

**Center for Biological Diversity, Sierra Club, Desert Survivors,  
California Native Plant Society, Defenders of Wildlife, and  
Desert Tortoise Council**

***VIA CERTIFIED MAIL AND ELECTRONIC MAIL***

March 24, 2021

Paul Souza, Regional Director  
U.S. Fish and Wildlife Service  
Region 8 - Pacific Southwest Region  
2800 Cottage Way, Room W-2606  
Sacramento, CA 95825  
Email: [paul\\_souza@fws.gov](mailto:paul_souza@fws.gov)

Scott Sobiech, Field Supervisor  
Ecological Services  
Carlsbad Fish and Wildlife Office  
U.S. Fish and Wildlife Service  
2177 Salk Avenue, Suite 250  
Carlsbad, CA 92008  
Email: [scott\\_sobiech@fws.gov](mailto:scott_sobiech@fws.gov)

Deb Haaland, Secretary  
Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240  
Email: [doixecsec@ios.doi.gov](mailto:doixecsec@ios.doi.gov)

Karen Mouritsen, California State Director  
Bureau of Land Management  
2800 Cottage Way, Suite W1623  
Sacramento, CA 95825  
Email: [castatedirector@blm.gov](mailto:castatedirector@blm.gov)

Andrew Archuleta, District Manager  
California Desert District  
Bureau of Land Management  
22835 Calle San Juan De Los Lagos  
Moreno Valley, CA 92553  
Email: [BLM\\_CA\\_Web\\_CD@blm.gov](mailto:BLM_CA_Web_CD@blm.gov)

**Sixty-Day Notice of Intent to Sue the Secretary of the Interior, U.S. Fish and Wildlife Service, and Bureau of Land Management Pursuant to the Endangered Species Act; Actions Relating to the California Desert Conservation Area Plan Amendments and Approvals for the West Mojave Route Network Project and Travel Management Plans.**

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity (“Center”), Sierra Club, Desert Survivors, California Native Plant Society, Defenders of Wildlife, and Desert Tortoise Council (collectively “environmental organizations”) of intent to sue the U.S. Fish and Wildlife Service (“FWS”) and the Bureau of Land Management (“BLM”) over violations of Sections 2, 4, 7, and 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, 1533, 1536, 1538, for actions and inactions related to the management of the desert tortoise and other listed species in the California Desert Conservation Area (“CDCA”). This

letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

BLM has violated the ESA by failing to protect and conserve listed species and their habitats in its management of lands within the CDCA pursuant to the Plan Amendments and management actions adopted in the Record of Decision for the West Mojave Route Network Project, Decision to Amend California Desert Conservation Area Plan and Implement Nine Travel Management Plans signed October 3, 2019 (“2019 WEMO ROD”) in reliance on the Fish and Wildlife Service’s Biological Opinion for the West Mojave Route Network Project, San Bernardino, Inyo, Kern, Riverside, and Los Angeles Counties, California (6840 (P) LLCAD00000) issued on September 30, 2019 (“2019 WEMO BiOp”) and its accompanying Incidental Take Statement (“ITS”). The 2019 WEMO Plan ROD adopted the Route Network Project and seven plan amendments including approval of continued livestock grazing within Desert Tortoise critical habitat on allotments in the CDCA Plan for the WEMO planning area.

The environmental organizations, their members, and staff, actively participated in the administrative processes for the BLM plan amendments and the route network project including, but not limited to, attending public meetings, providing written comments on scoping documents, providing written comments on draft plan documents and environmental documents, and filing protests regarding final plan documents and environmental documents. The environmental organizations, their members, and staff, have exhausted all available administrative remedies provided by BLM, nonetheless, violations of the ESA continue. As a result of BLM’s management of the CDCA, the desert tortoise and other sensitive, rare, threatened, and endangered species are at risk of continued decline and loss of essential and critical habitat on public lands within the CDCA.

The FWS has also violated the ESA in issuing the 2019 WEMO BiOp and ITS which cover six plants [Cushenbury milk-vetch (*Astragalus albens*), Cushenbury buckwheat (*Eriogonum ovalifolium* var. *vineum*), Cushenbury oxytheca (*Acanthoscyphus parishii*, *Oxytheca pi* var. *goodmaniana*), Parish’s daisy (*Erigeron parishii*), triple-ribbed milk-vetch (*Astragalus tricarinatus*), and Lane Mountain milk-vetch (*Astragalus jaegerianus*)] and the desert tortoise [Mojave distinct population segment (*Gopherus agassizii*)], and provides take authorization to BLM for the desert tortoise without properly identifying and analyzing the impacts of the Plan Amendments including livestock grazing, route network, and travel management plans on the survival and recover of these listed species and impacts to critical habitats affected by the activities authorized in the 2019 WEMO ROD, and without requiring appropriate monitoring to determine the actual project effects on listed species (50 CFR §402.14(i)(3)). The 2019 WEMO BiOp and ITS also completely fail to address at least four other listed species (endangered arroyo toad (*Anaxyrus californicus*) and designated critical habitat, endangered least Bell’s vireo (*Vireo bellii pusillus*), endangered southwestern willow flycatcher (*Empidonax traillii extimus*) and designated critical habitat, Inyo California Towhee and designated critical habitat, and the threatened yellow-billed cuckoo (*Coccyzus americanus*))<sup>1</sup> found in the West Mojave area of the

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<sup>1</sup> Endangered arroyo toad occurs in the planning area, near Little Horsethief Creek, which eventually flows into the West Fork of the Mojave River; this area is located along the north slope of the San Bernardino Mountains; Least Bell’s vireos breed within the Big Morongo Canyon Area of Critical Environmental Concern in the WEMO planning area and may also be found in other riparian areas of the WEMO; southwestern willow flycatchers are

CDCA that may be affected by the Plan Amendments and activities authorized by BLM in the 2019 WEMO ROD. In addition, the 2019 WEMO BiOp completely ignores impacts to listed species and critical habitats outside of the West Mojave area that may be affected by Plan Amendment-I (“PA-I”) which is a CDCA-wide plan amendment that eliminates the limit on routes that has been part of the CDCA Plan since its inception.<sup>2</sup> Therefore, FWS’s conclusions that the 2019 WEMO ROD does not jeopardize listed species or destroy or adversely modify designated critical habitat are arbitrary and capricious, and the BLM’s reliance on those conclusions in the invalid 2019 WEMO BiOp and ITS is unlawful.

## **I. BACKGROUND**

### **A. The California Desert Conservation Area Plan and Amendments**

The CDCA is an approximately 25 million-acre swath of the California desert stretching from north of Death Valley National Park on the Nevada border to the Mexican border and encompassing much of the eastern part of the state between those two points. BLM is responsible for managing approximately 10 million acres within the CDCA. Congress created the CDCA to protect the abundant biological, ecological, cultural, aesthetic, and economic resources found there which are “extremely fragile, easily scarred, and slowly healed.” Federal Land Policy and Management Act of 1976 (“FLPMA”), 43 U.S.C. § 1781(a)(2) & (3). Approximately half of the CDCA is made up of public land managed by the BLM. 43 U.S.C. § 1781(c). The planning document which guides virtually all BLM activities on the CDCA is the CDCA Plan.<sup>3</sup> The amendments include bioregional plans (including the 2006 West Mojave plan), bioregional travel management plans, and most recently, a comprehensive set of amendments adopted in 2016 under the umbrella of the Desert Renewable Energy Conservation Plan (“DRECP”).

In 2019, the BLM adopted the 2019 WEMO ROD. Plan Amendment-I (PA-I) included in the ROD is a CDCA-wide plan amendment, while other Plan Amendments and management actions are specific to the West Mojave planning area.

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found on lands managed by the BLM in the planning area including (Arraste Canyon) and designated critical habitat near Little Horsethief Creek/West fork of the Mojave River and along the Mojave River; Inyo California Towhee and its designated critical habitat is found in Indian Joe Canyon Ecological Reserve, north of Trona; and yellow billed cuckoo is found in several places including along the Mojave River in Victorville and Barstow, Piute Ponds, California City, Galileo Hill, Butterbrecht Springs and Inyokern area.

<sup>2</sup> Desert tortoise and its critical habitat occur throughout the CDCA plan area but CDCA-wide impacts to desert tortoise and its critical habitat from PA-I are not addressed at all in the biological opinion. Other listed species are found in areas of the CDCA outside of the West Mojave and may be affected by the adoption of PA-I including, but not limited to, the Peninsular bighorn sheep, the Ridgway’s Rail (formerly Yuma clapper rail), Desert pupfish, Southwestern willow flycatcher, Amargosa Vole, Amargosa niterwort and Ash Meadows gumplant

<sup>3</sup> U.S. Department of the Interior, Bureau of Land Management, The California Desert Conservation Area Plan 1980 (amended and reprinted as U.S. Department of the Interior, Bureau of Land Management, The California Desert Conservation Area Plan 1980, as Amended).

## **B. Background on Desert Tortoise and Other Listed Species That May Be Affected by the 2019 WEMO ROD**

The Agassiz's desert tortoise was listed as threatened in 1990 and critical habitat was designated in 1994. A recovery plan was adopted in 1994 and revised in 2011. Unfortunately, many of the recommendations in the recovery plan were never adopted in BLM's land use plan amendments or implemented, and the desert tortoise populations have continued to decline. Indeed, the desert tortoise now has the dubious and concerning distinction of being added to the list of the planet's 50 most endangered tortoises and freshwater turtles. World-wide, Agassiz's desert tortoise is considered to be Critically Endangered and Vulnerable.<sup>4</sup> The most recent climate change modeling for desert tortoise indicates that the West Mojave Desert will be a refugia for desert tortoise into the future.<sup>5</sup> Therefore, high levels of conservation for Agassiz's desert tortoise are needed in the WEMO plan area, its modeled refugia, to ensure survival of the species and to support recovery efforts to reverse the declines.

Recent data continue to point to a continued decline in desert tortoise populations in the West Mojave Desert.<sup>6</sup> California has 75.9% of range-wide habitat for Agassiz's desert tortoise primarily on BLM managed lands, including habitat designated as Areas of Critical Environmental Concern ("ACECs")/federally designated critical habitat, containing part or all of three Recovery Units. The West Mojave Recovery Unit continues with declines in population to the point where, as a whole, it no longer supports population densities required for a viable population. Analyses over ten years of data (2004-2014) collected by the FWS document a 50.7% decline in Agassiz's desert tortoise density in the West Mojave area (Fremont-Kramer, Ord-Rodman Superior-Cronese, and Pinto Mountains ACECs/federally designated critical habitat).

In 2014, the FWS<sup>7</sup> concluded that "most of the declines" in desert tortoise populations "[have] occurred within the Western Mojave" and that "Declining proportions of juvenile tortoises observed in the Western Mojave and Colorado Desert recovery units reinforce concerns about the status of tortoise populations in those units due to an apparent reduction in younger cohorts that might otherwise have bolstered declining adult numbers has occurred within the Western Mojave."

The subsequent monitoring reports from 2014 to 2017<sup>8</sup> for the desert tortoise in the western Mojave Recovery Unit from FWS' Desert Tortoise Recovery Office document

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<sup>4</sup> [http://www.iucn-tftsg.org/wp-content/uploads/file/Top%2025/Turtle\\_Conservation\\_Coalition\\_2018\\_Top\\_25+\\_Turtles\\_in\\_Trouble\\_lr.pdf](http://www.iucn-tftsg.org/wp-content/uploads/file/Top%2025/Turtle_Conservation_Coalition_2018_Top_25+_Turtles_in_Trouble_lr.pdf)

<sup>5</sup> Sinervo 2014

<sup>6</sup> Range-wide monitoring of the Mojave Desert Tortoise (*Gopherus agassizii*): 2019 annual report DRAFT available at [https://www.fws.gov/nevada/desert\\_tortoise/documents/reports/2020/2019\\_DRAFT\\_RangewideMojaveDesertTortoiseMonitoring.pdf](https://www.fws.gov/nevada/desert_tortoise/documents/reports/2020/2019_DRAFT_RangewideMojaveDesertTortoiseMonitoring.pdf)

<sup>7</sup> USFWS 2014.

<sup>8</sup> USFWS 2018. [https://www.fws.gov/nevada/desert\\_tortoise/documents/reports/2018/2017\\_rangewide-mojave-desert-tortoise-monitoring.pdf](https://www.fws.gov/nevada/desert_tortoise/documents/reports/2018/2017_rangewide-mojave-desert-tortoise-monitoring.pdf).

USFWS 2016. [https://www.fws.gov/nevada/desert\\_tortoise/documents/reports/2015/201516\\_rangewide-mojave-desert-tortoise-monitoring.pdf](https://www.fws.gov/nevada/desert_tortoise/documents/reports/2015/201516_rangewide-mojave-desert-tortoise-monitoring.pdf)

continuing declines throughout the West Mojave Recovery unit in all ACECs/federally designated critical habitat. While the recent (2015-2018) Agassiz's desert tortoise monitoring reports do not evaluate the overall population decline since the population baseline was established in the early 2000s, the ongoing continuing declines in the West Mojave are dooming this species in the very place where it is most likely to survive under climate change model scenarios. Peer-reviewed, published data from 2018 indicate that some areas of the West Mojave no longer support populations of desert tortoise that are dense enough for long-term viability, and "The negative population trends in most of the TCAs [Tortoise Conservation Areas] for Mojave Desert Tortoises indicate that this species is on the path to extinction under current conditions."<sup>9</sup>

Many impacts to tortoise and its habitat are controllable and the need to limit those threats is even stronger in the face of increasing threats due to climate change. Off-road vehicle ("ORV") routes have long been documented to cause declines in desert tortoise populations.<sup>10</sup> ORV use on and off route directly impacts mortality by striking or crushing tortoises on the surface or in burrows. ORV routes indirectly impact habitat alteration from soil compaction, vegetation destruction via direct impacts or indirect impacts via dust, promotion of weed invasions which displaces native vegetation, and toxins from exhaust. Roads are also documented to form barriers that inhibit dispersal and subsequent gene flow between subpopulations and metapopulations.<sup>11</sup> This is contrary to the recovery plan, which highlighted the importance of connectivity between desert tortoise habitats to maintain gene flow. In addition, because roads and routes alter hydrology,<sup>12</sup> and resulting enhanced hydrological conditions increase diversity and productivity of vegetation beside roads, which attracts the herbivorous tortoise, roads and routes place tortoise at greater risk of direct mortality from motorized vehicles.<sup>13</sup>

Published research identifies that in the West Mojave Recovery Unit, protection of desert tortoise habitat through local exclusion of motorized recreation has reversed the downward trend in desert tortoise populations, and has documented increases in younger age classes.<sup>14</sup> The Desert Tortoise Research Natural Area ("DTRNA") has the longest history of protection (maintained fencing and legal exclusion of livestock and vehicles) in the West Mojave Desert. The DTRNA had significantly more live tortoises and lower death rates than two other areas included in the study: 1) private lands outside the DTRNA with no livestock or vehicular exclusions or limitations, and 2) federally-designated critical habitat for the desert tortoise managed by the BLM that has more recently excluded livestock, limited vehicular traffic, and recently has been partially fenced. These latter two areas had lower tortoise densities and higher death rates than the DTRNA. In fact, tortoise abundance in the areas outside of the DTRNA was negatively associated with vehicle tracks – meaning the less vehicle tracks, the more tortoises. This study shows the blueprint for desert tortoise conservation and desperately needed recovery – maintained fencing and elimination of vehicle routes.

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<sup>9</sup> Allison and McLuckie, 2018

<sup>10</sup> Boarman 2002

<sup>11</sup> Boarman et al 1997

<sup>12</sup> Myers Report

<sup>13</sup> IBID

<sup>14</sup> Berry et al. 2014

Despite the declining status of the desert tortoise populations and increasing degradation of the critical habitat, the BLM's 2015 biological assessment ("2015 BA"), EIS, and 2019 WEMO BiOp failed to rely on the best available science in analyzing the status of the species, address impacts from the route network designation and plan amendments, and consider needed conservation efforts to ensure conservation, survival, and eventual recovery of the tortoise.

Lane Mountain milk-vetch and triple-ribbed milkvetch are discussed in the 2019 WEMO BiOp but the impacts of the decision on these species is not adequately assessed.<sup>15</sup> In 2014<sup>16</sup>, FWS identified the threats to the Lane Mountain milk-vetch and its federally designated critical habitat from off-road vehicles ("ORVs") that include habitat loss, fragmentation and degradation. It concludes that within the species already limited range, BLM's reliance on minimization measures including fencing, signing, and closing areas "have had limited success in managing access or controlling new unauthorized routes." They conclude that "[ORV] use is ongoing and has increased from past levels. The impacts of ORV use currently threaten the destruction, modification, or curtailment of the habitat or range of Lane Mountain milk-vetch."

Many of the riparian obligate species in the WEMO area are affected by the activities authorized in the decision but were not addressed in the 2019 WEMO BiOp. Specifically, the FWS failed to address impacts to the endangered arroyo toad and designated critical habitat, endangered least Bell's vireo, endangered southwestern willow flycatcher and designated critical habitat, and threatened yellow-billed cuckoo.

And other listed species in the CDCA area that may be affected by the decision to adopt PA-I were not considered in the 2015 BA or 2019 WEMO BiOp at all. For example, the Peninsular bighorn sheep populations are small and restricted to mountain ranges surrounded by urban and industrial development. The species has continued to decline in those areas despite conservation efforts. ORV routes and use present a threat to Peninsular bighorn sheep by disturbing breeding, feeding and sheltering and thus cause sheep to abandon the already limited habitat areas. As another example, the Ridgway's Rail (*Rallus obsoletus*), formerly Yuma clapper rail, has very small population numbers and is subject to multiple threats within the CDCA including loss of riparian habitat and impacts from development.

## **C. West Mojave Route Network Project and Plan Amendments**

### **1. Background on 2003 WEMO Route Designation and 2006 WEMO Route Designation and Plan Amendments**

On June 30, 2003, BLM adopted the Western Mojave Desert Off Road Vehicle Designation Project ("WEMO Route Designation") and a Finding of No Significant Impact ("FONSI") for that action. On the same day, FWS issued the 2003 WEMO Route Designation

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<sup>15</sup> See Attachment A providing aerial photographs of the Lane Mountain milk-vetch's populations taken during 2021, overlaid with WEMO designated routes, which show widespread proliferation of unauthorized routes in the plant's habitat.

<sup>16</sup> 79 FR 25084

BiOp. In 2006, the BLM approved an amendment to the West Mojave area of the CDCA Plan and modified its motorized vehicle management decisions, including ORV route designation, on more than 3 million acres of public land within the CDCA by designating over 5,000 miles of motorized vehicle routes, based on a flawed “decision tree” process. A coalition of conservation organization, including the Center, Sierra Club, Desert Survivors, and California Native Plant Society, filed a legal challenge to the route designation process and the ESA compliance. In response to that litigation filed challenging the 2006 the biological opinion, FWS issued a memo in 2007 amending the ITS in the 2006 biological opinion.

In September 2009, the Court found that the BLM violated the National Environmental Policy Act (“NEPA”) and FLPMA in adopting the 2006 Western Mojave management plan amendment, but that the BLM and FWS did not violate the ESA by relying on the 2006 biological opinion as amended in 2007. *Ctr. for Biological Diversity et al. v. United States BLM*, 746 F. Supp. 2d 1055, 1129 (N.D. Cal. 2009). In January 2011, the Court remanded the 2006 West Mojave Record of Decision to the BLM to reconsider route designation throughout the WEMO area and other issues, including air quality impacts of the plan, cumulative impacts to resources from routes and grazing, impacts to unusual plan assemblages (“UPAs”), and impacts to the Mojave fringe-toed lizard (*Uma scoparia*). *Ctr. for Biological Diversity v. United States BLM*, 2011 U.S. Dist. LEXIS 11764 (N.D. Cal. Jan. 28, 2011). At that time, the Court ordered BLM to complete a revised decision by March 31, 2014. The Court later granted several extensions of time to BLM to complete the remand, ultimately resulting in the 2019 WEMO ROD.

## **2. 2019 WEMO Route Designation Project and Plan Amendments; 2019 WEMO Biological Opinion and ITS**

In 2011, BLM issued a “Notice of Intent to Prepare an Environmental Document and Proposed Plan Amendment for the West Mojave (WEMO) Plan, Motorized Vehicle Access Element” (76 Fed. Reg. 56466-68 (September 13, 2011)), and in 2013 BLM issued a “Amended Notice of Intent To Clarify the Scope of Analysis of the Environmental Document and Proposed Plan Amendment in the West Mojave Planning Area, to the Motorized Vehicle Access Element of the California Desert Conservation Area Plan” (78 Fed. Reg. 25758 (May 2, 2013)). In March 2015, the BLM issued a Draft Supplemental Environmental Impact Statement (“EIS”) with a 90-day public comment period; the comment period was then re-opened for an additional 120-days in September 2015. After the DRECP ROD was issued in September 2016, BLM issued another revised Draft Supplemental EIS in March 2018 with a 90-day public comment period. The BLM published the Final EIS and draft Plan Amendments on April 26, 2019, which initiated a concurrent 30-day protest and a 60-day Governor’s consistency review period.

The Record of Decision for the West Mojave Route Network Project Decision to Amend California Desert Conservation Area Plan and Implement Nine Travel Management Plans was adopted in October 2019. The 2019 WEMO ROD acknowledged that ESA consultation was needed and a copy of the 2019 WEMO BiOp issued by FWS on September 30, 2019, was Appendix A to the ROD. 2019 WEMO ROD at 5. The environmental organizations protest the following planned amendments (“PA”):

- PA-I changed the language in the CDCA plan that limits the extent of ORV routes to “existing routes” of travel as of 1980 to “restricted to designated routes of travel.” PA-I’s “restricted to designated routes of travel” language fails to constrain ORV use or route expansion in the CDCA in anyway.
- PA-III created approximately 15 miles of routes for competitive ORV races that could operate under special recreation permits year-round. In addition, it created a connector route between the Johnson Valley and Stoddard Valley Off-highway Vehicle Recreation Areas that crosses the Ord-Rodman Critical Habitat Unit, which was expressly forbidden during formulation of the original WEMO Plan.
- PA-IV added Koehn, Cuddeback, Coyote, and Chisholm Trail lakebeds to the Table 9 list of designated lakebeds in the CDCA plan. It designated Cuddeback and Coyote dry lakes, both of which are surrounded by designated tortoise critical habitat, as open to ORV use. Koehn dry lake was designated as limited use on designated routes and additional use could be authorized by permit. These designations allow more ORV use on Koehn, Cuddeback, and Coyote lakebeds. Chisholm Trial dry lake was designated as closed due to public health concerns caused by historic mining. BLM ignored concerns raised that ORV use would not be restricted to the lakebeds, that adjacent vegetated critical habitats would be adversely affected, resulting in adverse modification of critical habitat.
- PA-V eliminated a previous permit requirement for ORV use in the Rand Mountains-Fremont Valley Management Area; this area includes desert tortoise critical habitat.
- PA-VI limited stopping and parking in Desert Tortoise (DT) ACECs and California Desert National Conservation Lands (CDNCLs) to 50 feet from route centerline on previously disturbed areas, except as site-specifically designated, and limited camping in DT ACECs and CDNCLs to previously existing sites within 50 feet from route centerline, except as site-specifically designated. (This updated the existing limits in ACECs to include CDNCLs designated in the DRECP). Outside of DT ACECs and CDNCLs, BLM limited stopping, parking, and camping within 100 feet of route centerline on previously disturbed areas, except as site-specifically designated.
- PA-VII retained livestock grazing in active allotments within desert tortoise critical habitat and management of grazing allotments pursuant to the CDCA Plan. BLM did not adopt any other changes in the way BLM manages livestock grazing on active allotments in ACECs or critical habitat for the desert tortoise or other sensitive areas. BLM management of livestock grazing has not changed since the 2006 consultation.

## II. REQUIREMENTS OF THE ESA

Section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31.<sup>17</sup> “Take” is

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<sup>17</sup> The 2019 WEMO BiOp was issued on September 30, 2019 and is based on the earlier version of the regulations. Amendments to the regulations implementing the ESA were adopted in 2019 and went into effect on October 28, 2019.



defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. *See* 16 U.S.C. § 1532(19). Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2). These protections are intended to ensure the conservation of listed species.

Section 7 of the ESA requires all federal agencies to ensure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). For each federal action, the action agency must request from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the federal agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i). The action agency may undertake the biological assessment as part of its compliance with NEPA, but the NEPA documents must provide sufficient information for the agencies to make informed biological assessment of effects of the proposed actions. 16 U.S.C. § 1536(c)(1).

If the federal agency determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14. To complete formal consultation FWS must provide a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. To comply with formal consultation regulatory requirements, FWS must evaluate both the current status of listed species as well as the effects of the proposed action and cumulative effects on the listed species. *Id.* § 402.14(g)(2)-(3). Agencies are required to “use the best scientific and commercial data available” in assessing impacts to protected species during the consultation process. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(d)<sup>18</sup>, (g)(8).<sup>19</sup> Based on this information, FWS must reach a “biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(g)(4).

The biological opinion must include a “summary of the information on which the opinion is based” and a “detailed discussion of the effects of the action on listed species or critical habitat.” 50 C.F.R. § 402.14(h)(1), (2). If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline

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<sup>18</sup> 50 C.F.R. § 402.14(d) (“Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.”)

<sup>19</sup> 50 C.F.R. § (g)(8)(2018) (“In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.”)

“reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the listed species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with to implement those measures, reporting requirements, and, procedures to handle or dispose of any individuals of a species actually taken. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1).

In order to monitor the impacts of incidental take, the action agency must monitor and report the impact of its action on the listed species to FWS as specified in the ITS. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, the federal agency must reinitiate consultation with FWS immediately. 50 C.F.R. § 401.14(i)(4).

The re-initiation of formal consultation is required and must be requested by the action agency or FWS if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

After the initiation or re-initiation of consultation, the action agency is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

### **III. VIOLATIONS OF THE ESA**

#### **A. Violations of Section 7(a)(2) & 7(c); Unlawful Reliance on Inadequate Biological Opinion for Listed Species**

Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical . . . .” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the FWS whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is defined in the ESA’s implementing regulations to “mean all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States. . . .” 50 C.F.R. § 402.02. Even after the procedural requirements of consultation are complete, however, the ultimate duty to ensure that an activity

does not jeopardize a listed species lies with the action agency. An action agency's reliance on an inadequate, incomplete, or legally flawed biological opinion to satisfy its ESA section 7 duty is arbitrary and capricious, for example if information was not considered in the biological opinion that challenges its conclusion or if the FWS made clear legal errors. *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010).

The BLM's adoption of the 2019 WEMO ROD was a federal agency action requiring consultation. Here both the consultation process and the resulting biological opinion are flawed in multiple ways and therefore both FWS's issuance of the 2019 WEMO BiOp and BLM's reliance on it were unlawful.

## **1. BLM's Biological Assessment is Inadequate**

Although a biological assessment of the species affected by the proposed action was prepared by BLM and submitted to FWS in 2015 ("2015 BA"), it is unclear whether FWS relied on that document in its consultation. The 2019 WEMO BiOp does not mention any biological assessment but rather states that FWS "based this biological opinion on information obtained from your final supplemental environmental impact statement for the proposed land use plan amendment (Bureau 2019b), a table of errata regarding revised data (Toedtli 2019), and other information in our files. We also coordinated closely with your staff during the development of the biological opinion." 2019 WEMO BiOp at 1. While such reliance on NEPA documents is allowable under the ESA section 7(c)(1), because the FEIS and Errata for the WEMO did not contain an adequate assessment of impacts to the species and designated critical habitats, and the 2015 BA also failed to adequately address these issues, BLM failed to comply with its obligations under the ESA.

Issues with the 2015 BA include:

- Reaches a determination of "No Effect" for the Arroyo Toad, California Red-legged Frog, Mohave Tui Chub, Least Bell's Vireo, Southwestern Willow Flycatcher, Yellow-billed Cuckoo, and Inyo California Towhee and their critical habitat solely on the basis that there was no overlap between the route network and these species' ranges or critical habitat (with the exception of 0.5 miles of overlap with the Least Bell's Vireo's habitat.) 2015 BA at 7–8. This analysis fails to consider indirect impacts on these species and their habitats from the route network, such as non-compliance with route closures, changes in air quality, introduction of invasive species, or fire;
- Failure to adequately identify the action area by disregarding impacts on adjacent non-BLM managed land. 2015 BA at 27–28;
- Failure to discuss the status of the species or prior consultations. The 2015 BA only referenced a section of the draft SEIS, 2015 WEMO BA at 34, but the referenced section only discusses air quality, Chapter 4 Feb 05 2015 508 Chapter 4 at 4.2-20;
- Wrongly groups analyses of critical habitat together with listed plant and animal species despite the need to separately analyze impacts on critical habitat and listed species. 2015 BA at 30, 34;

- Failure to discuss the major decline in the desert tortoise population, as well as other best scientific and commercial data regarding direct and indirect impacts of ORV use (see below);
- Incomplete assessment of cumulative effects, especially disregarding the impacts of climate change. 2015 BA at 40;
- Does not discuss how BLM will monitor for compliance or take limits. Instead, the 2015 BA references Appendix G of the Draft SEIS provided to FWS, which only includes general assurances that BLM will monitor the area to implement the Plan. The few specific features that the monitoring plan “may include,” such as using aerial photography to check for use of closed routes *every three years*, are inadequate. SEIS App G Travel Management Plan Feb 06 2015 508 at 7–8;
- Incorporates the ITS for the desert tortoise from the amended 2007 BiOp—19 tortoises taken annually including 8 as a result of vehicle use. The BA rationalized using the same anticipated take estimate because the draft SEIS concluded that any change in route extent would not increase the number of users. 2015 BA at 44. The referenced Draft SEIS section, however, explains that this assumption is based only on anecdotal observations and visitor use data. SEIS Chapter 4 Feb 05 2015 508 at 4.1-5. No information about visitor use data is shared. The anticipated take estimate and its effect on the species also fails to account for the documented decline in the desert tortoise population since 2007.

Further, the 2015 BA, FEIS, and Errata do not rely on the best scientific and commercial data regarding the effects of habitat fragmentation, increased spread of invasive plants, and fire due to roads and ORV use on desert tortoise and its habitat. Among the many relevant scientific papers that are ignored in the 2015 BA, FEIS and Errata are:

- Allison, L., and A. McLuckie. 2018. Population Trends in Mojave Desert Tortoises (*Gopherus agassizii*). *Herpetological Conservation and Biology* 13(2): 433–452.
- Berry, K.H., L.M. Lyren, J.L. Yee, and T.Y. Bailey. 2014. Protection Benefits Desert Tortoise (*Gopherus agassizii*) Abundance: The Influence of Three Management Strategies on a Threatened Species. *Herpetological Monographs*, 28: 66–92  
<https://pubs.er.usgs.gov/publication/70141682>
- Boarman, W.I., M. Sazaki and W. B. Jennings. 1997. The Effect of Roads, Barrier Fences, and Culverts on Desert Tortoise Populations in California, USA. *Proceedings: Conservation, Restoration, and Management of Tortoises and Turtles—An International Conference*, pp. 54–58
- Campbell, S. P., Zylstra, E. R., Darst, C. R., Averill-Murray, R. C. and Steidl, R. J. 2018. A spatially explicit hierarchical model to characterize population viability. *Ecol Appl*, 28: 2055-2065. doi:10.1002/eap.1794
- Chafee, M., and K. Berry. 2006. Abundance and distribution of selected elements in soils, stream sediments, and selected forage plants from desert tortoise habitats in the Mojave and Colorado Deserts, USA. *Journal of Arid Environments* 67, pp. 35–87.
- Sinervo, B. 2014. Prospects for *Gopherus*: Demographic and physiological models of climate change from 65 million years ago to the future. Abstract from Desert Tortoise Council Symposium. 1 page.  
[https://www.drecp.org/draftdrecp/comments/Barry\\_Sinervo\\_comment\\_2015-02-22.pdf](https://www.drecp.org/draftdrecp/comments/Barry_Sinervo_comment_2015-02-22.pdf)

- Tuma, M., C. Millington, N. Schumaker, and P. Burnett. 2016. Modeling Agassiz's Desert Tortoise Population Response to Anthropogenic Stressors. *Journal of Wildlife Management*; DOI: 10.1002/jwmg.1044.
- Webb, R. H., and H. G. Wilshire. 1983. *Environmental effects of off-road vehicles: Impacts and management in arid regions*. Springer-Verlag, New York. 534 pp.
- Wilshire, H.G. 1983. Off-Road Vehicle Recreation Management Policy for Public Lands in the United States: A Case History. *Environmental Management*. Vol. 7. No.6, pp. 489-500

Many of the survey data and status reports from FWS on the desert tortoise are not referenced in the FEIS including, but not limited to:

- U.S. Fish and Wildlife Service. 2015. Range-wide Monitoring of the Mojave Desert Tortoise (*Gopherus agassizii*): 2013 and 2014 Annual Reports. Report prepared by Linda Allison the Desert Tortoise Recovery Office, U.S. Fish and Wildlife Service, Reno, NV.
- U.S. Fish and Wildlife Service. 2016. Range-wide Monitoring of the Mojave Desert Tortoise (*Gopherus agassizii*): 2015 and 2016 Annual Reporting. Report by the Desert Tortoise Recovery Office, U.S. Fish and Wildlife Service, Reno, Nevada.
- U.S. Fish and Wildlife Service. 2018. Range-wide Monitoring of the Mojave Desert Tortoise (*Gopherus agassizii*): 2017 Annual Reporting. Report by the Desert Tortoise Recovery Office, U.S. Fish and Wildlife Service, Reno, Nevada
- U.S. Fish and Wildlife Service. 2018. Status of the Desert Tortoise and its Critical Habitat. Desert Tortoise Recovery Office, Reno, NV. 24 pp.

## **2. 2019 WEMO BiOp is Inadequate**

BLM relied on the substantially flawed 2019 WEMO BiOp in adopting the disputed plan amendments and route designations. As detailed herein, FWS' conclusion that BLM's management of the West Mojave areas within the CDCA pursuant to the plan amendments and route designations would not jeopardize listed species or destroy or adversely modify critical habitat for listed species is not supported. Therefore, the FWS's issuance of the 2019 BiOp and the BLM's implementation of the 2019 WEMO ROD in reliance on that biological opinion both violate the substantive and procedural provisions of Section 7 of the ESA.

The inadequacies of the 2019 WEMO BiOp include, but are not limited to, the following:

- Failure to adequately identify the action area<sup>20</sup> and providing conclusions regarding jeopardy to listed species and destruction or adverse modification of critical habitats without properly identifying the scope the actions being considered (specifically, ignoring the CDCA Plan-wide scope of Plan Amendment-I);
- Failure to consider the current status of the species or critical habitats and the future trends in the jeopardy analysis taking into account both survival and recovery;

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<sup>20</sup> 50 C.F.R. § 402.02 defines "action area" as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action."

- Failure to provide an accurate and detailed discussion of the effects of the action on listed species or critical habitat based on the best scientific and commercial data available. For example, for the desert tortoise the data and information omitted includes, but is not limited, to: FWS's failure to utilize its own decision support tool for assessing impacts to the desert tortoise; ignoring published scientific studies regarding impacts attributable to ORV use including spread of invasive plants and risk of fire (see below) and regarding recovery within habitat closed to ORVs (Berry et al. 2014); and ignoring increased Arsenic dust mobilization and other air quality impacts due to opening lakebeds (PA-IV) and potential impacts to tortoise;
- Failure to analyze impacts of grazing approved by the 2019 WEMO ROD in the Ord Rodman Critical Habitat Unit beyond incorporating the previous biological opinion;
- Failure to rely on the best scientific and commercial data available in formulating its biological opinion (see below);
- Failure to accurately assess whether the action, taken together with cumulative effects (including climate change), is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat including the failure to undertake a tipping point analysis;
- Failure to utilize the best available scientific and commercial data to assess the current status and trend of the species in the face of climate change. For example, the impacts of persistent drought, increased temperatures, and climate change to desert tortoise and its habitat and the changing baseline were not adequately addressed in the 2015 BA, FEIS, or 2019 WEMO BiOp;
- Reliance on BLM's route designations and enforcement of limitations that BLM's own monitoring show are ineffective throughout the WEMO area renders the biological opinion's conclusions unsupported. For example, FWS concludes that that allowing "limited" ORV use in areas occupied by listed species will not jeopardize the species and that allowing "limited" ORV use in critical habitat will not destroy or adversely modify critical habitat but BLM's own monitoring shows significant and widespread non-compliance with route closures and limitations across the WEMO both within critical habitat and outside of critical habitat;
- Issuance of incidental take authorization for the desert tortoise based on inadequate review of impacts to the species survival and recovery;
- Issuance of incidental take authorization for the desert tortoise without including any reasonable and prudent measures needed to protect the tortoise from harm despite the fact that the need measures to minimize impacts to the species and its habitat is clear;
- Failure to address several riparian-obligate listed species that will be affected by the plan amendments and route designations including arroyo toad, least Bell's vireo, southwestern willow flycatcher, and yellow-billed cuckoo; and
- Failure to include adequate monitoring as required by 50 CFR §402.14(i)(3) and FWS policy (Consultation Handbook).

As the regulatory agency tasked to implement the ESA, the FWS did not use some of the most relevant and recent science when writing the 2019 WEMO BiOp. These data are either publicly available in peer-reviewed journal articles or data sets from desert tortoise researchers working at the U.S. Geological Survey, Biological Resources Division, and would have been

readily available to and known to FWS at the time that the 2019 WEMO BiOp was being written. They include:

- Berry, K.H. and R. W. Murphy. 2019. *Gopherus agassizii* (Cooper 1861) – Mojave Desert Tortoise, Agassiz’s Desert Tortoise. Conservation Biology of Freshwater Turtles and Tortoises: A Compilation Project of the IUCN/SSC Tortoise and Freshwater Turtle Specialist Group. In: Rhodin, Iverson, van Dijk, Stanford, Goode, Buhlmann, Pritchard, and Mittermeier (Eds.) Chelonian Research Monographs (ISSN 1088-7105) No. 5 (Installment 13), doi:10.3854/crm.5.109.agassizii.v1.2019.
- Rhodin, Iverson, van Dijk, Stanford, Goode, Buhlmann, Pritchard, and Mittermeier (Eds.). 2019. Chelonian Research Monographs. (ISSN 1088-7105) No. 5 (Installment 13), doi:10.3854/crm.5.109.agassizii.v1.2019.
- Berry, K.H., L.M. Lyren, J.S. Mack, L.A. Brand, and D.A. Wood. 2016. Desert Tortoise Annotated Bibliography, 1991–2015. USGS Open-File Report 2016–1023.
- Berry, K.H., L.M. Lyren, J.L. Yee, and T.Y. Bailey. 2014. Protection Benefits Desert Tortoise (*Gopherus agassizii*) Abundance: The Influence of Three Management Strategies on a Threatened Species. Herpetological Monographs 28: 66–92.
- Boarman, W. 2002. Threats to Desert Tortoise Populations: A Critical Review of the Literature. Prepared for: West Mojave Planning Team, Bureau of Land Management, by U.S. Department of the Interior, U.S. Geological Survey, Western Ecological Research Center. 91 p.
- Boarman, W.I., and Kristan, W.B. 2006, Evaluation of evidence supporting the effectiveness of desert tortoise recovery actions: U.S. Geological Survey Scientific Investigations Report 2006–5143, 27 p.
- Hoff, K.S. and R.W. Marlow. 2002. Impacts of Vehicle Road Traffic on Desert Tortoise Populations with Consideration of Conservation of Tortoise Habitat in Southern Nevada. Chelonian Conservation and Biology 4(2): 449-456.

Each of the above deficiencies in the biological opinion renders the FWS’s “no jeopardy” and “no adverse modification” conclusions and the BLM’s reliance on those conclusions arbitrary and capricious and therefore unlawful under the ESA and the Administrative Procedure Act. The BLM therefore is in violation of its substantive mandate to insure against jeopardy and adverse modification of critical habitat for listed species within the CDCA including within the West Mojave planning area.

## **B. Violation of Section 7(b)(4); Unlawful Reliance on Inadequate ITS**

The FWS is required under Section 7(b)(4) of the ESA to issue an ITS with each biological opinion for animal species that specifies the amount and extent of incidental take authorized to the action agency. Additionally, the ITS must specify reasonable and prudent measures that the Secretary considers necessary to minimize such impacts. Finally, the ITS must include terms and conditions implementing the reasonable and prudent measures.

As detailed above, the ITS in the biological opinion is inadequate in many ways including, but not limited to, its failure to provide any reasonable and prudent measures for

minimizing impacts to the desert tortoise and failure to provide terms and conditions for implementing reasonable and prudent measures that will adequately protect the desert tortoise from jeopardy. Such reasonable measure could have included, for example, speed limits, seasonal closures, limits on number of ORV users in critical habitat, and systematic monitoring. The lack of any reasonable and prudent measures in the ITS is contrary to the law given that FWS specifically acknowledges the need for conservation measures to minimize impacts to the desert tortoise and its habitat throughout the biological opinion and that the minimization measures in some of the alternatives would be more protective of desert tortoise than those in the adopted alternative. For example, PA-VI alternative 2 would have limited stopping, parking and camping to within 50 feet of the centerline of designated routes in areas outside of Desert Tortoise ACECs (critical habitat) providing significant conservation value in other desert tortoise habitat but FWS did not address this alternative. Similarly, PA-IV opened routes within critical habitat on Cuddeback and Coyote lakes and the BiOp does not address the potential impacts to the tortoise or its habitat. PA-V for the Rand Mountains-Fremont Valley Management area ended the current closures and permit system that has provided significant conservation value for the tortoise and critical habitat and FWS did not make any independent determination that reopening these routes with the new system will minimize impacts as compared with the existing management.

### **C. Violation of Section 7(d); Commitment of Resources Before Consultation is Completed**

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” The purpose of Section 7(d) is to maintain the status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat. As detailed above, the BLM must *at minimum* reinstate consultation for: four listed species found within the West Mojave plan area (the endangered arroyo toad and its designated critical habitat, endangered least Bell’s vireo, endangered southwestern willow flycatcher and its designated critical habitat, and threatened yellow-billed cuckoo), which were not considered in the biological opinion; and regarding impacts to the desert tortoise and other listed species outside of the West Mojave area that may be impacted by the adoption of PA-I. Therefore, the prohibitions of Section 7(d) should apply and BLM cannot make irreversible or irretrievable commitments of resources based on the 2019 WEMO ROD.

The BLM has violated this section by continuing to authorize ORV use, grazing, and other activities that adversely affect listed species prior to complying with its obligations under Section 7. Because BLM is required to reinstate consultation on the West Mojave route network project, the plan amendments, and travel management plans, when it does so as it must, it will also be in violation of this provision.



#### **D. Violation of Section 9; Unlawful Taking of Listed Species**

The ESA also prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. The definition of “take,” found at 16 U.S.C. § 1532(19), states,

The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

More specifically, the term “harass” means any “intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.” 50 C.F.R. § 17.3. The term “harm” is also not limited to direct physical injury. “Harm” includes any “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

The BLM is in violation of Section 9 of the ESA because the BLM is in violation of Sections 7(a)(2), 7(d) and 50 C.F.R. § 402.16, and because the 2019 WEMO BiOp and the accompanying ITS are inadequate and unlawful, no take of desert tortoise or other listed species associated with the route networks in the CDCA or the WEMO bioregion is properly authorized.

Unfortunately, the ORV use authorized in the CDCA under the plan amendments, and WEMO route designations will continue to result in take of listed species. The BLM therefore is in violation of Section 9 of the ESA and 50 C.F.R. § 17.31 for the take of listed species that is occurring in the CDCA as a result of activities “authorized” by the WEMO plan amendments and route designations.

#### **E. Violation of Section 4(f); Failure to Implement Recovery Plans**

Section 4 of the ESA calls for the preparation of a recovery plan for every species listed under the Act. Recovery plans establish recovery goals and objectives, describe site-specific management actions recommended to achieve those goals, and estimate the time and cost required for recovery. 16 U.S.C. § 1533(f). Section 4(f) specifically requires that the Secretary of Interior to both “...develop and implement plans (hereinafter...referred to as ‘recovery plans’) for the conservation and survival of endangered species and threatened species...” 16 U.S.C. § 1533(f) (emphasis added). Drafting a recovery plan is not sufficient to comply with this statutory mandate. Consistent with the intent that recovery plans actually be implemented, Congress required that recovery plans “...incorporate...(i) a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species.” 16 U.S.C. § 1533(f)(1)(B)(i).

FWS adopted final recovery plans for many of the listed species in the CDCA planning area including the desert tortoise (1994, rev. 2011), southwestern willow flycatcher (2002), and arroyo toad (1999). Despite the clear mandate of the ESA that the Secretary of Interior

“implement” recovery plans, neither the FWS nor the BLM have adequately implemented the recommendations of the desert tortoise recovery plan or many of the other recovery plans adopted by FWS. Unfortunately, this inaction fosters the continued decline of these listed species and fails to support survival and recovery. Moreover, the 2019 plan amendments and WEMO route designations do little to further recovery for these various species and go against many of the recommendations of the recovery plans. In fact, these 2019 plan amendments and the WEMO route designations leave the vast majority of habitat for listed species in the CDCA at risk of destruction, fragmentation, and degradation due to continued and increasing ORV use. The utter failure of the BLM to implement the existing recovery plans constitutes a violation of section 4(f)(1) of the ESA. The FWS’s approval of BLM’s management of the CDCA pursuant to the 2019 plan amendments and WEMO route designations though the inadequate 2019 WEMO BiOp likewise constitutes a violation of section 4(f)(1) of the ESA.

#### **F. Violation of Section 2(c) and 7(a)(1); Failure to Conserve Listed Species**

Section 2(c) of the ESA establishes that it is “...the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “...the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3).

The BLM’s implementation of the CDCA Plan including adoption of the 2019 plan amendments and WEMO route designations are violating section 2(c) of the ESA because the BLM refuses to use its authorities to further the purpose of the ESA and species conservation within the CDCA including in the WEMO bioregion. Specifically, the BLM has failed to fully implement the recovery plans for the Mojave population of the desert tortoise, Southwestern willow flycatcher, or arroyo toad, within the CDCA as a whole and the WEMO planning area and failed to implement many of the conservation recommendations from earlier biological opinions covering this area.

Similarly, the FWS is violating section 2(c) of the ESA because the 2019 WEMO BiOp fails to apply the Secretary’s affirmative responsibility to conserve listed species by including measures required to conserve these species as reasonable and prudent measures reflected in mandatory terms and conditions of the ITS for the desert tortoise in the biological opinion.

BLM is also violating section 2(c) by failing to adopt and implement sufficient protections for the listed species that would promote conservation of these species. Section 7(a)(1) of the ESA directs that the Secretary review “...other programs administered by [her] and utilize such programs in furtherance of the purposes of the Act.” 16 U.S.C. § 1536(a)(1). The purpose of the ESA is to conserve endangered or threatened species. Among the “other programs administered by” the Secretary of the Interior is the administration of the CDCA through the BLM. The recovery plans for the listed species within the CDCA were developed under section 4(f) of the ESA to conserve these species. The Secretary, through the BLM, must administer the CDCA “in furtherance” of species conservation. However, the Secretary’s 2019

WEMO BiOp issued through FWS provides **no** conservation recommendations<sup>21</sup> and **no** reasonable and prudent measures or terms and conditions that would protect and conserve the desert tortoise<sup>22</sup> or any other listed species to promote recovery. By failing to require BLM to implement reasonable and prudent measures or terms and conditions in the ITS for the desert tortoise or other affected listed species, the FWS, through its biological opinion, joins the BLM as partner in the failure to implement the recovery plan for the desert tortoise and for other listed species with recovery plans as well as the failure to use other programs administered by the Secretary in furtherance of the purposes of the ESA to conserve these species.

#### IV. CONCLUSION

If the BLM and the FWS do not act within 60 days to correct these violations of the ESA, the Center for Biological Diversity, the Sierra Club, Desert Survivors, California Native Plant Society, Defenders of Wildlife, and Desert Tortoise Council will pursue litigation in federal court against the agencies and officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact us.

Sincerely,



Lisa T. Belenky, Senior Attorney  
Center for Biological Diversity  
1212 Broadway, Suite 800  
Oakland, CA 94612  
ofc (510) 844-7107 fax (510) 844-7150  
[lbelenky@biologicaldiversity.org](mailto:lbelenky@biologicaldiversity.org)

Deborah A. Sivas  
Matthew J. Sanders  
Environmental Law Clinic  
Mills Legal Clinic at Stanford Law School  
Crown Quadrangle, 559 Nathan Abbott Way  
Stanford, California 94305-8610  
(650) 723-0325 fax (650) 723-4426  
[dsivas@stanford.edu](mailto:dsivas@stanford.edu)  
[matthewjsanders@stanford.edu](mailto:matthewjsanders@stanford.edu)

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<sup>21</sup> 2019 WEMO BiOp at 103

<sup>22</sup> 2019 WEMO BiOp at 65

### References (provided in electronic format)

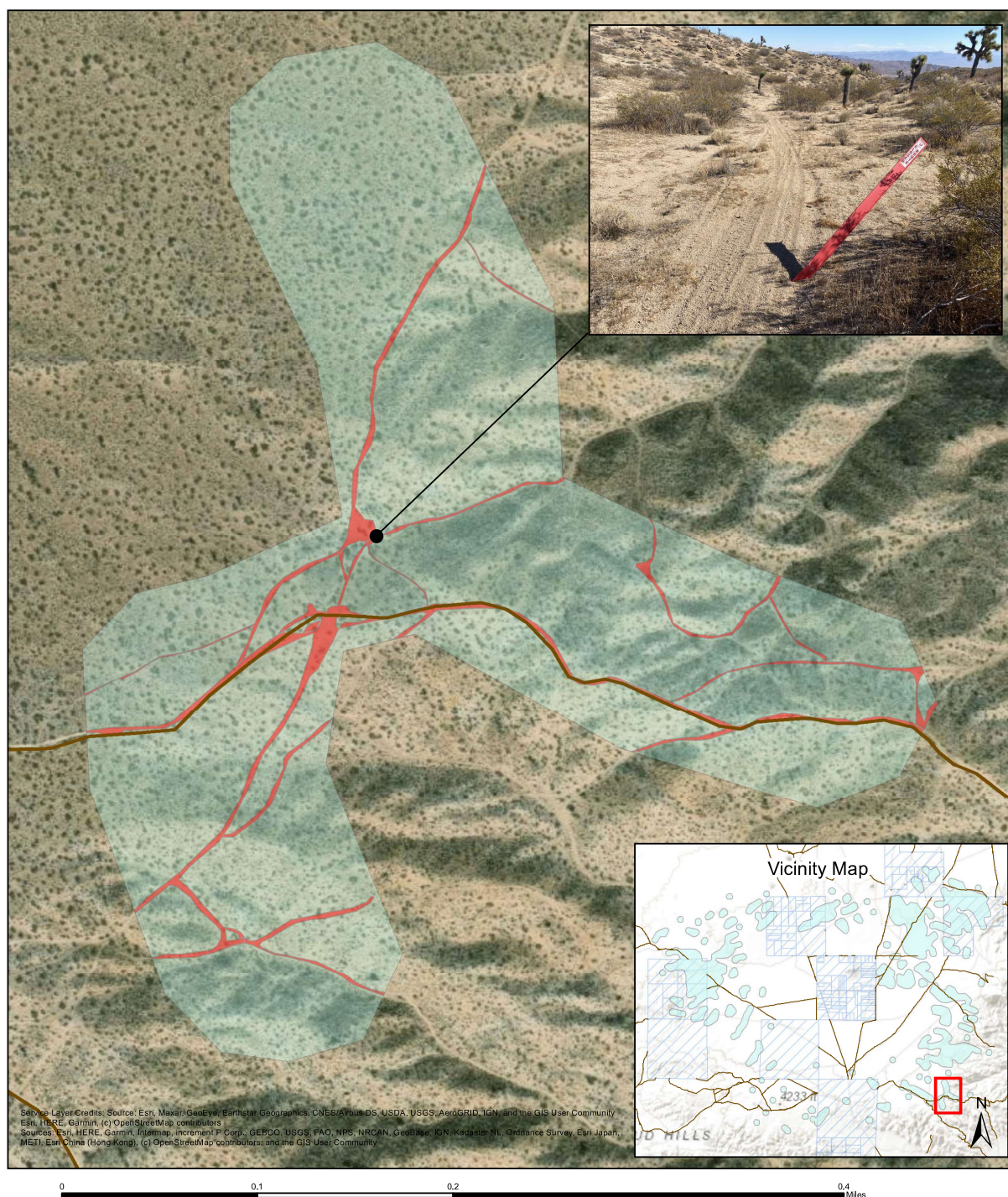
- Allison, L., and A. McLuckie. 2018. Population Trends in Mojave Desert Tortoises (*Gopherus agassizii*). *Herpetological Conservation and Biology* 13(2): 433–452.
- Berry, K.H., L.M. Lyren, J.L. Yee, and T.Y. Bailey. 2014. Protection Benefits Desert Tortoise (*Gopherus agassizii*) Abundance: The Influence of Three Management Strategies on a Threatened Species. *Herpetological Monographs* 28: 66–92.
- Boarman, W.I., M. Sazaki and W. B. Jennings. 1997. The Effect of Roads, Barrier Fences, and Culverts on Desert Tortoise Populations in California, USA. *Proceedings: Conservation, Restoration, and Management of Tortoises and Turtles—An International Conference*, pp. 54–58
- Boarman, W. 2002. Threats to Desert Tortoise Populations: A Critical Review of the Literature. Prepared for: West Mojave Planning Team, Bureau of Land Management, by U.S. Department of the Interior, U.S. Geological Survey, Western Ecological Research Center. 91 pp.
- Myers, T. Ph.D. Hydrologic Consultant. 2015. “Technical Memorandum: Review of Hydrology and Water Resources: Draft West Mojave (WEMO) Route Network Project Land Use Plan Amendment to the California Desert Conservation Area Plan and Draft Supplemental Environmental Impact Statement (DSEIS)” pp. 30
- Sinervo, B. 2014. Prospects for *Gopherus*: Demographic and physiological models of climate change from 65 million years ago to the future. Abstract from Desert Tortoise Council Symposium. 1 page.  
[https://www.drecp.org/draftdrecp/comments/Barry\\_Sinervo\\_comment\\_2015-02-22.pdf](https://www.drecp.org/draftdrecp/comments/Barry_Sinervo_comment_2015-02-22.pdf).
- U.S. Department of the Interior, Bureau of Land Management, The California Desert Conservation Area Plan 1980 (amended and reprinted as U.S. Department of the Interior, Bureau of Land Management, The California Desert Conservation Area Plan 1980, as Amended).
- U.S. Fish and Wildlife Service. 2014. Update on Mojave Desert Tortoise Population Trends March 10, 2014. 2 pp.
- U.S. Fish and Wildlife Service. 2016. Range-wide Monitoring of the Mojave Desert Tortoise (*Gopherus agassizii*): 2015 and 2016 Annual Reporting. Report by the Desert Tortoise Recovery Office, U.S. Fish and Wildlife Service, Reno, Nevada,  
[https://www.fws.gov/nevada/desert\\_tortoise/documents/reports/2015/201516\\_rangewide-mojave-desert-tortoise-monitoring.pdf](https://www.fws.gov/nevada/desert_tortoise/documents/reports/2015/201516_rangewide-mojave-desert-tortoise-monitoring.pdf).
- U.S. Fish and Wildlife Service. 2018. Status of the Desert Tortoise and its Critical Habitat. Desert Tortoise Recovery Office, Reno, NV. 24 pp.,  
[https://www.fws.gov/nevada/desert\\_tortoise/documents/misc/status-desert-tortoise.pdf](https://www.fws.gov/nevada/desert_tortoise/documents/misc/status-desert-tortoise.pdf)

U.S. Fish and Wildlife Service. 2019. Biological Opinion for the West Mojave Route Network Project, San Bernardino, Inyo, Kern, Riverside, and Los Angeles Counties, California.

U.S. Fish and Wildlife Service. 2020. Range-wide monitoring of the Mojave Desert Tortoise (*Gopherus agassizii*): 2019 annual report DRAFT available at [https://www.fws.gov/nevada/desert\\_tortoise/documents/reports/2020/2019\\_DRAFT\\_Range-wideMojaveDesertTortoiseMonitoring.pdf](https://www.fws.gov/nevada/desert_tortoise/documents/reports/2020/2019_DRAFT_Range-wideMojaveDesertTortoiseMonitoring.pdf).



## Attachment A



### Lane Mountain Milk Vetch OHV Damage Assessment, conducted 02/19/2021

- WEMO Designated Routes
- Active OHV Disturbance
- CNDDB Record Population
- Non BLM Parcels (within area of interest)