



# United States Department of the Interior

NATIONAL PARK SERVICE  
1849 C Street, N.W.  
Washington, D.C. 20240

K30 (2465)

OCT 14 2010

Mr. Jeff Ruch  
Executive Director  
Public Employees for Environmental Responsibility  
2000 P Street, NW, Suite 240  
Washington, DC 20036

Dear Mr. Ruch:

On behalf of the Secretary of the Interior, I am writing to provide you with a response to the petition for rulemaking your organization submitted together with the Center for Biological Diversity, the Desert Tortoise Council, and Citizens for Mojave Park in June of 2002 (with subsequent requests for a response, most recently in May of 2009). You have asked the National Park Service (NPS) to promulgate special regulations for hunting in the Mojave National Preserve, California, submitting your request under the Administrative Procedure Act, 5 U.S.C. § 553(e) and the Department of the Interior regulations, 43 CFR Part 14.

After review of the legislation establishing Mojave National Preserve, NPS regulations related to hunting, and other relevant documents and information, we have concluded that special regulations for hunting at the preserve are not warranted at this time, and we are therefore denying your petition for rulemaking. The remainder of this letter will address the arguments presented in your 2002 petition.

### *Standing to File*

Based on the allegations in your petition, it is not clear that the organizations are "interested persons" within the meaning of the Administrative Procedure Act. For the purposes of this response alone, the NPS will assume that one or more of the organizations have standing to file the petition. We do not, however, believe that these organizations would necessarily have Article III standing in a federal court with respect to this matter.

### *NPS Authority to Regulate*

Argument I and the introductory section of Argument II in the petition, on pages 7-10, set out the general argument that NPS has the authority to issue special regulations in park units where hunting occurs, including Mojave National Preserve. The California Desert Protection Act, which established the current Mojave National Preserve, authorizes the Secretary of the Interior to restrict times and locations for hunting "for reasons of public safety, administration, or compliance with provisions of applicable law." 16 U.S.C. § 410aaa-46(b).

We agree that NPS would have the authority to issue special regulations at Mojave National Preserve if they were warranted. We simply do not believe that such regulations are warranted at this time.

### *Public Safety*

Argument II(A) in the petition argues that NPS may regulate the discharge of weapons by hunters in order to protect public safety, including in developed or occupied areas. Though not clearly stated, it appears that this argument is intended to support proposed regulation (c) in the Summary.

While NPS agrees it would have the authority to promulgate such a regulation if necessary to protect public safety, a special regulation is not warranted here. California state law, adopted through 36 C.F.R. § 2.2(b)(4), already includes such a prohibition in section 3004 of the California Fish & Game Code. In addition, NPS has implemented an even stricter no-shooting zone (similar to that requested in the petition) under existing regulations, 36 C.F.R. §§ 1.5, 1.7, through its Superintendent's Compendium. NPS is not aware of any evidence of a further threat to public safety or that the existing restrictions are otherwise inadequate, nor does the petition offer any such evidence.

### *Administration*

Argument II(B) argues that because NPS can regulate hunting in Mojave National Preserve for reasons of "administration," it should restrict hunting of nongame animals based on various biological resource management principles set out in Chapter 4 of the NPS Management Policies.

All native wildlife in a national park unit is an essential component of a naturally functioning ecosystem, whether it is considered game or non-game by state hunting regulations. At the same time, hunting is expressly permitted under the California Desert Protection Act, which makes no distinction between game and non-game hunting, and hunting is to be restricted only for certain reasons, including "administration." Even assuming the petition's broad reading of "administration" is correct, we do not believe that it has shown that restrictions on non-game hunting are warranted.

The petition articulates no reason, other than alleged impacts on desert tortoise that will be discussed below, why non-game hunting is particularly problematic under NPS Management Policies or for preserve "administration." We therefore disagree that hunting of nongame animals at Mojave National Preserve presents an unusual issue under the NPS Management Policies, and with the petition's apparent suggestion that non-game hunting must *per se* be restricted by special regulations.

If faced with specific credible reasons suggesting that non-game hunting were violating the NPS Organic Act or the California Desert Protection Act, or that it were making it impossible for the preserve to comply with the resource management guidelines in the NPS Management Policies, then NPS might find that special regulations were warranted. But the petition offers no such reasons, other than its factual allegations regarding impacts on the desert tortoise, which are discussed below. Absent any such reasons, special regulations are not warranted.

### *Endangered Species Act and Desert Tortoise Impacts*

Arguments II(C) and IV of the petition argue that NPS should impose various restrictions on hunting in Mojave National Preserve because they are needed to protect the desert tortoise, which is listed as threatened under the Endangered Species Act (ESA).

These arguments are based on various statements made in the preserve's 2001 General Management Plan, an associated 2001 Biological Opinion (BO) by the U.S. Fish & Wildlife Service (FWS), and the FWS 1994 Recovery Plan for the desert tortoise. The petition did not cite or provide any new information on tortoise impacts other than quotations from those documents, nor have petitioners provided any new information in their correspondence since 2002.

The first substantive allegation is that the Recovery Plan named shooting and vandalism as major threats to the tortoise. Petition at 16-17. The Recovery Plan did include prohibiting the discharge of firearms, except for hunting of big game and upland game birds, from September through February. This was the basis at the time for the statements in the GMP on hunting, and is apparently the basis for proposed regulations (a) and (b) in the petition's Summary.

Our experience has not indicated that shooting of tortoises during their active season is actually occurring in the preserve. Though Appendix D of the 1994 Recovery Plan addresses human activities that threaten the tortoise, including intentional shooting and killing of tortoises as acts of vandalism or reprisal for listing the species, it also recognized that this was less of an issue at the preserve. While a considerable number of documented carcasses in the West Mojave bore evidence of gunshots (up to 28.9%), in the less-visited eastern Mojave, including the preserve, gunshot carcasses were much less prevalent (0-3.1%). Moreover, since the monitoring of desert tortoise populations was initiated in 2001, only one carcass has been discovered in the preserve with a bullet hole. It is not known if the tortoise was shot and killed, or whether someone shot at the empty shell.

The pending revisions to the Recovery Plan confirm our conclusion that restrictions on hunting in the preserve are not needed to protect the tortoise from shooting or vandalism. A new Draft Revised Recovery Plan for the Mojave Population of the Desert Tortoise was released in 2008, and final approval of that new plan is expected soon. The Draft Revised Recovery Plan acknowledges that shooting is by far the most prevalent method of deliberate maiming or killing (formerly referred to as vandalism), and calls for preventing the discharge of firearms, except for hunting authorized by state game and fish departments, in problem or other sensitive areas. The preserve has not been identified as a problem area over the last fifteen years, and the only shooting that is allowed is hunting authorized by state game and fish regulations.

Next, the petition alleges that non-game hunting may leave carcasses that could lead to increased raven populations, which can in turn harm tortoises. Petition at 17. Although the 2001 BO speculated about this possibility, it is not supported by current evidence. Appendix A of the Draft Revised Recovery Plan addresses threats to the desert tortoise and its habitat. Though it recognizes predator subsidies as a cause for increasing raven populations in the desert Southwest, these subsidies are most commonly road kill. Ravens fly along road corridors and easily find dead animals, and also visit landfills and sewage ponds. Though non-game carcasses could potentially provide food for ravens, the carcasses are just as likely to be eaten by other predators like coyotes and foxes.

Ravens typically concentrate in the preserve in a few key areas, such as around Baker, where human subsidies abound, but these areas are generally too low in elevation to serve as tortoise habitat. They also are occasionally found on utility poles and along roadways, where wildlife carcasses from vehicle strikes provide a ready food source. Ravens have not generally been observed in large numbers in the areas where hunters typically shoot non-game species, and there is no evidence that ravens feeding on carcasses left by hunters (usually jackrabbits and coyotes) are a problem for tortoises. While coyote hunters do leave carcasses behind, there has been only one observation of a raven feeding on a coyote carcass in the preserve. Jackrabbits are not generally hunted during the spring and summer, when desert tortoises are active.

The next substantive allegation is that hunting during the tortoise's active season increases vehicular traffic and leads to an increased risk of tortoises being crushed by vehicles. Petition at 18. Actual use levels do not support this speculation. The actual number of hunters during the spring and summer seasons is only about 30 per month. These hunters are spread throughout a preserve that covers 1.6 million acres or 2,500 square miles (approximately the size of the State of Delaware). Of these, most are coyote hunters who tend to hunt at night when tortoises are not active above ground. The Draft Revised

Recovery Plan indicates that there is a detectable impact on desert tortoise abundance with traffic levels on the order of 220 to 5,000 vehicles per day. The total traffic levels on unpaved roads in the Preserve rarely if ever achieve these levels and very little of this traffic, particularly during the day, is attributable to hunters. Therefore it is not reasonable to assume that this group contributes to tortoise mortality on unpaved roads to any significant degree. Even if there were evidence of a tortoise mortality problem on these roads, the proper response would be some sort of restriction on driving, rather than the hunting restrictions suggested in the petition. This is confirmed by the Draft Revised Recovery Plan, which includes a recovery action titled "restrict, designate, close, and fence roads," at p. 68, but none with respect to hunting.

The petition then discusses the GMP process, alleging that NPS has not implemented certain statements made in the preserve's GMP. Petition at 18-20. Though the GMP did include language suggesting that NPS would seek special regulations for the preserve, it does not compel NPS to develop special regulations when the evidence since then indicates that they are unwarranted. The NPS develops a GMP for a park unit to provide overall guidance for management of the unit for a 15-20 year period. They are developed based on the best information available at the time, and nothing compels the NPS to implement a GMP action in the face of conflicting or new information, or absent funding to support the action. The GMP relied on the 1994 Recovery Plan in recommending actions to minimize the potential for indiscriminate shooting of desert tortoises during their active season if possible. It is now apparent, though, that there has been no evidence over the last 15 years that suggests that this is a significant threat to the tortoise in the preserve.

Many of the other recommended actions that the GMP based on the 1994 Recovery Plan have been or are being implemented. The preserve has implemented several of the other hunting or related goals in the GMP through existing regulations and its Superintendent's Compendium, including: 1) no collection of reptiles under a California fishing license (which is otherwise permitted by state law); 2) no target shooting; 3) no-shooting zones around various campgrounds and buildings, discussed above; and 4) hunting dogs must carry identification tags or be tattooed. The NPS is also pursuing possible desert tortoise augmentation (rearing of juvenile tortoises under protected conditions) as identified in the Draft Revised Recovery Plan of 2008.

The petition next alleges that NPS did not take certain actions that the BO apparently assumed would occur. Because portions of the BO were based on the GMP, it contains some statements based on the GMP goals related to hunting and related activities. Thus, the BO suggested that there would not be non-game hunting in the preserve, just as it also recognized that the park had already eliminated target shooting and required dogs to be on leashes or, if used for hunting, under the owner's verbal control.

The petition does not clearly explain the significance of this allegation. As it notes, the BO concluded that the GMP was not likely to jeopardize the continued existence of the desert tortoise. To the extent the petition is arguing that FWS might have concluded otherwise had it known that non-game hunting would continue at the preserve, it offers no supporting evidence or rationale. As discussed above, NPS has no evidence that the lack of special regulations and the continuation of non-game hunting have caused any harm or threat to the desert tortoise.

The petition is also overly selective in its discussion of the assumptions made by the BO, ignoring the BO's discussion of the role of the California Department of Fish & Game (CDF&G). The BO assumed that NPS management of hunting, including any limitation of non-game hunting, would be done in cooperation with CDF&G. CDF&G shares in the responsibility to protect the desert tortoise and implement appropriate recovery actions. In the years immediately following the GMP and BO, both NPS and the petitioners requested changes to the state hunting rules for the preserve. The state biologists

responding to these petitions found the changes unwarranted, due to the lack of evidence that would support the requested changes.

NPS agrees with the petitioners that it could still promulgate special regulations absent state action, if they were warranted. As discussed above, however, there is no evidence to suggest that they are.

Argument IV in the petition concludes with a legal argument that various provisions of the ESA place a mandatory duty on the NPS to promulgate the requested regulations. While NPS generally agrees that it has a responsibility to conserve the desert tortoise at the preserve, both under the ESA and under NPS's own laws, regulations, and policies, none of these authorities compel or even support the regulations requested by the petition. As discussed above, the evidence does not suggest that hunting at the preserve is harming the desert tortoise, nor that the requested regulations would help conserve the tortoise. The petition does not present any evidence to the contrary.

The Recovery Plan is a list of recommended actions, but it does not place a requirement on the agency, unless incorporated into a BO as a Reasonable and Prudent Measure, Term and Condition, or Conservation Recommendation. NPS is free to find other effective ways to conserve the tortoise based on the most current information. The NPS does not believe that restricting hunting as requested in the petition would significantly contribute to the recovery of the desert tortoise and more than restricting the activities of any other user group.

Moreover, the NPS has either completed or is implementing most of the desert tortoise recovery actions specified in the GMP where current data still support the action. NPS has also taken additional proactive tortoise conservation measures beyond those discussed in the GMP. For instance, the preserve recently has sought to install desert tortoise barrier fencing along the paved roads even though the GMP stated that NPS did not support the concept at that time. This was the result of a three-year study, which indicated a need to install fencing to prevent road mortality.

#### *Management Policies*

Argument III in the petition contends that a special regulation is necessary in order to comply with NPS Management Policies. The petition correctly notes that section 8.2.2.6 of the NPS Management Policies directs NPS units where hunting occurs (even if mandated by statute) to publish special regulations.

NPS Management Policies also provide that "[a]dherence to policy is mandatory unless specifically waived or modified by . . . the Director." As discussed above, we have determined that special regulations on hunting are not warranted at this time for Mojave National Preserve. Accordingly, by this letter, I am waiving the relevant portion of section 8.2.2.6.

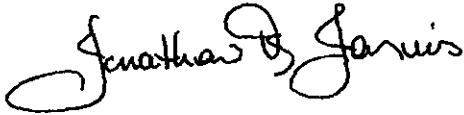
The NPS Management Policies are an internal agency manual intended to guide and inform NPS managers and staff, and are not intended to create any rights in outside parties. They are not enforceable by members of the public. *Wilderness Society v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006). In any event, by following the waiver provision, we have in fact complied with NPS Management Policies in this matter.

#### *Conclusion*

We agree with you that NPS has a responsibility to conserve the desert tortoise and the other resources and values of Mojave National Preserve, as well as to protect visitor safety. We also agree that NPS would have the authority to promulgate special regulations for hunting in the preserve, if they were warranted. For the reasons discussed above, however, we do not agree that special regulations on hunting are currently needed for the preserve, and are accordingly denying your petition.

We recognize our deliberations on this topic have taken many years. This was in large part due to our efforts to work cooperatively with the State of California, as well as an evolving view concerning the actions that best protect the desert tortoise. Nonetheless, we apologize for the delay in responding. If you have any questions, you may contact A.J. North, NPS Regulations Coordinator, at 202-208-5268, or [AJ\\_North@nps.gov](mailto:AJ_North@nps.gov).

Sincerely,

A handwritten signature in black ink that reads "Jonathan B. Jarvis". The signature is written in a cursive style with a large, looping initial "J".

Jonathan B. Jarvis  
Director