

Response to Comment Letter P-3

Response to Comment P-3-1

Funding of management and monitoring provided in the Tehachapi Uplands Multiple Species Habitat Conservation Plan (TU MSHCP) is the responsibility of the permittee, Tejon Ranchcorp (TRC), with funding assurances and cost assumptions provided in Section 9 of the TU MSHCP. TRC is responsible for providing manpower to carry out these activities, including annual funding for the U.S. Fish and Wildlife Service (Service) to provide technical assistance related to management of condors on the Covered Lands (see TU MSHCP Table 9-2); any future budgetary restrictions the Service may experience would not affect the Service's responsibility or ability to implement and fund mitigation, monitoring, and management activities. Section 8 of the Implementing Agreement also makes it clear that the "permittee shall pay all costs related to implementation of other California condor-related provisions and implementation of all other take minimization and mitigation measures specified in the MSHCP for the other Covered Species." Among these obligations is a commitment in the TU MSHCP that TRC will "deliver certification to the Service that the funds required of TRC to perform its duties under this TU MSHCP have been authorized and are available."

The Service will assess the permittee's compliance with the TU MSHCP through review of annual reports and will take enforcement actions, as required. It is expected that staffing would be available to fulfill this role.

Response to Comment P-3-2

Section 9.4 of the Implementing Agreement ensures the Service access to the Covered Lands for the purposes of monitoring and enforcing the conservation measures provided in the TU MSHCP. Specifically, that section states:

Pursuant to 50 CFR Section 13.21(e)(2), by accepting the Permit, Permittee consents to and will allow entry to the Covered Lands by agents and employees of the USFWS engaged in and for the purpose of ensuring compliance with the Permit, and laws and regulations applicable to the Permit, and/or undertaking any activities that are necessary to protect the Covered Species and/or are identified in the TU MSHCP. Except where specified below, such entry will occur under the following conditions: (1) at reasonable hours; (2) in a manner consistent with the purpose of the entry, that minimizes any disruption of the Covered Activities or any other operation of Permittee or any holder of a Certificate of Inclusion; (3) after provision of advance notice to Permittee; and (4) with the opportunity for an agent or employee of Permittee to accompany the USFWS's agent or employee. These conditions on entry will not apply in the following circumstances: (1) when the USFWS has reason to believe a Covered Species is at risk of injury or death and an immediate response is necessary; or (2) when the USFWS has reason to believe a violation of the Permit, or laws or regulations applicable to the Permit has occurred or may be occurring which, in the USFWS's good-faith judgment, warrants immediate or noticeless access; or (3) entry, without consent, is otherwise for law enforcement purposes consistent with the Fourth Amendment of the Constitution. Access to the Covered Lands by USFWS agents or employees and California Condor Recovery Team members solely to establish and operate a trap and release/supplemental feeding site, if deemed necessary by USFWS in accordance with TU MSHCP Section 4.4.3.2, shall not be governed by this Section 9.4, but shall be allowed in accordance with the provisions of the TU MSHCP.

Section 5.1.1(e)(2) through (4) of the Implementing Agreement also provides that the conservation easements conveyed on the Covered Lands, which would be conveyed in perpetuity, "...name the Service as a third party beneficiary with access rights and the right to enforce the terms of the conservation easement."

Response to Comment P-3-3

No features of the TU MSHCP would alter any existing Federal protections for whistle blowers.

Response to Comment P-3-4

As provided in 50 Code of Federal Regulations (CFR) 17.32, the Service considers several factors in determining the duration of an incidental take permit (ITP), including the duration of the activities proposed under the TU MSHCP, and the expected positive and negative effects on the Covered Species over the proposed term of the permit, including the extent to which the conservation plan will increase the survivability of the covered species and/or enhance their habitat. The Service also considers the extent of scientific and commercial data underlying the proposed plan, the length of time necessary to implement and achieve the benefits of the conservation plan, and the extent to which the program incorporates adaptive management strategies. TRC has requested the Service consider an ITP with a 50-year term. The Service will consider the above factors in determining the appropriate duration of the ITP for the TU MSHCP, should one be issued.

Section 12.2 of the Implementing Agreement, which is included as Appendix C to the TU MSHCP, includes provisions for the Service to suspend or revoke the ITP, in whole or in part, for cause in accordance with the laws and regulations in force at the time of such suspension or revocation. Federal Endangered Species Act (ESA) regulations also 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)). Outside of those circumstances, the "No Surprises" regulations in 50 CFR 17.22(b)(5) and (6) and 17.32(b)(5) and (6) provide that, as long as the TU MSHCP, Implementing Agreement, and ITP are being properly implemented, the Service shall not require additional conservation and mitigation measures that involve the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the TU MSHCP without the consent of the permittee.

Section 13 of the Implementing Agreement addresses modifications and amendments to the ITP and allows amendments in accordance with the applicable ESA regulations and National Environmental Policy Act (NEPA) requirements. If an amendment is pursued, TRC must provide a statement of reasons for the amendment and an initial analysis of the environmental effects (see Appendix C to the TU MSHCP, Section 13.2, Implementing Agreement,).

Response to Comment P-3-5

The commenter is correct in stating that Kern County will have final approval over the design and location of structures within the Tejon Mountain Village (TMV) Planning Area. Other Federal and state agencies, such as the U.S. Army Corps of Engineers (USACE), Regional Water Quality Control Board (RWQCB), and California Department of Fish and Game (CDFG), may also influence the

location and design of structures, particularly where they are proposed to occur in sensitive communities, such as wetlands or riparian areas.

With respect to the Service's role in the design of developed infrastructure, the *Habitat Conservation Planning Handbook* (U.S. Fish and Wildlife Service 1996) provides that the "purpose of the habitat conservation planning process and subsequent issuance of incidental take permits is to authorize the incidental take of threatened or endangered species, not to authorize the underlying activities that result in take." Here, the proposed action is approval of the TU MSHCP and issuance of an ITP. Any development that would occur on the Covered Lands would be subject to a separate approval process under the jurisdiction of Kern County, and other local, state and Federal regulatory agencies, as noted above.

Nonetheless, the TU MSHCP does include conservation measures designed to deter condors from being attracted to human activities and structures on the Covered Lands. These measures, which are provided in Section 4 of the TU MSHCP and summarized in Table 2-3 in Volume I of the Supplemental Draft Environmental Impact Statement (EIS), include provisions requiring covenants, conditions, and restrictions (CC&Rs) on the development area that, among other things, limit the type of development to low density and limit the heights of the buildings to 35 to 45 feet above finished grade, as well as provisions to avoid or clean up microtrash (which can attract condors) at work sites, filming sites, and recreation areas. The Service-approved biologist would also be required to conduct educational programs and disseminate education materials concerning the California condor to contractors, home buyers and visitors. Such materials would be reviewed and approved by the Service and would provide guidance on proper behavior by persons who construct or buy real estate or visit the Covered Lands. In addition, anti-perching devices would be required on all new vertical communication towers. These conservation measures would be enforceable under the TU MSHCP, ESA, and the Implementing Agreement.

Response to Comment P-3-6

As required by NEPA, the magnitude and incremental effects (qualitative or quantitative) of each alternative are disclosed and compared in this EIS. NEPA regulations require that this evaluation discuss the context and intensity of each potential effect (40 CFR 1508.27); a significance conclusion is not legally required. However, to provide the public with a meaningful understanding of how potential effects were considered in the EIS, each section in Chapter 4, Environmental Consequences, of the Supplemental Draft EIS describes the general criteria (quantitative and/or qualitative) by which the effects are evaluated. These criteria are considered in assessing the relative magnitude of the potential direct, indirect, and cumulative effects of each alternative, including, where appropriate, determining if the effects are anticipated to be minor (i.e., minimal or hardly noticeable), moderate (i.e., above negligible), or substantial.

As discussed in Section 4.0.5, Method for Assessing Relative Magnitude of Effects, in Volume I of the Supplemental Draft EIS, the consideration of effects is based on the criteria listed in the methods section of each resource section of Chapter 4, Environmental Consequences. For example, regarding biological resources, Section 4.1.1.2 in the Supplemental Draft EIS states the magnitude of effects was considered in terms of whether an alternative would substantially reduce the number of acres or substantially degrade habitat for special-status species and unique or sensitive habitats, or if it would exceed a standard or criterion provided by another Federal, state or local statute specific to biological resources, such as the California Fish and Game Code (FGC) or Federal Clean Water Act (CWA). Quantitative measures and standards were identified and used in the individual analyses where possible.

The Service acknowledges that the assessment of the relative magnitude of effects is subjective, but has included such determinations to provide a basis for comparing the relative effects of each of the five alternatives considered in the Supplemental Draft EIS.

Response to Comment P-3-7

Where applicable, the Supplemental Draft EIS analysis identified the measures or practices that would be implemented in the Covered Lands, to the extent practicable, to avoid, minimize, or mitigate the effects of the proposed action. For example, in Section 4.2, Water Resources, it is noted that construction in waters of the U.S. and State would be avoided to the extent practicable with the exception of road crossings and culverts. Practicable mitigation measures are those considered to be possible given the constraints of implementation in the context of the physical environmental and operational feasibility. The Record of Decision (ROD) must also state whether all practicable mitigation measures have been adopted and if not, why not (Section 1505.2[c]).

Response to Comment P-3-8

The criteria for assessing the relative magnitude of direct, indirect, or cumulative effects depend on the resource in question, the specific effect mechanism being considered, and the context for each effect (i.e., the environmental baseline; applicable timeframe; and cumulative scenario). As indicated in Response to Comment P-3-6, the Service acknowledges the determinations of the relative magnitude of effects (minor, moderate, or substantial) provided in the Supplemental Draft EIS are subjective, but are provided as a basis of comparison of the relative effects of the five alternatives considered in the EIS. With respect to air quality effects, Section 4.3, Air Quality, indicates the analysis of the effects and magnitude of the direct, indirect, and cumulative effects on air quality are considered in terms of whether each alternative would contribute to an exceedance of any applicable air quality thresholds, as a result of construction, operations, or both; expose sensitive receptors to unacceptable levels of risk from exposure to toxic air contaminants (TACs) or carbon monoxide (CO) hotspots; or expose people to an unmitigable objectionable odor.

Response to Comment P-3-9

Comment noted. Education materials regarding acceptable activities in open space areas, pet restrictions, and wildlife restrictions are intended to provide guidance on proper behavior by persons who buy real estate, recreate, or otherwise visit the Covered Lands. Conservation measures to protect the Covered Species would be monitored and enforced by TRC, including the Tejon staff biologist, and the Service and subject to compliance reporting. Land managers (e.g., homeowners associations and conservation easement holders) would also be authorized and required to take action to prevent any activity that would pose a threat to the Covered Species, including enforcement of the project CC&Rs, as implemented through rules and regulations promulgated by the land manager. These rules must be no less stringent than the conservation measures provided in the TU MSHCP. Furthermore, TRC, as the permittee, would retain primary responsibility for enforcing all ITP conservation requirements.

Enforcement of such rules can rely on a much broader range of tools than eviction, including fines, legal action, and other mechanisms. CC&Rs, for example, are legally binding contracts and are enforceable through prescribed notices and hearings, and ultimately through civil courts. In all cases, however, TRC would be required to demonstrate compliance with the ESA and the ITP,

including applicable take avoidance, minimization, and mitigation measures for Covered Species identified in the TU MSHCP, and the terms of any conservation easement recorded on the Covered Lands.

Finally, violations of the ESA, including unauthorized take of a federally listed species, 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. 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.

Response to Comment P-3-10

Comment noted. The Service believes the information provided in the TU MSHCP and EIS, including data on status and distribution, habitat characteristics and use, and occurrence on the Covered Lands of the Covered Species, is based on the best scientific information available. In addition, the analysis of the alternatives considered in the Supplemental Draft EIS, including the Proposed TU MSHCP Alternative, was completed by the Service, independent of TRC. Assembly and participation of an independent scientific advisory committee or group of biologists in the HCP planning process is not a requirement of the ESA, nor required to inform a legally adequate NEPA analysis. The public review process provides the opportunity for independent review.

Marcotte, Kimberley

From: Roger_Root@fws.gov
Sent: Tuesday, May 01, 2012 9:38 AM
To: Zohn, April; Marcotte, Kimberley
Cc: Robles, John; Mary_Grim@fws.gov; Kirkland, Steve; David_Simmons@fws.gov
Subject: Fw: response to multispecies plan for tejon ranch

----- Forwarded by Roger Root/VFWO/R1/FWS/DOI on 05/01/2012 09:33 AM -----

Mary Ann Lockhart

To: fw8tumshcp@fws.gov

05/01/2012 08:32 AM

cc:

Subject: response to multispecies plan for tejon ranch

May 1, 2012

Thank you for the opportunity to respond to the proposed multispecies habitat conservation plan for Tejon Ranch.

First I want to state that the following questions and comments I wish to make are strictly my own and do not represent any of the environmental groups that I am associated with.

Concerns :

- P-3-1 | Monitoring of the proposed plan: Tejon's holdings are very large and varied. Is there really enough manpower to monitor all the activities going on, given the cutbacks everywhere in the government?
- P-3-2 | Will Fish and Wildlife Service be able to inspect unannounced any area of concern covered by this agreement?
- P-3-3 | Would a whistleblower be protected if s/he might provide information that appeared valid to the point that it would trigger such an unannounced visit?
- P-3-4 | Fifty year plan? Once and if accepted could Congress interfere with the plan, changing requirements, etc.
- P-3-5 | As I understand it, Kern County Planning Department will be in the center of planning and design of the proposed homes. Will Fish and Wildlife have any rights to determine the siting of proposed houses? Will F@W have any say in design of homes in terms of making homes unattractive for condors?
- P-3-6 | Here are some suggestions to make the protection efforts more effective;
 1. Close up the too-many loopholes in the wording of the plan, loopholes mainly caused by lack of specificity.
 Examples:...
 the phrase: but effects would remain minor How is minor defined? Removing 20 trees or 5 trees?
if practicable.... If it is not practicable, what should be done? Does it mean that you can go ahead no matter what the impact
- P-3-7 | may be? or does it mean, give up that plan and try to figure out another way to achieve what is needed to be done without negative impact or what?
- P-3-8 | would not contribute substantially...re .air pollution. Now there are some standards about which one could argue but at least there is something more definitive to discuss but to begin with *how do you define substantially?*
- P-3-9 | 2. One has to question the effectiveness of developing informational papers in regards to having the privilege to build and occupy a million dollar home on the property without having effective means of enforcing those rules. Example: Dogs cannot run free in the woods . Could you really evict someone from a million dollar home s/he built if s/he absolutely refused to obey the rules s/he agreed to follow?
- 3. There is a need to assemble a body of biologists that have no connection with Tejon Ranch and Fish and Wildlife Service or the State of California to provide neutral information in regards to interpretation of impacts of proposed activities on the Condor and other protected and threatened species, etc. Taxpayer money should be used for reimbursement.
 These persons should be free of obligation to support any one position of the parties involved in regards to the proposed developments.

P-3-10

Finally, I compliment the efforts of the staff that put the presentation of comments by the public in a form that made it much easier to understand and far less time consuming for the reader to absorb the main points of concern in regard to this project.

Sincerely yours,

Mary Ann Lockhart

