



DESERT TORTOISE COUNCIL

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Via Regulations.gov

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Gina Shultz, Andy DeVolder
Public Comments Processing
Attn: FWS-HQ-ES-2025-0049
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Endangered Species Act (ESA) Section 10(a) Program Implementation; Development of Conservation Benefit Agreements and Habitat Conservation Plans, and Issuance of Associated Enhancement of Survival and Incidental Take Permits (Docket No. FWS-HQ-ES-2025-0049)

Dear Ms. Shultz and Mr. DeVolder,

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."

We appreciate this opportunity to provide comments on the above-referenced action. Because the request may affect the issuance of permits for the federally threatened Mojave desert tortoise

(*Gopherus agassizii*) (synonymous with Agassiz's desert tortoise), the Sonoran desert tortoise (*G. morafkai*) (synonymous with Morafka's desert tortoise), and federally endangered bolson tortoise (*G. flavomarginatus*), our comments are based on our commitment to enhance protection of these species and provide for their conservation. Please accept, carefully review, and include in the administrative record, the following comments 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), "... 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."

The International Union for Conservation of Nature's (IUCN) Species Survival Commission, Tortoise and Freshwater Turtle Specialist Group, now considers the Sonoran desert tortoise, located in Arizona and Sonora, Mexico, to be Vulnerable at this time, but nearly qualifies as Endangered (Averill-Murray et al. 2023). "Steep declines of approximately 54% have occurred in recent years in several formally monitored local subpopulations in Arizona." "Despite evidence that several subpopulations have stabilized or increased, survival rates are predicted to decline with future drought conditions, which are expected to intensify with global climate change." In Mexico, "patterns of rainfall and drought across Sonora mirror those in Arizona and suggest that Sonoran subpopulations likely increased and decreased similarly over time." According to the IUCN, this designation of Vulnerable means that the species is "considered to be facing a high rate of extinction in the wild" and is one step above endangered.

The IUCN identified several threats to the survival of the Sonoran desert tortoise including residential, commercial, and industrial development; ranching and farming; roads and railroads; hunting and trapping; recreational activities; wildfires and fire suppression activities; invasive non-native plant species; and drought/temperature extremes from climate change. The proposed project directly deals with management of ranching and indirectly deals with wildlife, invasive non-native plant species, and drought/temperature extremes from climate change.

The bolson tortoise was listed in 1979 as endangered and without critical habitat, for population declines resulting from human predation, habitat modification, competition from grazing and collection of individuals. In 2017, the IUCN listed the bolson tortoise as "critically endangered" with a "decreasing" population trend. The IUCN estimated the number of mature tortoises in the Bolsón de Mapimí to be 2,500 individuals (Kiestler, et al., 2018) In the U.S., the species occurs on two private ranches in southern New Mexico and was recently released on USFWS refuge lands

nearby. The USFWS recently issued an Enhancement of Survival (EOS) permit to the Turner Endangered Species Fund, the managers of the two ranches in New Mexico.

Proposed Action

On June 9, 2025, the U.S. Fish and Wildlife Service (USFWS) published in the *Federal Register* a request for information and comments on the Federal Endangered Species Act (FESA) section 10(a) program implementation. This request was limited to the development of conservation benefit agreements (CBAs) and habitat conservation plans (HCPs), and issuance of associated EOS permits and incidental take permits (ITPs). In 2024 the USFWS simplified the requirements for EOS permits by combining safe harbor agreements and candidate conservation agreements with assurances into one agreement type called a conservation benefit agreement.

According to the USFWS, the purpose of Section 10(a)(1)(A) conservation benefit agreements is to incentivize voluntary conservation of listed and at-risk species on non-Federal lands. The purpose of Section 10(a)(1)(B) is to provide a means for non-federal entities to ensure federal Endangered Species Act (FESA) compliance when otherwise lawful activities may result in incidental take of listed species or a species that may become listed in the future. The nature of the associated habitat conservation plan associated with an ITP is a mitigation plan to minimize and offset the adverse impacts to the species when implementing otherwise lawful activities.

In their request, the USFWS specifically is seeking comments concerning:

- (1) Barriers that prevent applicants from pursuing development of conservation benefit agreements and habitat conservation plans;
- (2) Methods to streamline conservation benefit agreement and habitat conservation plan development and their associated permit issuance;
- (3) Strategies to enhance USFWS communications on conservation benefit agreements, habitat conservation plans, and their associated permits;
- (4) Whether any clarification is needed on the roles and responsibilities of the Service and applicants during conservation benefit agreement and habitat conservation plan development and permit issuance;
- (5) Funding and resources necessary to develop and implement conservation benefit agreements and habitat conservation plans;
- (6) Strategies the USFWS could pilot to improve the overall effectiveness of the section 10(a) program.

Comments in Response to USFWS's Request

Thank you for asking the public for their input on how the USFWS can improve the development of EOS permits and ITPs and associated documents to improve the overall efficiency and effectiveness of the USFWS's section 10(a) program. The issuance of these permits requires compliance with the National Environmental Policy Act (NEPA) and section 7 of FESA.

Our comments address # 1, 2, 3, 5, and 6 stated above; they are focused on two major areas — what the USFWS can do to improve its implementation of the EOS permit and ITP programs, and

what the USFWS can do to better inform the public about the availability of these permits and their requirements and help them through the permit process.

Improve Implementation of the Incidental Take Permit Program within the USFWS

Develop and Implement National and Project Focused Teams: The ITP program is managed by the Ecological Services division of the USFWS. Most USFWS staff in Ecological Services have little experience with the HCP process, little formal training, and do not have a high level of experience with implementing the guidance in the HCP Handbook (USFWS and NMFS 2016). Consequently, the first step to improving the process and shortening the issuance time for ITPs is to have knowledgeable and experienced USFWS staff (1) helping the applicant/project proponent prepare the HCP and (2) preparing the other documents (e.g., biological opinion, findings and recommendations, ITP terms and conditions, etc.) associated with the ITP under FESA. It is not likely realistic for each Ecological Services field office to possess staff with this experience and knowledge. Therefore, we recommend that a team of several USFWS staff from across the country with a high level of experience with the HCP Handbook, HCP process, and court decisions on ITPs be established (= national HCP team). When a project proponent identifies their desire to obtain an ITP for a proposed project/action, a team specific to this proposed project/action (i.e., project focused team) would be formed by selecting one or more staff from this national HCP team along with the species lead(s), and the Ecological Services biologist who is the project lead. This focused proposed project HCP team would help an applicant prepare an HCP and would prepare the other documents required to implement the ITP process.

Issuance of ITPs requires compliance with the National Environmental Policy Act (NEPA). Most biologists in Ecological Services have little knowledge or experience with preparing NEPA documents, particularly complex environmental assessments (EAs) and environmental impact statements. As previously mentioned, it is not likely that each Ecological Services field office has an expert on staff on to prepare a NEPA document that complies with the statute, regulations, and Department of the Interior/USFWS policies and directives for preparing a NEPA document. Therefore, we recommend that the USFWS create a national USFWS NEPA team. Similar to the national HCP team of experts, the national NEPA team of experts would be comprised of several staff from the USFWS from across the country with a high level of experience in preparing NEPA documents and with the NEPA statute, regulations, DOI/USFWS guidance on NEPA implementation, and court decisions on NEPA documents. One or more staff from the national NEPA team would become part of focused project team that is formed to implement the ITP process for the proposed project/action.

In addition, issuance of ITPs requires the preparation of a biological opinion and a Findings and Recommendations Memo. The biological opinion should be prepared by a USFWS biologist with section 7 expertise that includes the statute, relevant implementing regulations, and section 7 consultation handbook **and** the biologist that is the species lead. Both areas of expertise (legal and biological) are required to prepare a biological opinion that accurately addresses the impacts of the taking on the species' ability to survive and recover during the ITP term/duration.

Using the Mojave desert tortoise as an example of implementing this ITP process in California or Nevada, the project focused team would include the following:

- The HCP expertise would be provided by one or two persons from the USFWS's HCP team. For the tortoise, this could be the regional HCP coordinator in Region 8 or a biologist in an Ecological Services field office with many years of experience preparing ITP documents and helping applicants prepare HCPs.
- The species lead would be one or more biologists from the Desert Tortoise Recovery Office (DTRO). As the species lead, the biologists in this office are charged with staying current with the scientific information in the scientific literature, reports, annual permit reports, etc. on the biology, ecology, and biological status of the tortoise; the arrangement of functioning habitats; direct and indirect threats and their locations; and effective recovery actions.
- The project lead would be the biologist assigned the ITP project in the field office.
- The NEPA expertise would likely be provided by staff from another federal agency, or a private consultant hired by the USFWS who has extensive expertise in preparing NEPA documents, complying with NEPA law and regulations, and expertise in relevant court decisions. Most Ecological Services offices in the range of the tortoise do not prepare complex environmental assessments, environmental impact statements, or NEPA decision documents.
- The biological opinion's legal/regulatory compliance would be provided by the section 7 coordinator in the local Ecological Services office, or the section 7 coordinator in Region 8 if there is no section 7 coordinator in the field office or a nearby field office.
- The biological opinion's biological expertise would be provided by the species lead especially with respect to the survival and recovery of the tortoise when implementing the proposed HCP along with the current and foreseeable biological status of the tortoise from all other existing and proposed actions.

Thus, the project focused team for implementing the ITP process for the tortoise would be a minimum of five people with the expertise to produce an ITP and other documents to comply with the FESA, NEPA, their regulations, HCP Handbook, Section 7 Consultation Handbook, and relevant court cases.

Other agencies in the Department of the Interior have a history of using teams comprised of staff with needed expertise to complete project assignments (e.g., Bureau of Land Management for issuing rights-of-way, U.S. Geological Survey for conducting research, etc.). We strongly recommend a "team of experts approach" when an applicant/project proponent indicates their intent to obtain an ITP.

While the USFWS may claim that they do not have the staff to implement a focused project team approach, we contend that using highly experienced staff to implement the ITP process would greatly improve the efficiency of the process (i.e., ITPs would be issued sooner) and the documents produced are less likely to be challenged successfully in court.

Change the Perspective of Supervisors and Biologists: Some Ecological Services biologists and supervisors view the ITP process as lots of work with little benefit. There are no deadlines for permit issuance like there are for biological opinions so ITPs are a low priority. The biologists/supervisors inform the project proponent that permit issuance will take years, which discourages a project proponent from applying for an ITP. Some of this perception likely stems

from biologists and supervisors not understanding the process and the benefits to the species that may be gained from permit implementation.

The USFWS should modify its policy on ITP issuance to “incentivize” the development and completion of ITPs that comply with all relevant statutes, regulations, handbooks, and policies for both USFWS supervisors and biologists and project proponents.

General Conservation Plans

The USFWS issued policy guidance on general conservation plans (GCPs) in 2007. The intent of this process is to streamline the application for an ITP by allowing the USFWS to develop a single general conservation plan for a local area. The USFWS completes all documents required by the FESA and NEPA. Non-federal entities may apply for an ITP provided they commit to complying with the monitoring, minimization, and mitigation measures in the general conservation plan.

We support this concept as a method of improving the issuance of ITPs, but insist that all GCPs should be developed using the same process described earlier in this letter for HCPs and ITPs. In addition, the GCP and associated documents should be regularly reviewed by the species lead(s) and revised whenever additional information (e.g., from scientific papers, reports, etc.) indicates that the needs of the species have changed with respect to survival and recovery. For example, if a species is substantially improving in its recruitment, abundance, and connectivity, the mitigation listed in the GCP may be reduced for the issuance of future ITPs. If the species is declining in recruitment, abundance, or connectivity, the mitigation listed in the GCP may be increased, and areas important to the survival and recovery of the species, including connectivity, may be removed for the issuance of future ITPs.

Improve Implementation of the Enhancement of Survival Permit Program within the USFWS

Our comments on the EOS permit program are identical to those for the ITP program (see our comments above). The USFWS should develop and implement a national team and focused project team approach, and should change the perspective of supervisors and biologists regarding their importance. In addition, the USFWS should explore issuing a policy similar to the policy on General Conservation Plans for EOS permits.

Preparing Templates/Formatting Documents to Help the USFWS and the Project Proponent

For some species, the need or demand for ITPs and EOS permits may be great. For these species, the USFWS should develop a template to share with Ecological Services offices and project proponents for HCPs and CBAs.

When preparing final rules to list species in the future, the USFWS should format the final rule documents so that sections may be lifted and used in ITP and EOS permit documents.

For listed species, when preparing 5-Year Reviews and “status of the species” sections for biological opinions, these documents should be formatted and information provided that may be

used in ITP and EOS permit documents. In addition, the species leads should update these documents when new information becomes available for each listed/candidate species so this current information is included in the decision process of whether to issue the ITP or EOS permit.

Improve the Understanding by the Public and the Project Proponent of the EOS Permit and ITP Purposes and Processes

Here we offer suggestions on what the USFWS can do to help the public and project proponents understand and comply with the statute, regulations, handbooks, and relevant guidance documents and issue permits sooner.

The USFWS should develop and implement an effective outreach plan to inform the public about the importance of listed species and how the public can help to conserve these species while implementing their projects. Posting information on the USFWS website at the national and local level is not sufficient to inform the public about the EOS permit and ITP processes. Because the USFWS must communicate with several generations of persons who have different methods of receiving their information, and people whose primary language is not English, this outreach plan should include various forms of communication, from ads on television and radio, to podcasts, celebrity spokespersons, short videos, etc., and in languages in addition to English. Perhaps the USFWS could persuade a marketing firm to donate their time and expertise to help develop and implement part of an outreach program.

Private citizens, state and local agencies, project proponents, and most environmental consulting firms have little or no experience in preparing HCPs and CBAs. The HCP Handbook is an excellent and thorough document with relevant chapters that direct the USFWS and project proponents on how to prepare an HCP. However, the level of information provided in the HCP Handbook may be overwhelming to a non-federal entity preparing a draft HCP. We recommend that a checklist be prepared that addresses two aspects of HCP and CBA preparation — a list of information on the biology and threats to the species and proven management actions that improve the condition of the species and/or its habitat (= biological information) , and a list of the factors that must be addressed when developing HCPs and CBAs to comply with the FESA and implementing regulations (= legal/regulatory information).

States with Permit Requirements for Take

When a state requires a permit for incidental take or a document similar to a CBA that is similar to the FESA requirement (e.g., California Endangered Species Act), the development of the HCP or CBA should occur with both the USFWS and the state fish and wildlife agency represented. This should result in an HCP or CBA document that satisfies both the FESA and state requirements. This would streamline the issuance of the subsequent ITP or EOS permit from the USFWS and the state agency to the applicant. Failure to do so may result in USFWS spending time on issuing a permit when the state agency will not issue a permit and the applicant is unable to move forward with their project, or the state issues a permit that has different requirements that contradict the USFWS's permit. This would result in wasted time and effort by all parties involved.

Need for a Team Dedicated to Monitoring the Implementation of Permits

The USFWS should be looking at improving the efficiencies for implementing the entire program for 10(a)(1)(A), not just permit issuance. Permit issuance is the beginning of the permit process especially for permits that are issued for up to 50 years as USFWS has used ITPs in the past for this duration. Consequently, it is imperative that USFWS have a team of biologists assembled from offices nationwide that are dedicated to monitoring the implementation of the mitigation measures/recovery implementation actions identified in the EOS permits and ITPs. This approach would help to remove the perception of the permittee's HCP implementation team ensuring compliance with little or no separate oversight by the USFWS. It would also remove the local political pressure placed on/felt by the local field supervisor and regional director to accept subpar implementation of required mitigation measures/recovery actions of these permits and force implementation of these measures/actions and effective management actions under adaptive management in a timely manner. Because of the composition of this team, it would function like a third party that is overseeing the implementation of the permit terms and conditions and associated documents. The current system has the permittee only conducting the monitoring and submitting annual reports to the USFWS. In many cases these reports briefly skimmed and filed because of workload issues. Rarely are biologists from the local field offices sent to the field to verify the information in the reports.

Improve the Recovery Permit Process

The USFWS limited its request to improving the EOS and ITP permit issuance process. We request that the USFWS request input from the public on how to improve the section 10(a) recovery permit program including permit issuance, reporting, monitoring, and amending permits. This program could use improvements and efficiencies. When someone is applying for a permit to USFWS to conduct recovery actions, that is to help a listed species, the USFWS should encourage the implementation of these recovery actions by issuing a recovery permit as soon as possible. For example, it should not take 9 months or longer for a recovery permit to be reviewed at the field office, processed at the regional and headquarters offices, and issued for an endangered species. From our experience with members requesting recovery permits, the field offices are fairly prompt at reviewing the permit requests and preparing draft permit terms and conditions. The bottleneck appears to be at the regional and headquarters offices.

If a submitted application for an endangered species permit is complete, the field office review should take 30 days with 15 more days for preparing draft terms and conditions. The regional office should take no more than 15 days to review the draft documents from the field office and prepare the draft Federal Register Notice. The headquarters office should take no more than 7 days to review the documents and submit to the Federal Register for publication the request for the permit for an endangered species. Following the 30-day comment period, if there are no objections, the permit should be issued within 7 days. This is a 3.5 month process, not 9 months or longer.

The responsibility for permit management including submitting reports and amending permit activities should be revised to include two responsible parties, not one. The ePermits program should be accessible by these two responsible parties and both should be authorized to submit information and reports. This requirement provides a contingency in case one of the responsible

parties may not be able to access the ePermits program to make changes or submit reports in a timely manner.

In addition, the new ePermits software that was recently instituted for recovery permit management has some “rules” that need to be revised. For example, when a recovery permit is issued to an employee of a federal agency, the supervisor of that agency’s office is the contact person. However, this contact person is not an authorized individual on the permit and has no personal or professional interest to stay current with the requirements of the issued permit. In some agencies, the supervisor may move to a different position at another location every few years, well before the completion of the 5-year term of the issued recovery permit. That supervisor no longer has any authority over the staff implementing the recovery permit and no access to the information to submit in the annual report as required by the recovery permit’s terms and conditions.

We question whether the annual comprehensive reports for listed species are provided to or made accessible by the species leads. We recommend that the USFWS request input from the public on how they can improve the development, implementation, and management of recovery permits. This request would include permit issuance; monitoring compliance with permit terms and conditions; and using the results from permit activities, data, and annual reports to update the data that the USFWS should be keeping on each listed and candidate species and that is readily available to its biologists for using the best available information in making decisions under the FESA.

We appreciate this opportunity to provide the above comments and trust they will help protect tortoises during any resulting authorized activities. Herein, 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 USFWS that may affect 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 notify the Council at eac@deserttortoise.org of any proposed projects of actions that the USFWS 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 the USFWS fully considers and implements actions to conserve these tortoises as part of its directive under the FESA.

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,



Edward L. LaRue, Jr., M.S.

Desert Tortoise Council, Ecosystems Advisory Committee, Chairperson

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