



WESTERN WATERSHEDS PROJECT
DEFENDERS OF WILDLIFE

188 IBLA 250

Decided September 15, 2016



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Interior Board of Land Appeals
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DEFENDERS OF WILDLIFE

IBLA 2014-164

Decided September 15, 2016

Appeal from a Decision Record and Rationale by the Assistant Field Manager, Resources, Las Vegas (Nevada) Field Office, Southern Nevada District, Bureau of Land Management, approving the Eldorado Valley Tortoise Translocation Plan. DOI-BLM-NV-S010-2014-0038-DNA.

Affirmed.

1. Environmental Quality: Environmental Statements;
National Environmental Policy Act of 1969:
Environmental Statements

A BLM decision approving the proposed release of captively bred and/or raised desert tortoises into an area of public lands will be affirmed where BLM prepared a Documentation of NEPA Adequacy, concluding that it had already taken a hard look at the likely environmental impacts of taking such action, and reasonable alternatives thereto, in a prior Programmatic EA, and the appellant has failed to carry its burden to demonstrate, with objective proof, that BLM had failed in the EA to adequately consider the likely effects of taking such action on the health, genetic diversity, and long-term viability of the existing native tortoise population or the species as a whole.

2. Federal Land Policy and Management Act of 1976:
Unnecessary or Undue Degradation

A BLM decision approving the proposed release of captively bred and/or raised desert tortoises into an area of public lands will not be deemed to unnecessarily or unduly degrade the public lands, in violation of section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2012), by virtue of BLM's

failure to abide by its procedural obligations of section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), where BLM fulfilled those obligations.

3. Endangered Species Act of 1973: Section 7: Generally

In approving the proposed release of captively bred and/or raised desert tortoises into an area of public lands, BLM complied with its procedural obligation under section 7 of the ESA, 16 U.S.C. § 1536 (2012), to formally consult with FWS, where the proposed action was covered by a prior Programmatic Biological Opinion in which FWS concluded that actions designed to augment the tortoise population in a larger area of the public lands that encompasses the area at issue were not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat.

APPEARANCES: Michael J. Connor, California Director, Western Watersheds Project, Reseda, California, for Western Watersheds Project; Jeff Aardahl, California Representative, Defenders of Wildlife, Gualala, California, for Defenders of Wildlife; Edward L. LaRue, Jr., Chairperson, Ecosystems Advisory Committee, The Desert Tortoise Council, Palmdale, California, for The Desert Tortoise Council; Luke Miller, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE ROBERTS

Western Watersheds Project and Defenders of Wildlife (collectively, WWP) have appealed from a March 27, 2014, Decision Record and Rationale (DR) of the Assistant Field Manager, Resources, Las Vegas (Nevada) Field Office (LVFO), Southern Nevada District, Bureau of Land Management (BLM), approving the Eldorado Valley Tortoise Translocation Plan (Translocation Plan).¹ The Fish and Wildlife Service (FWS), U.S. Department of the Interior, submitted the Translocation Plan to BLM on or about December 17, 2013. Under the Plan, 600 desert tortoises (300 adults and 300 juveniles) would be translocated from the Desert Tortoise Conservation Center (DTCC), a rehabilitation and adoption facility located in Las Vegas, Nevada, to an area

¹ By Order dated July 24, 2014, we afforded The Desert Tortoise Council, which had filed a letter supporting WWP's appeal, *amicus curiae* status pursuant to 43 C.F.R. § 4.406.

of public lands designated as the Piute-Eldorado Critical Habitat Unit (CHU) and the Piute-Eldorado Area of Critical Environmental Concern (ACEC), in the Eldorado Valley southeast of Las Vegas, Nevada. The tortoises would be taken from the DTCC, where they have been captively bred and/or raised, by FWS' Desert Tortoise Recovery Office (DTRO) and released into the Valley. Only tortoises found to be normal, healthy, and satisfying other criteria would be selected for translocation.

On appeal, WWP argues that approval of the Translocation Plan violates the environmental review requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA),² the requirement to prevent unnecessary and undue degradation of the public lands of section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA),³ and the consultation requirement of section 7 of the Endangered Species Act of 1973 (ESA).⁴ WWP asks the Board to vacate the DR and remand the case to BLM for compliance with those statutes.

We conclude that WWP does not show any error of fact or law in BLM's approval of the Translocation Plan. Therefore, we affirm the DR.

BACKGROUND

FWS has designated the Mojave Desert population of the desert tortoise (*Gopherus agassizii*) as a threatened and endangered (T&E) species,⁵ and the public lands at issue in the Valley and elsewhere as critical habitat for the tortoise.⁶ By virtue of the T&E designation, BLM is required by section 7(a)(2) of the ESA⁷ to ensure that Federal actions do not jeopardize the continued existence of the desert tortoise or destroy or adversely modify its critical habitat. In order to achieve that substantive goal, BLM is required, when proposing to approve any action, to consult, either informally or formally, with FWS, when that action may affect the species. Informal consultation is required when the proposed action may affect but is *not likely to adversely affect* the species, and formal consultation is required when the proposed action may affect and is *likely to adversely affect* the species.⁸ The proposed action may

² 42 U.S.C. § 4332(2)(C) (2012).

³ 43 U.S.C. § 1732(b) (2012).

⁴ 16 U.S.C. § 1536 (2012).

⁵ 54 Fed. Reg. 32326 (Aug. 4, 1989); 55 Fed. Reg. 12178 (Apr. 2, 1990).

⁶ 59 Fed. Reg. 5820 (Feb. 8, 1994).

⁷ 16 U.S.C. § 1536(a)(2) (2012).

⁸ See 16 U.S.C. § 1536(a)(2) (2012); e.g., *Natural Resources Defense Council v. Houston [NRDC v. Houston]*, 146 F.3d 1118, 1125, 1126 (9th Cir. 1998), cert. denied, 526 U.S. 1111 (1999).

go forward, in the former case, when FWS concurs with BLM's *not likely to adversely affect* determination and, in the latter case, when FWS prepares a Biological Opinion (BiOp) concluding the action will not result in jeopardy to the species.

FWS, as the lead Federal agency for tortoise population augmentation as well as the required Section 7 consultation, completed a Programmatic BiOp on July 3, 2013,⁹ for the issuance of "recovery permits," authorizing the release of desert tortoises and other actions associated with its plan for augmenting the desert tortoise population in California, Nevada, Utah, and Arizona. Because FWS did not, in this BiOp, take into account the fact that BLM and other Federal land management agencies would approve the release of desert tortoise on Federal lands, FWS amended the BiOp on March 18, 2014, to reflect this fact.¹⁰ FWS concluded that its issuance of "recovery permits" was not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat.¹¹

BLM analyzed the likely environmental impacts of the Translocation Plan in a February 2013 Programmatic Environmental Assessment (Programmatic EA)¹² issued pursuant to NEPA and implementing regulations.¹³ The Programmatic EA had been prepared in connection with BLM's "Desert Tortoise Translocation throughout the Species Range within the Southern Nevada District and Caliente Field Office, Nevada" program, and was tiered to the June 15, 1998, Final Environmental Impact Statement (EIS) completed in connection with the October 5, 1998, Las Vegas Resource Management Plan (RMP). In a Determination of NEPA Adequacy and Land Use Plan Conformance (DNA)¹⁴ issued on March 27, 2014, BLM concluded that the environmental impacts of the Translocation Plan were adequately considered in the Programmatic EA.

In the DNA, BLM addressed whether the Programmatic EA, as tiered to the Las Vegas RMP Final EIS, included an adequate consideration of the likely environmental impacts of the Translocation Plan, or whether BLM was required to supplement the

⁹ File No. 2013-F-0273.

¹⁰ File No. 2013-F-0273.AMD1.

¹¹ See July 3, 2013, BiOp at 18.

¹² DOI-BLM-NV-S010-2012-0097-EA.

¹³ 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. Chapter V (Council on Environmental Quality) and 43 C.F.R. Part 46 (Department),

¹⁴ DOI-BLM-NV-S010-2014-0038-DNA.

Programmatic EA.¹⁵ In the Programmatic EA, BLM had assessed the likely environmental impacts of authorizing, over an expected 10-year period, the translocation of tortoises from the DTCC for the purpose of augmenting depressed native populations in Clark, southern Nye, and southern Lincoln Counties, in Nevada.¹⁶ BLM expected to translocate an estimated 900 tortoises each of the first 2 to 3 years, followed by the translocation of approximately 100 tortoises each year thereafter.¹⁷ BLM identified relevant suitability criteria that would be used by BLM, subject to the approval of the DTRO, to select specific qualified translocation sites, which included giving priority to CHUs, ACECs, and other areas that have a depleted tortoise population and would afford the released tortoises added protection.¹⁸ The Programmatic EA noted that the translocation program area encompassed a number of CHUs and ACECs, including the Piute-Eldorado CHU and ACEC.¹⁹

BLM concluded in the DNA that since the Translocation Plan was a feature of the proposed action considered in the Programmatic EA, it was not required to conduct additional NEPA analysis. BLM found that (1) the Valley met the criteria for translocation site selection in the Southern Nevada District; (2) the EA considered the likely impacts of translocating tortoises in the Valley and elsewhere in the District; and (3) the existing environmental analysis remained valid, in the absence of any new information or circumstances that might change the analysis.²⁰ BLM specifically concluded: “The direct, indirect, and cumulative effects from the Eldorado Valley translocation *are similar* [both quantitatively and qualitatively] *to those analyzed in the [Programmatic] EA[.]*”²¹

¹⁵ See Answer at 5 (quoting DR at unpaginated (unp.) 1); ROD for Approved Las Vegas RMP and Final EIS, dated Oct. 5, 1998, Appendix A, at 9; Proposed Las Vegas RMP and Final EIS, dated June 15, 1998, at 3-35 to 3-40, 4-18 to 4-19; *see also, e.g., Biodiversity Conservation Alliance*, 171 IBLA 313, 321-22 (2007); *Southern Utah Wilderness Alliance*, 164 IBLA 1, 30-31, n.12 (2004).

¹⁶ See Programmatic EA at 7, 9-15, 35 (Figure 1 (Map of Project Extent)).

¹⁷ See *id.* at 15.

¹⁸ See *id.* at 9-10.

¹⁹ See *id.* at 18.

²⁰ See DNA at 2-3, 5; DR at unp. 2 (“Based on the . . . [DNA], I have determined that the [Programmatic] EA . . . is adequate, and that the impacts are not expected to be significant”); Response at 2 (“[The] strategy [of translocating tortoises] . . . has gone through prior rigorous review and continues to be studied and adjusted to make it a valuable tool in assisting the tortoise in its recovery”).

²¹ DNA at 3 (emphasis added).

Based on the Programmatic EA, the Acting District Manager of BLM's Southern Nevada District issued a January 31, 2013, Record of Decision (ROD), in which he approved the proposed action, *i.e.*, the translocation of tortoises from the DTCC to public lands in the Southern Nevada District. There were no appeals taken from the ROD, which took effect.²²

On March 27, 2014, the Assistant Field Manager issued the DR at issue in this appeal, in which she approved the Translocation Plan. She authorized the translocation of up to 600 desert tortoises, subject to various stipulations, including those for the protection of the tortoises. She provided that, in translocating the tortoises, BLM would “[f]ollow . . . FWS DTRO guidance for translocation site selection, disease testing, genetic testing, survey protocols, handling, and monitoring techniques.”²³ Such guidance was found in the March 19, 2014, revised Translocation Plan, which had been prepared by the DTRO. In the Programmatic EA, BLM had stated that “[t]he use of [FWS [translocation] guidelines will minimize potential negative impacts to both the resident and translocated tortoises[.]”²⁴ Finally, BLM provided for monitoring released and resident tortoises in order to assess the effects of the translocation.²⁵

WWP appealed timely from and requested a stay of the DR pending final disposition of its appeal. In addition to its notice of appeal/petition for stay (NA/Petition), which included its statement of reasons for its appeal, WWP filed a Reply to BLM's Response to the Stay Petition (Stay Reply) and a Reply to BLM's Answer (Answer Reply). On August 18, 2014, BLM filed a motion to strike the Reply to its Answer, arguing that it was untimely, being filed after the 15-day time frame established by 43 C.F.R. § 4.412(d), and was “substantively duplicative or of limited value.”²⁶ Because we likewise regard the Reply as of limited value, and we see no prejudice to BLM by allowing the Reply, we decline to strike the pleading. The motion to strike is denied.

WWP is concerned that the placement of these tortoises with the native tortoise population extant in the CHU and ACEC, which is known to be “genetically distinct” from the captive population, has the potential to alter the genetic makeup of the existing population, and otherwise threaten its long-term viability.²⁷ WWP argues

²² See Answer at 6.

²³ DR at unpag. 2.

²⁴ Programmatic EA at 20.

²⁵ See DR at unpag. 2; DNA at 1, 4, 5; Translocation Plan at 8-9.

²⁶ Motion to Strike at 1; *see id.* at 4.

²⁷ NA/Petition at 3.

that BLM should continue to hold the 600 tortoises at the DTCC until it develops an adequate scientific-based plan “that will ensure that any desert tortoise populations [in the Valley] that are below carrying capacity are augmented *with appropriate genetic stock*.”²⁸

WWP asks the Board to vacate the DR and remand the case to BLM for compliance with NEPA, FLPMA, and the ESA. Based upon our review and analysis, we conclude that WWP has not shown error under any of those statutes. We therefore affirm the subject DR.

DISCUSSION

A. *BLM Took a Hard Look at the Environmental Consequences of the Translocation Plan, as Required by NEPA*

WWP contends that BLM violated NEPA by failing to prepare a site-specific EA or EIS to address the likely impacts of the Translocation Plan on the existing native population of desert tortoises in the Valley. What is critically important, according to WWP, is that the majority of the captive tortoises at the DTCC are of unknown genetic origin, and that those to be translocated to the Valley have been scientifically determined to be genetically distinct from the resident native tortoises in the Valley.²⁹ WWP argues that BLM was required to address the likely site-specific impacts to the existing native tortoise population in the Valley arising from the introduction of 600 genetically distinct captive tortoises. Specifically, WWP contends that BLM should have considered the risks of “1) disease transmission, 2) genetic contamination, 3) exceeding the current carrying capacity of the [tortoise] habitat, resulting in mortality above natural levels for the resident population of desert tortoise[, and] [4)] disrupting the social structure of [the] . . . resident desert tortoise population causing stress and increased risk of disease outbreak[.]”³⁰ However, according to WWP, BLM did not address these impacts in the Programmatic EA, tiered to the Las Vegas RMP Final EIS; that the EIS is “outdated” and concerns proposed land management decisions generally affecting over 3.3 million acres of BLM-administered public land in Clark and southern Nye counties, Nevada; and (2) that the Programmatic EA concerns the proposed translocation of tortoises from the DTCC to an even larger area of BLM-administered public lands in Clark and Lincoln counties, Nevada.³¹

²⁸ Stay Reply at 3 (emphasis added).

²⁹ NA/Petition at 3; *see id.* at 14.

³⁰ *Id.* at 5-14.

³¹ *Id.* at 4.

[1] Section 102(2)(C) of NEPA requires a Federal agency to prepare a “detailed statement” addressing the potential environmental impacts of a proposed action and alternatives thereto in the case of any major Federal action that “significantly affect[s] the quality of the human environment[.]”³² In order to determine whether to prepare an EIS, BLM may prepare an EA which addresses whether the proposed action may result in a significant impact that requires preparation of an EIS.³³ When it finds, based on the EA, that no significant impact is likely, it need not prepare an EIS.³⁴ Where the likely impacts of the proposed action have already been adequately addressed in an existing EA or EIS, BLM will prepare a DNA for the purposes of determining whether it has already satisfied NEPA.³⁵ BLM did so here, concluding that the Programmatic EA, tiered to the Las Vegas RMP Final EIS, satisfied the statute.

When BLM decides to proceed on the basis of an existing EA, tiered to an RMP EIS, that decision will be deemed to comply with NEPA where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that no significant impact not already addressed in the EIS will result or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures.³⁶ An appellant challenging such a BLM decision must carry its burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA.³⁷ The appellant must make an “*affirmative showing* that BLM failed to consider a substantial environmental question of material significance,” and cannot simply “pick apart a record with alleged errors and disagreements[.]”³⁸

³² 42 U.S.C. § 4332(2)(C) (2012).

³³ *E.g.*, *WildEarth Guardians*, 185 IBLA 193, 200-01 (2015).

³⁴ *Id.*

³⁵ *Id.* at 205 n.13; *Southern Utah Wilderness Alliance*, 177 IBLA 29, 33-34 (2009).

³⁶ *Center for Native Ecosystems*, 182 IBLA 37, 50 (2012); *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007).

³⁷ *Southern Utah Wilderness Alliance*, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); *Red Thunder*, 117 IBLA 167, 175, 97 I.D. 203, 267 (1990); *Sierra Club*, 92 IBLA 290, 303 (1986).

³⁸ *Arizona Zoological Society*, 167 IBLA 347, 357-58 (2006) (quoting *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004) (emphasis added)).

Further, BLM's decision to rely on the existing Programmatic EA, tiered to the Las Vegas RMP Final EIS, "implicates agency expertise."³⁹ Thus, where, in assessing environmental impacts in the Programmatic EA, BLM relied on the professional opinion of its technical experts, concerning matters within the realm of their expertise and which is reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert.⁴⁰ A mere difference of opinion, even of expert opinion, will not suffice to show that BLM failed to fully comprehend the true nature, magnitude, or scope of the likely impacts.⁴¹

BLM considered, in the Programmatic EA, the likely environmental impacts of translocating desert tortoises from the DTCC to public lands in the Southern Nevada District, which includes the public lands in the Valley where the 600 tortoises now at issue will be released. BLM, with the concurrence of FWS, determined that the Valley meets the suitability criteria for release, and that the impacts of the release were likely to be similar to those already analyzed in the EA. We conclude that BLM's environmental review, which was completed not long before issuance of the DR, adequately assessed the environmental ramifications of this release, which was the conclusion of the DNA.

WWP, at best, broadly argues that the Programmatic EA did not analyze the site-specific impacts of releasing 600 tortoises in the Valley, since it only analyzed releases in "Trout Canyon."⁴² WWP contends that although BLM considered releases in the Piute-Eldorado CHU and ACEC, such analysis did not address habitat quality, predators, human activities, and other site-specific aspects of the Valley.⁴³ We disagree with WWP's contention. In the Programmatic EA, BLM considered augmenting depleted populations of desert tortoises on public lands under the jurisdiction of its Southern Nevada District and Caliente Field Office by releasing tortoises at suitable habitat sites within 175 kilometers (km) of the DTCC.⁴⁴ Trout Canyon was simply the "first recipient site" identified by BLM.⁴⁵ BLM considered the

³⁹ *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004).

⁴⁰ *See, e.g., Wyoming Outdoor Council*, 173 IBLA at 235 (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)).

⁴¹ *See, e.g., Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974); *Concerned Citizens for Nuclear Safety*, 175 IBLA 142, 154 (2008); *Wyoming Audubon*, 151 IBLA 42, 51 (1999).

⁴² Answer at 3.

⁴³ *Id.*

⁴⁴ *See* Programmatic EA at 5, 7, 9-10.

⁴⁵ *Id.* at 10.

likely impacts of undertaking the program and concluded that most aspects of the human environment were not likely to be affected.⁴⁶ In its DNA, BLM held that the EA was sufficient for purposes of the specific release action at issue, thus satisfying section 102(2)(C) of NEPA.

WWP does not identify any site-specific impact attributable to the release of the 600 tortoises in the Valley that was not addressed in the Programmatic EA. Nor does WWP explain how or to what degree any site-specific impact of such release is likely to differ from the impacts generally attributable to the release of tortoises at suitable habitat sites elsewhere in the Southern Nevada District.

1. *BLM Was Not Required to Supplement the Programmatic EA or Las Vegas RMP Final EIS*

WWP faults BLM for not considering the need for testing to ensure that the genetic makeup of the released tortoises matches the genetic makeup of the resident tortoises.⁴⁷ In its Programmatic EA, BLM relied upon the Translocation Plan in which FWS' DTRO had concluded that releasing the tortoises in the Valley within 175 km of the DTCC "ensures that the vast majority of released tortoises will remain in a genetic unit equivalent to that of their origin[.]"⁴⁸

WWP argues that BLM was required to supplement its Programmatic EA because of the results presented in a "new paper" by Taylor Edwards and Kristin H. Berry, entitled *Are captive tortoises a reservoir for conservation? An assessment of genealogical affiliation of captive Gopherus agassizii to local, wild populations* (Edwards Paper).⁴⁹ WWP asserts that the Edwards Paper contradicts BLM's (and DTRO's) conclusion that tortoises from the DTCC will be genetically similar to the tortoises resident in the Valley.⁵⁰ WWP notes that Edwards and Berry "tested the genetic background of 39 tortoises from the DTCC . . . and found that only 16 of them (41%) were from the local genetic unit," and would be genetically similar to the tortoises

⁴⁶ See *id.* at 16-17, 20-23.

⁴⁷ NA/Petition at 5; see Translocation Plan at 7.

⁴⁸ Programmatic EA at 21 (quoting a June 2012 study authored by DTRO entitled, *Defining Spatial Scales for Translocation That Are Consistent With Genetic Population Structure of Mojave Desert Tortoises*, included as Appendix B of the Programmatic EA, and published as R.C. Averill-Murray and B.E. Hagerty, *Translocation Relative to Spatial Genetic Structure of the Mojave Desert Tortoise, Gopherus agassizii*, HELONIAN CONSERVATION AND BIOLOGY (2014) (Averill-Murray Paper), at 7).

⁴⁹ NA/Petition at 6; see 14 CONSERVATION GENETICS 649 (2013).

⁵⁰ NA/Petition at 6; see Translocation Plan at 7.

resident in the Valley, which is situated within 175 km of the DTCC.⁵¹ WWP concludes that BLM was required by this new information to supplement the Programmatic EA, since it disclosed that the “genetic pollution risks are much higher than . . . had [been] anticipated in the Programmatic EA[.]”⁵²

BLM is required by NEPA’s implementing regulations to supplement an EIS “if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁵³ However, the U.S. Supreme Court has said that “an agency need not supplement an EIS every time new information comes to light after the EIS is finalized,” but that, applying the rule of reason, “if the new information is sufficient to show that the remaining [major Federal] action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.”⁵⁴ As the Seventh Circuit stated in *State of Wisconsin v. Weinberger*: “[A Supplemental EIS is required when] the new information presents a seriously different picture of the likely environmental consequences of the proposed action not adequately envisioned by the original EIS[.]”⁵⁵

BLM was fully aware of the conclusions presented in the Edwards Paper when it prepared the EA and the DNA, as evidenced by its citation to the Edwards Paper in both documents.⁵⁶ It reasonably concluded that the “vast majority” of tortoises from the DTCC would be genetically similar to tortoises residing in areas of the public lands within 175 km of the DTCC. BLM briefly analyzed the genetic risk posed to the native tortoise population in the Southern Nevada District of translocating tortoises from the DTCC.⁵⁷ In its Response, BLM explains that it relied on the Averill-Murray Paper, which disagreed with the basic conclusion of the Edwards Paper and confirmed the “high probability” of genetic compatibility of translocated tortoises from the DTCC and the resident native population.⁵⁸ We find no fault with BLM’s conclusion that, given the “high probability” of genetic compatibility as found by FWS, it was not necessary to

⁵¹ NA/Petition at 6.

⁵² *Id.*

⁵³ 40 C.F.R. § 1502.9(c)(1).

⁵⁴ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989).

⁵⁵ 745 F.2d 412, 420 (7th Cir. 1984); *see also, e.g., Center for Biological Diversity*, 181 IBLA 325, 344 (2012).

⁵⁶ *See* Programmatic EA at 47 (citing “Edwards and Berry, pers[onal] comm[unication], 2012”); DNA at 4 (citing Translocation Plan at 7).

⁵⁷ *See* Programmatic EA at 21-22; *id.*, Appendix B, at 43-52.

⁵⁸ Response at 8.

engage in wholesale genetic testing in order to ensure that compatibility.⁵⁹ WWP offers no convincing argument or supporting evidence establishing that the released and resident tortoises are genetically incompatible when the release occurs within 175 km of the DTCC.

We agree with BLM that WWP has failed to show that there is significant new information concerning the genetic make-up of the desert tortoises that requires BLM to supplement its NEPA analysis.

2. *BLM Considered the Likely Direct, Indirect, and Cumulative Impacts of the Plan*

WWP also argues that BLM failed to consider the likely direct, indirect, and cumulative impacts of the Plan on the released and resident tortoises from the standpoint of whether the area of public lands into which the 600 tortoises are to be released is capable of sustaining all of these animals.⁶⁰ WWP asserts that BLM did not assess the carrying capacity of the area in terms of food, shelter, and other factors affecting the quality of the habitat.⁶¹ Importantly, it notes that population data generated in 1994 and starting again in 2004 has disclosed increased mortality and a decreasing adult population in the Valley, which may be attributable to the inability of the Valley to sustain the existing population, and which BLM has failed to take into account in assessing the likely consequences to released and resident tortoises of the proposed translocation.

We reject WWP's criticism. The record shows that BLM addressed the ability of these areas to support additional tortoises.⁶² BLM states that no current scientific basis exists for establishing the carrying capacity of a particular area. In lieu of any scientific basis, BLM explains that it assessed, with the assistance of FWS, whether an area is capable of absorbing additional tortoises based on the existing population density of tortoises elsewhere in the CHU, and "project[ed] a *conservative* population-density target for the post translocation site."⁶³ BLM then effectively determined whether a translocation area could absorb the translocated tortoises relative to food, shelter, and other factors affecting the quality of the habitat, as well as the social structure of the resident population.⁶⁴ BLM concluded that "[d]ensity-dependent

⁵⁹ Answer at 12 (quoting Programmatic EA, Appendix B, at 50-51).

⁶⁰ See NA/Petition at 7-8.

⁶¹ *Id.*

⁶² See Programmatic EA at 17-18, 20-22, 24; *id.*, Appendix B.

⁶³ Response at 11; see *id.* at 10-11 (citing Translocation Plan at 5).

⁶⁴ See *id.* at 11-12 (citing Translocation Plan at 5; and Programmatic EA at 21).

effects on resident populations are expected to be minor because []FWS guidance limits the number of tortoises that can be translocated based on the population densities for the recovery unit.”⁶⁵

As stated in the Translocation Plan, FWS calculated that, since a total of 518 adult tortoises were currently found in the 185 km² translocation area in the CHU (at a density of 2.8/km²), a total of 555 adult tortoises could be released (achieving a density of 5.8/km²).⁶⁶ In fact, BLM would only release up to 300 adult tortoises (achieving a density of 4.4/km²). While 300 juvenile tortoises would also be released, BLM concludes that, given their “very high natural mortality rate,” it expects “no appreciable impact . . . on the tortoise population density.”⁶⁷ BLM concluded: “Based on the best scientific information available, the *BLM agrees with FWS that the population [in the Valley] can support additional tortoises*, and the translocation plan places a conservative limit on the number of tortoises to be added relative to densities seen within the region.”⁶⁸

WWP has not shown error in BLM’s estimate of the capacity of the translocation area in the Valley to support the additional tortoises, or otherwise established that the number of tortoises following translocation will exceed that capacity.

At the time it completed the Programmatic EA, BLM foresaw the need to prepare DNAs for the purpose of determining whether there were site-specific impacts that had not been adequately addressed in the Programmatic EA, including the ability of the area to sustain the translocated tortoises. BLM concluded, in the current DNA, that it was not likely that there would be any site-specific impacts not adequately addressed in the Programmatic EA.

We agree with BLM’s conclusion that “[t]he decision to authorize translocation [to] the Eldorado Valley area was evaluated in the Programmatic EA.”⁶⁹ Thus, we hold that WWP failed to carry its burden to demonstrate, by a preponderance of the evidence, that BLM’s approval of the Translocation Plan violated section 102(2)(C) of NEPA.

⁶⁵ Programmatic EA at 21 (emphasis added).

⁶⁶ Transportation Plan at 5.

⁶⁷ Answer at 14.

⁶⁸ DNA at 4 (emphasis added).

⁶⁹ Response at 6.

B. The Translocation Plan Complies with FLPMA

WWP argues that BLM's failure to comply with NEPA in approving the Translocation Plan also amounts to a violation of section 302(b) of FLPMA⁷⁰ because the proposed translocation will unnecessarily and unduly degrade the public lands. WWP asserts that BLM did not adequately address whether translocating captive tortoises is likely to transmit disease to resident tortoises, genetically pollute the resident tortoise population, and exceed the carrying capacity of the public lands at issue, thus threatening the existing population of native tortoises.⁷¹ It relies on the Board's conclusion in *Island Mountain Protectors* to the effect that, "[t]o the extent BLM failed to meet its obligations under NEPA, it also failed to protect public lands from unnecessary or undue degradation."⁷²

[2] BLM is required by section 302(b) of FLPMA to "take any action necessary to prevent unnecessary or undue degradation of the [public] lands."⁷³ Given its broad language, it has been said that "§ 1732(b) 'leaves [the] BLM a great deal of discretion in deciding how to achieve' these objectives, because it does not specify precisely how the BLM is to meet them, other than by permitting the BLM to manage public lands by regulation or otherwise."⁷⁴

The Department currently defines "[u]nnecessary or undue degradation" in 43 C.F.R. § 3809.5, in connection with mining operations on the public lands, in part, as "conditions, activities, or practices that . . . [f]ail to comply with . . . Federal and state laws related to environmental protection[.]" In *Island Mountain Protectors*, which involved a proposal to engage in mining operations, the Board effectively concluded that, since NEPA was an "environmental protection" law, a failure to abide by NEPA constituted unnecessary or undue degradation within the meaning of 43 C.F.R. § 3809.5.⁷⁵

⁷⁰ 43 U.S.C. § 1732(b) (2012).

⁷¹ See NA/Petition at 8-10.

⁷² 144 IBLA 168, 202 (1998).

⁷³ 43 U.S.C. § 1732(b) (2012).

⁷⁴ *Gardner v. BLM*, 638 F.3d 1217, 1222 (9th Cir. 2011) (quoting *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004)).

⁷⁵ 144 IBLA at 202; see also *Great Basin Mine Watch*, 160 IBLA 340, 370-71 (2004); *Western Shoshone Defense Project*, 160 IBLA 32, 40, n.5 (2003).

The present case does not involve mining operations, and thus 43 C.F.R. § 3809.5 does not apply. Further, we are no longer convinced that a failure to abide by NEPA constitutes unnecessary or undue degradation. NEPA is an environmental review, not an environmental protection, law. It imposes no substantive obligation on BLM for the protection of air, water, or any other aspect of the human environment. It is procedural in nature and simply requires BLM to consider the likely environmental consequences of a proposed action. All that a failure to comply with NEPA means is that BLM has yet to properly consider whether there are likely to be negative environmental impacts.⁷⁶ Further, BLM may decide to go forward with a proposed action following NEPA review even where environmental harm has been found likely to occur.⁷⁷

We are not persuaded that Congress intended that BLM's failure to abide by the procedural dictates of NEPA would equate to a violation of its duty under section 302(b) of FLPMA to prevent unnecessary or undue degradation of the public lands. In *Center for Biological Diversity v. U.S. Department of the Interior*, the Ninth Circuit stated that unnecessary and undue degradation requirements are distinct from requirements under NEPA,⁷⁸ and quoted the following statement from the Board's opinion in *Kendall's Concerned Area Residents*: "A finding that there will not be significant impact [under NEPA] does not mean either that the project has been reviewed for unnecessary and undue degradation or that unnecessary or undue degradation will not occur."⁷⁹ We conclude that a NEPA violation, even were one to exist, does not also constitute a violation by BLM of the FLPMA requirement to prevent unnecessary or undue degradation of the public lands.

In any event, we have concluded that BLM's approval of the Translocation Plan does not involve a violation of NEPA. And considering the FLPMA requirement as a distinct issue, we conclude that the alleged impacts to the desert tortoise population in the Valley are not likely to result in unnecessary or undue degradation of the public lands. BLM fully considered the likely adverse impacts to the desert tortoise in the Programmatic EA, and determined, on the basis of that analysis, that the Translocation Plan and other efforts to translocate tortoises in the Valley and elsewhere in the Southern Nevada District would not significantly impact the tortoise or its habitat.⁸⁰

⁷⁶ See, e.g., *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989).

⁷⁷ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

⁷⁸ 623 F.3d 633, 645 (9th Cir. 2010).

⁷⁹ 129 IBLA 130, 140 (1994); see also *Western Watersheds Project v. Salazar*, 993 F. Supp. 2d 1126, 1144 (C.D. Cal. 2012).

⁸⁰ See DNA at 2-3, 5; Programmatic EA at 17-18, 20-22, 24, Appendix B; Finding of No Significant Impact at 1, 3, 5-6.

BLM concluded, in the ROD, that the “decision to authorize the Proposed Action does not result in any undue or unnecessary environmental degradation.”⁸¹ And further, FWS stated in its BiOp that the Translocation Plan and other translocation efforts in the District would not jeopardize the continued existence of the tortoise or destroy or adversely modify its critical habitat.⁸² WWP does not offer any convincing argument or supporting evidence that, despite these analyses and conclusions, the Translocation Plan is likely to result in unnecessary or undue degradation of the public lands.

Thus, we hold that WWP failed to carry its burden to demonstrate that BLM, in approving the Translocation Plan, violated its duty under section 302(b) of FLPMA to prevent unnecessary or undue degradation of the public lands.

C. BLM’s Approval of the Plan Complies with Section 7 of the ESA

Finally, WWP contends that, in approving the Translocation Plan, BLM violated section 7 of the ESA,⁸³ because it failed to consult with FWS before taking the action, and to ensure that the proposed translocation is not likely to jeopardize the continued existence of the desert tortoise or destroy or adversely modify its critical habitat. See NA/Petition at 10.

[3] Section 7(a)(2) of the ESA imposes a substantive obligation on BLM for the protection of T&E species, stating, in relevant part:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical[.]^[84]

In order to assist BLM in complying with its obligation, section 7 of the ESA and its implementing regulations impose procedural duties on the agency.⁸⁵ Where a T&E species may be present in the area of a proposed action, BLM is generally directed to prepare a Biological Assessment for the purpose of “evaluat[ing] the

⁸¹ ROD at 2.

⁸² See BiOp at 18.

⁸³ 16 U.S.C. § 1536 (2012).

⁸⁴ 16 U.S.C. § 1536(a)(2) (2012); see 50 C.F.R. Part 402; see also *NRDC v. Houston*, 146 F.3d at 1127.

⁸⁵ 50 C.F.R. Part 402.

potential effects of the action on listed . . . species and designated . . . critical habitat and determin[ing] whether any such species or habitat are likely to be adversely affected by the action,” and whether formal consultation with FWS is required.⁸⁶

When it is determined that a proposed action may affect, and is likely to adversely affect, a T&E species, BLM is required by section 7(a)(2) of the ESA to formally consult with FWS in order to ensure that such action is not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat.⁸⁷ Formal consultation concludes with issuance of a BiOp by FWS, which includes a no jeopardy determination and an incidental take statement. Formal consultation is not required when BLM determines, with the concurrence of FWS, that the proposed action may affect, but is not likely to adversely affect, a T&E species.⁸⁸

BLM properly states that it determined that the proposed translocation now at issue was covered by the existing Programmatic BiOp, which included a no jeopardy determination and an incidental take statement, thus fulfilling its consultation obligations under section 7 of the ESA.⁸⁹ WWP offers no convincing argument or supporting evidence to the contrary.

Thus, we hold that WWP failed to carry its burden to demonstrate that BLM’s approval of the Translocation Plan violated section 7 of the ESA.

CONCLUSION

WWP has failed to demonstrate by a preponderance of the evidence, with objective proof, that the translocation of 600 tortoises from the DTCC to the Valley is likely to substantially alter the genetic makeup of the existing native population to the point that it threatens the viability of that population. We, therefore, conclude that, absent any showing by WWP that BLM’s approval of the Translocation Plan was

⁸⁶ 50 C.F.R. § 402.12(a); *see* 16 U.S.C. § 1536(c)(1) (2012); 50 C.F.R. § 402.12(f); *Enos v. Marsh*, 769 F.2d 1363, 1368 (9th Cir. 1985); *Save Medicine Lake Coalition*, 156 IBLA 219, 258 (2002), *aff’d sub nom.*, *Pit River Tribe v. BLM*, 306 F. Supp. 2d 929 (E.D. Cal. 2004), *rev’d on other grounds*, 469 F.3d 768 (9th Cir. 2006); *Oregon Natural Resources Council*, 116 IBLA 355, 366-67 (1990).

⁸⁷ 50 C.F.R. § 402.14(a); *NRDC v. Houston*, 146 F.3d at 1125; *Enos v. Marsh*, 769 F.2d at 1368; *Umpqua Watersheds, Inc.*, 158 IBLA 62, 81 (2002).

⁸⁸ 50 C.F.R. §§ 402.12(k), 402.13(a), and 402.14(b)(1); *NRDC v. Houston*, 146 F.3d at 1126; *In Re Big Deal Timber Sale*, 165 IBLA 18, 32 (2005); *Klamath-Siskiyou Wildlands Center*, 153 IBLA 110, 115 (2000).

⁸⁹ *See* Response at 13 (citing DNA at 2).

contrary to section 102(2)(C) of NEPA, section 302(b) of FLPMA, or section 7 of the ESA, the Assistant Field Manager's DR is properly affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁹⁰ the DR appealed from is affirmed.

/s/
James F. Roberts
Deputy Chief Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge

⁹⁰ 43 C.F.R. § 4.1.