



August 19, 2024  
*Sent via email*

Derek Newland  
Planner III  
Imperial County Planning and Development  
801 Main Street  
El Centro, CA 92243  
[DerekNewland@co.imperial.ca.us](mailto:DerekNewland@co.imperial.ca.us)

**Subject: Imperial County’s Response to CDFW Comments on Mitigated Negative Declaration, Cal 98 Holdings Project, SCH#: 2024031103**

Dear Derek Newland:

On April 26, 2024, the California Department of Fish and Wildlife (CDFW) submitted comments on the Mitigated Negative Declaration (MND) for the Cal 98 Holdings Project (SCH #2024031103; Project) in its capacity as Trustee and Responsible Agency (Pub. Resources Code, § 21069 & 21070; Fish & G. Code, §§ 711.7, subd. (a) & 1802). On May 22, 2024, CDFW received a response (see Attachment 1) from Imperial County (County), prepared by Barrett Biological Enterprises, regarding CDFW’s comments on the MND and indicating that the MND was scheduled for consideration by the Imperial County Planning Commission at its meeting on July 10, 2024.

To support the County in its environmental review efforts for this Project, CDFW provides the following additional guidance related to the comments provided by the County in its letter received on May 22, 2024.

### **Adequacy of Biological Assessment**

Page 1 of the County’s letter received on May 22, 2024, states: *“Experience in this area for over 20 years has shown that agricultural areas like these might be used for foraging but not for successful nesting, there were no significant trees in the area that would be available for raptor or passerine nesting.”*

This statement is in contradiction to the MND (p. 414), which states “Bird nesting could occur within the project. Ground nesting species, such as lesser nighthawk, and killdeer could use the area.” In addition, impacts to and loss of foraging habitat are a potentially significant impact that should be analyzed and mitigated for in the MND.

The response letter defers the biological assessment to the time of construction on the basis that *“this is an agricultural area that has been farmed for decades and is currently planted to a perennial crop, no change in the species surveyed for and found located within the Project footprint is expected to occur.”* CDFW is concerned that a pre-construction survey is not adequate in timing or scope to detect special-status wildlife or reduce impacts to biological resources to less than significant. The revised Mitigation Measure BIO-[A] on Pages 2 and 3 of the County’s response letter does not reduce impacts to biological resources to less than significant. CDFW is concerned that the County has not adequately analyzed the significance of the Project’s potential impacts on wildlife, including special-status species, that utilize agricultural areas.

### **Potential Impacts to Burrowing Owls**

Page 2 of the County’s letter received on May 22, 2024, states: *“BUOW [burrowing owl] Potential for Occurrence Low on site but burrowing possible in water conveyance system (canals/drains). Those systems belong to the IID and BUOWs found on IIDROW are the responsibility of the IID (Quantified Settlement Agreement (QSA) requirement). Additionally, CNDDDB/BIOS report occurrences of burrowing owl less than 1 mile from the Project site: well outside of the 500 foot buffer zone used for construction monitoring. It would be unusual for there NOT to be BUOW in the vicinity. DeSante et al. (2007) determined that 71% of the estimated BUOW population occupied the Imperial Valley south of the Salton Sea. It is assumed that they are within the agricultural region; four focused surveys are not informative and pedestrian surveys may have an adverse effect of disturbing a breeding pair. The habitat assessment survey established the baseline of presence/absence. As a project usually takes 2-3 years to be permitted, preconstruction surveys provide the most accurate assessment of BUOW presence at the time of construction. As a result of the December 2022 survey, a baseline has been established.”*

Excluding direct or indirect impacts to irrigation drains/canals and the burrowing owls that they support, on the basis that Imperial Irrigation District maintains them, is not congruent with the County’s obligation as CEQA lead agency. Direct and indirect impacts, as well as cumulative impacts, to biological resources associated with the Cal98 Holdings Project must be disclosed and analyzed in the MND, and mitigation to reduce impacts to less than significant must be incorporated. As CEQA lead agency, the County should not defer these obligations to another agency.

The response states, *“CNDDDB/BIOS report occurrences of burrowing owl less than 1 mile from the Project site: well outside of the 500 ft buffer zone used for construction monitoring.”* Unfortunately, it is not sufficient to depend solely on California Natural Diversity Database (CNDDDB) occurrences to determine that impacts to biological resources will be less than significant. CNDDDB is not exhaustive in terms of the data it houses. It is important to emphasize that absence of data in CNDDDB is not proof of absence of species. There are areas of the state that have not been surveyed or where

data have not been submitted to CNDDDB. CDFW recommends that CNDDDB be used as a starting point in gathering information about the potential presence of species within the Project area. Recent biological surveys are also essential to determine the potential for impacts to wildlife. CDFW considers surveys for wildlife to be valid for a 1-year period. The December 2022 field assessments are outdated and not adequate in scope and timing to establish the potential for direct and indirect impacts to burrowing owl resulting from the Cal98 Holdings Project.

The response letter indicates that “*preconstruction surveys provide the most accurate assessment of BUOW presence at the time of construction.*” CDFW is concerned that waiting until the time of construction to determine whether burrowing owls are present on the Project site or in the surrounding area will not be sufficient to reduce impacts to less than significant and may also result in Project delays. The presence of burrowing owls in the surrounding irrigation drains/canals should be determined well in advance of Project activities to provide adequate time to coordinate with the wildlife agencies and to determine appropriate avoidance, minimization, and mitigation measures to prevent direct and indirect impacts to burrowing owls, which would be a significant impact under CEQA. CDFW continues to recommend that the appropriate level of survey effort when burrowing owl habitat has already been confirmed is focused surveys according to the *2012 Staff Report on Burrowing Owl Mitigation* (available online at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843&inline>). Note that avoidance buffers of up to 500 m (1,640 feet) can be necessary when construction activities occur in proximity to breeding burrowing owls (see the 2012 Staff Report).

CDFW is concerned about the potential for burrowing owls (*Athene cunicularia*) to occur in proximity to the Project site in irrigation drains/canals and to move into the Project site prior to and during construction activities. Burrowing owls frequently move into disturbed areas since they are adapted to highly modified habitats (Chipman et al. 2008<sup>1</sup>; Coulombe 1971<sup>2</sup>). In Imperial Valley, burrowing owls are highly dependent on irrigation canals for nesting habitat (Wilkerson and Siegel 2011<sup>3</sup>). Impacts to burrowing owls from the Project could include take of burrowing owls, their nests or eggs, or destroying nesting or foraging habitat, thus impacting burrowing owl populations. Take of individual burrowing owls and their nests is defined by Fish and Game Code section 86, and prohibited by sections 3503, 3503.5, and 3513. Fish and Game Code section 3513 makes it unlawful to take or possess any migratory nongame bird except as provided by

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<sup>1</sup> Chipman, E. D., N. E. McIntyre, R. E. Strauss, M. C. Wallace, J. D. Ray, and C. W. Boal. 2008. Effects of human land use on western burrowing owl foraging and activity budgets. *Journal of Raptor Research* 42(2): 87-98.

<sup>2</sup> Coulombe, H. N. 1971. Behavior and population ecology of the Burrowing Owl, *Speotyto cunicularia*, in the Imperial Valley of California. *Condor* 73:162–176.

<sup>3</sup> Wilkerson, RL and RB Siegel. 2011. Distribution and abundance of western burrowing owls (*Athene cunicularia hypugaea*) in southeastern California. *The Southwestern Naturalist* 56(3): 378-384.

rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. § 703 et seq.).

The changes to Mitigation Measure BIO-[B] in the County's response letter do not reduce impacts to burrowing owl to less than significant. Because of the potential for impacts to burrowing owls to occur as a result of Project activities, CDFW continues to recommend inclusion of Mitigation Measure BIO-[B], as follows, in the MND, to ensure that impacts to this species are avoided or reduced to less than significant:

#### **MM BIO-[B]: Focused and Pre-Construction Surveys for Burrowing Owl**

**Suitable burrowing owl habitat has been confirmed on the site; therefore, focused burrowing owl surveys shall be conducted in accordance with the *Staff Report on Burrowing Owl Mitigation* (2012 or most recent version) prior to vegetation removal or ground-disturbing activities. If burrowing owls are detected during the focused surveys, the qualified biologist and Project proponent shall prepare a Burrowing Owl Plan that shall be submitted to CDFW for review and approval prior to commencing Project activities. The Burrowing Owl Plan shall describe proposed avoidance, monitoring, relocation, minimization, and/or mitigation actions. The Burrowing Owl Plan shall include the number and location of occupied burrow sites, acres of burrowing owl habitat that will be impacted, details of site monitoring, and details on proposed buffers and other avoidance measures if avoidance is proposed. If impacts to occupied burrowing owl habitat or burrow cannot be avoided, the Burrowing Owl Plan shall also describe minimization and compensatory mitigation actions that will be implemented. Proposed implementation of burrow exclusion and closure should only be considered as a last resort, after all other options have been evaluated as exclusion is not in itself an avoidance, minimization, or mitigation method and has the possibility to result in take. The Burrowing Owl Plan shall identify compensatory mitigation for the temporary or permanent loss of occupied burrow(s) and habitat consistent with the "Mitigation Impacts" section of the 2012 Staff Report and shall implement CDFW-approved mitigation prior to initiation of Project activities. If impacts to occupied burrows cannot be avoided, information shall be provided regarding adjacent or nearby suitable habitat available to owls. If no suitable habitat is available nearby, details regarding the creation and funding of artificial burrows (numbers, location, and type of burrows) and management activities for relocated owls shall also be included in the Burrowing Owl Plan. The Project proponent shall implement the Burrowing Owl Plan following CDFW and USFWS review and approval.**

**Preconstruction burrowing owl surveys shall be conducted no less than 14 days prior to the start of Project-related activities and within 24 hours prior to ground disturbance, in accordance with the *Staff Report on Burrowing Owl Mitigation* (2012 or most recent version). Preconstruction surveys should be performed by a qualified biologist following the recommendations and guidelines provided in the *Staff Report on Burrowing Owl Mitigation*. If the preconstruction surveys confirm occupied burrowing owl habitat, Project**

**activities shall be immediately halted. The qualified biologist shall coordinate with CDFW and prepare a Burrowing Owl Plan that shall be submitted to CDFW and USFWS for review and approval prior to commencing Project activities.**

## Conclusion

Compliance with CEQA is predicated on a complete and accurate description of the environmental setting that may be affected by the proposed Project. CDFW is concerned that the assessment of the existing environmental setting has not been adequately analyzed in the MND. CDFW is concerned that without a complete and accurate description of the existing environmental setting, the MND may provide an incomplete analysis of Project-related environmental impacts. CEQA requires that a MND include mitigation measures to avoid or reduce significant impacts. CDFW is concerned that the mitigation measures proposed in the MND and the County's response letter received on May 22, 2024, are not adequate to avoid or reduce impacts to biological resources to below a level of significance.

CDFW appreciates the opportunity to provide additional guidance on the Cal 98 Holdings Project to assist Imperial County in identifying and mitigating Project impacts on biological resources to reduce impacts to below a level of significance. CDFW requests that Imperial County address CDFW's concerns prior to adoption of the MND. Questions or comments regarding this letter should be directed to Julia Charpek, Environmental Scientist, at 909.354.0937 or [Julia.Charpek@wildlife.ca.gov](mailto:Julia.Charpek@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
  
84F92FFEEFD24C8...

Kim Freeburn  
Environmental Program Manager

**Attachment 1: Copy of Imperial County's response to CDFW's comments on the MND, received by CDFW on May 22, 2024.**

ec:

Heather Brashear, Senior Environmental Scientist (Supervisor)  
CDFW, Inland Deserts Region  
[Heather.Brashear@wildlife.ca.gov](mailto:Heather.Brashear@wildlife.ca.gov)

Office of Planning and Research, State Clearinghouse, Sacramento  
[state.clearinghouse@opr.ca.gov](mailto:state.clearinghouse@opr.ca.gov)

**Attachment 1: Copy of Imperial County’s response to CDFW’s comments on the MND, received by CDFW on May 22, 2024**

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**Barrett Biological Enterprises**

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May 16, 2024

Julia Charpek, Environmental Scientist  
State of California – Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
Inland Deserts Region  
3602 Inland Empire Blvd, Suite C-220  
Ontario, CA 91764

Re: CDFW letter of April 26, 2024, Zone Change #23-0007 /Conditional Use Permit #23-0027  
/Initial Study #23-0033 Cal 98 Holdings (PROJECT) MITIGATED NEGATIVE DECLARATION (MND)  
SCH# 2024031103

Dear Ms. Charpek,

Thank you for providing CDFW comments and your biological expertise during the public agency environmental review efforts for this project and project related activities that have the potential to adversely affect fish and wildlife resources.

First, to address CDFW concerns regarding the adequacy of the biological assessment conducted by Barrett’s Biological Enterprises. Three qualified, experienced biologists spent six hours evaluating the agricultural fields and vacant lot of the project and documented wildlife and botanical species. A 9 Quadrangle CNDDDB search was performed prior to the survey. Biologists were familiar with the species listed in that document. This is an active agricultural field of alfalfa and has been farmed for decades. Experience in this area for over 20 years has shown that agricultural areas like these might be used for foraging but not for successful nesting, there were no significant trees in the area that would be available for raptor or passerine nesting. These issues were addressed in Appendix A and also in the body of the report. Please review the Appendix A and the information regarding Sensitive Species in 3.4 Sensitive Biological Resources, as this information addresses your concerns.

No Focused BUOW study was conducted as no BUOW were observed on site or in buffer zone. The report actually states: BUOW Potential for Occurrence Low on site but burrowing possible in





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water conveyance system (canals/drains). Those systems belong to the IID and BUOWs found on IIDROW are the responsibility of the IID (Quantified Settlement Agreement (QSA) requirement). Additionally, CNDDDB/BIOS report occurrences of burrowing owl less than 1 mile from the Project site: well outside of the 500 foot buffer zone used for construction monitoring. It would be unusual for there NOT to be BUOW in the vicinity. DeSante et al. (2007) determined that 71% of the estimated BUOW population occupied the Imperial Valley south of the Salton Sea. It is assumed that they are within the agricultural region; four focused surveys are not informative and pedestrian surveys may have an adverse effect of disturbing a breeding pair. The habitat assessment survey established the baseline of presence/absence. As a project usually takes 2-3 years to be permitted, preconstruction surveys provide the most accurate assessment of BUOW presence at the time of construction. As a result of the December 2022 survey, a baseline has been established.

Other focused surveys were not conducted as none of the sensitive species were not found or expected to be found on site as explained in Appendix A.

Due to unforeseen events, the biological survey was performed outside of the one year preferred by CDFW. It is still a valid baseline quantification of the biological inventory. The preconstruction survey will provide a current assessment of the environmental setting. The mitigations in the report addressed actions to be taken if sensitive species are found.

CEQA states that lead agency may use an environmental assessment, or a similar analysis based on expert opinion supported by technical studies to document findings in the Initial Study. An initial study is neither intended nor required to include the level of detail included in an EIR. This was accomplished through the Biological Resources Assessment Technical Report.

After review of CDFW suggested Mitigation Measures, we believe the following revisions to be applicable:

MM BIO-[A]: Assessment of Biological Resources

Prior to Project construction activities, a complete and recent inventory of rare, threatened, endangered, and other sensitive species located within the Project footprint and within offsite areas with the potential to be affected, including California Species of Special Concern (CSSC)





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and California Fully Protected Species (Fish and Game Code § 3511), has been completed. Species were addressed that include all those which meet the CEQA definition (CEQA Guidelines § 15380). A qualified biologist will complete an initial take avoidance survey no more than 30 days or less than 14 days; and within 24 hours prior to ground disturbance activities and notify CDFW if any sensitive species are observed.

As this is an agricultural area that has been farmed for decades and is currently planted to a perennial crop, no change in the species surveyed for and found located within the Project footprint is expected to occur.

**MM BIO-[B]: Focused and Pre-Construction Surveys for Burrowing Owl**

BUOW Potential for Occurrence Low on site but burrowing possible in water conveyance system (canals/drains). Those systems belong to the IID and BUOWs found on IIDROW are the responsibility of the IID (Quantified Settlement Agreement (QSA) requirement. Suitable burrowing owl foraging habitat has been confirmed on the site; therefore, a qualified biologist will complete an initial take avoidance survey no more than 30 days or less than 14 days; and within 24 hours prior to ground disturbance activities using the recommended methods described in the Detection Surveys section above. Implementation of avoidance and minimization measures would be triggered by positive owl presence on the site where project activities will occur. The development of avoidance and minimization approaches would be informed by monitoring the burrowing owls prior to vegetation removal or ground-disturbing activities. If burrowing owls are detected during the focused take avoidance preconstruction surveys, the qualified biologist and Project proponent shall prepare a Burrowing Owl Plan that shall be submitted to CDFW for review and approval prior to commencing Project activities. The Burrowing Owl Plan shall describe proposed avoidance, monitoring, relocation, minimization, and/or mitigation actions. The Burrowing Owl Plan shall include the number and location of occupied burrow sites, acres of burrowing owl habitat that will be impacted, details of site monitoring, and details on proposed buffers and other avoidance measures if avoidance is proposed. If impacts to occupied burrowing owl habitat or burrow cannot be avoided, the Burrowing Owl Plan shall also describe minimization and compensatory mitigation actions that will be implemented. Proposed implementation of burrow exclusion and closure should only be considered as a last resort, after all other options have been evaluated as exclusion is not in itself an avoidance, minimization, or mitigation method and has the possibility to result in take. The





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Burrowing Owl Plan shall identify compensatory mitigation for the temporary or permanent loss of occupied burrow(s) and habitat consistent with the "Mitigation Impacts" section of the 2012 Staff Report and shall implement CDFW-approved mitigation prior to initiation of Project activities. If impacts to occupied burrows cannot be avoided, information shall be provided regarding adjacent or nearby suitable habitat available to owls. If no suitable habitat is available nearby, details regarding the creation and funding of artificial burrows (numbers, location, and type of burrows) and management activities for relocated owls shall also be included in the Burrowing Owl Plan. The Project proponent shall implement the Burrowing Owl Plan following CDFW review and approval.

MM BIO-[C]: Nesting Birds

Regardless of the time of year, nesting bird surveys shall be performed by a qualified avian biologist no more than 3 days prior to vegetation removal or ground-disturbing activities. Pre-construction surveys shall focus on both direct and indirect evidence of nesting, including nest locations and nesting behavior. The qualified avian biologist will make every effort to avoid potential nest predation as a result of survey and monitoring efforts. If active nests are found during the pre-construction nesting bird surveys, a qualified biologist shall establish an appropriate nest buffer to be marked on the ground. Nest buffers are species specific and shall be at least 300 feet for passerines and 500 feet for raptors. A smaller or larger buffer may be determined by the qualified biologist familiar with the nesting phenology of the nesting species and based on nest and buffer monitoring results. Construction activities may not occur inside the established buffers, which shall remain on site until a qualified biologist determines the young have fledged or the nest is no longer active. Active nests and adequacy of the established buffer distance shall be monitored daily by the qualified biologist until the qualified biologist has determined the young have fledged or the Project has been completed. The qualified biologist has the authority to stop work if nesting pairs exhibit signs of disturbance after concurrence with CDFW.

MM BIO-[D]: CDFW's Lake and Stream Alteration (LSA) Program

This project is located entirely on agricultural land. The vacant lot to the south will not be utilized and will be left as a vacant lot. None of the following LSA activities will occur:





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- Divert or obstruct the natural flow of any river, stream, or lake;
- Change the bed, channel, or bank of any river, stream, or lake;
- Use material from any river, stream, or lake; or
- Deposit or dispose of material into any river, stream, or lake.

As an Imperial County Planning, Development Department requirement, a retention basin will be built that is required to contain the results of a 100-year flood. Therefore, no water will leave the project.

No IID water conveyance structures will be impacted.

MM BIO-[G]: Worker Education Program

Permittee shall conduct an education program for all persons employed or otherwise working on the Project prior to performing any work on-site. The education program shall consist of a presentation from a Designated Biologist or safety manager with access to the Designated Biologist that includes a brief discussion of the biology of the habitats and species identified in this letter expected and present at this site. The Designated Biologist or safety manager with access to the Designated Biologist shall also include as part of the education program a brief discussion information about the distribution and habitat needs of any protected species that may be present, legal protections for those species, penalties for violations, and Project-specific protective measures included in this Agreement. Interpretation shall be provided for non-English-speaking workers, and the same instruction shall be provided for any new workers prior to their performing work on-site. The Permittee shall prepare and distribute wallet-sized cards or a fact sheet that contains this information for workers to carry on-site. Upon completion of the education program, employees shall sign a form stating they attended the education program and understand all protection measures. These forms shall be filed at the worksite offices and be available to CDFW upon request. The education program shall be repeated annually for part of the Project extending more than one (1) year. Copies of the education program materials shall be maintained at the Project site for workers to reference as needed.

Permittee shall include a brief invasive species education program for all persons working on the Project prior to the performing any work on-site. The education program shall consist of a presentation from a Designated Biologist or safety manager with access to the Designated





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Biologist that includes a brief discussion of the invasive species currently present within the Project site as well as those that may pose a threat to or have the potential to invade the Project site. The brief discussion shall include a physical description of each species and information regarding their habitat preferences, local and statewide distribution, modes of dispersal, and impacts. The education program shall also include a brief discussion of Best Management Practices (BMPs) to be implemented at the Project site to avoid the introduction and spread of invasive species into and out of the Project site. Note: the WEAP presentation shall not exceed 15-20 minutes.

BBE concludes that CDFW did not sufficiently review the Biological Resources Assessment Technical Report which would have answered the comments listed in CDFW letter of April 26, 2024.

Please do not hesitate to contact BBE regarding this comment letter.

Sincerely,

Marie S. Barrett  
Senior Biologist

