



VIA ELECTRONIC MAIL and CERTIFIED MAIL; RETURN RECEIPT REQUESTED

March 8, 2016

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Re: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act; Actions Relating to the Proposed Translocation of Desert Tortoises from the Marine Corps Air Ground Combat Center at Twentynine Palms, California Expansion Area onto Both Navy Managed Lands and Public Lands Managed by the Bureau of Land Management

This letter provides you with sixty days notice that the Center for Biological Diversity intends to sue the Bureau of Land Management (“BLM”), the Department of the Navy’s Corps Air Ground Combat Center, Twentynine Palms, California (“Navy” or “Marine Corps”), and the U.S. Fish and Wildlife Service (“FWS”), (collectively the “Federal Agencies”) for violating Sections 7 and 9 of the Endangered Species Act (“ESA”) and its implementing regulations, 16 U.S.C. §§ 1536, 1538, for actions and inactions related to the management of the desert tortoise. This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

Specifically, the BLM and Navy have failed to ensure against jeopardy through consultation regarding the proposed translocation of desert tortoise from the Twentynine Palms Expansion Area onto both lands managed by the Navy and lands managed by the BLM. The BLM has not undertaken any consultation regarding translocation of tortoises from the Twentynine Palms Expansion area onto BLM managed lands. While the Navy undertook consultation for the expansion which resulted in a Biological Opinion dated July 7, 2012

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(Reference No. 81440-2011-F-0580), the specific recipient sites had not been identified, therefore the Navy is required to reinitiate consultation on the site specific translocation plan.

In addition, new information, not available at the time of the 2012 consultation, shows that the impacts of the translocation may be far higher than previously anticipated, and may not serve to provide the anticipated avoidance or mitigation, or any avoidance or mitigation function for that matter. Significant new information regarding the impacts of the translocation shows that survival rates among both translocated and resident tortoises can be affected by the translocation, with some data showing that less than 50% of the translocated individuals survive; therefore, the proposed translocation may have far greater impacts to desert tortoise than previously considered by the Navy and FWS. In addition, survey data shows that the population of the desert tortoise in the West Mojave recovery unit, where the translocation is proposed, continues to decline. Because the proposed translocation of desert tortoise is intended to reduce impacts to the species due to the Twentynine Palms expansion and new and more detailed information shows additional negative impacts of translocation on desert tortoises, the Navy and FWS are required to re-initiate consultation before proceeding with the translocation, but have failed to do so. In addition, the BLM has failed to satisfy its legal requirement to consult on the potential impacts of tortoise translocations to BLM managed lands and resources, including resident tortoise populations, before allowing any translocation onto these public lands.

We understand that the Federal Agencies want to take advantage of this year of relatively good rainfall to accomplish the translocation plan. However, by the same token, this is a very important year for individual tortoises to recover from the previous drought years. Recovery is best accomplished by allowing tortoises to remain in their home territories with the highest habitat forage values, while they recover from unprecedented drought, rather than subjecting them to the stress of translocation to new areas which may have poorer habitat and where existing desert tortoises will also be trying to recover from drought stress.

Given the unprecedented magnitude of the proposed translocation and its potential to take a significant portion of the desert tortoise population in the critical habitat unit (Ord-Rodman Critical Habitat Unit) and, indeed, the West Mojave Recovery Unit as a whole, the translocation should not move forward without adequate analysis of these and other impacts, particularly in light of the new information regarding the poor outcomes and low survival of tortoises from many recent translocations.

I. BACKGROUND

A. Base Expansion and Translocation Plan

As the Federal Agencies are well aware, the status of the desert tortoise in the Western Mojave desert has been in decline for many years due to many factors. The Twentynine Palms expansion, while only one of the threats to the tortoise population in this area, is expected to adversely impact over 100,000 acres of desert tortoise habitat and to displace over 1,100 desert tortoises through translocation. The proposed translocation impacts do not include detailed analyses of impacts to the translocation recipient sites on public lands managed by the BLM or of the impacts to the recipient tortoise populations. On July 17, 2012, the FWS issued the

“Biological Opinion for Land Acquisition and Airspace Establishment to Support Large-scale Marine Air Ground Task Force Live-fire and Maneuver Training, Twentynine Palms, California (8-8-11-F-65)” (“2012 29 Palms Expansion BiOp”) regarding the base expansion.

After that time, the Navy engaged in additional data collection on the expansion area and revised the 2011 translocation plan, including identification of specific recipient sites for translocation of over 1,100 adult desert tortoises. The revised translocation plan has not been circulated to the public. The Center is informed and believes that the plan includes tortoise translocation from the expansion area onto public lands managed by the BLM including lands designated as desert tortoise critical habitat. The Center has found no evidence: 1) that the BLM has completed needed environmental review¹ or undertaken and completed consultation with the FWS for the translocation onto public lands; or 2) that the Navy has re-initiated consultation with FWS to consider the detailed, revised translocation plan or any new information. The Center has been informed and believes that the Navy intends to undertake the translocation starting in late-March 2016.

B. Desert Tortoise in the West Mojave Recovery Unit

The 1994 Recovery Plan recognized distinctions between populations of the desert tortoise based on habitat use, behavior, and other factors, and established 6 separate recovery units on that basis, including the Western Mojave recovery unit. Although the 2011 Recovery Plan revised the definitions to establish only 5 recovery units, the Western Mojave Recovery Unit remains a separate recovery unit with some changes in the southern area. Notably, a 2007 study of genetic data from various populations of desert tortoise throughout the Mojave desert in California and Utah and the Colorado desert in California shows that there is a significant divergence between various populations within the listed population of the desert tortoise.²

The 2007 study showed that the tortoise populations in the Western Mojave desert are significantly distinct from other populations, even those in close proximity, such as the Eastern Mojave, Northeastern Mojave, and Eastern Colorado populations. Further, although there is some overlap, the population in the Western Mojave desert can be further divided into 3 distinct sub-groups – the Southern Mojave, Central Mojave and Western Mojave populations. These data show that impacts to the desert tortoise and its critical habitat must be evaluated in the context of the survival and recovery of this unique Western Mojave population, in addition to

¹ A recent entry on the BLM Barstow website indicates that BLM may intend to rely on a Categorical Exclusion (“CX”) for this action. However, the possibility of significant effects constitutes “extraordinary circumstances” which precluded reliance on any categorical exclusion. Indeed, the BLM has previously prepared detailed environmental assessments of the potentially significant impacts before it agreed to accept translocated tortoises onto public lands. *See e.g.* “Environmental Assessment for the Translocation of Desert Tortoises onto Bureau of Land Management and Other Federal Lands in the Superior-Cronese Desert Wildlife Management Area, San Bernardino County, California Bureau of Land Management Environmental Assessment CA-680-2009-0058”, U.S. Department of the Interior BLM Barstow Field Office, July 31, 2009; “Environmental Assessment DOI-BLM-NV-S010-2012-0080-EA, August 2012, Desert Tortoise (*Gopherus agassizii*) Translocation throughout the Species Range within Southern Nevada District and Caliente Field Office, Nevada”, BLM, Las Vegas Field Office.

² Murphy et al., “A Genetic Assessment of the Recovery Units for the Mojave Population of the Desert Tortoise, *Gopherus agassizii*,” *Chelonian Conservation and Biology*, 2007, 6(2); 229-251.

assessments of range-wide impacts.

Moreover, recent climate change modeling shows that the Western Mojave is likely to be one of only two remaining habitat refugia for desert tortoise in the future, making the survival of the population in this recovery unit even more critical to the survival of the species as a whole.³

In light of this information regarding the extent of genetic distinctness of the desert tortoise populations in the Western Mojave desert, the potential loss of large numbers of tortoises in the Western Mojave due to unanticipated impacts of the translocation from the Twentynine Palms Expansion Area is of even greater concern. Because the Western Mojave population is genetically distinct and translocation may have greater impacts than expected, the potential impacts of the translocation on resident populations at the recipient sites must be fully evaluated, along with a re-evaluation of the likely impacts of the translocation on individuals moved out of the expansion area. The potential loss of over 1,000 adult tortoises from this population must be re-evaluated and the impacts to resident tortoise at recipient sites must be considered. The magnitude of the impact of the proposed translocation on the species' survival and recovery must be fully evaluated in light of the specific translocation plan, the importance of the Western Mojave Recovery Unit to the species as a whole, and all new evidence and data regarding impacts of translocation.

II. VIOLATIONS OF THE ESA

A. *Failure to Consult On BLM Action of Approving Recipient Sites on BLM Lands and Management Actions Affecting Translocated Desert Tortoises*

Section 7(a)(2) of the ESA requires federal agencies to “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 adverse modification of habitat of such species . . . determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the FWS whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Agency “action” is defined in the ESA’s implementing regulations to “mean all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States. . . .” 50 C.F.R. § 402.02.

The Center is informed and believes that the revised translocation plan identifies specific translocation recipient sites on public lands managed by the BLM. These sites are already occupied habitat of the desert tortoise and at least some are within designated critical habitat. In addition, some sites may include habitat or individuals of other listed species. None of the current BLM Biological Opinions address the impacts of the proposed translocation, identify the specific recipient sites for the translocation, or analyze the impacts to tortoises at those sites.⁴

³ Sinervo 2015 (attached hereto).

⁴ The West Mojave biological opinion covering BLM lands in the area of the recipient sites does not analyze translocations in general, this translocation in particular, or short- and long- term management needs for the recipient sites to protect desert tortoise after this or any other translocation.

The 2012 Biological Opinion issued to the Navy does not discuss specific impacts to public lands or tortoises on those lands at recipient sites (and to the degree those issues are mentioned in a general way, it is not sufficient). More importantly, consultation by the Navy cannot substitute for consultation by the action agency, BLM. The BLM is required to clearly identify and analyze the likely future impacts of this translocation on both the translocated tortoises and the host populations of desert tortoise at the recipient sites including, but not limited to, impacts to habitat in the recipient areas, carrying capacity concerns, predation, and potential spread of disease from one population to another. The consultation will compel the BLM to explain and address its proposed management of the recipient sites: to help ensure the survival of the translocated tortoises and host tortoises; to minimize impacts to both the host and translocated tortoises; and to protect critical habitat in the recipient area in order to promote survival and recovery of both populations affected by the translocation.

B. Failure to Re-initiate Consultation As Required in the Terms of the Biological Opinion.

The 2012 Biological Opinion requires the Navy to reinitiate consultation “. . . if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; [or] if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion . . .” As explained above, here the revised translocation plan includes site-specific information about the resident tortoises at the recipient sites, as well as the location of the recipient sites, which were not previously considered in the Biological Opinion. There is also significant new information showing that the benefits of translocation as mitigation are unclear⁵ and translocations may be less successful than assumed depending on the recipient site.⁶ Translocations may impact the desert tortoises that are moved as well as tortoises at the recipient sites in a manner or to an extent not previously considered and that the impacts of the action may be higher than considered in the BiOp.

Therefore, the Navy is required to reinitiate consultation to consider how this new information may affect the impacts of its action on the desert tortoise. In addition, FWS is violating its own regulations, which require it to request re-initiation of consultation in such circumstances. *See* 50 C.F.R. § 402.16.

C. Violation of Section 7(b)(4); Unlawful Reliance on Incidental Take Statement in Light of New Information.

The FWS is required under Section 7(b)(4) of the ESA to issue an incidental take

⁵ Germano et al. 2015. Mitigation-driven translocations: are we moving wildlife in the right direction? *Front Ecol Environ* 2015; doi:10.1890/140137

⁶ Berry et al. 2015. Distance to Human Populations Influences Epidemiology of Respiratory Disease in Desert Tortoises. *Journal of Wildlife Management* 79(1):122–136. Hinderle et al. 2015. The Effects of Homing and Movement Behaviors on Translocation: Desert Tortoises in the Western Mojave Desert. *Journal of Wildlife Management* 79(1):137–147. Jennings & Berry 2015. Desert Tortoises (*Gopherus agassizii*) Are Selective Herbivores that Track the Flowering Phenology of Their Preferred Food Plants. *PLOS ONE* DOI:10.1371/journal.pone.0116716

statement (“ITS”) with each biological opinion for animal species that specifies the amount and extent of incidental take authorized to the action agency. Additionally, the ITS must specify reasonable and prudent measures necessary to minimize such impacts. Finally, the ITS must include terms and conditions implementing the reasonable and prudent measures.

The ITS in the 2012 biological opinion provides a quantitative measure of allowable take and estimates that few tortoises will be killed as a result of the translocation activities. It does not estimate the survival rate for translocated tortoises or provide any take authorization for resident tortoises on BLM-managed recipient lands.

Contrary to the 2012 BiOp's estimate that few tortoises will be killed in the translocation, recent data from other translocations shows that it is possible that up to half of the translocated tortoises may be killed, and that resident tortoises may suffer significant mortality and other impacts as well.⁷ This information was not evaluated in the 2012 Biological Opinion and no take authorization was provided that would cover such levels of mortality at recipient sites at either Navy lands or BLM-managed lands. The only take discussed for resident tortoises in the recipient areas is for post-translocation monitoring. Therefore, FWS should re-analyze the impacts to the translocated tortoises and must still analyze impacts to the host populations at the recipient sites.

In light of this and other new information the Navy cannot rely on the ITS in the 2012 BiOp. In any event, the 2012 ITS does not cover BLM’s acceptance of the translocation onto public lands and BLM cannot rely on that ITS. Because of this, Section 7(b)(4) of the ESA is also being violated.

D. Violation of Section 7(d); Commitment of Resources Before Consultation is Completed.

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” The purpose of Section 7(d) is to maintain the status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

⁷ One study of a much smaller desert tortoise translocation, of 32 adult desert tortoises, documents a 68% survival rate of translocated tortoises over an approximate 20 month period. All of the confirmed mortalities occurred within the first eight months during drought conditions. See Field, et al., “Return to the Wild; Translocation as a Tool for Desert Tortoise Conservation”, 2007 Biological Conservation 136: 232-245. A more recent study found only a 47% survival of juvenile tortoises over 3 years. Hall et al. 2016. Factors Influencing Survival of Translocated Juvenile Desert Tortoises. Risk of disease spread through translocation is dependent upon the type of disease and disease testing in both the proposed translocatees and recipient populations is necessary. Rideout (ed). 2015. Transmissible Infections and Desert Tortoise Translocation: A Comprehensive Disease Risk Analysis. Report to USFWS pgs. 54

The BLM must initiate consultation regarding the impacts of translocation at the recipient sites, therefore, when they do so, the prohibitions of Section 7(d) will apply. Similarly, the Navy must reinstate consultation for the desert tortoise in light of the new detailed translocation plan and other new information as discussed above, therefore, the prohibitions of Section 7(d) should apply.

E. Violation of Section 9; Unlawful Taking of Listed Species.

The ESA also prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. The definition of “take” in 16 U.S.C. § 1532(19), states,

The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

If the translocation proceeds before the needed consultations are completed, the Federal Agencies will be in violation of Section 9 of the ESA. Here, BLM lacks take authority to approve the translocation onto public lands that may impact host populations on recipient sites or for management actions within the recipient areas that may take translocated tortoises. Similarly, if, as alleged herein, the Navy has failed to re-initiate consultation on the 2012 biological opinion, based on the revised translocation plan and other new information regarding effects and poor success rate of recent translocations, then the Navy is in violation of the terms of the 2012 BiOp and cannot rely on the ITS for take authority.

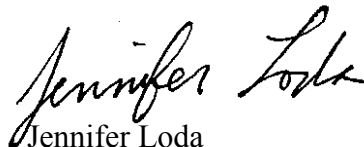
III. CONCLUSION.

If the Bureau of Land Management, the Navy, and the Fish and Wildlife Service, do not act within sixty days to correct these violations of the ESA, the Center for Biological Diversity will pursue litigation in federal court against the agencies and officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact us.

Sincerely,



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