service agrees with the comments stating that condor critical habitat may not be disregarded and that the effects of the proposed action on condor critical habitat must be fully analyzed. Section 4.1, Biological Resources, in Volume I of this Supplemental Draft EIS includes a discussion of the effects of the proposed action and alternatives on condor critical habitat. Master Response 1B, California Condor Critical Habitat, and Master Response 1E, California Condor Loss of Foraging Habitat, provide additional information specific to that analysis. The Service will also complete a formal analysis of the effects of the proposed ITP and TU MSHCP on condor critical habitat as part of its internal Section 7 consultation. As discussed in Section 8.3.2.4 above, in the evaluation of the effects of the ITP and TU MSHCP on the Covered Species under Section 10(a)(2)(B)(iv) and Section 7, the Service will consider effects on species habitat, including California condor habitat, whether or not the habitat has been formally designated as critical habitat.

One commenter stated that the TU MSHCP, by its own terms, disregards critical habitat, which is contrary to law. However, the comment takes a quotation from the Draft TU MSHCP, p. 4-19, out of context. The full statement reads, “The MSHCP has been designed to continue to provide for, and support, condor feeding, foraging, and overflight activities in the ranch *without regard to* the precise boundaries of the large Township blocks that have been designated as critical habitat.” (emphasis added). The intent of this statement in the TU MSHCP is to emphasize that implementation of the TU MSHCP would, by virtue of the preservation of 80,231 acres of condor critical habitat in the TU MSHCP Mitigation Lands and the continuation of hunting and ranching activities that provide critical sources of food for condors on Tejon Ranch, provide for and support ongoing condor use of the ranch both within and outside the boundaries of the critical habitat on the ranch.

The comment that allowing development on the Covered Lands makes a mockery of legislation to protect condors misunderstands the legislative structure of the ESA, which prohibits take of a species unless otherwise authorized in accordance with the terms of the statute. See discussion in Section 8.2.1, Permit Application under ESA Section 10, above. This Supplemental Draft EIS analyzes the effects of the proposed ITP/TU MSHCP on the condor and its critical habitat (Section 4.1,

Biological Resources, in this Supplemental Draft EIS); the effects of the proposed action on the condor and condor critical habitat will also be carefully evaluated by the Service in its internal ESA Section 7 consultation and Section 10 permit decision.

### 8.3.4 Role of the Condor Recovery Plan

One commenter asked about the role of the California Condor Recovery Plan in the ITP and Draft TU MSHCP process, as follows:

- The TU MSHCP should be consistent with the California Condor Recovery Plan (U.S. Fish and Wildlife Service 1996b).

Recovery plans are guidance documents intended to assist the Service, other Federal agencies and non-Federal parties in carrying out actions to recover listed species. They do not impose legally binding commitments on the Service or third parties. (*Nat'l Audubon Soc'y v. Hester* 801 F.2d 405 [D.C. Cir. 1986] [refusing to enforce recovery plan for the condor, rejecting argument that the Services captive-breeding program was inconsistent with its 1979 recovery plan].) The ESA does not require that an HCP meet a recovery standard, although the Service encourages ITP applicants to develop HCPs consistent with a recovery plan's goals (U.S. Fish and Wildlife Service 1996a, p. 3-20). The TU MSHCP includes measures intended to contribute to Covered Species conservation and recovery consistent with the California Condor Recovery Plan. The recovery strategy in the California Condor Recovery Plan focuses on the following:

- increasing reproduction in captivity to provide California condors for release,
- releasing California condors to the wild,
- minimizing California condor mortality factors,
- maintaining adequate foraging, nesting, and roosting habitat for California condor recovery, and
- implementing California condor information and education programs (U.S. Fish and Wildlife Service 1996b, p. 21).

While goals 1 and 2 relate to Service actions only, the Service has evaluated the measures proposed in the TU MSHCP and notes that the TU MSHCP includes a variety of provisions intended to promote goals 3 through 5. For example, the TU MSHCP includes measures to contribute to the California Condor Recovery Plan goals of information and education programs, and to minimize California condor mortality ( Table 2-4 in Chapter 2, Proposed TU MSHCP and Alternatives, in Volume I of this Supplemental Draft EIS). The TU MSHCP also includes funding to provide additional GPS units to aid in condor population monitoring and adaptive management. The TU MSHCP also incorporates a perpetual ranchwide ban on lead ammunition, which the California Condor Recovery Plan recognizes is a major factor in the historical decline of the condor, to minimize condor mortality (U.S. Fish and Wildlife Service 1996b, p. 9). Thus, the TU MSHCP incorporates several measures intended to further the goals of the California Condor Recovery Plan.

### 8.3.5 Implementing Agreement

One commenter questioned the authority and purpose of the Implementing Agreement. Other comments on the Implementing Agreement include:

- The ESA does not provide specific authority for the Implementing Agreement; however, the Implementing Agreement should meet the standards of ESA.
- The Implementing Agreement defines nonlethal take much more narrowly than the ESA, and the reason for the narrow definition is not clear.

- The Implementing Agreement inappropriately abdicates the Service's future discretion in Section 7 consultations to impose reasonable and prudent measures and terms and conditions.

The Implementing Agreement is intended to clarify the provisions of the TU MSHCP and the processes the Service and TRC intend to follow to ensure successful implementation of the TU MSHCP in accordance with the ITP and applicable law. The Implementing Agreement would be incorporated into the ITP if the Service issues the permit.

One commenter noted that there is no specific authority for the Implementing Agreement. The commenter is correct. The Implementing Agreement is not a creature of statute; it is an optional document signed by the permit applicant and the Service that summarizes and clarifies the applicant's commitments under a proposed HCP and is intended to further ensure that the mitigation, avoidance and minimization measures in the HCP will be implemented (ESA Section 10(a)(2)(A)(iv) and (v)). To that end, the Implementing Agreement, which is included as Appendix A to the TU MSHCP, clarifies a number of obligations of TRC as the permittee. Under Section 5.1.6 of the Implementing Agreement, the permittee must take all necessary action to enforce all applicable terms of the TU MSHCP and the ITP against itself, third-party lessees, and third persons undertaking the Covered Activities. The failure to do so would be considered noncompliance by the permittee and could result in suspension or revocation of the ITP. The Implementing Agreement describes the process for suspension/revocation of the Section 10(a)(1)(B) permit. In addition, the Implementing Agreement specifies that the ITP does not shield third parties from liability under the ESA for take of Covered Species or limit the authority of the state or Federal government to enforce endangered species laws (Implementing Agreement, Sections 3 and 12).

With respect to the definition of *nonlethal take*, this term in the Implementing Agreement is not intended to replace the definition of take under the ESA. Rather, it is a defined term used in Implementing Agreement Section 5.1.1(g) to clarify when the mitigation measures described in Section 4.4.2, Measures to Mitigate Unavoidable Impacts, of the TU MSHCP will be taken.

One commenter asserted that the Implementing Agreement requires the Service to ensure that subsequent consultations under Section 7 of the ESA do not result in terms and conditions in excess of those included in the TU MSHCP, the Implementing Agreement, and/or the ITP, and that this provision is an inappropriate abdication of Service's future discretion under ESA Section 7. The comment misstates Section 11.1 of the Implementing Agreement which applies to future Section 7 consultations on the Covered Activities. Section 11.1 provides: "Any reasonable and prudent measures and terms and conditions in the biological opinion, or views expressed by the [Service] in informal consultation, on the proposed activity shall, *to the maximum extent appropriate*, be consistent with and not in excess of the measures included in the TU MSHCP, this Agreement, and the Permit" (emphasis added). Thus, the Service continues to retain its discretion on future Section 7 consultations.

Comments raising issues related to the adequacy of mitigation measures and conclusions regarding effects on Covered Species and critical habitat are responded to in Master Response 1A-11, California Condor, and Master Response 15, Procedural Considerations, in Volume II of this Supplemental Draft EIS.

## 8.3.6 No Surprises Rule

Several commenters suggested that the assurances provided in the Implementing Agreement and TU MSHCP were inadequate due to the No Surprises rule. Comments include:

- The TU MSHCP fails to provide increased protections to the species in the face of changed circumstances due to the No Surprises provision.
- The adaptive management program is insufficient to provide for the "recovery" of the species due to the No Surprises rule, which forecloses management changes that are necessary to address new scientific data or address changed circumstances.
- The Permit Revocation rule does not cure the invalidity of the No Surprises rule.
- The No Surprises rule will likely be struck down by the courts; therefore, the TU MSHCP should not include this "illegal" provision.

The No Surprises rule was promulgated by the Service in recognition of the considerable land and monetary commitments made by landowners undertaking habitat conservation planning efforts. The No Surprises rule provides assurances to property owners that the Service will not require additional financial or land commitments beyond those contained in an approved HCP if unforeseen circumstances should arise during the permit term (63 FR 8859 (1998)). Under the No Surprises rule, an HCP must anticipate reasonably foreseeable changes in circumstances (described as changed circumstances under the rule) that could occur during the permit term to species or the geographic area covered by the plan and include measures in the plan to respond to those circumstances (63 FR 8859 8871, 50 CFR 17.3 (definition of changed circumstances), 17.22(b)(5) and 17.32(b)(5)).

Provisions relevant to the No Surprises Rule are set forth in the Implementing Agreement at Section 5.2.2 and in Section 8, Changed Circumstances and Plan Implementation, of the TU MSHCP. These No Surprises provisions apply only to unforeseen circumstances (not to changed circumstances that can be reasonably anticipated [U.S. Fish and Wildlife Service 1996a, p. 3-28]). Unforeseen Circumstances are limited to changes in circumstances affecting a species or the geographic area covered by the plan that could not reasonably have been anticipated by TRC or the Service and that result in a substantial and adverse change in the status of a covered species. Under the No Surprises Rule, the Service may require additional measures even in the event of unforeseen circumstances so long as those measures are limited to modifications in the TU MSHCP Mitigation Lands or to operating the conservation program under the plan, such that the original terms of the conservation plan are maintained to the maximum extent possible. Measures that involve additional commitments of land, water or use restrictions are also allowed only with the consent of the permittee (CFR 17.22(b)(5), 17.32(b)(5), Section 5.2.2 of the Implementing Agreement, and Section 8.3, Reconciliation of the No Surprises Rule, Unforeseen Circumstances, and Adaptive Management, in the TU MSHCP).

Contrary to the commenter's assertion, the TU MSHCP does in fact require increased protections in the event of a changed circumstance, as discussed in Section 8 of the TU MSHCP. The TU MSHCP includes an adaptive management program that requires increased protections in response to a changed circumstance. In Section 8.1, Changed Circumstances, the TU MSHCP identifies drought/climate change, fire/climate change, and new listings of species or designation of critical habitat not covered by the TU MSHCP. For changed circumstances resulting from drought, fire and climate change issues, the TU MSHCP incorporates preventative measures and responses. For the listing of a new species or designation of critical habitat, the TU MSHCP requires avoidance of jeopardy, take and adverse modification of critical habitat, as appropriate. In Section 9, Funding, of the TU MSHCP, funding is provided to address changed circumstances (Table 9-2 in the TU MSHCP). Additionally, the adaptive management program specifically allows the TU MSHCP to be revised as a result of new information on the effectiveness of mitigation measures, and as a result of the

monitoring programs (Section 8.3, Reconciliation of the No Surprises Rule, Unforeseen Circumstances, and Adaptive Management, in the TU MSHCP). The adaptive management program also has funding allocated to it (Table 9-2 in the TU MSHCP).

The comment cites *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917 (9th Cir 2007) and *Southwest Ctr. for Biological Diversity v. Bartel*, 470 F.Supp.2d 1118 (S.D. Cal. 2006) as requiring the Service to take into account both the survival and recovery of the species when issuing a biological opinion under ESA Section 7. The Service agrees that it must consider the recovery as well as survival of a species in ESA Section 7 consultations.

The commenter relies on the decision in *Southwest Center for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118 (S.D.Cal. 2006) to support its argument that use of the No Surprises provision in the TU MSHCP/Implementing Agreement results in a shell game that fails to provide for both the survival and recovery of the Covered Species. The Service disagrees with the commenter's assertion and with the suggestion in *Bartel* that an HCP must meet a recovery standard for covered species (See *Spirit of the Sage Council v. Kempthorne*, 511 F.Supp.2d 31, 42-44 [D.D.C. 2007]. [HCP is not required to meet a recovery standard but rather the five issuance criteria in Section 10(a)(2)(B).]). The Service notes that the *Bartel* decision did not question the validity of the No Surprises rule; rather, the court found the Service's issuance of the ITP and approval of the associated HCP flawed because the agency:

- relied on future consultation with the U.S. Army Corps of Engineers (USACE) to protect fairy shrimp, which consultation would not necessarily occur due to an intervening Supreme Court ruling that removed isolated wetlands from Federal jurisdiction;
- deferred analyzing the effects of development until the later consultation process, and
- relied on mitigation measures for transplanting fairy shrimp which were either untested or had proven unsuccessful in practice.

In contrast to situation in *Bartel*, the Service is not "defer[ring] analysis of the direct and indirect effects of development under the MSHCP until future ESA Section 7 consultations" (*Bartel*, 470 F. Supp. 2d at 1139). This Supplemental Draft EIS and TU MSHCP analyze the effects of the Covered Activities on the Covered Species, as will the Service's internal ESA Section 7 consultation on the proposed ITP. The TU MSHCP notes that "Federal wetland permitting within the Plan remains subject to the Fish and Wildlife Coordination Act, Clean Water Act (CWA), and state law, and may require additional avoidance, minimization, and mitigation measures" (Section 1, Introduction and Background, in the TU MSHCP), but such future permitting actions provide an additional level of protection. The TU MSHCP acknowledges that under the CWA wetland permit regulations, the development must first show avoidance, then minimize and mitigate effects on wetlands, meeting the no net wetland loss policies of USACE and state agencies (Section 7, Other Covered Species, in the TU MSHCP). Such future permitting may result in further benefits to Covered Species. The obligation for the proposed action to comply with Federal, state, and local regulations and statutes is also reflected in Chapter 4, Environmental Consequences, in Volume I of this Supplemental Draft EIS. However, neither the Service nor the TU MSHCP is relying on future Federal wetland permitting to mitigate for effects on riparian species. Instead, the TU MSHCP incorporates measures to avoid or minimize and mitigate the effects on all Covered Species which will be analyzed by the Service under Section 10 and Section 7 of ESA to determine whether to issue the ITP. The plan simply acknowledges that future CWA permitting may result in additional protective measures for certain species.

The TU MSHCP also incorporates proven conservation measures for riparian species – preservation and avoidance. As discussed above, a total of 129,318 acres would be preserved under the TU MSHCP, and federally protected wetland areas would be generally avoided in permanently preserved open space. Here, unlike in *Bartel*, the TU MSHCP incorporates adaptive management

provisions that, consistent with the No Surprises rule, are intended to provide for flexibility in the conservation plan to allow for changed circumstances. With respect to California condors, for example, the TU MSHCP explicitly acknowledges that "how condors that utilize Tejon Ranch will adapt to some of the conservation and mitigation strategies proposed in this MSHCP is not entirely known"; therefore, based on monitoring results, the conservation program for condors may be adaptively managed to address microtrash issues and deterrence methods (Section 4, California Condor, in the TU MSHCP). Additionally for the other Covered Species, the effectiveness monitoring set forth in Section 7.3.2, Effectiveness Monitoring, of the TU MSHCP provides: "Overall, the effectiveness monitoring program will assess the biological conditions in the open space system resulting from implementation of the Conservation Plan for Other Covered Species and provide any information needed to implement an adaptive management strategy". Thus, the TU MSHCP is designed to incorporate changes based on lessons learned from monitoring. None of the flaws the court found in the *Bartel* HCP is applicable.

The commenter's citation to *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 931 (9th Cir. 2007) is also misplaced. That case dealt with the Service's biological opinion and jeopardy determination under Section 7 of ESA. The court held that the agency's determination was insufficient under the regulations governing ESA Section 7, as the agency had considered only the survival and not the recovery of the species. As discussed above in Section 8.3.2.2 of this master response, the TU MSHCP would include measures to contribute to the recovery of the Covered Species. The Service will consider the effects of the ITP and TU MSHCP on recovery in addition to survival of the Covered Species and other listed species in its internal Section 7 consultation on the proposed ITP.

The TU MSHCP's conservation measures, adaptive management plan, and Implementing Agreement are consistent with the No Surprises regulations at 50 CFR §17.22(b)(5) and (6) and 17.32(b)(5) and (6). Contrary to the commenter's statement, the No Surprises rule has been upheld and has been consistently applied in HCPs nationwide. See *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31 (D.D.C. 2007). Unless and until the Service or a Federal court modifies or otherwise revisits the rule, there is no basis for questioning the validity of the No Surprises rule as applied to the TU MSHCP.

### 8.3.7 Enforceability of the ITP and TU MSHCP

Commenters raised issues regarding the likelihood that the TU MSHCP would be enforceable. Specifically, commenters state that:

- There should be a mechanism to revoke the ITP if requirements of the TU MSHCP are not being met.
- The permittee should not be absolved for the death of any species.
- A failure to comply with an ITP's terms constitutes a take under ESA Section 9, and permit revocation should not be the only enforcement tool.

In response to commenters' concern regarding the enforceability of the ITP, the Service notes that the provisions of an ITP are fully enforceable under the ESA, which provides for permit revocation for violations of the terms of the permit (16 U.S.C. 539(a)(2)(C)). In addition, ESA regulations provide that an ITP may be revoked if continuation of the permitted activities would appreciably reduce the likelihood of survival and recovery of the species in the wild (17 CFR 17.22(b)(8), upheld in *Spirit of Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 46 (D.D.C. 2007)), and an ITP may be revoked upon willful violations of the ESA or failure to correct a condition that led to permit suspension (17 CFR 13.28(a)). Furthermore, violations of the ESA, including unauthorized takes, are punishable under civil and criminal enforcement mechanisms in Sections 9 and 11 of the ESA; nothing in the Section 10 process removes that authority. Thus, in response to one commenter's concern, the ITP would not

absolve any party, including the permittee from an unauthorized take. Additionally, contrary to another commenter's statement, violation of a permit condition does not automatically constitute a take under ESA Section 9. Rather, as noted above, violation of a permit condition can result in a permit revocation.

In addition, the ESA requires that the Service receive assurances that the terms of an HCP will be implemented (16 U.S.C. 1539(a)(2)(B)). As noted in the discussion above, the Implementing Agreement, which contains additional implementation measures, would be incorporated into the ITP issued by the Service. The violation of those measures, could result in enforcement action. Thus, contrary to the commenter's assertion, permit revocation is not the only enforcement tool available to the Service. As noted in the Implementing Agreement, the Service retains a full range of enforcement remedies, including the ability to seek injunctions, revoke or suspend the permit or seek civil or criminal penalties. Through the ITP, the mitigation, avoidance and minimization measures in the TU MSHCP as well as all permit conditions and Implementing Agreement conditions will be ensured of being implemented and will be enforceable by the Service.

Finally, the Service notes that the ITP does not shield third parties. The Implementing Agreement specifically acknowledges that the ITP does not shield third parties from liability under ESA for take of Covered Species or limit the authority of the state or Federal government to enforce endangered species laws (Implementing Agreement, Sections 3 and 12). In addition to statutory enforcement remedies, the Implementing Agreement contains additional measures, the violation of which could result in revocation of the ITP. Pursuant to the Implementing Agreement, the Service would have ongoing oversight obligations; for example, it would review and approve all management plans or amendments to ensure compliance with the TU MSHCP and ESA (Implementing Agreement, Section 5.1.1(d)). The Implementing Agreement also requires certain additional provisions in perpetuity. These include enforcement of the lead ammunition ban in perpetuity, establishment and enforcement of terms required in covenants, conditions and restrictions (CC&Rs), and protection of open space in perpetuity (Implementing Agreement, Section 5.1.1(a), (b), (e)). The Service would also be named as a third-party beneficiary to conservation easements over open space lands, and the easements must include requirements to continue to submit management plan revisions to the Service (Implementing Agreement, Section 5.1.1(d)).

### 8.3.8 Section 7 Consultation Process and Biological Opinion

Several commenters raise issues relating to the Service's Section 7 internal consultation process. As noted above, the Section 7 consultation process has not been completed. The comments are summarized in each section below.

#### 8.3.8.1 Definition of Action Area

One commenter raised questions regarding the TU MSHCP's definition of the action area for the California condor pursuant to Section 7 of the ESA. Specifically, the commenter stated that:

- Analysis of effects on critical habitat and cumulative effects must be completed in the action area.
- The TU MSHCP and EIS should include a clearly defined action area, which is essential to identifying a clear baseline from which to analyze effects on critical habitat and indirect effects on listed species, and to permit a complete review by the Service and the general public.
- The TU MSHCP must clarify whether the Covered Lands is the same as the action area.
- The action area should be defined as the whole of California, not just the Covered Lands in TRC ownership. Empirical evidence supports this definition of action area.

An action area is a component of the Section 7 process under the ESA. The action area refers to the area to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR 402.02). The action area is also important for determining cumulative effects from future state or private activities, not involving Federal activities, that are reasonably certain to occur in the action area of the Federal action subject to consultation 50 CFR 402.02). The environmental baseline for the Section 7 process includes the past and present effects of all Federal, state, or private actions and other human activities in the action area, the anticipated effects of all proposed Federal actions in the action area that have already undergone formal or early Section 7 consultation, and the effect of state or private actions which are contemporaneous with the consultation in process (50 CFR 402.02) (definition of effects of the action).

Thus, the comments are correct that selecting an appropriate action area is important in analyzing the direct, indirect and cumulative effects of a proposed action in order to make jeopardy and adverse modification determinations pursuant to Section 7 of the ESA. The Service will make a formal determination of the action area during its internal Section 7 consultation on the proposed ITP and TU MSHCP.

This Supplemental Draft EIS, however, includes analysis of the direct, indirect and cumulative effects of the proposed action of an appropriate study area, as defined for each resource area in Chapter 3, Affected Environment, and Chapter 4, Environmental Consequences. In general, the study area used to assess potential direct and indirect effects on biological resources is concurrent with the Covered Lands (Section 4.1, Biological Resources, in Volume I of this Supplemental Draft EIS). For several resource areas, the cumulative effects analysis area was expanded beyond the Covered Lands (e.g., air quality, water quality). In particular, the assessment of cumulative effects on the California condor was expanded to include a cumulative effects analysis area representative of the range of the California population, including the southern California subpopulation, which generally occurs between San Luis Obispo County and Ventura County, through the Tehachapi Mountains and into the southern Sierra Nevada, and the northern California subpopulation, which generally occurs between the Big Sur Coast in Monterey County and Pinnacles National Monument in San Benito County. The cumulative effects analysis area for condors was expanded because the Service anticipates that there will be more intermixing between the northern and southern California subpopulations of the condor over the 50-year ITP term as the species increases in numbers, and condor use of their historic range in California continues to expand.

The Service disagrees that the NEPA and ESA analyses must consider the entire State of California in considering cumulative effects on condors. As noted above, the cumulative effects analysis area for the condor has been expanded to include the range of the California population.

### 8.3.8.2 Adverse Modification to Critical Habitat

Commenters stated that the ITP must not result in the destruction or adverse modification of critical habitat. Specifically, commenters stated that:

- In its internal Section 7 consultation process, the Service should conclude the proposed action would result in destruction and adverse modification of condor critical habitat.
- One commenter summarized the ESA definition of “destruction or adverse modification” of critical habitat, and concluded that in light of the Gifford Pinchot Task Force decision and Service guidance, the ESA must be read to preclude anything that diminishes the value of critical habitat for either survival or recovery of the affected species.
- Based on the definitions of “critical habitat” and “conservation” under the ESA, if an action's effects threaten either the recovery or survival of a species, the biological opinion must conclude that the action adversely modifies critical habitat.

- The Service must ensure that the HCP is not likely to result in either the destruction *or* the adverse modification of critical habitat for the California condor, and that "destruction" and "adverse modification" cannot be equated.
- Even with the preservation of habitat and avoidance, minimization, and mitigation measures proposed, the loss of habitat and indirect effects of fragmentation will negatively affect the condor and cause direct and indirect take.
- Approval of the ITP would set a precedent disregarding the critical habitat designation for condors and all other endangered species.

The Service will determine whether the proposed ITP and TU MSHCP will adversely modify or destroy condor critical habitat through its internal Section 7 consultation on the proposed action. Under the ESA, at the conclusion of the Section 7 consultation, the Service must issue a biological opinion that, among other things, states the Service's opinion as to whether the Federal action is likely to result in the destruction or adverse modification of critical habitat (16 U.S.C. 1536(a)(2)). As discussed above, the ESA Section 7 consultation will be completed prior to the Services' decision on the permit application. This Supplemental Draft EIS provides important information regarding the Federal action's potential effects on critical habitat (Section 4.1, Biological Resources, in Volume I), which will assist the Service in making this determination. The TU MSHCP also provides information that may assist the Service in the consultation (Section 4, California Condor, in the TU MSHCP). In making the adverse modification determination, the Service will follow the guidance memorandum, *Application of the "Destruction or Adverse Modification" Standard under Section 7(a)(2) of the Endangered Species Act*, issued in December 2004 following the Gifford Pinchot Task Force decision. This memorandum identifies the appropriate analytical framework for conducting adverse modification determinations during ESA Section 7 consultation pending the adoption of a new regulatory definition of destruction or adverse modification. Refer to Master Response 1B, California Condor Critical Habitat, for more information on this topic.

It is important to understand that a critical habitat designation does not set up a preserve or refuge. Rather, designation of critical habitat identifies essential habitat for a listed species, and requires Federal agencies to consult with the Service if their proposed actions may affect critical habitat to ensure that the Federal agency action does not destroy or adversely modify the critical habitat. (U.S. Fish and Wildlife Service 2000). Consideration of effects on critical habitat applies only when Federal funding, permits, or projects are involved; critical habitat restrictions apply to citizens engaged in activities on private land only to the extent that their proposed activities involve Federal agency permitting or funding (16 U.S.C. 1532(a)(2)).

With respect to development in critical habitat, the commenter's contention that development on Tejon Ranch is legally required to avoid condor critical habitat is incorrect. The Service has consistently affirmed that a "critical habitat designation does not necessarily restrict further development. It is a reminder to Federal agencies that they must make special efforts to protect the important characteristics of these areas" (U.S. Fish and Wildlife Service May 2000). The Service's rule establishing condor critical habitat in 1976 states that, "There has been widespread and erroneous belief that a critical habitat designation is something akin to establishment of wilderness area or wildlife refuge and automatically closes an area to most human uses. Actually, a critical habitat designation applies only to Federal agencies, and is a notification to such agencies that their responsibilities pursuant to Section 7 of the Act are applicable in a certain area." (41 FR 41915).

The Federal regulation defining adverse modification or destruction of critical habitat has been invalidated. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.* (Gifford Pinchot) (9th Cir. 2004). Pending promulgation of a new definition of adverse modification, the Service relies on the statutory definition of critical habitat set forth in Section 4 of the ESA. In the Section 7 consultation on the proposed permit, the Service will formally analyze the effects of the proposed action on the ability of

critical habitat to carry out its intended function and conservation role. Refer to Master Response 1B, California Condor Critical Habitat, in Volume II of this Supplemental Draft EIS, for more information on this topic.

### 8.3.8.3 Jeopardy

Several commenters raised issues regarding whether a jeopardy finding is warranted. Specifically, commenters stated:

- The jeopardy standard and requirement from the ESA must be met.
- Before granting an ITP, the Service must ensure that the ITP will not jeopardize the continued existence of a threatened or endangered species.
- Given the existing population of condors, the avoidable loss of one condor could jeopardize the species in the wild.
- Bifurcation and fragmentation of the condor's range in the Covered Lands has the potential to jeopardize the continued existence of the condor because it is reasonably expected to appreciably reduce the likelihood of both the survival and recovery of the condor in the wild by adversely modifying its critical habitat, reducing its distribution, and reducing its reproduction through to the loss of foraging habitat available in the nesting area to the west.

As accurately summarized by one commenter, the ESA requires that at the conclusion of the Section 7 consultation, the Service must issue a biological opinion that states, among other things, the Service's opinion as to whether the Federal action is likely to jeopardize the continued existence of any endangered species or threatened species (16 U.S.C. 1536(a)(2)). To jeopardize the continued existence of a species means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR §402.2). The Service must ensure that any action it authorizes does not result in jeopardy.

The Service's internal Section 7 consultation will be completed prior to a decision on the permit application for the TU MSHCP. The Service will reach a determination during the Section 7 consultation process as to the likelihood of jeopardy to any of the Covered Species. The Section 10 ITP issuance criteria, which include a finding that the taking will not appreciably reduce the likelihood of survival and recovery of the species, also reflect the regulatory definition of jeopardy under ESA Section 7 (U.S. Fish and Wildlife Service 1996a, p. 6-13). With respect to the comment that the avoidable loss of one condor could jeopardize the continued existence of the species in the wild, it should be noted that there is no allowance or request for lethal take of condors in the TU MSHCP. The TU MSHCP, as related to the California condor, is intended to avoid lethal take of the species and to minimize and mitigate potential nonlethal take resulting from habituation. The proposed TU MSHCP requests up to four nonlethal takes over a 50 year permit term. Such take would involve capturing the habituated birds, rehabilitating the birds for release if possible, or if the birds cannot be retrained, maintaining them in captivity. Refer to Master Response 1C, California Condor Take and Habituation, in Volume II of this Supplemental Draft EIS. The Services formal jeopardy analysis will be completed during the Section 7 consultation process.

With respect to the comment that fragmentation of the condor's range or loss of foraging habitat could jeopardize the species, Section 4.1, Biological Resources, in this Supplemental Draft EIS indicates that flyover habitat would be preserved under the Proposed TU MSHCP Alternative, and the loss of foraging habitat would not be substantial compared with the amount conserved from development. The TU MSHCP is consistent with this analysis. Please refer to Master Response 1A-1I, California Condor, regarding issues of foraging habitat and food source availability, linkages, habituation, and recovery.

### 8.3.9 Bald and Golden Eagle Protection Act

Comments on protection of eagles under the ITP include:

- Any take of golden or bald eagles is illegal because it violates the BGEPA, which imposes strict liability with no provision for take. New rules governing take provisions within the BGEPA must be promulgated by the Service before any implementation of any development on Tejon Ranch.
- Avoidance of lethal take of bald eagles is not enough to avoid liability under the BGEPA because the act also prohibits disturbance of the species.
- Eagles nesting on the Centennial site should be protected.

The commenter is incorrect in asserting that any take of bald eagles is illegal because the BGEPA imposes strict liability with no provision for take. As discussed above, the Service has issued rules permitting the incidental take of eagles and extended BGEPA take authorization to holders of existing ESA authorizations, including specifically allowing take authorization to be extended to future ESA Section 10 ITPs associated with habitat conservation plans for multiple species that include bald or golden eagles as Covered Species (73 FR 29075, May 20, 2008). There is no strict-liability exception that prevents issuance of take permits under these BGEPA permit rules. The Service has not completed its analysis of potential take of bald and golden eagle under the proposed ITP; however, based on review of the proposed action to date, the Service does not believe that the proposed TU MSHCP would result in take of any bald or golden eagles that would require a BGEPA permit.

The commenter is correct that avoidance of lethal take is not enough to avoid liability under the BGEPA due to the prohibition on disturbance. In 2007, the Service defined "*disturb*" under the BGEPA as meaning "to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle (2) a decrease in its productivity, by substantially interfering with normal, breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding or sheltering behavior". The BGEPA is not a habitat management law and habitat loss, by itself, is not take under the BGEPA. However, to the extent that a loss of, or other effects to, habitat cause effects on an eagle within the definition of *take* under the BGEPA and its implementing regulations, such effects are prohibited without authorization. To constitute take under the BGEPA definition of *disturb*, a loss of habitat must agitate or bother an eagle to the extent that the loss causes or is likely to cause an injury to, a decrease in the productivity of, or nest abandonment by, an eagle.

As indicated above, the Service has not completed its analysis of the effects of the proposed ITP or the BGEPA on eagles. However, as indicated in Section 4.1, Biological Resources, in Volume I of this Supplemental Draft EIS, there is no information that suggests that disturbance of eagles, within the meaning of the BGEPA, would occur under the TU MSHCP. The bald eagle is a wintering visitor that does not breed on site. The Covered Activities would result in the permanent loss of some modeled habitat but are not likely to cause injury to or a decrease in productivity of any bald eagles. Because bald eagles do not breed on the Covered Lands, nest abandonment would not occur. The TU MSHCP would result in the conservation of a significant amount of modeled habitat and would require the avoidance of habitat disturbances during construction activities, the avoidance of cattle-grazing effects on riparian habitat, the distribution of educational information to minimize disturbances caused by human recreation, and the establishment of seasonal setbacks from roost and perch areas (Section 6, Potential Biological Impacts / Take Assessment, in the TU MSHCP). These measures should avoid effects on and any take of bald eagles within the meaning of the BGEPA.

With respect to golden eagles, Section 4.1, Biological Resources, in Volume I of this Supplemental Draft EIS indicates the Proposed TU MSHCP Alternative would result in some loss of modeled habitat within the Covered Lands. However, the TU MSHCP would provide for the conservation of

extensive primary breeding/forging and foraging habitat in large, unfragmented open space on the Covered Lands, which should be adequate to continue to support breeding pairs of the golden eagle within the plan area. In addition, under the TU MSHCP all active golden eagle nest sites on the Covered Lands would be conserved. The TU MSHCP also incorporates specific avoidance measures to avoid injury to, a decrease in productivity of, or nest abandonment by any eagle. These measures include surveys, application of a view-shed analysis, and implementation of development setbacks and disturbance avoidance measures, such as closing recreational trails near active nests sites during the breeding season to avoid effects on golden nests and associated foraging habitat (TU MSHCP, Section 6). With the conservation of extensive primary breeding/forging and foraging habitat in large, unfragmented open space in the Covered Lands (91% of the primary breeding habitat and 92% of breeding/forging habitat for golden eagle preserved under the Proposed TU MSHCP Alternative), it is anticipated there would be sufficient habitat to continue to support the existing known active golden eagle nests (three total) within the Covered Lands. These measures should avoid effects on, and, consequently, any take of, golden eagles within the meaning of the BGEPA. The habitat effects on bald and golden eagles cited above are not anticipated to rise to the level of a take under BGEPA for the following reasons:

- The Covered Activities within the eagle habitat areas, including the development of the TMV Project, are not activities likely to “agitate or bother” a bald or golden eagle so as to cause injury, a decrease in eagle productivity, or nest abandonment. This is attributable to the measures incorporated into the TU MSHCP, summarized in bullet 3 below, which are designed to avoid effects on bald and golden eagles from the Covered Activities and require protection of golden eagle nests and substantial foraging habitat for both bald and golden eagles.
- The bald eagle does not breed on the Covered Lands and all active golden eagle nests within the Covered Lands would be preserved under the TU MSHCP.
- The TU MSHCP describes several conservation measures, and avoidance and minimization measures, to protect bald and golden eagles. These includes conserving 99% of the bald eagle foraging habitat, and 91% of the primary breeding habitat and 92% of the breeding/forging habitat for the golden eagle. Although up to 58% of bald eagle wintering habitat could be directly affected by the TU MSHCP Covered Activities, there is no evidence of a large wintering population on the Covered Lands, and conservation measures would require additional protections and enhancements of the wintering habitat that would be preserved (e.g., signage, education, and diurnal perch protection). The conservation plan sets out a series of additional required measures to manage any potential effects on bald and golden eagles including avoiding and minimizing habitat disturbances during construction activities, long-term (operations) effects, cattle-related effects, and the effects of human recreation and pet activities in foraging and wintering habitat. These measures would be likely to result in a net conservation benefit to eagles and would be compatible with the preservation of bald eagles and golden eagles.

The TU MSHCP does not analyze effects on eagles from the proposed Centennial development mentioned by one commenter, except with respect to cumulative effects (Master Response 12, Cumulative Effects). However, as noted above, there is no evidence that the TU MSHCP Covered Activities, in combination with the Centennial development, would result in take of bald or golden eagles because significant bald and golden eagle habitat would be preserved (Section 4.1, Biological Resources, in Volume I of this Supplemental Draft EIS). Further, it is presumed that the Centennial Project itself would need to comply with the ESA and BGEPA, so that bald and golden eagles would persist in the region.