



United States Department of the Interior



FISH AND WILDLIFE SERVICE
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Memorandum

To: Field Office Manager, Hollister Field Office, Bureau of Land Management,
Hollister, California

From: *M. Anderson-Wick for*
Assistant Field Supervisor, Ventura Fish and Wildlife Office, Ventura, California

Subject: Comments on the Draft Clear Creek Management Area Resource Management
Plan and Environmental Impact Statement

We have reviewed the Draft Clear Creek Management Area (CCMA) Resource Management Plan and Environmental Impact Statement (RMP/EIS) (Bureau 2009), received in our office on December 9, 2009. The Draft CCMA RMP/EIS is intended to provide management guidance for the use and protection of the resources managed by the Bureau of Land Management's (Bureau) Hollister Field Office. The Draft CCMA RMP/EIS applies to approximately 63,000 acres of southern San Benito County and western Fresno County. The planning area is defined in the Draft CCMA RMP/EIS as public lands managed by the Bureau, accounting for more than 63,000 of the 75,000-acre CCMA; and approximately 3,500 acres of "split estate" areas in which the Bureau administers Federal subsurface minerals where the surface is owned by a non-Federal entity. The principal issues addressed in the Draft CCMA RMP/EIS include public health and safety, recreation, protection of sensitive natural and cultural resources, livestock grazing, guidance for energy and mineral development, land tenure adjustments, and other planning issues; however, our comments focus primarily on issues concerning listed species and their habitats, and the potential need for future consultation.

The existing Resource Management Plan (RMP) for the CCMA was adopted in 1984. Since 1984, approximately 30,000 acres of serpentine soils high in asbestos fibers within the CCMA have been designated as the Clear Creek Serpentine Area of Critical Environmental Concern (ACEC) to protect public health and safety. There have been several amendments to the 1984 RMP to address public health and safety and resource protection issues in the CCMA, although many other issues emerging on public lands were not addressed in those amendments. The need for preparation of an updated management plan is based on the following factors:

1. The Environmental Protection Agency's (EPA) CCMA Asbestos Exposure and Human Health Risk Assessment released in 2008 provides significant new information that must be incorporated into a land use plan to evaluate the public health risk associated with the Bureau's land use authorizations.

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2. The existing RMP does not specifically address listing and/or additional habitat needs for federally listed species, including the federally endangered California condor (*Gymnogyps californianus*), the federally threatened California red-legged frog (*Rana aurora draytonii*), and the federally threatened California tiger salamander (*Ambystoma californiense*).
3. Changes in social and economic conditions in San Benito County, the San Joaquin Valley, and the entire State of California have led to increased demand for use of public lands for recreation and energy production as well as an increased awareness and social value placed on the cultural and natural resources in the planning area (Bureau 2009).

The purpose of a new CCMA RMP is to establish goals, objectives, and management actions for Bureau administered lands in the CCMA that address current issues, knowledge, and conditions guiding the management of the lands and resources administered by the BLM's Hollister Field Office in the CCMA to achieve the following:

- Minimization of asbestos exposure;
- Reduction of asbestos emissions;
- Designation of areas in the CCMA for motorized, mechanized, and non-motorized/non-mechanized recreation opportunities;
- Protection of sensitive natural and cultural resources from impacts due to recreation and other land uses;
- Guidance for mineral and energy development; and
- Other land use authorizations and tenure adjustments (Bureau 2009).

Figure 1 describes the seven land use management alternatives under consideration presented in the Draft CCMA RMP/EIS for the CCMA RMP, including a 'no action' alternative and a Bureau preferred alternative.

Figure 1. Land use management alternatives A-G.

| Alternative | Description |
|-------------------------|---|
| A | Represents the 'no action' alternative and would reaffirm current management under the 1984 Hollister RMP (as amended). |
| B | Maintains multiple use opportunities in the CCMA and considers multiple mitigation measures to protect public health and safety. |
| C | Limits off-highway vehicle recreation opportunities in the Serpentine ACEC based on vehicle types, minimum age requirements, and other mitigation measures. |
| D | Emphasizes vehicle access for non-motorized recreation opportunities inside the ACEC, and new off-highway vehicle recreation opportunities outside of the ACEC. |
| E (Bureau preferred) | Allows limited vehicle touring and pedestrian use in the ACEC, and non-motorized recreation opportunities outside the ACEC. |
| F | Restricts public access in the ACEC to non-motorized travel only. |
| G | Minimizes public health risk by prohibiting all public access and entry into the Clear Creek Serpentine ACEC. |

The U.S. Fish and Wildlife Service's (Service) responsibilities include administering the Endangered Species Act of 1973, as amended (Act), including sections 7, 9, and 10. Section 9 of the Act prohibits the taking of any federally listed endangered or threatened species. Section 3(18) of the Act defines take to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define harm to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harassment is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. The Act provides for civil and criminal penalties for the unlawful taking of listed species.

The Bureau as the lead Federal agency for projects on the CCMA has the responsibility to review proposed activities and determine whether any listed species may be affected. If the project is a construction project which may require an environmental impact statementⁱ, the Bureau has the responsibility to prepare a biological assessment to make a determination of the effects of the action on the listed species or critical habitat. If the Bureau determines that a listed species or critical habitat is likely to be adversely affected, it should request, in writing through our office, formal consultation pursuant to section 7 of the Act. Informal consultation may be used to exchange information and resolve conflicts with respect to threatened or endangered species or their critical habitat prior to a written request for formal consultation. During this review process, the Bureau may engage in planning efforts but may not make any irreversible commitment of resources. Such a commitment could constitute a violation of section 7(d) of the Act.

Section 9 of the Act does not address the incidental take of listed plant species; however, protection of listed plants is provided in that the Act requires a Federal permit for the removal or reduction to possession of endangered or threatened plants from Federal lands. Furthermore, it is unlawful for any person to remove, cut, dig up, or damage or destroy a listed plant species in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law [section 9(a)(2)(B) of the Act].

The federally threatened San Benito evening-primrose (*Camissonia benitensis*) is presently the only federally listed species confirmed to occur within the CCMA; however, there are several federally listed species that have the potential to occur within the area. The Draft CCMA RMP/EIS identifies the following listed species that may occur in the CCMA, although it states that occurrences of these species have yet to be recorded within the boundaries of the CCMA:

ⁱ 1/ "Construction project" means any major Federal action which significantly affects the quality of the human environment designed primarily to result in the building of structures such as dams, buildings, roads, pipelines, and channels. This includes Federal actions such as permits, grants, licenses, or other forms of Federal authorizations or approval which may result in construction.

- California condor
- California red-legged frog
- California tiger salamander
- San Joaquin kit fox (*Vulpes macrotis mutica*; federally endangered)
- Tipton kangaroo rat (*Dipodomys nitratooides nitratooides*; federally endangered)
- Coho salmon* (*Oncorhynchus kisutch*)
- Steelhead* (*Oncorhynchus mykiss*)

In addition, federally endangered species that have occurred in the vicinity of the CCMA and also have potential to occur within the CCMA are as follows:

- Blunt-nosed leopard lizard (*Gambelia silus*)
- Giant kangaroo rat (*Dipodomys ingens*)

San Benito Evening-Primrose

The San Benito evening-primrose is restricted to serpentine-derived alluvial terraces and deposits near San Benito Mountain, within and adjacent to the CCMA (Service 2009). Of the 63 known populations of San Benito evening-primrose, all but 5 occur within the boundaries of the CCMA (Bureau 2009). Identified threats to this species include, but are not limited to, off-highway vehicle (OHV) recreation, camping, soil loss and erosion, facilities construction and maintenance, mining activities, and habitat alteration due to invasive species; the most significant of these threats being OHV use. Implementation of the Bureau's 2006 Record of Decision, specifically, the closing of some routes and barrens, in addition to the temporary closure of the CCMA and ongoing monitoring and management of the San Benito evening-primrose and its habitat, has helped to reduce threats to the species and maintain populations (Service 2009).

If the land use management alternative implemented by the Bureau has the potential to adversely affect the San Benito evening-primrose, consultation pursuant to section 7 of the Act is required.

Listed Species That May Occur In the Clear Creek Management Area

We recommend that biological surveys for the previously mentioned species that have the potential to occur in the CCMA be conducted if suitable habitat is present. We recommend that survey results and any related appendices be submitted to our office for review.

* Species for which the National Marine Fisheries Service has responsibility. For more information, call the Santa Rosa Field Office at (707) 575-6050 or go to <http://swr/ucsd.edu>

Land Disposal and Acquisition

We recommend that biological surveys for listed species be conducted on lands proposed for disposal or acquisition, and on any lands that may be redesignated for recreational purposes. We recommend that the survey results and any related appendices be submitted to our office for review. In addition, if the intent of use of lands that are disposed of, or acquired by the Bureau, may have an impact on listed species or their habitats, consultation pursuant to section 7 of the Act is required.

California Condor

The California condor remains one of the world's rarest and most imperiled vertebrate species. As of December 31, 2009, a total of 350 individuals exist in the wild and captivity, with 95 of these free-flying in California, 18 in Baja California, and 75 in Arizona. The remaining 162 California condors are in captivity (Service 2009a).

In 1982, the California condor population reached its lowest level of 22 birds left in the wild. In 1987, the last wild condor was captured and taken to the Los Angeles Zoo to join the captive-breeding program. The Service began reintroducing California condors to the wild in 1992. Dangers such as collisions with power lines; ingestion of debris, garbage, toxic chemicals, and lead ammunition left in animal carcasses, have killed California condors and remain a challenge for birds in the wild. California condors and other scavenging birds and mammals that eat carrion are susceptible to lead poisoning from consuming lead shot or lead bullet fragments within their food sources. Lead poisoning has been identified as the most serious threat to recovery of the California condor (Service 2009b, 2009c). The CCMA is within the non-lead ammunition use area, as defined by the Ridley-Tree Condor Preservation Act (CDFG 2007).

The CCMA is located well within the range of the California condor, and there is additional concern regarding lands that may be left unmanaged by the Bureau following the designation of a land use management plan. For instance, the "Tucker Mountain Zone" proposed for disposal in the northwestern CCMA is located within approximately 16 miles of the Pinnacles National Monument, a California condor release site. Hunting, development, and construction of communications towers and/or wind turbines, are a few examples of land use that could be cause for concern in the area. For this reason, we recommend that the utmost consideration is taken when determining the use and long term goals of the proposed disposal lands to ensure the California condor is not adversely affected.

Bald and Golden Eagle Protection Act

On November 10, 2009, the Service implemented new rules (74 FR 46835) governing the take of golden eagles (*Aquila chrysaetos*) and bald eagles (*Haliaeetus leucocephalus*). The new rules were released under the existing Bald and Golden Eagle Protection Act, which has been the primary regulation protecting unlisted eagle populations since 1940. All activities that may disturb or incidentally take an eagle or its nest as a result of an otherwise lawful activity must be permitted by the Service under this act. The definition of disturb (72 FR 31132) includes

interfering with normal breeding, feeding, or sheltering behavior, to the degree that it causes or is likely to cause decreased productivity or nest abandonment. Because large-scale energy projects could result in the loss of large areas of golden eagle foraging habitat, we have concerns about the individual and cumulative impacts to foraging habitat from these projects. We recommend that the Bureau review the Wind Power Siting, Incentives, and Wildlife Guidelines in the United States manual for potential wind energy projects in the CCMA (AFWA and Service 2007).

Communications Towers

Alternative A in the Draft CCMA RMP/EIS includes management actions that would serve to mitigate impacts to visual resources, including regulating communications towers to appropriate areas. Construction of communications towers (including radio, television, cellular, and microwave) in the United States has been growing at an exponential rate, increasing at an estimated 6 percent to 8 percent annually. The construction of new towers creates a potentially substantial adverse impact on migratory birds, especially some 350 species of night-migrating birds.

Communications towers are estimated to kill 4 to 5 million birds per year, which violates the spirit and the intent of the Migratory Bird Treaty Act (MBTA) and the Code of Federal Regulations at Part 50 designed to implement the MBTA. Some of the species affected are also protected under the Act and the Bald and Golden Eagle Protection Act of 1940, as amended.

The MBTA (16 U.S.C. 703-712) prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the MBTA has no provision for allowing take, we recognize that some birds may be killed at structures such as communications towers and wind turbines even if all reasonable measures to avoid it are implemented. The Service's Division of Law Enforcement carries out its mission to protect migratory birds not only through investigations and enforcement, but also through fostering relationships with individuals and industries that actively seek to eliminate their impacts on migratory birds. Although individuals or companies cannot be absolved from liability under the MBTA if they follow these recommended guidelines, the Division of Law Enforcement and Department of Justice have used enforcement and prosecutorial discretion in the past regarding individuals or companies who have made good faith efforts to avoid the take of migratory birds.

We recommend that the Bureau review the enclosed interim guidelines the Service has adopted concerning the siting, construction, operation, and decommissioning of communications towers. These guidelines were developed because the number of communications towers in the United States has increased dramatically and evidence suggests that these towers pose a hazard to migratory birds. Implementation of these guidelines is voluntary, and the recommendations must be balanced with Federal Aviation Administration requirements and local community concerns where necessary.

Field Office Manager

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In conclusion, if the land use management alternative chosen could potentially have an adverse effect on listed species or their habitats, consultation pursuant to section 7 of the Act must be initiated. We appreciate the opportunity to provide comments on the Draft CCMA RMP/EIR and look forward to working with the Bureau in the future to address and minimize the CCMA RMP's potential effects on federally listed species. If you have any questions regarding these comments, please contact Lena Chang of my staff at (805) 644-1766, extension 302.

Enclosure

LITERATURE CITED

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U.S. Fish and Wildlife Service Interim Guidelines For Recommendations On Communications Tower Siting, Construction, Operation, and Decommissioning

1. Any company/applicant/licensee proposing to construct a new communications tower should be strongly encouraged to collocate the communications equipment on an existing communications tower or other structure (e.g., billboard, water tower, or building mount). Depending on tower load factors, from 6 to 10 providers may collocate on an existing tower.
2. If collocation is not feasible and a new tower or towers are to be constructed, communications service providers should be strongly encouraged to construct towers no more than 199 feet above ground level (AGL), using construction techniques which do not require guy wires (e.g., use a lattice structure, monopole, etc.). Such towers should be unlighted if Federal Aviation Administration regulations permit.
3. If constructing multiple towers, providers should consider the cumulative impacts of all of those towers to migratory birds and threatened and endangered species as well as the impacts of each individual tower.
4. If at all possible, new towers should be sited within existing antenna farms (clusters of towers). Towers should not be sited in or near wetlands, other known bird concentration areas (e.g., state or Federal refuges, staging areas, rookeries), in known migratory or daily movement flyways, or in habitat of threatened or endangered species. Towers should not be sited in areas with a high incidence of fog, mist, and low ceilings.
5. If taller (>199 feet AGL) towers requiring lights for aviation safety must be constructed, the minimum amount of pilot warning and obstruction avoidance lighting required by the FAA should be used. Unless otherwise required by the FAA, only white (preferable) or red strobe lights should be used at night, and these should be the minimum number, minimum intensity, and minimum number of flashes per minute (longest duration between flashes) allowable by the FAA. The use of solid red or pulsating red warning lights at night should be avoided. Current research indicates that solid or pulsating (beacon) red lights attract night-migrating birds at a much higher rate than white strobe lights. Red strobe lights have not yet been studied.
6. Tower designs using guy wires for support which are proposed to be located in known raptor or waterbird concentration areas or daily movement routes, or in major diurnal migratory bird movement routes or stopover sites, should have daytime visual markers on the wires to prevent collisions by these diurnally moving species. (For guidance on markers, see Avian Power Line Interaction Committee (APLIC). 1994. *Mitigating Bird Collisions with Power Lines: The State of the Art in 1994*. Edison Electric Institute, Washington, D.C., 78 pp, and Avian Power Line Interaction Committee (APLIC). 1996. *Suggested Practices for Raptor Protection on Power Lines*. Edison Electric Institute/Raptor Research Foundation, Washington, D.C., 128 pp. Copies can be obtained via the Internet at <http://www.eei.org/resources/pubcat/enviro/>, or by calling 1-800/334-5453).

7. Towers and appendant facilities should be sited, designed and constructed so as to avoid or minimize habitat loss within and adjacent to the tower footprint. However, a larger tower footprint is preferable to the use of guy wires in construction. Road access and fencing should be minimized to reduce or prevent habitat fragmentation and disturbance, and to reduce above ground obstacles to birds in flight.

8. If significant numbers of breeding, feeding, or roosting birds are known to habitually use the proposed tower construction area, relocation to an alternate site should be recommended. If this is not an option, seasonal restrictions on construction may be advisable in order to avoid disturbance during periods of high bird activity.

9. In order to reduce the number of towers needed in the future, providers should be encouraged to design new towers structurally and electrically to accommodate the applicant/licensee's antennas and comparable antennas for at least two additional users (minimum of three users for each tower structure), unless this design would require the addition of lights or guy wires to an otherwise unlighted and/or unguyed tower.

10. Security lighting for on-ground facilities and equipment should be down-shielded to keep light within the boundaries of the site.

11. If a tower is constructed or proposed for construction, Service personnel or researchers from the Communication Tower Working Group should be allowed access to the site to evaluate bird use, conduct dead-bird searches, to place net catchments below the towers but above the ground, and to place radar, Global Positioning System, infrared, thermal imagery, and acoustical monitoring equipment as necessary to assess and verify bird movements and to gain information on the impacts of various tower sizes, configurations, and lighting systems.

12. Towers no longer in use or determined to be obsolete should be removed within 12 months of cessation of use.

In order to obtain information on the usefulness of these guidelines in preventing bird strikes, and to identify any recurring problems with their implementation which may necessitate modifications, please advise us of the final location and specifications of the proposed tower, and which of the measures recommended for the protection of migratory birds were implemented. If any of the recommended measures cannot be implemented, please explain why they were not feasible.