



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Inland Deserts Region
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GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director



October 2, 2023

Jim Morrissey
San Bernardino County Land Use Services
385 N Arrowhead Ave
San Bernardino, CA 92415

Phelan Pinon Hills Community Services District 14 Acre Park Site (PROJECT)
MITIGATED NEGATIVE DECLARATION (MND)
SCH# 2023080701

Dear Mr. Morrissey,

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability (NOA) of an MND from the San Bernardino County Land Use Services (Lead Agency) for the Project pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, we appreciate the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State. (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, sub. (a).) CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. (*Id.*, § 1802.) Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have potential to adversely affect fish and wildlife resources.

CDFW is also submitting comments as a **Responsible Agency** under CEQA. (Pub. Resources Code, § 21069; CEQA Guidelines § 15371.) CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority. (Fish & G. Code, § 1600 et seq.) Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish &

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G. Code § 2050 et seq.), the project proponent may seek related take authorization as provided by the Fish and Game Code.

PROJECT DESCRIPTION SUMMARY

Proponent: San Bernardino County Land Use Services

Objective: The Phelan Pinon Hills Community Services District proposes development of a 14-acre Public Park, subject to a Conditional Use Permit, that adjoins and is designated to be compatible with the adjoining five-acre Civic Center site. The Public Park is not permitted in the General Commercial (CG) Zone and a Zone Change to RC (Rural Commercial) is required and proposed. Sharing of infrastructure (roadways and utilities), and balancing cut and fill grading tie the proposed Project and approved Phelan Civic Center together.

Location: Project is located at the northeast corner of the intersection of Warbler Road and Sahara Road in the unincorporated Phelan Pinon Hills community in the county of San Bernardino; NW ¼ of Section 24, Township 4 North, Range 7 West Phelan quadrant 7.5-minute United State Geological Survey (USGS) Topographic Quadrangle; Accessor's Parcel Numbers 3066-261-08, 3066-261-10, & 3066-251-14.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the County of San Bernardino Land Use Services Department in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct, and indirect impacts on fish and wildlife (biological) resources.

LeConte's Thrasher

The MDN includes survey results from a General Biological Resources Assessment performed on June 28, 2021. The report includes special status species in the Phelan quadrangle according to the CNDDDB, including LeConte's thrasher (*Toxostoma lecontei*). Under the listing for LeConte's thrasher, the report states that "No suitable habitat was observed and [no individuals] were observed on site." Although no individuals were recorded on site, the site location does include suitable habitat, as evidenced by several verified sightings recorded in the area within the last year. CDFW recommends that the LeConte's thrasher be anticipated on site during nesting bird surveys.

CDFW appreciates the inclusion of the suggested Mitigation Measure BIO-2 regarding nesting birds on the MND, however the CEQA document should not defer impact analysis and mitigation measures to future regulatory discretionary actions, such as a

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Nesting Bird Plan as part of a Lake or Streambed Alteration Program. CDFW recommends the following revisions (edits are in strikethrough and bold for additions):

MM BIO-2

Permittee shall ensure that impacts to nesting birds are avoided through the implementation of pre-maintenance surveys and the establishment of minimization measures such as buffering and monitoring as deemed appropriate by the Designated Biologist.

The Permittee shall designate a biologist (Designated Biologist) experienced in: identifying local and migratory bird species; conducting bird surveys using appropriate survey methodology; nesting survey techniques, recognizing breeding and nesting behaviors, locating nests and breeding territories, and identifying nesting stages and nest success; determining/establishing appropriate avoidance and minimization measures; and monitoring the efficiency of implemented avoidance and mitigation measures.

~~Bird nesting season generally extends from February 1 through September 15 in southern California and specifically, April 15 through August 31 for migratory passerine birds. In general, Projects should be reconstructed outside of this time to avoid impacts to nesting birds. If a Project cannot be constructed outside of nesting seasons, The Project Site shall be surveyed for nesting birds by a qualified avian biologist~~
(Designated Biologist) at the appropriate day/night, during appropriate weather conditions, no more than within three (3) days prior to initiating the construction activities. Surveys shall encompass all suitable areas including trees, shrubs, bare ground, burrows, cavities, and structures. Survey duration shall take into consideration the size of the property; density, and complexity of the habitat; number of survey participants; survey techniques employed; and shall be sufficient to ensure the data collected is complete and accurate. Pre-maintenance surveys shall focus on both direct and indirect evidence of nesting, including nesting locations and nesting behavior (e.g., copulation, carrying food or nesting material, nest building, removal of fecal sacks, flushing suddenly from atypically close range, agitation, aggressive interactions, feigning injury or distraction display, or other behaviors). If a nest is suspected, but not confirmed, the Designated Biologist(s) shall establish a disturbance-free buffer until additional surveys can be completed, or until the location can be inferred based on observations. Surveyors shall not risk failure of the nest to determine the exact location or status and will make every effort to limit the nest to potential predation as a result of the surveying/monitoring efforts (e.g., limit the number of surveyors, limit time spent at/near the nest, scan the site for potential nest predators before approaching, immediately depart nest area if indicators of stress or agitation are displayed). If a nest is observed, but thought to be inactive, the Designated Biologist(s) shall monitor the nest for one hour (four hours for raptors

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during the non-breeding season) prior to approaching the nest to determine status. The Designated Biologist(s) shall use their best professional judgement regarding monitoring period and whether approaching the nest is appropriate. If active nests are found during the pre-construction nesting birds survey, a Nesting Bird Plan (NBP) will be prepared and implemented. At a minimum, the NBP will include guidelines for addressing active nests, establishing buffers, monitoring, and reporting. The NBP will include a copy of maps showing the location of all nests and an appropriate buffer around each nest sufficient to protect the nest from direct and indirect impact. The size and location of all buffer zones, if required, shall be determined by the biologist, and shall be based on the nesting species, its sensitivity to disturbance, and expected types of disturbance. The nests and buffer zones shall be field checked weekly by a qualified biological monitor. The approved buffer zone shall be marked in the field with construction fencing, within which no vegetation clearing or ground disturbance shall commence until the qualified biologist has determined young birds have successfully fledged.

When an active nest is confirmed, the Designated Biologist(s) shall immediately establish a conservative buffer surrounding the nest based on their best professional judgement and experience. The buffer shall be delineated to ensure that its location is known by all persons working within the vicinity but shall not be marked in such a manner that it attracts predators. Once the buffer is established, the Designated Biologist(s) shall document baseline behavior, stage of reproduction, and existing site conditions, including vertical and horizontal distances from proposed work areas, visual or acoustic barriers, and existing level of disturbance. Following documentation of baseline conditions, the Designated Biologist(s) may choose to adjust the buffer based on site characteristics, stage of reproduction, and types of Project activities proposed at/near that location. The Designated Biologist(s) shall use his/her professional expertise to determine the frequency of monitoring required (based on the nest location, bird species, and identified maintenance activities) at the onset of any changes in Project activities (e.g., increase in number or type of equipment, change in equipment usage, etc.) to determine the efficacy of the buffer. If the Designated Biologist(s) determines that the Project activities may be causing an adverse reaction, the Designated Biologist(s) shall adjust the buffer accordingly.

The Designated Biologist(s) shall monitor existing nests, the efficacy of established buffers, and document any new nesting occurrences. The Designated Biologist(s) shall document the status of all existing nests, including the suspected stage of reproduction and the expected fledge date when this can be determined without endangering the nest by disturbance of alerting predators. If a nest is suspected to have been abandoned or failed prior to completion of maintenance activities, the Designated Biologist(s) shall use their professional expertise to determine the time necessary to monitor the nest for viability. CDFW

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recommends the Designated Biologist(s) monitor the nest for at least one hour (four hours for raptors), uninterrupted, during favorable field conditions. If no activity is observed during that time, the Designated Biologist(s) may approach the nest to assess the status. Permittee, under the direction of the Designated Biologist(s), may also take steps to discourage nesting on the Project site, including moving equipment and materials daily, covering materials with tarps or fabric, and securing all open pipes and construction materials. The Designated Biologist(s) shall ensure that none of the materials used propose an entanglement risk to birds or other species.

Special-Status and State Threatened Species

The General Biological Resources Assessment includes burrowing owl (*Athene cunicularia*) and desert tortoise (*Gopherus agassizii*) to potentially be located on the Project site. In Mitigation Measure BIO-3, pre-construction surveys for both species are combined. CDFW recommends separating the species in separate mitigation measures. CDFW requires desert tortoise surveys to be conducted without being combined with other surveys conducted for other species while using the same personnel. CDFW is also concerned with the inclusion of the allowance to relocate special-status or listed species during pre-construction surveys. The following recommendations are made:

Mitigation Measure BIO-3 – Desert Tortoise

Preconstruction Protocol-level presence absence surveys within the Project area, access route(s), staging area(s), stockpiles(s), and a 50-foot buffer zone for BUOW and Desert Tortoise shall be conducted no more than three (3) at least 30 days prior to new ground disturbance in accordance with *Preparing for Any Action That May Occur Within the Range of the Mojave Desert Tortoise* (USFWS 2019). and documentation indicating such a survey has occurred is to be provided to the County. Pre-construction surveys shall be completed using perpendicular survey routes and 100-percent visual coverage for desert tortoise and their sign, including tortoise remains, burrows, track, scat, or eggshells within the Project area and 50-foot buffer zone. Project surveys cannot start until two negative results from consecutive surveys using perpendicular survey routes for desert tortoise are documented. Results of the survey shall be submitted to CDFW prior to construction start. If the pre-construction surveys confirm desert tortoise absence, the Designated Biologist(s) shall ensure desert tortoises do not enter the Project area. If the surveys or monitoring throughout the Project confirms presence, Permittee shall halt all activities that could result in impacts and notify CDFW immediately in writing. Regardless of the survey results, tortoises cannot be subject to take per the requirements of state and federal law. Handling or other inappropriate treatment of tortoises must be avoided until authorization is obtained from the USFWS and CDFW.

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Mitigation Measure BIO 4 – Burrowing Owl

Prior to initiating Project activities, a qualified biologist shall conduct at least one survey covering the entire Project area and surrounding 15-meter buffer to identify the presence of suitable burrows and/or burrow surrogates (>11 cm in diameter [height and width] and >150 cm in depth) for burrowing owl and sign of burrowing owl (e.g., pellets, prey remains, whitewash, or decoration, etc.) If burrowing owls or suitable burrows and/or sign of burrowing owl are documented on-site, a breeding season survey for burrowing owl in accordance with the Staff Report on Burrowing Owl Mitigation (Department of Fish and Game, March 2012) shall be conducted by a qualified biologist prior to start of Project activities. If no burrowing owl, active burrowing owl burrows, or sign thereof are found, no further action is necessary. If burrowing owl, active burrowing owl burrows, or sign thereof are found the qualified biologist shall prepare and implement a plan for avoidance, minimization, and mitigation measures to be approved by CDFW prior to commencing Project activities and propose mitigation for permanent loss of occupied burrow(s) and habitat.

The surveys will be conducted by a qualified biologist, who shall be approved by the County and CDFW prior to the start of the surveys. Wildlife found on the site will be allowed to leave the site under their own power or relocated, where possible, to the nearest suitable habitat in the surrounding area. If any listed or special status wildlife species are found on the site during pre-construction surveys, an Authorized Permitted Biologist will relocate the species to suitable habitat outside the impact area, once CDFW has approved the proposed relocation activities. In addition, if any nesting birds are observed within the boundaries of the site, the appropriate buffers will be placed around the nest, where necessary.

Mitigation Measure BIO 5

If any listed species (e.g., desert tortoise, Mohave ground squirrel, etc.) are observed on the site during ground disturbance activities, the project biologist shall have the right to halt all activities which may impact the species. **Take of any Federal Endangered Species Act (FESA) and/or California Endangered Species Act (CESA) listed species is prohibited except as authorized by federal and/or state law. If a Project, including Project construction or any Project related activity during the life of this Project, results in the take of FESA and/or CESA-listed species, the Permittee shall seek appropriate authorization prior to Project implementation. This may include an incidental take permit (ITP) or a consistency determination (Fish and Game Code Section 2080.1 and 2081).** Work shall proceed only after hazards to the State or federal listed species or other special-status species are removed by an Authorized Permitted Biologist and the species is no longer at risk **as authorized by**

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law. The project biologist and the Authorized Permitted Biologist will have copies of all of the compliance measures in their possession while work is being conducted onsite. During all on-site activities, project personnel will strictly adhere to the WEAP, BMPs, and additional impact and avoidance or minimization measures described in the permits issued for the project. Project personnel will respond to special status species encounters as directed in the Environmental Awareness Training Program.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e).) Accordingly, please report any special status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-data>. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

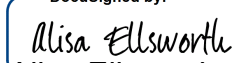
ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document filing fees is necessary. Fees are payable upon filing the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the environmental document filing fee is required in order for the underlying project approval to be operative, vested, and final. (Cal. Code Regs, tit. 14, § 753.5; Fish and G. Code, § 711.4; Pub. Resources Code, § 21089.)

CONCLUSION

CDFW appreciates the opportunity to comment on the MND to assist San Bernardino County Land Use Services in identifying and mitigating Project impacts on biological resources and we request that the County address the Department's comments and concerns prior to adoption of the MND. If you should have any questions pertaining to the comments provided in this letter, please contact Marlee Poff at (760) 338-8942 or at Marlee.Poff@wildlife.ca.gov.

Sincerely,

DocuSigned by:

Alisa Ellsworth

Environmental Program Manager

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ATTACHMENT 1: MITIGATION MONITORING AND REPORTING PROGRAM (MMRP)

PURPOSE OF THE MMRP

The purpose of the MMRP is to ensure compliance with mitigation measures during project implementation. Mitigation measures must be implemented within the time periods indicated in the table below.

TABLE OF MITIGATION MEASURES

The following items are identified for each mitigation measure: Mitigation Measure, Implementation Schedule, and Responsible Party. The Mitigation Measure column summarizes the mitigation requirements. The Implementation Schedule column shows the date or phase when each mitigation measure will be implemented. The Responsible Party column identifies the person or agency that is primarily responsible for implementing mitigation measures.

Biological (BIO) Mitigation Measure	Implementation Schedule	Responsible Party
<p>Mitigation Measure BIO-3 – Desert Tortoise</p> <p>Protocol-level presence absence surveys within the Project area, access route(s), staging area(s), stockpiles(s), and a 50-foot buffer zone for Desert Tortoise shall be conducted no more than three (3) days prior to new ground disturbance in accordance with <i>Preparing for Any Action That May Occur Within the Range of the Mojave Desert Tortoise</i> (USFWS 2019). Pre-construction surveys shall be completed using perpendicular survey routes and 100-percent visual coverage for desert tortoise and their sign, including tortoise remains, burrows, track, scat, or eggshells within the Project area and 50-foot buffer zone. Project surveys cannot start until two negative results from consecutive surveys using perpendicular survey routes for desert tortoise are documented. Results of the survey shall be submitted to CDFW prior to construction start. If the pre-construction surveys confirm desert tortoise absence, the Designated Biologist(s) shall ensure desert tortoises do not enter the Project area. If the surveys or monitoring throughout the Project confirms presence, Permittee shall halt all activities that could result in impacts and notify</p>	<p>Prior to commencing ground- or vegetation-disturbing activities</p>	<p>Project Proponent</p>

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<p>CDFW immediately in writing. Regardless of the survey results, tortoises cannot be subject to take per the requirements of state and federal law. Handling or other inappropriate treatment of tortoises must be avoided until authorization is obtained from the USFWS and CDFW.</p>		
<p>Mitigation Measure BIO 4 – Burrowing Owl</p> <p>Prior to initiating Project activities, a qualified biologist shall conduct at least one survey covering the entire Project area and surrounding 15-meter buffer to identify the presence of suitable burrows and/or burrow surrogates (>11 cm in diameter [height and width] and >150 cm in depth) for burrowing owl and sign of burrowing owl (e.g., pellets, prey remains, whitewash, or decoration, etc.) If burrowing owls or suitable burrows and/or sign of burrowing owl are documented on-site, a breeding season survey for burrowing owl in accordance with the Staff Report on Burrowing Owl Mitigation (Department of Fish and Game, March 2012) shall be conducted by a qualified biologist prior to start of Project activities. If no burrowing owl, active burrowing owl burrows, or sign thereof are found, no further action is necessary. If burrowing owl, active burrowing owl burrows, or sign thereof are found the qualified biologist shall prepare and implement a plan for avoidance, minimization, and mitigation measures to be approved by CDFW prior to commencing Project activities and propose mitigation for permanent loss of occupied burrow(s) and habitat.</p> <p>The surveys will be conducted by a qualified biologist, who shall be approved by the County and CDFW prior to the start of the surveys. Wildlife found on the site will be allowed to leave the site under their own power or relocated, where possible, to the nearest suitable habitat in the surrounding area. If any listed or special status wildlife species are found on the site during pre-construction surveys, an Authorized Permitted Biologist will relocate the species to suitable habitat outside the impact area, once CDFW has approved the proposed relocation activities. In addition, if any nesting birds are observed within the boundaries of the site, the</p>	<p>Prior to commencing ground- or vegetation-disturbing activities</p>	<p>Project Proponent</p>

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<p>appropriate buffers will be placed around the nest, where necessary.</p>		
<p>Mitigation Measure BIO 5</p> <p>If any listed species (e.g., desert tortoise, Mohave ground squirrel, etc.) are observed on the site during ground disturbance activities, the project biologist shall have the right to halt all activities which may impact the species. Take of any Federal Endangered Species Act (FESA) and/or California Endangered Species Act (CESA) listed species is prohibited except as authorized by federal and/or state law. If a Project, including Project construction or any Project related activity during the life of this Project, results in the take of FESA and/or CESA-listed species, the Permittee shall seek appropriate authorization prior to Project implementation. This may include an incidental take permit (ITP) or a consistency determination (Fish and Game Code Section 2080.1 and 2081). Work shall proceed only after hazards to the State or federal listed species or other special-status species are removed by an Authorized Permitted Biologist and the species is no longer at risk as authorized by law. The project biologist and the Authorized Permitted Biologist will have copies of all of the compliance measures in their possession while work is being conducted onsite. During all on-site activities, project personnel will strictly adhere to the WEAP, BMPs, and additional impact and avoidance or minimization measures described in the permits issued for the project. Project personnel will respond to special status species encounters as directed in the Environmental Awareness Training Program.</p>	<p>Prior to commencing ground- or vegetation-disturbing activities 5</p>	<p>Project Proponent</p>