



VIA FACSIMILE and CERTIFIED MAIL; RETURN RECEIPT REQUESTED

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Re: Sixty-Day Notice of Intent to Sue for Violations of Sections 7 and 9 of the Endangered Species Act; Actions Relating to the Proposed Translocation of Desert Tortoises from the Southern Expansion Area of Fort Irwin to Occupied Habitat and the Transfer of Acquired Mitigation Lands from the Army to the Bureau of Land Management

This letter provides you with sixty days notice that the Center for Biological Diversity, and Desert Survivors (collectively “Conservation Groups”) intend to sue the U.S. Fish and Wildlife Service (“FWS”), the Department of the Army’s National Training Center and Fort Irwin (“Army”), and the Bureau of Land Management (“BLM”) (collectively the “Federal Agencies”) for violating Sections 7 and 9 of the Endangered Species Act (“ESA”) and its implementing regulations, 16 U.S.C. §§ 1536, 1538, for actions and inactions related to the management of the desert tortoise. 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).

Specifically, the Army and FWS have failed to re-initiate consultation regarding the proposed translocation of desert tortoise from Fort Irwin in light of new information that shows that the impacts of the translocation may be far higher than previously anticipated and may not in fact serve to provide the anticipated mitigation or any mitigation function. Significant new information regarding disease rates and potential for disease transmission (as detailed below) shows that the impacts of the translocation may be far higher than were analyzed in the 2004 and 2006 biological opinions and that the proposed translocation may have far greater impacts to desert tortoise. Because the proposed translocation of desert tortoise from Fort Irwin was approved as a mitigation measure for impacts to the species due to the Fort Irwin expansion, the Army and FWS are required to re-initiate consultation before proceeding with the translocation but have failed to do so.

We understand that the Federal Agencies want to take advantage of this year of relatively good rainfall to accomplish the first stage of the translocation plan. However, by the same token, this is a very important year for individual tortoises to recover from the previous drought years, including 2007, which was one of the driest years on record. Recovery is best accomplished by remaining in their home territories with the highest habitat forage values while recovering from unprecedented drought rather than undergoing the stress of translocation to poorer habitat. Because the translocation plan that was initiated as *mitigation* for impacts to the species, it must be implemented so as to best accomplish that goal.

In addition, it appears that the BLM and the Army have failed to consult with the FWS regarding the transfer of ownership of the former Catellus lands purchased by the Army to the BLM including, but not limited to, the effects of BLM's proposed management of resident desert tortoise populations on those lands, and management of the desert tortoise that are proposed to be relocated onto those lands.

Given the unprecedented magnitude of the proposed translocation and its potential to take a significant portion of the remaining desert tortoise population in this critical habitat unit (Superior-Cronese Unit) and, indeed, the West Mojave recovery unit as a whole, the translocation should not move forward without adequate analysis of these and other impacts particularly in light of the new information regarding the relative health of these populations and the potential for spreading disease from one population to the other.

I. BACKGROUND

As the Federal Agencies are well aware, the status of the desert tortoise in the western Mojave desert has been in decline for many years due to many factors. The Fort Irwin expansion, while only one of the threats to the tortoise population in this area, is expected to adversely impact over 75,000 acres of desert tortoise critical habitat and to displace over 2,000 desert tortoises. On March 14, 2004, the FWS issued the "Biological Opinion for the Proposed Addition of Maneuver Training Lands at Fort Irwin California (1-8-03-F-48)" ("2004 Ft. Irwin BiOp") regarding the base expansion.

On December 29, 2006, the FWS issued the "Biological Opinion for Translocation of Desert Tortoises from the Southern Expansion Area of Fort Irwin to Occupied Habitat, San

Bernardino County, California (1-8-05-F-43)” (“2004 Translocation BiOp”), focused largely on the areas surrounding the pens that would be used in transiting relocated tortoise and the fencing of the I-15.

The Army solicited proposals for carrying out the translocation plan and in June, 2007, awarded a contract worth \$6.9 million dollars to I.T.S Corporation to carry out the translocation of desert tortoise from the expansion areas. *See* “Army Picks I.T.S. Corporation to Help Preserve Threatened Desert Tortoises in Mojave Desert,” Forbes newswire, 06.04.07

As part of the mitigation for impacts to desert tortoise due to the expansion of Fort Irwin, the Army purchased nearly 100,000 acres of land formerly owned by Catellus within desert tortoise critical habitat. Most of these lands are interspersed in a checkerboard pattern with public lands managed by the BLM and/or with private lands. In 2006, the Army transferred management of the newly acquired lands to BLM via a document entitled “Management of Army Acquired Mitigation Lands by BLM (011FG-2006-0389 P2)”. The Conservation Groups have found no evidence that any environmental evaluation or ESA consultation was undertaken by the Army or BLM at that time. The Conservation Groups have been informed, and believe, that the ownership of these lands is now in the process of being transferred to BLM as well. Again, the Conservation Groups have found no evidence that any environmental evaluation or ESA consultation has been undertaken by the Army or BLM for the transfer of ownership of these lands.

II. NEW INFORMATION REGARDING PREVALENCE OF DISEASE AND HABITAT QUALITY IN THE TRANSLOCATION AREA

In anticipation of the translocation, blood samples were collected from both the tortoises in the Fort Irwin southern expansion area (also known as the UTM 90) and in the host sites. The preliminary results presented by Dr. Berry¹ at the 2008 Desert Tortoise Symposium show a rate of disease that is far lower in the Fort Irwin UTM 90 population than in the host population on the former Catellus lands. In addition, the density of tortoises in the UTM 90 appears to be far higher than in the host areas which may also suggest that there has already been significant die off in the host areas due to disease or that the carrying capacity of the host areas simply cannot sustain larger population levels.

In general, data also shows that areas of high disturbance, such as roads, are correlated with areas of high disease. *See, e.g.,* Berry, *et al.*, “Attributes of desert tortoise populations at the National Training Center, Central Mojave Desert, California, USA”, *Journal of Arid Environments* 67 (2006) 165–191. New data presented by Jeremy Mack,² U.S. Geological Survey, also corroborates these earlier studies and the disease data from the translocation host sites. The data presented shows a significantly higher incidence of disease in desert tortoise close to roads. Although the study was in a small area, it shows significant correlations between

¹ Decision Time for Desert Tortoises in the Fort Irwin Translocation Project: Health and Disease Issues, Kristin H. Berry, Jeremy Mack, Mary Brown, Kemp Anderson, John Roberts, and Elliott Jacobson

² Epidemiology of Upper Respiratory Tract Disease in Desert Tortoises At the Daggett Study Area, California, in 2007, Jeremy Mack, Kristin H. Berry, Mary Brown, and John Roberts

roads and disease. Indeed, disease appears to radiate out from roads – whether this is due to stress on the tortoise from noise and habitat degradation, from the introduction of diseased animals along roads, or from a combination of factors has not yet been determined.

In addition, Peter Hudson, a member of the Science Advisory Committee for desert tortoise recovery and Professor of Biology at the Center for Infectious Disease Dynamics at Pennsylvania State University, made it clear in his presentation³ that although the epidemiology of diseases in tortoise is not yet fully understood, certain basic precautions must be taken. His common sense approach included improving the overall health of the population by reducing stress and improving habitat quality, not translocating tortoise during drought, and not translocating any infected tortoise into a healthy population. In addition, he also specifically recommended that *healthy tortoises not be released into an infected population*. Because it now appears that the planned translocation will violate this principle by translocating healthy tortoises into a population with a high rate of disease and where significant die-offs may have already occurred, the Federal Agencies must re-assess the proposed translocation and its efficacy as a mitigation measure.

In addition, as the Federal Agencies have all acknowledged, the habitat in the Fort Irwin UTM 90 area is far superior for desert tortoise needs than the habitat in the host area both due to natural features of the landscape (soil type, elevation, etc.) and because the habitat in the host area has been degraded by vehicle routes (causing fragmentation), human habitation, trash, and mining. Although fencing along the north side of I-15 and the Fort Irwin road is required as another mitigation measure, there is no fencing (or any other mitigation measures) to reduce impacts in the host area from the many other roads there (including the Mannix Trail) or from ORV routes.⁴ The high incidence of trash and illegal dumping is also of particular concern as it attracts ravens that predate on tortoise.

The likelihood of disease transmission and its impacts on the translocated tortoises and the host population must be evaluated before the translocation moves forward. In addition, the impacts of disease transmission due to translocation must be evaluated in the context of the higher tortoise densities that will be created in lower quality habitat at the host locations which may cause additional stress to both tortoise populations making them even more susceptible to disease and other threats.

³ Infectious Diseases in the Desert Tortoise: Recommended Research and Conservation Actions, Peter J. Hudson and the Desert Tortoise Science Advisory Committee.

⁴ It is well known that roads can cause a significant decrease in tortoise populations. *See, e.g.*, Boarman, W.I., and Sazaki, M., “A highway’s road-effect zone for desert tortoises (*Gopherus agassizii*),” *Journal of Arid Environments* 65(2006) 94-101; Hoff, Karin von Seckendorff, and Marlow, Ronald William, “Impacts of vehicle road traffic on desert tortoise populations with consideration of conservation of tortoise habitat in southern Nevada,” *Chelonian Conservation and Biology*, 2002, 4(2):449-456. Even dirt roads and ORV routes that are less frequently traveled can also cause a significant decrease in nearby tortoise populations and in habitat quality. *See, e.g.*, Brooks Matthew L., and Lair, Bridget, “Ecological Effects of Vehicular Routes in a Desert Ecosystem,” USGS, 2005; Bury and Luckenbach, “Comparison of Desert Tortoise (*Gopherus agassizii*) Populations in an Unused and Off-Road Vehicle Area in the Mojave Desert,” *Chelonian Conservation and Biology*, 2002, 4(2):457-463.

III. NEW INFORMATION REGARDING THE GENETIC DISTINCTNESS OF THE WESTERN MOJAVE POPULATION OF DESERT TORTOISE

A recently published study of genetic data from various populations of desert tortoise throughout the Mojave desert in California and Utah and the Colorado desert in California shows that there is a significant divergence between various populations within the listed population of the desert tortoise. Murphy, Robert W., Berry, Kristin H., Edwards, Taylor, and McLuckie, Ann M., "A Genetic Assessment of the Recovery Units for the Mojave Population of the Desert Tortoise, *Gopherus agassizii*," *Chelonian Conservation and Biology*, 2007, 6(2); 229-251. While the 1994 Recovery Plan recognized that there were distinctions between populations of the desert tortoise based on habitat use, behavior, and other factors, and established 6 separate recovery units on that basis including the Western Mojave recovery unit, this new information provides more evidence of the divergence between these populations.

As most relevant here, the study showed that the tortoise populations in the western Mojave desert are significantly distinct from other populations even those in closest proximity such as the Eastern Mojave, Northeastern Mojave, and Eastern Colorado populations. Further, although there is some overlap, the population in the western Mojave desert could be further distinguished into 3 sub-groups – the Southern Mojave, Central Mojave and Western Mojave populations. This new data shows that the FWS' practice of evaluating impacts to the desert tortoise and its critical habitat on a range-wide basis from the western Mojave desert to the Colorado desert in southern California and east into southern Utah may be seriously flawed.

In light of this new information regarding the extent of genetic distinctness of the desert tortoise populations in the western Mojave desert, the potential loss of large numbers of tortoises in the western Mojave due to unanticipated impacts of the translocation from Fort Irwin is of even greater concern. Because this new information shows that the western Mojave population is genetically distinct and that the translocation may have greater impacts than expected and not serve to mitigate impacts of the expansion of Fort Irwin, the potential loss of up to 2,000 tortoises from this population must be re-evaluated. FWS recently estimated the total number of desert tortoise in the western Mojave region on public lands to be approximately 45,000. Based on FWS' estimates alone, the translocation could impact approximately 4.4% of the entire population of this genetically distinct desert tortoise population. The magnitude of this impact on species survival and recovery must be re-evaluated in light of the new genetics information.

IV. VIOLATIONS OF THE ESA

A. Failure to Re-initiate Consultation As Required in the Terms of the Ft. Irwin and Translocation Project Biological Opinions.

Both the 2004 Fort Irwin biological opinion and the 2006 Translocation biological opinion require the Army to reinitiate consultation "if 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." As explained above, here there is significant new information that shows that the translocation that was proposed as part of the mitigation may indeed impact the desert tortoise in

a manner or to an extent not previously considered and that the impacts of the action may be higher than considered in the BiOps.

Therefore, the Army is required to reinitiate consultation. In addition, FWS' own regulations require it to request re-initiation of consultation in such circumstances. *See* 50 C.F.R. § 402.16.

B. Violation of Section 7(b)(4); Unlawful Reliance on Inadequate ITS In Light Of New Information.

The FWS is required under Section 7(b)(4) of the ESA to issue an incidental take statement (“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 necessary to minimize such impacts. Finally, the ITS must include terms and conditions implementing the reasonable and prudent measures.

The ITS in the 2004 Ft. Irwin biological opinion provides a quantitative measure of allowable take and estimated that approximately 15 percent of the translocated tortoises and 15 percent of the host or resident tortoises would die. The 2004 Ft. Irwin BiOp estimated that translocation of tortoises would cause, at most, 15% of the translocatee population and 15% of the host population to die as a result of the translocation. 2004 Ft. Irwin BiOp at 31-42, 47.⁵ The 2006 Translocation BiOp uses this same figure of 15% but does not provide any basis for this figure nor does it provide any additional take authority for the translocated tortoises but focuses on tortoises that may be encountered near the pens and along the I-15 corridor during fence installation.

However, based on surveys and studies done since those biological opinions were issued the 15% estimate may be far too low.⁶ In addition, there is now new detailed information regarding the number of tortoises that will be affected in the southern expansion area and the higher risk of disease transmission to those tortoises that are translocated. Therefore, FWS should re-analyze the impacts to both the translocated tortoises and the host population.

In sum, even at the time the 2004 Biological Opinion was written, the 15% estimate of death during translocation was highly speculative and the ITS was likely inadequate. New information shows that the loss may be higher due to the risks of disease transmission and, where drought is a factor, as high as 32% of translocated tortoises may die. In light of this and other new information the Federal Agencies cannot rely on the ITS in the 2004 Ft. Irwin BiOp or the 2006 Translocation BiOp. Because of this, Section 7(b)(4) of the ESA is also being violated.

⁵ The basis for this figure appears to be a 15% die off *in one year* of a three year studying of a translocation of 60 tortoises to Bird Springs Valley in Nevada. 2004 Ft. Irwin BiOp at 40.

⁶ One recent study of a much smaller desert tortoise translocation of 32 adult desert tortoises documents a 68% survival rate of translocated tortoises over an approximate 20 month period. All of the confirmed mortalities occurred within the first eight months during drought conditions. *See Field, et al.*, “Return to the Wild; Translocation as a Tool for Desert Tortoise Conservation”, 2007 Biological Conservation 136: 232-245.

C. Failure to Consult Regarding Land Transfer and Management of Newly Acquired Lands.

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.

Neither the 2004 Ft. Irwin BiOp nor the 2006 Translocation BiOp clearly identify and analyze the likely future impacts of this translocation on both the translocated tortoises and the host populations of desert tortoise including, but not limited to, potential spread of disease from one population to another, impacts to habitat in the host area. Nor does either BiOp adequately address management of the “host” areas: to ensure the survival of the translocated tortoises and host tortoises; to minimize impacts to both the host and translocated tortoises; or to protect critical habitat in the host area in order to promote survival and recovery of both populations affected by the translocation.

In addition, the West Mojave biological opinion which covers the BLM lands that are interspersed with the Catellus lands now owned by the Department of Defense does not analyze the acquisition of these lands from the Army or potential management of those lands by BLM noting that the translocation plan was still “under development” at the time the WEMO BiOp was issued. 2006 West Mojave BiOp at 43. Similarly, there is no biological opinion that analyzes the translocation plan in concert with the short- and long- term management of the “host” lands for tortoise recovery after the initial translocation.

D. 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.

The Army and FWS must reinitiate consultation for the desert tortoise in light of new information as discussed above, therefore, the prohibitions of Section 7(d) should apply.

Moreover, the BLM and the Army have not yet initiated consultation on the land transfer, when they do so as they must, the prohibitions of Section 7(d) will also apply.

E. 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,

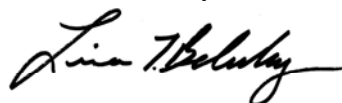
The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

If the translocation proceeds before the needed consultations are completed, the Federal Agencies will be in violation of Section 9 of the ESA. For example, BLM and the Army both lack take authority for management actions within the host areas that BLM is currently managing for the Army (and may soon acquire). As such, the BLM and the Army cannot permit activities that will take tortoise on the host lands including the use of off-road vehicles or any other activities that may take desert tortoise in either the translocatee population or the host population if they are found on the host lands. Similarly, if, as alleged herein, the Army and FWS have failed to re-initiate consultation in light of significant new information as expressly required in the 2004 and 2006 biological opinions, then the Army is in violation of the terms of the biological opinions and cannot rely on the ITSs for take authority.

V. CONCLUSION.

If the Army, the Fish and Wildlife Service, and the Bureau of Land Management do not act within sixty days to correct these violations of the ESA, the Center for Biological Diversity and Desert Survivors 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 me at (415) 436-9682 ext. 307.

Sincerely,



Lisa Belenky
Staff Attorney