



DESERT TORTOISE COUNCIL

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Submitted via <https://www.regulations.gov>

August 5, 2023

Martha Williams, Director
Carey Galst, Branch of Listing & Policy Support
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Proposed Rule – Regulations Pertaining to Endangered and Threatened Wildlife and Plants
(Docket Number FWS-HQ-ES-2023-0018)

Dear Director Williams and Mr. Galst,

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 proposed changes to regulations on threatened and endangered species. Because the proposed changes in the regulations may affect the management of the federally threatened Mojave desert tortoise (*Gopherus agassizii*)

(synonymous with Agassiz's desert tortoise), our comments are based on our commitment to enhance protection of this species and provide for its conservation and recovery. 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 had 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.

Comments on Regulations Pertaining to Endangered and Threatened Wildlife and Plants

On Thursday, June 22, 2023, the U.S. Fish and Wildlife Service (USFWS or Service) published in the *Federal Register* a proposed rule to revise the regulations concerning protections of endangered species and threatened species under the Endangered Species Act (FESA or Act) (see <https://www.govinfo.gov/content/pkg/FR-2023-06-22/pdf/2023-13055.pdf>). The USFWS is seeking public comments on these proposed revisions and identified specific issues that it is requesting the public to comment on.

The USFWS proposes to make the following revisions:

- reinstate the general application of the "blanket rule" for protecting newly listed threatened wildlife and plant species,
- add federally recognized Tribes to the entities authorized to aid, salvage, or dispose of threatened species, and
- update the endangered plant regulations at [50 CFR 17.61\(c\)\(1\)](#) to match amendments to the FESA that Congress enacted in 1988. These updates would also apply to threatened plants protected under the "blanket rule."

In addition, the USFWS requested the public to provide comments on specific proposed text in the proposed regulations and the following issues:

- The current regulatory burden to federally recognized Tribes to apply for and receive permits for conservation actions for threatened species and the extent to which extending this exception to federally recognized Tribes would alleviate that burden;

- Whether federally recognized Tribes would view this type of exception as helpful or desirable;
- Whether the inclusion of this exception in “blanket rules” is consistent with the conservation purposes of the Act;
- Whether the USFWS should require cooperative agreements with federally recognized Tribes to provide the exception for conservation-related activities and how we should determine the scope of such exceptions;
- Whether the phrase “employee or agent” of a Tribe's “natural resource agency” is the best way to describe the organizational or functional role of individuals who would be designated by a federally recognized Tribe for conservation purposes;
- Whether this change that the USFWS is considering would have a significant effect on the human environment.

Reinstating Blanket Rules

Until 2019, the USFWS implemented general protective regulations that applied to threatened species of wildlife and plants by extending the majority of the protections (all of the prohibitions that apply to endangered species under section 9 (i.e., prohibitions against take) and additional exceptions to the prohibitions) to threatened species, unless the USFWS issued an alternative rule under section 4(d) of the FESA for a particular species (i.e., a species-specific rule). These general protective regulations were called “blanket rules” as they would automatically apply to all threatened species. In 2019, the blanket rule was removed from being applied to all newly-listed threatened species, and the USFWS was required to prepare species-specific rules that described the protective regulations for each species including the types of take that were allowed under the FESA, also called “exceptions to take prohibitions” by the USFWS.

The Council supports the reinstatement of blanket rules for threatened species for the reasons the USFWS stated in the proposed rule (e.g., to prevent declines in the species’ status, to avoid making assumptions about the reasons for the species’ decline especially at the time of listing, to aid enforcement of take prohibitions, and standardize take prohibitions for threatened and endangered species). However, we believe the USFWS should revisit the species-specific rules for the 27 threatened wildlife species and 8 threatened plant species finalized since 2019 to determine whether the current data continue to support species-specific rules that allow for certain types of take for these species, or whether the blanket rule should be applied to reduce take and aid in their recovery. To support this request, the Council reiterates this quote from the USFWS in this Proposed Rule – “[W]e often lack a complete understanding of the causes of a species' decline, and taking a precautionary approach to applying protections would proactively address potentially unknown threats. In addition, the initial listing of a species may bring new attention to the species, and that attention may increase the risk of collection or sale. Therefore, we determined that this approach of applying section 9 prohibitions to threatened species under the “blanket rules” assists our goal of putting in place protections that will both prevent the species from becoming endangered and promote the recovery of species. As we learn more about a given species and the reasons for its decline over time, we have the option to establish or revise species-specific rules accordingly.” and “we have concluded that applying those prohibitions in the “blanket rules” upon the listing of threatened species will similarly help prevent further declines of the species and further the conservation purposes of the Act.”

Adding Federally Recognized Tribes

The long-standing implementing regulations for threatened wildlife and plants have allowed the USFWS and certain Federal and State agencies to aid, salvage, or dispose of threatened species. The USFWS proposes to extend this authority to certain employees or agents of a federally recognized Tribe. The wording of this proposed regulation is:

“Notwithstanding § 17.21(c)(1) and unless otherwise specified, any employee or agent of the Service or NMFS, of a federally recognized Tribe's natural resource agency undertaking conservation activities in accordance with an approved cooperative agreement with the Service that covers that threatened species of wildlife , or of a State conservation agency that is operating a conservation program pursuant to the terms of an approved cooperative agreement with the Service that covers the threatened species of wildlife in accordance with section 6(c) of the Act, who is designated by their agency for such purposes, may, when acting in the course of their official duties, take those species.”

and

“Notwithstanding § 17.61(c)(1) and unless otherwise specified, any employee or agent of the Service, of a federally recognized Tribe's natural resource agency undertaking conservation activities in accordance with an approved cooperative agreement with the Service that covers the threatened species of plant, or of a State conservation agency that is operating a conservation program pursuant to the terms of an approved cooperative agreement that covers the threatened species of plant with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those species.”

The *Federal Register* document describes various recent Executive and Secretarial Orders and Department of the Interior policies that make commitments of the U.S. Government to strengthening the relationship between the Federal Government and Tribal Nations and to advance equity for Indigenous people, including Native Americans, Alaska Natives, Native Hawaiians, and Indigenous peoples of the U.S. Territories. The USFWS’s proposed changes to the threatened species protective regulations are a recognition that Tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources, similar to States.

The Council supports adding federally recognized Tribes to these two sections of the regulations implementing the FESA, but recommends that the wording for federally recognized Tribes be the same as for State conservation agencies but with the elimination of the reference to section 6 of the FESA. Thus, we propose that the wording of the regulations be changed to the following:

For threatened wildlife —

“...of a federally recognized Tribe's natural resource agency operating a conservation program pursuant to the terms of an approved cooperative agreement with the Service that covers the threatened species of wildlife, who is designated by their agency for such purposes, may, when acting in the course of their official duties, take those species.”

For threatened plants —

“...of a federally recognized Tribe's natural resource agency that is operating a conservation program pursuant to the terms of an approved cooperative agreement that covers that threatened species of plant with the Service, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those species.”

Whenever consistent wording of the regulations can be applied to similar situations (e.g., State agencies and Tribal agencies), this promotes efficiency and reduces confusion.

Because the status of how federally recognized Tribes are viewed by the Federal government has changed since the FESA was passed in 1973, we request that the Department of the Interior's Office of the Solicitor review the intent of section 6 of the FESA and determine whether it should apply to federally recognized Tribes. If yes, then the reference to section 6 of the FESA should be added to the proposed regulations.

Corrections and Clarifications

In this section of the *Federal Register* document, the USFWS is proposing to add a provision that makes it unlawful to: (a) “maliciously damage or destroy” an endangered plant species on an area under Federal jurisdiction; or (b) “remove, cut, dig up, or damage or destroy” an endangered plant species on any area that is not under Federal jurisdiction in knowing violation of a State law or regulation or in the course of violating a State criminal trespass law.” The reason given for this wording is for the regulatory language to conform to the statutory language regarding prohibitions for endangered plants - specifically, Congress's amendments to the FESA in 1988 and the House of Representatives Report.

Currently the section of the Code of Federal Regulations that discusses prohibitions for endangered plants is limited to the following actions:

“§ 17.61 Prohibitions.

(a) Except as provided in a permit issued pursuant to § 17.62 or § 17.63, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, any of the acts described in paragraphs (b) through (e) of this section in regard to any Endangered plant.”

“(b) Import or export. It is unlawful to import or to export any Endangered plant. Any shipment in transit through the United States is an importation and an exportation, whether or not it has entered the country for customs purposes.”

“(c) Remove and reduce to possession.

(1) It is unlawful to remove and reduce to possession any endangered plant from an area under Federal jurisdiction.”

“(d) Interstate or foreign commerce. It is unlawful to deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, an endangered plant.”

“(e) Sale or offer for sale.

(1) It is unlawful to sell or to offer for sale in interstate or foreign commerce any endangered plant.”

Thus, the proposed wording would expand and clarify the actions currently in paragraph (c) that are prohibited without a permit to comply with the FESA and implement Congress’s intent. In addition, this wording should provide greater conservation benefit to endangered plants. The Council supports this proposed change to the regulations.

Comments on the Specific Issues Identified by the USFWS

The USFWS identified six specific issues and requested the public to comment on them.

- The current regulatory burden to federally recognized Tribes to apply for and receive permits for conservation actions for threatened species and the extent to which extending this exception to federally recognized Tribes would alleviate that burden.

From our recent experience, obtaining a permit from the USFWS to take a threatened or endangered species takes as a minimum several months if not longer. Consequently, providing this authorization to federally recognized Tribes for these specific circumstances to take threatened species would greatly relieve this burden of applying for and waiting to receive a permit before being able to take for conservation purposes.

- Whether federally recognized Tribes would view this type of exception as helpful or desirable.

The Council cannot speak for the Tribes but when an entity is provided with an option that reduces the time and effort needed to obtain an authorization, this circumstance is usually viewed as helpful or desirable.

- Whether the inclusion of this exception in “blanket rules” is consistent with the conservation purposes of the Act.

Extending this authorized from federal and State conservation and land management agencies to tribal natural resource agencies with conservation programs/cooperative agreement with USFWS would appear be consistent with the purposes of the Act. Currently the USFWS has the authority to modify/renew/terminate a cooperative agreement with the States. Applying this same mechanism to federally recognized Tribes would be consistent with current implementation practices of the FESA.

- Whether the USFWS should require cooperative agreements with federally recognized Tribes to provide the exception for conservation-related activities and how we should determine the scope of such exceptions.

The USFWS should require cooperative agreements with the Tribes. It is the mechanism that the USFWS and the Tribes have to ensure they are carrying out the purposes of the FESA. It clarifies the role the Tribe would implement to ensure certain actions it may implement to take threatened species would be authorized under the FESA. It is also the only discretionary action under which compliance with the National Environmental Policy Act (NEPA) would occur.

- Whether the phrase “employee or agent” of a Tribe's “natural resource agency” is the best way to describe the organizational or functional role of individuals who would be designated by a federally recognized Tribe for conservation purposes.

This term is consistent with the term applied to other agencies in this regulation. We recommend using consistent wording whenever possible. The explanation of what this phrase means should be stated in the cooperative agreement with each Tribe to provide both clarification and protection to each Tribe.

- Whether this change that the USFWS is considering would have a significant effect on the human environment.

Please see our comments under “National Environmental Policy Act” below.

National Environmental Policy Act

In this section of the proposed rule, the USFWS says it will complete its analysis of the proposed rule in compliance with NEPA, before finalizing the proposed regulations.

If the USFWS determines that to implement the proposed regulations an EA is needed to comply with NEPA, we request that this document be available for public review and comment. If the USFWS determines the changes are covered by a categorical exclusion, we request that the USFWS make this NEPA document available for public inspection prior to issuing the final regulations.

In the *Federal Register* document, the USFWS requested that the public comment on whether the change that the USFWS is considering to provide take coverage to federally recognized Tribes for some activities for threatened species would have a significant effect on the human environment. The Council believes it would depend on several factors including but not limited to each Tribe’s natural resource agency, the listed species it would cover, and the contents of the cooperative agreement. This situation means each cooperative agreement would be a unique document because of unique circumstances. Hence, we recommend that as each cooperative agreement is developed with the goal of the USFWS approving it, this discretionary action would be subject to NEPA analysis including analysis of cumulative, synergistic, and interactive impacts. This rationale further supports conducting NEPA for each cooperative agreement, as a programmatic NEPA document evaluating the environmental effects of all potential cooperative agreements would consist mostly of assumptions and little data.

Clarity of the Rule

The USFWS requested feedback on whether certain requirements for writing and explaining the proposed changes to the regulations have been met. We offer the following suggestion for the requirement to use lists and tables wherever possible.

In August 2019, the USFWS issued a final rule that revised 50 CFR 17.31 and 17.71 (or the 2019 4(d) rule) that required species-specific rules setting out specific regulations appropriate for each threatened species along with take that would be allowed with no additional permit or authorization. On January 20, 2021, the President issued Executive Order 13990 requiring all agencies to review agency actions issued between January 20, 2017, and January 20, 2021. This included the August 2019 final rule. In July 2022, the U.S. District Court for the Northern District of issued a decision vacating the 2019 4(d) rule. The USFWS advised the Court that it anticipated proceeding with a rulemaking process to revise the 2019 4(d) rule. In November 2022, the District Court issued orders remanding the 2019 4(d) rule to the Services without vacating it.

Because of this complicated history of the pre-2019 4(d) rule, the 2019 4(d) rule, and the proposed amended 4(d) rule, we believe that providing the public with a table with these three rules side by side would have been helpful. This table would allow the public to compare the wording and determine the extent of the changes the USFWS is proposing to the 2019 4(d) rule.

Similarly, when the USFWS is proposing to make any change to the wording of a regulation, a table that compares the current wording next to the proposed wording would be helpful and assist the public in comparing and better understanding the extent of the proposed changes. For example, earlier in this letter we compared the current language of the unlawful take of endangered plants with the USFWS's proposed wording. We had to look up the current wording so we could compare it with the USFWS's proposed wording, and analyze the differences between the two, so we could provide a recommendation. Please provide a comparison table for all future proposed changes to regulations.

Regarding the use of clear language, most of the document was clear. However, we found that the USFWS used legal/regulatory phrases lifted from the existing or proposed regulations that sometimes is not clear language that the public would understand. We suggest the USFWS explain what the phrases mean the first time they are used in the document (add an i.e., followed with a rephrasing in plain English) to help the public understand legal /regulatory phrases.

Examples of using legal/regulatory phrases or legal jargon are:

In "Corrections and Clarifications," the USFWS says the following, "We also propose edits to clarify that take of a threatened species is excepted for the Service and NMFS independent of the section 6 provision." The public would have a difficult time understanding what this sentence means (i.e., that take is allowed [for conservation purposes] under authorizations other than section 6 of the FESA).

Throughout the document (e.g., "Summary," "Background," etc.) the phrase "exceptions to prohibitions for threatened species" and "exceptions to prohibitions" repeatedly occurs. When used the first time, we suggest the USFWS follow this phrase with (i.e., circumstances when take of a threatened species is allowed without a permit).

Proposed Regulation Promulgation

The USFWS is proposing to revise paragraphs (c)(3) of 50 CFR 17.21 to read as follows:

“(3) Notwithstanding paragraph (c)(1) of this section, any employee or agent of the Service, any other Federal land management agency, the National Marine Fisheries Service, or a State conservation agency, who is designated by their agency for such purposes, may, when acting in the course of their official duties, take endangered wildlife without a permit if such action is necessary to:

- (i) Aid a sick, injured, or orphaned specimen; or
- (ii) Dispose of a dead specimen; or
- (iii) Salvage a dead specimen that may be useful for scientific study; or
- (iv) Remove specimens that constitute a demonstrable but nonimmediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed in an appropriate area.”

The Council believes the USFWS has inadvertently overlooked the biologists, botanists, ecologists, and other natural resource scientists of the U.S. Geological Survey (USGS), as they were added to this agency about two decades after the FESA was passed and implementing regulations approved. Because USGS is not a land management agency, its biologists, botanists, ecologists, and other natural resource scientists are not covered by current or the proposed wording. We request that the USFWS revise paragraph 17.21(c)(3) and add the U.S. Geological Survey to the lists of agencies that may take endangered wildlife in these limited circumstances.

In addition, the Council requests that the USFWS add the U.S. Geological Survey to the paragraphs regarding prohibitions for threatened wildlife (50 CFR 17.31(b)) and endangered and threatened plants (50 CFR 17.61(a)(2) and 50 CFR 17.71(b)(1)), respectively.

We appreciate this opportunity to provide comments on this proposed rulemaking process and trust they will help protect tortoises during any activities that may result in take. Herein, we reiterate that the Desert Tortoise Council wants to be identified as an Affected Interest for this and all other proposed actions funded, authorized, or carried out by the USFWS that may affect species of desert tortoises directly or indirectly. As an Affected Interest, the Council requests that any subsequent environmental documentation for this proposed action (e.g., NEPA compliance, etc.) is provided

to us at the contact information listed above. In addition, 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

Literature Cited

Berry, K.H., L.J. Allison, A.M. McLuckie, M. Vaughn, and R.W. Murphy. 2021. *Gopherus agassizii*. The IUCN Red List of Threatened Species 2021: e.T97246272A3150871. <https://dx.doi.org/10.2305/IUCN.UK.2021-2.RLTS.T97246272A3150871.en>

Defenders of Wildlife, Desert Tortoise Preserve Committee, and Desert Tortoise Council. 2020. A Petition to the State of California Fish And Game Commission to move the Mojave desert tortoise from listed as threatened to endangered. Formal petition submitted 11 March 2020. <https://defenders.org/sites/default/files/2020-03/Desert%20Tortoise%20Petition%203%202020%20Final%200.pdf>