



# Everglades Law Center, Inc.

*Defending Florida's Ecosystems  
and Communities*

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## Northern Everglades Office

P.O. Box 2693  
Winter Haven, FL 33883  
Phone: (561) 568-6740

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July 16, 2013

George Neugent, Mayor  
Monroe County Board of County Commissioners  
1100 Simonton St.  
Key West, FL 33040

## **Re: Discussion and Direction on the Status of the Implementation of the Incidental Take Permit and Associated Habitat Conservation Plan for the Florida Key Deer and Other Protected Species on Big Pine Key and No Name Key.**

Dear Mayor Neugent and Commissioners Kolhage, Carruthers, Rice, and Murphy:

On behalf of the Key Deer Protection Alliance and Last Stand I urge you to maintain the status quo and not take any action with the U.S. Fish & Wildlife Service ("Service") to amend or eliminate the Big Pine Key Habitat Conservation Plan (HCP) and Incidental Take Permit (ITP).

Following more than eight years of negotiation, the Florida Department of Transportation, Monroe County, Florida Department of Community Affairs, established the Big Pine Key HCP with the Service in 2006. The goal of the HCP was to address impacts to several species listed under the Endangered Species Act (ESA) resulting from potential development activities over a twenty-year period in Big Pine Key and No Name Key. The development of this HCP included extensive public involvement and was based on years of scientific study. This research led to the development of a population viability analysis model to evaluate impacts of development scenarios on the Key deer population and the County's development of a conservation priority classification system aimed at protecting species habitat while accommodating responsible development.

There are no compelling reasons why after more than a decade of public participation, study, and implementation, the County should upset the current process. Doing so could create additional complex legal issues and put species such as the Key deer, eastern indigo snake, and Lower Keys marsh rabbit at greater risk of extinction.

Proposed Option #3 of consulting with the Service to close the ITP and rely on the Amended Biological Opinion is likely not an option because the species assessment guides created by the Service under the FEMA Biological Opinion (which staff suggests could replace the HCP) refer all development on Big Pine Key and No Name Key to the HCP.

Therefore, this recommendation would require not only a re-opening of the HCP but may also require the re-opening of the federal court case, *Florida Key Deer v. Fugate*.

Proposed Option #2 of amending the HCP appears to be in response to concerns about constitutional takings claims or claims under the Bert J. Harris Act. These concerns appear to be based merely on speculation and the law does not support the notion that the HCP/ITP's permitting requirements would likely result in successful legal challenges under the Fifth Amendment. In the ESA's forty-year history there has only been one case where plaintiffs have succeeded in bringing such a challenge<sup>1</sup> and that case has been criticized by a number of other courts.<sup>2</sup> Moreover, no appellate court in Florida has ever upheld a trial court finding of a Bert Harris Act violation and some appellate decisions have reversed such rulings by lower courts.<sup>3</sup>

Lastly, eliminating the HCP all together (Proposed Option #4) would likely put a number of species at great risk of extinction as it may encourage landowners to roll the dice and build without any habitat protections. Given the likelihood that such actions would result in the "taking" of federally listed species, this could result in increased liability and additional costs under the ESA for all those involved.

In closing, we urge the Commission to maintain the status quo and keep the HCP in place for the remainder of its duration. If anything, further strengthening of the HCP may be required to address the continued rise in the mortality rate of the Florida Key deer. Further, to the extent additional species are listed under the Act, the ESA affords a process for the Service to re-initiate consultation and make any necessary adjustments to ensure that these species also receive any necessary protections from continued development in the Florida Keys.<sup>4</sup> We thank you for your consideration.

Sincerely,

s/Jason Totoiu

Cc: Derek Howard, Assistant County Attorney

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<sup>1</sup> See Robert Meltz, *The Endangered Species Act (ESA) and Claims of Property Rights "Takings,"* Congressional Research Service, (January 7, 2013) (citing *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001)). This case involved the "taking" of western water rights.

<sup>2</sup> See Melinda H. Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 *Env'tl. L.* 551 (2002).

<sup>3</sup> See, e.g., *Town of Ponce Inlet v. Pacetta, LLC*, Case No. 5D12-1982 (Fla. 5th DCA, July 5, 2013).

<sup>4</sup> See 50 C.F.R. § 402.16.