



DESERT TORTOISE COUNCIL

4654 East Avenue S #257B

Palmdale, California 93552

www.deserttortoise.org

eac@deserttortoise.org

Via email only

10 November 2021

Ms. Laura Goff
Bureau of Land Management
345 East Riverside Drive,
St. George, UT 84790
lgoff@blm.gov

RE: Toquerville Butte Road/Utilities ROW (DOI-BLM-UT-C030-2021-0021-EA)

Dear Ms. Goff,

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 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.

We appreciate this opportunity to provide comments on the above-referenced project. Given the location of the proposed project in habitats likely occupied by Mojave desert tortoise (*Gopherus agassizii*) (synonymous with Agassiz's desert tortoise), our comments pertain to enhancing protection of this species during activities authorized by the Bureau of Land Management (BLM), which we assume will be added to the Decision Record as needed. Please accept, carefully review, and include in the relevant project file the Council's following comments and attachments for the proposed project.

First, thank you for personally informing us of this project in several emails on 1 November 2021, and persisting until we received a functional link on 5 November 2021. Given that the request is for scoping comments, there is limited information available for review except the following paragraph in the notice:

“Toquerville City has applied for a right-of-way (ROW) to cross public lands [managed by the BLM] to gain access to surrounding private parcels that is planned to be developed for residential uses. The ROW requested would consist of two paved roads with room for utilities, located as shown on the map below [see map in Attachment 1]. The first road requested (southern road) would be located near an existing jeep trail, and would be needed to gain legal access across public lands to connect key utilities and provide non-highway vehicle connected access to the north and south portions of the future subdivision. The ROW for this portion of the facilities is requested to be approximately 1,600 ft. in length, and 100 ft. in width, with an additional 50 ft. in temporary construction width. This would consist of approximately 3.67 acres in permanent and 1.84 acres in temporary ROW area. The second road requested (northern road) would be needed to gain access to the top of the butte and is requested to be approximately 800 ft. in length, and 100 ft. in width, with an additional 50 ft. in temporary construction width. This would consist of approximately 1.84 acres in permanent and 0.92 acres in temporary ROW area. The total permanent ROW area requested for both roads is approximately 5.51 acres, and the total temporary ROW area requested for both roads is approximately 2.76 acres. Both roads would be paved and developed according to City standards, with utilities running underneath and/or adjacent to the roadway.”

Given that these scoping comments will be used to help inform the BLM in drafting a subsequent Environmental Assessment (EA), we provide the following information for your consideration and inclusion in the EA:

1. The provided map is at such a low resolution that we cannot reasonably see the relationship between the proposed southern route and existing routes, but we do note that the southern route “...would be located **near** an existing jeep trail” [bold emphasis added]. Similarly, it is not clear to us from the information provided why the northern route loops onto BLM lands for 800 feet, only to re-enter private lands. Please provide maps of appropriate scale in the EA that depict existing and proposed routes. This would include alternative routes to the proposed routes and those routes that already exist.

2. BLM is required to consider alternative routes (please see 40 CFR 1502.14 “(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits. (c) Include reasonable alternatives **not** [emphasis added] within the jurisdiction of the lead agency.”). Although these regulations apply to the preparation of environmental impact statements, please note that an EA must ‘include brief discussions of the need for the proposal, of alternatives as required’ [42 U.S.C. § 4332(2)(E)].”

One such alternative should include the “existing jeep trail” referenced above. Presumably if the preferred alternative route followed an existing trail, the amount of habitat directly lost from project construction, use, and maintenance would be reduced. Similarly, there appear to be routes through the middle of Section 10 (see Attachment 1) that avoid public lands. As such, we ask that one alternative addresses routes through private lands that completely avoid public lands.

3. Because the proposed project would affect BLM land and requires their authorization, BLM is required to consult on the proposed project under Section 7(a)(2) of the Federal Endangered Species Act (FESA), which then allows the project proponent to avoid the more expensive and often more rigorous Section 10(a)(1)(B) permit process. In your alternative analysis, please discuss these issues and demonstrate why these roads must involve public lands rather than be located on non-federal lands. Will authorized take of tortoises during construction, use, and maintenance of the routes or subsequent take of tortoises on the routes from direct and indirect impacts be assigned to the take limit identified in a project-specific biological opinion or to the Washington County Habitat Conservation Plan? Will the proponent be required to provide compensation habitat or fees, and will these be to the BLM or Washington County? These questions should be addressed in the EA.

4. We fully expect that BLM will require the proponent to complete desert tortoise protocol surveys (USFWS 2019). Importantly, these surveys must encompass a sufficient action area to determine the relative impacts of the proposed project. The action area is defined by regulation as all areas to be affected directly or indirectly by proposed development and not merely the immediate area involved in the action (50 CFR §402.02). Given the early planning stages, the Council understands the proponent can perform protocol surveys along multiple alternative routes, on both public and private lands. Surveys along various alternatives will help inform the BLM in its environmental analysis to choose a preferred alternative route that minimizes direct, indirect, and cumulative impacts to tortoises. Note that the impacts from a roadway extend 230 meters to more than 1000 meters from lightly used roads (von Seckendorff Hoff and Marlow 2002, Peaden et al. 2015). This area should be included in the action area and analysis of impacts to the tortoise.

5. It is our interpretation of the paragraph quoted above from the BLM eplanning website that the sole function of these routes is to provide access to private lands that are to be developed for residential purposes. As such, this paragraph gives the impression that *but for* the BLM's action to grant the right-of-way, those lands could not be developed and are therefore part of the action area, must also be surveyed for tortoises, the results published in the EA, and an analysis of impacts from the development and use of these private lands be included in the NEPA document. We view these routes as a growth-inducing impact that must be part of the environmental analysis in the EA.

6. In the early 1990s a 70-mile pipeline (e.g., "Morongo Basin Pipeline in San Bernardino County, CA) crossing two or three linear miles of public lands managed by the BLM prompted the need for a formal Section 7 consultation that resulted in the U.S. Fish and Wildlife Service (USFWS) issuing a biological opinion. For that project, the proponent (e.g., Mohave Water Agency) was required by the BLM to compensate for *all* lost habitat, whether it was occupied or not by tortoises, and whether it was on private versus public lands. The entire project became "federalized," and rather than a dozen acres of BLM land, the proponent compensated for a 100+ acres of lost habitat which was "*authorized, funded, or carried out*" by the BLM ("authorized" being the pertinent term in the clause).

7. The EA must describe the relationship between Toquerville City as the proponent for these routes versus the proponent(s) for residential development. Please clarify why the proponent for residential development is not including these routes as integral parts of their proposed

development; why are the routes and future residential development being separated in this manner? It is our understanding that NEPA prohibits “segmentation” or “piece-mealing” of projects, the subdivision of a large project into smaller projects, and requires that connected actions be analyzed in a NEPA document (BLM 2008, page 45). “Connected actions are those actions that are ‘closely related’ and ‘should be discussed’ in the same NEPA document [40 CFR 1508.25 (a)(1)]. Actions are connected if they automatically trigger other actions that may require an EIS; cannot or will not proceed unless other actions are taken previously or simultaneously; or if the actions are interdependent parts of a larger action and depend upon the larger action for their justification [40 CFR 1508.25 (a)(i, ii, iii)]” (BLM 2008). We believe the last definition applies to the Toquerville City ROW request. The ROW request is part of a larger action (residential development) and depends on the larger action for its justification. Consequently, the residential development should be included in the analysis of the NEPA document.

8. Please clarify that the term of the ROW grant (e.g., will be in perpetuity?), and who will be responsible for the construction, function/use and maintenance of these routes (e.g., Toquerville City, BLM, developer of the residential area)? What assurances is BLM requiring that the routes would be constructed, functioned/used, and maintained in a manner that is safe for the human environment? As the landowner, BLM may be legally responsible for any resulting impacts to the human environment from improper construction, function/use, or maintenance.

9. We see that the notice references a “temporary ROW area,” but surely the paved routes will exist in perpetuity? Assuming the routes impact tortoise habitats, what measures will BLM require of the City to minimize subsequent indirect impacts and who will monitor whether these measures are implemented and their effectiveness? For example, will the routes be fenced, both on public lands and adjoining private lands with tortoise exclusion fencing? If so, who will be responsible for fence maintenance and repair? These questions should be discussed and analyzed in the NEPA document.

10. Although the word, “utilities,” appears in the title for the project in BLM’s notice, there is no explanation of what these utilities are. Will there be telephone poles or other structures that will provide new nest, roost, and perch sites for ravens? Please clarify what you mean by “utilities,” and if appropriate, what measures will be taken to avoid creating new opportunities for raven nesting and hunting. Will the utilities be developed at the same time the routes are paved, and if not, how will BLM ensure that future development of intended utilities does not result in direct impacts to tortoises (e.g., from entrapment in trenches or pits, etc.), and indirect impacts including the loss of additional habitats? Does the 5.51-acre impact area include foreseeable utilities construction, operation, and maintenance? If not, all foreseeable impacts and the total acres lost should be divulged. Please analyze these issues/questions in the NEPA document.

11. The NEPA document should include an analysis of cumulative impacts to the resource issues. This requirement applies to environmental assessments. [Please see *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989 (9th Cir. 2004) and *Kern v. BLM*, 284 F.3d 1062, 1075-76 (9th Cir. 2002)]. For the Toquerville City ROW EA, this would include the desert tortoise and tortoise habitat.

12. In the cumulative effects analysis of the NEPA document, please ensure that the Council on Environmental Quality's (CEQ) "Considering Cumulative Effects under the National Environmental Policy Act" (1997) is followed, including the eight principles, when analyzing cumulative effects of the proposed action to the tortoise and its habitats. CEQ states, "Determining the cumulative environmental consequences of an action requires delineating the cause-and-effect relationships between the multiple actions and the resources, ecosystems, and human communities of concern. The range of actions that must be considered includes not only the project proposal but all connected and similar actions that could contribute to cumulative effects." The analysis "must describe the response of the resource to this environmental change." Cumulative impact analysis should "address the sustainability of resources, ecosystems, and human communities." For example, the DEIS should include data on the estimated number of acres of tortoise habitats and the numbers of tortoises that may be lost to growth-inducing impacts along the entire length of the alignment.

These eight principles listed below:

1. Cumulative effects are caused by the aggregate of past, present, and reasonable future actions.

The effects of a proposed action on a given resource, ecosystem, and human community, include the present and future effects added to the effects that have taken place in the past. Such cumulative effects must also be added to the effects (past, present, and future) caused by all other actions that affect the same resource.

2. Cumulative effects are the total effect, including both direct and indirect effects, on a given resource, ecosystem, and human community of all actions taken, no matter who (federal, non-federal, or private) has taken the actions.

Individual effects from disparate activities may add up or interact to cause additional effects not apparent when looking at the individual effect at one time. The additional effects contributed by actions unrelated to the proposed action must be included in the analysis of cumulative effects.

3. Cumulative effects need to be analyzed in terms of the specific resource, ecosystem, and human community being affected.

Environmental effects are often evaluated from the perspective of the proposed action. Analyzing cumulative effects requires focusing on the resources, ecosystem, and human community that may be affected and developing an adequate understanding of how the resources are susceptible to effects.

4. It is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.

For cumulative effects analysis to help the decision maker and inform interested parties, it must be limited through scoping to effects that can be evaluated meaningfully. The boundaries for evaluating cumulative effects should be expanded to the point at which the resource is no longer affected significantly or the effects are no longer of interest to the affected parties.

5. Cumulative effects on a given resource, ecosystem, and human community are rarely aligned with political or administrative boundaries.

Resources are typically demarcated according to agency responsibilities, county lines, grazing allotments, or other administrative boundaries. Because natural and sociocultural resources are not usually so aligned, each political entity actually manages only a piece of the affected resource or ecosystem. Cumulative effects analysis on natural systems must use natural ecological boundaries and analysis of human communities must use actual sociocultural boundaries to ensure including all effects.

6. Cumulative effects may result from the accumulation of similar effects or the synergistic interaction of different effects.

Repeated actions may cause effects to build up through simple addition (more and more of the same type of effect), and the same or different actions may produce effects that interact to produce cumulative effects greater than the sum of the effects.

7. Cumulative effects may last for many years beyond the life of the action that caused the effects.

Some actions cause damage lasting far longer than the life of the action itself (e.g., acid mine damage, radioactive waste contamination, species extinctions). Cumulative effects analysis need to apply the best science and forecasting techniques to assess potential catastrophic consequences in the future.

8. Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accommodate additional effects, based on its own time and space parameters.

Analysts tend to think in terms of how the resource, ecosystem, and human community will be modified given the action's development needs. The most effective cumulative effects analysis focuses on what is needed to ensure long-term productivity or sustainability of the resource.

Numbers 5 through 8 are especially relevant for the Mojave desert tortoise.

We appreciate this opportunity to provide these scoping comments and trust that they will help BLM identify measures that will protect tortoises during any authorized project activities. Herein, we ask that the Desert Tortoise Council continue to be identified as an Affected Interest for this and all other BLM projects 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. Additionally, we ask that you 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.

Regards,



Edward L. LaRue, Jr., M.S.
Desert Tortoise Council, Ecosystems Advisory Committee, Chairperson

Literature Cited

- [BLM] Bureau of Land Management. 2008. National Environmental Policy Act Handbook – H-1790-1. Washington, D.C. January 2008.
- [CEQ] Council on Environmental Quality. 1997. Considering Cumulative Effects Under the National Environmental Policy Act. https://www.ntc.blm.gov/krc/uploads/499/CEQ_ConsideringCumulativeEffects.pdf
- von Seckendorff Hoff, K., and R. Marlow. 2002. Impacts of vehicle road traffic on desert tortoise populations with consideration of conservation of tortoise habitat in southern Nevada: *Chelonian Conservation and Biology* v. 4, p. 449–456.
- Peadar, J.M., T. D. Tuberville, K. A. Buhlmann, M. G. Nafus, and B. D. Todd. 2015. Delimiting road-effect zones for threatened species: implications for mitigation fencing. *Wildlife Research*, 2015, 42, 650–659 <http://dx.doi.org/10.1071/WR15082>.
- U.S. Fish and Wildlife Service. 2019. Preparing for any action that may occur within the range of the Mojave desert tortoise (*Gopherus agassizii*). USFWS Desert Tortoise Recovery Office. Reno, NV.

Attachment 1. Map of project area provided on BLM's eplanning website

