

From: [Perez-Arrieta, Stephanie \(FRA\)](#)
To: [Blodgett, Kenneth](#)
Cc: [Gosselin, Danielle](#)
Subject: FW: CORRESPONDENCE: TECHNICAL ASSISTANCE_20B0244-21TA0969_[SB]_BrightLine West_DETO_29210506_jn_
Date: Monday, May 10, 2021 1:27:47 PM
Attachments: [20B0244-21TA0969 \[SB\] BrightLine West DETO 29210506 in.pdf](#)
[20B0244-20I1617 SB XpressWest concur f20201007 smn1.pdf](#)

FYI ... we received our final letter from USFWS. I've also attached their concurrence letter from Oct 2020.

Stephanie

From: Nussbaum, Jeramy N [mailto:jeramy_nussbaum@fws.gov]
Sent: Friday, May 7, 2021 11:48 AM
To: Perez-Arrieta, Stephanie (FRA) <s.perez-arrieta@dot.gov>
Cc: Veronica.C.Li@usace.army.mil; Knowles, Glen W <glen_knowles@fws.gov>; Croft, Brian <brian_croft@fws.gov>; Bransfield, Ray <ray_bransfield@fws.gov>; Patrovsky, Joan E <jpatrovs@blm.gov>
Subject: Fw: CORRESPONDENCE: TECHNICAL ASSISTANCE_20B0244-21TA0969_[SB]_BrightLine West_DETO_29210506_jn_

CAUTION: This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Dear Ms. Perez,

The aforementioned correspondence is from the US Fish and Wildlife Service. A physical copy won't follow unless requested.

If you have any questions regarding the content please contact (805) 677-3398 at the below listed telephone number.

Kind Regards,

Jeramy

Jeramy N. Nussbaum

Secretary
Palm Springs Fish and Wildlife Office
777 E. Tahquitz Canyon Way, Suite 208
Palm Springs, CA 92262
760-322-2070 x400
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United States Department of the Interior

U.S. FISH AND WILDLIFE SERVICE

Ecological Services
Palm Springs Fish and Wildlife Office
777 East Tahquitz Canyon Way, Suite 208
Palm Springs, California 92262



In Reply Refer to:
FWS-SB-20B0244-21TA0969

May 06, 2021
Sent by Email

Stephanie B. Perez, PG
Supervisory Environmental Protection Specialist
Office of Railroad Policy and Development
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Subject: BrightLine West High Speed Train Project, Apple Valley, California to Las Vegas, Nevada

Dear Ms. Perez:

By letter dated July 17, 2020, you requested the U.S. Fish and Wildlife Service's (Service) concurrence that the proposed design modifications for the XpressWest High Speed Train Project did not require the re-initiation of formal consultation under section 7(a)(2) of the Endangered Species Act of 1973 (Act), as amended. Your letter provided a history of the Federal Railroad Administration's previous consultation, a summary of the design modifications, and a list of revised protective measures for the federally threatened desert tortoise (*Gopherus agassizii*).

On October 7, 2020, the Service concurred with Federal Railroad Administration's determination that re-initiation of formal consultation was unnecessary because none of the proposed changes met the re-initiation criteria at 50 Code of Federal Regulations (CFR) 402.16. Our response also noted that we had become aware that Southern California Edison would apply to the Bureau of Land Management (Bureau) for separate authorization for the construction of the two electrical substations and transmission lines that would supply power to the rail line. BrightLine West (the name of the company changed since our October letter) would also require authorization from the U.S. Army Corps of Engineers (Corps) for the placement of dredged or fill material into waters of the United States. Pursuant to 50 CFR 402.07, the Corps and Bureau have designated the Federal Railroad Administration as the lead agency for section 7(a)(2) consultation. You notified us of the Corps' designation on November 20, 2020, and of the Bureau's on April 5, 2021.

In our October 7, 2020, response, we noted that the protective measures included in the original consultation were outdated because the Service had modified several of its protocols since issuance of the biological opinion in 2011. Our agencies agreed to coordinate to bring those

measures up to date and to clarify some of them in coordination with the Bureau. With the assistance of your planning team and the Bureau, we have now revised the protective measures to provide additional clarity and to reflect current practices. We have enclosed the final version of the protective measures, which you provided to us on May 3, 2021. We also appreciate your cooperation and that of the Bureau and Southern California Edison in revising the plans for the substation and transmission lines in the Ivanpah Valley.

If you have any questions, please contact [Ray Bransfield](#)¹ of my staff at (805) 677-3398.

Sincerely,

Rollie White
Assistant Field Supervisor

Enclosure

cc: Glen Knowles, USFWS, Joan Patrovsky, BLM, Veronica Li, USACE

¹ Ray Bransfield, U.S. Fish and Wildlife Service, ray_bransfield@fws.gov



Attachment D: Biological Opinion Protective Measures

The Biological Opinion (BO) prepared in 2011 by the United States Fish and Wildlife Service (USFWS) for the Brightline West (formerly XpressWest and DesertXpress) High Speed Train Project (Project) stipulated conservation measures to avoid or reduce potential impacts to federally protected species. These conservation measures were incorporated as commitments for the Project, as documented in the Record of Decision (ROD) DesertXpress High-Speed Passenger Train (July 2011).

The federal lead agency conducting this Section 7 consultation is the FRA. The Bureau of Land Management (BLM) is considering separate authorizations for the Project under its land use plan. The BLM will take responsibility for overseeing the implementation of mitigation measures in compliance with Section 7(a)(2) of the Endangered Species Act as they relate to BLM managed lands. FRA will be responsible for overseeing compliance on lands other than BLM managed lands. The U.S. Army Corps of Engineers also requested that the FRA assume the lead for compliance with section 7(a)(2) of the Endangered Species Act.

Based on the modified action, the FRA proposed clarifications to the desert tortoise-specific protective measures codified in the ROD and based on the original BO.

Many of the original BO protective measures apply to desert tortoise 'suitable habitat'. The FRA proposes the following definition for suitable habitat within the action area:

- The I-15 median is considered unsuitable habitat, except Mountain Pass.
- We will refer to portions of the action area within existing exclusion fences that contain tortoise habitat as unsuitable habitat. The premise here is that desert tortoises are no longer present in these areas because of earlier actions that have previously undergone section 7(a)(2) consultation.
- Portions of the action area that do not contain tortoise exclusion fencing are likely to be degraded habitat. These will be treated on a case-by-case basis during application of protective measures.
- We will refer to portions of the action area outside of existing exclusion fences that contain tortoise habitat as suitable habitat.
- An area will no longer be treated as suitable habitat after exclusion fencing has been installed, tortoise clearance survey has been conducted, and the transition of suitable habitat areas to unsuitable habitat has been determined by the authorized biologist.

For the purposes of defining biologist roles and responsibilities herein, an "authorized biologist" must be approved by the consulting federal agencies and USFWS and possess the skills and qualifications to implement the minimization measures pertaining to the desert tortoise. The authorized biologist has the authority to designate "desert tortoise monitors" for the Project, for the tasks that the authorized biologist deems they have sufficient training and experience.

DESERT TORTOISE CONSERVATION MEASURES

General Project Conditions

Measure DT-1

Prior to the commencement of Project-related construction activities, the Applicant shall ensure all personnel working within the Project area attend an environmental awareness training program. The

program will be prepared by biologists approved by the consulting federal agencies and USFWS and/or the “authorized biologist” and can be presented in-person or digitally (e.g. Microsoft PowerPoint or similar means). Temporary personnel (including delivery drivers, concrete truck drivers, mechanics/refueling trucks, port-a-toilet pump trucks, etc.) will not be required to attend the training program such that they are instructed by trained Project personnel not to operate or enter into areas designated as suitable desert tortoise habitat, defined above. Each person attending the training will be required to sign a training sheet, which will be kept on file in the project trailer. The program will include information on the life history of the desert tortoise, the legal protection it is afforded by the Endangered Species Act, the definition of take for listed species, measures to protect the desert tortoise, reporting requirements, specific measures that each worker will need to employ to avoid adverse impacts on desert tortoises, a detailed description of environmental Project commitments (including those for the desert tortoise, as described in this document) as described in the decision records (i.e., Record Of Decision), ROW grants, and penalties for violation of federal and state environmental laws. All awareness presentations and materials will be in the first language of all workers.

Measure DT-2

The Applicant shall implement a litter-control program during construction. The program will include the use of covered, common raven-proof trash receptacles, daily removal of trash from work areas to the trash receptacles, and proper disposal of trash in a designated solid waste disposal facility. Precautions will also be taken to prevent trash from blowing out of construction vehicles.

To account for subsidies provided to ravens during the operational phase (food wastes, roosting and nesting sites, etc.), the Applicant shall pay into the Common Raven Management Fund, which is managed by the National Fish and Wildlife Foundation. This one-time payment of \$105 per acre for the Dale Evans Station permanent footprint will fund measures to control common ravens and their subsidies. The deposit form required by the National Fish and Wildlife Foundation is attached; the FRA must submit this form upon its approval of the proposed action.

Measure DT-3

The Applicant shall confine all construction activities to the designated work areas. Grubbing of vegetation will only be done to the extent necessary for construction and will be limited to areas designated for that. Overnight parking and storage of equipment and materials will be limited to areas of unsuitable habitat.

Measure DT-4

The Applicant shall restrict all vehicle traffic to existing paved roads and the Project alignment within the permanent or temporary construction areas. Disturbance beyond the construction area would be prohibited except in emergency situations.

Measure DT-5

The Applicant shall not allow speeds in excess of 15 miles per hour for Project-related vehicles on unpaved roads within suitable habitat. Project-related vehicles shall obey all posted speed limits while on paved roads.

Measure DT-6

The Applicant will promptly remove all dead animals larger than desert cottontails (*Sylvilagus audubonii*) within the Project construction area and within the operational train ROW to reduce the adverse effects associated with predation of desert tortoise by common ravens (*Corvus corax*). The removal area does not include the I-15 freeway automobile travel lanes.

Measure DT-7

The Applicant will not allow construction personnel to bring pets or firearms into the work area.

Desert Tortoise Protective Measures

Measure DT-8

The Applicant shall ensure an authorized biologist will be on site during any Project activity (e.g., construction, restoration, maintenance, etc.) within or near suitable desert tortoise habitat to ensure the implementation and compliance of protective measures. Coordination of the location of desert tortoise monitors will be up to the discretion of the authorized biologist. If desert tortoises are discovered within the action area, the authorized biologist shall translocate the desert tortoise according to identified translocation strategy.

Measure DT-9

The Applicant will ensure the authorized biologists properly implement protective measures, record and report desert tortoise and sign observations in accordance with approved protocol, report incidents of noncompliance in accordance with the biological opinion and other relevant permits and authorizations and performs translocations according to identified translocation strategy.

Measure DT-10

To minimize adverse effects to the desert tortoise during the construction and operational phases, the Applicant shall install permanent or temporary desert tortoise exclusion fencing around project features, where appropriate. The locations where exclusion fencing will be installed will be done in coordination between the authorized biologist, the USFWS, Caltrans, NDOT, and BLM. Long-term fence maintenance will be addressed in the Applicant's right of way agreements with both Caltrans and NDOT. The various ROW agreements will be provided to the USFWS.

Measure DT-11

Installation of the fencing will be monitored by an authorized biologist to ensure that desert tortoises are not killed or injured during this activity. After installation, the fencing will be inspected at the onset of each active season and after any rain that results in any kind of surface flow to ensure its integrity. The Applicant will ensure that cross-country travel for construction purposes outside of the areas of desert tortoise fencing is prohibited.

Measure DT-12

In areas where high vehicular construction traffic is expected (such as yards or stations), desert tortoise exclusionary fencing may require the supplemental use of a desert tortoise (cattle) guard. Locations of such guards will be determined by an authorized biologist. This device resembles a cattle guard and is

positioned at ground level and connected to the exclusionary fencing to prohibit desert tortoise from crossing into the construction area but allowing the passage of construction vehicles. The guard would be maintained throughout its use during the construction phase by the Applicant. Such maintenance would require the presence of an authorized biologist. The guard would have a clear escape route away from construction activity for any desert tortoise that should fall into the guard. The guard would be inspected at the onset of each active season and after any rain that results in any kind of surface flow for desert tortoise and to ensure the escape route is free of obstruction. The guard would also be cleared of debris that may allow desert tortoise passage across the guard and into a construction area.

Measure DT-13

After installation of the permanent and temporary exclusionary desert tortoise fencing, the entire fenced area will be surveyed for desert tortoises by authorized biologists. Following the procedures and precautions outlined in the *Desert Tortoise Field Manual* or later guidance provided by the USFWS, all desert tortoise pellets and burrows within the survey areas will be examined and excavated by hand, either by or under the direct supervision of an authorized biologist, and collapsed to prevent re-entry.

Measure DT-14

The Applicant shall ensure an authorized biologist will be present during all initial topsoil removal, blading, or grading activities within suitable habitat in the Project area. During Project implementation, the Applicant shall ensure all workers will inform the authorized biologist or desert tortoise monitor if a desert tortoise is found within or near Project areas. All work in the vicinity of the desert tortoise will cease and it will be observed until it is moved from harm's way by the authorized biologist.

Measure DT-15

The Applicant shall ensure only biologists authorized by the USFWS will handle desert tortoises and follow the guidelines within the *Desert Tortoise Field Manual* or later guidance provided by the USFWS. Desert tortoises found within the Project area will be translocated to undisturbed suitable habitat beyond the construction site. When lands managed by the BLM, non-governmental organizations, or other conservation organizations are available, the tortoise would be moved the shortest possible distance. Given the low likelihood of encountering a desert tortoise within the construction area and overall linear distance of action, a desert tortoise translocation plan was determined to not be practical under this BO. Rather, a strategy for translocation will be developed and agreed upon by the Applicant, USFWS, and BLM prior to beginning construction in each of the Project's six segments. The BLM would be responsible for performing any requirements to ensure NEPA compliance associated with the translocation of desert tortoises to its lands. In general, the strategy would consist of the authorized biologist performing a visual health assessment as described in USFWS (2019) and then notifying the USFWS and BLM. While a suitable translocation area is being coordinated, the authorized biologist would temporarily hold the tortoise in captivity in a secure, climate-controlled location.

The authorized biologist or desert tortoise monitor will move desert tortoises that are in harm's way to suitable habitat no more than 300 feet from the edge of the right-of-way. The authorized biologist or desert tortoise monitor will move desert tortoises to the same side of the right-of-way on which they were found; if moving the desert tortoise to the same side of the right-of-way would place it close to a paved road, the authorized biologist or desert tortoise monitor will place it on the opposite side of the right-of-way. The authorized biologist or desert tortoise monitor will release desert tortoises at

unoccupied shelter sites; shelters include unoccupied soil burrows, spaces within rock outcrops, caliche caves, and the shade of shrubs.

Releases will occur only when temperatures range from 18–30°C (65–85°F) and are not forecasted to exceed 32°C (90°F) within 3 hours of release. Additionally, forecasted daily low temperatures should not be cooler than 10°C (50°F) (Service 2020).

If the Applicant needs to move desert tortoises from harm's way during times of the year when temperatures are likely to be unfavorable for extended times, it will coordinate with the Service to adaptively manage specific circumstances

The Applicant will allow any desert tortoise that it moves from harm's way to rehydrate. To rehydrate desert tortoises, the Applicant will maintain approved biosecurity protocols, which include but are not limited to avoiding cross-contamination of supplies and of desert tortoises, and to properly disinfecting all sampling gear (Service 2019). The Applicant will rehydrate the desert tortoise in a clean, biosecure container, for a minimum of 20 minutes in a quiet protected area, in water level that is no higher than the lower jaw of the animal, and in lukewarm water.

Measure DT-16

While working in suitable habitat, workers will inspect for desert tortoises under vehicles and equipment before such equipment is moved. If a desert tortoise is present, the worker will wait for it to move out from underneath the vehicle or the authorized biologist will be contacted to remove it.

Measure DT-17

The Applicant shall ensure the authorized biologists and desert tortoise monitors have the authority to stop work if dangers to desert tortoises arise, and to allow work to proceed after the hazard or desert tortoise has been removed. The Applicant shall notify the Southern Nevada and Palm Springs Fish and Wildlife Offices and BLM Offices of any desert tortoise injury or death. The authorized biologist will attempt to ascertain the cause of death or injury and note whether it resulted from Project-related activities. Only Project-related activities apply against the incidental take statement.

Measure DT-18

The Applicant will replace any previously installed permanent desert tortoise exclusionary fencing along I-15 that is removed during Project construction. There may be instances where the fencing is no longer necessary based on changed conditions since the fencing was installed. These circumstances will be determined on a case-by-case basis.

Habitat Restoration and Erosion Control

The Applicant shall implement all appropriate protective measures for the desert tortoise during restoration work.

The Applicant shall restore temporarily impacted areas appropriately with regard to land ownership and designated land management.

- The Applicant shall restore all BLM lands according to specifications provided by the BLM.
- For non-BLM lands, the Applicant will restore lands as requested by the landowner.

- For non-BLM lands within conservation areas where the landowner does not specify restoration goals, the Applicant will restore lands to the same specifications provided by the BLM for its adjacent lands.
- For non-BLM lands outside of conservation areas where the landowner does not specify restoration goals, the Applicant will restore lands to stabilize substrates to the appropriate standards.

Measure DT-19

The Applicant shall install and maintain rice wattles, straw wattles, or silt fencing according to the Project's Stormwater Pollution Prevention Plan (SWPPP) to prevent sediment from being transported off of the ROW during construction. The Applicant shall employ permanent stabilization measures upon completion of construction along washes and in other areas of potential erosion according to the SWPPP. These measures may include, but are not limited to, the use of geo-textile mats or rip-rap in areas of high erosion potential (erosion control devices). The rip-rap shall be designed to be compatible for use within desert tortoise habitat. That is, the Applicant shall install riprap that does not have gaps that can trap desert tortoises of any size. To minimize the extent to which a desert tortoise individual can become heat-stressed as a result of fence walking, the installation of silt fencing along desert tortoise exclusion fencing should only be used when necessary. If desert tortoises are later observed traveling along the silt fence, the Applicant shall install shade structures every 1,000 feet along the silt fencing.

Measure DT-20

The Applicant shall use culverts that will not entrap desert tortoises or block their passage. Specifically, all erosion control devices must be constructed and maintained in a manner that allows desert tortoises to enter and leave them freely.

Desert Tortoise Habitat Compensation

Measure DT-21

In addition to habitat restoration, in Nevada, the Applicant will compensate for habitat disturbance through payment of a per-acre fee for disturbance of desert tortoise habitat. For disturbance on BLM lands in Nevada, land remuneration fees will be used for management actions expected to promote recovery of the desert tortoise over time, including management and recovery of desert tortoise in Nevada. Actions may involve habitat acquisition, population or habitat enhancement, increasing knowledge of the species' biological requirements, reducing loss of individual animals, documenting the species status and trend, and preserving distinct population attributes. Fees will be used to fund the highest priority recovery actions for desert tortoises in Nevada. The current rate is \$936 per acre of disturbance, as indexed for inflation, effective March 1, 2021. The next adjustment will become effective March 1, 2022. The fee rate will be indexed for inflation based on the Bureau of Labor Statistics Consumer Price Index for All Urban Consumers (CPI-U) on January 31st of each year, becoming effective March 1st. Fees assessed or collected for projects covered under the biological opinion and consultation for southern Nevada will be adjusted based on the current CPI-U for the year they are collected. Information on the CPI-U can be found on the internet at: <http://stats.bls.gov/news.release/cpi.nr0.htm>.

For disturbance on lands in Nevada not managed by BLM, the Applicant will submit fees as described in the attached Southern Nevada Mitigation and Conservation Account, Mojave Desert Tortoise Sub-Account Deposit Document. See attached.

In California, for disturbance of BLM lands, the applicant will compensate in accordance with the Desert Renewable Energy Conservation Plan. LUPA-BIO-Comp 1 of the Desert Renewable Energy Conservation Plan states that:

Impacts to biological resources, identified and analyzed in the activity specific environmental document, from activities in the LUPA Decision Area will be compensated using the standard biological resources compensation ratio, except for the biological resources and specific geographic locations listed as compensation ratio exceptions, specifics in CMAs LUPA-BIO-COMP-2 through -4, and previously listed CMAs. Compensation acreage requirements may be fulfilled through non-acquisition (i.e., restoration and enhancement), land acquisition (i.e., preserve), or a combination of these options, depending on the activity specifics and BLM approval/authorization. Compensation for the impacts to designated desert tortoise critical habitat will be in the same critical habitat unit as the impact. Compensation for impacts to desert tortoise will be in the same recovery unit as the impact.

BLM will determine the appropriate amount of compensation in its rights-of-way grant to the Applicant.

The Applicant will compensate for impacts to desert tortoise habitat on non-BLM lands in California by installing desert tortoise exclusion fencing along unfenced portions of Interstate 15 within desert tortoise critical habitat. Specifically, the Applicant will install exclusion fencing along the north side of Interstate 15 from approximately post mile 77.9 to post mile 78.9 (between Old Highway 58 and Ft. Irwin Road) and from approximately post mile 111.6 to post mile 115.3 (north of Afton Canyon Road). This fencing would connect with the exclusion fencing that the Applicant would install to the east and west of these post miles where construction work would occur outside of the median.

TERMS AND CONDITIONS OF THE BIOLOGICAL OPINION SPECIFIC TO DESERT TORTOISE

Measure DT-22

To ensure that the measures proposed by the FRA are effective and are being properly implemented, the Applicant must contact the USFWS immediately if it becomes aware that a desert tortoise has been killed or injured by Project activities. At that time, the Applicant must review the circumstances surrounding the incident with the USFWS to determine whether additional protective measures are required. Project activities may continue during the review, provided that the proposed protective measures in the Project description and any appropriate terms and conditions of this biological opinion have been and continue to be fully implemented.

If five desert tortoises are injured or killed as a result of construction of the Project, the FRA shall re-initiate consultation on the Project pursuant to the implementing regulations for section 7(a)(2) of the Endangered Species Act at 50 Code of Federal Regulations 402.16.

Measure DT-23

If two desert tortoises are injured or killed as a result of operation and maintenance of the Project in any calendar year, FRA shall re-initiate consultation on the Project, pursuant to the implementing regulations for section 7(a)(2) of the Endangered Species Act at 50 Code of Federal Regulations 402.16.

Measure DT-24

During construction, the Applicant shall monitor the integrity of all desert tortoise exclusion fencing installed by the Applicant and/or where it is their responsibility to do so, at the onset of each active season and after any rain that results in any kind of surface flow. The frequency of inspections during the operational phase will be defined in the ROW agreements between the Applicant and responsible agency (Caltrans, NDOT, BLM, etc.). The various ROW agreements will be provided to the USFWS in order for them to be aware of the responsible parties for long-term maintenance and inspections.

Measure DT-25

The Applicant shall ensure authorized biologists survey areas that could become isolated from the main body of habitat where the alignment deviates slightly from the freeway (e.g., at off-ramps). If desert tortoises are present and construction of the Project may disrupt their behavior or if a culvert or other access to the main body of habitat does not exist or will not be provided, the authorized biologist must translocate them to the side of the rail line that is adjacent to the main body of habitat. In any event of uncertainty, the authorized biologist must contact the USFWS for guidance prior to moving the desert tortoise; during this time, the authorized biologist may install fencing around the area of the desert tortoise's burrow so he or she may find it again.

Measure DT-26

The Applicant shall design all new structures associated with the Project in a manner that will reduce the likelihood of nesting and perching by common ravens. The Applicant, as appropriate, must monitor these structures to ensure the effectiveness of their measures and implement adaptive management, in coordination with the USFWS, if the initial measures are unsuccessful. The Applicant must ensure that any common ravens nests established on new structures are removed within one year at a time when they are inactive.

Measure DT-27

By January 31 of any year the proposed action is under construction and during its operation, the FRA must provide a report to the USFWS that provides details on the effects of the action on the desert tortoise. Within 60 days of the completion of the proposed action, the FRA must provide a summary report that provides, in addition to the following information, a complete overview of the amount of habitat disturbed and the number of desert tortoises that were taken. These reports shall include information on any instances when desert tortoises were killed, injured, or handled, the circumstances of such incidents, and any actions undertaken to prevent similar instances from re-occurring. In addition, the reports should include any recommendations that would facilitate the implementation of the protective measures while maintaining protection of the desert tortoise and the names of any monitors who assisted the authorized biologist and an evaluation of the experience they gained on the Project.

Measure DT-28

Within 24 hours of locating any dead or injured desert tortoises, the Applicant shall notify the USFWS by telephone and by electronic mail. For desert tortoises in Nevada, call (720) 515-5230; for California, call (760) 322-2070. The report must include the date, time, and location of the carcass, a photograph, presumed cause of death, if known, and any other pertinent information. If an injured desert tortoise is

discovered in the Project area, the authorized biologist will immediately take it to the nearest wildlife rehabilitation or veterinary clinic approved by the USFWS. Prior to beginning construction in each of the Project's six segments, a list of approved veterinary clinics will be developed. Following phone notification, as required above, USFWS representatives will determine the final disposition of the injured tortoise.

Measure DT-29

The Applicant shall take care in handling dead desert tortoises to preserve biological material in the best possible state for later analysis. If desert tortoises are killed by Project activities, the USFWS will instruct the Applicant regarding the final disposition of the carcass.

References Cited

U.S. Fish and Wildlife Service. 2019a. Health assessment procedures for the Mojave desert tortoise (*Gopherus agassizii*): A handbook pertinent to translocation. Dated March. Desert Tortoise Recovery Office. Reno, Nevada.

U.S. Fish and Wildlife Service. 2020. Translocation of Mojave desert tortoises from project sites: Plan development guidance. Dated June. Desert Tortoise Recovery Office. Reno, Nevada.



United States Department of the Interior

U.S. FISH AND WILDLIFE SERVICE

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Palm Springs Fish and Wildlife Office
777 East Tahquitz Canyon Way, Suite 208
Palm Springs, California 92262



In Reply, Refer to:
FWS-SB-20B0244-20I1617

October 7, 2020
Sent by Email

Stephanie B. Perez, PG
Supervisory Environmental Protection Specialist
Office of Railroad Policy and Development
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Subject: XpressWest High Speed Train Project, Apple Valley, California to Las Vegas, Nevada

Dear Ms. Perez:

By letter dated July 17, 2020, you requested the U.S. Fish and Wildlife Service's (Service) concurrence that the proposed design modifications for the XpressWest High Speed Train Project (project) do not require the re-initiation of formal consultation under section 7(a)(2) of the Endangered Species Act of 1973 (Act), as amended. Your letter provides a history of the Federal Railroad Administration's previous consultation, a summary of the design modifications, and a list of revised protective measures for the federally threatened desert tortoise (*Gopherus agassizii*).

To summarize the consultation history briefly, the Service issued a biological opinion to the Federal Railroad Administration in 2011 in which we concluded that the DesertXpress High Speed Train Project, as it was then named, was not likely to jeopardize the continued existence of the desert tortoise or result in the destruction or adverse modification of its critical habitat. Since that time, a new owner has acquired the project and redesigned the proposed action.

The primary modifications to the project's design are that the right-of-way for the train would primarily be within the median of Interstate 15 for most of its length. In Nevada, a portion of the right-of-way would lie immediately adjacent to the freeway. The Victorville station would now be located on the east side of Interstate 15. The Las Vegas station would be relocated to the Warm Springs site in Las Vegas near the intersection of Blue Diamond Road and Interstate 15. The locations of some ancillary facilities and construction areas would also change from those considered in the biological opinion.

Your letter lists the criteria for re-initiation of consultation, found at 50 Code of Federal Regulations (CFR) 402.16, and details how the Federal Railroad Administration reached its

conclusion regarding each of the criteria. We have briefly summarized the changes in the proposed action in terms of each of the criteria.

50 CFR 402.16(a)(1): If the amount or extent of taking specified in the incidental take statement is exceeded. You note that the project has not proceeded to construction; therefore, implementation of the proposed action has not caused any take of desert tortoises.

50 CFR 402.16(a)(2): If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. You note that recent research has shown that existing linear barriers in the Ivanpah Valley have a significant negative influence on the connectivity of the desert tortoise population in this region. The revised alignment would lie within the median of Interstate 15 or immediately alongside it; the rail line would include culverts and bridges in the same locations as the freeway and therefore would not measurably increase fragmentation of habitat.

50 CFR 402.16(a)(3): If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence. The proposed action is different from the project that our agencies consulted on in 2011. The primary differences are the amount of disturbance associated with the projects and the locations of those disturbances.

The revised project would disturb approximately 1,810 acres of habitat, approximately 1,130 permanently; by contrast, the former project would have disturbed approximately 5,645 acres. For critical habitat, the revised project would disturb approximately 385 acres, of which 291 acres would be permanent; by contrast, the former project would have disturbed approximately 1,853 acres. The former alignment would also have contributed to fragmentation of habitat, including within critical habitat units.

We acknowledge that the revised project would disturb some areas of desert tortoise habitat that are different from those we considered in the 2011 biological opinion. However, none of these areas is of specific significance to the desert tortoise or its critical habitat and the nature of the effect (i.e., potential mortality of desert tortoises and loss or disturbance of habitat) is the same as we discussed in the biological opinion.

50 CFR 402.16(a)(4): If a new species is listed or critical habitat designated that may be affected by the identified action. The Service has not listed any species as threatened or endangered, or designated new critical habitat within the action area.

For these reason, the Service concurs with the Federal Railroad Administration's determination that the proposed design modifications for the project do not require the re-initiation of formal consultation under section 7(a)(2) of the Endangered Species Act. If implementation of the proposed action meets any of the re-initiation criteria listed at 50 CFR 402.16, the Federal Railroad Administration must re-initiate consultation, provided it has retained discretionary involvement or control over the action.

During our coordination, we learned that Southern California Edison would construct the two electrical substations and transmission lines that would supply power to the rail line under separate authorization from the Bureau of Land Management (Bureau). The question arose as to

whether the Service considered the substations were part of the proposed action. The implementing regulations for section 7(a)(2) of the Endangered Species Act note “(e)ffects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action” 50 Code of Federal Regulations 402.02). Because Southern California Edison would not construct the substations “but for” the need to supply power to the rail line, the Service considers the construction and operation of the substations as part of the proposed action. The revised acreage for the rail line includes the proposed substations and the effects of this aspect of the proposed action are similar to other activities associated with the project’s construction and operation.

We also discussed with Bureau staff its responsibilities with regard to compliance with section 7(a)(2) of the Endangered Species Act. The implementing regulations at 50 Code of Federal Regulations 402.07 allow for the designation of a lead agency to conduct consultation. In this case, we suggest that the Bureau and Federal Railroad Administration agree that the Federal Railroad Administration would serve as the lead agency for consultation, given the past consultation history of this project. If this approach is acceptable, we request that the Federal Railroad Administration notify the Service in writing. We would continue to coordinate with the Bureau regarding protective measures for the desert tortoise, as we discuss in the following paragraph.

As mentioned previously in this letter, the Federal Railroad Administration’s request included a set of protective measures for the desert tortoise. As Ray Bransfield of my staff has discussed with members of your planning team, a few of the measures rely upon Service protocols that we have revised since the 2011 biological opinion. Additionally, our staff and that of the Bureau believe some of the measures would benefit from additional clarity. To that end, as Mr. Bransfield has discussed with you and Bureau staff via electronic mail, we would like to continue to work with you and the planning team to refine the protective measures for the desert tortoise to update and clarify them. The changes we believe are appropriate would maintain and likely increase the amount of protection that desert tortoises would receive during implementation of the proposed action without additionally burdening the applicant.

We appreciate your cooperation during this process. If you have any questions, please contact [Ray Bransfield](#)¹ of my staff at (805) 677-3398.

Sincerely,

Brian Croft
Acting Assistant Field Supervisor

cc:

Flo Defner, USFWS, Joan Patrovsky, BLM, Justin Saiz, BLM, Mark Slaughter, BLM

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