



# United States Department of the Interior



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December 10, 2019

**In Reply Refer To:**

6200 (CA190.50)P

Stephen P. Henry, Field Supervisor  
Ventura Fish and Wildlife Office,  
U.S. Fish and Wildlife Service,  
2493 Portola Road, Suite B,  
Ventura, CA 93003

Michael A. Houlemard, Jr.  
Executive Officer Fort Ord Reuse Authority (FORA)  
920 2nd Ave,  
Marina, CA 93933

Regarding: Habitat Conservation Plan

Dear Gentlemen:

Thank you for the opportunity to review the Draft Fort Ord Habitat Conservation Plan (HCP). As you know, the Fort Ord Reuse Authority (FORA) has been coordinating with the Bureau of Land Management (BLM) and many others on the development of the HCP since 1997. The BLM is hopeful that this conservation strategy will be approved and funded to assist local government with their habitat management responsibilities on lands they administer adjacent to (or near) the Fort Ord National Monument (FONM), which is jointly managed by the BLM and the United States Army.

Active management of the Fort Ord open space areas by local jurisdictions has been limited due to funding deficiencies, resulting in habitat degradation in some cases. This includes open space parcels designated as habitat reserves or other open space areas immediately bordering the FONM with "borderland" habitat management requirements. If approved, the HCP provides a funding mechanism where development fees collected by FORA and its successor agency(s) would be used for open space management and protection of listed species. Although the HCP does not alter the conservation status of lands as prescribed by the Army's Installation-Wide Multispecies Habitat Management Plan for the Former Fort

Ord (1997 HMP, as amended), the HCP does provide financial backing to implement a habitat conservation strategy across open space areas.

The conservation strategy described within the Draft HCP facilitates protection of four plant species and four animal species covered under Section 10(a)(2)(B)(ii) of the Federal Endangered Species Act (FESA-10) and/or the State of California Endangered Species Act (CESA). As you both are aware, the HCP itself does not govern how the Bureau of Land Management (BLM) administers land on the FONM. Rather, the HCP governs how non-federal jurisdictions manage non-federal Fort Ord land in the long-term for the purposes of permitting non-federal entities under FESA-10 and CESA.

The BLM manages the FONM under federal land management plans (i.e. Resource Management Plans) and various step-down plans (i.e. Activity-Level Plans) prepared pursuant to the Federal Land Policy and Management Act (FLPMA) and other federal law, regulation, and policies. These plans are subject to consultation with the U.S. Fish and Wildlife Service (USFWS) under the provisions of Section 7 of the Federal Endangered Species Act (FESA-7) and must be consistent with the FONM designation as a National Monument. When BLM periodically updates these plans, as required by FLPMA, it also reinitiates consultation with the USFWS under FESA-7. The BLM is not subject to permitting under CESA or FESA-10.

The BLM has been coordinating with FORA to ensure that the management program described within the Draft HCP is consistent with how the BLM manages the FONM under current federal plans and associated biological opinions. Similarly, we have repeatedly disclosed that those federal management plans are subject to periodic change under FLPMA and that this could be problematic for the purpose of issuing permits to non-federal entities pursuant to FESA-10 and CESA. Any change in management of the FONM is not expected to be substantial, however, due to the FONM designation and agreements in place between the Secretary of Interior and Secretary of Army in regards to the 1997 HMP.

In July of 2016, the USFWS identified an important FESA-10 issue in their comment letter to FORA on the administrative draft HCP. The USFWS letter was mindful of the United States District Court Ruling--often referred to the "Fruit Growers Supply Case" (*Klamath-Siskiyou Wildlands Ctr. V. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033 (N.D. Cal. 2015)). Plaintiffs in that case alleged that Fruit Growers wrongfully obtained an incidental take permit by piggybacking off the U.S. Forest Service's conservation efforts on neighboring lands as described within an HCP prepared under FESA-10. The court held:

*"By relying on the minimization and mitigation efforts by the U.S. Forest Service, FWS improperly found that Fruit Growers satisfied the "minimize and mitigate" requirement in ESA § 10(a)(2)(B)(ii)."*

To address that legal issue, FORA made some adjustments in the Draft HCP for the FESA-10 purposes and limited the BLM's role under the Draft HCP in regards to overall mitigation. FORA's strategy in the Draft HCP is to sever BLM's routine management of FONM under federal plans from the FESA-10 incidental permit process and instead is proposing seven mitigation measures to be considered by the BLM for approval on the FONM. These mitigation measures, if BLM approved, may be used by FESA-10 permittees as mitigation, subject to limitations provided by federal law.

The FESA listed animal species on FONM include California tiger salamander (known to occur on FONM) and Red-legged frog (suspected to occur on FONM). The other HCP animal species (Western snowy plover and Smith's blue butterfly) do not occur on FONM. The FESA listed plant species known to occur on FONM include Sand gilia, Yadon's piperia and Monterey spineflower. The other plant species, Seaside bird's beak, also occurs on FONM, but is not a federally-listed species.

In the Draft HCP, applicants for FESA-10 permits are proposing to partially mitigate for these species through mitigation activities on FONM lands administered by the BLM. Recognizing the BLM's continuing administrative jurisdiction over the FONM lands, the FWS has acknowledged that only those additional mitigation measures funded by FORA and approved by BLM to be implemented by FORA or successor agency(s), will be credited as mitigation for the non-federal FESA-10 permit purposes in a manner that complies with the "Fruit Growers Supply Case" ruling. The Draft HCP accurately describes this relationship in several places; however, there are a few places where the document is misleading.

For example, Mitigation Measure 22 in Table 5-5 suggests that rotational burning on the FONM by BLM is mitigation for loss of Yadon's piperia, Monterey spineflower and Sand gilia. All of these plant species are listed under FESA and prescribed burning is not funded by the FORA endowment fund so the table should be modified to show that FESA-10 permitting for those species is not dependent upon that planned management activity of the BLM. Furthermore, habitat monitoring by the Army for over 20 years suggests that those three FESA species are open space and/or disturbance dependent and not necessarily fire dependent so that action should not be considered mandatory (as mitigation is generally considered mandatory and not discretionary under FESA-10) for those three listed species.

Other mitigation measures are shown in Table 5-5, Table 5-6 and elsewhere that are applicable to FESA species and require edits. For example, Mitigation Measure 33 in Table 5-6 that is attributed to the BLM at FONM is for the protection of Yadon's piperia, a FESA species. In all cases, if an action is expected to be a mandatory FESA-10 management action to mitigate for non-federal take, then it would need to be described, funded and approved similarly to the seven actions listed and described in Table 9-9.


Permitting of the three CESA species is more problematic under the Draft HCP. The three CESA species located on the FONM include California tiger salamander, Sand gilia, and Seaside bird's beak. The first two species are also FESA species so we would expect that the Draft HCP management program for those species under FESA-10 would be sufficient for CESA purposes. In other words, FORA or successor agency(s) and CDFW should not expect the BLM to implement additional management actions to protect those species other than what is proposed, funded and approved under the FESA-10 permit, or through the BLM's internal FESA-7 requirements.

Seaside bird's beak is the sole species covered only under CESA on the FONM. Like Sand gilia, Yadon's piperia and Monterey spineflower, this annual plant is open space and/or disturbance dependent and not necessarily fire dependent. As such, we do not agree that it is appropriate for FORA to identify Mitigation Measure 22 as necessary mitigation attributable to the BLM under the CESA permit, or any other BLM management program that is not externally funded as mitigation for Seaside bird's beak.

As we have explained previously, the BLM has no authority under federal law to obligate public land to perpetual or even long-term management since the management objectives and goals for public land may change over time. The 2012 designation of FONM is perhaps the strongest and most durable protection that can be afforded by the executive branch of federal government on the management of BLM-administered public lands. This is especially true for the HMP/HCP protected species that are among the "objects and values" of the Monument requiring protection. The CDFW should take into consideration whether the monument designation, the BLM governing land use and activity plans, the HMP, and the FWS biological opinions provide the assurances CDFW needs to satisfy CESA, and whether it may issue CESA incidental take permits based on BLM management of FONM for Seaside bird's beak, Sand gilia (also federally protected) and California tiger salamander (also federally protected).

Should you have any questions, please contact Eric Morgan, Fort Ord National Monument Manager, at (831)582-2212.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Heppe", written in a cursive style.

Chris Heppe

Acting Central California District Manager