

Master Response 2

California Condor Critical Habitat

Master Response 2 addresses comments on the potential effects of the Tehachapi Uplands Multiple Species Habitat Conservation Plan (TU MSHCP) on California condor critical habitat. Several commenters expressed concern that development proposed under the TU MSCHP would be incompatible with the designation of critical habitat for condors, and that such development would result in “destruction or adverse modification” of critical habitat within the meaning of the Federal Endangered Species Act (ESA). Table MR2-1 provides a list of commenters and a reference to the individual comment addressed by this master response. Refer to Chapter 4, Individual Responses to Public Comments, for a copy of each comment letter and responses to other substantive comments not addressed by a master response.

Table MR2-1. Comments Addressed in Master Response 2

Comment	Commenter
N-3-2	Center for Biological Diversity
N-3-3	Center for Biological Diversity
N-3-4	Center for Biological Diversity
N-3-5	Center for Biological Diversity
N-3-6	Center for Biological Diversity
N-3-7	Center for Biological Diversity
N-3-8	Center for Biological Diversity
N-3-18	Center for Biological Diversity
P-5-16	Snyder et al.
P-5-17	Snyder et al.
P-5-18	Snyder et al.

Overview

Under the ESA, critical habitat consists of those lands in the geographical area occupied by a listed species that contain physical or biological features essential for the conservation of the species that may require special management considerations or protection, and those lands outside the occupied geographical area that are essential for the species conservation (16 United States Code [U.S.C.] 1532(5)(A)). The U.S. Fish and Wildlife Service (Service) is required to render a formal determination of the effects of a proposed action—in this case, issuance of an incidental take permit (ITP) to Tejon Ranchcorp (TRC)—on critical habitat as part of the Service’s intra-Service consultation under Section 7 of the ESA. This determination is made in a Biological Opinion that formally addresses the potential destruction or adverse modification of critical habitat. Consistent with the Ninth Circuit Court of Appeals decision in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) (*Gifford Pinchot*), under the Section 7 process, the Service will determine whether issuance of an ITP to TRC will result in the destruction or adverse modification of critical habitat based on an assessment of the effects the proposed action would have on the capability of critical habitat to carry out its intended function and conservation role after the proposed Federal action is implemented. This assessment will be informed by the National Environmental Policy Act (NEPA) analysis, including all comments received on the Draft and

Supplemental Draft EIS, and will be based on the statutory provisions of the ESA specific to critical habitat analyses, rather than the regulatory definition of “destruction or adverse modification of critical habitat” provided in 50 Code of Federal Regulations (CFR) 402.02. Thus, in reviewing the effects of a proposed Federal action that would eliminate or degrade the habitat value of specific lands within the boundaries of critical habitat, the Service analyzes what the effects of such habitat elimination or degradation are likely to be on the overall capability of critical habitat to perform its intended conservation role and function. The analysis is species-specific and habitat-specific, and considers the life history needs of the species and the particular role of the affected critical habitat in meeting those life history needs.

Destruction or Adverse Modification of Critical Habitat

As discussed above, the Service’s application of “destruction or adverse modification” of critical habitat under Section 7 of the ESA considers whether any direct or indirect alteration to the critical habitat would appreciably diminish the capability of critical habitat to carry out its conservation function. Several commenters suggested the removal of a portion of designated critical habitat by the Tejon Mountain Village Project (TMV Project) constitutes “destruction” of critical habitat within the meaning of Section 7 of the ESA. This assertion is incorrect. As the Ninth Circuit Court of Appeals has recognized, “[a]n area of a species’ critical habitat can be destroyed without appreciably diminishing the value of a critical habitat for the species’ survival or recovery” *Butte Environmental Council v. U.S. Army Corps of Engineers*, 620 F.3d 936, 948 (9th Cir. 2010). Thus, the fact that a proposed action will result in removal of a particular area of critical habitat does not compel a determination by the Service that the action will destroy or adversely modify critical habitat within the meaning of Section 7. Instead, the Service must evaluate the impacts of removing a particular area of critical habitat plus any other impacts of the proposed action on the value of critical habitat for the species’ survival or recovery. For instance, if a proposed action would eliminate the habitat value of particular lands through development of those lands and adversely affect the habitat value of other lands through the indirect effects of development, such as increased human activity, the Service must consider what the combined direct and indirect effects on designated critical habitat would be, and whether those combined effects are likely to appreciably diminish the capability of critical habitat to carry out its intended conservation function. If the combined effects would appreciably diminish the capability of designated critical habitat to perform its intended conservation function (i.e., result in the destruction or adverse modification of critical habitat), the Service must identify in the Biological Opinion any reasonable and prudent alternatives that would avoid “destruction or adverse modification” of critical habitat.

California Condor Critical Habitat

The Service designated critical habitat for California condor in 1976 (41 *Federal Register* [FR] 41914, September 24, 1976). It was one of the first critical habitat designations, was demarcated generally by township and range lines, and lacks the detailed discussion of essential habitat features and primary constituent elements that are characteristic of more recent designations. However, each of the nine different critical habitat units was designated because of its specific role in meeting the life history needs of the California condor (i.e., nesting, roosting, and foraging areas).

The totality of the discussion of Tejon Ranch in the 1976 final critical habitat rule is as follows:

The Tejon Ranch, Kern County rangelands, and Tulare County rangelands, as described below, are considered critical for feeding and related activities. The Tejon Ranch is very important because it contains the only significant feeding habitat remaining in close proximity to the Sepe-Piru Condor

nesting area. In most cases Condor feeding habitat is not as restricted as nesting and roosting sites, and only certain portions of the areas described below are needed at any one time. Because, however, the location of food is directly related to both Condor distribution and reproductive success, substantial areas of open range, with adequate food, and limited development and disturbance, would have to be preserved in each delineated area in order to maintain the species.

(7) Tejon Ranch: an area of land, water and airspace in Kern County, with the following components (San Bernardino Meridian): R16W T10N, R17W T10N, R17W T11N, R18W T9N, R18W T10N, R19W T10N [41 FR 41914-41916])

The Tejon Ranch critical habitat unit encompasses 134,871 acres. Approximately 127,774 acres of the critical habitat unit are located within the Tejon Ranch boundary (excludes Not-A-Part Inholdings, or the 38,865 acres in the Covered Lands that are not owned by TRC), and 95,068 acres of the unit are located in the Covered Lands.

NEPA Analysis of Potential Effects on Critical Habitat

Under NEPA, the Service is required to analyze the effects of the proposed Federal action (i.e., issuance of an ITP) on the human environment, including potential effects on the California condor and its critical habitat. This Environmental Impact Statement (EIS) has been prepared to meet the Service's NEPA obligations, and includes a discussion of the potential effects of all alternatives on the condor and its habitat in Section 4.1, Biological Resources. The results of the EIS analysis as they relate to California condor critical habitat are summarized below.

As provided above, in the final critical habitat rule for the species, the specific conservation function of the Tejon Ranch critical habitat unit is to provide essential feeding (foraging) areas for the California condor. Although the Tejon Ranch critical habitat unit was designated as an essential foraging area, the unit also provides areas for roosting, including traditional roost sites, and habitat connectivity to other portions of their historic range outside and beyond the boundaries of Tejon Ranch.

In evaluating the effects of the TU MSHCP on condor critical habitat in this EIS, the Service considered the amount of foraging habitat that would be lost and conserved under the TU MSHCP, and the effects such loss would likely have on the potential food base in the condor's range, focusing on the portion of the range currently used by the southern California subpopulation. Potential effects on habitat connectivity between the Tejon Ranch critical habitat unit and other designated critical habitat units for the California condor were also considered.

A detailed description of the potential effects of the TU MSHCP on the estimated food base and foraging habitat on Tejon Ranch are provided in Master Response 3, California Condor Foraging Habitat, and Master Response 4, California Condor Food Availability Analysis, in this Final EIS. In summary and with respect to the loss and preservation of modeled condor foraging habitat within the Tejon Ranch critical habitat unit, the EIS analysis identified 87,400 acres of foraging habitat within the 134,871-acre Tejon Ranch critical habitat unit, 58,715 acres of which occur in the Covered Lands. Commercial and Residential Development Activities proposed under the TU MSHCP would result in direct and indirect effects on 12,015 acres of foraging habitat, including the actual loss of 4,257 acres of foraging habitat in the Tejon Ranch critical habitat unit. Approximately 80,231 acres of critical habitat, encompassing 46,045 acres of foraging habitat, would be conserved in the Covered Lands. An additional 21,867 acres of critical habitat, encompassing 18,261 acres of foraging habitat, would be conserved outside the Covered Lands under the Ranchwide Agreement. In total, 102,098 acres (76%) of the 134,871 acres within the Tejon Ranch critical habitat unit, encompassing approximately 64,306 acres of foraging habitat and traditional roosting areas, would be conserved in perpetuity under the TU MSHCP and the Ranchwide Agreement. Further, the

reduction in foraging habitat for condors on Tejon Ranch is not anticipated to affect the food base for condors on the ranch because grazing would continue through the permit term on the majority of the ranch, and the amount of cattle grazed would remain comparable to the historical average grazing level of 14, 500 cattle. Additionally, hunting would continue at the same general level through the permit term, with the commercial program expected to operate under tighter oversight (see Response to Comment P-6-13). Wild pig depredation is also expected to continue at similar levels through the permit term. As a result, despite potential future declines in livestock across the condor range, the current contribution of Tejon Ranch to the condor's overall food supply would remain relatively constant over the 50-year permit term.

The Service agrees with several comments that noted that urban and suburban development generally adversely affect condor conservation. Even with the variety of measures incorporated into the TU MSHCP to protect condors and their habitat, the Service recognizes there would be a loss of foraging habitat and the potential for disturbance or habituation of condors as a result of the Covered Activities, including development. For that reason, the Service considered that suitable foraging habitat within 0.5 mile from the TMV Planning Area Development Envelope and Oso Canyon Development Envelope would be indirectly affected (i.e., would not consistently provide feeding opportunities for condors due to construction, ongoing human use, and visual and noise-related disturbance). However, the Service also expects that the areas that would be conserved and managed under the TU MSHCP and the Ranchwide Agreement would provide sufficient habitat to maintain Tejon Ranch's contribution to the foraging needs of a down-listed population of condors in California. In addition, the Service expects that implementation of the mitigation and conservation measures provided in the TU MSHCP would contribute to the overall conservation values of these preserved areas for California condors.

Considering the amount of foraging habitat that would remain on Tejon Ranch under the TU MSHCP and Ranchwide Agreement, and the food supply for condors that would be produced from cattle, pig, and native ungulate carcasses on that foraging habitat in the TU MSHCP Mitigation Lands and other conserved areas of Tejon Ranch, it is likely that the ranch would continue to function as an essential and viable foraging area for the existing and expanding condor population. In addition, the proposed permanent conservation of historically and currently used traditional roost sites on Winters Ridge, along with the permanent land use restrictions on the TU MSHCP Mitigation Lands and other rangelands in the Tejon Ranch critical habitat unit, would enable those lands to continue to provide foraging and roosting habitat essential for the conservation of condors. The continuation of ongoing ranch-wide activities, such as grazing and hunting, and limitations on the nature and extent of public access within the ranch are also expected to maintain the conservation value of the TU MSHCP Mitigation Lands and other conserved areas of the ranch to the condor.

Finally, the Service does not believe that commercial and residential development proposed under the TU MSHCP would preclude condors from reaching the remaining portion of the Tejon Ranch critical habitat unit, other critical habitat units, or other foraging habitat in the northern portions of the Tehachapi Mountains and southern Sierra Nevada portions of their historic range. Condors regularly fly over other developed areas in southern and central California, as well as Arizona. Based on geographic positioning system (GPS) data, condors currently fly over developed areas in general vicinity of the Covered Lands, including the communities of Frazier Park, Lebec, Pine Mountain Club, Stallion Springs, Big Sur, and King City. Condors also regularly travel between Hopper Mountain National Wildlife Refuge and the Sespe Condor Sanctuary south and west of Tejon Ranch, as well as through the Tehachapi Mountains into the northern portion of their historical range. Condors can fly long distances in a single day, including over developments similar in size to the proposed TMV Project. Based on these patterns, the Service does not believe that the development proposed under the TU MSHCP would restrict condor movements or affect their use of their historical range.

For these reasons, the Service does not anticipate that the development proposed under the TU MSHCP would reduce condor reproduction through loss of foraging habitat in the Covered Lands, changes in food availability, or adverse effects on condor overflight.

As noted above, the Service will make a statutory determination regarding the effects of the proposed Federal action on the California condor and its critical habitat in an intra-Service Biological Opinion prepared in accordance with Section 7 of the ESA. In the Section 7 consultation, the Service will formally consider the direct, indirect, and cumulative effects of the proposed action on critical habitat and make a determination as to whether critical habitat will continue to serve its intended conservation role and function.