



***Bureau of Land Management
Director's Summary Protest Resolution
Report***

**Gemini Solar Project
Proposed Resource
Management Plan
Amendment and Final
Environmental Impact
Statement**

March 6, 2020

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Acronyms

BLM	Bureau of Land Management
CFR	Code of Federal Regulations
EIS	environmental impact statement
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
NEPA	National Environmental Policy Act
PRMPA	Proposed Resource Management Plan Amendment
RMP	Resource Management Plan
RMPA	Resource Management Plan Amendment
RMS	regional mitigation strategy
USFWS	U.S. Fish and Wildlife Service
VRM	Visual Resource Management

Protesting Party Index

Protester	Organization	Letter ID	Determination
Ron Berger	Desert Tortoise Preserve Committee, Inc.	PP-NV-GSPRMP-19-001	Dismissed – Comments Only
Alex Daue	The Wilderness Society	PP-NV-GSPRMP-19-004	Denied – Issues and Comments
Shaun Gonzalez		PP-NV-GSPRMP-19-003	Denied – Issues and Comments
Kevin Landis		PP-NV-GSPRMP-19-002	Dismissed – No Standing
Meagan Papp		PP-NV-GSPRMP-19-005	Dismissed – Comments Only

NEPA – Inadequate Analysis – Desert Tortoise

Shaun Gonzalez

Issue Excerpt Text: The measurement of the corridor width notwithstanding, the RMPA/FEIS analysis of impacts on the federally listed desert tortoise does not meet standards under NEPA. The RMPA/FEIS for the Gemini Solar project acknowledges that it is uncertain whether or not tortoises can inhabit the mowed project site and, thus, whether or not a viable habitat linkage remains after construction. The RMPA/FEIS uses the untested assumption that the mowed project area could provide suitable tortoise habitat as the foundation for other assessments regarding tortoise mortality and implications for translocation. These affects and the potential loss of a priority 1 habitat linkage would constitute the irreversible and irretrievable commitment of resources that NEPA demands agencies clearly identify to decisionmakers. Instead, the reader of the RMPA/FEIS must decipher the extent to which analysis is based on the assumption that reintroduction of tortoises to the project site will work.

Summary:

The impact analysis is inadequate because it did not accurately describe and predict the degree to which the desert tortoise would be affected upon implementation of the action. Also, the impact analysis is inadequate because the Bureau of Land Management (BLM) relied on an untested assumption.

Response:

The Council on Environmental Quality regulations implementing the National Environmental Policy Act (NEPA) describe how the data and analyses in an environmental impact statement (EIS) must be commensurate with the importance of the impact (40 Code of Federal Regulations [CFR] 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). Here, the BLM is required to take a “hard look” at potential environmental impacts of amending the Las Vegas Resource Management Plan (RMP) in the manner described by the Gemini Solar Project Proposed Resource Management Plan Amendment (RMPA)/Final EIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

A land use planning–level decision, such as the one at issue here, is generally broad in scope. For this reason, analysis of land use plan alternatives is typically broad and qualitative rather than quantitative or focused on site-specific actions. The baseline data provide the necessary basis to make informed land use plan–level decisions. The analysis focuses on the direct, indirect, and cumulative impacts that could potentially result from on-the-ground changes. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Here, the land use planning decision proposed by the BLM is to amend the Las Vegas RMP to change the Visual Resource Management (VRM) Class III objective to a Class IV objective. As noted in the Biological Opinion (Appendix N, p. 131), because “the Project will leave habitat within 65 percent of the solar array and allow tortoises to reoccupy the site following construction, the majority of the action area will continue to be used as part of the connectivity corridor. Due to this, we anticipate that

opportunities for desert tortoise connectivity would be modified by the construction of the Project but not significantly.” Furthermore, the USFWS notes in the Conclusion that “the proposed action is not likely to jeopardize the continued existence of the desert tortoise” (Appendix N, p. 137).

Elsewhere, the Gemini Solar Project Proposed RMPA/Final EIS addresses impacts from the proposed solar project, acknowledging that “the greater concern for connectivity, though, is the movement of tortoises from the west side to the east side of the Project site and from the north side of the Project site to the North Muddy Mountains due to the long barrier fence along development areas B, C, and D along the traditional development areas. From the Muddy Mountains to the southern end of development area D is 2.4 miles. This area is a pinch-point of unaltered habitat for tortoise migration in the east-west directions. This area must be protected to preserve desert tortoise movement. Tortoise would have some additional space to move through the mowed areas of development area D. The distance from the southern end of the fenced area for traditional development in development area D and the Muddy Mountains is approximately 3.5 miles, as shown in Figure 24. Some reduced gene flow could occur based on tortoise movement restrictions, as could localized increases in densities and stressors” (Gemini Solar Project Proposed RMPA/Final EIS, Appendix N, p. 129).

With respect to project impacts, the Gemini Solar Project Proposed RMPA/Final EIS acknowledges that mowing is a new method and provides discussion of the long-term monitoring that will be employed to understand its success (refer to Master Response 2: Mojave Desert Tortoise, Appendix L.1, pp. 13 through 24). Mowing would only occur in the solar array areas where vegetation can affect the panels, equipment, or access. During operation and maintenance, vegetation under the solar arrays would be cut or trimmed by hand to a height that allows the vegetation to maintain its habitat function for desert tortoise and to maintain hydrology patterns on the site while not affecting the functionality of the solar panels. Heavy equipment could only be used along established access roads.

The Biological Opinion (Appendix N, Gemini Solar Project Proposed RMPA/Final EIS) includes additional methods to address impacts on desert tortoise and adaptive management if methodologies are unsuccessful.

The BLM complied with NEPA’s requirement to analyze the environmental consequences relating to desert tortoises from the proposed plan amendment.

Compensatory Mitigation

The Wilderness Society

Alex Daue

Issue Excerpt Text: Though the Biological Opinion frames this as a proposal from the Applicant to pay the fee, it is our understanding that this is in fact the baseline per acre fee that the U.S. Fish and Wildlife Service (USFWS) requires for all development in desert tortoise habitat in southern Nevada.

While this fee is important, it is not adequate to fully offset the impacts to desert tortoise and their habitat. As detailed below, BLM should require the applicant to also pay the full fee from the Dry Lake Regional Mitigation Strategy (RMS). This fee should not include the “SEZ Adjustment” reduction.

Further, BLM and USFWS should not reduce the \$902/acre fee for the project acreage that will be mowed unless the agencies can provide analysis that demonstrates that a reduction is appropriate because the impacts of the mowing approach are significantly lower than the non-mowing approach. This analysis must be supported by the best available science and research. Given that there is limited research available on the impacts of the mowing approach, it seems unlikely that a fee reduction could be supported by robust analysis.

In response to our previous comments raising these issues, the PRMPA/FEIS states that “In accordance with Instruction Memorandum 2019-18, ‘the BLM will not impose, and will not build mechanisms for it to enforce, mandatory compensatory mitigation into its official actions, authorizations to use the public lands, and any associated environmental review documents, including, but not limited to, permits, rights-of-ways, environmental impact statements...’” Compensatory mitigation; however, can be imposed under the ESA and the Project is undergoing review under Section 7 of the ESA concurrent to the NEPA process.” Gemini Solar PRMPA/FEIS Vol II Appendix L.1 p. 140.

The Wilderness Society

Alex Daue

Issue Excerpt Text: In response to our scoping comments, the BLM argues that “The RMS can no longer be applied under Instruction Memorandum 2019-18. Numerous mitigation measures to reduce effects are provided in Appendix H. Section 7 consultation is underway and the Biological Opinion will include additional requirements and measures to reduce impacts to desert tortoise.”¹¹

This decision is in violation of BLM’s obligations under relevant laws, regulations and policies, as described above. Using this RMS to inform compensatory mitigation for Gemini Solar is both defensible and pragmatic given that some of the same resources and values are present on both sites. That said, adjustments will need to be made to address the differing quality of the resources and values present in the two sites and to address any resources and values present at Gemini Solar that were not present at Dry Lake. In general, BLM should direct mitigation fees from Gemini Solar into implementation of the Dry Lake RMS; if there is a portion of the Gemini Solar mitigation fee associated with resources and values present at Gemini Solar that were not present at Dry Lake, that portion of the fee should be directed towards other mitigation actions that would specifically address those impacts.

Summary:

The BLM failed to provide adequate analysis to justify the reduction in fees for compensatory mitigation as part of the mitigation strategy. The BLM should use the regional mitigation strategy (RMS) for the Dry Lake Designated Leasing Area to inform compensatory mitigation for the Gemini Solar Project.

Response:

NEPA requires the BLM to include a discussion of measures that may mitigate adverse environmental impacts (40 CFR 1502.14(f), 40 CFR 1502.16(h)). Potential forms of mitigation include: (1) avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20).

Here, the land use planning decision proposed by the BLM is to amend the Las Vegas RMP to change the VRM Class III objective to a Class IV objective. As the Proposed RMPA/Final EIS discloses, that change would not result in any adverse effects on desert tortoises or their habitat. Elsewhere, the Gemini Solar Project Proposed RMPA/Final EIS addresses impacts from the proposed solar project, analyzing mitigation measures to minimize potential future impacts by rectifying impacts, reducing impacts over time, and/or compensating for impacts. Mitigation measures analyzed for threatened, endangered, and candidate species are listed on page 3-87 of the

Proposed RMPA/Final EIS. Proposed minimization measures to avoid or reduce environmental impacts on desert tortoise were evaluated in consultation with the USFWS and are provided on pages 50 through 62 of the Biological Opinion (Appendix N, Proposed RMPA/Final EIS). The effects of compensatory mitigation and land conservation is provided in the Biological Opinion (Appendix N, Proposed RMPA/Final EIS, p. 133).

Instruction Memorandum No. 2019-018 describes how the BLM will evaluate mitigation, including compensatory mitigation. While the BLM will consider voluntary proposals for compensatory mitigation, and state-mandated compensatory mitigation, the BLM will not accept any monetary payment to mitigate the impacts of a proposed action. Refer to the Biological Opinion, included as Appendix N in the Proposed RMPA/Final EIS, for a discussion of the required desert tortoise conservation and additional remuneration fees that will be used to support desert tortoise recovery actions (p. 62 of the Biological Opinion). The BLM will monitor the construction to ensure that all proposed minimization measures are followed. If it is determined that the applicant is not adhering to the minimization measures, and the habitat is being affected beyond what was approved, the BLM will reinitiate consultation with the USFWS to implement additional measures to reduce those adverse effects, including adjustments to the discounted remuneration fees.

The BLM complied with NEPA and Instruction Memorandum No. 2019-018 in its consideration of the proposed plan amendment. The Gemini Solar Project Proposed RMPA/Final EIS included a discussion of measures that may mitigate adverse environmental impacts to the extent appropriate for the proposed action and alternatives.

FLPMA – Land Use Plan Conformance

Shaun Gonzalez

Issue Excerpt Text: The RMPA/FEIS for the Gemini Solar project contains inaccurate information with regard to potential impacts on the desert tortoise and contradicts the management objectives and guidance set forth in the Las Vegas RMP.

Shaun Gonzalez

Issue Excerpt Text: If reoccupation is successful, the effects on desert tortoise under the Hybrid Alternative and All Mowing Alternative would be less than the Proposed Action, where approximately 215 adult tortoises and approximately 900 or more juveniles would be lost.” (emphasis added) The conditional “if” statement in the RMPA/FEIS makes it clear that the Department of Interior’s approval of the mowed alternative is based on assumption, and not careful study or analysis, and therefore it is not consistent with the FLPMA or NEPA. That “if” statement must also be added too much of the tiered analysis regarding impacts on the desert tortoise, including the viability and width of the habitat linkage, tortoise mortality, and translocation scenarios.

According to Section 201 of the FLPMA:

“(c) In the development and revision of land use plans, the Secretary shall-

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.”

And according to the BLM’s NEPA Handbook Section 6.8.1.2 on “Analyzing Effects,” “the effects analysis must demonstrate that the BLM took a “hard look” at the impacts of the action.”

Shaun Gonzalez

Issue Excerpt Text: The mowed areas of the preferred alternative also would not meet the BLM’s own criteria for managing desert tortoise habitat under the Las Vegas RMP. The Las Vegas RMP,

Objective SS-2 directs that the BLM shall “[m]anage habitat to further sustain the populations of Federally listed species so they would no longer need protection of the Endangered Species Act.” And Objective SS-3 of the RMP stipulates that BLM shall “[m]anage desert tortoise habitat to achieve the recovery criteria defined in the Tortoise Recovery Plan (USFWS 1994) and ultimately to achieve delisting of the desert tortoise.” Because the RMPA/FEIS is uncertain as to whether the document’s primary mitigation effort to reduce impacts on desert tortoises - vegetation mowing - will even succeed, the RMPA/FEIS fails to prove that the alternative is consistent with these objectives. This is especially an issue given the ongoing and drastic decline of the desert tortoise population throughout its range (See Attachment A).

Shaun Gonzalez

Issue Excerpt Text: Additionally, according to the Vegetation Management objective of the Las Vegas RMP (VGI), the BLM must “[m]aintain or improve the condition of vegetation on public lands to a Desired Plant Community or to a Potential Natural Community (see Appendix N for desert tortoise habitat guidelines for desired plant community).” Appendix N of the Las Vegas RMP provides additional objectives for managing “desert tortoise habitat outside of areas of critical environmental concern.” (page N-2, Appendix N, Las Vegas RMP) This objective stipulates that BLM must “[m]anage for a perennial native grass composition by dry weight of at least 3 to 5 percent or as limited by potential natural community (manage for at least 5 percent ground cover of perennial native grass species).” This requirement is unlikely to be met by the mowed project site as a result of the likely spread of invasive species over the lifespan of the project, and/or the project applicant’s planned use of herbicides to control invasive species.

The same section of the Las Vegas RMP requires that the BLM “[m]anage habitat to ensure tortoise recruitment is sufficient to maintain a stable population.” It is simply unknown whether the mowed portions of the Gemini Solar project site will meet these criteria, further underscoring that the RMPA/FEIS analysis cannot rely upon portions of the project site to serve as future desert tortoise habitat in its impacts on the habitat linkage.

Therefore, the BLM is contradicting the Las Vegas RMP in the RMPA/FEIS because it erroneously assesses that the mowed project area would still count as viable desert tortoise habitat, even though the mowed project area would not meet the criteria for desert tortoise habitat under its own RMP (Las Vegas RMP, 55-2, 55-2, VG- 1, and Appendix N)

Summary:

Actions under the Hybrid (Preferred) Alternative and All Mowing Alternative of the Gemini Solar Project RMPA/EIS would not meet the current Las Vegas RMP (BLM 1998) management objectives; therefore, the preferred alternative would not be in conformance with the land use plan.

Response:

Here, the land use planning decision proposed by the BLM is to amend the Las Vegas RMP to change the VRM Class III objective to a Class IV objective. As the Proposed RMPA/Final EIS discloses, that change would not result in any adverse effects on desert tortoises or their habitat. The BLM has prepared the Proposed Las Vegas RMP amendment specifically to ensure that any approval of the proposed Gemini Solar Project would be in conformance with the Las Vegas RMP. Moreover, as described in the Proposed RMPA/Final EIS, with the exception of conforming to the VRM Class objective, the proposed solar project would be consistent with the basic policy objectives for the management of the area (pp. 2-1 and 2-2 of the Final Gemini Solar Project RMPA/EIS and p. 2-7 of the Alternatives Report [BLM 2019b]). Refer to Master Response 2: Mojave Desert Tortoise for a discussion of consultation with the USFWS regarding the specific impacts of this project and

consistency with the Desert Tortoise Recovery Plan, and the USFWS’s need to make a conclusion based on the Hybrid Alternative.

Successful reoccupation and reduced impacts on tortoise connectivity could occur under the mowing alternatives (including the Preferred Alternative), whereas neither would occur under Solar Partners XI, LLC’s original Proposed Action. The Hybrid Alternative would reduce the amount of native vegetation removed from 7,097 acres (2,872 hectares) for the Proposed Action to 2,574 acres (1,042 hectares). Maintaining 4,489 acres (1,816 hectares) of vegetation within the solar facility would allow desert tortoises to reoccupy the site, but the habitat would be highly modified and the success of reoccupation is unknown; therefore, this alternative is considered to result in a loss of habitat (p. 3-85 of the Gemini Solar Project Proposed RMPA/Final EIS).

The Proposed RMPA/Final EIS analyzed the indirect effect of the project on the spread and introduction of invasive plant species, as well as the effects of invasive species on desert tortoise habitat and foraging (refer to Section 3.6.2 of the Proposed RMPA/Final EIS pp. 3-56 through 3-63, and pp. 3-84 through 3-87, respectively). Extensive measures are included in MM VG-1 to remove and treat red brome and other invasive weeds on the project site. The Hybrid (Preferred) Alternative and the All Mowing Alternative also reduce these impacts, as native vegetation would be maintained on site.

References

- Bureau of Land Management (BLM). 1998. Record of Decision for the Approved Las Vegas Resource Management Plan and Final Environmental Impact Statement.
- . 2019a. Gemini Solar Project Final Resource Management Plan Amendment and Environmental Impact Statement. December 27. Available: <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=149503>. Accessed February 5, 2020.
- . 2019b. Gemini Solar Project Alternatives Report. December. Available: https://eplanning.blm.gov/epl-front-office/projects/nepa/100498/20010844/250013872/508_FINAL_DRAFT_Gemini_Alternatives_Report_122019.pdf. Accessed February 5, 2020.