



MEMORANDUM

Date: April 30, 2013

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator 

Re: **Public Outreach for the Multi-species Conservation Plan**

On December 7, 2012, the U.S. Fish and Wildlife Service (Service) released a Notice of Availability for Pima County's Multi-species Conservation Plan (MSCP) Draft Environmental Impact Statement (EIS). This began a 90-day public comment period that ended on March 15, 2013. In the months preceding the Service's release and during the comment period, staff from Pima County's Office of Sustainability and Conservation held 23 meetings (19 during the comment period) to discuss the MSCP, with an estimated 537 people.

Pima County staff joined with the Service to meet with members of the Tohono O'odham Nation and other tribal representatives. County staff also met with Metropolitan Pima Alliance, the Arizona State Land Department (ASLD), Altar Valley Conservation Alliance (AVCA), the Southern Arizona Homebuilders Association (SAHBA) Technical Committee, Coalition for Sonoran Desert Protection (CSDP), Pima Association of Governments, Pima County Public Works Department, the Regional Flood Control District Advisory Committee, International Right of Way Association, the Real Estate Advisory Committee, University of Arizona students and more. Meeting attendees were supportive of the County's pursuit of the MSCP, with special interest in who was covered by, and under what terms, of the MSCP.

The Service held its own public meeting on February 21, 2013, with approximately 20 people in attendance. The Service received one request to extend the comment period deadline but did not grant that request.

To date, County staff have been copied on five letters sent to the Service (attached). Other letters may have been received by the Service, but the official public comment record is not yet available to Pima County or others. Letters from the Sonoran Institute, AVCA, CSDP, and the Environmental Protection Agency (EPA) have been highly supportive of the MSCP process, with individual concerns regarding the County's role in ranch management and the integration of certain goals and objectives of the Sonoran Desert Conservation Plan into the MSCP. SAHBA provided comments, focusing primarily on their

The Honorable Chairman and Members, Pima County Board of Supervisors
Re: **Public Outreach for the Multi-species Conservation Plan**
April 30, 2013
Page 2

Conservation Plan into the MSCP. SAHBA provided comments, focusing primarily on their desire for broader coverage of private sector activities. The ASLD reviewed the documents and chose not to comment.

The EPA, which must review the draft EIS and MSCP due to the requirements of the National Environmental Policy Act, "strongly supports the objectives of the MSCP" and has given the DEIS its highest ratings.

In the coming weeks, Pima County will receive copies of all comments. The comments will inform the content of the Final MSCP. The Service will complete a Final EIS responding to comments as appropriate under their federal authorities and will prepare a Biological Opinion on listed species. After the release of a Final EIS, there is a 30-day waiting period, followed by issuance of a Federal Record of Decision on the EIS. Permit issuance from the Service is expected in early 2014 and will require approval by the Board of Supervisors.

CHH/dph

Attachments

c: John Bernal, Deputy County Administrator for Public Works
Linda Mayro, Director, Conservation and Sustainability
Julia Fonseca, Environmental Planning Manager, Conservation and Sustainability
Nicole Fyffe, Executive Assistant to the County Administrator
Diana Durazo, Special Staff Assistant to the County Administrator



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March 14, 2013

- Arizona Center for Law in the Public Interest
- Arizona League of Conservation Voters Education Fund
- Arizona Native Plant Society
- Bat Conservation International
- Center for Biological Diversity
- Center for Environmental Connections
- Center for Environmental Ethics
- Defenders of Wildlife
- Desert Watch
- Drylands Institute
- Empire Fagan Coalition
- Environmental and Cultural Conservation Organization
- Environmental Law Society
- Friends of Cabeza Prieta
- Friends of Ironwood Forest
- Friends of Madera Canyon
- Friends of Saguaro National Park
- Friends of Tortolita
- Gates Pass Area Neighborhood Association
- Native Seeds/SEARCH
- Neighborhood Coalition of Greater Tucson
- Northwest Neighborhoods Alliance
- Protect Land and Neighborhoods
- Safford Peak Watershed Education Team
- Save the Scenic Santa Ritas
- Sierra Club—Grand Canyon Chapter
- Sierra Club—Rincon Group
- Silverbell Mountain Alliance
- Sky Island Alliance
- Sky Island Watch
- Society for Ecological Restoration
- Sonoran Arthropod Studies Institute
- Sonoran Permaculture Guild
- Southwestern Biological Institute
- Tortolita Homeowners Association
- Tucson Audubon Society
- Tucson Herpetological Society
- Tucson Mountains Association
- Wildlands Network
- Women for Sustainable Technologies

Steve Spangle
Field Supervisor, Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, AZ 85021

Dear Mr. Spangle:

For over a decade, the Coalition for Sonoran Desert Protection (Coalition) and its 41 member groups have consistently and vigilantly worked with Pima County (County), the US Fish and Wildlife Service (FWS), and community stakeholders to contribute to the development of Pima County’s Multi-species Habitat Conservation Plan (MSCP) and many of its supporting reports and documents. We commend the County for undertaking such a bold and comprehensive conservation effort and for its extensive efforts to involve the public and integrate public input. In particular, we applaud the County for clearly and fully linking the Conservation Lands System (CLS) to the MSCP and for persevering in the design of an opt-in program that addresses the concerns of a wide range of stakeholders. Both of these decisions involved creative problem-solving that has resulted in a stronger and more inclusive MSCP. It is our hope that these comments will be helpful as the County works to refine and finalize its MSCP.

The Public Draft MSCP is the focus of the following comments. However, it is important to consider the MSCP’s context in relation to the biological goals and objectives established by the Sonoran Desert Conservation Plan (SDCP), which more holistically reflect the community’s values and input. The biological goal of the Sonoran Desert Conservation Plan is:

To ensure the long-term survival of the full spectrum of plants and animals that are indigenous to Pima County through maintaining or improving the habitat conditions and ecosystem functions necessary for their survival.

Inherent within this broad goal are the following objectives Science and Technical Advisory Team (STAT) Goals and Objectives 9.1):

1. Promote recovery of federally listed and candidate species to the point where their continued existence is no longer at risk.
2. Where feasible and appropriate, re-introduce and recover species that have been extirpated from this region.
3. Maintain or improve the status of unlisted species whose existence in Pima County is vulnerable.
4. Identify biological threats to the region’s biodiversity posed by exotic and native species of plants and animals, and develop strategies to reduce these threats and avoid additional invasive exotics in the future.

5. Identify compromises to ecosystem functions within target plant communities selected for their biological significance and develop strategies to mitigate them.
6. Promote long-term viability for species, environments and biotic communities that have special significance to people in this region because of their aesthetic or cultural values, regional uniqueness, or economic significance.

...

In the broadest sense, this conservation element of the SDCP will be the framework for integrating biological conservation into Pima County's development process. If the plan effectively addresses the objectives above, it will also lead to a Section 10 Permit under the Endangered Species Act, for those species where it is justified by scientific evidence and by the implementation of a defensible habitat conservation plan.

The MSCP is a crucial component of the SDCP. If adequately structured and implemented, the MSCP will be one of the primary mechanisms that will enable the County to achieve the broader, even more ambitious goals set forth in the SDCP. Therefore, the ultimate success of the SDCP hinges upon an MSCP that contains all of the right elements: sound science, clear management and monitoring commitments, assured funding, and other crucial details specific to Pima County's plan.

The Coalition appreciates the County's commitment to the strategies included in the current MSCP draft. However, the Final MSCP will need additional components, as well as greater clarity and specificity, in order to comply with the Endangered Species Act, be consistent with the FWS HCP Handbook (1996), and ultimately to be more successful than other MSCPs/HCPs have been to date. In order to be successful, the Final MSCP should include:

- Documentation of assured funding for mitigation, management and monitoring, and a transparent mechanism for the FWS to concur with MSCP-related general fund allocations;
- A clear delineation between the actions Pima County commits to under the incidental take permit vs. the actions which will commence in specific circumstances (including when appropriate "triggers" are reached), as well as voluntary actions the County strives towards;
- An adequate explanation of why the proposed minimization and mitigation measures are the "maximum extent practicable";
- Clearly stated biological goals and objectives for all the covered species;
- A commitment to implementing a monitoring and adaptive management program that will enable the County to test hypotheses by tracking the success or failure of management actions to achieve the stated objectives and that will inform future management decisions;
- Greater specificity for species-specific enhancement measures and unequivocal language on which of these measures Pima County is required to perform under the MSCP to maintain its incidental take permit;
- A more robust assessment of foreseeable changed circumstances and a more detailed discussion of how the County plans to respond to changed circumstances; and
- A commitment to developing resource management plans for its mitigation lands (in consultation with the FWS and with public input, including Coalition members) to include monitoring and adaptive management of natural resources and Special Elements found on these lands, which are vital to the continued survival and recovery of the 44 species Pima County seeks coverage for under the incidental take permit.

Mitigation Program

Assured Funding

The FWS HCP Handbook (1996) states:

The ESA requires that the HCP detail the funding that will be made available to implement the proposed mitigation program. Measures requiring funding in an HCP typically include onsite measures during project implementation or construction (e.g., pre-construction surveys, biological monitors, exclusion fences, etc.), as well as onsite and offsite measures required after completion of the project or activity (e.g., revegetation of disturbed areas and acquisition of mitigation lands). Large-scale, regional HCPs should require funds for long term needs such as biological monitoring and habitat acquisition programs. Some will even require perpetual funding mechanisms to support long-term management of mitigation lands or for monitoring.

...

Whatever the proposed funding mechanism is, failure to demonstrate the requisite level of funding prior to permit approval or to meet funding obligations after the permit is issued are grounds for denying a permit application or revoking or suspending an existing permit, respectively.

The Public Draft MSCP identifies potential Assured Funding Mechanisms (8.2) and we appreciate that the County has already conducted biological surveys prior to acquisition of mitigation lands, along with requiring site assessments by private landowners who have open space set-asides on their property. However, the MSCP should more clearly outline the measures that are already funded vs. those that need additional future funding. It is also concerning to read in a footnote of Table 8.1 that the “[mitigation lands management] budget is likely to increase as the number of properties under management increases, which is not reflected in these estimates.” The estimated budget for the “mitigation lands management” line item **must** accurately reflect the anticipated increases in management costs for mitigation lands the County anticipates acquiring and/or conserving. The budget also needs to outline an estimate of necessary funding for future land acquisition. The MSCP must then report the assured funding mechanism for these foreseeable management costs. Furthermore, since the County’s commitments to management and monitoring are not completely clear (see Management, Monitoring and Adaptive Management sections to follow), it is therefore equally unclear how much management commitments required under the permit will cost over the life of the permit.

The Draft Environmental Impact Statement (DEIS) for the MSCP states “The cost of the mitigation commitment, beyond the amount already spent, could be approximately \$20 million” (p. 2-12). This amount does not appear to be included in the MSCP’s list of costs and their assured funding sources in Chapter 8 (Table 8.1). Yet the MSCP states, “Pima County has already acquired over 106,000 acres with which to mitigate future impacts. This represents 91% of the mitigation projects to be needed over the 30-year permit...Based on the current projected footprint of Covered Activities, Pima County’s existing land portfolio will be sufficient for all mitigation needs except for those needed to off-set impacts within Multiple Use Management Areas” (p. 40-42). Thus, the County may potentially need more money to finish purchasing the remaining 8% of mitigation lands, although this could be avoided if they improve and monitor condition goals on State Trust Lands and increase the credit received for these lands. This seems to be in direct contradiction with the DEIS, which indicates that

Alternative D will cost about \$20 million more in mitigation acquisitions. The DEIS does not indicate where this money would come from. In Table 2.1, the Draft EIS states the “Need to acquire additional mitigation lands in addition to those already acquired is ‘potentially minimal.’” Is the DEIS referring to the \$20 million figure noted above? If so, \$20 million cannot be considered minimal. Either way, the MSCP and the EIS must be consistent.

The MSCP must state that the FWS will be given the opportunity to review and concur, or not, with the County’s annual MSCP-related general fund allocation. This process needs to be open and transparent to the public with an opportunity for public input.

Summary of Recommendations:

- The estimated budget for the “mitigation lands management” line item **must** accurately reflect the anticipated increases in management costs for mitigation lands the County anticipates acquiring and/or conserving.
- The MSCP should clarify the amount of money needed for future open space acquisitions. Currently, this information is inconsistent between the MSCP and DEIS and with language included in Table 8.1 in the MSCP.
- The MSCP should include a statement that the FWS will be given the opportunity to review and concur, or not, with the County on a yearly basis with the MSCP-related general fund allocation.
- The MSCP should identify how much of the multi-jurisdictional RTA Critical Landscape Linkages funding the County expects to utilize for mitigation.

Maximum Extent Practicable Analysis

The MSCP should explain why the proposed minimization and mitigation meet the “maximum extent practicable” standard

In approving an HCP, the FWS must conclude that the plan will minimize and mitigate adverse impacts to the “maximum extent practicable.” This is typically a higher standard than the “jeopardy” standard that all HCPs must also meet and is a central component of any HCP. In determining whether the standard is met, the HCP Handbook states the following:

This finding typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented by the applicant. To the extent maximum that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can be reasonably required by that applicant.

The entire draft MSCP, however, mentions the “maximum extent practicable” standard only twice, both in passing. From the draft alone, it is difficult for us to understand how Pima County has created a record that facilitates the FWS’s ability to determine whether the “maximum extent practicable” standard has been met. Further, page 3 of the MSCP misstates the approval standard for HCPs, referring to “those steps Pima County will take to avoid, minimize, and mitigate such impacts

(see Chapter 4),” rather than doing so to the “maximum extent practicable” as required under the ESA. Our comments are not to suggest that the conservation measures in the MSCP do not come close to minimizing and mitigating to the maximum extent practicable. We recognize the valuable amount of habitat acquired under the SDCP, prior to the MSCP. But we also believe that this standard must be taken seriously and that both FWS and HCP applicants must articulate to the public how the standard has been met. In applying the standard, we believe FWS should conclude that many of the species-specific enhancement measures in the Draft MSCP’s Appendix A should be required under the MSCP, as they appear practicable for Pima County to implement. Section 4.3 on mitigation tools, however, does not explicitly commit Pima County to implementing those measures under the MSCP, as discussed in greater detail below.

Summary of Recommendations:

- The MSCP should explain why the proposed minimization and mitigation meet the “maximum extent practicable” standard.

The Mitigation Sandwich

Pima County’s “Mitigation Sandwich” has many, but not all, of the right ingredients

Under the Endangered Species Act [Section 10(a)(2)(A)] and Federal regulation [50 CFR 17.22(b)(1), 17.32(b)(1), and 222.22], a conservation plan submitted in support of an incidental take permit application must detail the “measures the applicant will undertake to monitor, minimize, and mitigate such impacts; the funding that will be made available to undertake such measures; and the procedures to deal with unforeseen circumstances.” (FWS 1996).

An addendum to a memorandum addressed to the Pima County Board of Supervisors, written by Pima County Administrator C.H. Huckelberry on August 28, 2009 regarding “Difference Between Open Space and Mitigation Land for MSCP Credit” states:

The USFWS will grant mitigation credit that is proportional to the level of land protection achieved on each mitigation parcel. **In order for USFWS to grant full credit for mitigation to a parcel, the land must not only be acquired without the use of federal funds, it must be managed and monitored with biological protection in mind, and have an enduring legal status that prevents future incompatible uses.** This standard has been colloquially called the “mitigation sandwich”. Most Mitigation Lands do not yet provide all four levels of protection. **Monitoring and legal protection satisfactory to USFWS will be required to meet with terms of the Section 10 permit”** (emphasis added).

The “mitigation sandwich” required by the FWS is an analogy that has been used to explain mitigation requirements as detailed in the FWS’s Habitat Conservation Planning and Incidental Take Permit Processing Handbook (FWS 1996). The handbook states:

Mitigation actions under HCPs usually take one of the following forms: (1) avoiding the impact (to the extent practicable); (2) minimizing the impact; (3) rectifying the impact; (4) reducing or eliminating the impact over time; or (5) compensating for the impact. For example, project effects can be (1) avoided by relocating project facilities within the project

area; (2) minimized through timing restrictions and buffer zones; (3) rectified by restoration and revegetation of disturbed project areas; (4) reduced or eliminated over time by proper management, monitoring, and adaptive management; and (5) compensated by habitat restoration or protection at an onsite or offsite location.

In order to be consistent with the handbook's guidance, the County's MSCP mitigation sandwich must include clear, transparent commitments (i.e. "sandwich ingredients") in the following categories: **1) acquisition, 2) legal protection, 3) management, and 4) monitoring.** We have organized our comments on the proposed mitigation program based upon these categories.

We commend Pima County's long-standing commitment to implementing avoidance, minimization and mitigation measures through the County's Conservation Lands System and governing development policies. And while we believe the County has demonstrated that it has the ability and mechanisms to meet the acquisition and legal protection requirements for mitigation lands, the MSCP as currently written does not adequately describe and codify the County's ability to implement its commitments to managing and monitoring them.

Summary of Recommendations:

- The MSCP must adequately describe and codify the County's ability to implement its commitments, including managing and monitoring mitigation lands and a subset of the covered species.

1) Acquisition

Pima County has demonstrated a strong commitment, well in advance of applying for an incidental take permit, to acquiring lands (conserved habitat areas) for the purpose of mitigating future impacts it anticipates authorizing for the duration of the permit. In 2004, Pima County residents approved \$164 million in bond funds to acquire important conservation lands identified as "Habitat Protection Priorities" (priorities developed by the Arizona Land and Water Trust and the Nature Conservancy of Arizona, using the biological reserve design developed by the Pima County Science and Technical Advisory Team), community open space, and specific lands requested by other local jurisdictions. According to County staff speaking at the Coalition's MSCP Open House on February 27, 2013, the County has acquired 75,000 acres of fee simple lands and 124,000 acres of leased State Trust Lands (equating to 31,000 acres available for mitigation credit) with this bond money, other funds such as the County's Floodprone Acquisition Program, and monies from the 1997 Open Space bond.

A future Open Space bond election is also anticipated, with the County's citizen-led Conservation Acquisition Commission recommending \$285 million for open space in the next County bond, although the Bond Advisory Committee has tentatively recommended only \$120 million. The County Administrator is, as of this writing, proposing a further reduced \$100 million. Critical parcels remain to be acquired to complete the vision and intent of the County's decade-plus efforts to balance land use planning with conservation of its natural resources. Parcels necessary to complete the vision include critical landscape connections between the northern Tucson Mountains and the Tortolita Mountains; connecting the Canoa Ranch under Interstate 19 towards the Marley Ranch; and other previously identified Habitat Protection Priority parcels.

The 1996 FWS HCP Handbook states: “Generally, the location of replacement habitats should be **as close as possible to the area of impact; it must also include similar habitat types and support the same species affected by the HCP**” (emphasis added). Therefore, the County should “bank ahead” for anticipated impacts with similar (i.e. like-for-like) habitat types that support the same species impacted by covered activities, as close as possible to the area of impact.

The County should track impacts to Special Elements and strive to mitigate for them

Special Elements are landscape features which were used in the development of the reserve design for the SDCP and which are, in combination with Priority Conservation Areas (PCAs), emphasized in the FWS’ DEIS. Special Elements are an important “coarse filter approach” to conservation planning, which complements the more species-specific “fine filter approach.” A total of 21 Special Element conservation targets were chosen by the Science and Technical Advisory Team (STAT) for the “biologically preferred alternative” of the SDCP. In the case of the SDCP, these Special Elements were grouped into five categories of conservation targets: grassland, desertscrub, riparian area, middle to high elevation and “other” (talus slopes, caves, adits, bat bridges, limestone outcrops, etc.).

The County’s Special Elements Report (2002) notes that “Certain plant communities and landscape features, called Special Elements, were used to constrain or influence the location of the exterior and interior reserve boundaries.” Thus, the configuration of CLS reserve design classifications and the delineation of Priority Conservation Areas were informed in part by the known spatial distribution of Special Elements. Because the compensatory component of the County’s proposed MSCP mitigation program is tied to the CLS and the PCAs, monitoring and mitigation for Special Elements should be included in the MSCP. Currently, restoration of Special Elements is included in the list of “species enhancements” that are “over and above what is required in HCP management and mitigation” (p. 47), even though the DEIS identifies significant impacts to them (p. 4-17).

However, because Special Elements are often discrete in their location or distribution, there is the distinct possibility that conservation of Special Elements may “fall through the cracks” if they are not explicitly tracked and mitigated for. For instance, under the current framework, if a covered activity were to result in the destruction of an acre of ironwood desert scrub (a Special Element) located in a special species management or biological core area, the County could mitigate for that acre by conserving another acre in the same or different special species management or biological core area that does not contain ironwood forest. In this scenario ironwood desert scrub, which provides important habitat for covered species, such as nesting and breeding habitat for the cactus ferruginous pygmy-owl, would experience a net loss. The Pima County MSCP DEIS (p. 4-32) states that the impacts to ironwood desert scrub in the Preferred Alternative (D) will only be 141 acres while in Table 4.3 (p. 4-18) the impacts to ironwood desert scrub at the end of the 30 year permit are projected to be 12,325 acres within all jurisdictions in Pima County. Yet in Table 4.4 of the DEIS (p. 4-19) 5,349 acres of ironwood desert scrub are projected to be impacted (the same as Alternative C) in unincorporated Pima County (including State Trust Lands that have been planned for development and lands in other jurisdictions that are owned by Pima County).

While we recognize it is important that the County have some flexibility with its compensatory mitigation program, we also advocate that impacts to Special Elements be incorporated into the annual reporting to the FWS, and that the County strive to mitigate “like-for-like” for impacts to Special Elements, as close to the area of impact as possible, to the maximum extent practicable. This could take a similar form to the County’s 2009 report “Progress Report: Measuring Effectiveness of

Open Space Land Acquisitions in Pima County, Arizona in Relation to the Sonoran Desert Conservation Plan.” This report clearly detailed the acres of individual Special Elements preserved through the County’s Open Space preserve system and identified those Special Elements that need more conservation.

Lands containing Special Elements, especially those Special Elements that provide habitat or resources important to covered species, should continue to inform future acquisition and land conservation priorities. In addition, the County should develop Conservation and Management Goals for each Special Element and these should be discussed in the MSCP in the Impacts, Mitigation, Covered Species, and Monitoring and Adaptive Management sections, and should be included in the Ecological Monitoring Program. (Refer to STAT goals for Special Elements in Table 1 on p. 6 of the County’s “Progress Report: Measuring Effectiveness of Open Space Land Acquisitions in Pima County, Arizona in Relation to the Sonoran Desert Conservation Plan,” included in a Memorandum from C.H. Huckelberry dated August 28, 2009). As noted above, Special Elements often and necessarily provide habitat for Covered Species and their importance, monitoring and management approaches, and the number of acres impacted and mitigated for should be accounted for in the MSCP and in all reporting.

Summary of Recommendations:

- Pima County should conduct detailed biological and Special Element surveys on all acquired fee simple lands to establish a reliable ecological baseline.
- To the maximum extent practicable, Pima County should “bank ahead,” via legal instruments that ensure conservation in perpetuity, with like-for-like habitat as close to the area of impact as is possible.
- Impacts to Special Elements should be incorporated into the annual reporting to the FWS.
- The County should develop Conservation and Management Goals for each Special Element and these should be discussed in the MSCP in the Impacts, Mitigation, Covered Species, and Monitoring and Adaptive Management sections.
- Any future bond monies approved by voters should be used to acquire lands that support populations of covered species, high quality suitable habitat and/or Special Elements critical to the future survival of covered species.

2) Legal Protection

The FWS HCP Handbook (1996) states:

When habitat losses permitted under an HCP are permanent, protection of mitigation lands normally should also be permanent (i.e., "in perpetuity").

The Public Draft MSCP (p. 48-49) states:

The nature of Pima County’s ownership on any given mitigation property pre-determines the tools Pima County will use to meet the remaining criteria. To that end, acquisition of fee-title lands (including appurtenant water rights when possible) and acquisition of partial interests in real property such as leases and receipt of conservation easements are—and will continue to be—the primary conservation tools for assembling Mitigation Lands for the Section 10 permit.
...

Conservation easements or other legally enforceable instruments will be used to provide assurances to the USFWS that the biological values of County-owned fee simple mitigation lands will be maintained in perpetuity. Because a conservation easement grants specified rights to another party and is a legally enforceable agreement that can be used to restrict certain activities on properties subject to the easement, County-owned mitigation lands will be placed under a conservation easement where restrictions on its use will support and maintain the conservation values of the property

...

Pima County currently owns most of the fee-simple lands that would be subject to conveyance of conservation easements under this MSCP. For these lands, Pima County will be the grantor and the Regional Flood Control District (RFCD) will be the grantee. Conversely, Pima County will be the grantee for those lands that the RFCD owns. For those mitigation lands where Pima County or the RFCD, as the grantor, conveys a conservation easement, a third party beneficiary will be designated; first preference will be to designate an entity such as the USFWS or the AGFD whose persistence over time is not questionable. This additional layer of protection provides the USFWS with an assurance that biological values on County-owned fee-simple mitigation lands will be maintained over time. As grantee, Pima County or the RFCD will acquire and extinguish development rights to the Mitigation Land, as well as other rights, to protect the site's conservation values (see prohibited activities, Appendix L).

In regard to the use of a third party beneficiary of conservation easements on mitigation lands, we suggest the County also include the Army Corps of Engineers as an additional option. We concur that the Public Draft MSCP demonstrates the County is committed to using the appropriate legal instruments to conserve mitigation lands in perpetuity. It is crucial that all such conservation easements or other legal instruments include provisions that provide that the land in question is being set aside in perpetuity and that the County and/or RFCD has the unquestionable right to enforce the terms of restrictions. We appreciate the progress the County has made in this regard as the MSCP has evolved and the increased specificity and commitments stated in the Public Draft MSCP.

Summary of Recommendations:

- All conservation easements or other legal instruments should include provisions that provide that the land in question is being set aside in perpetuity and that the County and/or RFCD has the unquestionable right to enforce the terms of restrictions.

3) Management

The MSCP should state a clearer commitment to implementing a management program with the goal of improving resource conditions

Page 22 of the Public Draft MSCP states: "Pima County **may** implement a management program to improve resources conditions..." (emphasis added). This commitment is crucial to the success of the MSCP. Therefore, in order to codify this commitment as a requirement under the controlling document of the MSCP, the conditional language "may" must be replaced with "shall" or "will."

Resource Management Plans for ranchlands must be developed that adequately address the management of natural resources

Approximately three years ago, Pima County finalized its Ranchland Standards and Guidelines, which are applicable to all rangelands controlled by the County. However, these standards and guidelines are not legally enforceable. They do not contain specific best management practices, standards or guidelines for conserving or restoring natural resources (aside from forage value). In addition, five Coordinated Resource Management Plans (CRMPs) have been developed by the County in concert with the Natural Resource Conservation Service. Again however, the CRMPs do not address the management of natural resources beyond forage production. Therefore, the functions of and differences between the ranchland management agreements, the CRMPs and complementary resource management plans should be clearly spelled out in the appropriate sections of the MSCP. This should include the use of fire as a management practice, exclusionary fencing of all riparian areas, closure of certain lands during breeding seasons, and exclusionary fencing of specific plots of land in order to monitor and assess the impacts of climate change versus grazing practices on the baseline resource. It is also not clear whether the County will lose credit for leased or fee simple lands if conditions fall below baseline.

We are also concerned about invasive species management on mitigation lands. We commend the County's existing invasive species management programs. There are examples, however, where County activities are in conflict with invasive species management. Departments impacted by and contributing to the implementation of the MSCP and invasive species management include the Pima County Regional Flood Control District, Pima County Regional Wastewater and Reclamation Department, Pima County Department of Transportation, Pima County Natural Resources, Parks, and Recreation, and Pima County Public Health. These departments should anticipate and initiate protocols such as the washing of tires to minimize the spread of exotic invasive species, maintenance of floodways and roadways to control exotic invasive species such as buffelgrass, while allowing native vegetation to grow naturally, not maintaining a park-like environment, and leaving deadfall and leaf litter to protect soils and enhance habitat. In addition, we understand that County staff currently waters the bermuda grass on the A7 Ranch to utilize their water right. The invasive grass should be removed and replaced with native species.

Summary of Recommendations:

- The functions of and differences between the ranchland management agreements, the CRMPs and complementary resource management plans should be clearly spelled out in the appropriate sections of the MSCP.
- Ensure that County activities are consistent with MSCP management goals and objectives (e.g. vegetation management, ranching practices, etc.).
- The County must develop, in consultation with FWS and with public input, resource management plans that adequately address natural resource management on ranch and preserve lands the County intends to use for mitigation credit.
- If open space “set asides” accumulate in a sizeable and manageable complex, resource management plans should be developed for these set-aside lands as well. The County should also ensure that they have right-of-entry to these set-asides when they are created under the CLS so that appropriate management can take place.

- Pima County should commit to actively managing any lands contributing to its mitigation credit, including certain set-asides, so as to avoid or reduce ongoing threats to the maximum extent practicable. For example, monitor and control for invasive species – or avoid the introduction of same – monitor and repair fencing, restrict unauthorized motorized access, monitor and remove trash, etc.

The MSCP should offer clearer commitments to completing species enhancement measures

The MSCP Management and Conservation Commitments for each covered species need to be clarified and codified such that these commitments constitute an adequate “operating conservation program” (50 CFR 17.3). The Public Draft MSCP makes very few firm commitments, and those that are firm are mostly general in nature. For example, the MSCP states that Pima County will “Implement monitoring as described in Appendix O, including recording and entering incidental observations in the Covered Species Information Database” (p. 69). However, in Appendices A and O there are many instances of the use of conditional non-committal language such as “may,” “if feasible,” “investigate,” and “explore.” A table that clearly outlines what conservation measures the County is definitely committing to in the MSCP and those that are conditional or may potentially occur would be very helpful to the reader.

In addition, subject-matter language is inconsistently used throughout the bulleted points in each species account. The language on conservation easements on preserves is different almost every time it’s mentioned, is missing entirely in some, and important language is missing from other species-specific measures. For example, for the needle-spined pineapple cactus, Appendix A states, “Include measures to avoid and minimize impacts to the species in management and master plans in Pima County-controlled mitigation lands within the PCA” (p. A-11). This important language is missing entirely for the Huachuca water umbel, the Tumamoc globeberry, mammals and birds.

Other measures mentioned, but that must be committed to, in the MSCP include baseline surveys of preserve lands for each covered species and general ecosystem and landscape health observation. In addition, baseline surveys of important habitat and landscape features for each covered species and Special Element should be included. Rangeland health monitoring should include incidental observations of covered species and general ecosystem and landscape health in addition to the Ecological Monitoring Plan. Commitments that are inconsistently applied among the covered species include bat roost surveys, invasive species monitoring, habitat connectivity, and inventories. The County should clearly acknowledge that habitat being used to mitigate for impacts to specific species is only species habitat if the species actually occurs there or has the potential to use that habitat on a consistent basis. Ongoing occupancy surveys will be necessary to document presence/absence and contraction/expansion of ranges.

The Public Draft MSCP relies largely on land acquisition to compensate for adverse impacts under the MSCP. While land acquisition is undeniably an important conservation strategy, it alone may not be adequate to offset adverse impacts to covered species under the MSCP. For example, if high-quality habitat is offset by moderate-quality habitat or habitat where local mortality exceeds reproductive success (i.e., sink habitat), the affected species may experience an overall loss and further imperilment.¹

¹ The importance of identifying source and sink habitats in conservation planning was underscored by the National Research Council in its study on science and the ESA: “The fate of a population as a whole can depend on whether the reproductive success of the individuals in high-value habitats outweighs the failure of the individuals in the poor

This can be the case even with mitigation ratios that exceed 1:1. Pima County should thus carefully evaluate the need to supplement land acquisition with robust species-specific restoration and management, particularly given that the overall mitigation ratio for individual species is only 1:1 under the MSCP and is based entirely on habitat acres. This is particularly true for riparian obligate species.

While the MSCP refers to species-specific conservation measures generally, it does not commit to taking any particular measures. Indeed, it specifies that such measures are “typically over and above what is required in HCP management and mitigation” (p. 47). We urge Pima County to not use a typical HCP as a reference point for the MSCP, since most HCPs are not specifically designed to conserve or contribute to the recovery of listed species. The MSCP, by contrast, claims to “benefit the conservation of listed species” (p. 53). To achieve this goal, the MSCP should explicitly incorporate many of the species enhancement measures listed in Appendix A. The main text of the MSCP, however, does not commit Pima County to implementing those measures. Only in the introduction to Appendix A do we learn of “the conservation commitments that Pima County is agreeing to implement to avoid, minimize, and mitigate for Covered Activities. The proposed management activities in this appendix are in addition to the numerous avoidance, minimization, and mitigation tools that are covered in detail throughout the MSCP” (p. A-1). The Final MSCP should address this ambiguity and treat the conservation measures in Appendix A as seriously as the County’s land acquisition commitments. This means specifying a timeframe for implementation, ensuring adequate funding, and monitoring and reporting on outcomes for affected species.

Section 4.4.5 states that Pima County will work with FWS to determine mitigation credits for species enhancement measures on a “case-by-case basis.” Because mitigation is designed to compensate for adverse impacts to individual species, the metric used to determine credits should, to the maximum extent possible, be the same one used to measure adverse impacts and should inform Pima County about the status of the affected species, not only their habitat. For example, if incidental take is authorized for 50 individual lowland leopard frogs, credits for species enhancement measures should also measure the number of individual frogs, rather than acres of habitat or another variable that allows for “like-for-like” mitigation. Conservationists have also been using metrics based on demographic variables, such as the reproductive value of California tiger salamanders, in assigning mitigation credits for the species.² Pima County should work with FWS to evaluate these and other techniques that make up the best available scientific data on mitigation.

Summary of Recommendations:

- The MSCP should include a table that clearly outlines what conservation measures the County is committing and those that are conditional or may potentially occur.
- The MSCP should correct subject-matter language used throughout the bulleted points in each species account so that this language is consistent and thorough for each species.

areas....Source habitats could easily be overlooked if conservation efforts concentrate only on habitats where a species is most common, rather than where it is most productive. If source habitats are not protected by conservation plans, an entire metapopulation could be threatened.” National Research Council. *Science and the Endangered Species Act*; National Academy Press: Washington, DC, 1995, 98-99.

² Christopher Searcy and H. Bradley Schaffer, *Calculating Biologically Accurate Mitigation Credits: Insights from the California Tiger Salamander*, *Conservation Biology* 22:997-1005 (2007).

- The MSCP should discuss monitoring and management goals, objectives and plans for each species and include a conceptual model for each species on how monitoring and management questions and goals feed into adaptive management.
- The MSCP should include baseline surveys of important habitat and landscape features for each covered species and Special Element, and a commitment to continue to conduct baseline surveys of preserve lands for each covered species and for the observation of general ecosystem and landscape health.
- The MSCP should clearly acknowledge that habitat being used to mitigate for impacts to specific species can only be counted as mitigation if the species actually occurs there or has the potential to use that habitat on a consistent basis for migration, dispersal, or as occupied habitat/home territory for all or part of its life cycle requirements.
- The County should carefully evaluate the need to supplement land acquisition with robust species-specific restoration and management, particularly given that the overall mitigation ratio for individual species is only 1:1 under the MSCP and is based entirely on habitat acres.
- The County should incorporate, and explicitly commit to, many of the species enhancement measures listed in Appendix A, including specifying a timeframe for implementation, ensuring adequate funding, monitoring, and reporting on outcomes for affected species.
- The MSCP should clearly describe which species enhancement measures Pima County shall or will perform under the MSCP.

The MSCP should incorporate clear biological goals for the covered species.

To determine which conservation measures to prioritize under the MSCP and to design an effective monitoring and adaptive management program, the MSCP must incorporate clear biological goals for covered species. Indeed, the FWS’s *Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process* (“Five-Point Policy”) requires all HCPs to specify biological goals and objectives.³ According to the policy, explicit biological goals and objectives “create parameters and benchmarks for developing conservation measures, provide the rationale behind the HCP’s terms and conditions, promote an effective monitoring program, and, where appropriate, help determine the focus of an adaptive management strategy.” The policy further provides that:

Biological goals and objectives must address each species covered by a HCP. Landscape or habitat-level goals and objectives alone are not adequate to provide for a successful HCP.

...

Although the goals and objectives may be stated in habitat terms, each covered species that falls under that goal or objective must be accounted for individually as it relates to that habitat.

...

Biological objectives should include the following: species or habitat indicator, location, action, quantity/state, and timeframe needed to meet the objective.

We believe that the Public Draft MSCP lacks robust biological goals and objectives for the covered species. The document does not explain how the conservation measures under the MSCP are expected to benefit covered species. Rather, biological objectives (1.2, p. 2-3) are exceedingly general

³ 65 Fed. Reg. 35250 (June 1, 2000)

in nature, which will make it impossible to determine when or if they have been met. In addition, most of these objectives center on avoidance and achieving the 1:1 fee simple habitat mitigation ratio. As mentioned previously, while this ratio certainly furthers habitat conservation for covered species, it alone is inadequate to determine how species will be affected. For example, how will Pima County assess whether the Pima pineapple cactus is sufficiently abundant on mitigation lands in the Priority Conservation Area? And how does this level of abundance compare to that lost through habitat modification authorized under the MSCP? Fine-filter measures should be implemented that adequately assess the demographic traits and trends of the subset of covered species identified for species-specific monitoring. As an example, acceptable mitigation goals and objectives for the lowland leopard frog are included in Appendix 2.

The County needs to clearly describe and demonstrate its ability to implement the terms and conditions of the Incidental Take Permit.

The County is receiving mitigation credit for existing Pima County regulations and protocols. If these regulations and protocols are modified in the future, the FWS must approve these modifications. However, it is unclear how the notification and approval process will occur.

For example, Pima County's Department of Transportation (PC DOT) discussed modifying both their community advisory committee public process and the manner in which PC DOT manages vegetation pre- and post-construction on capital improvement projects. Instead of changing any existent ordinance, PC DOT has simply changed their internal method of operation which does not entail review or approval by the Board of Supervisors or FWS. During the current widening of Cortaro Farms Road and Magee Road in a special species management area, most existent native vegetation, such as Special Element ironwood desert scrub, were not salvaged and/or transplanted, other than a few cacti salvaged by the Cactus and Succulent Society. Post-construction plantings along the median and sides of the road do not reflect the adjacent native tree species or groundcover and do not comply with the Environmentally-Sensitive Roadway Design Guidelines. PC DOT has not changed the applicable ordinance; they have simply not abided by its intent nor followed the standards they expect the regulated community to follow. We therefore are very concerned about the County's ability to adequately implement and integrate their own ordinances into their respective department's policies and actions without a process for ongoing internal integration, training and education and a method of internal policing and review for best management practices and compliance.

Pima County and Pima County Regional Flood Control District must ensure that the MSCP will be carried out as specified since compliance with the MSCP is a condition of the permit. The authority of the permit is a primary instrument for ensuring that the MSCP will be implemented. Implementing Agreements (IA) may also provide assurances that the MSCP will be properly implemented. When a local government agency is the applicant, the IA should detail the manner in which local agencies will exercise their existing authorities to effect land or water use as set forth in the MSCP. Actions that modify the agreements upon which the permit is based could invalidate the permit. In addition, failure to abide by the terms of the MSCP and IA (if included) is likely to result in suspension or revocation of the permit. An informed and responsible entity, such as Pima County's Office of Sustainability and Conservation, must have specific authority over the departments affected by and implementing the MSCP and be willing to exercise that authority to ensure that the terms of the MSCP will be upheld.

To provide a more robust description of the commitments, the species and habitat-specific applications of the avoidance and minimization measures, as described in Chapter 4, should be

described for each covered species or Special Element, such as the application of the Environmentally Sensitive Roadway Design Guidelines and the applicable riparian ordinances. Monitoring and management goals, objectives, and strategies for each species should be discussed and a conceptual model should be included for each species illustrating how monitoring and management questions and goals feed into adaptive management. In Appendix 1 of these comments, we provide several generalized conceptual models and results chains that elucidate the relationships between the various elements of the MSCP and pose key questions the County should consider as it works to finalize the MSCP. We want to especially call the County's attention to boxes containing red text in Appendix 1.

Summary of Recommendations:

- The MSCP should clearly state the notification and approval process for modifications to regulations and protocols.
- The MSCP should specify an appropriate methodology to ensure the County's ability to implement and comply with the intent, terms and conditions of the permit via an ongoing County-wide internal programmatic integration, education, training and compliance monitoring program within Pima County departments.
- The MSCP should specify who will have the authority and be responsible for MSCP implementation and compliance. This could be accomplished by, for example, creating an Assistant Director's position within the Pima County Office of Sustainability and Conservation responsible for ensuring that all the County departments affected by or implementing the permit are able to demonstrate the ability to adequately implement compliance with the intent, terms and conditions of the permit for the life of the permit. The MSCP should also demonstrate the assured funding for same.
- The MSCP should include robust biological goals and objectives for all the covered species.

Riparian and Aquatic Species Mitigation and Management

The County should explain how the Riparian and Aquatic Species Management Plan contributes to offsetting authorized impacts.

Will the adverse impacts offset by the Riparian and Aquatic Species Management Plan be determined on a case-by-case basis? If so, what are the criteria for determining which impacts qualify for offsets? The measures pursued under the Riparian and Aquatic Species Management Plan could be as important, if not more important, than habitat acquisition to conserving certain covered species. Therefore, the Final MSCP should more clearly articulate how mitigation credits will be assigned to species enhancements under the plan and how those credits may be used to offset adverse impacts.

The MSCP must clarify how Army Corps of Engineers In-Lieu Fee 404 mitigation lands interface with and complement mitigation lands under the MSCP.

The Pima County Regional Flood Control District is, as of this writing, in the process of becoming an In Lieu Fee (ILF) Sponsor as specified under the Rule(s) of the Army Corps of Engineers. Pima County states that:

The District may wish to establish locations for offsetting impacts to Waters of the US. These covered activities would be located on lands owned by Pima County or the District and would conform with the Corps of Engineers mitigation requirements in 33 CFR Parts 325 and 332 (p. 19-20)

...

Pima County may, from time to time, utilize portions of county-owned lands for stewardship activities intended to offset impacts to Waters of the US under Section 404 of the Clean Water Act. The U.S. Army Corps of Engineers (Corps) requires mitigation sites to be permanently protected through an appropriate legal instrument. In these cases, the Corps could receive the conservation easement on the qualifying portion of the mitigation land used as a 404 mitigation bank or in-lieu fee project. The conservation easement to the Corps would allow for restoration and stewardship of biological values, similar to the draft conservation easement in Appendix I, but would conform with the particular requirements of the 2008 regulations for Compensatory Mitigation For Losses of Aquatic Resources (33 CFR Parts 325 and 332). Such easement would be an alternative way to provide the permanent protection sought for lands committed as mitigation under Section 10 of the Endangered Species Act. Land acquisition and conservation easements required by the Corps for mitigating the impacts to Waters of the US would be timed so as to precede any claim for mitigation value for lands that provide habitat for endangered species under this MSCP (p. 50).

...

Pima County may establish sites for offsetting of impacts to Waters of the US on portions of Mitigation Lands degraded by historic land-use activities such as farming. The activities on these sites would focus on repairing degraded riparian and aquatic features, while conforming with the U.S. Army Corps of Engineers requirements for mitigation. Mitigation fees paid by public or private sector pursuant to the Section 404 Clean Water Act would be used for stewardship activities such as fencing, erosion treatments, and re-establishment of natural cover. **Such corps mitigation activities would not count as Section 10 mitigation, though the CLS mitigation value of the underlying land could be used to offset CLS impacts elsewhere** (p. 60, emphasis added).

Federal law does not allow 404 encumbered lands to be counted to offset County impacts from covered activities since this is considered “double dipping.” The MSCP needs to clarify how the County will account for these two distinct types of mitigation lands.

Pima County’s MSCP Appendices Table of Contents, Appendix I, Draft Conservation Easement for Mitigation Land Owned in Fee Simple by Pima County or Pima County Regional Flood Control District (pg. A-1), states the draft Conservation Easement provided in Appendix I “would need to be adapted for use on District-owned land.” In addition, the MSCP states, “Specific commitments of water or water rights as mitigation under the Section 10 permit will be made in reciprocal conservation easements for County-controlled mitigation lands (Appendix I). The easement will limit the County’s future uses of surface water, groundwater and water rights associated with the Mitigation Land” (p. 44).

The County should provide templates of Conservation Easements for District-owned or managed lands under both the MSCP and for 404 mitigation.

Conservation Effluent Pool as Mitigation

There is no mention of the Conservation Effluent Pool (CEP), which sets aside effluent specifically for endangered species mitigation purposes. Will the County be utilizing the CEP for mitigation? If so, it needs to be explained how the CEP will fit into the overall mitigation program.

Summary of Recommendations:

- The MSCP must explain how 404 in-lieu fee mitigation lands can be counted for CLS offset credit elsewhere and how this is not “double dipping.”
- The County should provide templates of Conservation Easements for District-owned or managed lands under both the MSCP and for 404 mitigation.
- If applicable, include and explain the utilization of the Conservation Effluent Pool as a mitigation measure.
- The District’s Prospectus (already approved) and Instrument (pending as of this writing) should be attached in the final Appendices as well as any completed Project Plans (e.g. the plans currently in development for Canoa Ranch).

Changed Circumstances and Associated Responses

Changed circumstances means changes in circumstances affecting a species or geographic area covered by a conservation plan that can reasonably be anticipated by plan developers and the Service and that can be planned for (50 CFR 17.3).

While the MSCP does identify a range of changed circumstances, it fails to identify all that are reasonably foreseeable. In some cases, the potential responses are inadequate and lack specificity (Table 7.1). Therefore, this section needs to describe more clearly what Pima County is committed to do in response to all changed circumstances and how the County will fund those activities.

The provisions on changed circumstances should offer climate change adaptation measures specific to covered species

Section 7.2.1 of the Public Draft MSCP, which covers changed circumstances relating to climate change, underscores the unpredictable or potentially serious threats that climate change poses to covered species. However, the section offers no specific measures to help these species adapt to a changing climate. Most of the adaptation and mitigation measures are designed to reduce the emissions of greenhouse gases and to store carbon dioxide in the environment. None of these measures will directly benefit covered species or help them adapt during the life of the MSCP to reasonably foreseeable increased overall temperatures and winds, increased severity and frequency of hard freezes, prolonged droughts, and reduced winter precipitation, at minimum. The appendices are similarly vague. For example, Appendix A states that talus snails are “thought to be particularly sensitive to potential global climate change.” But the management and conservation commitments for the species do not indicate how the MSCP will help the species adapt to a changing climate or monitor the species’ response to those changes. The Final MSCP should include management provisions specific to species that are believed to be vulnerable to climate change impacts - it is reasonable to

foresee that this may include many, if not all, species for which the County is seeking coverage considering current trends and the duration of the permit.⁴

Plants will also be challenged to adapt to climate change. For example, will the County consider amending its Native Plant Preservation Ordinance to accommodate species more tolerant of colder temperature from the Mohave and Chihuahuan Deserts in the presence of continuing severe freezing episodes such as those we have experienced regionally within the last three years? What types of vegetation can we anticipate replacing mesquite bosques along riparian flow channels if the incidence of hard freezes persists or increases? How might plant palettes adapt to similar circumstances throughout the multiple elevations and habitat types throughout Pima County?

The Pima County MSCP DEIS (p. 3-45 – 3-46) references *Climate Change and Natural Resources in Pima County: Anticipated Effects and Management Challenges* (Powell 2010) and Table 3.3 lists the anticipated effects of climate change. These anticipated effects are only briefly and generally summarized in the MSCP's Table 7.1 that lists changed circumstances and potential responses. All of the anticipated effects from climate change found in EIS Table 3.3 should also be included in MSCP Table 7.1, and should include corresponding responses and measures to address these foreseeable effects.

The provisions for Additional Foreseeable Changed Circumstances deserve greater analysis and more robust responses

The MSCP Management and Conservation Commitments section needs a more robust discussion of additional foreseeable changed circumstances, including four issues that could have profound effects on the avoidance, minimization and mitigation plans, and on covered species: 1) anticipated direct, indirect and cumulative impacts from the proposed Rosemont Mine to Davidson Canyon and Cienega Creek Watersheds, where at least half of the species the County seeks coverage for are mitigated at a 1:1 ratio with fee simple lands; 2) loss of hydrological and riparian function in the Cienega Creek Natural Preserve or the Lower San Pedro River due to continued geomorphological and fluvial instability; 3) direct, indirect and cumulative impacts from the proposed Sierrita Lateral Pipeline in the Altar Valley and particularly across the County's mitigation lands; and 4) changes in avoidance and minimization measures by current actions of County employees that fail to implement the terms and conditions of the permit and potential future changes in County regulations, ordinances, and protocols by future less conservation-minded decision-makers. There is a lack of specific detail regarding how the County will integrate and demonstrate its ability to oversee compliance with the MSCP within its own departments. All of these foreseeable changed circumstances should have corresponding potential measures that will address the impacts.

The proposed Rosemont Mine and Sierrita Gas Pipeline are clearly foreseeable circumstances and thus the "No Surprises" rule does not apply. Both projects, and Rosemont in particular, pose very serious and foreseeable threats to the County's ability to implement the MSCP's broad goal of "conserving" covered species, and therefore these changed circumstances in particular deserve greater analysis and more robust potential responses under the changed circumstances provision.

⁴ For suggestions on improving how HCPs address climate change, see Melinda Taylor & Holly Doremus, *Habitat Conservation Plans and Climate Change: Recommendations for Policy* (July 2011). http://www.law.berkeley.edu/files/HCPs_and_Climate_Change.pdf

Lastly, several proposals exist for new transmission lines that would traverse Pima County (e.g. SunZia Southwest Transmission Project and Southline Transmission Project). These are foreseeable projects that should also be included in the changed circumstances section and table.

Summary of Recommendations:

- The provisions on changed circumstances should offer climate change adaptation measures specific to covered species.
- The provisions on changed circumstances should assess in greater detail anticipated impacts from the proposed Rosemont Mine including direct, indirect and cumulative impacts such as fragmentation and loss of ecosystem services, functions, and hydrological function in Davidson Canyon and the Cienega Creek Natural Preserve; direct, indirect and cumulative impacts from the proposed Sierrita Lateral Pipeline in the Altar Valley and across the County's mitigation lands; active transmission line proposals; and the potential for administratively determined avoidance and minimization measures to change due to changes in County leadership and staff.

4) Monitoring & Adaptive Management

Pima County has developed the Pima County Ecological Monitoring Program, or PCEMP (Powell et al. 2010). This detailed, long-term monitoring program and protocol was developed as part of the Section 10 permit application. The County has also committed to conducting single-species monitoring for a subset of the covered species. A robust monitoring program is crucial not only so that ecological trends can be quantified and documented but, more importantly, to guide future management actions that aim to respond to reasonably foreseen and unforeseen changing conditions (i.e. adaptive management).

For adaptive management to be successful, a management plan must include:

- The identification of a target(s) and objectives, with unambiguous metrics and target conditions (What does the management plan seek to achieve?);
- A set of potential management actions and a testable hypothesis about how those actions are expected to affect the target(s); and
- A monitoring plan that will test that hypothesis by tracking the success or failure of management actions in achieving the objectives and inform future management decisions by comparing predicted with actual results, triggering further adaptive management.

The MSCP's targets are the 44 covered species, and its stated objective for each of those species is to avoid, minimize, and mitigate for losses to those species related to covered activities, to enhance their habitat, and ensure their long-term survival (MSCP, p. 1-2). To receive incidental take coverage, the plan must demonstrate that take will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild" (p.1-7).⁵

⁵ USFWS Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 1996.

The mitigation actions outlined in the plan, conversely, address acres of land protected or restored. The “coarse-filter” approach described in the plan requires impacts to land within the planning area to be mitigated through protection or restoration of an equal number of acres in the same category under the County’s Conservation Land System (CLS) (MSCP section 4.3, p. 38). The “fine-filter” approach aims to ensure that impacts to lands that occur in a given species’ priority conservation area (PCA) are offset by protection or restoration of an equal number of acres of land also within that species’ PCA (MSCP section 4.3, p. 39), though not necessarily in the area of impact or of a similar habitat type.

The current draft plan **does not propose a testable hypothesis** about how the County expects mitigation acres in either CLS designations or PCAs to affect populations of covered species and, therefore, the likelihood of their continued survival. For example, impacts to a listed species could be mitigated by the protection of land that occurs within that species’ PCA but does not necessarily contain any individuals of that species. Alternatively, mitigation might occur in habitat included in the PCA for dispersal that does not contain suitable nesting/breeding habitat, such as might occur with the cactus ferruginous pygmy-owl along the valley floor of the Altar Valley. It is also unclear what, if any, action the County would take if species-level monitoring showed that individuals of a species do not exist on mitigation land intended to offset impacts to that species, that mitigation land does not contain key habitat characteristics necessary to the species, or that the species continued to decline on the site despite habitat or management protections. As such, at minimum, the County should conduct occupancy surveys to determine presence/absence and range contraction/expansion to validate and verify their hypothesis and the efficacy of their conservation measures. The County should also consider validating and refining the PCAs upon permit issuance and then on a decadal cycle, to be completed prior to each 10-year FWS review. The County should also attach current protocols, where available and as approved by the FWS, and explain that any future revisions and/or additions will be incorporated with the concurrence of the FWS.

Taken together, the proposed conservation measures and commitments, management actions, monitoring approaches, Ecosystem Monitoring Plan, and the proposed adaptive management process have potential for success. However, it is not apparent in the Public Draft MSCP that these combined approaches will work in concert to conserve the species and habitats they address. The information is widely scattered and is not synthesized in the Covered Species Accounts or Monitoring Plan appendices. After ten years of work since species conservation, monitoring and management goals were first proposed in the Priority Vulnerable Species and Special Elements reports, a more robust synthesis of information should have produced a detailed conceptual adaptive management plan for at least a subset of the covered species, and an outline of how the rest of the species plans will be completed. We realize that adaptive management is a challenging endeavor. However, the MSCP needs to more clearly codify how the County will commit to adaptive management, regardless of potential future changes in political will or budgetary constraints. Pima County has already committed years and a considerable amount of money to the process. As it stands, the community that has supported the development of the SDCP and MSCP, and likely the FWS, cannot make the determination that the County has the ability to implement the commitments of the Draft MSCP or that implementing the MSCP as currently drafted will fulfill the species and habitat goals of either the SDCP or the MSCP, nor the ESA standards for a Section 10(a)(1)(B) permit.

The MSCP should also discuss how covered species and their habitat(s) will be accounted for and managed on CLS set-asides. Will the County obtain a right-of-entry for any set-aside, especially set-asides whose assemblages exceed 100 acres? How can the County consider a management plan for assemblages of set-asides in excess of 100 acres without right-of-entry? The County should detail the

benefits of set-asides to each covered species and how the closeness to the area of impact and like-for-like habitat standards are or are not being met currently and over time. For example, if a homeowners' association allows the incursion of unpermitted exotic invasive species such as buffelgrass, what actions will the County take to substitute like-for-like lands in the area affected? If none, how will the County be able to mitigate like-for-like as close to the area of impact(s) as is possible? In addition, the MSCP should include a description of the GIS model that tracks development and set-asides and the process the County employs for the siting of set-asides.

Finally, the MSCP should address the potential future scenario whereby a covered but currently unlisted species becomes listed during the permit timeframe. If/when this occurs, this now-listed species should be added to the species-specific monitoring plan. We recommend the County add this explicit provision to their monitoring plan.

Summary of Recommendations:

- Management activities should be informed by robust ecological monitoring with specific triggers for implementing an adaptive management framework.
- The County should propose a testable hypothesis about how the County expects mitigation acres in either CLS designations or PCAs to affect populations of covered species and the likelihood of their continued survival.
- The MSCP should set species-level objectives for conservation actions to meet based on expected impacts from covered activities and monitor (through a combination of direct and proxy measures) progress toward those objectives over time.
- The MSCP should explicitly describe how the existing habitat-level objectives are expected to affect species viability, and monitor both progress toward meeting habitat-level objectives and the validity of the assumed link between habitat-level objectives and species viability.
- The MSCP should increase the likelihood that adaptive management will occur by clearly defining “trigger” threshold points for a monitored variable which, when exceeded, would trigger a particular change in management actions under the changed circumstances provisions of the MSCP.⁶
- The MSCP should include discussion of how covered species and their habitats will be accounted for and managed on CLS set-asides, as well as the anticipated benefits to covered species.
- The MSCP should include a description of the GIS model that tracks development, set asides, and the process the County employs for the siting of set-asides.
- The MSCP should add a provision whereby any new listed species (that is already a covered species) will be added to the species-specific monitoring plan.

⁶ Schultz, Courtney A., Thomas D Sisk, Barry R. Noon, and Martin A. Nie. 2013. “Wildlife Conservation Planning Under the United States Forest Service’s 2012 Planning Rule.” *The Journal of Wildlife Management* pre-pub. p. 4.

Critical Habitat Nexus

The relation between the MSCP and potential future critical habitat designations should be clarified

The Public Draft MSCP is unclear on how Pima County might be expected to respond to any new critical habitat designations for covered species. On the one hand, the changed circumstances section suggests that if FWS designates critical habitat for any covered species in the MSCP conservation areas, Pima County will not have any regulatory obligations beyond those under the MSCP (“No further action by Pima County is needed. The MSCP has adequately addressed habitat for Covered Species.”). On the other hand, section 3.4.2 states that activities not covered under the MSCP include “actions reviewed under section 7 of the ESA in the planning area, except for those triggered by section 404 of the Clean Water Act...” We are unclear whether the MSCP is intended to exempt Pima County from having to comply with any “adverse modification” prohibitions or other requirements under section 7 of the ESA. If this is the intent, the MSCP should at a minimum explain why it provides an adequate substitute for any conservation benefits arising from critical habitat designation. For example, does Pima County believe that the conservation measures in the MSCP exceed those that could be required under a section 7 consultation triggered by critical habitat? Answers to these questions are needed to help the public better understand the effects of the MSCP.

Conclusion

The Coalition greatly appreciates working with Pima County and the FWS over the last years on this creative and visionary approach to habitat conservation planning. We hope that you find our recommendations helpful. The bulk of our comments are requesting greater clarity and specificity throughout the permit application documents, while some address substantive additions.

As we stated earlier, the MSCP will be one of the primary mechanisms that will enable the County to achieve the broader, even more ambitious goals set forth in the SDCP. By adopting the recommendations the Coalition has made on the Public Draft, we believe the MSCP will be successful and will shape the legacy of Pima County. Thank you for your consideration of our comments on this very important project as we head toward the “finish line.”

Sincerely,



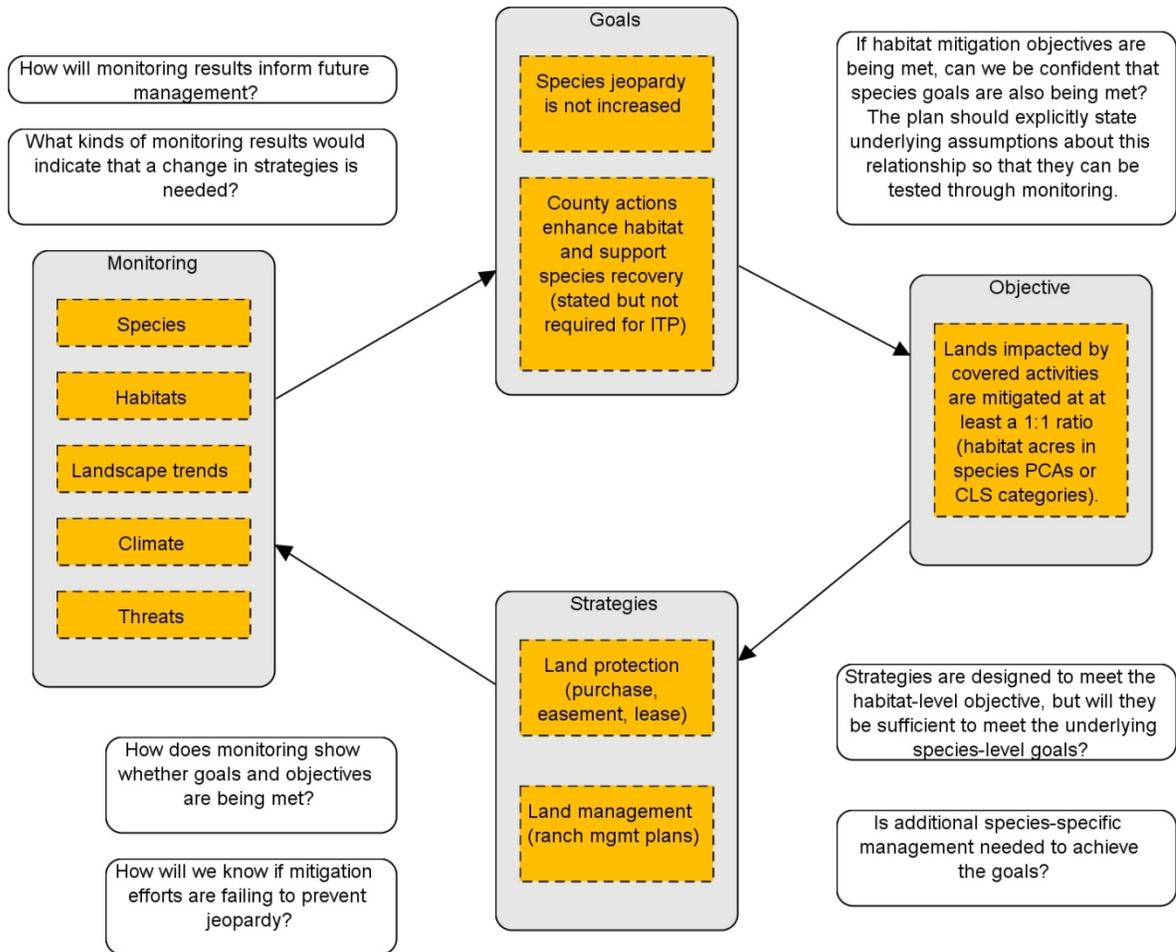
Carolyn Campbell
Executive Director

cc: Julia Fonseca, Pima County Office of Sustainability and Conservation
Sherry Ruther, Pima County Office of Sustainability and Conservation
Neva Connolly, Pima County Office of Sustainability and Conservation
Scott Richardson, Supervisory Fish & Wildlife Biologist, USFWS
Jean Calhoun, Assistant Field Supervisor for Southern Arizona, USFWS

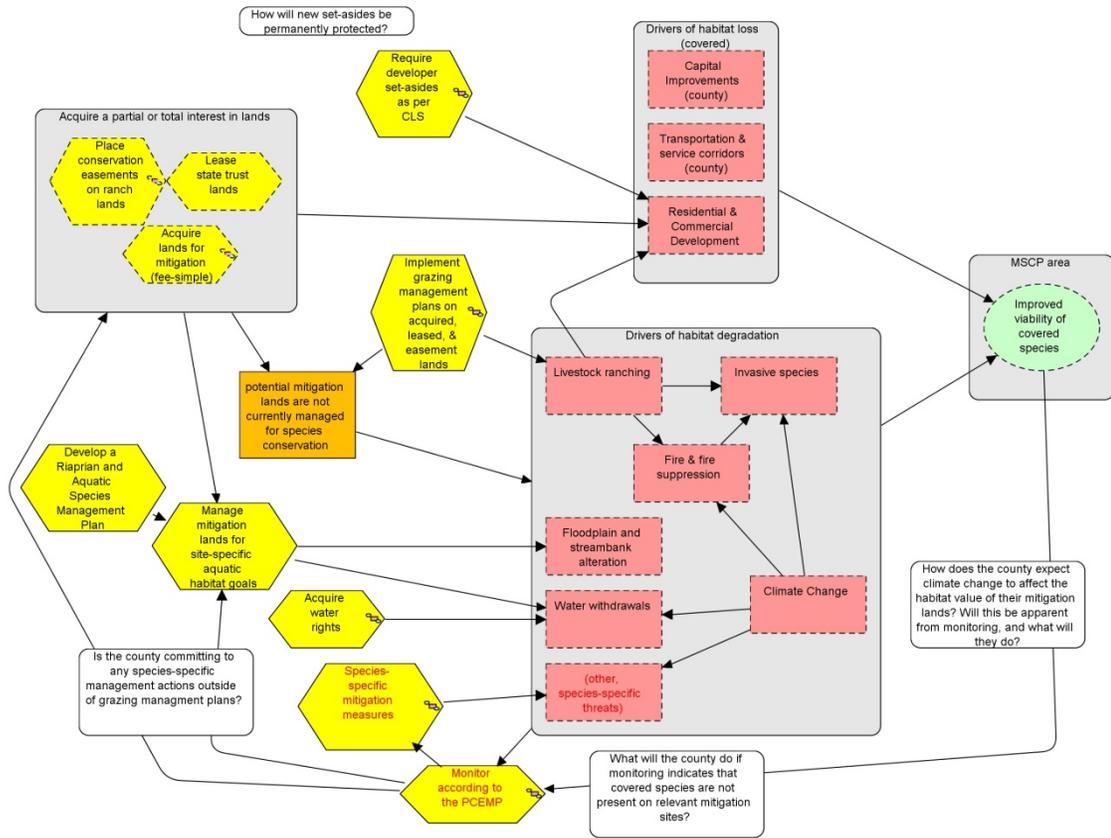
APPENDIX 1

CONCEPTUAL MODELS AND RESULTS CHAINS

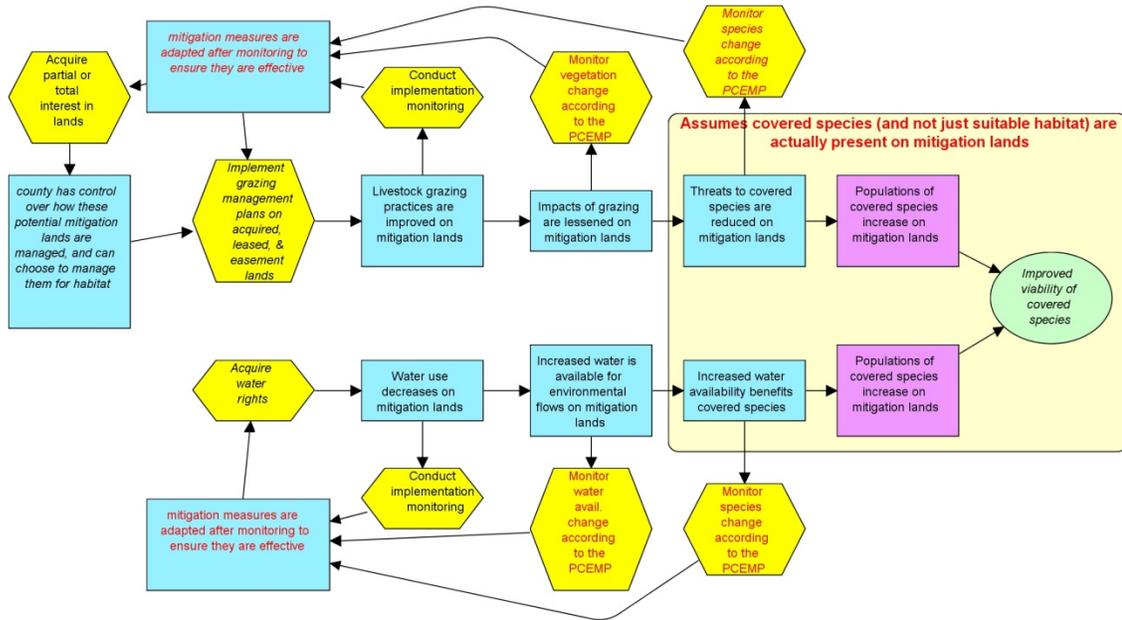
Conceptual Model for MSCP's Monitoring and Management Plan



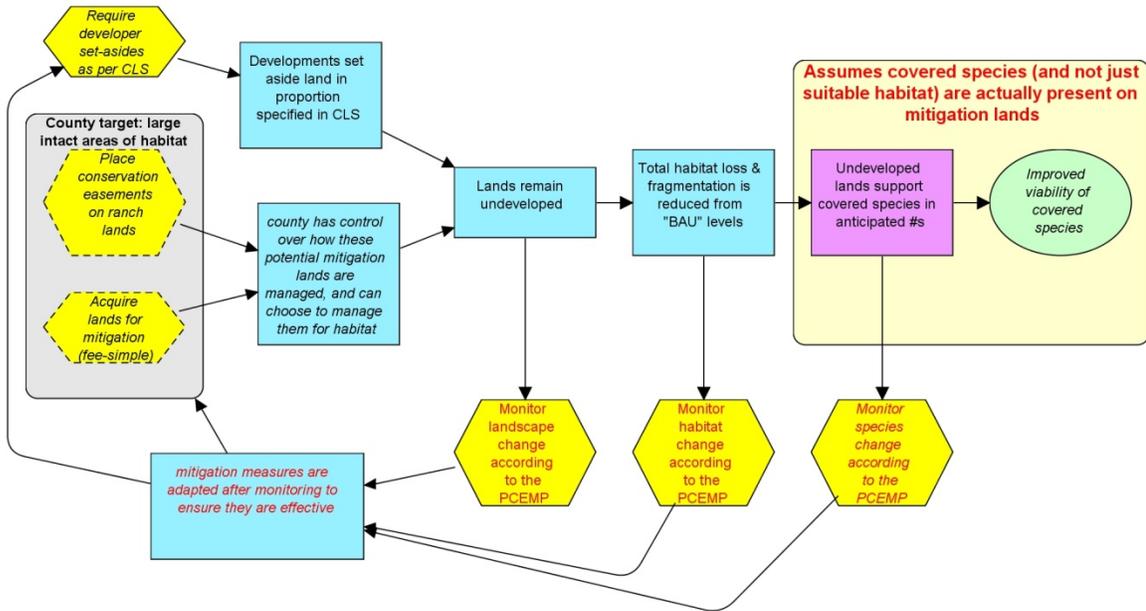
Conceptual Model for the MSCP



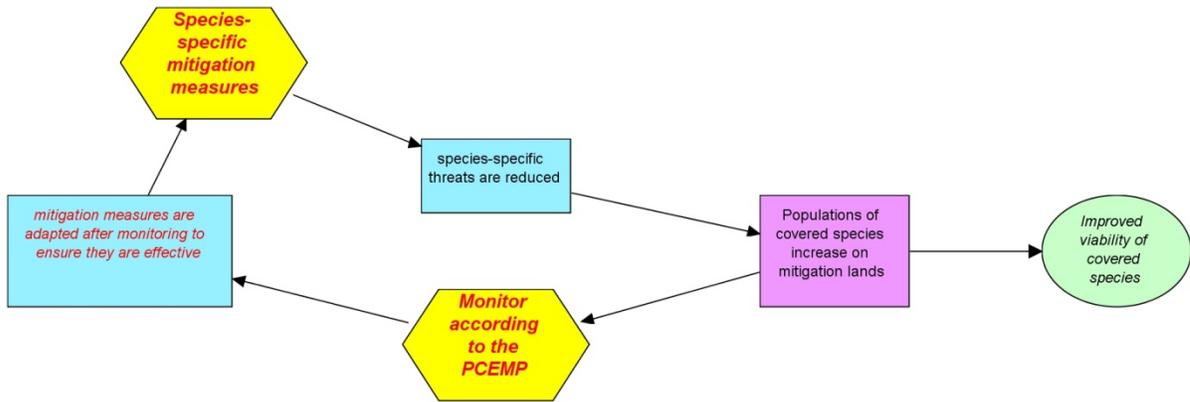
MSCP Land Conservation Results Chain



MSCP Land Management Results Chain



MSCP Species-specific Results Chain



APPENDIX 2

Biological Mitigation Goals and Objectives for the Lowland Leopard Frog (Example)

Population Goals/Objectives:

- No loss of current populations (6 sites).
- One new population established in historic sites every two years if suitable habitat exists or can be restored (24).
- Each frogshed should have at least two metapopulations located in different drainages, plus at least one isolated and robust population in each that exhibit long-term persistence and stability.

Habitat Goals/Objectives:

- Aquatic breeding habitats, including suitable, restored, and created habitats necessary for persistence of metapopulations and robust isolated populations identified above, are protected and managed in accordance with the recommendations in this plan.
- The additional habitat needed for population connectivity, re-colonization, and dispersal is protected and managed, in accordance with the recommendations in this plan.

Threats Goals/Objectives

- Threats and causes of decline have been reduced or eliminated, and commitments for long-term management are in place in each frogshed/preserve such that the lowland leopard frog is unlikely to need protection under the ESA in the foreseeable future.

Monitoring Goals/Objectives

- Monitor the six extant population sites twice every two years.
- Inventory all potential habitat in the preserve system.
- Monitor newly discovered and translocation sites.
- Record all incidental observations especially of non-native aquatic species.
- Monitoring must detect population trends, habitat changes and emergent threats.

Management Goals/Objectives

- Coordinate with Arizona Game and Fish Department, FWS and other entities (Arizona-Sonora Desert Museum, Cienega Watershed Partnership, Frog and Fish Restoration and Outreach Group, Sky Island Alliance, Tucson Audubon Society) to control non-native aquatic species and reintroduce lowland leopard frogs.



Comments on Pima County Multi-Species Conservation Plan DEIS and Implementation Concerns

MEMORANDUM

To: Steve Spangle, US Fish and Wildlife Service, PimaMSCP@fws.gov
Chuck Huckelberry, County Administrator, Pima County
Kristen Egen, District Conservationist, US Natural Resources Conservation Service

Cc: Mr. Kerry Baldwin, Pima County Natural Resources, Parks and Recreation

From: Patricia King, President
Mary Miller, Vice-President / Programs
Tom Sheridan, Chair, Science Advisory Board
Altar Valley Conservation Alliance

Date: March 14, 2013

Regarding: **Comments on Pima County Multi-Species Conservation Plan DEIS and
Implementation Concerns**

Altar Valley Conservation Alliance (AVCA) is a not-for-profit collaborative conservation founded in 1995. The group's vision follows:

*Ranchers and other agriculturalists work effectively with partners to **conserve** healthy and productive working landscapes, **promote** a thriving agricultural economy, and **sustain** a resilient rural community enriched by the culture and history of the Altar Valley.*

The Alliance wholeheartedly agrees with following statement from the DEIS:

Ranch conservation is one important mechanism to help define the urban boundary, preserve natural open space and habitat values, and allow the sustainable use of the land for grazing to continue.¹

Numerous Altar Valley ranchers were members of the Pima County Steering Committee that guided formation of the Sonoran Desert Conservation Plan (SDCP) and Multi-Species Conservation Plan (MSCP). While at times work on the SDCP and MSCP was contentious and complex, on the whole, the results are an impressive product of community collaboration. Given that Pima County now owns or manages approximately a third of the Altar Valley watershed, as part of its Conservation Land System that will be used as mitigation for the MSCP, the County and USFWS now play a critical role in the Altar Valley's ranching and conservation future. The Altar Valley has emerged from the process as a key area for working landscape and habitat conservation in a manner that we find to be consistent with the Alliance's vision. Altar Valley Conservation Alliance does not have substantive comments on the DEIS; however we do have a few concerns about MSCP implementation and one specific comment for MSCP page 78 concerning addition of the US Natural Resource Conservation Service (NRCS) to the list of monitoring partners.

AVCA would like to formally take this opportunity to suggest to USFWS and Pima County that the hard work has really just begun. The collaboration and science utilized to construct the Sonoran Desert Conservation Plan, MSCP and its companion DEIS will remain essential as the community strives to implement these programs. At times, there will be conflict between habitat protection goals and ranching economics. Pima County forecasts issues of this nature: "Guidelines include utilization levels of key forage species that will be set at an average level of 40%, the recommended utilization by the

¹ US Fish and Wildlife Service. November 2012. Environmental Impact Statement for the Pima County Multi-Species Conservation Plan, Pima County, Arizona: Public Draft. p. 3-67.



Comments on Pima County Multi-Species Conservation Plan DEIS and Implementation Concerns

Natural Resources Conservation Service, **but lower than current utilization levels on most ranches** [emphasis added].²
Further comments occur in the Adaptive Management sections:

6.6.2 Recurrent Management Actions

The second type of adaptive management will be those situations where monitoring data contribute to management actions that are repeated over time. We term those recurrent management actions and applications include those situations where on-the-ground management effort is repeated at a regular interval (e.g., annually). In the Pima County MSCP, the most significant use of recurrent management decisions will be in regards to the ranch management program, specifically cattle stocking-rates and its relation to improving resource conditions over an established baseline [emphasis added].³

The Alliance does not raise concern about grazing management in an effort to challenge Pima County's goals, rather we are **concerned about how we approach dispute resolution that protects both Pima County and USFWS interests and those of county owned ranch operators**. There will likely be other ranch management concerns separate from grazing; and other parties could challenge the County and its ranch operators. To use an old phrase, *good fences make good neighbors*.

In our review, the clearest statement we find about this dispute resolution is from the generic ranch management agreement, which calls for an annual meeting between the County and range manager to "determine whether the Management Plan is appropriate for existing conditions or needs to be modified," which could result in "exclusion of grazing". Furthermore, the Manager "may consult with other natural resource agency representatives if the Manager does not concur with such a requirement. The parties may agree to a compromise based on that consultation, although the County shall retain, in its sole discretion, the right to limit or exclude grazing from certain areas of the Property."⁴ If the Alliance has missed information that speaks to these concerns in our review, we respectfully ask that you steer us towards this information.

We find ourselves searching for the proverbial fence and find the MSCP and DEIS alternatives weak in this regard. While the County has decisive and final decision authority in the approach described above, the ranch operator recourse consisting of the "may consult with other natural resource agency representatives" appears vague at best. While we respect that County's ultimate authority as the landowner, and the contractual responsibility incurred when a ranch operator willingly signs a contract with the County, we find the approach outlined in the generic ranch management agreement to be unbalanced. In a situation like this, where the win:win nature of ranch and habitat conservation is so important, it seems critical to the success of both Pima County and ranching businesses that there be an even-handed approach to dispute resolution.

Having raised questions, we are compelled to offer some ideas. We have two suggestions:

1. Enhance the ability of NRCS to support Pima County ranch operators.
2. Use the SDCP Ranch Conservation Technical Advisory Team Form as the basis for forming a Pima County ranch management advisory / review board.

NRCS

More than any other public resource management agency, NRCS is uniquely poised to help willing ranch operators, including those on county owned ranches, enhance the quality of ranch and habitat management such that SDCP goals can

² Ibid. page 65.

³ Pima County. 2012. Multi-species Conservation Plan for Pima County, Arizona: Public Draft. Submitted to the Arizona Ecological Services office of the U.S. Fish and Wildlife Service. Page 77.

⁴ Ibid. Appendix H. Generic ranch management agreement. Page A-204.



Comments on Pima County Multi-Species Conservation Plan DEIS and Implementation Concerns

be met. NRCS works with public agencies and with ranch operators and serves as a critical bridge between the public and private sector. The Coordinated Resource Management Planning process directed by NRCS seeks paths forward that integrate ranch and habitat goals. It is important to note that Pima County is a recent addition to the collection of agencies with whom NRCS cooperates, and the County's sources of guidance and authority (the SDCP and MSCP) are new to all parties. It will take some time to build the relationships, mutual understanding, and institutional mechanisms to work together well. The ranch management workload incurred by the rapid acquisition of many ranch operations and thousands of acres has taxed the resources of both the County and NRCS. In addition, NRCS has traditionally focused its technical assistance on the ranch operator; whereas given the SDCP/MSCP setting, Pima County (as land-owner) wishes to be more integrally involved in operator/NRCS cooperation. As the leasing agency, it appears that Pima County needs to have more involved hands on role than the State Land Department or Bureau of Land Management.

The Alliance suggests that it is important that we as a community invest in building this relationship. We need to work together to strengthen the capability of NRCS to work closely with the County and vice versa. One idea would be to create a shared Pima County / NRCS range conservationist position. Another angle would be to work towards NRCS staff positions designed to focus on particular large watershed areas. While resources are limited, there is much to be proud of in our region and many outside groups, such as National Fish and Wildlife Foundation, are investing in our area and want success to continue. We recommend that we work together to frame some goals that would strengthen NRCS capacity relative to Pima County owned ranches, and then work together to seek funding mechanisms to put those ideas to work.

In addition, we would like to direct attention back to the MSCP where it addresses the importance of monitoring: "One of the key lessons learned from regional-scale planning efforts elsewhere in the U.S. is the important of cooperation and coordination among relevant entities. Ultimately, the successes of the [Pima County Ecological Monitoring Program] will hinge, in part, upon the application of the best scientific and management principles that are shared by all the major land owners and managers of the region."⁵ The MSCP goes on to list "the most likely partners"⁶ for monitoring implementation. The Alliance notes that NRCS is not listed among this list of partners. **We recommend adding NRCS to this list of likely partners, given its key role in ranch management.**

Ranch Management Advisory / Review Board

We recommend using the SDCP Ranch Conservation Technical Advisory Team as the basis for formation of a ranch management advisory / review group. Pima County has demonstrated its ability to form and manage teams of this nature during creation of the SDCP and MSCP, as well as through ongoing teams like the bond advisory committee. The community has demonstrated its willingness to put forth and support leaders to serve on groups of this nature. These types of groups have provided essential pathways for collaboration since the beginning of the SDCP, and we recommend that this approach continue into the future. We recommend that final drafts of the MSCP and USFWS decision documents call for formation of such a group within a reasonable time frame.

In Summary

Thank you for your attention to our concerns and ideas. The Altar Valley Conservation Alliance hopes to work with Pima County and US Fish and Wildlife Service to help this program succeed. As we do that, we will be looking out for the interests of the Altar Valley watershed and its ranch operators. We feel that we are stronger working together than individually; and at the same time, there will be times when the ranch operators need support. We hope to take a lead role in our geographic area in making things work for all -- there is a tremendous win:win at work here in the Altar Valley for protection of the valley as a working landscape, that provides for positive agricultural activity and habitat protection.

⁵ Ibid. page 78.

⁶ Ibid. page 78.



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

March 7, 2013

Mr. Jeff Servoss
U.S. Fish and Wildlife Service
Arizona Ecological Services Office – Tucson Suboffice
201 North Bonita Avenue
Suite 141
Tucson, Arizona 85745



Subject: Draft Environmental Impact Statement for the Pima County Multi-Species Conservation Plan, Pima County, Arizona (CEQ# 20120376)

Dear Mr. Servoss:

The U.S. Environmental Protection Agency has reviewed the Draft Environmental Impact Statement for the Pima County Multi-Species Conservation Plan pursuant to the National Environmental Policy Act, Council on Environmental Quality regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act.

The EPA strongly supports the objectives of the Pima County Multi-Species Conservation Plan (MSCP). The MSCP would build on the framework, established more than a decade ago by Pima County through the Sonoran Desert Conservation Plan, to conserve county natural and cultural resources. We commend the U.S. Fish and Wildlife Service (Service) for its long collaboration with Pima County to protect sensitive species.

Based on our review of the DEIS, we have rated the preferred alternative and the document as LO-1, Lack of Objections – Adequate (see enclosed EPA Rating Definitions). We are impressed with the many proactive planning elements that have been incorporated into the MSCP to both mitigate, and adapt to, the potential effects to Covered Species over the proposed 30-year permit term. We are especially pleased with the considerable focus on crafting a multi-species conservation plan that is intended to help mitigate, and respond to, the effects of climate change. The document drafted to inform the MSCP climate response, *Climate Change and Natural Resources in Pima County: Anticipated Effects and Management Challenges*, and the proposed *Monitoring and Adaptive Management Plan*, are just two of the many features of the MSCP that should assist planners in this effort.

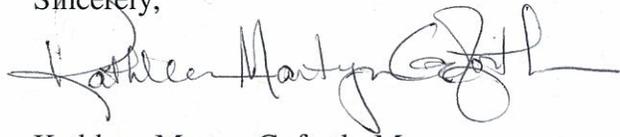
We are also pleased with the proposed MSCP riparian area protection and management principles. These principles, including seeking to “maintain or re-establish hydrologic connections between riparian, aquatic ecosystems, and shallow groundwater zones,” and “ensure sufficient in-stream flows to achieve and protect natural functions of riparian and aquatic ecosystems,” should aid efforts to protect sensitive riparian and aquatic species. We recommend, however, that the Final Environmental Impact Statement (FEIS) provide additional information on the potential interface between the MSCP and Section 404 of the Clean Water Act (CWA). The DEIS states that “development is projected to continue to impact many of the riparian and aquatic Special Elements such as intermittent streams, mesquite bisques and Sonoran riparian scrub”; such development could result in impacts to waters of the U.S. The FEIS should describe how jurisdictional waters will be identified over the permit term, and how FWS

and Pima County will coordinate with the U.S. Army Corps of Engineers to ensure that any development covered by the MSCP complies with the permit requirements of Section 404 of the CWA.

Please note that, as of October 1, 2012, EPA Headquarters no longer accepts paper copies or CDs of EISs for official filing purposes. Submissions must be made through the EPA's new electronic EIS submittal tool: *e-NEPA*. To begin using *e-NEPA*, you must first register with the EPA's electronic reporting site - https://cdx.epa.gov/epa_home.asp. Electronic submission does not change requirements for distribution of EISs for public review and comment, and lead agencies should still provide one hard copy of each Draft and Final EIS released for public circulation to the EPA Region 9 office in San Francisco (Mail Code: CED-2).

We appreciate the opportunity to review this DEIS, and are available to discuss our comments. If you have any questions, please contact me at 415-972-3521, or contact Jason Gerdes, the lead reviewer for this project. Jason can be reached at 415-947-4221 or gerdes.jason@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathleen Martyn Goforth". The signature is fluid and cursive, with a large, stylized initial "K" and "G".

Kathleen Martyn Goforth, Manager
Environmental Review Office

Enclosure: Summary of the EPA Rating System

cc: C.H. Huckelberry, County Administrator, Pima County

SUMMARY OF EPA RATING DEFINITIONS*

This rating system was developed as a means to summarize the U.S. Environmental Protection Agency's (EPA) level of concern with a proposed action. The ratings are a combination of alphabetical categories for evaluation of the environmental impacts of the proposal and numerical categories for evaluation of the adequacy of the Environmental Impact Statement (EIS).

ENVIRONMENTAL IMPACT OF THE ACTION

"LO" (Lack of Objections)

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

"EC" (Environmental Concerns)

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

"EO" (Environmental Objections)

The EPA review has identified significant environmental impacts that should be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

"EU" (Environmentally Unsatisfactory)

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

ADEQUACY OF THE IMPACT STATEMENT

"Category 1" (Adequate)

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

"Category 2" (Insufficient Information)

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analysed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

"Category 3" (Inadequate)

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analysed in the draft EIS, which should be analysed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

*From EPA Manual 1640, Policy and Procedures for the Review of Federal Actions Impacting the Environment.



Shaping the Future of the West
www.sonoraninstitute.org

March 14, 2013

U. S. Fish and Wildlife Service
Field Supervisor, Arizona Ecological Services Office
2321 West Royal Palm Road, Suite 103
Phoenix, AZ 85021

Re: Pima County Draft Multi-Species Conservation Plan

To whom it may concern,

Thank you for this opportunity to submit comments regarding Pima County's Draft Multi-Species Conservation Plan (MSCP).

The Sonoran Institute is a nonprofit conservation organization whose mission is to inspire and enable community decisions and public policies that respect the land and people of Western North America. Sonoran Institute's work follows several guiding principles: 1.) we have a passion for people and wildlife; 2.) we consider conservation and smart growth to be compatible with economic prosperity; and 3.) we believe that civil dialogue, public participation and collaboration produce enduring conservation results. Pima County's draft MSCP is fully compatible with Sonoran Institute's core principles.

As the Institute was founded in Tucson over 20 years ago, advancing conservation of this region's rich heritage is among our top priorities. We are therefore pleased to be able to support and commend the efforts Pima County has taken to advance a regional approach that balances conservation with planning for long-term economic prosperity.

Conservation Lands System (CLS) – We commend the County on this visionary component of the Sonoran Desert Conservation Plan that is fundamental to the success of the MSCP. Specifically:

- With the CLS integrated into the Pima County Comprehensive Plan, open space set-asides required through the rezoning process meaningfully complement the existing CLS Reserve.
- Since no set asides are required for development in the urban core, the design of the CLS promotes a more compact urban form, a chief principle of the Institute.

TUCSON, ARIZONA
BOZEMAN, MONTANA
GLENWOOD SPRINGS, COLORADO
MEXICALI, BAJA CALIFORNIA
PHOENIX, ARIZONA
SHERIDAN, WYOMING

- The CLS is designed to protect a full suite of ecosystem processes, instead of merely piecemeal protection of single species and their habitats.
- The CLS recognizes that working landscapes, such as ranching, can be compatible with rangeland conservation and protection of wildlife corridors
- Since 1974, over \$60 million of voter-approved open space bonds have been used to protect lands in the Cienega Corridor as a part of the CLS—an area of particular interest to the Sonoran Institute due to our role in helping establish Las Cienegas National Conservation Area.

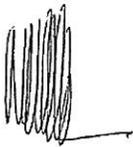
Foundational role of science – We acknowledge and commend the County for the role science has played in development and refinement of the mitigation program.

- We agree with the statement in the MSCP that ecological restoration is necessary to protect many aquatic and riparian species.
- We also agree that the priority should be protection of existing ecosystems over creation of new ecosystems that will require continuing inputs of water, energy, and materials.
- We support the diverse approach to monitoring that covers a range of ecological parameters in addition to species-level monitoring.

Extensive public engagement – Public participation and collaboration are vital to conservation success. Thus, we commend the extensive public engagement during the long process which has resulted in a much stronger plan, as well as stronger relationships between the development community and conservation interests.

In short, Pima County's Draft Multi-Species Conservation Plan demonstrates true leadership in protecting the economic vitality of this region while conserving critical natural and cultural resources. We support Pima County in their efforts to obtain the Section 10 permit from the US Fish and Wildlife Service.

Sincerely,

A handwritten signature in black ink, consisting of several vertical, wavy lines that form a stylized name, followed by a short horizontal line at the end.

Maria Baier
Chief Executive Officer
Sonoran Institute



Alan M. Glen
(512) 481-8427
alan.glen@sedgwicklaw.com

March 15, 2013

Steve Spangle
Field Supervisor
U.S. Fish and Wildlife Service
Arizona Ecological Services Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Re: TE84356A - Comments filed by Sedgwick, LLP on Behalf of the Southern Arizona Home Builders Association, Tucson Association of Realtors, and Metropolitan Pima Alliance Regarding the Notice of Availability for the Draft Environmental Impact Statement and Draft Pima County Multi-Species Habitat Conservation Plan

Dear Mr. Spangle:

Pima County (the "County") and the Pima County Regional Flood Control District (the "Flood Control District") have applied to the U.S. Fish and Wildlife Service (the "Service" or "USFWS") for an incidental take permit (the "Permit") pursuant to section 10 of the Endangered Species Act ("ESA"). The Permit, if issued, would authorize take of 7 plant and animal species listed as threatened or endangered under the ESA, as well as 37 other species of plants and animals that may be listed in the future (collectively, the "Covered Species"). In connection with its application for the Permit, the County and Flood Control District have prepared and submitted a Multi-species Conservation Plan (the "MSCP"), which details, among other things, the measures the County and Flood Control District would take to minimize and mitigate the impacts of the taking to the maximum extent practicable. On December 7, 2012, the Service published in the Federal Register a Notice of Availability of the Draft Environmental Impact Statement (the "DEIS") and MSCP and solicited public comment and review on the proposed Permit, DEIS, and MSCP (the foregoing documents shall be collectively referred to herein as the "Permit Documents").

At the outset, the Southern Arizona Home Builders Association,¹ the Tucson Association of Realtors,² and the Metropolitan Pima Alliance³ (the foregoing organizations will be collectively referred to herein as the

¹ The Southern Arizona Home Builders Association ("SAHBA") is a member trade organization with approximately 350 dues-paying members, including home builders, developers, and associated members. SAHBA was incorporated in 1952, and its coverage area from the National Association of Home Builders includes Pima, Cochise and Santa Cruz Counties. SAHBA is a 501(c)(6) organization under the United States Internal Revenue Code. SAHBA represents the building industry professionals ranging from builders, developers, land planners, architects, engineers, environmental consultants, trade contractors, banking and mortgage, real estate and the many supporting disciplines necessary to create, sell, remodel, furnish and maintain new homes and communities throughout Southern Arizona. SAHBA serves as an advocate for its membership and keeps them apprised of changes in regulatory and governmental matters that will affect their businesses.

² The Tucson Association of Realtors is the largest trade association in Southern Arizona, representing the interests of over 4,800 professionals in the real estate industry. Its mission is to promote enhanced communication, a positive regulatory climate, and

“Industry Groups”) would like to take the opportunity to compliment the County, Flood Control District, the Service, and the Pima County community for the collective effort on this innovative plan. As the Service knows, the Industry Groups and their members have attempted to stay engaged in the decade of MSCP planning process and appreciate the opportunity to provide feedback and insight into the needs of the development community with respect to permitting under the ESA.

On behalf of the Industry Groups, we are pleased to submit the following comments regarding the Permit Documents. These comments are intended to assist the Service in approving a plan that accomplishes the greatest deal of incidental take coverage and permitting certainty to the community while solidifying the enormous public investment made towards listed and sensitive species conservation through the County’s Sonoran Desert Conservation Plan (“SDCP) and Conservation Land System (“CLS”). At the outset, we would like to note that it is important that the proposed Permit allows the Industry Groups to deliver adequate lots, homes, businesses, and acreage for residential and commercial development within the County. While the Industry Groups agree that conserving the Covered Species is one goal of the Permit, the Permit should also not prohibit residential and commercial real estate from being available to buyers at competitive prices, responsive to market timing, and offering a diversity of real estate choices in Pima County.

While our letter focuses mainly on the MSCP, we have included a brief addendum setting forth various concerns the Industry Groups have with the DEIS. The Industry Groups and their individual members reserve the right to provide additional comments – both oral and written – to the Service regarding any of the Permit Documents.

I. MSCP unfairly excludes certain land development activities without providing a rational basis for doing so.

For well over a decade, landowners and real estate development professionals within the County have operated under the comprehensive environmental protection framework of the SDCP and CLS. Furthermore, since the adoption of the CLS in December 2001, landowners and real estate development professionals have been subject to its broad land use policies. Specifically, the CLS was put in place by the County and imposes significant restrictions on development by requiring project proponents to, among other things, set aside large portions of properties proposed for development in order to preserve natural and cultural resources and mitigate impacts to Covered Species habitat. The SDCP and CLS have placed a significant burden on all landowners within Pima County in other ways, including a significant increase in the property taxes paid by landowners to fund County acquisition of open space lands via the 1997 and 2004 open space bond initiatives, and required adherence to a battery of environmentally-focused County regulations and policies such as the Native Plant Preservation Ordinance, Riparian Ordinance, and Site

elevate professionalism and public perception for its members. The Tucson Association of Realtors supports the healthy growth of Southern Arizona's real estate market and is dedicated to improving the community

³ The Metropolitan Pima Alliance (“MPA”) represents approximately 120 companies, mostly in the private and commercial real estate development sector. MPA is dedicated to advocating responsible development in the Pima County metropolitan area and furthering the interests of the real estate and development industry through education, public policy advocacy and networking.

Uniquely, MPA is an alliance of business, government and non-profit organizations with a vested interest in how land is developed in Pima County. MPA is the community leader in finding common ground between members of the development community with those in the public sector. MPA’s role in the community is to advocate for balanced residential and commercial land use policies that stimulate economic development and reasonably preserves the natural environment.

Analysis Checklist, to name but a few. Despite this fact, the MSCP, as written, would exclude from Permit coverage a significant number of landowners and their activities. The rationale underlying these exclusions is never provided by the authors of the MSCP and, moreover, some of the exclusions set forth in the MSCP could very likely have the effect of encouraging landowners to forgo conservation in favor of more expansive development simply to be able to gain incidental take coverage through the MSCP. Below, we describe the arbitrary limitations the MSCP places on take coverage for the private sector and the potential implications to the community at large should such limitations remain.

A. *Automatic take coverage provided on individual, single-dwelling residential lots only where grading exceeds 14,000 square feet*

The MSCP proposes to cover automatically for incidental take private development-related activities on individual, single-dwelling residential lots where the County has issued a Type I grading permit that provides for grading 14,000 square feet or more.⁴ Once take coverage is provided, the County will cover the entire parcel for take – regardless of the extent of grading on that parcel – and will mitigate that parcel as if the entire parcel was disturbed or developed.⁵ The allocation of the mitigation “credits” provided under the MSCP is to be on a first come, first served basis. The MSCP does not provide coverage for development activities on individual, single-dwelling residential lots requiring less than 14,000 square feet of grading, nor does it provide a mechanism to cover take only for those portions of a given parcel that are actually disturbed. This mitigation structure is troubling for several reasons.

- Requiring 14,000 square feet of grading or more before one may receive take coverage encourages landowners to undertake development at a greater level than they may otherwise pursue. A landowner may only require a fraction of 14,000 square feet of grading to successfully complete a project, but may choose to increase grading to the minimum 14,000 square feet simply to receive incidental take coverage through the MSCP. Not only does this policy encourage unnecessary degradation of potential habitat, it also has the effect of depleting the County’s mitigation “credits” far sooner than would otherwise be necessary.
- Once a lot development passes the 14,000 square foot threshold, the approach of assuming the entire parcel requires mitigation, rather than accounting for actual grading impacts, removes any incentive under the MSCP to limit grading.

The combined effect of these features of the mitigation approach is to incentivize excessive grading and penalize the mitigation bank unnecessarily. Under this program, it will be in the best interests of developers and property owners to ensure grading on single-dwelling residential lots exceeds 14,000 square feet and not be concerned with limiting grading beyond that threshold. This approach unnecessarily draws down the County’s mitigation credits and is a waste of the County’s and, more importantly, the community’s resources. As noted above, the citizens of Pima County have, through taxes and other means, funded both the development of the MSCP, the SDCP, and much of the set asides provided by the CLS. It is not appropriate, therefore, that the County would limit coverage in the MSCP only to those who develop sooner rather than later and who develop more intensely.

Finally, the MSCP does not make clear whether automatic coverage will be offered to projects that fall outside the CLS. The Industry Groups request that the MSCP be revised to clarify that projects eligible for

⁴ See MSCP at 18.

⁵ *Id.*

automatic inclusion will be authorized for take through the Permit regardless of whether or not those projects fall within the CLS.

B. *Opting In: Criteria are unclear, arbitrary, and do not consider the realities of real estate transactions*

While the Industry Groups applaud the County for including an opportunity for residential subdivisions and non-residential developments to choose incidental take coverage under the MSCP (the “Opt-in Provisions”), the Industry Groups request that two issues be addressed.

First, the MSCP does not clearly state whether projects that either are outside the CLS or received approvals prior to adoption of the CLS will be permitted to opt-in. Because all landowners have and will continue to pay for the County’s implementation of the MSCP through higher property taxes, and because developers throughout the County must adhere to various land use ordinances and policies put into place for the benefit of various natural resources, including Covered Species and their habitats, the Industry Groups request that the County and Service clearly state that the Opt-in Provisions are available to any project that meets the opt-in criteria, regardless of that projects standing with respect to the CLS.

Second, criteria set forth in the MSCP for opting-in are not only burdensome, but do not consider the realities of typical real estate transactions, and seem unnecessary to accomplish the purpose and need set forth in section 1.1 of the MSCP.⁶ Among the criteria for opting-in are: (1) the entire area within the boundaries of the subdivision plat or development plan must be under the ownership of a single entity; (2) grading has not commenced; (3) no grading or building permits may have been issued; and (4) an application for a Type II grading permit has been made but not approved.⁷ These narrowing restrictions make little practical sense:

- The Industry Groups can see no rationale behind the MSCP requiring that an entire residential subdivision or commercial development be owned by a single entity. Neither the extent of potential incidental take nor any mitigation fee or other conservation measure would hinge on the number of owners involved in a given development project. Moreover, monitoring or management requirements placed upon the owners of development projects within the County should not be affected by the number of ownership entities of a given development project. Rather, any condition – be it mitigation, management and monitoring, or reporting – should be a condition of opting-in that attaches to the property in question at the time the owner or owners opt-in, regardless of the number of owners.
- With respect to the requirements that grading has not commenced and that no grading or building permits have been issued, the Industry Group take issue with the fact that many of the same landowners with properties that would fail this criteria have already been subjected to the CLS – and had to set aside large portions of their property in that regard. Why, then, would those who were required to set aside the majority of their properties for preservation in order to support the County’s Permit then be denied the very benefit provided by it? Furthermore, all landowners within the County – whether subject to the CLS or not – have been subjected to higher tax rates to fund the County’s acquisition of additional open space. Why should any landowner be prohibited from

⁶ MSCP at 1.

⁷ See MSCP at 18-19.

receiving the coverage supplied by his or her tax dollars? Opt-in coverage should absolutely be available to at least those portions of properties where Covered Species habitat has not been removed or altered to a state where it could no longer serve as potentially suitable for the species at issue. Given that the County's take analysis in the MSCP (and, indeed, the Service's analysis in the DEIS) "conservatively" models full build-out within the County, and the fact that the MSCP will only cover projects for take on a first come, first-served basis at any rate, covering partially completed projects – particularly those already subjected to the CLS - should place no additional mitigation burden on the County.

- The Industry Groups can find no basis behind the MSCP's requirement that to receive opt-in coverage, a Type II grading permit must have been applied for but not yet granted. No rationale is given for this restriction, and we can think of no reason why the value of a property to the MSCP changes based on whether an applied-for permit has been granted. If the concern is that the permit decision was based on pre-MSCP criteria, the permit can be amended to reflect the MSCP terms incorporated into the project.
- The Permit distinction between offering coverage for single family residential lots requesting a grading permit of 14,000 sq. ft. or more of disturbance, unless the lot owner opts out of coverage, while denying coverage for single family residential lots within an approved subdivision, places an additional burden and cost on projects, many of which have obtained County approvals and have been designed consistent with the CLS.

II. No landowner should be excluded from automatic Permit protection except those who specifically "opt out."

As noted above, all landowners within Pima County have participated in the County's land acquisition and preservation activities either by setting aside large portions of their properties under the CLS or through paying a significantly higher property tax bill to fund County acquisition of open space lands. Additionally, as stated in section 4.1 of the MSCP, the County subjects nearly every project over which it has authority to regulations and policies that "seek to avoid, minimize, or mitigate impacts to on-site sensitive resources...⁸" Adherence with these policies and regulations has made development as a whole within the County significantly more expensive – a condition that has affected the development community even harder during the most recent economic downturn. Finally, the County counts as MSCP-related mitigation the land set aside by developers within the CLS who choose to opt-in to coverage.¹⁰ Yet, the MSCP limits its ESA compliance benefits to specified categories of automatic and opt-in developments. This approach is nothing short of unjust for several reasons:

- Given the impact the compliance requirements of the CLS, SDCP, and other MSCP-related initiatives have had on landowners within the County, and the fact that under the CLS, all developers seeking County approvals have had to set aside large amounts of land, the County should not grant MSCP coverage only to those landowners who opt-in to such coverage *and* pay additional

⁸ See MSCP at 30.

⁹ Many of these policies and regulations were implemented as part of the SDCP and apply not only to sensitive species, but to water and other natural resources as well.

¹⁰ See MSCP at 45.

fees to do so. Rather, the County should grant automatic MSCP coverage at a minimum to any landowner required to provide set asides pursuant to the CLS. No one should be categorically excluded from receiving the benefits the Permit offers. Rather, the Permit should provide automatic coverage for all development within the County or at least to those projects that were and will be subject to the CLS, unless the project proponent chooses to opt out of said coverage. The MSCP offers no rationale for violating this simple principle of equity.

- Excluding a significant number of development projects from receiving incidental take coverage through the Permit negates one central purpose in developing the Permit in the first place: providing a method for streamlining ESA permitting both for the County and its citizens.¹¹ Given that the MSCP explicitly does not cover activities subject to review pursuant to section 7 of the ESA (except where section 7 is triggered by Clean Water Act section 404), further limiting coverage through the MSCP to only that relatively small subset of projects that fit the automatic or Opt-in coverage criteria does little to achieve the streamlining the MSCP purports to promise.
- Finally, the Industry Groups note that the MSCP does not speak as to whether projects approved prior to the adoption of the CLS (hereafter, “Grandfathered Projects”) may opt in to MSCP coverage and, if so, whether Grandfathered Projects that do opt-in to MSCP coverage would lose their vested rights and be required to become compliant with the CLS. Grandfathered Projects should be allowed to opt in without losing their vested rights simply because they choose to opt-in. After all, CLS compliance is not a condition of providing Permit coverage to single family residential lots vis a vis the 14,000 sq. ft. grading permit threshold required for automatic coverage.

III. The MSCP should specify the precise mechanism through which private development activities may be authorized for incidental take

Section 3.4 of the MSCP sets forth those activities for which the Permit authorizes incidental take. In addition to the Permit covering various County and Flood Control District activities, the Permit would also authorize development on privately-held lands, under certain circumstances. As described above, the MSCP sets forth two mechanisms for private participation. First, the MSCP appears to cover automatically development on “individual, single-dwelling residential lots” where a type 1 grading permit is issued and where grading exceeds 14,000 square feet. Second, the MSCP allows participation for residential subdivisions and non-residential developments where certain criteria are met.¹² While the Industry Groups appreciate the efforts of the County, Flood Control District, and the Service to ensure that some private development within Pima County can move forward with ESA permitting in an efficient and predictable fashion, the Industry Groups remain concerned that the precise mechanism and process for private “participation” (i.e., private landowners receiving take coverage through the County and Flood Control District’s Permit) is not set forth in the MSCP or related documentation.

While the above-referenced provisions of the MSCP set forth the criteria that a given development must meet in order to receive take authorization through the Permit, the MSCP does not set forth the specific process or mechanism through which such take authorization is conferred. Without a specific process or mechanism, there is no meaningful opportunity to review and provide comment upon this important procedural aspect of the MSCP.

¹¹ See MSCP at 2.

¹² See MSCP at 19.

Setting forth the precise mechanism through which private and other development will receive incidental take coverage will ensure that the MSCP does its job to reduce the workload of the Service as it relates to ESA approvals, to provide certainty to the development community as to how incidental take coverage will be achieved, and to bolster species conservation efforts by encouraging the community to participate in a plan that has received the careful scrutiny of the Service, the County, and the community.

IV. The MSCP’s description of its mitigation program is confusing, inconsistent, and contains little or no rationale for the manner in which mitigation requirements will be applied.

Below, we describe several problems inherent in the MSCP’s mitigation program.

A. *MSCP description of covered impacts and mitigation program lacks sufficient detail to allow meaningful public review and comment*

The MSCP executive summary states that, based on the “suite” of Covered Activities considered in the MSCP and on modeled growth projections, there will be approximately 36,000 acres of “disturbance” covered by the Permit. Further, the MSCP states that, for this 36,000 acres of disturbance covered through the Permit, approximately 112,000 acres of mitigation will be provided.¹³ Several problems are inherent in this description. First, the description of “covered” disturbances does not indicate whether this includes projects approved by the County prior to adoption of the CLS who will choose to opt in to MSCP coverage, what percentage of projects that could receive automatic coverage under the MSCP will choose to receive such coverage, or what percentage of projects that are eligible for opting in to MSCP coverage will actually do so.

Second, with respect to mitigation ratios, the MSCP does not describe how ratios will be applied on a project-specific basis. Page 45 of the MSCP states that for projects required by the County to provide set asides pursuant to the CLS and who choose to opt-in to MSCP coverage, the County will take a “minimum of 75% mitigation credit.” The MSCP offers no example of how such a system would work in the “real world.” For example, if the County claims mitigation credit for these properties, does that mean that there will be no debit against the County’s overall mitigation credits for CLS-compliant properties who opt in to MSCP coverage? Or, will the County debit its mitigation credits at the relevant ratio on the one hand (e.g., if the project sat in a Biological Core Management Area, the MSCP mitigation ratio would be 5:1)¹⁴ and then credit itself at 75% of the relevant CLS ratio (for the same property, that ratio would be 4:1)? Providing concrete examples of how both “participation” (MSCP coverage) and mitigation would work under the MSCP would greatly increase predictability and reduce conflicts down the road.

Several large-scale, County- and region-wide habitat conservation plans approved in Region 2 of the Service provide actual participation (the process by which parties other than the permit holder receive incidental take coverage through the Endangered Species Act permit) documents, describe the specific process through which projects receive incidental take coverage, the cost of such coverage (the per acre calculation of mitigation fees and the administrative fees associated with processing participation requests), and the precise mechanism by which incidental take authorization would be tracked and reported. For example, the habitat conservation plan prepared in connection with the Williamson County, Texas countywide habitat conservation plan (hereafter, the “Williamson County HCP”) devoted an entire chapter specifically to the participation process. In fact, chapter 6 of the Williamson County HCP sets forth separately the

¹³ MSCP Executive Summary at x.

¹⁴ MSCP at 39.

participation process as it relates to each species covered by the plan. Additionally, Appendix C to the Williamson County HCP provides a sample participation document to reduce further any question as to how the participation process will work.

Finally, the Industry Groups question how the County arrived at the mitigation acreage proposed by the MSCP – which is a little more than three times the acreage proposed for coverage through the MSCP – when Alternative C in the DEIS, which would provide coverage for all private development within Pima County that requires County approvals, offers to mitigate at merely two times the acreage proposed for coverage.

The Industry Groups request that the Service and County clarify the MSCP coverage and mitigation programs described in the MSCP, provide the rationale behind the mitigation ratio structure, provide examples of how these programs will work in the “real world,” and provide an additional opportunity for public comment and review. As stated above, because of the lack of detail provided in the MSCP with respect to MSCP coverage and mitigation requirements, the public has not been provided a meaningful opportunity to review and comment on those aspects of the MSCP. Further, the Industry Groups request the County apply the information developed during the development and refinement of the MSCP rather than merely overestimating occupied habitat, mitigating for undisturbed lands, overestimating development, and increasing the Permit mitigation ratios over those adopted with the SDCP CLS.

B. *MSCP impact and mitigation calculations are vague or inconsistent*

With respect to anticipated impacts of 36,000 acres that are proposed to be covered by the MSCP, beyond distinguishing that 31,000 acres will be caused by private development and 5,000 acres by the County, the MSCP provides no insight as to how this number was derived. Does 36,000 acres represent a percentage of overall anticipated impacts? Or perhaps the number represents only those acres of impacts the County anticipates will seek coverage through the MSCP? Unfortunately, the MSCP does not provide sufficient detail to determine the basis for the acres proposed to be covered through the plan. For example, the MSCP states, “[r]egardless of the specific projects implemented, total combined impacts of the County’s [Capital Improvement Program] and private development activities will not exceed 36,000 acres.”¹⁵ This statement is contradicted elsewhere in the MSCP; for example, in section 3.4.2, the MSCP lists several types of activities which could result in take of Covered Species or impacts to potential Covered Species habitat that are not covered by the MSCP or Permit.¹⁶ Importantly, Alternative C in the DEIS, which would cover all take occurring from County activities and private development activities for which the County issues permits, states that approximately 114,000 acres of ground disturbance would occur as a result of covered activities.¹⁷ The Industry Groups would like more detailed information on the acreage locations and activities which result in the conclusion that Alternative C represents 111,400 acres of disturbance as compared to Alternative D (the Preferred Alternative) with 36,000 acres of disturbance. In sum, the Industry Groups request that the County: (1) provide detailed information on the acreage locations and activities resulting in the conclusion that DEIS Alternative C would facilitate 114,000 acres of disturbance as compared to only 36,000 acres of disturbance under the Preferred Alternative; (2) provide the rationale behind limiting covered impacts to 36,000 acres – including any formulae used to arrive at this number; and (3) consider increasing the 36,000 acre cap.

¹⁵ MSCP at 19.

¹⁶ MSCP at 22.

¹⁷ DEIS at 2-7.

With respect to the mitigation proposed by the County in the MSCP, the executive summary to the MSCP states that the County will provide 112,000 acres of mitigation for 36,000 acres of impacts caused by Covered Activities.¹⁸ Chapter 4.3.1 and Table 4.2 of the MSCP, however, indicate that approximately 116,320 acres of mitigation will be provided. Moreover, it is not clear how (if it all) the MSCP accounts for set asides for CLS compliant properties who choose to opt-in to MSCP coverage. The Industry Groups request that the County clarify the following: (1) the precise amount of mitigation that will be provided for Covered Activities; and (2) where, precisely, that mitigation will come from (e.g., from CLS set asides, state trust lands, etc.).

C. *MSCP contains no rationale for mitigation ratios and credits used*

Although the MSCP provides various mitigation ratios based on a given project's location within the County with respect to the CLS, the MSCP contains little or no explanation regarding whether mitigation used is limited to direct areas of disturbance, inclusive of indirect adjacent areas, or encompassing the entire parcel, including undisturbed areas. Further the MSCP does not provide a rationale for increasing the various mitigation ratios in excess of the SDCP and CLS or why less than 100% mitigation credit would be granted for designated lands, which have been set aside for Permit compliance. In addition, the Industry Groups request more detail on the procedure to implement the proposed "incentive based approach to gaining mitigation credits," which appears to be able to be applied to private land on a case-by-case basis and involves the Service at the individual project level.

Why, for example, would the County take only 75% credit for lands set aside under the CLS? Indeed, the MSCP states that 100% credit for these lands will only be claimed under certain conditions and "if the County desires and USFWS determines it is appropriate."¹⁹ The MSCP makes no attempt to outline under what circumstances the County would "desire" to claim 100% credit and under what circumstances the Service would deem such a claim "appropriate." Given that the County will offer MSCP coverage on a first-come, first-served basis, it seems that having a predictable set of criteria for claiming 100% credit is of utmost importance – certainly to the development community, some of whom may ultimately be excluded from receiving coverage once the County's mitigation "bank" has been exhausted. Considering the fact that, pursuant to the CLS and the Opt-In Provisions of the MSCP, any set asides must be permanently protected via a legally-enforceable instrument,²⁰ the Industry Group requests that 100% credit be given for private sector set asides associated with CLS compliance and that the MSCP allow homeowners' associations or other qualified volunteer groups to monitor and manage open space set asides.

Why would the County require itself to mitigate at a 2:1 ratio for projects occurring outside the CLS? And why would only 25% credit be taken for State Trust Lands that the County is actively managing for the benefit of Covered Species, particularly since the County obligates itself to replace such lands if the County's leases are not renewed?²¹ While the MSCP states that 100% credit may be taken should the County obtain fee ownership of said lands and place them under "permanent protection," pursuant to the terms of the

¹⁸ MSCP Executive Summary at x.

¹⁹ MSCP at 46.

²⁰ MSCP at 19.

²¹ MSCP at 45.

MSCP, the County is obligated to replace any State Trust Lands whose leases are not renewed with “other lands that meet or exceed mitigation credit generated by the lost lease lands.”²²

The Special Species Management Area which establishes an 80% open space set aside may be unnecessary with the issuance of the Permit.

The foregoing examples are but a few of the many instances in which the MSCP lacks sufficient rationale behind proposed mitigation ratios. The Industry Group requests that the County provide its rationale behind all mitigation ratios set forth in the MSCP.

V. MSCP Funding Plan does not account for possibility that the County may have to fund acquisition of replacement for State Trust Lands

As noted above, the MSCP requires that, in the event the one or more of the County’s leases on State Trust Lands is not renewed, the County must replace any such lands with other lands that “meet or exceed the mitigation credit generated by the lost leased lands.”²³ The MSCP chapter regarding funding mechanisms, however, does not appear to take this possibility into account.

VI. Funding Plan provides inadequate details regarding fees and other charges or conditions that may be imposed on private development under the Opt-in Provisions

Section 8.2.4 of the MSCP states that the County will “collect an application fee, *at the minimum*, from Participants who elect coverage under the Opt-in Provisions” (emphasis added).²⁴ The same section also notes that a monitoring fee will be assessed against certain properties.²⁵ The MSCP, however, does not set forth the amount of those fees and, more importantly, provides no details about what other monies, in addition to the fees, may be assessed or what other arbitrary conditions may be imposed. While drafting the MSCP, Pima County staff made commitments to the Industry Groups that the fee for a property owner to “Opt-In” will be minimal. Because the MSCP does not set forth within specificity the fee structure – including how the fee might be increased or decreased during the life of the Permit – and does not set forth the other fees or measures that will be required beyond the ill-defined application fee, the residential and commercial real estate sector cannot effectively provide substantive comments on this portion of the plan. The MSCP should set forth the precise categories and amounts of any fees and other measures that will be assessed on those choosing to opt in to MSCP coverage. Fees and potential other charges or measures for opting in to MSCP coverage should not be a moving target.

VII. MSCP ignores opportunity to streamline ESA section 7 consultation processes over the Permit term

As set forth in section 3.4.3 of the MSCP, the County proposes to explicitly exclude from Permit coverage “actions reviewed under Section 7 of the ESA in the Planning Area, except for those triggered by Section 404 of the Clean Water act for activities covered under the Permit.”²⁶ This exclusion is problematic for at

²² MSCP at 44-45.

²³ *Id.*

²⁴ MSCP at 98.

²⁵ *Id.*

²⁶ *See* MSCP at 22.

least two reasons. First, the exclusion is exceptionally vague. Will the private sector have to prove to the County that there are no potential federal nexi triggering ESA section 7 prior to opting in to or receiving automatic coverage through the MSCP? Or will the private sector be allowed to opt-in to MSCP coverage only to find later, when a federal nexus crops up, that the incidental take coverage paid for is invalid and the project may be subject to a jeopardy finding under a section 7 consultation? Second, the Service, in its approval of the MSCP and issuance of the Permit, must go through a formal section 7 consultation to determine whether implementation of the MSCP and issuance of the Permit would jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Through this consultation, the Service will look at the potential effects of activities to be covered under the Permit – including private development and County and Flood Control District infrastructure projects described in the MSCP. Why, then would anyone – including the County – be required to go through another full consultation on projects already considered in the MSCP and related formal consultation?

It is worth noting that while Region 2 of the Service recently has taken the view that future federal activities cannot be covered by a habitat conservation plan, in prior permits, Region 2 has allowed consideration of future section 7 consultations. For instance, the Lower Colorado River Multi-species Conservation Plan (“LCR MSCP”) includes within its umbrella future federal actions that may require consultation under ESA section 7. Specifically, the LCR MSCP states:

The effects of all covered Federal and non-Federal activities, whether discretionary or not, have therefore been described and covered in this LCR MSCP HCP, as well as in the LCR MSCP [Biological Assessment] prepared by Reclamation. Given the combined Federal and non-Federal effort in the conservation actions and covered activities of the LCR MSCP, the USFWS has determined to analyze the effects of the covered Federal activities and issuance of the section 10(a)(1)(B) permit for non-Federal covered activities in one [Biological Opinion].²⁷

The LCR MSCP refers to these future federal actions as “Covered Actions.” Specifically, the LCR MSCP implementing agreement states:

In the event that...any Federal Party determines that a section 7 consultation or re-initiation of consultation is required pursuant to applicable Federal law for any Covered Action, the Federal Party shall give notice thereof to the Program Manager, the Steering Committee, and the Permittees, and such Permittees shall be treated as applicants in any such section 7 consultation, and be entitled to fully and completely participate in all matters involved in such consultation or re-initiation of consultation...

The Service has evaluated the direct, indirect, and cumulative effects of the Covered Actions and Covered Activities in its Biological Opinion issued in connection with the LCR MSCP and issuance of the Permit. As a result, and to the maximum extent allowable, in any consultation under section 7 of the ESA subsequent to the Effective Date with regard to the Covered Actions or Covered Activities, including consultations involving the Permittee(s) or entity that is a Third Party Authorized to Take with regard to Covered Species, the Service shall ensure that the biological opinion issued in connection with the proposed action or

²⁷ See LCR MSCP at 2-2, available at http://www.lcrmscp.gov/publications/hcp_volii_dec04.pdf.

project that is the subject of the future consultation is consistent with the Biological Opinion.²⁸

Furthermore, other regions within the Service – including Region 8 – routinely allow consideration of future section 7 consultations in the development of a habitat conservation plan.

It is within the regulated community's interest – including that of Pima County and the Flood Control District – to receive some protection against additional measures that could be imposed pursuant to future ESA section 7 consultations. Indeed, the Service's own Habitat Conservation Planning Handbook ("HCP Handbook") supports such an approach:

In some cases...Federal agencies besides [USFWS]...may be integrally involved in HCP efforts. In those cases, the action to be conducted by the Federal agency during the implementation of the HCP should be included as an additional element to be consulted on through the section 7 consultation conducted for the HCP. This allows [USFWS] to conduct one formal consultation that incorporates the actions for the HCP and any related and supportive Federal actions into one biological opinion... Thus, the single biological opinion issued by [USFWS] would address both the Federal action and the non-Federal action, and it would include an incidental take statement that authorizes any incidental take by the section 10 permittee...

There are cases where a Federal agency is a partner in an HCP, and has a minor, but integral role in the HCP. Examples of these types of HCPs would include HCPs where a Federal agency is involved in a cooperative planning effort in which both Federal and private lands are addressed under a single HCP but the Federal agency is not the applicant or the primary partner in the plan. In these cases, the specific identified actions to be conducted by the Federal agency during the implementation of the HCP should be consulted on as part of the section 7 consultation conducted for the HCP. This allows the [Service] to conduct one formal consultation that incorporates the actions for the HCP and any specified or identified cooperative Federal action into one biological opinion.²⁹

Given the above, why would the County and the Service utilize significant taxpayer resources to develop the MSCP and not maximize the scope of potential federal nexi considered? There are myriad federal nexi that potentially could implicate ESA section 7 (e.g., federal funding for infrastructure projects, floodplain certifications, etc.). Projects subject to ESA section 7 through federal nexi other than section 404 could be put to double-jeopardy by participating in the MSCP and then, subsequently, also having to undergo section 7 consultations. Moreover, failing to provide a more streamlined section 7 process for projects "participating" in the MSCP does nothing to reduce the Service's workload over the life of the Permit. We can determine no rational basis for this approach. Reducing the Service's workload with respect to section 7 consultations and increasing regulatory certainty for the County and regulated community should be key components of the MSCP and Permit. Indeed, streamlining ESA approvals is one of the central purposes of the MSCP itself.³⁰

²⁸ See LCR MSCP Implementing Agreement at 17.

²⁹ See HCP Handbook at 1-4 and 3-2.

³⁰ See MSCP at 2.

VIII. MSCP should provide incidental take coverage for monitoring and management carried out by private landowners on their conservation set asides.

With respect to property owners who choose to opt-in to MSCP coverage and whose projects were subject to the CLS, section 4.5.1.7 of the MSCP states that the responsibility for protecting conservation set asides falls to said landowners.³¹ Importantly, however, the MSCP specifically *excludes* from coverage take associated with “management, monitoring, or research within mitigation lands conducted by entities other than Pima County or its cooperators.”³² If the MSCP assumes that, under most circumstances, landowners will manage and maintain their own conservation lands, the MSCP should, likewise, provide take coverage for any monitoring and management actions undertaken by landowners in accordance with the terms of the Permit, MSCP, and any Permit participation documentation.

IX. MSCP should more clearly define what kinds of activities are covered under the MSCP

With respect to properties eligible for automatic coverage through the MSCP, the MSCP states that “[g]rading of 14,000 square feet or more...”³³ will be considered a Covered Activity. The Industry Groups request that the MSCP clarify that all development-related activities – not just grading – be considered Covered Activities.

X. MSCP does not expressly establish that it covers take associated with indirect impacts of Covered Activities

As noted above, section 7 of the ESA requires that the Service, in conducting a section 7 consultation, consider the effects – both direct and indirect – of a proposed action (here, the Service’s own issuance of an incidental take permit to Pima County and the Flood Control District) to determine whether that action may jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. As defined by ESA implementing regulations, indirect effects are those effects “caused by the proposed action and are later in time, but still reasonably certain to occur.”³⁴

Importantly, the MSCP points out that indirect effects, in the form of habitat fragmentation and edge effects, may occur as a result of Covered Activities, the MSCP does not propose coverage for the same. Yet these types of indirect effects may lead to take of listed species. For example, the Service has long maintained in Central Texas that take of the endangered golden-cheeked warbler occurs not only when that species habitat is cleared, but also can occur up to 300 feet from cleared areas due to noise and other development- and construction-related disturbances. Indeed, the County and Flood Control District – without explicitly stating so – seem to recognize that indirect effects may lead to some level of take.³⁵ Table 4.1 of the MSCP lists numerous County regulations and protocols that exist to avoid and minimize indirect effects not only to Covered Species but also to “scenic” and “cultural” resources.³⁶ Given that the County has implemented many of these regulations and protocols as part of the CLS, and given the amount of land

³¹ See MSCP at 51-52.

³² See MSCP at 22.

³³ MSCP at 17.

³⁴ 50 C.F.R. § 402.02.

³⁵ See MSCP at 31-38.

³⁶ *Id.* at 31.

set aside to mitigate for take of Covered Species (far in excess of anything that would typically be required by the Service through the section 10 process), the County, Flood Control District, and the public should receive the benefit of such measures. Perhaps more importantly, if indirect effects are not covered by the Permit, it is possible that the County and those within the County receiving incidental take protection automatically or by opting in to MSCP coverage could unwittingly be liable for take of listed species despite fully adhering to the requirements of the MSCP, Permit, and related documents. Specifically, the Permit issued by the Service should expressly specify that take caused by indirect effects of Covered Activities is covered by the Permit.

XI. MSCP arbitrarily provides coverage for water quality impacts caused by Pima County but excludes such coverage for the community at large

Section 3.4.2 of the MSCP specifically excludes from Permit coverage “[g]roundwater pumping or effluent discharges that increase, decrease, or otherwise alter water quality or availability, except for groundwater pumping or effluent discharges carried out by Pima County...”³⁷ It remains unclear as to why the regulated community cannot be afforded the same incidental take coverage assurances as the County even where the regulated community, including privately operated water and sewer utility companies, or possibly a domestic water/wastewater improvement district, obtains any necessary federal permitting with respect to water quality or availability. As noted above, all citizens of Pima County have paid for the ESA protections supposedly provided by the MSCP. Assuming all necessary federal, state, and other permitting is obtained by a given developer, there is no rational justification as to why that developer should not be afforded the same protections as the County itself.

XII. The MSCP is legally insufficient in its use of habitat as a proxy for take of individual species

The MSCP states that, “[f]or the purposes of [the] MSCP, ‘take’ is calculated based on the number of acres of habitat lost for each Covered Species.”³⁸ With respect to defining the degree of take of listed species in an incidental take permit, Congress indicated that “[w]here possible, the impact should be specified in terms of a numerical limitation.”³⁹ However, neither the ESA itself nor the Service’s implementing regulations require the Service to establish a specific numeric cap on authorized take. The Service’s HCP Handbook seems to suggest that a cap on take must be established. Specifically, the HCP Handbook states that take authorized by the Service may be expressed in one of two ways:

[I]n terms of the number of animals to be killed, harmed, or harassed, if those numbers are known or can be determined; or (2) in terms of habitat acres or other appropriate habitat units (e.g., acre-feet of water) to be affected generally or because of a specified activity, in cases where the specific number of individuals is unknown or indeterminable.⁴⁰

Similarly, the Service’s ESA Section 7 Consultation Handbook (“Consultation Handbook”) provides the following with respect to establishing the level of authorized take:

³⁷ See MSCP at 22.

³⁸ See MSCP at 23.

³⁹ H.R. Rep. No. 97-567, at 27 (1982).

⁴⁰ See HCP Handbook at 3-14.

Generally, incidental take is expressed as the number of individuals reasonably likely to be taken or the extent of habitat likely to be destroyed or disturbed...When preparing an incidental take statement, a specific number...or level of disturbance...to habitat must be described. Take can be expressed also as a change in habitat characteristics affecting the species...where data or information exists which links such changes to the take of listed species. In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided.⁴¹

In many incidental take permitting decisions and ESA section 7 consultations around the country, the Service has utilized habitat or other ecological metrics as a proxy for take of actual individuals of a given species. There has been a significant amount of case law relating to how best to describe potential impacts to listed species. The Ninth Circuit recently provided a condensed summary of how the courts have come out on the issue (citations, brackets, and quotation marks removed):

We have recognized that the permissible level of take in an [incidental take statement] ideally should be expressed as a specific number. However, while Congress indicated its preference for a numerical value, it anticipated situations in which the amount of take could not be contemplated in terms of a precise number. As a result, we have held that the Service need not specify numerical take in an [incidental take statement] if it establishes that no such numerical value could be practically obtained. ***In such circumstances, an [incidental take statement] may utilize a surrogate instead of a numerical cap on take, so long as it explains why it was impracticable to express a numerical measure of take. The chosen surrogate must be able to perform the functions of a numerical limitation by setting forth a “trigger” that, when reached, results in an unacceptable level of incidental take and requires the parties to re-initiate consultation.*** The [incidental take statement] also must articulate a rational connection between the surrogate and the taking of the species....A surrogate measure of take in an [incidental take statement] must be able to perform the functions of a numerical limitation by setting forth a clear standard for determining when the authorized level of take has been exceeded.⁴²

(Emphasis not in the original.)

In short, while use of actual numbers of species to be taken is preferred by the courts as a reflection of congressional intent, courts frequently have approved use of an ecological surrogate where the Service meets a three-part test:

(1) the availability and quality of actual or estimated population figures; (2) the ability to measure incidental take; and (3) the ability to determine the extent to which incidental take is attributable to the action prompting the biological opinion and incidental take statement, as opposed to other environmental factors.⁴³

⁴¹ See Consultation Handbook at 4-47.

⁴² See *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 911-13 (9th Cir. 2012) (approving use of surrogate for ITS involving the polar bear).

⁴³ *Micosukee Tribe of Indians of Florida v. U.S. Fish and Wildlife Service*, 2010 WL 1037962 at *4 (S.D. Fla. 2010)(citing *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1250 (9th Cir. 2001)).

Courts have demanded a rigorous showing by the Service that all three factors have been met, consistently rejecting mere unsupported statements and probing the administrative record's evidence and rationale closely.⁴⁴ Moreover, they have explained, this three-part test is fact intensive, with context varying species to species, and a robust record of evidence and explanation in support of the decision to use a surrogate is required.

Accordingly, in order to meet the three-part test outlined above, the MSCP must contain a thorough analysis regarding the availability and quality of any existing species population data, the ability of the applicant or the Service to measure incidental take numerically, the rationale for surrogate alternatives where numerical measures are not practicable, and the ability to use the chosen surrogate to establish and measure a take limit. While we understand that the number of Covered Species included in the MSCP makes it more difficult to conduct such a rigorous analysis, the analysis must, nevertheless be conducted. As discussed below, we do not believe a sufficient analysis has been conducted.

Applying the three-part test to the MSCP

As demonstrated below, the MSCP fails to meet the first two parts of the three-part test for use of habitat as a proxy for take of individual members of a listed species.

1. *Has the Service demonstrated that it is impractical to establish a numerical limit on take?*

Section 3.7.1 of the MSCP states merely that, “[f]or the purposes of this MSCP, ‘take’ is calculated based on the number of acres of habitat lost for each Covered Species.”⁴⁵ We were unable to find anywhere in the MSCP or its appendices a discussion of or explanation as to why it is impractical to establish a numerical limit on take of the Covered Species.

2. *Is the ecological surrogate used rationally linked to actual take of the listed species by the proposed action?*

While the MSCP does explain briefly and generically the two modeling systems used to determine the potential extent of Covered Species habitat within the Permit Area, neither the MSCP nor relevant Appendices attempt to link in any way habitat loss to loss of individual members of a given Covered Species. The habitat modeling methods are described in the MSCP in no more than a cursory manner, and habitat modeling methodology is not provided for individual Covered Species. For example, one of the MSCP's Covered Species is the lesser long-nosed bat. According to the MSCP, the lesser long-nosed bat roosts in Pima County during the spring and summer. Appendix A at A-24. We were unable to find within the MSCP or relevant appendices a listing of the number of actual roost sites within the Permit Area nor were we able to find an explanation as to how, precisely, the MSCP calculated the amount of lesser long-nosed bat habitat. Despite that fact, the MSCP estimates that nearly 5,500 acres of the bat's habitat will be

⁴⁴ See, *Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp. 2d 1115, 1137 (N.D.Cal. 2006); *Micosukee v. United States*, 566 F.3d 1257, 1275 (11th Cir. 2009); *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229, 1249, 1250 (9th Cir.2001); *Micosukee Tribe of Indians of Florida v. U.S. Fish and Wildlife Service*, 2010 WL 1037962 (S.D. Fla. 2010); *Ramsey v. Kantor*, 96 F.3d 434, 441 n. 12 (9th Cir. 1996); *Swan View Coalition v. Barbouletos*, 2008 WL 5682094, at *23 (D. Mont. 2008); *Northwest Environmental Defense Center v. U.S. Army Corps of Engineers*, No. 10-1129, 2011 WL 4369129 at *9-11 (D. Ore. Sept. 19, 2011); *Northwest Environmental Defense Center v. National Marine Fisheries Service*, 647 F.Supp.2d 1221, 1237-8 (D.Or. 2009); *Pacific Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Engineers*, 538 F.Supp.2d 242, 257 (D.D.C. 2008); *Heartwood v. Kempthorne*, 2007 WL 1795296, at *20 (S.D. Ohio 2007); *City of Santa Clarita v. U.S. Dep't of Interior*, 2006 WL 4743970, at *13 (C.D.Cal. 2006).

⁴⁵ See MSCP at 23.

lost due to Covered Activities and that nearly 79,300 acres of habitat exists within conservation lands. *Id.* at A-27. No link is made between the amount of bat habitat lost over the Permit term and how many bats may actually be impacted by that habitat loss. Similarly, the extent of habitat impacts and conserved acres of habitat for each Covered Species are set forth in one line of text and a simple, hard to read map, without further explanation or discussion.

As we mentioned above, never is there an attempt to describe how, precisely, impacts to habitat result in actual take, and the MSCP is devoid of discussion or explanation as to how habitat acres were calculated for each of the Covered Species. Rather, it seems that the MSCP relies on various studies performed pursuant to the Sonoran Desert Conservation Plan (“SDCP”) and the CLS. Importantly, these studies apparently were conducted at a “landscape scale” level rather than a species-specific one⁴⁶ and, even if the studies were species-intensive, neither the MSCP nor its appendices make any attempt to provide details.

In sum, the MSCP does not link – rationally or otherwise – how impacts to habitat as modeled by the MSCP will equate to actual take of Covered Species.

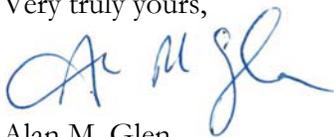
XIII. SDCP Retrospective and Table 4.1

The Industry Group is concerned that by including a detailed list of County ordinances, regulations, and policies (the “Controlling Documents”) that supposedly offer the Covered Species some measure of conservation, the County will make itself less flexible to amending any of the Controlling Documents in the future for fear of jeopardizing the Permit in some way. By incorporating the local laws directly into the federal Permit, the County could be interpreted as binding future Commissioners well into the future to refrain from altering the local laws for fear of violating the Permit, a condition that runs contrary to sound governance policy and possible state legislative and constitutional principles. If doing so is legal, the DEIS does not adequately consider the economic and social impacts such a constraint on local power will have. The needs of the County and its citizens will change over time – and certainly within the 30 year span of the Permit Term – and the County should not give up its ability to amend the Controlling Documents to address the changing needs of its citizens.

XIV. Conclusion

In conclusion, while the Industry Groups appreciate the progress made on MSCP since the last draft was made available to the public, significant work remains, particularly as it relates to private development coverage through the plan. We thank the Service, in advance, for its consideration of the comments provided herein.

Very truly yours,



Alan M. Glen
Sedgwick LLP

⁴⁶ “Pima County and its cooperators used a Geographic Information System to map the distribution of known locations for Priority Vulnerable Species and their potential habitat by modeling important, broad-scale environmental variables (e.g., vegetation, soils, and water features) for each Priority Vulnerable Species.” *See* MSCP at 8.

Steven L. Spangle

Re: TE84356A – Industry Group Comments on the MSCP

March 15, 2013

Page 18

Attached to this letter are the following three documents:

1. Addendum: Summary Comments on Draft Environmental Impact Statement (DEIS)
2. Pygmy Owl Lawsuit, *Center for Biological Diversity v. Salazar*: Joint Stipulation of Dismissal
3. Direct Economic Contribution of the Home Building Industry

Addendum: Summary Comments on Draft Environmental Impact Statement (DEIS)

The time provided to review the MSCP and its associated DEIS has been inadequate to allow a thorough assessment of both. The Industry Groups have focused their efforts primarily on developing a thorough assessment of the MSCP. These summary comments on the DEIS are intended to provide FWS notice of the broad and specific points of concern and objection which the Industry Groups have with the DEIS. The Industry Groups will gladly provide FWS further detail on any point FWS wishes, and the Industry Groups reserve the opportunity to do so with respect to any of the points raised.

General Comments:

1. Inadequate time to review and comment: The Scope of Work for the DEIS was prepared well over a decade ago, from October – December 2000, and involved one public meeting in 2003. Social, environmental and economic conditions have fluctuated significantly in that time. Seven previous versions of the MSCP have been prepared and commented on. Little more than 90 days have been provided to review and comment on the final draft MSCP and DEIS.
2. Superficial impact analysis: The DEIS is primarily a compilation and inventory of data (mostly outdated) and a distorted, unsupported analysis of the impact of the permit on resources in Pima County.
3. Failure to follow standard NEPA protocols: Standard EIS impact review protocols from the NEPA handbook and other policy guidance, such as those “More Common Social Concerns” and “Economic Concerns” do not appear to have been followed.

Specific Comments:

2.4.2 – Reserve Design Process

- The accuracy of the maps is imperative to the MSCP as the CLS (based on overlay analysis in GIS of natural and built environment) is the foundation for determining mitigation ratios. Often, however, the quality or grade of habitat on the DEIS maps differs from what is known from actual field observations to be the true factual context. The opportunity should be provided to make minor modifications to the maps based on field verification.
- It is also important to note that while the Reserve Design Process used GIS to shape the biological value mapping, the mapping process was not based on field inventories. Periodic “ground truthing” should be performed to validate biologic and environmental integrity of the CLS land categories.

3.2.1 – Water Supply for Humans

- The first sentence, stating that “Pima County residents are almost entirely dependent on groundwater for all uses” is contradicted a few sentences later that states “Water from the Colorado River, via the Central Arizona Project (CAP) has recently begun to supplant groundwater for most water users in Pima County.” This inconsistency should be corrected.
- As the DEIS references, the region’s need for additional water resources is based on assumptions. Tucson Water has recently forgone taking the full entitlement of CAP water and is likely to do so again in

the future. The water scarcity analysis should acknowledge this and other sources of water supply management.

3.3.4 – Federally Listed Threatened, Endangered, and Candidate Species

- Information regarding the litigation related to the pygmy owl on page 3-19 and 3-20 should be corrected. The lawsuit filed on August 20, 2012, challenging the USFWS’s finding not to list the species has been withdrawn at the request of the plaintiffs.

3.7 – Urban Land Use

Information in this section is outdated and in need of revision. As referenced in the opening paragraph, “Information here is based on Pima County reports prepared for the SDCP and the 2001 Pima County Comprehensive Plan update...”

- 3.7.1.1 – The statement that “low-density platted subdivision developments, as well as unregulated lot splitting (also referred to as “wildcat” subdividing), have contributed to sprawl in the County” should be removed. The private sector has not been the driver or perpetuated “sprawl.” A number of factors have resulted in the growth patterns in Southern Arizona, they include: majority ownership of federal and state land and procedures for sale or lease; consumer preference for amenities of master planned communities; consumer preferences to be close to natural environments; and strict environmental regulations including mandatory open space. The DEIS analysis of urban land use is superficial in this respect and does not reflect a thorough understanding of the urban land and housing markets.
- 3.7.1.2.1 – Population estimates used in the DEIS for Pima County are inflated by over 10 percent. According to the US Census Bureau, the estimated Pima County population for 2011 is 989,569 (<http://quickfacts.census.gov/qfd/states/04/04019.html>) and not the 1,092,369 estimated by PAG. Additionally, the Arizona Department of Administration Office of Employment & Population Statistics estimates the 2011 population as 990,380 (<http://azstats.gov/pubs/demography/July1-2012PopulationEstimates.pdf>). Population estimates should not be inflated for purposes of the DEIS.
- The assumption that the population of Pima County is anticipated to increase by roughly 202,000 people is unfounded and likely highly inaccurate given the above point.
- The population for Pima County in 2010 in Table 3.4 is inconsistent with the population number referenced in 3.7.1.2.1.
- 3.7.1.2.2 – The projected development area over the life of the permit will be deeply dependent on natural market conditions (such as consumer preferences and availability and cost of land) as well as the regulatory environment, both of which are highly fluid and variable as recent history has shown. It appears as though these factors have not been considered in preparing this section.
- 3.7.2.1 – Pima County has recently initiated the update of the Comprehensive Plan in accordance with Arizona law. While perhaps not drastically different, the updated Plan will have differences with respect to the aspects of the 2001 Plan referenced in the DEIS.

3.8 – Transportation

- 3.8.2.2 – This section should include listing of new road projects planned during the life of the permit and the impacts associated with those. This section should also consider the contribution of the development industry in contributing to transportation infrastructure through impact fees and other off-site improvements.

3.11 – Recreation

- The DEIS limits its focus almost exclusively on recreation activities that require natural open space and trails. The DEIS should also include and consider recreation activities requiring more intensive land development, such as: soccer, golf, Frisbee golf, tennis, baseball, football, basketball, pickleball, swimming, dog parks and playgrounds.
- Also missing is the contribution by the private sector, particularly by the residential and commercial development industries, to the community’s recreational assets. For example, the County’s Recreation Areas in Residential Subdivisions Ordinance requires subdivisions to provide 817 “amenitized” square feet per single family dwelling unit, including public recreation and trails. This standard is based upon 8 acres of active recreational amenities per 1,000 population. Parks within planned communities, or community parks like Reid Park, are highly sought after by many residents in Pima County and are as valuable as recreational assets as open space and trails. These recreational amenities must be accounted for in the DEIS.

3.13 – Socioeconomics

This section is largely lacking in substantive, accurate and up-to-date information. We request the section be revised to provide a more accurate and detailed information on the socioeconomic impacts of the proposed alternatives.

- Table 3.8 should be updated to reflect data more current than 2008.
- 3.13.1.2 – This section lacks citation and is debatable and likely inaccurate. Statements like “every year one-third of the population is new to the area” are hard to believe and must be substantiated.
- The median age referenced was from 2007 and should be updated.
- 3.13.2.3 – While it is accurate to observe that the economy of the mid-1900’s was a reflection of the “Arizona’s five C’s,” the later part of the 20th century and thus far in the 21st century has incorporated another “C”: construction. Pima County and Arizona have relied heavily on revenue associated with construction activity to fuel the economy. Table 3.10 should be eliminated. Using 2009-10 to gauge the performance of area employment and project its impacts over the 30 year life of the permit cannot be accurate given the economy was then in a great recession. The economic contribution of construction should be based on a more robust historical analysis and projection.
- 3.13.2.4 – While environmental tourism is a small but important component of the region’s economy, there are many other sectors that will grow over the life of the permit (construction, mining, optics, bio-science and pharmaceutical, aero-space and defense, etc.). These sectors should have their own sections in the EIS and impacts of the proposed alternatives on those sectors should be considered.

- Furthermore, within tourism, the DEIS fails to reference or analyze the contribution of Pima County's premier resorts (Mirival, Ritz Carlton Dove Mountain, Starr Pass, La Paloma, Hilton El Conquistador, Lowe's Ventana Canyon, etc.), which attract visitors from all over the world.
- 3.13.2.6 Housing & Affordability - This section is largely lacking in substantive, accurate and up-to-date information on the housing market and home affordability. We request the section be revised to provide a more accurate and detailed portrayal of the conditions of the housing market as well as the impact of each alternative on housing.

Examples include:

- Evaluating the state of population growth and development based on a two-year period (from 2008-2009) is short-sighted. The EIS should consider a longer period of time and consider projections from notable local housing experts such as Marshall Vest from the University of Arizona and Ginger Kneupp of Bright Future Business Consultants.
- Table 1.13 is outdated and should be revised through 2012.
- There is no source for the statement "In 2000, 38 percent of all residential units were permitted north of the Rillito River. By 2002, this had dropped to 20 percent." Further, there is no validation that this phenomenon (if it were true) was a result of "a better supply of market-priced, fully serviced, and developed lots in and about the City." It is evident that the growth in 2012 and projected growth in 2013 is expected to occur largely in the Northwest (north of the Rillito River) for the very reason the DEIS cites as reasons why development has declined in that area. Additionally, the litany of environmental and land use regulations imposed by the County and City have contributed to pushing development outside of the urbanized areas.
- The DEIS should provide a source for the statement "The affordability of housing is generally decreasing". In fact, according to University of Arizona economist Marshall Vest, the opposite is true. In his annual forecast presentation in December of 2012, he states "housing affordability is at an all time high."
(http://ebr.eller.arizona.edu/research/presentations/Economic_Outlook_Luncheon_2013_14.pdf)
- The statement "unregulated subdivision of land by lot splitting has greatly increased" is inaccurate and the source of that statement should be cited.
- This section should include a section entitled "Economic Role of Real Estate, Construction and Development" to focus on the positive economic contribution of housing and development in our region. It should also provide an analysis of the impact the proposed alternatives would have on the housing market and development industries.

3.16.1.2 – Environmental Justice, Planning Context: Pima County Comprehensive Plan

- This section is highly subjective and short of cited sources. The preferences of home buyers influence the patterns of growth. The statement "limiting sprawl to designated growth areas would likely reduce total community costs" should be based on a fact-based analysis.

4.0 – Existing and Projected Footprint of Development Related Activities

- It should not be assumed that the entire footprint of development would be impacted nor should mitigation for the entire parcel occur if impacts are not felt across the entire parcel. Mitigation should only be required for the impacted portion of parcels and the developer-provided open space should be subtracted from the amount of mitigation required by the County.

4.3.6 – Comparison of Alternatives

- No rational justification has been provided for 1) exceeding a 1:1 mitigation ratio and 2) increasing the mitigation ratio (compared to the CLS) for Alternatives B and D. This needs to be clarified.

Figure 4.4 – Covered Development under Alternative D

- It is unclear how projects entitled prior to the CLS adoption and “opt-in” would be reflected on this map.

4.13.3 – Socio Economics

- All socioeconomic impacts were last evaluated in 2003. A new analysis should be performed. The impact on employment generation and housing demand were also last reviewed in 2003. A new analysis should be performed.
- Local economic development organizations like the Tucson Metro Chamber of Commerce, Tucson Hispanic Chamber of Commerce, and TREO (Tucson Regional Economic Opportunities) – instead of or in addition to Santa Cruz Valley National Heritage Area – should be used to provide a framework for a regional economic development strategy.

4.14 – Utility Rights-of-Way Impacts of the B, C, D

- Alternatives to utility rights-of-way should be further explored.

4.2.3 – Water Resources

- Supporting documentation should be provided for claim “the reduction of water supply is likely to be the greatest under Alternative C.” Furthermore, while the environmental benefits of water conservation and riparian restoration are important, the DEIS should prioritize sufficient water resources for humans foremost.

5.2 – Alternatives B, C, and D

- There is no support for statements such as “without a Section 10(a)(1)(B) permit, the probability that contiguous, high-quality habitat on private lands would be systematically and perpetually preserved is lower than with a permit” and “...existing conservation management guidelines, which could benefit the long-term viability of species, may go unimplemented or be dropped under future BOS administrations.” These statements are subjective, conclusory, unsupported, politically charged, and should be deleted from the DEIS.

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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3	CENTER FOR BIOLOGICAL DIVERSITY,)		
4	et al.,)		
5		Plaintiffs,)	Case No. 4:12-cv-00627 (CKJ)
6		v.)	
7	KEN SALAZAR, et al.,)		
8		Defendants.)	
9			

JOINT STIPULATION OF DISMISSAL

Plaintiffs Center for Biological Diversity and Defenders of Wildlife (collectively “Plaintiffs”) and Federal Defendants Ken Salazar and Daniel Ashe (hereinafter “Federal Defendants”), through undersigned counsel, hereby state as follows:

WHEREAS, Plaintiffs challenged the U.S. Fish and Wildlife Service’s (“Service”) decision not to list the cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) as a threatened or endangered species pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544;

WHEREAS, Plaintiffs allege that the decision relied on a particular interpretation of the phrase “significant portion of its range,” as that phrase is used in the statutory definitions of “endangered species” and “threatened species” under the ESA, 16 U.S.C. §§ 1532(6), (20);

WHEREAS, Plaintiffs allege that the Service’s interpretation of “significant portion of its range,” as applied in the pygmy-owl decision, is contrary to the plain language and purpose of the ESA;

WHEREAS, Plaintiffs also allege that the pygmy-owl decision violated section 4(h) of the ESA, which requires the Secretary to “provide notice of, and opportunity to submit written

1 comments on, any guideline (including any amendment thereto) proposed to be established
2 under” section 4(h);

3 WHEREAS, Federal Defendants dispute Plaintiffs’ claims;

4 WHEREAS, Federal Defendants intend to submit a final policy on interpretation of the
5 phrase “significant portion of its range” for final departmental review in March;

6 WHEREAS, Federal Defendants cannot predict when the final policy will be published
7 in the Federal Register, in part due to the possibility that the final policy will be subject to
8 interagency review;

10 WHEREAS, depending on the nature of any changes between the draft and final policy,
11 Federal Defendants may revisit the decision not to list the pygmy-owl as threatened or
12 endangered.

13 NOW, THEREFORE, without need for court order pursuant to Federal Rule of Civil
14 Procedure 41(a)(1)(A)(ii), Plaintiffs and Federal Defendants hereby stipulate to the voluntary
15 dismissal without prejudice of all claims against the Federal Defendants, with each party to
16 bear its own fees and costs.
17

18 Respectfully submitted,

19 /s/ William S. Eubanks II

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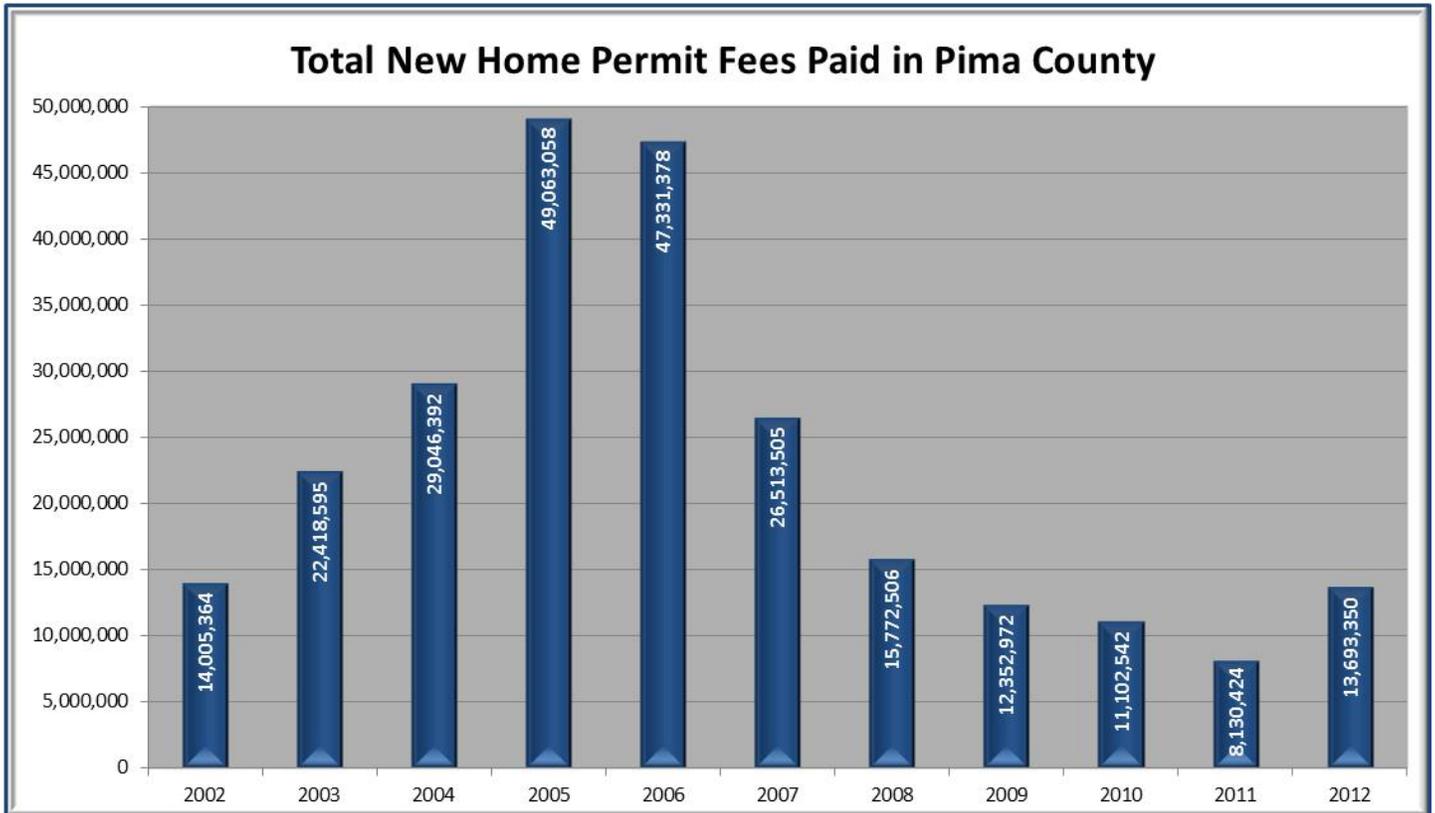
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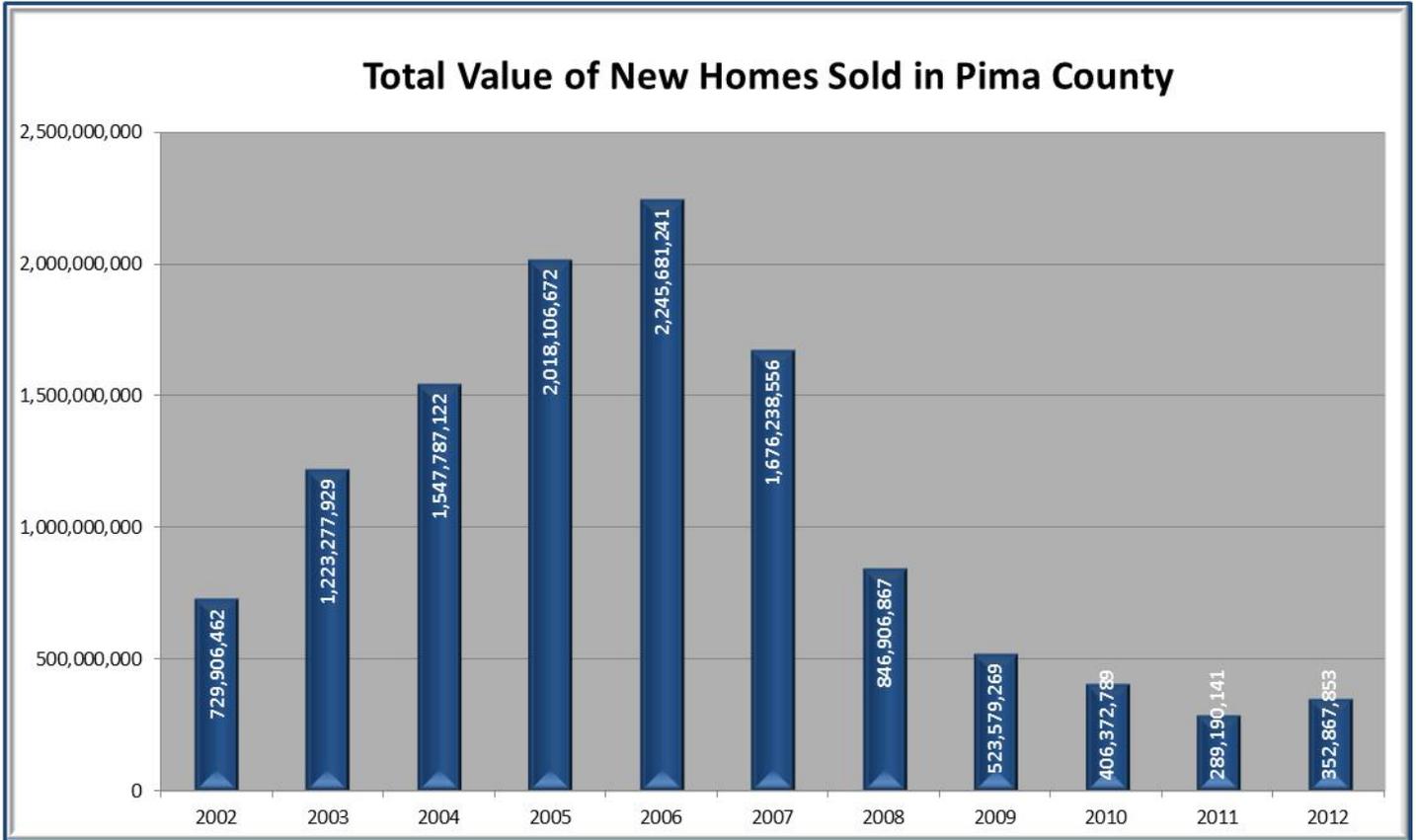
Direct Economic Contribution of the Home Building Industry

Based on the permit fee paid to the municipality at the time the new home permit is issued.



Direct Economic Contribution of the Home Building Industry

Based on the total of the sales prices reported on the affidavits of value filed for new homes.



Annual New Home Permit Activity in the Tucson Metropolitan Area 2002-2012

