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Via email

30 April 2024

Ronald Nuckles, Field Manager
Bureau of Land Management, Needles Field Office
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BLM_CA_Web_NE@blm.gov, rnuckles@blm.gov

RE: Rigo Favela Access Road Right-of-Way Categorical Exclusion (DOI-BLM-CA-D090-2024-0003-CX)

Dear Mr. Nuckles,

The Desert Tortoise Council (Council) is a 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 desert tortoise species. Established in 1975 to promote conservation of tortoises in the deserts of the southwestern United States and northern Mexico, the Council routinely provides information and other forms of assistance to individuals, organizations, and regulatory agencies on matters potentially affecting desert tortoises within their geographic ranges.

Both our physical and email addresses are provided above in our letterhead for your use when providing future correspondence to us. When given a choice, we prefer to receive emails for future correspondence, as mail delivered via the U.S. Postal Service may take several days to be delivered. Email is an "environmentally friendlier way" of receiving correspondence and documents rather than "snail mail."

The Mojave desert tortoise is among the top 50 species on the list of the world's most endangered tortoises and freshwater turtles. The International Union for Conservation of Nature's (IUCN) Species Survival Commission, Tortoise and Freshwater Turtle Specialist Group, now considers the Mojave desert tortoise to be Critically Endangered (Berry et al. 2021), "… based on population reduction (decreasing density), habitat loss of over 80% over three generations (90 years), including past reductions and predicted future declines, as well as the effects of disease (upper respiratory tract disease/mycoplasmosis). *Gopherus agassizii* (sensu stricto) comprises tortoises in the most well-studied 30% of the larger range; this portion of the original range has seen the most

human impacts and is where the largest past population losses have been documented. A recent rigorous rangewide population reassessment of *G. agassizii* (sensu stricto) has demonstrated continued adult population and density declines of about 90% over three generations (two in the past and one ongoing) in four of the five *G. agassizii* recovery units and inadequate recruitment with decreasing percentages of juveniles in all five recovery units."

This status, in part, prompted the Council to join Defenders of Wildlife and Desert Tortoise Preserve Committee (Defenders of Wildlife et al. 2020) to petition the California Fish and Game Commission in March 2020 to elevate the listing of the Mojave desert tortoise from Threatened to Endangered in California. In its status review, California Department of Fish and Wildlife (CDFW) (2024) stated: "At its public meeting on October 14, 2020, the Commission considered the petition, and based in part on the Department's [CDFW] petition evaluation and recommendation, found sufficient information exists to indicate the petitioned action may be warranted and accepted the petition for consideration. The Commission's decision initiated this status review to inform the Commission's decision on whether the change in status is warranted."

In their February 2024 status review, CDFW concluded: "The Department's recommendation is that uplisting the Mojave Desert Tortoise is warranted." Importantly, during their April 17-18, 2024 meeting, the California Fish and Game Commission voted unanimously to uplist the tortoise from threatened to endangered under the California Endangered Species Act (CESA) based on the scientific data and analysis provided on the species' status, declining trend, numerous threats, and ineffective management of the species and its habitat.

Description of BLM's Proposed Action

According to the "BLM National NEPA Register" webpage https://eplanning.blm.gov/eplanning-ui/project/2030046/510, last update March 4, 2024, and documents provided on that webpage, the Bureau of Land Management (BLM) Needles Field Office has completed a National Environmental Policy Act (NEPA) review of a request it received for a new road right-of-way (ROW) to access private property, APN 0573-311-05-0000, located north of Nipton Road. According to BLM (2024), the private property is "surrounded by public lands."

The road would be approximately 3,170 feet long, 15 feet wide, and would include a 5-foot buffer on each side. The area the road would impact directly would be 1.82 acres. A gate with lock would be installed at the entrance from Nipton Road.

The road would be constructed using a crew of approximately 4 to 8 people and a CAT 14E motor grade. A water truck would be used for dust control. Construction would occur within a 60-day period and would occur during the "desert tortoise off-season."

The location of the road was selected because it avoids large vegetation and allows driving through 4 washes without having to significantly alter the washes[1]. Prior to construction disturbing activities, the proponent with the assistance of the BLM would meet in the field for a preconstruction conference to place center line stakes and stakes at the exterior limits of the ROW. Prior to issuing a notice to proceed (NTP) for construction disturbing activities, the BLM will verify that the stakes are within the Area of Potential Effect (APE) and that the road would avoid large creosote bushes, desert tortoise burrows, and/or other resources.

[1] The BLM must inform the proponent that a Streambed Alteration Agreement may be required from the CDFW for even limited impacts to jurisdictional waters of the State.

According to Exhibit A Plan of Development, the purpose of the road is to access the property "(approximately 52 weekends per year) using personal vehicles and RV for a weekend stay."

The requested ROW is for 30 years. No other information was found on the use or maintenance of the road during the 30-year ROW grant or a requirement for restoration of the ROW when the grant is terminated.

The requested ROW and resulting road are located in Special Designation Area:

- Ivanpah Valley Area of Critical Environmental Concern (ACEC)
- Ivanpah Valley Extended Recreation Management Area (ERMA)
- Kingston–Amargosa California Desert National Conservation Lands (CDNCL)
- Desert Tortoise Critical Habitat

The location of the ROW is near the community of Nipton in eastern San Bernardino County near the California-Nevada border. It is in the Eastern Mojave Recovery Unit and Ivanpah Valley Tortoise Conservation Area (TCA) population for the tortoise (USFWS 2011).

The Categorical Exclusion was signed by the BLM Needles Field Manager on March 1, 2024.

Comments on the Rigo Favela Access Road Right-of-Way Categorical Exclusion

No Receipt of Email or Written Notification of BLM's Preparation of a Categorical Exclusion (CX)

We learned of BLM's issuance of this Rigo Favela Access Road Right-of-Way CX from a third party. The Council did not receive a notice from BLM about its intent to prepare and issue a CX for the project, despite the fact that we have requested in numerous letters to be informed of projects that *may affect* desert tortoise species. Had we received a notice, the Council would have provided written comments.

Because you are the new field manager in the BLM Needles Office, we are providing you with a history of the Council's efforts with BLM to be considered an affected interest for proposed actions that may affect desert tortoises and their habitats, and to be notified when there is an opportunity to provide public comment.

Beginning in 2014, in comment letters submitted by the Council to BLM for proposed projects in the California Desert Conservation Area (CDCA), we requested that the Desert Tortoise Council "be identified as an Affected Interest for this and all other projects funded, authorized, or carried out by the BLM that may affect species of desert tortoises, and that any subsequent environmental documentation for this project is provided to us at the contact information listed above." In other words, we requested to be notified of any proposed action that may affect the Mojave desert tortoise and/or tortoise habitat in the CDCA. We provided contact information including the email address for the Council's Ecosystem Advisory Committee so BLM could easily provide this information to us.

Because BLM failed to honor these repeated requests, on November 7, 2019, the Council sent a certified letter to the District Manager of the CDCA and copied the Field Managers in Ridgecrest, Barstow, Needles, Palm Springs, and El Centro[2]. In the certified letters to these six managers, the Council reiterated this request. We listed 14 comment letters the Council submitted to BLM field offices or the district office during 2018 and 2019 for various proposed projects/proposed actions in the CDCA that included this notification request.

During the past few years, we have carbon copied the BLM CDCA District Manager and California State Director on many of the Council's letters that commented on BLM proposed projects in the CDCA with the same request reiterated in these letters. We copied our comment letters and this request to these offices because the field offices in the CDCA were not consistent in providing notification to the Council for proposed projects in tortoise habitat. Our intent was for these managers to direct the field offices to honor the Council's simple request.

Because you are a new Field Manager, we are advising you of our ongoing request to be notified, preferably by email (eac@deserttortoise.org), of any action BLM proposes to authorize, fund, or carry out in the range of the tortoise for which there is an opportunity for the public to provide comments. Please contact us if you have any questions about this request.

Compliance of BLM's Issued Categorical Exclusion with National Environmental Policy Act (NEPA) Regulations

Connected Actions: As described in 40 Code of Federal Regulations (CFR) 1508.25(a)(1), connected actions include actions that "[c]annot or will not proceed unless other actions are taken previously or simultaneously." The Council believes the ongoing use and maintenance of the road as well as the activities that would occur on the private property because of the access provided to vehicles and an RV to the private property are connected actions to the issuance of a ROW to construct the road. The use of the road by vehicles and the RV cannot occur until the road is constructed, a previous action, and the vehicles and RV cannot access the private property for their weekend activities unless the road is constructed. Consequently, BLM should include the ongoing use and maintenance of the road and the activities that would occur on the private property because of the access provided to vehicles and an RV in its analysis of impacts, especially for the tortoise/tortoise habitat, when evaluating the appropriate method to implement to comply with NEPA.

Compliance with the Selected Categorical Exclusion: In the project-specific CX, BLM selected the following categorical exclusion to apply to the proposed project:

> 516 DM [Department of the Interior Manual]11.9 (E.)(17.): "Grants of a short rights-of-way for utility service or terminal access roads to an individual residence, outbuilding, or water well."

[2] https://www.dropbox.com/s/xaqfgb20ul94ak8/BLM%20CDCA%20District%20Manager%20DTC%20as%20an%20Affected%20Interest.11-7-2019.pdf?dl=0

The Council asserts that BLM was overly broad in its use of this CX to justify granting the road ROW. The Applicant's statement of purpose in the Road Plan of Development posted in the BLM National NEPA Register for the project (https://eplanning.blm.gov/eplanning-ui/project/2030046/510) does not align with this CX. According to the Applicant, the purpose of the access road is to access the site on weekends using vehicles and an RV. We were unable to find information that there is "an individual residence, outbuilding, or water well" on the property. In addition, in viewing the October 15, 2023 version of Google Earth, we did not find a structure (i.e., residence or outbuilding) on the parcel. Based on this information, we conclude the CX selected is inappropriate for the proposed action.

Compliance with Department of the Interior Regulations: Extraordinary Circumstances Requirement: Department of the Interior (DOI) regulations at 43 CFR 46.205(c) require that before any action described in the list of CXs is used, the list of ''extraordinary circumstances'' at 43 CFR 46.215 must be reviewed for applicability. If a CX does not pass the ''extraordinary circumstances'' test, the proposed action analysis defaults to either an environmental assessment (EA) or an environmental impact statement (EIS). "As proposed actions are designed and then reviewed against the CX list, proposed actions or activities must be, at a minimum, consistent with DOI and BLM regulations, manuals, handbooks, policies, and applicable land use plans regarding design features, best management practices, terms and conditions, conditions of approval, and stipulations" (BLM 2020).

The Council contends that (1) the justifications BLM used to explain why the list of extraordinary circumstances did not apply for the proposed action were not accurate, and (2) the proposed action is not consistent with the Desert Renewable Energy Conservation Plan (DRECP), which is the applicable land use plan providing best management practices, terms and conditions, conditions of approval, and stipulations.

Compliance with the Extraordinary Circumstances Requirement: *Extraordinary Circumstance 2. "Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas."*

BLM's response is "There are no park or refuge lands, wilderness areas, national natural landmarks, sole or principle drinking water aquifers, prime farmlands, wetlands, floodplains, or national monuments in the project area." However, in reviewing one of the maps provided by BLM for the ROW, the map indicates that the ROW would leave BLM land and enter National Park Service (NPS) land near the terminus of the ROW.

In addition, BLM neglected to mention that the project is in designated critical habitat for the tortoise (Ivanpah Critical Habitat Unit = CHU), the Ivanpah Valley Tortoise Conservation Area (TCA), and an Area of Critical Environmental Concern (ACEC) and would have adverse impacts to these ecologically significant or critical areas. When examining the baseline condition for the tortoise and tortoise habitat in this TCA and CHU, which includes past and present projects/actions and their impacts on the survival and recovery of the Ivanpah Valley TCA population, the data are clear. The ongoing non-viable status of the Ivanpah Valley TCA population demonstrates this critical habitat unit is unable to provide adequate feeding, breeding, and sheltering for the tortoise population to survive and persist. Please see a summary of the data on the demographic status of the Ivanpah Valley TCA population and the tortoise in the Eastern Mojave Recovery Unit under "Extraordinary Circumstance 8" below.

Extraordinary Circumstance 3. "Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources."

BLM's response is "There are no controversial environmental effects or unresolved conflicts associated with this action."

The Council disagrees that there are no unresolved conflicts. The ROW grant would provide a benefit to a private party at the expense of impacts to public trust resources. The public is not benefiting from the ROW grant. The purpose of the grant does not conform to the goals and objectives for managing the area as described in the DRECP. Road construction and use is not a compatible activity with desert tortoise management and recovery. New road construction and use should not occur in critical habitat. Please see additional information below under "Extraordinary Circumstance 9" and "Compliance with Desert Renewable Energy Conservation Plan (DRECP) and Conservation Management Actions (CMAs)."

Extraordinary Circumstances 5. "Establish a precedent for future action, or represent a decision in principle about future actions, with potentially significant environmental effects."

BLM responds that the "Activity is consistent with actions previously approved on similar ROWs. It will not establish a precedent for future action."

Given the hundreds of small private parcels in the CDCA, if each landowner came to BLM and requested a ROW to construct, use, and maintain a road to access their undeveloped land, what would be the cumulative impacts of that action? Has BLM analyzed those impacts to the human environment such that they can say the result is not a significant impact and warrants approval under NEPA as a CX? We contend that providing access to undeveloped land where there is no residence, outbuilding, or well for weekend recreation would be precedent setting because it may require BLM to approve ROWs under a CX to all landowners of undeveloped land within the CDCA boundary.

Extraordinary Circumstances 8. "Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species."

BLM responds that "Although the project is in desert tortoise critical habitat, surveys revealed only one burrow outside of the proposed road. Construction of the road would be during the desert tortoise off season, and would require standard stipulations including a speed limit of less than 15 miles per hour, and checking under tires for desert tortoises. A preconference meeting with the proponent and BLM resources staff prior to construction would verify again that no burrows are in the proposed road and that the proponent understands the terms and conditions of the ROW grant. Thus, the proposed action would not have significant impacts on federally listed Threatened or Endangered Species, and would not have impacts on designated Critical Habitat."

The construction of a road in tortoise critical habitat will have impacts on designated critical habitat. Granting the ROW and the subsequent construction, use, and maintenance of the road will result in the loss of forage species and the proper soil conditions to provide for the growth of such species; suitable substrates for burrowing, nesting, and overwintering; vegetation for shelter from temperature extremes and predators; and habitat protected from disturbance and human-caused mortality.

Unfortunately, BLM's response to this extraordinary circumstance indicates that BLM did not consider the current demographic status of the Ivanpah Valley TCA population; the behavior of the species; and the numerous direct, indirect, and cumulative impacts from the construction, use, and maintenance of a road to the tortoise and tortoise habitat.

Regarding the status of the tortoise, the Eastern Mojave Recovery Unit had a 67 percent decline in tortoise density from 2004 to 2014 (USFWS 2015, Allison and McLuckie 2018), the highest rate of decline of the five tortoise recovery units. The status did not improve through 2021, the last year population monitoring was conducted. The density of adult tortoises is well below the 3.9 adults per km^2 needed for tortoise population viability (USFWS 1994, Allison and McLuckie 2018, USFWS 2020, 2022). The Ivanpah Valley TCA population located in designated critical habitat had an adult density of 1.8 tortoise per km^2 when last surveyed. That is the lowest density of all 17 TCA populations monitored in 2020 and 2021. These data indicate that the habitat in the Eastern Mojave Recovery Unit and the Ivanpah Valley TCA population/Ivanpah CHU are not providing the physical and biological features for the tortoise for feeding, breeding (reproduction and recruitment), and shelter needed to sustain this tortoise population. Thus, any additional impacts to this population and habitat would be significant as they would continue the downward trend of this non-viable population toward extirpation. We remind BLM that survival and recovery of the tortoise must occur in all five recovery units before the tortoise is considered recovered (USFWS 1994, 2011).

Regarding the behavior of the tortoise, while tortoises are most active in the spring and fall months, they can be active at any time of the year especially during and after a precipitation event. This is especially true of juvenile tortoises that have been observed above ground in winter months when ambient temperatures are cool. Constructing the road during the "tortoise off season" does not guarantee that tortoises will not be aboveground and active in the project area during the construction of the road, and thus avoided as implied by BLM's explanation.

In addition, BLM said that "surveys revealed only one burrow outside of the proposed road" was found. There is no indication in the documents provided by BLM that the surveys followed U.S. Fish and Wildlife Service (USFWS) protocol surveys (USFWS 2019), especially with respect to time of year implemented, surveying the action area, which is larger than the project area, and that the surveys conducted by persons with experience and approved by the USFWS (USFWS 2009). In addition, the survey results that BLM provided did not indicate the number of rodent burrows occurring. Neonate and juvenile desert tortoises, especially during the first few years after hatching, will use rodent burrows for shelter and brumation rather than dig their own burrows (Hazard and Morafka 2004). Thus, the presence on one subadult or adult tortoise burrow does not necessarily indicate there is only one tortoise in the project area, because there may be neonate or juvenile tortoise in rodent burrows.

The lifetime home range for the Mojave desert tortoise is more than 1.5 square miles (3.9 square kilometers) of habitat (Berry 1986) and tortoises may make periodic forays of more than 7 miles (11 kilometers) at a time (Berry 1986). Thus, tortoises may be using the project area but may not have been using it at the time of surveys. Although the road is 3,170 feet long, "ignoring minor or temporary disturbance on the landscape could result in a cumulatively large impact that is not explicitly acknowledged (Goble 2009); therefore, understanding and quantifying all surface disturbance on a given landscape is prudent (Averill-Murray et al. 2021)."

With respect to the direct, indirect, and cumulative impacts of roads and their use to the tortoise and tortoise habitat, BLM calculated the direct loss of habitat from road construction. The CX does not mention the other direct impacts or the indirect or cumulative impacts from road use or maintenance when responding to relevance of this extraordinary circumstance. Some of these impacts are described below.

The presence/use of roads even with low vehicle use has numerous adverse effects on the desert tortoise and its habitats that have been reported in scientific literature. These include the deterioration/loss of habitat, changes in hydrology especially to downstream/downslope soils and vegetation, reduced air quality with associated impacts on vegetation; and increased competition and predation [including intentional and unintentional human predation (e.g., injury, mortality, collecting, and vandalism)].

Vehicle use on new roads equates to increased direct mortality and a new "road effect zone" for desert tortoises. Road construction, use, and maintenance adversely affect tortoises and other wildlife through numerous mechanisms that can include the loss, fragmentation, and alteration of habitat (Nafus et al. 2013; von Seckendorff Hoff and Marlow 2002). von Seckendorff Hoff and Marlow (2002) reported reductions in Mojave desert tortoise numbers and sign from infrequent use of roadways. For two graded, unpaved roads, the reduction in tortoises and sign was evident 1.1 to 1.4 km (3,620 to 4,608 feet) from the road. This loss of tortoises in this "road effect zone" is not calculated in the CX. Nafus et al. (2013) reported that roads may decrease tortoise populations via several possible mechanisms, including *cumulative* [emphasis added] mortality from vehicle collisions and reduced population growth rates from the loss of larger reproductive animals. Other documented impacts from road construction, use, and maintenance include creating or increasing food subsidies for common ravens and other tortoise predators that contribute to increased predation pressure on the desert tortoise, facilitating the spread and proliferation of non-native invasive plant species, and increased sources of wildfires (Brooks and Matchett 2006).

Vehicle use along roads facilitates the spread of invasive plant species. Their spread and proliferation from associated surface disturbance contributes to non-native invasive plants that outcompete native plant species. Native plants species, especially annual forbs, are required by tortoises for adequate nutrition (Drake et al. 2016).

The proposed Project would likely increase the availability of human-provided subsidies for predators of the tortoise including the common raven and coyote during construction, use, and maintenance. For example, during the construction phase, grading and other surface disturbance activities would kill/injure fossorial animals and attract scavengers such as ravens and coyotes to the site. Water used to control dust and the waste generated during construction including food brought to the project site by workers for meals, etc., are examples of food and water subsidies for ravens and coyotes that would attract these predators to the project area and increase their numbers in the surrounding area. The presence of food waste, water, and perhaps pet food during the use of the parcel on weekends and any outside waste containers would provide a reliable source of food subsidies for common ravens and coyotes throughout the year.

These subsidies of tortoise predators could be minimized by requiring Best Management Practices (BMPs) that include using water for dust suppression, so it does not form puddles, requiring waste containers that are predator-proof and wind-proof and are regularly maintained. The CX requires raven-proof waste containers, but not tortoise predator-proof or wind-proof waste containers. However, after implementing BMPs, impacts remain; they are not eliminated. The non-viable status of the Ivanpah Valley TCA population and the tortoise in the Eastern Mojave Recovery Unit cannot survive and persist by only minimizing impacts. Rather, the impacts must be reversed if the tortoise is to survive.

Extraordinary Circumstance "9. Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment."

BLM asserts that the "project does not occur within any Indian Reservation and would not violate Tribal law and would not violate any environmental laws within the California Desert Conservation Area. The proposed action conforms to the CDCA, as amended which complies with all federal or state law."

We assert that the proposed action does not conform with the CDCA, as amended, for reasons provided below under the DRECP (BLM 2016), which the latest pertinent CDCA Plan amendment. In addition, it is not consistent with DOI and BLM regulations, manuals, handbooks, policies, and applicable land use plans regarding design features, BMPs, terms and conditions, conditions of approval, and stipulations.

Compliance with Desert Renewable Energy Conservation Plan (DRECP) and Conservation Management Actions (CMAs): The DRECP includes various Goals and Objectives that are achieved in part by applying and enforcing CMAs that are required for all activities, including those involving motorized vehicle use. "Activity" under the DRECP includes authorized projects and management activities conducted on BLM-administered lands. Activities include actions approved by permit or other authorization as well as actions conducted by the BLM.

For example, in the Kingston–Amargosa National Conservation Lands Ecoregion, BLM states, "Overarching Goals: Manage area in accordance with the Desert Tortoise Recovery Plan. Protect biological values, including habitat quality, populations of sensitive species, and landscape connectivity while providing for compatible public uses." Allowing the construction and use of a new road does not conform to this overarching goal.

Below are some of the applicable Goals, Objectives, and CMAs that BLM is required to enforce that are in the DRECP and are applicable to the proposed ROW:

Goal 3/Desert Tortoise Conservation Areas: Within each desert tortoise recovery unit, on BLM land within the Land Use Plan Amendment (LUPA) Decision Area, maintain well-distributed populations through a network of conservation lands that provide sufficient contiguous size and configuration to provide long-term population viability, connectivity, growth in recovery unit population size, and increases in recovery unit population distribution.

- Objective 3.1 (Tortoise Conservation Areas): Maintain no net loss in the quantity of conserved desert tortoise habitat, on BLM land in the LUPA Decision Area, within each Tortoise Conservation Area in support of long-term desert tortoise population viability.
- Objective 3.2 (Tortoise Conservation Areas): Contribute to increasing rates of population change for desert tortoises over at least 25 years (a single tortoise generation).
- Objective 3.3 (Tortoise Conservation Areas): Increase in the distribution of desert tortoises throughout each Tortoise Conservation Area, on BLM land within the LUPA Decision Area over at least 25 years.

In the CX, BLM has not listed the applicable CMAs that apply and would be implemented as part of the proposed ROW grant. By not including these CMAs in the CX, BLM is not complying with the DRECP.

The Council asserts that the following CMAs apply to the proposed ROW grant, and there may be more:

LUPA-BIO-1: Conduct a habitat assessment (see Glossary of Terms) of Focus and BLM Special Status Species' suitable habitat for all activities and identify and/or delineate the DRECP vegetation types, rare alliances, and special features (e.g., Aeolian sand transport resources, Joshua tree, microphyll woodlands, carbon sequestration characteristics, seeps, climate refugia) present using the most current information, data sources, and tools (e.g., DRECP land cover mapping, aerial photos, DRECP species models, and reconnaissance site visits) to identify suitable habitat (see Glossary of Terms) for Focus and BLM Special Status Species. If required by the relevant species-specific CMAs, conduct any subsequent protocol or adequate presence/absence surveys to identify species occupancy status and a more detailed mapping of suitable habitat to inform siting and design considerations. If required by relevant species-specific CMAs, conduct analysis of percentage of impacts to suitable habitat and modeled suitable habitat.

LUPA-BIO-2: Designated biologist(s) (see Glossary of Terms), will conduct, and oversee where appropriate, activity-specific required biological monitoring during pre-construction, construction, and decommissioning to ensure that avoidance and minimization measures are appropriately implemented and are effective. The appropriate required monitoring will be determined during the environmental analysis and BLM approval process. The designated biologist(s) will submit monitoring reports directly to BLM. Note: If desert tortoise signs are found or a tortoise observed during the preconstruction survey prior to road construction (USFWS 2019), all activities must stop so the BLM can confer with the USFWS under Section 7 of the Federal Endangered Species Act (FESA), as the CX would no longer be a valid level of authorization for this project.

LUPA-BIO-3: Resource setbacks (see Glossary of Terms) have been identified to avoid and minimize the adverse effects to specific biological resources. Setbacks are not considered additive and are measured as specified in the applicable CMA. Allowable minor incursions (see Glossary of Terms), as per specific CMAs do not affect the following setback measurement descriptions. Generally, setbacks (which range in distances for different biological resources) for the appropriate resources are measured from:

- The edge of suitable habitat or active nest substrates for the appropriate Focus and BLM Special Status Species**.**

LUPA-BIO-4: For activities that may impact Focus and BLM Special Status Species, implement all required species-specific seasonal restrictions on pre-construction, construction, operations, and decommissioning activities. Species-specific seasonal restriction dates are described in the applicable CMAs. Alternatively, to avoid a seasonal restriction associated with visual disturbance, installation of a visual barrier may be evaluated on a case-by-case basis that will result in the breeding, nesting, lambing, fawning, or roosting species not being affected by visual disturbance from construction activities subject to seasonal restriction. The proposed installation and use of a visual barrier to avoid a species seasonal restriction will be analyzed in the activity/project specific environmental analysis.

LUPA-BIO-5: All activities, as determined appropriate on an activity-by-activity basis, will implement a worker education program that meets the approval of the BLM. The program will be carried out during all phases of the project (site mobilization, ground disturbance, grading, construction, operation, closure/decommissioning or project abandonment, and restoration/ reclamation activities). The worker education program will provide interpretation for non-English speaking workers and provide the same instruction for new workers prior to their working on site. As appropriate based on the activity, the program will contain information about:

- Site-specific biological and nonbiological resources.
- Information on the legal protection for protected resources and penalties for violation of federal and state laws and administrative sanctions for failure to comply with LUPA CMA requirements intended to protect site-specific biological and nonbiological resources.
- The required LUPA and project-specific measures for avoiding and minimizing effects during all project phases, including but not limited to resource setbacks, trash, speed limits, etc.
- Reporting requirements and measures to follow if protected resources are encountered, including potential work stoppage and requirements for notification of the designated biologist.
- Measures that personnel can take to promote the conservation of biological and nonbiological resources.

LUPA-BIO-6: Subsidized predator standards, approved by BLM, in coordination with the USFWS and CDFW, will be implemented during all appropriate phases of activities, including but not limited to renewable energy activities, to manage predator food subsidies, water subsidies, and breeding sites including the following:

- Common Raven management actions will be implemented for all activities to address food and water subsidies and roosting and nesting sites specific to the Common Raven. These include identification of monitoring reporting procedures and requirements; strategies for refuse management; as well as design strategies and passive repellant methods to avoid providing perches, nesting sites, and roosting sites for Common Ravens.

- The application of water and/or other palliatives for dust abatement in construction areas and during project operations and maintenance will be done with the minimum amount of water necessary to meet safety and air quality standards and in a manner that prevents the formation of puddles, which could attract wildlife and wildlife predators.
- Following the most recent national policy and guidance, BLM will take actions to not introduce, dispose of, or release any non-native species into areas of native habitat, suitable habitat, and natural or artificial waterways/water bodies containing native species.
- All activity work areas will be kept free of trash and debris. Particular attention will be paid to "micro-trash" (including such small items as screws, nuts, washers, nails, coins, rags, small electrical components, small pieces of plastic, glass or wire, and any debris or trash that is colorful or shiny) and organic waste that may subsidize predators. All trash will be covered, kept in closed containers, or otherwise removed from the project site at the end of each day or at regular intervals prior to periods when workers are not present at the site.
- In addition to implementing the measures above on activity sites, each activity will provide compensatory mitigation that contributes to LUPA-wide raven management.

LUPA-BIO-8: All activities that are required to close and decommission the site (e.g., renewable energy activities) will specify and implement project-specific closure and decommissioning actions that meet the approval of BLM, and that at a minimum address the following:

- Specifying and implementing the methods, timing (e.g., criteria for triggering closure and decommissioning actions), and criteria for success (including quantifiable and measurable criteria).
- Recontouring of areas that were substantially altered from their original contour or gradient and installing erosion control measures in disturbed areas where potential for erosion exists.
- Restoring vegetation as well as soil profiles and functions that will support and maintain native plant communities, associated carbon sequestration and nutrient cycling processes, and native wildlife species.
- Vegetation restoration actions will identify and use native vegetation composition, native seed composition, and the diversity to values commensurate with the natural ecological setting and climate projections.

LUPA-BIO-14: Implement the following general standard practices to protect Focus and BLM Special Status Species:

- Feeding of wildlife, leaving of food or trash as an attractive nuisance to wildlife, collection of native plants, or harassing of wildlife on a site are prohibited.
- Any wildlife encountered during the course of an activity, including construction, operation, and decommissioning will be allowed to leave the area unharmed.
- Domestic pets are prohibited on sites. This prohibition does not apply to the use of domestic animals (e.g., dogs) that may be used to aid in official and approved monitoring procedures/protocols, or service animals (dogs) under Title II and Title III of the American with Disabilities Act.

- All construction materials will be visually checked for the presence of wildlife prior to their movement or use. Any wildlife encountered during the course of these inspections will be allowed to leave the construction area unharmed.

LUPA-BIO-IFS-2: Construction of new roads and/or routes will be avoided to the maximum extent practicable (see Glossary of Terms) within desert tortoise habitat in tortoise conservation areas or tortoise linkages identified in Appendix D, unless the new road and/or route is beneficial to minimize net impacts to natural or ecological resources of concern for desert tortoise. TCAs and identified linkages should have the goal of "no net gain" of road density.

LUPA-BIO-IFS-8: Inspect the ground under the vehicle for the presence of desert tortoise any time a vehicle or construction equipment is parked in desert tortoise habitat outside of areas fenced with desert tortoise exclusion fencing. If a desert tortoise is seen, it may move on its own. If it does not move within 15 minutes, a designated biologist may remove and relocate the animal to a safe location. Note: The CX does not authorize handling of any tortoises.

LUPA-BIO-COMP-1: Impacts to biological resources, identified and analyzed in the activity specific environmental document, from activities in the LUPA Decision Area will be compensated using the standard biological resources compensation ratio, except for the biological resources and specific geographic locations listed as compensation ratio exceptions and Compensation acreage requirements may be fulfilled through non-acquisition (i.e., restoration and enhancement), land acquisition (i.e., preserve), or a combination of these options, depending on the activity specifics and BLM approval/authorization.

Compensation for the impacts to designated desert tortoise critical habitat will be in the same critical habitat unit as the impact (see Table 18 = in designated critical habitat 5:1). Compensation for impacts to desert tortoise will be in the same recovery unit as the impact.

LUPA-COMP-1: For third party actions, compensation activities must be initiated or completed within 12 months from the time the resource impact occurs (e.g., ground disturbance, habitat removal, route obliteration, etc. for construction activities, wildlife mortality, visual impacts, etc. due to operations).

CONS-BIO-IFS-2: All activities, except transmission in desert tortoise TCAs or linkages as identified in Appendix D that will result in long-term removal of habitat supporting more than 5 adult individuals are prohibited. The number of desert tortoises on-site is based on estimates derived from the protocol surveys described previously using the USFWS's pre-activity survey protocol.

CONS-BIO-IFS-3: Ground disturbance caps as per Table 20 are reflected in the individual ACEC Special Unit Management Plans and maps in Appendix B. Refer to the California Desert National Conservation Lands, Section II.2.1, and ACECs, Section II.2.2, for a description of how the BLM Conservation Lands Ground Disturbance Cap will be applied, including measured, activity approval and the disturbance mitigation strategy. The same implementation methodology is repeated in CMAs NLCS-DIST-2 and ACEC-DIST-2. Table 20 provides the specific desert tortoise conservation area and linkage ground disturbance caps in the BLM LUPA conservation designations (Ivanpah Valley ACEC Disturbance Cap 0/1%).

NLCS-DIST-1: Ground Disturbance Caps – Development in California Desert National Conservation Lands are limited by the 1% ground disturbance cap which is the total ground disturbance (existing [past and present] plus future), or to the level allowed by collocated ACEC(s) with its smaller ground disturbance cap units, whichever is more restrictive.

Ground disturbance will be calculated on BLM managed land at the time of an individual proposal, by BLM for a BLM initiated action or by a third party for an activity needing BLM approval or authorization, for analysis in the activity-specific NEPA document. Once BLM approves/accepts or conducts a calculation for an ACEC, that calculation is considered the baseline of past and present disturbance and is valid for 12 months, and can be used by other proposed activities in the same unit.

Ground disturbance includes: The calculation shall include existing ground disturbance in addition to the estimated ground disturbance from the proposed activity (future) determined at the time of the individual proposal:

- Authorized/approved ground disturbing activities – built and not yet built.
- BLM identified routes – all routes, trails, etc., authorized and unauthorized, identified in the Ground Transportation Linear Feature (GTLF) and/or other BLM route network database (i.e., BLM local databases that contain the best available data on routes and trails, replacement for GTLF, etc.), following applicable BLM standards and policy for identification of routes (authorized and unauthorized).

NLCS-LANDS-2: Avoid use authorizations that negatively affect the values for which the California Desert National Conservation Lands are designated, unless mitigation, including compensatory mitigation, result in a net benefit to the California Desert National Conservation Lands.

ACEC-DIST-1: Development in ACECs is limited by specified ground disturbance caps which are the total ground disturbance [existing (past and present) plus future]. The specific ACEC ground disturbance caps are delineated in each of the individual ACEC Special Unit Management Plans.

As previously stated, there are likely additional goals, objectives, and CMAs that apply.

We were unable to find how BLM is implementing these goals, objectives, and CMAs with the adoption of the CX. Consequently, we conclude that BLM has not complied with 43 CFR 46.205(c) because BLM did not pass the ‘‘extraordinary circumstances’’ test, and did not ensure that the proposed action as a minimum, is consistent with DOI and BLM regulations, manuals, handbooks, policies, and the DRECP regarding design features, BMPs, terms and conditions, conditions of approval, and stipulations.

Maps of the ROW: The two maps provided by the BLM are confusing. The legend for the maps uses yellow to indicate BLM land, gray for NPS lands, and white for private lands. On the first map, the ROW (green line) begins at Nipton Road and heads in a generally north direction across BLM (yellow) land and crossing onto and terminating on NPS (gray) land. The second map, which is at a larger scale, shows a similar path for the ROW but the “land described” (bordered in blue) is shown as BLM land. No private (white) land is shown on either map.

We recommend that BLM modify these maps so they clearly and consistently indicate land ownership including the location of the private land demonstrating that the ROW remains on BLM and private land.

Compliance with Other Environmental Laws and Regulations

In the CX, BLM provides information on compliance with the National Historic Preservation Act (NHPA) – "Section 106 review has been completed and activities would not directly or indirectly impact any unevaluated sites, or sites listed, or eligible for listing in the National Register of Historic Places." Although this information is limited, compliance with NHPA is addressed in the CX.

However, for the FESA, we found no information in the CX on compliance with this statute such as consultation with the USFWS under section 7. The project is located in the Ivanpah Valley ACEC that BLM established for the management of tortoises, a TCA, and in critical habitat. BLM's issuance of a ROW for the road is for 30 years and during that time, the construction, use, and maintenance of the road is likely to adversely affect the tortoise and critical habitat. Consequently, we would expect BLM to provide information on compliance with the FESA in its NEPA compliance document as BLM usually does when a proposed project/action occurs in habitat for a species listed under the FESA. The Council requests that BLM include information on its compliance with the FESA for the tortoise in the NEPA document.

In conclusion, for the reasons presented above, the Council requests that BLM withdraw its decision to grant the ROW under a CX. Rather, we request that BLM prepare and circulate for public review an environmental assessment (EA) that:

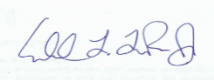
- Analyzes the direct, indirect, and cumulative impacts [in compliance with Council on Environmental Quality (CEQ) guidance of 1997] of the proposed action;
- complies with the DRECP (BLM 2016) especially with respect to implementing the goals, objectives, and conservation and management actions (CMAs);
- complies with the latest BLM regulations for managing an ACEC;
- complies with all relevant BLM policies (i.e., manuals and handbooks), with respect to conservation measures, mitigation, monitoring, and adaptive management; and,
- complies with the FESA for actions with surface disturbance in critical habitat.

BLM should then circulate the EA for public comment.

We reiterate that the Council wants to be identified as an Affected Interest for this and all other projects or actions funded, authorized, or carried out by the BLM that may affect desert tortoises, and that any subsequent environmental documentation for this project/action is provided to us at the contact information listed above. Additionally, we ask that you notify the Desert Tortoise Council at eac@deserttortoise.org of any proposed projects/actions that BLM may authorize, fund, or carry out in the range of any species of desert tortoise in the southwestern United States (i.e., *Gopherus agassizii*, *G. morafkai*, *G. berlandieri*, *G. flavomarginatus*) so we may comment on it to ensure BLM fully considers actions to conserve these tortoises as part of its directive to conserve species listed under the Federal Endangered Species Act and biodiversity on public lands managed by BLM.

Please respond in an email that you have received this comment letter so we can be sure our concerns have been registered with the appropriate personnel and office for this project.

Respectfully,



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