



VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED; AND FACSIMILE

April 30, 2012

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Sixty-Day Notice of Intent to Sue the U.S. Bureau of Land Management, the U.S. Fish and Wildlife Service and Clark County, Nevada Pursuant to the Endangered Species Act For Failure to Implement The Terms and Conditions of Biological Opinion for the Clark County MSHCP, Incidental Take Permit, and Implementing Agreement; and Notice of Violation of the MSHCP and the Incidental Take Permit TE034927-0.

This letter is to provide you with notice that the Center for Biological Diversity intends to file suit, pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), to challenge the failure to comply with and implement the mandatory terms and conditions of the biological opinion for the Clark County Multiple Species Habitat Conservation Plan (“MSHCP”), Incidental Take Permit (“ITP”) and the Implementing Agreement.

This letter also provides the U.S. Fish and Wildlife Service with Notice of violations of the MSHCP, ITP, and biological opinion. In light of the violations detailed herein, the Service should immediately suspend or revoke the permit pursuant to 50 C.F.R §§13.27-13.29 and the terms of the Implementing Agreement Section 16.07.

The MSHCP required Clark County to implement conservation measures for desert tortoise conservation including retiring certain grazing allotments on public lands in desert tortoise critical habitat at Gold Butte, Nevada and required that those lands be managed for conservation in the future. Although County secured the allotment leases more than 14 years ago and BLM closed the allotments administratively, throughout this time BLM has allowed trespass grazing to continue unchecked on the Gold Butte allotment lands in desert tortoise critical habitat that is required to be protected as a term of the MSHCP and therefore BLM is in violation of the MSHCP, BO, ITP and IA.

BLM has failed and refused to “provide adequate law enforcement presence to ensure that management actions and restrictions are implemented for the conservation of” the desert tortoise as required. MSHCP at 2-244 (BLM (98)). And FWS has likewise failed to “assure full and continuing implementation of existing management policies and actions” as required. MSHCP at 2-237 (USFWS (42)). Clark County has knowingly failed to ensure these conditions were met and continued to allow development affecting the desert tortoise to go forward and, as a result, Clark County is also in violation of its permit.

I. Identity of the Organizations Giving Notice: The name, address, and phone number of the organizations giving notice of intent to sue under the ESA are:

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II. Counsel for the party giving notice:

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III. Requirements of the ESA

Section 7 of the ESA requires all federal agencies to insure 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).

If the federal agency, including the FWS, 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 when an HCP is proposed to be issued, FWS must provide itself with 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. If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). 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. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

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 incidental take statement. 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, here FWS, 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).

In order to obtain an Incidental Take Permit under the ESA Section 10 for incidental harm to listed species, habitat conservation plans are designed to offset any harmful effects the proposed activity might have on the species in accordance with § 10 of the ESA. 16 U.S.C. § 1539. The ESA has strict requirements for consultation and implementation of Incidental Take Permits that cannot be violated. For a habitat conservation plan, the plan, implementing agreement, and incidental take permit are analyzed and approved as a complete package, if any conservation and management measures fall short then the conclusions in the BO are invalid, consultation must be reinitiated and the ITP should be suspended or revoked. *See* 50 C.F.R. §

§13.27 (“may be suspended at any time if the permittee is not in compliance with the conditions of the permit”), § 13.28 (permit revocation).

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. “Take” is 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).

IV. The MSHCP, Biological Opinion, ITP and IA

The Clark County MSHCP covers a broad area and a long list of species. The MSHCP, ITP, BO and IA went into effect in 2001 and provide “take” authorization for extensive development within the County that affects the desert tortoise and other species. Much of the authorized take for desert tortoise has already occurred. The MSHCP, BO and ITP allow take of desert tortoise measured in terms of habitat loss, of up to 145,000 acres over the 30-year term of the MSHCP. As of December 31, 2011, 80,626 acres of desert tortoise habitat has already been destroyed pursuant to the ITP. Unfortunately, some of the key conservation measures for the desert tortoise have not been implemented as required.

Many of the conservation and management measures required in the MSHCP to benefit the affected species take place on public lands managed by various agencies including the BLM, NPS, FWS, and Forest Service. These agencies are signatories to the Implementing Agreement and are bound to carry out the conservation and management measures assigned to them under the MSHCP, BO, and IA. All of the conservation and management measures in the MSHCP are incorporated as mandatory terms and conditions of the BO. The BO states:

All of the conservation and management measures in the MSHCP and accompanying agreements, together with the terms identified in the associated IA and the special permit terms and conditions, are hereby incorporated by reference as reasonable and prudent measures, and terms and conditions for this incidental take statement pursuant to 50 CFR 402.14(1). Such terms and conditions are non-discretionary and must be undertaken by the Applicants for the exemptions under section 10(a)(1)(B) and section 7(o)(2) of the Act to apply. If the Applicants fails to adhere to these terms and conditions, the protective coverage of the Permit and section 7(o)(2) may lapse.

BO at 8.7-8.8. The ITP terms and conditions specify that the “authorization granted by this permit is subject to compliance with, and implementation of the Clark County Multiple Species Habitat Conservation Plan (MSHCP), and executed Implementing Agreement, both of which are hereby incorporated by reference.” Permit at 1 (section F). The MSHCP and by incorporation the BO expressly require that USFWS “[a]ssure full and continuing implementation of existing management policies and actions, and monitoring of sensitive habitats and species”. MSHCP at 2-237 (USFWS (42)).

Among the many important conservation and management measures to be carried out by BLM was the designation of over 344,00 acres of Gold Butte desert tortoise critical habitat as an Area of Critical Environmental Concern, MSHCP at 2-227 (BLM (206)), and closing grazing allotments in that area and others. MSHCP at 2-249 (BLM (215)). BLM is also expressly required to enforce the grazing closures and other restrictions. “(BLM (98) Provide adequate law enforcement presence to ensure that management actions and restrictions are implemented for the conservation of covered and/or evaluation species.” MSHCP at 2-244

The MSHCP as a Habitat Conservation Plan, was analyzed, adopted and approved as a complete package, if any conservation and management measures fall short then the ITP is invalid and must be suspended or revoked.

V. Violations of Law

A. Permit Violations

Violation of any permit issued under the Endangered Species Act constitutes a violation of the ESA, 16 U.S.C. § 1540(a), which can be enforced through the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). As detailed above, the permit conditions are not being met in material regard as to implementation of the MSHCP by the BLM which has failed and refused to comply with permit conditions and the MSHCP requirements that it manage certain public lands for the conservation of the desert tortoise. Specifically BLM has failed to provide adequate law enforcement to ensure that the management action—closing grazing allotments at Gold Butte in desert tortoise critical habitat—are implemented for the conservation of the species. This is a material violation of the MSHCP and the Implementing Agreement and, thereby, a violation of the ITP. Both Clark County and FWS have also failed to ensure that the needed conservation and management measures were undertaken, in violation of the permit, and FWS has failed to reinitiate consultation in violation of the ESA.

B. Violations of Section 7 of the ESA; Failure to Comply With the Terms and Conditions of the BO and Failure to Reinitiate Consultation

The FWS is violating the mandatory terms and conditions set forth in the biological opinion concerning the implementation of the MSHCP, including failure to “assure full and continuing implementation of existing management policies and actions” as required. MSHCP at 2-237 (USFWS (42)). FWS has also failed to reinitiate consultation in light of information that the terms and conditions of the BO and ITP are not being met, in violation of the ESA. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(4). Due to the failure to provide the conservation and management measures agreed to in the BO and ITP, the FWS has also failed to insure that development under the MSHCP has not exceeded the incidental take allowances for desert tortoise in the ITP.

Through its failure to insure that the ITP take limit for desert tortoise has not been exceeded, the FWS is thereby failing to insure that the MSHCP and associated activities are not likely to jeopardize the continued existence of the desert tortoise, and/or result in the destruction or adverse modification of desert tortoise critical habitat. 16 U.S.C. § 1536(a)(2).

The FWS has failed to timely reinitiate and complete the reinitiated consultation regarding the continued failure to implement the terms and conditions of the BO, MSHCP and IA by BLM (a party to the implementing agreement) and the resulting impacts of development under the MSHCP on desert tortoise and its critical habitat in violation of the ESA. 16 U.S.C. §§ 1536(a)(2), 1536(b)(1)(A), 1536(c)(1); 50 C.F.R. §§ 402.12, 402.14(e), 402.14(i)(4), 402.16.

By allowing, authorizing, and approving projects and activities to proceed within the MSHCP area that may affect desert tortoise or its critical habitat, prior to the reinitiation of and completion of consultation, the FWS is violating the ESA. 16 U.S.C. § 1536(a)(2), (d); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994). The continued approval and authorization of take of desert tortoise under the MSHCP and ITP prior to the reinitiation and completion of consultation regarding the failure to fully implement conservation measures and terms and conditions of the BO and ITP, violates Section 7 the ESA. 16 U.S.C. § 1536(a)(2), (d); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994).

B. Violations of Section 9 of the ESA

Clark County, Nevada took steps required of it to retire grazing allotments on public lands managed by the BLM for the benefit of desert tortoise conservation, and BLM took steps *on paper* to close those allotments. However, in fact, BLM has and continues to allow trespass grazing on the allotments at a more intensive level than before the allotments were nominally closed. As a result, Clark County and the BLM have, in fact, failed to comply with the terms and conditions of the BO, ITP and IA regarding closing allotments as mandatory conservation measures for desert tortoise under the MSHCP; therefore, the ITP must be suspended and any additional “take” of desert tortoise under the MSHCP ITP is unauthorized and in violation of the ESA. Because the FWS and BLM are in ongoing violation of the terms and conditions of the BO, ITP and IA regarding conservation measures for the desert tortoise, no further take of desert tortoise may be authorized by FWS under the ITP and the ITP should be immediately suspended.

Because FWS continues to allow Clark County to authorize, approve, and allow projects and activities that may take desert tortoise under the ITP despite the violations of the terms and conditions of the BO, ITP and IA, the FWS is in ongoing violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1536(d); 50 C.F.R. § 17.31(a).

BLM is also in violation of Section 9 of the ESA for allowing take of desert tortoise to occur from grazing activities in desert tortoise habitat for over 14 years on lands for which it has not received any current biological opinion or incidental take statement. 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538. BLM is also in violation of the ESA for failing to fulfill the terms of the implementing agreement it adopted as a signatory to the Implementing Agreement for the MSHCP.

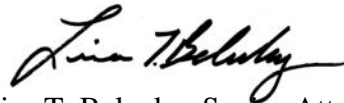
VI. Conclusion

For the above stated reasons, Clark County, the BLM and FWS have violated and remain in ongoing violation of the terms of the MSHCP, ITP, and terms and conditions of the biological

opinion; therefore, the incidental take permit is invalid and should be suspended or revoked. In addition, FWS and BLM have violated and remain in ongoing violation of Section 9 of the ESA for allowing take to occur without a valid take permit or take statement, and FWS has also violated and remains in ongoing violation of section 7 of the ESA for failing to reinstate consultation.

This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,



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