

DESERT TORTOISE COUNCIL

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Via regulations.gov

September 26, 2022

Craig Aubrey, Chief,
Division of Environmental Review
Attn: Docket No. FWS–HQ–ES–2021–0137
U.S. Fish and Wildlife Service
MS: PRB/3W;
5275 Leesburg Pike,
Falls Church, VA 22041–3803

RE: U.S. Fish and Wildlife Service – Establishing Objectives, Measurable Performance Standards, and Criteria for Use, Consistent with the Endangered Species Act, for Species Conservation Banking (Docket No. FWS–HQ–ES–2021–0137)

Dear Mr. Mr. Aubrey,

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.

As of June 2022, our mailing address has changed to:

Desert Tortoise Council
3807 Sierra Highway #6-4514
Acton, CA 93510.

Our email address has not changed. Both addresses are provided above in our letterhead for your use when providing future correspondence to us.

We appreciate this opportunity to provide comments on the development of the above-referenced proposed rule. Given this rule would affect habitats occupied by the federally threatened Mojave desert tortoise (*Gopherus agassizii*) (synonymous with Agassiz's desert tortoise), our comments pertain to enhancing protection of this species and providing for its conservation and recovery. Please accept, carefully review, and include in the relevant project file and decision record, the following comments for the proposed rule by the Council.

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), as it is a "species that possess an extremely high risk of extinction as a result of rapid population declines of 80 to more than 90 percent over the previous 10 years (or three generations), population size fewer than 50 individuals, other factors." It is one of three turtle and tortoise species in the United States to be critically endangered. This status, in part, prompted the Council to join Defenders of Wildlife and Desert Tortoise Preserve Committee (Desert Tortoise Council 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.

On Wednesday, July 27, the U.S. Fish and Wildlife Service (USFWS) published in the *Federal Register* an advance notice of proposed rulemaking (Notice). The USFWS is seeking public comments to assist in developing a proposed rule establishing objectives, measurable performance standards, and criteria for use, consistent with the Federal Endangered Species Act (FESA), for species conservation banking.

Joint Rule by U.S. Fish and Wildlife Service and National Marine Fisheries Service – Because the proposed rule concerns the FESA, we would presume the National Marine Fisheries Service (NMFS) would be part of the proposed rulemaking process. Given that USFWS and NMFS are lead agencies for administering the FESA, including sections 7 and 10 of the FESA, we request that NMFS be a co-lead agency for this rulemaking process. NMFS and USFWS have previously published joint regulations, rules, and policies for the FESA. It seems inappropriate that USFWS would have one set of rules for conservation banks for federally listed species it oversees, and NMFS would have a different set. Please include NMFS in this rulemaking process.

Elevating USFWS Guidance Document for Conservation Banks to a Rule – In the Notice, the USFWS refers to the "Guidance for the Establishment, Use, and Operation of Conservation Banks" (Guidance document) issued in 2003 and the Federal Register publication date. We reviewed this Guidance document, and with a few exceptions, we support proposing it as a rule for conservation banks. The goal of conservation banking is to offset the direct, indirect, and cumulative adverse impacts to a species, in this case, a species listed under the FESA. We recommend this proposed rule fully offset the direct, indirect, and cumulative adverse impacts to a species and be expanded to include candidate species.

The three main exceptions we have to this Guidance document being elevated to a rule are (1) it does not require that the temporal loss of species/habitat be calculated when determining the direct, indirect, and cumulative impacts of the proposed action and the subsequent credits needed to fully

offset these impacts, (2) it does not state that the measured improvement in the functions and values of the habitat in the mitigation bank is what is used to determine the value of the credits, and (3) it does not address the changes that will occur to lands in the conservation banks because of climate change.

For the Mojave desert tortoise, temporal loss is significant as the tortoise is slow to grow, reproduce, and recruit, and habitat improvement is a slow process in the Mojave and Colorado desert for vegetation (Abella 2010) and soils after they are degraded or destroyed, if it occurs at all. Temporal loss of species and habitat should be included in the calculation of impacts and credits for the conservation bank.

The Guidance document indicates that a ratio of 1:1 or less (acres of credit in the conservation bank acquired: acres impacted) may be acceptable, and that a conservation bank may only need to maintain the existing quality of the habitat, not improve its functions and values. We assert that this approach when applied to the tortoise would result in an ongoing loss of existing habitat quality and quantity, and it does not meet the standard of fully offsetting the impacts. The proposed rule should be clear that to fully offset the impacts, the improvements in the habitat at the conservation bank is the calculation used to determine the number of credits that are needed at the conservation bank.

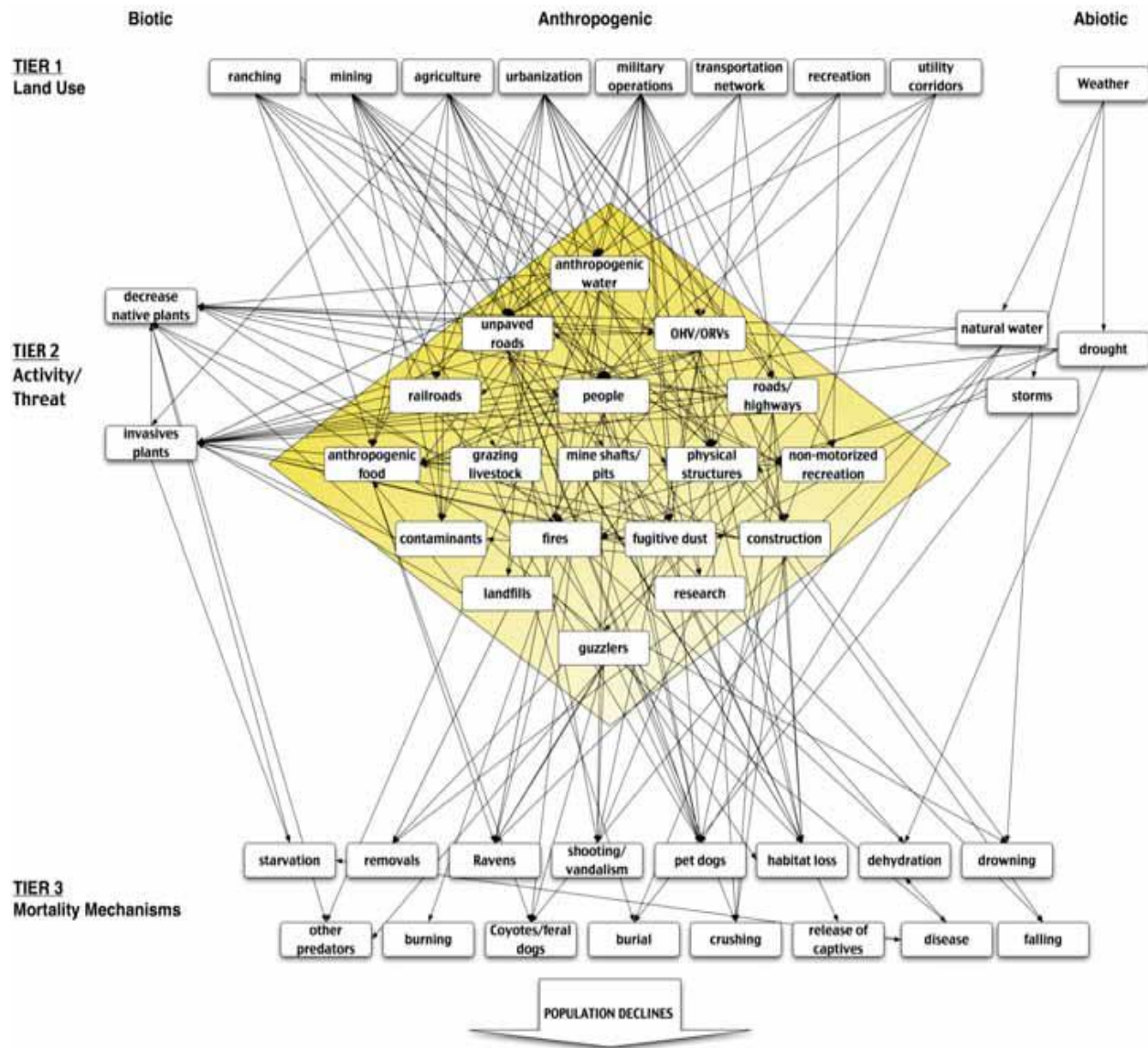
Climate change should be a heavily weighted factor when calculating the functions and values of the acres/credits in the conservation bank. What may be valuable habitat today may have less value in the future because of climate change. The changes caused/contributed to be climate change that will occur to lands managed in perpetuity in the conservation banks should be added to the algorithm when calculating credits.

In developing the proposed rule for conservation banks, we recommend the USFWS look at other compensation mechanisms at the Federal, State, and local level, learn from the successes and failures of their implementation, and adopt the mechanisms that were successes.

In addition, we recommend that the process for determining whether it is possible to fully offset the direct, indirect, and cumulative impacts of a proposed actions to a listed species follow an initial process similar to the USFWS's Mitigation Policy (USFWS 1981). In this process, the first question asked is whether it is realistically feasible to fully offset all direct, indirect, and cumulative impacts of a proposed action within a reasonable time. If not, the proposed action would be changed (equivalent of Category 1 habitat in the Mitigation Policy). If it is realistically feasible, the next step would be to use a validated formula/algorithm for the species to calculate the impacts and the needed compensation credits at a conservation bank for that species.

Testing the Inclusiveness and Efficacy of the Proposed Rule Using the Mojave Desert Tortoise – Once a preliminary draft rule is developed, we recommend that its efficacy be tested/validated by applying it to the Mojave desert tortoise. The Mojave desert tortoise has a unique and complex set of biological and ecological requirements (e.g., long-lived; slow to reach sexual maturity; specific nutritional requirements; low and slow recruitment; multi-mile lifetime

home range size; lives on the edge of physiological tolerance levels for temperature, hydration, osmolality, etc.), and is threatened by a myriad of human-caused threats many of which are shown below.



Network of threats demonstrates the interconnectedness between multiple human activities that interact to prevent recovery of tortoise populations. Tier 1 includes the major land use patterns that facilitate various activities (Tier 2) that impact tortoise populations through a suite of mortality factors (Tier 3). (From Tracy et al. 2004.)

Removing one or two threats does not result in conservation of the species. Rather, the tortoise is threatened with cumulative, interactive, and synergistic impacts of multiple threats (Tracy et al. 2004). Individual tortoise populations face a suite of threats simultaneously. This means that ameliorating one or a few prominent threats does not mean that the population has become secure.

Another threat may replace the one or two threats that have been removed. Focusing on individual threats has resulted in little positive change for desert tortoise populations (Tracy et al. 2004).

The threats network demonstrates that many human activities can have negative effects on tortoise populations through many pathways. Taking management actions that break one pathway, even though the pathway is real, may not be adequate to prevent the mortality factor from continuing to diminish a tortoise population. This is because alternative pathways exist to “compensate” by removing animals that were otherwise “saved” by a management action. Consequently, effectively managing for only some of the threats to the tortoise would not achieve the goal of a conservation bank for this species.

BLM has tried this approach for a few decades. The result has been a decline in tortoise density and abundance in all BLM Tortoise Conservation Areas since rangewide monitoring for the tortoise was initiated (Allison and McLuckie 2018; USFWS 2015, 2016, 2018, 2019, 2020, 2022a, 2022b), most of which are below population viability (USFWS 1994, Allison and McLuckie 2018).

The Mojave desert tortoise is a flagship species, keystone species, indicator species, and surrogate species (Kohn 2018). Consequently, the Mojave desert tortoise is an excellent species to use as a “test case” to determine, when the conservation bank rule is developed, whether it would be effective at achieving the goal of offsetting adverse impacts to the tortoise.

In the Notice, the USFWS asked six questions about conservation banks and requested the public to answer/comment on them. We appreciate the USFWS providing specific topics for which it is seeking specific information. The six questions and the Council’s answers/comments on them follow:

(1) What level of detail should be in the proposed rule to ensure equivalent standards are consistently applied to all forms of compensatory mitigation, including equivalence in covering the costs of mitigation whether they are on public or private lands?

The Council is unsure what is meant by “all forms of compensatory mitigation.” The proposed rule would be developed for conservation banks only, which usually means compensation for habitat of a particular species that would be or has been destroyed, degraded, and/or fragmented.

To determine equivalent standards between conservation banks and other forms of compensatory mitigation, we suggest the USFWS use the same analysis for all forms of compensatory mitigation. The analysis should include the time required to achieve mitigation/conservation goals and the use of Property Analysis Record (PAR) or a PAR-like analysis. This software prompts provision of detailed information on the acquisition transaction, conservation values and stewardship tasks, unit costs of items and services involved in providing stewardship and the business model of the implementing entity. Thus, realistic assessments of financial and time costs, implementation schedules, and expected results from management for conservation may be compared between conservation banks and other forms of compensatory mitigation.

Land ownership is not and should not be an issue. The issue is that a public trust resource is being adversely impacted and the impacts should be fully offset/fully mitigated. The total cost of mitigation including compensation of habitat impacted by a proposed action should be paid by the proponent of the proposed action. Three examples follow.

- (1) If a public or private utility company that wants to construct a transmission line or pipeline, they are responsible to fully mitigate the direct and indirect adverse impacts, and their contribution to the cumulative adverse impacts of their project, and fund and implement scientific monitoring and adaptive management. Please see section 9.5 Maximum Extent Practicable Standard of the Habitat Conservation Planning and Incidental Take Permit Processing Handbook for its discussion on fully offsetting impacts (USFWS and NMFS 2016).
- (2) If a federal agency wants to authorize grazing, OHV activity, or establish campground facilities on public land and public trust resources including threatened and endangered species would be adversely impacted, that federal agency is responsible to fully offset the direct and indirect adverse impacts, and the cumulative adverse impacts of their authorization/project, plus fund and implement scientific monitoring and adaptive management. If the federal agency cannot afford to fully offset the impacts including the monitoring and adaptive management, the agency should not authorize the project/action.
- (3) If a federal, state, or local agency wants to construct or improve a road, that agency is responsible for and should fully offset the direct, indirect, and cumulative adverse impacts to public trust resources from the construction, use, and maintenance of the road. They should fund and implement scientific monitoring and adaptive management.

(2) What level of detail should be in the proposed rule regarding durability and additionality standards to both achieve equivalent standards across mitigation mechanisms and provide species conservation?

We did not understand the complex wording of this long question. To what mitigation mechanisms are you referring? The Notice only discusses conservation banking as one form of compensatory mitigation. We are aware of other forms of mitigation besides compensation (i.e., avoiding, minimizing, reducing, and rectifying – 40 Code of Federal Regulations 1508.20 (a-d)).

The 2003 Guidance document addresses duration and states that the lands in the conservation bank are protected in perpetuity. How this is achieved will differ depending on whether the land in the conservation bank is under private ownership or local, Tribal, State, or Federal management. We suggest that existing mitigation/compensation programs at the local, State, Tribal, and Federal levels be evaluated, and if successful with respect to conserving species/habitat functions, incorporate them in to the proposed rule. As discussed in the Guidance document, the functions of the parcel to be developed must first be assessed and fully replace the functions that would be lost from implementation of the proposed action. We would add that the values and temporal loss should also be assessed to determine the equivalent compensation credits/values.

(3) How should the proposed rule incorporate monitoring, financial assurances, and publicly accessible mitigation data tracking systems to ensure a compensatory mitigation mechanism is meeting its performance standards?

We suggest incorporating the processes and requirements described in the USFWS's 2003 Guidance document for conservation banks. Some of this information may be supplemented/strengthened by gleaning additional information from the appropriate sections in the HCP Handbook (USFWS and NMFS 2016). A publicly accessible mitigation data tracking system is an excellent idea and should be implemented to contribute to transparency and accountability.

(4) What are the hurdles to species bank establishment that are within the Service's authority to address through regulation?

The USFWS should revise regulations for implementing section 7(a)(2) and 10(a)(1)(b) of the FESA to include conservation banks as a method for minimizing and mitigating take.

Depending on how a conservation bank is managed or its purpose, it could do more than offset impacts to listed species. A conservation bank could be established to manage for the recovery of the species. Conservation banks with this purpose should be included in regulations for implementation of section 7(a)(1) of the FESA, a most important section of this law that USFWS has not yet developed implementing regulations 49 years after FESA was signed into law. We volunteer our assistance to the USFWS in the development of these regulations.

The species lead for each listed species should be able to identify areas needed for recovery including linkage habitats that would be priority locations for conservation banks. If there are several habitat areas, the species lead should have a process to prioritize these areas using the best available science. USFWS may have identified some areas through its process of issuing recovery plans or designating critical habitat. Conservation banks should be located within the boundaries of designated critical habitat or where no critical habitat has been designated, the areas identified as needed for recovery by the USFWS.

If not already implemented, the USFWS should establish a conservation bank coordinator in each regional office to help the public, USFWS field offices, and other agencies in the development, review, and establishment of banks.

(5) How should the proposed rule align with 2008 Rule provisions to maintain compatibility between mitigation banks and species banks where appropriate?

We have no suggestion/comment for this question as mitigation banks are for impacts to wetlands and are usually not acquired in perpetuity. Although the tortoise is a species that inhabits xeric habitats and would not be affected directly by mitigation banks, given climate change and the scarcity of wetlands in the western United States, perhaps mitigation bank requirements need to be revisited and strengthened to align more with conservation banks.

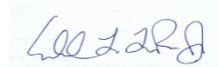
(6) How should the Service address potential bank projects on Federal and Tribal lands or on other lands with unique ownership considerations and/ or some degree of existing protection?

We are unaware of any existing protections that are assured on Federal lands. For example, BLM land where grazing rights were purchased and retired for conservation purposes was taken from BLM and given to the Navy for training purposes. Potential bank projects on Federal, State, and Tribal land and land owned by local governments should be treated the same as private land to attempt to provide the strongest protection for its conservation purposes in perpetuity. Currently, existing “protections” in the form of management designations on non-private land can be changed with the adoption of a new land use plan, resource management plan, zoning change, or similar action. To paraphrase a Department of the Interior regional solicitor, land management plans can be changed.

All land regardless of ownership should be treated as subject to management change unless there is a legally enforceable mechanism to place a conservation easement in perpetuity on the land. The USFWS 2003 Guidance document discusses this requirement for conservation banks. If there is no such mechanism, there is no guarantee the conservation bank will be able to manage the lands in perpetuity. This is a huge risk for the proponent of the proposed action, the future of the listed species, and the credibility of the USFWS. If a government entity can demonstrate that they can and will provide legal protections to lands in a conservation bank in perpetuity, then the bank would meet one of the criteria for establishment. If they cannot, the bank should not be established.

We appreciate this opportunity to provide comments on this Notice and trust they will help develop a USFWS-NMFS final rule that, when implemented, will contribute to maintaining or conserving species listed under the FESA including the tortoise. Herein, we reiterate that the Desert Tortoise Council wants to be identified as an Affected Interest for this and all other actions funded, authorized, or carried out by the USFWS that may affect species of desert tortoises, and that any subsequent environmental documentation for this rule 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.

Respectfully,



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

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