

DESERT TORTOISE COUNCIL

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Date: 25 February 2013

via email only

To: Jennifer Wade - Managing Associate, ESA | Land Management & Biological Resources,
2600 Capitol Avenue, Suite 200 Sacramento, CA 95816. jwade@esassoc.com

From: Desert Tortoise Council, Ecosystem Advisory Committee

RE: Proposal to develop a gaming casino in Twentynine Palms, San Bernardino Co., California

Dear Ms. Wade,

The Desert Tortoise Council (Council) is a private, non-profit organization comprised of hundreds of professionals and laypersons who share a common concern for wild desert tortoises and a commitment to advancing the public's understanding of this species. Established in 1976 to promote conservation of tortoises in the deserts of the southwestern United States and Mexico, the Council regularly provides information to individuals, organizations and regulatory agencies on matters potentially affecting the desert tortoise within its historical range.

The Council is in receipt of the draft Tribal Environmental Assessment (draft TEA) dated January 2013, and wishes to make comments and seek clarification on the issues that follow. We see on page 1-4 that a Final TEA will be produced later, so we herein assume that this is the draft, though that is not identified as such anywhere. We understand that the deadline for our comments is 27 February 2013.

We are concerned to see that the site is already being developed, a week before the deadline for receiving comments on the draft TEA. On 21 February 2013, six days before the deadline for public comment, the fenceline had already been bulldozed, a tortoise-proof fence installed, and gates were being constructed. The Council understands that the public review period is intended to solicit comments from affected interests, and that the project may be redesigned or even abandoned based on public input. We are not clear as to what authority has jurisdiction on tribal land in this case. How is it that the site is being developed before the public comment period is complete?

These are our specific comments and concerns:

1. The introduction in the draft TEA indicates that the evaluation considers impacts to resources located *off* the site, but is unclear as to what the regulations are that allow impact to resources occurring *on* the site. The draft TEA does not describe the Environmental Impact Ordinance referenced on page 1-4, but seems to imply that there is some immunity for onsite impacts so that only offsite impacts are of concern? Our review of Secretarial Order 3206 finds, "Nothing in this Order shall be applied to authorized direct (directed) take of listed species." The draft TEA does not document formal consultation between the Bureau of Indian Affairs (BIA) and U.S. Fish and Wildlife Service (USFWS), so we assume that such consultation has not been completed and the proponent has not received formal take authorization. The Final TEA must include a consultation history on this proposed project that clearly documents how the site can be developed before completing the public review of the draft TEA.

2. We are also in receipt of Mr. Davenport's "clearance survey" performed in January 2013; however his methods do not follow the protocol recommended by the USFWS. We understand that Mr. Davenport is a former employee of USFWS and is likely aware that USFWS recommends that clearance surveys be performed during the tortoise activity period, either in April/May or September/October. Did USFWS concur with these out-of-season surveys? It would appear that development of the site is being fast-tracked: clearance surveys have been performed out of season; ground disturbance and exclusionary fences have already been erected; and no formal take authorization has been granted, yet the project is proceeding as if all these factors were in place.

3. Is there intent to survey the site again in the spring or fall? If so and if tortoises are found, would the proponent be required to consult under Section 7 of the Federal Endangered Species Act between the BIA and USFWS; or, alternatively, under Section 10? Again, there is some confusion that would be cleared up if the Final TEA better describes the proponent's responsibilities or immunities to endangered species act regulations on tribal lands.

4. One of our primary concerns is the lack of endangered species act permitting for development of occupied habitat. Whereas we appreciate that the site with the fewest tortoise sign found during three surveys has been selected, tortoise sign is nonetheless still found throughout the tribal lands, as shown in Figure 2 (page 6) of Mr. Davenport's 2013 survey report. He indicated finding "...2 active desert tortoise burrows, 7 pellets (4 of which showed sign of recent occupation), 3 skeletal-shell remains, and 3 scats (2 of which were from the 2012 activity season for this species) were observed within the survey area" (see executive summary). There may be less sign than elsewhere, but there is sign; we assume that take authorization is required for developing occupied habitats.

5. We are not clear as to the proponent's relationship to the casino site, which clearly has sign of active tortoise occupancy, yet there is no discussion of formal consultation to offset the impact, which is at the least, loss of habitat and we must assume take of some tortoises. Although we applaud the proponent's due diligence to choose a site within its lands with the least tortoise signs, there are still signs present, and in California this means obtaining incidental take authorization either through Section 7 or Section 10. Our interpretation of Secretarial Order 3206 is that the proponent is not granted immunity from directly affecting a listed species, in this case, the desert tortoise. We strongly urge that mitigation for take of tortoises be prepared and executed if the project goes forward.

6. There is no alternative in the draft TEA that describes why these particular lands must be developed. Is the proponent required to develop their own lands? If not, is there latitude to develop lands not occupied by tortoises elsewhere in 29 Palms? It concerns us that tortoises occur, that the casino would be contiguous to Joshua Tree National Park, and the draft TEA fails to explain why this site apparently is the only viable alternative. This should be clarified in the Final TEA.

7. Is it true that the proponent tried to develop this same casino in the nearby community of Joshua Tree and received so much opposition that identified sites were abandoned? If so, why doesn't the draft TEA describe this and other rejected sites as "alternatives considered but rejected from further consideration?"

8. The intent of a "clearance survey" is typically to locate tortoises and remove them; it is performed as part of the incidental take permit. A clearance survey is performed to either document the absence of tortoises (which cannot be done here) or to locate burrows for excavation. Although this particular clearance survey found tortoise burrows, none was excavated and a host of measures, typically appearing in federal incidental take documents, has been identified. Having reviewed the draft TEA, we are still unsure if there is legal immunity concerning take, and we want that clearly described in the Final TEA. We strongly urge that any take of tortoises on the site be fully mitigated as expected under the Endangered Species Act.

9. Our review of Figure 2 on page 6 of Davenport's report suggests that there are no places within the survey area that are likely to be devoid of tortoises at the time of ground clearance. Apparently fewer signs were found in January 2013, but signs *were* found in the northwest corner in 2009 and in the "survey area" in 2013. The draft TEA fails to show the proposed project footprint on a map that also shows tortoise sign, and consequently we cannot determine how much sign would be affected by the current proposal.

10. Given the mobility of tortoises, we expect that tortoises and/or their signs will be found onsite, within the impact footprint at the time of construction. If preconstruction surveys reveal that tortoise signs, including either scat or burrows, are found within the impact footprint, would the site be developed anyway without an incidental take permit? Or would construction be halted until a site lacking all tortoise sign is found, or permits acquired?

11. Mitigation Measure BIO-1 should be amended to say that all activities likely to harm desert tortoises will cease **and necessary permits acquired if any tortoise sign is found within the construction impact area**. There is a bullet like this near the top of page 3.3.-12 of the draft TEA, which amazingly enough says the fence could be partially taken down to allow a tortoise to leave the site. Such manipulation of tortoises would be considered take, which would require endangered species act permitting to develop occupied habitat.

12. The draft TEA includes the following bullet on page 3.3.-12: "If an incidental take occurs during construction, work would stop and USFWS would be contacted to discuss what actions would be necessary." Since incidental take would include the development of occupied desert tortoise habitat, the presence of sign onsite at the time of construction may already be construed as occupied habitat. Permits should be required *before* site development, not as a contingency if *more* tortoise sign is found.

13. Section 3.3.4 of the draft TEA does a good job of outlining that Army Corps of Engineers would not have jurisdiction over this site, but provides absolutely no discussion as to why Section 1601 of the Fish and Game Code regulating streambed alteration is not applicable. Again, the naïve reader needs to know that Fish and Game regulations do not apply, if that is the case. At the very least, the Final TEA should indicate that a Streambed Alteration Agreement is needed or not, and for what reason(s). Again we strongly urge that the practices of the Fish and Game Code be followed to provide the best possible environmental management.

14. In general, the types of measures described on page 3.3.-10 through 3.3.-12 would normally appear in documents authorizing incidental take, such as a habitat conservation plan or biological opinion. Implementing these measures on the site where tortoises are likely to be affected without formal take authorization in either a Section 10(a)(1)(B) permit or Section 7 biological opinion, as applicable, would be in violation of the Federal Endangered Species Act.

15. Interestingly, the proponent's intent to implement a Habitat Conservation Plan (HCP) is missing from the analysis. Although it is listed as an existing document on page 3.3.-1, it is not mentioned again until Section 4.3 of the TEA in the cumulative effects paragraph (which is not an analysis), where it states: "...the Tribe proposes to adopt a Tribal Habitat Conservation Plan (HCP) and the mitigation measures within this TEA." The HCP and resulting incidental take permit come *before* ground disturbance, not afterwards; any protective measures implemented in the absence of formal take authorization are a violation of the Federal Endangered Species Act.

16. The Council does not necessarily oppose the project, although its location is problematic, so long as the development obtains the appropriate permits or, if that is not a legal requirement, follows the practices that best protect species and habitat. The first biological mitigation measure should be that the proponent shall acquire necessary permits and/or prepare the mitigation plans *before* initiating ground disturbance. Although the mitigation measures are described, the draft TEA fails to adequately describe the proponent's intent to implement the HCP, or to indicate which permit(s) would result from that action. One does not implement an HCP in the absence of the permit authorizing the measures to be implemented. We request clarification in the Final TEA.

17. The Final TEA needs to explain and analyze how the Tribal HCP legally offsets and mitigates impacts in the absence of pertinent permits. In the draft, it is confusing. First, HCP's apply to private actions, and this is a federal action (Or is it? Again, the draft TEA is unclear). Does the proponent plan to acquire a section 10(a)(1)(B) incidental take permit, which would result from a typical HCP? The draft TEA fails to explain how development of tribal lands, which we understand to be a federal designation, is not soliciting a biological opinion under Section 7 of the Federal Endangered Species Act.

18. The first paragraph in Section 3.3.6 indicates that "...the proposed development area does not include nesting habitat for migratory birds," which implies that only migratory birds are protected by the Migratory Bird Treaty Act (MBTA). In fact, in southern California the only two nesting birds not protected by the MBTA are European starling and English sparrow, which are not native. All other nesting birds are protected, including a dozen species that may nest onsite. Given the number of cacti onsite, we expect that house finches will already be nesting at the time of ground disturbance, and nests with eggs must be avoided. The Final TEA should correct this misrepresentation and define mitigation measures.

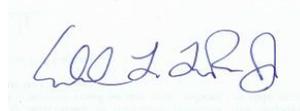
19. A member of the Council is very familiar with the region, having performed numerous surveys. He is certain that Alverson's foxtail cactus (*Coryphantha alversonii*), which is considered rare by the California Native Plant Society occurs onsite. He found it immediately east of the proposed casino, 1,000 feet north, and on every other site surveyed in the immediate area. Although it is depicted in Figure 7 of the draft TEA, it is not included in Table 3.3.1.

20. Other special status species documented within several miles of the site that are not discussed in the draft TEA are: Burrowing owl, Swainson's hawk, golden eagle, Cooper's hawk, sharp-shinned hawk, northern harrier, LeConte's thrasher, long-eared owl, and loggerhead shrike. The Council can provided documented evidence of the occurrence of each of these species in the immediate area, and feels that impacts and mitigation measures for these species should be included in the Final TEA.

21. The draft TEA mentions that several tortoises have been fitted with radio transmitters. How has this activity been permitted? Has a Section 10(a)(1)(A) scientific permit been issued for this activity? If this activity would not occur *but for* the proposed development, such manipulation must necessarily occur as part of the Section 10(a)(1)(B) permit. All of the many manipulations described on page 19 of Mr. Davenport's 2011 document, under "Population Monitoring," can only be implemented with necessary permits in place. Again, the draft TEA fails to describe under what authority these tortoises (and additional untagged tortoises as per page 19) have been fitted with transmitters.

In general, we are mostly concerned that protective measures would be implemented in the absence of incidental take authorization or the equivalent level of project mitigation. Most of our concerns would be alleviated if the proponent obtains pertinent incidental take permit(s) and implements measures given therein in a prudent manner. We understand that the proponent's consultant is obligated to answer the questions and concerns given herein, which would be reflected in the Final TEA. If you would like to discuss our concerns, please feel free to contact Ed LaRue (760-964-0012) or any of the other board members.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ed LaRue, Jr.", is centered below the text "Sincerely,". The signature is written in a cursive, somewhat stylized script.

Desert Tortoise Council – Ecosystems Advisory Committee
Edward L. LaRue, Jr.