ROYAL MINES & MINERALS CORP.

183 IBLA 174 Decided March 1, 2013

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

ROYAL MINES & MINERALS CORP.

IBLA 2012-170 Decided March 1, 2013

Appeal from a decision issued by the Southern Nevada District Office, Las Vegas Field Office, Bureau of Land Management, rejecting a notice of intent to conduct exploratory drilling activities within known desert tortoise habitat and requiring the submission of a plan of operations. N-91021.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Plan of Operations--Mining Claims: Surface Uses

   Truck-mounted drilling is not casual use. 43 C.F.R. § 3809.5(2). Although truck-mounted drilling that disturbs less than 5 acres may be conducted under a notice in most situations, *see* 43 C.F.R. § 3809.21, an operator intending to conduct such activity (or any activity greater than casual use) in areas known to contain a threatened or endangered species or in a designated critical habitat is required by 43 C.F.R. § 3809.11(c)(6) to obtain approval of a plan of operations unless a formally approved land use plan or species recovery plan provides otherwise.

APPEARANCES: Michael Boyko, Director of Operations, Royal Mines and Minerals Corp., Henderson, Nevada, for appellant; James E. Karkut, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Royal Mines and Minerals Corp. (Royal) has appealed from the March 28, 2012, decision issued by the Southern Nevada District Office, Las Vegas Field Office, Bureau of Land Management (BLM), rejecting a notice of intent to conduct exploratory drilling activities (Notice) within known desert tortoise habitat and requiring the submission of a plan of operations. On appeal, Royal contends that BLM has the discretion to accept a notice and requests the Board to reverse the decision, and allow it to proceed with its proposed exploration in accordance with the terms of its notice.

We affirm BLM's decision, determining, for the reasons discussed below, that given the circumstances of this case, BLM properly found that Royal must conduct its proposed mining activities pursuant to an approved plan of operations.

Applicable Legal and Policy Framework

On April 2, 1990, the U.S. Fish and Wildlife Service (FWS), Department of the Interior, listed the Mojave population of the desert tortoise (Gopherus agassizii) as a threatened species pursuant the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544 (2006).[1] 55 Fed. Reg. 12,178; *see* 50 C.F.R. § 17.11(h); *see also* 16 U.S.C. § 1532(20) (defining "threatened species" as those which are "likely to become an endangered species within the foreseeable future throughout all or a significant portion of [their] range"). Once a species has been listed as either "threatened" or "endangered," the Department must "develop and implement" a "recovery plan" "for the conservation and survival" of each endangered and threatened species. 16 U.S.C. § 1533(f)(1). A recovery plan "incorporates, to the maximum extent practicable, site-specific management actions that may be necessary to achieve the plan's goal for the conservation and survival of the species, and an estimate of the time required and cost to carry out those actions as well as intermediate steps toward the goal." *Pub. Employees for Env. Responsibility v. U.S. Dep't. of the Interior*, 832 F. Supp. 2d 5, 11 n.4 (D.D.C. 2011) (citation omitted).

In 1994, the FWS published a recovery plan for the desert tortoise (the 1994 Recovery Plan), which incorporated, to the maximum extent practicable, site-specific management actions necessary to achieve the plan's goal for the tortoises' conservation and survival.[2] It also designated 6.4 million acres as desert tortoise

[1] Unless otherwise specified, we cite to the 2006 edition of the U.S. Code.

[2] The 1994 Recovery Plan is available at http://ecos.fws.gov/docs/recovery_plans/1994/940628.pdf (last visited on Jan. 18,

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critical habitat. These lands were divided into Desert Wildlife Management Areas (DWMAs) in which specific conservation, protection, and recovery actions were to take place. A portion of the Piute-Eldorado DWMA is in T. 29 S., R. 63 E., secs. 5-10, 15-23, and 26-36, Mount Diablo Meridian, Clark County, Nevada. *See* 50 C.F.R. § 17.95-c-Reptiles (designated critical habitat for desert tortoise); 59 Fed. Reg. 5,820 (Feb. 8, 1994).

The 1994 Recovery Plan recognized that mining, among other human activities, directly and indirectly causes the destruction, degradation, and fragmentation of desert tortoise habitat. *See* 1994 Recovery Plan at F16. Nevertheless, the FWS noted that mining within DWMAs could take place "on a case-by-case basis, provided that the cumulative impacts of these activities do not significantly impact desert tortoise habitats or populations, that any potential effects on desert tortoise populations are carefully mitigated during the operation, and that the land is restored to its pre-disturbance condition."[3] *Id*. at 56.

In 2011, the FWS revised its Recovery Plan for the desert tortoise.[4] Section 2.12, titled "Limit mining and minimize its effects," states that

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[2] (...continued)
2013).

[3] The 1994 Recovery Plan directed other land management agencies to protect desert tortoises within designated DWMAs. 1994 Recovery Plan at 46-47. In 1998, BLM designated 328,242 acres as the Piute/Eldorado Valley area of critical environmental concern (ACEC) under its land management authority provided by the Federal Land Policy and Management Act of 1976 (FLPMA). *See* 43 U.S.C. § 1702. An ACEC is defined as lands "where special management attention is required (when such areas are developed or used or where no development is required)" in order to prevent irreparable damage to important natural or historical resources. *Id*. § 1702(a). This ACEC, serialized by BLM as NVN 076881, contains 286,541 acres of designated desert tortoise critical habitat and represents the largest area of high density desert tortoise habitat in Nevada. *See* 1998 Las Vegas Resource Management Plan. For our purposes, the boundaries of the ACEC are generally coextensive with those of the Piute-Eldorado DWMA in T. 29 S., R. 63 E., secs. 5-10, 15-23, and 26-36, Mount Diablo Meridian, Clark County, Nevada. The lands were eventually withdrawn from location and entry under the United States mining laws to protect desert tortoise habitat. 74 Fed. Reg. 56,657 (Nov. 2, 2009). As described below, the lands at issue are not within this designated area but lie immediately adjacent thereto.

[4] *See* U.S. Fish and Wildlife Service, Pacific Southwest Region, Sacramento, California, REVISED RECOVERY PLAN FOR THE MOJAVE POPULATION OF THE DESERT TORTOISE (GOPHERUS AGASSIZII), 222 pp. (2011).

> impacts from mining can include habitat destruction and direct mortality from off-road exploratory travel; habitat loss to road and development construction, sand and gravel extraction, leachate ponds, tailings, and trash; introduction of toxins; fugitive dust and soil erosion . . . and creation of disturbance zones for invasive plant species to establish. Within tortoise conservation areas and *where indirect effects would affect these areas, mining should be* withdrawn (if feasible) or *limited through mining plans of operations*. Monitoring plans and mitigation/minimization measures should be implemented at mining sites.

Id. at 76 (emphasis supplied).

BLM is charged with a duty under section 302(b) of FLPMA, 43 U.S.C. § 1732(b), and 43 C.F.R. Subpart 3809 to ensure that mining activities under the mining laws do not result in "unnecessary or undue degradation of the public lands." 43 C.F.R. § 3809.1(a); *see* M*ineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 33, 41-46 (D.D.C. 2003); *Robert Lewis*, 180 IBLA 376, 382-83 (2011)*; Austin Shepherd*, 178 IBLA 224, 232 (2009); *Cat Mountain Corp.*, 148 IBLA 249, 252 (1999); 43 C.F.R. § 3809.5 (defining unnecessary or undue degradation). Mining claimants also have a responsibility to protect the public lands, and accordingly, Subpart 3809 "establishes procedures and standards to ensure that operators and mining claimants meet this responsibility." 43 C.F.R. § 3809.1(a).

Mining activities resulting in only negligible disturbance of Federal lands are identified as "casual use" operations. 43 C.F.R. § 3809.5.[5] These activities require

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[5] As we have explained before, the regulations do not provide exclusive lists of activities that do and do not constitute casual use, but rather provide examples in the definition of "casual use" found in 43 C.F.R. § 3809.5. *Robert Lewis*, 180 IBLA at 384.

> *Casual use* means activities ordinarily resulting in no or negligible disturbance of the public lands or resources. For example –
> (1) Casual use generally includes the collection of geochemical, rock, soil, or mineral specimens using hand tools; hand panning; or non-motorized sluicing. It may include use of small portable suction dredges[,] . . . metal detectors, gold spears and other battery-operated devices . . . . Operators may use motorized vehicles for casual use activities . . . .
> (2) Casual use does not include use of mechanized earth-moving equipment, truck-mounted drilling equipment, motorized vehicles in areas when designated as closed . . . , chemicals, or explosives. It also

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no notification to or approval by BLM. 43 C.F.R. § 3809.10(a); *Robert Lewis*, 180 IBLA at 383 (citing *Joe Guttierez*, 174 IBLA 207, 221 (2008)). When mining activities rise above casual use, a mining claimant or operator must satisfy the notice or plan of operations and financial guarantee requirements of the 3809 regulations. Notice-level operations consist of exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed. *See* 43 C.F.R. § 3809.21(a).[6] Mining activities that cause a cumulative surface disturbance of more than 5 acres in any calendar year are identified as "plan-level" operations, which BLM may allow only after it has reviewed and approved the plan and the mandatory financial guarantee. 43 C.F.R. §§ 3809.11, 3809.412; *see also id.* at § 3809.411(a)(3)(ii) (environmental review required). However, there are some circumstances in which an approved plan of operations is required for any operation causing surface disturbance greater than casual use, even if less than 5 acres. 43 C.F.R. § 3809.11(c).

A mining claimant or operator who wishes to conduct mining activities on public lands "known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat" must first submit to BLM a plan of operations, regardless of whether the proposed activity would otherwise qualify as a notice-level operation. 43 C.F.R. § 3809.11(c)(6). The reason for requiring a plan of operations in this situation is to ensure that the impacts of the proposed operation on all potentially-affected resources are fully considered.[7] Thus,

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[5] (...continued)

> does not include "occupancy" . . . or operations in areas where the cumulative effects of the activities result in more than negligible disturbance.

43 C.F.R. § 3809.5 (emphasis added).

[6] "Exploration" includes activities such as "sampling, drilling, or developing surface . . . workings to evaluate the type, extent, quantity, or quality of mineral values present." 43 C.F.R. § 3809.5. The operator must submit to BLM a written notice containing the information outlined in 43 C.F.R. § 3809.301. Once BLM receives the notice, it has 15 calendar days to, *inter alia*, review the filing for completeness, notify the operator that the notice must be modified to prevent unnecessary or undue degradation, or determine that the operator's proposed activities do not qualify as notice-level operations. *See* 43 C.F.R. § 3809.313(b), (e); *Robert Lewis*, 180 IBLA at 383; *LKA International, Inc.*, 175 IBLA 225, 231 (2008); *George Stroup*, 164 IBLA 74, 79 (2004).

[7] We note that the ESA generally requires BLM to ensure that surface-disturbing activities it authorizes are not likely to jeopardize the continued existence of any

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BLM may require the operator to supply baseline environmental information in its plan of operations to assist the agency in analyzing potential environmental impacts from the proposed action. 43 C.F.R. § 3809.411(a)(3). Moreover, the regulations require BLM to publish a notice of the availability of the proposed plan in a newspaper of general circulation or an environmental assessment (EA) prepared pursuant to regulations and procedures implementing section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), and accept public comment for at least 30 days. 43 C.F.R. § 3809.411(c).

The regulations provide for an exception to conducting notice-level operations pursuant to an approved plan of operations in an area known to contain Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat: A mining claimant may proceed under a notice if a "formal land-use plan or threatened or endangered species recovery plan" allows for it. 43 C.F.R. § 3809.11(c)(6). BLM has explained that this portion of the "rule [] acknowledges that in some cases, under an endangered species recovery plan, notice-level operations[] may be allowed. The final rule doesn't affect those situations, and notice-level operations could be conducted in those areas if allowed under the land-use plan or recovery plan." 65 Fed. Reg. 69,998, 70,020 (Nov. 21, 2000) (Preamble/Record of Decision). As discussed below, this exception is not applicable to this case.

Factual Background

In 2006, multiple claimants located on Federal lands the P V Red #141 and P V Red #143, two unpatented placer mining claims respectively serialized by BLM as NMC 924338 and NMC 924340, and located in pertinent part in sec. 14, T. 29 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada, approximately 3 miles from Searchlight, Nevada.

On February 5, 2010, BLM received a Plan of Operations, dated January 29, 2010, from Royal (Jan. 2010 Plan). BLM serialized the Plan as N-88186. Therein, Royal proposed to drill 11 exploratory holes on P V Red #141 and P V Red #143 to sample for the presence of gold. Royal would use a truck-mounted reverse circulation drill rig and associated water truck to bore holes to a maximum depth of 200 feet. A maximum area of 20 feet by 17.5 feet (about 0.0875 total acres) for each hole would be temporarily disturbed. *See* Jan. 2010 Plan at 5. Even though Royal's

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[7] (...continued)
threatened or endangered species or result in the destruction or adverse modification of habitat of such species, including any species proposed to be listed or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. 16 U.S.C. § 1536(a)(2).

proposed surface exploration activities did not exceed 5 acres (*see* 43 C.F.R. § 3809.21(a)), the company submitted a Plan "because desert tortoise have been identified as occurring in the area of Plan activities." *Id*. at 1.

BLM acknowledged receipt of Royal's Jan. 2010 Plan and instructed Royal to include additional information needed to adequately review the Plan. *See* letter from BLM to Royal, dated March 8, 2010. BLM specifically requested Royal to provide the exact locations of the 11 drilling sites. Royal submitted its revised Plan of Operations dated May 24, 2010, which BLM received on June 7, 2010. Royal informed BLM that drill sites 1 through 9 were to take place on the P V Red #141 (NMC 924338), with holes 1 through 4 situated in the W½NW¼NW¼ of sec. 14, T. 29 S., R. 63 E., and holes 5 through 9 positioned in the W½SW¼NW¼ of the same section. The last two drill sites were positioned on the P V Red #143 (NMC 924340), in the W½NW¼SE¼ of sec. 14. *See* June 2010 Revised Plan at Appx. A, Fig. 2. These sites were directly adjacent to a pre-existing dirt road. *See* 3809 Compliance Inspection Report, dated Mar. 27, 2012 ("All of the [drill] sites [are] parallel [to] the road, which is a county claimed RS2477."). *See* Master Title Plat for T. 29 S., R. 63 E., Mount Diablo Meridian (current to Nov. 6, 2009) (showing a Federal telephone right of way). Most notably, the drilling locations are within a few feet of the Piute/Eldorado Valley ACEC.

After addressing several other outstanding issues identified by BLM, Royal submitted an acceptable Final Plan dated October 20, 2010, which BLM received on November 8, 2010. BLM conducted internal scoping of the proposed project and instructed Royal to complete an EA. *See* letter from BLM to Royal, dated Mar. 11, 2011. Nine months passed.

On December 12, 2011, Royal asked BLM to accept a Notice of Operations in lieu of its Final Plan. Royal contended that FWS' 2011 Recovery Plan, which was not finalized when the company submitted its Final Plan, permits notice-level operations without an approved plan of operations: "[W]e see no conflict with the recovery plan" in conducting notice-level operations without a BLM-approved plan of operations. Thus, Royal argued that it should be able to conduct drilling on its claims pursuant to a notice. Letter from Royal to BLM, dated Dec. 12, 2011, at unpaginated (unp.) 1 (citing 65 Fed. Reg. at 70,020). According to Royal, "[a]cceptance of a Notice would save the BLM and Royal significant resources in time and money and could accelerate job growth in southern Nevada." *Id*. at unp. 2.

BLM replied on January 5, 2012. It recognized the exception noted in 43 C.F.R. § 3809.11(c)(6), which allows the agency the discretion to adopt a recovery plan's suggested procedures for notice-level mining operations. However, BLM noted that Royal did "not point to any specific citation or otherwise identify a provision in the recovery plan that would apply to allowing notice level activity in an

area in which a threatened species has been found," and stated that it found nothing in the recovery plan that allows notice level activity. Letter from BLM to Royal, dated Jan. 5, 2012, at 1. BLM therefore determined that "if notice level activities are proposed in lands known to contain" desert tortoise, "a plan of operations will be required." *Id*. at 2.

Because Royal's mining claims are on lands "classified as moderate to very high density tortoise habitat, and not designated critical habitat," BLM invited Royal to submit a notice. The agency emphasized, however, that it would conduct a site inspection to determine whether desert tortoise existed in the proposed project area. "If [] tortoises are found, the BLM will return the notice and require a plan of operations." Letter from BLM to Royal, dated Jan. 5, 2012, at 2.

On March 14, 2012, Royal filed with BLM its documentation relating to its notice-level operations. *See* "Notice for a confirmation drilling project" (Notice). The Notice mirrored its previously-filed Final Plan. BLM serialized the Notice as N-91021. Ten days later, BLM conducted an onsite inspection of the proposed project area: "Although it is early in the season for tortoise to be out, [we] found 6 tortoise burrows of which 4 were active, 2 pieces of scat and 1 live tortoise out of its burrow. Due to observed presence of tortoise[,] a Plan of Operations is required." 3809 Compliance Inspection Report, dated Mar. 27, 2012. Photographs of BLM's findings were attached to the Report. BLM rejected Royal's Notice the next day. Royal timely appealed.[8]

Discussion

[1] As indicated above, the exploration activity Royal proposes is not casual use as defined in 43 C.F.R. § 3809.5. The definition explicitly excludes mechanized earth-moving equipment and truck-mounted drilling equipment.
43 C.F.R. § 3809.5(2). Although truck-mounted drilling that disturbs less than 5 acres may be conducted under a notice in most situations, *see* 43 C.F.R. § 3809.21,

[8] We note that Royal requested this Board "to refer this case to [BLM] for an Appropriate Dispute Resolution meeting with [BLM] before [] the IBLA[] actually evaluate[s] the merits of our case from our Statement of Reasons, attached." *See* Notice of Appeal at 1. In a docketing notice, the Board provided Royal information on pursuing alternative dispute resolution through the Department's Office of Collaborative Action and Dispute Resolution (CADR). There is no indication in the administrative record before us that Royal ever contacted CADR. This Board has contacted the CADR office and it is not aware of any alternative dispute resolution proceedings initiated by Royal. BLM has also indicated that "the issue on appeal is not one that is appropriate for a dispute resolution process." Answer at 4 n.3. Accordingly, this matter is ripe for review.

an operator intending to conduct such activity (or any activity greater than casual use) in areas known to contain a threatened or endangered species or in a designated critical habitat is required by 43 C.F.R. § 3809.11(c)(6) to obtain approval of a plan of operations unless a formally approved land use plan or species recovery plan provides otherwise. Where the land use plan or species recovery plan does not expressly allow for action other than an approved plan of operations, a BLM decision requiring an approved plan of operations for notice-level exploration activity will be affirmed on appeal.

Royal's principal reason for its request to operate under a notice rather than an approved plan of operations is its "concern[ ] with the unnecessary and burdensome costs for authorization of our drilling plan by requiring a Plan of Operations, when the environmental requirements, standards, and benefits with a notice level authority would be the same at a greatly reduced cost[] not only to Royal but to BLM." Statement of Reasons (SOR) at ¶ 10. In order to avoid those costs, Royal believes BLM should allow it to operate pursuant to a notice, which does not require the preparation of an EA. Royal contends that 43 C.F.R. § 3809.11(c)(6) "allow[s] Notice level operations when there is a recovery plan in place."[9] SOR at ¶ 1. Royal references its letter to BLM dated December 12, 2011, in which it asserted that BLM possesses the flexibility pursuant to the Recovery Plan to accept a notice. We cannot agree.

The record clearly establishes that the proposed project is "known to contain Federally proposed or listed threatened or endangered species or their proposed or designated habitat."[10] The regulation allowing notice-level activities therefore does not apply. As set forth above, the Recovery Plan recognizes that mining, including notice-level activities, in desert tortoise habitat may take place in conservation areas, but it also explicitly provides for limiting the effects of such activities through mining plans of operations. Recovery Plan at 76. Thus, the limited exception provided in 43 C.F.R. § 3809.11(c)(6) does not relieve Royal of the obligation to conduct its

[9] Royal also asserts that it can proceed with its operations pursuant to a notice because it will retain a biologist, monitor its operations, and adjust its drilling activities if desert tortoises are encountered within the project area. *See* SOR at ¶¶ 4-6, 9. These measures are irrelevant to the legal question of whether Royal has a regulatory obligation to submit a plan of operations for notice-level mining activities in an area known to contain a threatened species.

[10] Since the lands Royal wants to explore contain occupied tortoise habitat, we need not discuss whether Royal's drilling plans would indirectly affect the conservation area.

activities under an approved plan of operations, and Royal's contentions to the contrary must be rejected. BLM's decision is properly affirmed.[11]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
T. Britt Price
Administrative Judge

[11] Royal quotes language from Executive Order (EO) No. 13,563, "Improving Regulation and Regulatory Review," for the proposition that BLM has a duty to curb costs associated with accepting, processing, and authorizing Royal's drilling plan: BLM must "take a hard look at measures in permits and other authorizations to ensure they are absolutely necessary for the projects at hand." Letter dated Dec. 12, 2011; *see* SOR at ¶ 10. This EO directs Federal agencies to conduct a cost-benefit analysis of proposed regulations and mandates retrospective review of existing regulations to simplify and reduce regulatory requirements that are "redundant, inconsistent, or overlapping." EO No. 13,563, 76 Fed. Reg. 3,821 § 4 (Jan. 18, 2011). Royal fails to show how this EO supports its claim, and we consider this matter no further.