

Before the Department of the Interior National Park Service

WASHINGTON, D.C. 20240

In Re: Hunting in the Mojave National Preserve,)
California.)
Petition for Rulemaking Governing Hunting)
in the Mojave National Preserve.)

*To the Secretary of the Interior and
the Director, National Park Service:*

Petition for Rulemaking

Daniel P. Meyer
Public Employees for Environmental Responsibility
2001 S Street, N.W., Suite 570
Washington, D.C. 20009
Tele: (202) 265-7337

Brendan Cummings
Center for Biological Diversity
PO Box 493
Idyllwild, California 92549

June 20, 2002

TABLE OF CONTENTS

| | Page |
|--|------|
| Summary----- | 3 |
| Petition for Rulemaking----- | 5 |
| Argument in Support of Petition----- | 7 |
| | |
| I. CONGRESS AUTHORIZED THE SECRETARY OF THE INTERIOR TO REGULATE THE AREAS UNDER THE JURISDICTION OF THE NATIONAL PARK SERVICE----- | 7 |
| | |
| II. CONGRESS AUTHORIZED THE SECRETARY OF THE INTERIOR TO REGULATE HUNTING IN THE MOJAVE NATIONAL PRESERVE FOR PUBLIC SAFETY, ADMINISTRATION, OR COMPLIANCE WITH PROVISIONS OF APPLICABLE LAW----- | 9 |
| | |
| III. CURRENT NATIONAL PARK SERVICE MANAGEMENT POLICIES REQUIRE THAT HUNTING WITHIN THE MOJAVE NATIONAL PRESERVE BE GOVERNED BY FEDERAL SPECIAL REGULATIONS----- | 14 |
| | |
| IV. THE BIOLOGICAL OPINION OF THE SECRETARY FOR THE MOJAVE NATIONAL PRESERVE IS BASED, IN PART, ON THE NATIONAL PARK SERVICE RESPONSIBILITY TO GOVERN HUNTING IN THE PRESERVE----- | 15 |
| | |
| Conclusion----- | 22 |
| Appendix A - Proposed Rule ----- | 24 |
| Appendix B - Exhibits----- | 25 |

SUMMARY

This Petition, filed by Public Employees for Environmental Responsibility (“PEER”), the Center for Biological Diversity, the Desert Tortoise Council, and Citizens For Mojave National Park, requests that the Department of the Interior and the National Park Service promulgate regulations governing hunting in the Mojave National Preserve in the State of California. Specifically, this petition seeks the following regulations.

- (a) Hunting is allowed only for big game animals and upland game birds, as such species are defined by State regulations, during the seasons established by the State of California Department of Fish and Game.
- (b) In no case will any hunting be permitted from the period beginning on March 1 and ending on September 30 of each year.
- (c) The discharge of rifles is prohibited within one mile of the Hole-in-the-Wall Visitor Center, Mid-Hills campground, the Granite Mountains Natural Reserve, the Soda Springs Desert Study Center, the communities of Kelso and Cima, Kelso Dunes, and Piute Creek.

Such regulations are necessary to bring the Department of the Interior and the National Park Service into compliance with the General Management Plan for the Mojave National Preserve, the Recovery Plan for the threatened desert tortoise, National Park Service management policies, and the terms of the operative Biological Opinion for the Preserve.

On October 31, 1994, Congress established the Mojave National Preserve in the State of California. 108 STAT. 4489. The California Desert Protection Act (CDPA) (P.L. 103-433) directed that the Secretary of the Interior administer the Mojave National Preserve as part of the national park system. The CDPA further mandated that the Secretary permit hunting within the Preserve. The CDPA authorizes the Secretary to “...designate areas where, and establish periods when, no hunting...will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law.” 16 U.S.C. 410aaa-46.

On December 28, 2000, the National Park Service (NPS) announced the adoption of new Management Policies, known as Management Policies 2001. The Policies require that the NPS publish special regulations to govern hunting in all areas of the national park system where hunting is authorized in law as either a mandated or discretionary activity. NPS Management Policies 8.2.2.6. The Mojave National Preserve is an area of the national park system in which hunting is mandated by law.

On June 22, 2001, the NPS announced the availability of the Abbreviated Final Environmental Impact Statement (EIS) and General Management Plan (GMP) for the Mojave National Preserve. 66 FR 33537. That document states that the NPS would “begin the promulgation process for federal regulations in 36 CFR...” to govern hunting in the Mojave National Preserve. On July 6, 2001, the U.S. Fish and Wildlife Service (USFWS) issued a Biological Opinion for the Mojave EIS/GMP (BO 1-8-00-F-36). The Biological Opinion based its conclusion of “no jeopardy” to the desert tortoise, in part, on the understanding that hunting in the Mojave National Preserve “[I]n accordance with NPS regulations at 36 CFR...” is limited to “upland game birds and big game during the seasons designated for these species by the California Department Fish and Game.” On September 21, 2001, the NPS Regional Director responsible for the Mojave National Preserve signed the Record of Decision for the Mojave Abbreviated Final EIS/GMP.

The NPS possesses the power to promulgate special rules for hunting. NPS Management Policies, adopted pursuant to the Organic Act of August 25, 1916 (16 U.S.C. 1 *et seq.*), require that the Mojave National Preserve promulgate special rules for hunting. The Secretary’s obligations under the Endangered Species Act (16 U.S.C. 1531 *et seq.*) place an affirmative responsibility on the NPS to promulgate special rules for hunting. But the NPS has not initiated the process for rulemaking to govern hunting in the Mojave National Preserve.

Before the National Park Service

WASHINGTON, D.C. 20240

In Re: Hunting in the Mojave National Preserve,)
California.)
Petition for Rulemaking Governing Hunting)
in the Mojave National Preserve.)

To the Director, National Park Service:

Petition for Rulemaking

Public Employees for Environmental Responsibility (“PEER”), the Center for Biological Diversity, the Desert Tortoise Council, and Citizens for Mojave National Park, pursuant to the Administrative Procedures Act (16 U.S.C. 553 (e)) and Department of the Interior regulations (43 C.F.R. Part 14), hereby petition the National Park Service (NPS) to govern through rulemaking the activity of hunting within the Mojave National Preserve, California, an area of the national park system. The Administrative Procedures Act directs that “[E]ach agency (of the Federal Government) shall give an interested person the right to petition for the issuance...of a rule.” 5 U.S.C. 553.

Standing to File. PEER is an IRS 501(c)(3) non-profit organization incorporated under the laws of the District of Columbia. PEER serves the professional needs of the local, State, and federal employees—the scientists, hydrologists, biologists, and rangers —charged with the protection of America’s environmental resources, including the resources within the national park system. As such, PEER is “an interested person” under the Administrative Procedures Act.

The Center for Biological Diversity is an organization that seeks to protect and restore the endangered species and wild places of North America and the Pacific, including such resources within the national park system, through science, policy, education, citizen activism, and environmental law. The Center for Biological Diversity has over 6,000 members, many of whom reside in California. The Center for Biological Diversity is “an interested person” under the Administrative Procedures Act.

The Desert Tortoise Council is a private non-profit organization whose goal is to ensure the survival of viable populations of desert tortoise throughout its range, including within the Mojave National Preserve. The Desert Tortoise Council is “an interested person” under the Administrative Procedures Act.

Citizens For Mojave National Park, located in Barstow, California, is the only non-profit conservation organization dedicated solely to the creation and protection of the Mojave National Preserve. The group has 300 members, many of whom regularly visit, use, and enjoy the Preserve. Citizens For Mojave National Park is “an interested person” under the Administrative Procedures Act.

ARGUMENTS IN SUPPORT OF PETITION

I. CONGRESS AUTHORIZED THE SECRETARY OF THE INTERIOR TO REGULATE THE AREAS UNDER THE JURISDICTION OF THE NATIONAL PARK SERVICE

The Organic Act of the National Park Service of August 25, 1916 directs the Secretary of the Interior to “regulate the use of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to *conserve* the scenery and the natural and historic objects and *the wild life therein* and to provide for the enjoyment of the same in such manner and by such means as will leave them *unimpaired* for the enjoyment of future generations.” (emphasis added) 16 U.S.C. 1.

The Organic Act further directs the Secretary to “make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service . . .” 16 U.S.C. 3. The regulations published pursuant to this authority are found at Title 36 Code of Federal Regulations (CFR), Chapter I.

In addition to the Organic Act, in the 1970 General Authorities Act, Congress directed that “each area of the national park system shall be administered in accordance with the provisions of any statute made specifically applicable to that area.” 16 U.S.C. 1c(a). In 1978, Congress reinforced section 1 of the Organic Act with these provisions:

Congress declares . . . [that the] national park system [shall be] preserved and managed for the benefit and inspiration of all people of the United States . . . [and] directs that the promotion and regulation of the various areas of the national park system . . . shall be consistent with and founded in the purpose established by Section 1 . . . to the common benefit of all the people of the United States.

The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the national park system and shall

not be exercised in derogation of the values and purposes for which these various areas have been established except as may have been or shall be directly and specifically provided by Congress.

16 U.S.C. 1a-1 (commonly referred to as the Redwood Amendments).

The idea of “parks as sanctuaries for wildlife” reverberates throughout the early history of the national parks and the National Park Service. The first formal regulations for the national park system, published in the Federal Register’s first volume in 1936, included the statement that “[t]he parks and monuments are sanctuaries for wildlife of every sort, and all hunting, or the killing, wounding, frightening, capturing of wildlife...is prohibited.” 1 Fed. Reg. 791 (1936).

Soon thereafter, Congress established areas of the national park system in which the Secretary was required to allow recreational or sport hunting. One of the earliest examples was Cape Hatteras National Seashore, North Carolina in 1940. See 54 Stat. 702.

In 1974 Congress designated the first national park system areas titled “national preserves” in Texas (Big Thicket) and in Florida (Big Cypress). In all respects, national preserves were to be administered in accordance with the Organic Act and the 1970 General Authorities Act, as amended. National preserves were not “lesser areas” of the national park system. Congress laid out the criteria for national preserves generally. Congress said “[T]he basic thrust of these areas (i.e. national preserves) should be the preservation of the natural values which they contain. They might differ, in some respects, from national parks and monuments insofar as administrative policies are concerned. Hunting, for example, *subject to reasonable regulation by the Secretary*, could be permitted to the extent compatible with the purposes for which the area is established.” (emphasis added) p. 6, S. Rpt. No. 93-1128 (August 22, 1974).

From the very inception of the national preserve concept, Congress expected the Secretary of the Interior to apply reasonable regulations to the conduct of authorized sport hunting. Congress authorized sport hunting in the preserves and many other areas of the national park system. But Congress also viewed authorized hunting as subject to NPS oversight so as to protect the fundamental purpose that binds all areas of the national park

system together.

II. CONGRESS AUTHORIZED THE SECRETARY OF THE INTERIOR TO REGULATE HUNTING IN THE MOJAVE NATIONAL PRESERVE FOR PUBLIC SAFETY, ADMINISTRATION, OR COMPLIANCE WITH PROVISIONS OF APPLICABLE LAW

On October 31, 1994, Congress enacted the California Desert Protection Act (CDPA). 108 Stat. 4471. The CDPA, among other things, designated a 1,419,000-acre Mojave National Preserve, comprised largely of federal lands formerly administered by the Bureau of Land Management. The Mojave National Preserve is an area of the national park system, and Congress directed that the Secretary administer the Preserve as an area of the national park system. See Sec. 506(a), CDPA. 16 U.S.C. 410aaa-46(a). Exhibit 1.

The Senate passed a version of the bill that did not authorize hunting in what was originally proposed as “Mojave National Park.” See S. Rpt. 103-165 (October 26, 1993). The House enacted a version of the bill that called the new area “Mojave National Preserve” and authorized sport hunting there. The House version prevailed, and the CDPA contains the following provision:

SEC. 506. Administration of Lands.

...

- (b) The Secretary shall permit hunting...on lands and waters within the preserve designated by this Act in accordance with applicable Federal and State laws except that the Secretary may designate areas where, and establish periods when, no hunting...will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law. Except in emergencies, regulations closing areas to hunting...pursuant to this subsection shall be put into effect only after consultation with the appropriate State agency having responsibility for fish and wildlife.

16 U.S.C. 410aaa-46.

The CDPA confers clear authority upon the NPS to promulgate regulations governing hunting in the Mojave National Preserve. However, that authority may be used only for purposes specified in the CDPA: public safety, administration, or compliance with applicable law. While the CDPA provides that the game laws of the State of California generally apply to persons engaged in sport hunting in the preserve, the CDPA provides that

the NPS, for the above-listed purposes, may modify State-imposed conditions that govern hunting in the Preserve. The NPS may promulgate such regulations without the consent of the State but “only after consultation with the appropriate State agency...” *Ibid.* In emergencies, the NPS may promulgate hunting regulations without consulting with the State. For the purposes of the CDPA, the appropriate State agency is the California Department of Fish and Game.

The CDPA states that “[N]othing in this Act shall be construed as affecting the jurisdiction or responsibilities of the States with respect to fish and wildlife on Federal lands and waters covered by this title...” *Ibid.* This sentence, viewed in isolation, could support a counter-argument to this petition that the State of California retains an absolute right to manage wildlife in the Mojave National Preserve. Such an interpretation is not feasible in light of established rules of construction that require the NPS to consider Section 506 of the CDPA in its entirety. The first two sentences of Section 506(b) vest clear power with the Secretary to do what petitioners seek of the NPS.

The CDPA provides that the Secretary may promulgate regulations closing areas to hunting in the Mojave National Preserve. The CDPA allows the NPS to close certain places in the Preserve to hunting, or to specify periods (i.e. times of the day or year) when no hunting may occur. Regulatory closures of either kind could apply to some or all species of wildlife subject to hunting under the game laws of California.

The Secretary’s power to effect such regulations is limited. The CDPA requires that designating areas or times when no hunting may occur in the Preserve must serve one of three specific purposes: public safety, administration, or compliance with applicable law. The petitioners request that the NPS promulgate regulations to serve the three specific purposes and only the three purposes. Each purpose is explained as follows.

A. Public Safety

For purposes of public safety, the CDPA empowers the NPS to regulate the discharge of weapons in connection with hunting. Public safety means to protect human life and property from harm, injury, or death. Thus, the CDPA implicitly authorizes the NPS to limit the discharge of weapons in connection with hunting in

the vicinity of developed or occupied areas, including but not limited to campgrounds, habitations, roads, research stations, pipelines, and similar facilities. The discharge of weapons in connection with hunting is the only legal weapons discharge now allowed in the Preserve under 36 CFR 2.4(a)(1) and (2). The NPS may adopt a rule to specify places and times where such otherwise legal weapons discharge in connection with hunting will be prohibited to protect public safety. The NPS is aware of this authority and responsibility as evidenced by the following statement in the Abbreviated Final EIS and GMP for the Preserve:

The California Desert Protection Act provides that the National Park Service may designate areas where no hunting is allowed for reasons of public safety. As more visitors come to Mojave National Preserve for recreational park visits it is our responsibility to ensure their safety. Our proposal to eliminate shooting of rifles within one mile of developed areas is due to the well known fact that bullets fired from rifles may travel as far as one mile.

Abbreviated Final EIS and GMP, NPS Response to Public Comments, Response to Comment 7 under “Hunting, Fishing and Trapping.” See Exhibit 2, p.22 of 42.

The NPS recognizes its obligation and power to ensure the safety of the public. We petition that the NPS discharge its obligation.

B. Administration

The CDPA authorizes that the NPS “...may designate areas where, and establish periods when, no hunting...will be permitted for reasons of...administration.” 16 U.S.C. 410aaa-46. The CDPA does not define the term “administration.” In its common usage, “administration” means “to manage,” which in turn means “to handle, control; also to direct or carry on business or affairs.” The Merriam Webster Dictionary 28, 445 (1994 edition). Congress authorized hunting in the Preserve but gave the Secretary both the power to regulate hunting in the Preserve and three specific purposes for doing so. If Congress wished to vest complete and exclusive control over hunting in the Preserve with the State of California, Congress could have done so. Instead, Congress chose to subject hunting to overriding NPS rules that serve to administer the Mojave National Preserve as a full area of the national park system.

As a matter of law and policy, the NPS goal at Mojave National Preserve, and throughout the national park system, is to “preserve natural resources, processes, systems, and values...in an unimpaired condition, to perpetuate their inherent integrity...” NPS Management Policies Chapter 4. See Exhibit 3. This goal applies equally to a Yellowstone, in which hunting is strictly proscribed, and to a Mojave where hunting is mandated.

NPS Management Policies prescribe that in ALL areas of the system, “[N]atural resources will be managed to preserve fundamental physical and biological processes, as well as individual species, and plant and animal communities. The Service will not attempt to solely preserve individual species (except threatened or endangered species) or individual natural processes; rather it will try to maintain all the components and processes of naturally evolving park ecosystems, including natural abundance, diversity, and genetic integrity of the plant and animal species native to those ecosystems.” NPS Management Policies 2001 4.1. See Exhibit 3. This policy applies to the Mojave National Preserve and all areas of the national park system, including those in which Congress authorizes hunting.

Management Policies direct that when harvesting of animals (e.g., by hunting) is allowed in a park, the Service will allow harvesting when “the Service has determined that the harvesting will not unacceptably impact park resources or natural processes, including the natural distributions, densities, age-class distribution, and behavior of ...” harvested species or of native species that use or are used by the harvested species. NPS Management Policies 4.4.3. See Exhibit 3.

Under the game laws of the State of California, persons with licenses from the State may take animals traditionally classed as game during specified seasons but may also take nongame animals and varmints. Varmints include skunks, badgers, coyotes and the like. The take of such wildlife may occur virtually year-around and with few, if any, State of California imposed restrictions. (Note that because of public referenda, California law does not permit the take of mountain lion and the prohibition applies to members of the public hunting in the Mojave National Preserve.)

Wildlife classed as non-game animals, predators, or “varmint” under California law, is valued very differently

by the NPS in areas of the national park system. Such wildlife is integral to healthy, intact, and functioning ecosystems – the perpetuation of which is the overarching goal of the NPS in the Mojave National Preserve. Such wildlife is an important attribute for park visitors to observe and enjoy under natural conditions. While such wildlife may be wantonly slaughtered under California law, the NPS must administer or manage it differently than State game laws provide.

The NPS recognizes this principle, having stated the following in the Abbreviated Final EIS and GMP for the Preserve:

In light of the management recommendations in the U.S. Fish and Wildlife Service's Desert Tortoise Recovery Plan, the mission and purpose of the National Park Service, and the enjoyment of all park visitors, predator hunting would be eliminated in Mojave National Preserve. This will be incorporated by the National Park Service in specific 36 CFR regulations...

Abbreviated Final EIS and GMP, NPS Response to Comment on Predator Hunting. See Exhibit 2, pp. 22-23 of 42.

Petitioners seek that the NPS promulgate a special regulation consistent with the above commitment.

C. Provisions of Applicable Law

The last purpose for which Congress authorized the Secretary to regulate hunting in the Mojave National Preserve is to comply with the provisions of applicable law. The essential law in this case is the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*). This law is especially relevant because vast areas of the Mojave National Preserve are designated as critical habitat for desert tortoise (*Gopherus agassizii*). The USFWS has listed the Mojave population of the tortoise as a threatened species. The discharge of weapons has been determined to be a leading cause of human-caused mortality to the species. Protecting the desert tortoise from gunshots during crucial spring and fall seasons when tortoise are more likely to be above ground supports limiting hunting so the NPS may comply with obligations imposed on it under the ESA. Argument IV will explain this purpose in detail.

III. CURRENT NATIONAL PARK SERVICE MANAGEMENT POLICIES REQUIRE THAT HUNTING WITHIN THE MOJAVE NATIONAL PRESERVE BE GOVERNED BY FEDERAL SPECIAL REGULATIONS

On December 28, 2000, the NPS announced the adoption of revised Management Policies 2001. The revised policy manual states that “[P]olicy sets the framework and provides direction for all management decisions.” Introduction - Management Policies 2001. Exhibit 4. The Introduction Page to the manual states “[T]his volume is the basic Service-wide document of the National Park Service. Adherence to policy is mandatory unless specifically waived or modified by the Secretary, the Assistant Secretary (of Fish and Wildlife and Parks), or the Director.”

The NPS Management Policies 2001 prescribe:

Hunting and trapping, whether it takes place as a mandated or discretionary activity, will be conducted in accordance with federal law and applicable laws of the state or states in which a park is located. However, except for Alaska park units (which are subject to regulations published at 36 CFR Part 13), *the park in which it occurs must also publish special regulations to govern the activity*, and those regulations may be more restrictive than applicable state regulations. (emphasis added).

NPS Management Policies 2001 8.2.2.6. See Exhibit 4.

The NPS publishes special regulations that govern a particular area of the national park system at 36 CFR Part 7. In violation of NPS Management Policies, the NPS has failed to publish a special regulation governing hunting in the Mojave National Preserve at 36 CFR Part 7 or in any other part of 36 CFR. The NPS policy requiring a special regulation applies to the Mojave National Preserve.

Petitioners can only speculate as to why the NPS adopted this policy requirement. Perhaps the policy serves to ensure that individual areas of the national park system give thoughtful consideration, with formal public

involvement, to the nature and extent of hunting in parks where Congress authorized hunting. Proposing and promulgating a special regulation compels both outcomes. Petitioners leave it to the NPS to conclusively describe the reasoning behind the policy. Petitioners state only that the NPS adopted this policy deliberately, and after review of public comments, some of which specifically highlighted this requirement. Petitioners seek for the Mojave National Preserve no more than NPS Management Policies 2001 require.

IV. THE BIOLOGICAL OPINION OF THE SECRETARY FOR THE MOJAVE NATIONAL PRESERVE MANAGEMENT PLAN IS BASED, IN PART, ON NATIONAL PARK SERVICE RESPONSIBILITY TO GOVERN HUNTING IN THE PRESERVE

In September 2001, the NPS adopted a General Management Plan (GMP) to guide the management of the Mojave National Preserve “for the next 10–15 years.” p. 1, Revised Draft EIS/GMP (July 2000). See Exhibit 7. The GMP needed a Biological Opinion from the USFWS. Petitioners seek that the NPS promulgate a special regulation governing hunting in Mojave National Preserve to fulfill commitments the NPS made in its GMP, the expectations of the Biological Opinion, and NPS’ obligations under the Endangered Species Act to protect the threatened desert tortoise.

On August 4, 1989, the USFWS listed the Mojave population of the desert tortoise (*Gopherus agassizii*) as endangered by emergency rule (54 Fed Reg. 32326). The Mojave population was then proposed under normal listing procedures on October 13, 1989 (54 Fed Reg. 42270), and listed as threatened on April 2, 1990 (55 Fed Reg. 12178). On February 8, 1994, the USFWS designated habitat that is essential to conservation of the species, known as “critical habitat.” (59 Fed Reg. 5820). On June 28, 1994, the Regional Director of the USFWS adopted a Recovery Plan for the Mojave population of the desert tortoise in fulfillment of the mandatory duty that ESA section 4(f)(1) imposes on the Secretary to develop plans “for the conservation and survival of...threatened species...” 16 U.S.C. 1533(f)(1).

The Act of October 7, 1976, as amended by the Act of November 10, 1978, requires that the NPS Director prepare “[G]eneral management plans for the preservation and use of each unit of the National Park System.” 16 U.S.C. 1a-7(b). Among other things, the law requires that general management plans shall include “(1) measures for the preservation of the area’s resources.” *Ibid.* On October 31, 1994, under the CDPA, Congress established the Mojave National Preserve as part of the national park system and directed that the

Secretary of the Interior administer the Preserve “...in accordance with this title and with the provisions of law generally applicable to units of the National Park System...” 16 U.S.C. 410aaa-46

Section 512 of the CDPA also directed the Secretary to submit to the appropriate committees of Congress by October 31, 1997 “...a detailed and comprehensive management plan for the Preserve. Such plan shall place emphasis on historical and cultural sites, and ecological and wilderness values...” 16 U.S.C. 410aaa-52. The Preserve contains noted populations of desert tortoise and encompasses approximately 772,000 acres of habitat designated in 1994 as critical to the conservation of desert tortoise.

Pursuant to the CDPA and the laws that govern the national park system, the NPS developed a draft GMP for the Preserve in 1998. On August 28, 1998, the NPS requested consultation with the USFWS under section 7(a)(2) of the ESA. Based on public comments that said, among other things, that the draft failed to implement the 1994 Recovery Plan and adequately conserve tortoise or habitat critical to tortoise, the NPS developed a revised draft plan and reinitiated formal consultation with the USFWS on February 17, 2000. On June 22, 2001, the NPS announced the release of its Abbreviated Final EIS and GMP for the Preserve. See 66 Fed. Reg. 33538. On July 6, 2001, the USFWS office in Ventura, California issued Biological Opinion (BO) 1-8-00-F-36 concluding that the GMP, as proposed, “...is not likely to jeopardize the continued existence of...” listed species “...or adversely modify critical habitat of the desert tortoise.” p. 49, BO 1-8-00-F-36. See Exhibit 5.

The Secretary of the Interior’s Recovery Plan for desert tortoise recommended that, in critical habitat areas (which the Recovery Plan recommends be called “desert wildlife management areas”), federal land-managing agencies generally prohibit, among other things, “the discharge of weapons except for hunting of big game or upland game birds from September through February.” pp. 56-57 Recovery Plan (June 1994). See Exhibit 6. The reason for this restriction was simple. The Recovery Plan cites scientific research that gunshot wounds are a major source of human-induced mortality to desert tortoise. Limiting discharge of weapons to big game and upland game seasons only, corresponds to the months when desert tortoise are much less active and much less likely to be the objects of target practice or wanton killing.

Hunting is an established threat to tortoise populations, particularly when it occurs during the active season of the species, which approximately occurs from March through August. This includes a direct impact on mortality levels through take of the species, but also subsidiary impacts.

According to the 1994 Desert Tortoise (Mojave Population) Recovery Plan:

Shooting and vandalism play a major role in losses of desert tortoises in many areas, particularly where human visitation is high...At the BLM's western Mojave Desert study plots, 14.6% to 28.9% of all desert tortoise carcasses bore evidence of gunshots, whereas carcasses from the less-visited eastern Mojave Desert yielded gunshot frequencies of 0% to 3.1% (Berry 1986a)... The highest rate of vandalism was recorded in the Fremont Valley, where 40.7% of desert tortoises found dead between 1981 and 1987 showed signs of gunshots and other vandalism (Berry 1990, as amended).

Desert Tortoise Recovery Plan, p. D6.

In addition to the direct killing of tortoises by gunshot, other hunting-related factors impact mortality rates. First, hunting can increase the local population of ravens, which are drawn by the existence of carcasses. The USFWS cited this subsidiary impact in its July 6, 2001 Biological Opinion as a reason for the stricter regulation of hunting within the Preserve:

The elimination of small game hunting may reduce the availability of carcasses upon which common ravens can feed. The reduction in this source of food could reduce the attractiveness of the Mojave National Preserve to common ravens and thereby reduce the level of mortality that this species inflicts upon desert tortoises in the region.

BO 1-8-00-F-36, pp. 39-40.

Second, increases in vehicular traffic as the result of hunting during the tortoise's active season add to the risk of tortoises being crushed. This is mentioned by the UFWWS in the Amendment to its Biological Opinion, dated September 19, 2001:

Desert tortoises could be at additional risk from increased human use of the Mojave National Preserve by hunters specifically traveling to the area to hunt Audubon cottontails and black-tailed jack rabbits.

Regulations are therefore necessary to control the frequency and specificity of hunting as a way of limiting tortoise mortality. According to the Desert Tortoise Recovery Plan, and as affirmed in subsequent NPS planning documents for the Preserve, regulations should:

1. limit hunting to a period between September and February, when the tortoises are mostly inactive on the surface, and
2. limit the species that can be hunted to big game and upland game birds.

The USFWS declared that the Recovery Plan “represents the best available biological information on the conditions needed to bring the Mojave population of the desert tortoise to the point where listing under the Act is no longer necessary (i.e. recovery).” 59 Fed. Reg. 5823 (February 8, 1994).

As the NPS began planning for the Mojave National Preserve, it took note of the Recovery Plan recommendation on the discharge of weapons in connection with hunting. The NPS Revised Draft GMP proposed to seek “special regulations” to limit hunting (and thus the discharge of weapons) throughout the Preserve to big game, upland game birds, and small game. p. 156, Revised Draft GMP (July 2000). Exhibit 7. The Abbreviated Final EIS/GMP did not alter these words.

The NPS went beyond the Recovery Plan recommendation that hunting and associated weapons discharge be limited in critical tortoise habitat. The NPS proposed to adopt the Recovery Plan hunting recommendations

for tortoise throughout the entire Preserve and not just on critical habitat. The NPS rationale was that the entire Preserve should “receive the highest possible protection.” p. 121, *Ibid.*

The Abbreviated Final EIS and GMP of June 2001 repeated this conviction, stating “[T]he Preserve would protect desert tortoise throughout the Preserve, wherever it occurs, not just in critical habitat.”

Abbreviated Final EIS and GMP, NPS Response to Public Comments, Response to Comment 2 under Sensitive Species – Desert Tortoise - Critical Habitat.” See Exhibit 2, p. 2 of 42.

The Abbreviated Final EIS and GMP then states:

Although the U.S. Fish and Wildlife Service’s Desert Tortoise Recovery Plan specifically recommends certain actions in “critical” desert tortoise habitat, we have opted to implement management actions throughout Mojave National Preserve for two reasons. First, the preservation mission of the National Park Service lends itself to protect the desert tortoise throughout the park area, not just in critical habitat. Second, adopting consistent management actions, *such as hunting requirements* throughout Mojave, aid in public understanding and enforcement equitability. We agree with the CDF&G proposal for firearm discharge restrictions and will adopt the action in the Desert Tortoise Recovery Plan throughout the park.

In keeping with the preservation mission of the National Park Service and consistent with the California Department of Fish and Game proposal, and the Desert Tortoise Recovery Plan, the new stipulation will be to prohibit the discharge of firearms, except for hunting of big game or upland game birds from September through February. The EIS has been modified to reflect this change. (emphasis added)

Abbreviated Final EIS and GMP, NPS Response to Public Comments, Response to Comment 3 under “Sensitive Species – Desert Tortoise - Critical Habitat.” See Exhibit 2, p. 3 of 42.

In the Abbreviated Final EIS and GMP, the NPS adopted a position more protective than the Revised Draft GMP and included the “recommendation” to exclude small game (e.g. rabbits) as huntable in the Preserve. Abbreviated Final EIS and GMP, NPS Response to Public Comments, Response to Comment 2 under “Hunting, Fishing and Trapping.” See Exhibit 2, p. 21 of 42.

Lastly, the Abbreviated Final EIS and GMP stated that the NPS “... will begin the promulgation process for federal regulations in 36 CFR” to implement the preferred action alternative to limit hunting in the

Preserve to big game and upland game birds.

Abbreviated Final EIS and GMP, NPS Response to Public Comments, Response to Comment 1 – Hunting, Trapping and Fishing. See Exhibit 2, p. 21 of 42.

Consistent with the NPS’ express and repeated commitment, petitioners seek NPS rulemaking that limits discharge of weapons in the Preserve only to hunting of big game and upland game birds. Petitioners seek that such a rule shall apply to all Federal lands within the Preserve. Petitioners seek only what the NPS promised to undertake.

On July 6, 2001, the USFWS rendered a Biological Opinion (BO) on the Abbreviated Final GMP for The Mojave National Preserve. The BO found that the NPS Plan was not likely to jeopardize the continued existence of desert tortoise. But the BO assumed that the NPS would carry out the commitments made in the Plan, one of which was governing hunting and the associated discharge of weapons.

The BO states that “[I]n accordance with NPS regulations at 36 CFR, the discharge of firearms is prohibited throughout the Mojave National Preserve, except for hunting of upland game birds and big game during seasons designated for these species by the California Department of Fish and Game.” p. 25, BO. Exhibit 5. Thus, the BO assumed and expected that the NPS would fulfill the Desert Tortoise Recovery Plan and the NPS would adhere to the alternative the NPS selected in its Final GMP for Mojave National Preserve.

To date, the NPS has not begun the promulgation of regulations governing discharge of weapons in the Preserve or in critical habitat portions of the Preserve, as the NPS promised in the Abbreviated Final GMP, and which the BO assumed to be the case. The promulgation of a special regulation for the Mojave National Preserve at 36 CFR Part 7 would begin with a proposed rule or, more conservatively, with an advanced notice of proposed rulemaking (ANPR). The NPS has yet to initiate either.

Petitioners repeat that the CDPA authorizes the NPS to promulgate regulations that limit hunting in the Preserve for the purpose of “compliance with provisions of applicable law.” This is the third purpose for which the CDPA authorizes the Secretary to promulgate such regulations. The ESA is an “applicable law.” And the ESA places a mandatory duty on the NPS.

Section 2(c) of the ESA establishes that it is “...the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. 1531(c)(1). The ESA defines “conservation” to mean “...the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. 1532(3). The NPS, by failing to regulate hunting and the associated discharge of weapons, is failing to utilize its authority to further the purpose of the ESA, and to comply with section 2 of the ESA.

Section 4(f) of the ESA requires that the Secretary both “...develop and implement plans (hereinafter...referred to as ‘recovery plans’) for the conservation and survival of endangered species and threatened species...” 16 U.S.C. 1533(f). The ESA mandates that the Secretary implement recovery plans as well as develop them. Plan development is not enough. Congress intends that recovery plans be written in such a way as to be implemented. In the 1988 amendments to the ESA, Congress prescribed that recovery plans “...incorporate...(i) a description of such site-specific management actions as may be necessary to achieve the plan’s goal for the conservation and survival of the species;” 16 U.S.C. 1533(f)(1)(B)(i). Promulgating regulations to govern hunting in the Mojave National Preserve to advance the recovery of desert tortoise serves to comply with Section 4(f) of the ESA.

Section 7(a)(1) of the ESA directs that the Secretary review “...other programs administered by [her] and utilize such programs in furtherance of the purposes of the Act.” 16 U.S.C. 1536(a)(1). The purpose of the ESA is to conserve endangered or threatened species. Among the “other programs administered by” the Secretary of the Interior is the administration of national park system, including the Mojave National Preserve. The Desert Tortoise Recovery Plan was developed under section 4(f) of the ESA to conserve the desert tortoise. The Secretary must administer the Preserve, in part, “in furtherance” of tortoise conservation. Promulgating regulations to govern hunting in the Mojave National Preserve to advance the recovery of desert tortoise serves to comply with Section 7(a)(1) of the ESA.

Thus, there is ample support for the principle that promulgating a special regulation to govern hunting at the

Mojave National Preserve serves to comply “with provisions of applicable law,” as specified in Section 506 (b) of the CDPA.

CONCLUSION

As a matter of law, the NPS is empowered to promulgate regulations to limit hunting in the Mojave National Preserve for reasons of public safety, administration, or compliance with applicable law. As a matter of Management Policies, the NPS must publish special regulations to govern the activity of hunting in the Preserve.

The NPS cannot rely on the State of California Department of Fish and Game to achieve the objectives imposed upon the NPS by law and policy. While the State agency manages wildlife throughout California pursuant to California’s laws, the State does not manage wildlife specifically to fulfill the mandate of the Organic Act or the CDPA. The NPS alone is capable of managing the Preserve for the purpose it was established, among which is the perpetuation, in their natural state, of significant and diverse ecosystems of the California Desert, as prescribed by section 2(b) of the CDPA. The NPS alone is obligated to manage the Preserve for the fundamental purposes enunciated in the 1916 Organic Act, among which is the conservation of wildlife in an unimpaired state. The NPS obligation is elevated by the presence in the Preserve of the threatened desert tortoise and nearly 800,000 acres of habitat designated as critical to its survival. The ESA imposes affirmative responsibilities upon the NPS to implement the Recovery Plan developed under that Act. The NPS is not a helpless giant in this instance. Congress equipped the NPS with the power to discharge its legal obligations.

For the reasons we have given, we petition that the NPS promulgate special regulations to govern hunting within the Mojave National Preserve and give the Preserve the “highest possible protection as park...lands” that the NPS promised in the Abbreviated Final GMP.

Daniel P. Meyer
Public Employees for Environmental Responsibility
2001 S Street, N.W. — Suite 570
Washington, D.C. 20009
Tele: (202) 265.7337

Brendan Cummings
Center for Biological Diversity
P.O. Box 493
Idyllwild, CA 92549
Tele: (909) 659-6053

June 20, 2002

APPENDIX A – PROPOSED RULE TEXT

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

Special Regulations; Areas of the National Park System; Hunting in the Mojave National Preserve.

AGENCY: National Park Service, Interior.

ACTION: Proposed rule.

List of subjects in 36 CFR Part 7

We propose to amend Part 7 of 36 CFR as set forth below:

PART 7 – SPECIAL REGULATIONS; AREAS OF THE NATIONAL PARK SYSTEM

1. The table of contents is amended by adding Sec. 7.10X to read as follows:

Sec.

* * * *

7.10X Mojave National Preserve

2. Add Sec. 7.10X to read as follows:

Sec. 7.10X Mojave National Preserve.

- (a) Hunting is allowed only for big game animals and upland game birds, as such species are defined by State regulations, during the seasons established by the State of California Department of Fish and Game.**
- (b) In no case will any hunting be permitted under subsection (a) from the period beginning on March 1 and ending on September 30 of each year.**
- (c) The discharge of rifles is prohibited within one mile of the Hole-in-the-Wall Visitor Center, Mid-Hills campground, the Granite Mountains Natural Reserve, the Soda Springs Desert Study Center, the communities of Kelso and Cima, Kelso Dunes, and Piute Creek.**

APPENDIX B – EXHIBITS