UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

January 10, 2008

Jim Bartel, Field Supervisor
U.S. Fish and Wildlife Service
Carlsbad Fish and Wildlife Office
6010 Hidden Valley Road
Carlsbad, CA 920011

Subject: Draft Environmental Impact Statement (DEIS) for the Agua Caliente Band of Cahuilla Indians Tribal Habitat Conservation Plan (CEQ # 20070420)

Dear Mr. Bartel:

The U.S. Environmental Protection Agency (EPA) has reviewed the above-referenced document pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act. Our detailed comments are enclosed.

The U.S. Fish and Wildlife Service's (Service) proposed action and preferred alternative is to approve the Tribal Habitat Conservation Plan (THCP) and issue an incidental take permit for multiple species, pursuant to Section 10 of the Endangered Species Act. The Draft Environmental Impact Statement (DEIS) also evaluates 3 other alternatives, including one (Alternative 4) that avoids all direct impacts to Peninsular bighorn sheep essential habitat as identified in the Peninsular bighorn sheep recovery plan. The DEIS identifies Alternative 4 as the environmentally preferable alternative.

Based on our review, we have rated the DEIS as Environmental Concerns – Insufficient Information (EC-2) (see enclosed "Summary of Rating Definitions"). We are concerned that the most environmentally protective alternative was formulated in a way that impacts Tribal sovereignty and the Service's Tribal trust responsibility and was therefore rejected. EPA recommends that the Service and the Tribe work together to create an alternative that promotes a greater conservation goal while honoring Tribal sovereignty. EPA also recommends additional mitigation be included in the selected alternative, including smart growth conservation measures for areas to be developed.

EPA appreciates the opportunity to review this DEIS. When the FEIS is released, please send one hard copy and CD to this office at the address above (mail code: CED-2).

If you have any questions, please contact me at 415-972-3846 or Karen Vitulano, the lead reviewer for this project, at 415-947-4178 or vitulano.karen@epa.gov.

Sincerely,

Nova Blazej, Manager
Environmental Review Office

Enclosure: Summary of EPA Rating Definitions
EPA's Detailed Comments

cc: Richard Milanovich, Chairman, Agua Caliente Band of Cahuilla Indians
Margaret Park, Environmental Director, Agua Caliente Band of Cahuilla Indians

Peninsular Bighorn Sheep

Modified Bighorn Sheep Avoidance Alternative

The preferred alternative (Alternative 1), if fully implemented, would result in almost half of the Reservation (19,375 acres) being dedicated to the habitat preserve and managed in perpetuity, making it unavailable for the economic use of the Tribe and its members (p. 1-10). The Draft Environmental Impact Statement (DEIS) also evaluated a Peninsular bighorn sheep impact avoidance alternative (Alternative 4), which would avoid any impacts to Peninsular bighorn sheep essential habitat as identified in the Peninsular bighorn sheep recovery plan. Alternative 4 would reduce the acreage potentially available for development by 3,503 acres compared to the preferred alternative, making approximately 53% of the Reservation unavailable for the use and benefit of the Tribe and its members (p. ES-8).

We understand that the Tribe would support restrictions on almost half of Reservation land but does not support restrictions on 53% of the Reservation and therefore does not support designating Alternative 4 as the preferred alternative. The U.S. Fish and Wildlife Service (Service) has concluded that requiring conservation of all Peninsular bighorn sheep essential habitat would not allow the Tribe to exercise its sovereign authority with regard to land use in this area, would result in a disproportionate burden to the Tribe, and thus would not allow the Service to fulfill its Tribal trust responsibilities (p. 4.3-8).

We understand this position, but note that these impacts to sovereignty and tribal trust responsibility are a result of the particular formulation of Alternative 4. The DEIS acknowledges this when it states that these impacts to Tribal sovereignty are "inherent in the definition of the alternatives and no mitigation is available" (p. 4.4-1). However, the Service has the ability to create a new alternative that promotes greater environmental protection without impacts to Tribal sovereignty or the Service's trust responsibility.

> *Recommendation:* EPA recommends the Service evaluate a modified version of Alternative 4 in the FEIS that includes all the conditions of the preferred alternative but with a voluntary restriction by the Tribe to avoid direct impacts to Peninsular bighorn sheep essential habitat as identified in the Peninsular bighorn sheep recovery plan. Designating this restriction as voluntary would establish a minimum level of habitat protection (that under the preferred alternative), and would affirm Tribal sovereignty by allowing the Tribe to determine whether protection of all essential habitat will occur, based on information from monitoring data and studies. Selecting this modified Alternative 4 with voluntary protection of essential habitat would also allow the Service to publicly encourage this conservation, which is deemed of particular concern since only ten ewes of reproductive age are currently known in the San Jacinto ewe group (p. 2-23).

Benefits of Alternative 4 to multiple species
EPA agrees that Alternative 4 is the environmentally preferable alternative (p. 2-23). In addition to avoiding all direct impacts to Peninsular bighorn sheep, this alternative would conserve all 1,163 acres of riparian habitat, since all of this habitat is within or above the elevation of Peninsular bighorn sheep essential habitat. It would also benefit avian riparian species, amphibian species, the southern yellow bat, Triple-ribbed milk-vetch, desert tortoise, burrowing owl, gray vireo, and LeConte's thrasher to a greater extent than the preferred alternative (p. 4.1-36-39).

These benefits would be accrued without impacting economic development. The DEIS states that under Alternative 4, the amount of housing and employment growth in the Plan Area is anticipated to be similar to what would occur with implementation of the preferred alternative (p. 4.5-4).

> *Recommendation:* EPA encourages the Tribe to consider voluntary conservation of Peninsular bighorn sheep essential habitat for the benefit of the above-mentioned species. We encourage the Tribe to make this larger commitment to conservation as a resource management goal, and exercise tribal sovereignty in the execution of these additional protections.

Encouraging Peninsular bighorn sheep recolonization
The DEIS identifies Chino Canyon as providing an important corridor to large amounts of bighorn sheep habitat and indicates that this movement corridor must remain intact for the ewe group to recolonize this habitat. It is not clear how the preferred alternative in the Tribal Habitat Conservation Plan (THCP) ensures or promotes protection of a corridor across Chino Canyon. Additionally, the DEIS identifies the opportunity for encouraging recolonization in the areas north of Chino Canyon through the provision of water sources. This area is not identified in the Target acquisition area and the provision of water sources is not discussed as a means to mitigate adverse environmental impacts per 40 CFR 1502.16(f).

> *Recommendation:* Clarify in the FEIS how the THCP promotes recolonization of previously occupied bighorn sheep habitat across and north of Chino Canyon. Clarify why the area west of Section 4 (Township 4 South, Range 4 East) is not an acquisition target. Discuss the feasibility of providing a water source in this area as mitigation.

Smart Growth Conservation Measures

Avoidance and minimization measures are included for development in certain geographical areas only. The THCP largely does not require these measures in the Valley Floor Conservation Area (VFCA). For these areas, the only mitigation is the development fee. In addition, the THCP does not appear to direct growth in a manner that avoids habitat fragmentation or impacts if less-than-maximum development occurs. The THCP should include development guidance which minimizes habitat fragmentation and utilizes smart growth or low impact development practices.

Smart growth practices could enhance the benefits of this regional conservation planning effort and lessen the environmental impacts in areas slated for development. The THCP could require or encourage techniques such as compact development, reduced impervious surfaces and improved water detention, avoidance of environmentally sensitive areas and provision of habitat corridors and open space, mixing of land uses (e.g., homes, offices, and shops), transit accessibility, and better pedestrian and bicycle amenities. Reduced air and water pollution from these practices results in significant benefits for both the developed community and covered species. More information on smart growth and low-impact development can be found at: http://www.epa.gov/dced/index.htm and http://www.epa.gov/owow/nps/lid.

While we understand that much of the land slated for development is highly fragmented already, smart growth can still encourage development in a way that encourages habitat values. For example, the DEIS indicates that the Southern Yellow bat range is expanding in residential areas with untrimmed palm trees (p. 3.1-14). This practice could be encouraged in developed areas for the benefit of this species. Additionally, common ravens are known to prey on young desert tortoises[1]. Measures to discourage nesting activity and roosting could be included in areas adjacent to desert tortoise habitat such as undergrounding power utilities to eliminate poles and lines.

> *Recommendation:* EPA recommends that nonmonetary mitigation also be included for all development areas, including the VFCA, to encourage smart-growth practices. The THCP and alternatives should include incentives that will encourage the adoption of smart-growth practices by developers, such as discounts on permit fees or other incentive mechanisms, and requirements for smart growth practices in all development plans. The THCP and alternatives should encourage practices that allow for species to utilize habitat elements that exist within developed areas, to the extent beneficial to the species.

Additional Recommendations/Request for Clarifications

- It is unclear whether a rough step provision is included in the THCP or Implementing Agreement. Please clarify this in the FEIS. EPA recommends this provision be included to ensure that conservation activities keep pace with development.
- It is unclear whether Off-Highway Vehicle (OHV) activity would be allowed in the Valley floor habitat preserve. Please clarify this in the FEIS. EPA strongly recommends prohibiting OHV activity in all conservation lands for the benefit of the desert tortoise, Coachella Valley giant sand-treader cricket, Flat-tailed horned lizard, Palm Springs pocket mouse, Palm Springs round-tailed ground squirrel, Coachella Valley Jerusalem cricket, Coachella Valley milkvetch, and the Little San Bernardino Mountains gilia.
- The DEIS states that the Tribe can restore lands for mitigation credit (p. 2-3). It is not clear what the process is for this or if there is a limit on how much acreage of the

[1] http://www.werc.usgs.gov/pubbriefs/boarmanpbjan2004.pdf

preserve will be potentially reduced due to restorations. It is also unclear how the valley floor conservation ratio of 0.25:1 was established. Please clarify this in the FEIS.

- The DEIS indicates that adverse impacts to 69% of the active and ephemeral sand fields in Section 6 (p. 4.1-16) would be authorized under the THCP. Approximately 315 acres would be authorized as a Fluvial Sand Transport Process area, in which sand mining could occur, resulting in the direct loss of habitat for sensitive species. After 20 years, this area would be reclaimed and dedicated to the Habitat Preserve (p. 4.1-17). It is unclear how this 20 year loss of habitat will impact the ability of these species to recover. The FEIS should address the likelihood that the covered species that utilize this area will survive during the 20 year disturbance to allow for recolonization of this area later.
- The DEIS indicates that Casey's June beetle habitat would be mitigated at a 85:15 ratio to ensure no net loss of habitat value or function (p. 2-10). It is not clear whether this habitat to be acquired requires beetle occupancy. If this is not required, the FEIS should comment on the effectiveness of this mitigation.
- The DEIS states that up to 77% of modeled habitat for burrowing owl could be impacted, and that predisturbance surveys would assist in relocation if necessary. No avoidance of this habitat appears to be required. The FEIS should clearly identify the cumulative impacts to this species from covered activities and indicate the likely success of relocation. As mentioned above, we recommend avoidance as a smart growth conservation measure.
- Page 2-19 states that EPA conducts consultations with the Service for projects that propose dredge and fill within Waters of the U.S. and may adversely impact listed species. This should be corrected to say that the U.S. Army Corps of Engineers conducts these consultations.