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Working to protect and restore
Western Watersheds and Wildlife

December 1, 2022

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The Honorable Deborah Haaland
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Desert Conservation Program
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RE: 60-day Notice of Intent to Sue for Violations of the Endangered Species Act Related to Reliance on the Clark County Multiple Species Habitat Conservation Plan ("MSHCP") and its Biological Opinion ("BiOp").

Dear Secretary Haaland, U.S. Fish and Wildlife Service Director Williams, Director Stone-Manning, Forest Service Chief Moore, and Director Sams:

Western Watersheds Project ("WWP") provides notice that they intend to file suit, pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), to challenge your failure to comply with and implement the mandatory terms and conditions of the biological opinion ("BiOp") (*see* USFWS 2000, Attachment 1) for the Clark County Multiple Species Habitat Conservation Plan ("MSHCP") (*see* Clark County and US Fish and Wildlife Service 2000, Attachments 2 and 3), Incidental Take Permit ("ITP") and Implementing Agreement ("IA"). Failure to adhere to the BiOp's terms and conditions violates Sections 7 and 9 of the Endangered Species Act ("ESA"). This letter also provides notice that you must immediately reinitiate consultation on the MSHCP to consider new information bearing upon impacts to the desert tortoise (*Gopherus agassizii*), especially rampant solar development on federal lands and the species' dramatically declining population, to comply with your duty under the ESA to ensure actions authorized under the MSHCP do not jeopardize the desert tortoise, or cause unauthorized take.

The MSHCP allows development of private lands in Clark County, but requires Clark County to implement conservation measures for the desert tortoise, including buying out grazing privileges on federal lands to promote tortoise conservation, and requires that those lands be managed for conservation in the future. *See* MSHCP at 2-196. Although the County secured the allotment privileges and Bureau of Land Management ("BLM") closed the allotments administratively, BLM has allowed trespass grazing to continue unchecked on the Gold Butte allotment lands in desert tortoise critical habitat that is required to be protected as a term of the MSHCP. In addition, even though the MSHCP assumed that "Multiple-Use Management Area" ("MUMA") lands would provide habitat for the desert tortoise and other species, BLM has allowed—and continues to authorize—large-scale solar development within desert tortoise habitat that adversely affects the desert tortoise and was not contemplated by the MSHCP. Meanwhile the desert tortoise is in dire straits and is experiencing catastrophic population decline. By failing to reinitiate consultation in light of this new information about additional

threats to the desert tortoise, the BLM and the U. S. Fish and Wildlife Service (USFWS) violate the ESA. 50 C.F.R. § 402.16(a)(2-4).

Unless, within 60 days of receipt of this notice, you suspend or revoke the ITP pursuant to 50 C.F.R. §§ 13.27-13.29, withdraw the BiOp, reinitiate consultation, and halt activities previously authorized under the BiOp until consultation is complete, we intend to challenge your unlawful conduct in court.

ORGANIZATION GIVING NOTICE

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I. REQUIREMENTS OF THE ESA

Section 7 of the Endangered Species Act ("ESA") requires all federal agencies to ensure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species, or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). For each federal action, the action agency must request from U.S. Fish and Wildlife Service whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the federal agency must prepare a biological assessment to determine whether the listed species may be affected by the proposed action. *Id*.

If the federal agency, including the USFWS, determines that its proposed action may affect any listed species or critical habitat, the agency must engage in formal consultation with FWS. 50 C.F.R. § 402.14(a). To complete formal consultation when an HCP is proposed to be issued, FWS must provide itself with a "biological opinion" explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If USFWS concludes that the proposed action "will jeopardize the continued existence" of a listed species, the biological opinion must outline "reasonable and prudent alternatives." 16 U.S.C. §

1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, USFWS must provide an "incidental take statement," specifying the amount or extent of such incidental taking on the listed species, any "reasonable and prudent measures" that USFWS considers necessary or appropriate to minimize such impact, and setting forth the "terms and conditions" that must be complied with to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

In order to monitor the impacts of incidental take, the action agency must monitor and report the impact of its action on the listed species to USFWS as specified in the incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, the federal agency, here USFWS, must reinitiate consultation with USFWS immediately. 50 C.F.R. § 401.14(i)(4).

The re-initiation of formal consultation is required and must be requested by the action agency or USFWS if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) 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; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16. After the initiation or re-initiation of consultation, the action agency is prohibited from making any irreversible or irretrievable commitment of resources with respect to the agency action which may foreclose the formulation or implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

In order to obtain an Incidental Take Permit under the ESA Section 10 for incidental harm to listed species, habitat conservation plans are designed to offset any harmful effects the proposed activity might have on the species in accordance with § 10 of the ESA. 16 U.S.C. § 1539. The ESA has strict requirements for consultation and implementation of Incidental Take Permits that cannot be violated. For a habitat conservation plan, the plan, implementing agreement, and incidental take permit are analyzed and approved as a complete package, if any conservation and management measures fall short then the conclusions in the BO are invalid, consultation must be reinitiated, and the ITP should be suspended or revoked. See 50 C.F.R. § §13.27 ("may be suspended at any time if the permittee is not in compliance with the conditions of the permit"), § 13.28 (permit revocation). In the case of the MSHCP, the "complete package" also includes the Environmental Impact Statement ("EIS") supporting the MSHCP, which was prepared by the USFWS.

Section 9 of the ESA and its implementing regulations prohibit the unauthorized "take" of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. "Take" is defined broadly to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. See 16 U.S.C. § 1532(19). Taking that is in compliance with the terms and conditions specified in a biological opinion is not considered a prohibited taking under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).

II. FACTUAL BACKGROUND

The Clark County MSHCP plan area covers all lands within Clark County, Nevada, as well as all Nevada Department of Transportation (NDOT) rights-of-way below 5,000 feet in elevation, south of the 38th parallel in Nye, Lincoln, Mineral, and Esmeralda Counties. MSHCP at 2-3. The MSHCP, ITP (Attachment 4), BiOp and Implementing Agreement (IA) went into effect in 2001 and provide "take" authorization for development on 145,000 acres of non-federal lands within the County that affects the desert tortoise and 77 other imperiled species. *See* BiOp at 2.1.

The current conservation plan dates back to agreements originating out of earlier Habitat Conservation Plans (HCPs) in the late 1980s and early 1990s between urban developers and Clark County, Nevada Division of Wildlife, USFWS, and BLM. Mitigation for desert tortoise and rare plants such as Las Vegas bear poppy resulted in land disposal of BLM-managed lands to allow Las Vegas to grow, in exchange for conserving a wide area of surrounding public lands in southern Nevada. Scientists identified mitigation measures such as closing certain off-road routes through tortoise habitat, and ending livestock grazing.

The Southern Nevada Public Land Management Act of 1998 (Attachment 5) was passed as a unique way of moving more public lands into private hands, and encouraging urban growth into the Mojave Desert.[1]

The relevant text from the Southern Nevada Public Land Management Act of 1998 as amended is following:

> Section 2. (a) Findings.-- The Congress finds the following:
>
> (1) The Bureau of Land Management has extensive land ownership in small and large parcels interspersed with or adjacent to private land in the Las Vegas Valley, Nevada, making many of these parcels difficult to manage and more appropriate for disposal.
>
> (2) In order to promote responsible and orderly development in the Las Vegas Valley, certain of those Federal lands should be sold by the Federal Government based on recommendations made by local government and the public.
>
> (3) The Las Vegas metropolitan area is the fastest growing urban area in the United States, which is causing significant impacts upon the Lake Mead National Recreation Area, the Red Rock Canyon National Conservation Area, the Sloan Canyon National Conservation Area and the Spring Mountains National Recreation Area, which surround the Las Vegas Valley.

[1] https://www.nytimes.com/2007/12/03/us/03lands.html

(b) Purpose. --The purpose of this Act is to provide for the orderly disposal of certain Federal lands in Clark County, Nevada, and to provide for the acquisition of environmentally sensitive lands in the State of Nevada.[2]

After the passage of this law the Bureau of Land Management disposed of federal lands within Las Vegas Valley in order to allow the urban growth of the Las Vegas metropolitan area, which was reaching the limits of private land growth potential. Federal lands were disposed of and transferred to private ownership. The MSHCP was supposed to be the mitigation agreement between all parties—private developers, the county, cities, and government agencies—that would avoid or minimize significant negative environmental impacts from urban development on these former federal lands to the federally threatened species such as the Mojave desert tortoise, and other Covered Species.

To mitigate this large disposal of public lands to allow urban expansion, participants in the 2000 MSHCP agreed to offset negative impacts of this large urban development by protecting and conserving federal lands in the greater region which are of high value to conserving the Covered Species, including the federally threatened Mojave desert tortoise.

The Implementing Agreement of Clark County for the Multiple Species Habitat Conservation Plan of 2000 (Attachment 6), between all parties participating (U. S. Fish and Wildlife Service, Bureau of Land Management, U. S. Forest Service, National Park Service, Nevada Division of Wildlife, Nevada Division of Forestry, Nevada Division of State Parks, Nevada Division of Transportation, Clark County, and the cities of Las Vegas, North Las Vegas, Boulder City, Henderson, and Mesquite) allowed for minimization, mitigation, and monitoring would be sufficient to assure that incidental take of Covered Species "will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild" (Implementing Agreement 2000 at 14).

The Covered Species include:

2.1.6 Covered Species, Evaluation Species, and Watch List Species[3]

The MSHCP and Incidental Take Permit provide coverage for 78 species, two of which are listed under the Endangered Species Act (ESA): the threatened Mojave desert tortoise and the endangered southwestern willow flycatcher. Two additional categories are identified in the plan: evaluation and watch list. Species designated as covered under the MSHCP are those for which sufficient information was available to allow incidental take coverage and for which adequate management prescriptions exist to help protect them. Evaluation species are those for which additional information is required and

[2] https://www.blm.gov/sites/blm.gov/files/uploads/Programs_LandsRealty_Regions_NV_SNPLMA_Actof1998.pdf

[3] https://files.clarkcountynv.gov/clarknv/Environmental%20Sustainability/Desert%20Conservation/MSHCP/chap2.pdf?t=1669669157093&t=1669669157093, updated at https://files.clarkcountynv.gov/clarknv/Website_Covered%20Species.pdf?t=1656444695718&t=1656444695718

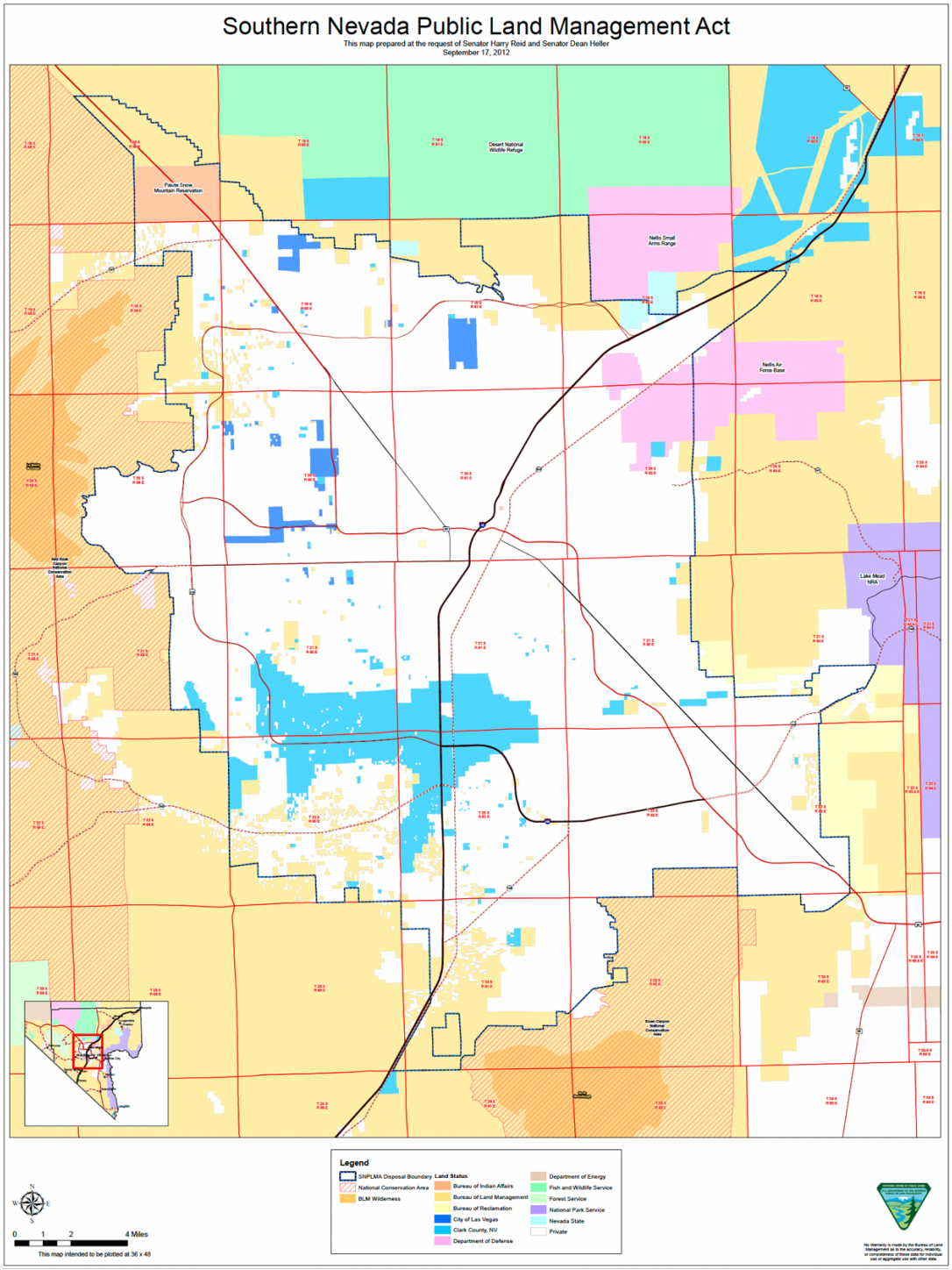

Figure 1. This map shows the disposal boundary enacted in the law, where federal land hosting federally threatened Mojave desert tortoise habitat was transferred to private ownership in the Las Vegas Valley. Map source: https://eplanning.blm.gov/public_projects/78155/200174043/20053714/250059897/PL%20113-291%20National%20Defense%20Act%20for%202015%20map%20-%2020120912_SNPLMA.pdf

management plans need to be developed. Watch list species are those with inadequate information to assess population range, status, conservation potential, or risk of extinction within Clark County. Take authorization for evaluation or watch-list species is not provided for watch list species.

Covered Species:

Yellow-billed cuckoo *(Coccyzus americanus)*
Southwestern willow flycatcher *(Empidonax traillii extimus)*
American peregrine falcon *(Falco peregrinus anatum)*
Blue grosbeak *(Guiraca caerulea)*
Phainopepla *(Phainopepla nitens)*
Summer tanager *(Piranga rubra)*
Vermilion flycatcher *(Pyrocephalus rubinus)*
Bell's vireo *(Vireo bellii)*
Silver-haired bat *(Lasionycteris noctivagans)*
Long-eared myotis *(Myotis evotis)*
Long-legged myotis *(Myotis volans)*
Palmer's chipmunk *(Neotamias palmeri)*
Relict leopard frog *(Rana onca)*
Glossy snake *(Arizona elegans)*
Banded gecko *(Coleonyx variegatus)*
Sidewinder *(Crotalus cerastes)*
Speckled rattlesnake *(Crotalus mitchellii)*
Mojave green rattlesnake *(Crotalus scutulatus scutulatus)*
Great Basin collared lizard *(Crotaphytus bicinctores)*
Desert iguana *(Dipsosaurus dorsalis)*
Large-spotted leopard lizard *(Gambelia wislizenii wislizenii)*
Desert tortoise *(Gopherus* agassizii)
California kingsnake *(Lampropeltis getulus californiae)*
Western leaf-nosed snake *(Phyllorhynchus decurtatus)*
Western red-tailed skink *(Plestiodon gilberti rubricaudatus)*
Western long-nosed snake *(Rhinocheilus lecontei lecontei)*
Sonoran lyre snake *(Trimorphodon biscutatus lambda)*
Spring Mountains acastus checkerspot *(Chlosyne acastus robusta*)
Dark blue butterfly *(Euphilotes ancilla purpura)*
Morand's checkerspot butterfly *(Euphydryas anicia morandi)*
Spring Mountains comma skipper *(Hesperia colorado mojavensis)*
Spring Mountains icarioides blue *(Icaricia icarioides austinorum)*
Mt. Charelston blue butterfly *(Icaricia shasta charlestonensis)*
Nevada admiral *(Limenitis weidemeyerii nevadae)*
Spring Mountains springsnail *(Pyrgulopsis deaconi)*
Southeast Nevada springsnail (Pyrgulopsis turbatrix)
Carole's silverspot butterfly *(Speyeria zerene carolae)*
Rough angelica *(Angelica scabrida)*
Charleston pussytoes (Antennaria soliceps)

Sticky ringstem *(Anulocaulis leiosolenus)*
Las Vegas bearpoppy *(Arctomecon californica)*
White bearpoppy *(Arctomecon merriamii)*
Rosy king sandwort *(Arenaria kingii* ssp. *rosea)*
Clokey milkvetch *(Astragalus aequalis)*
Threecorner milkvetch *(Astragalus geyeri* var. *triquetrus)*
Clokey eggvetch *(Astragalus oophorus* var. *clokeyanus)*
Spring Mountains milkvetch *(Astragalus remotus)*
Alkali mariposa lily *(Calochortus striatus)*
Clokey paintbrush (*Castelleja martinii* var. *clokeyi*)
Clokey thistle *(Cirsium clokeyi)*
Blue Diamond cholla *(Cylindropuntia multigeniculata)*
Jaeger whitlowgrass *(Draba jaegeri)*
Charleston draba *(Draba paucifructa)*
Inch high fleabane (*Erigeron uncialis* ssp. *Conjugans)*
Forked (Pahrump Valley) buckwheat (*Eriogonum bifurcatum)*
Sticky buckwheat (*Eriogonum viscidulum)*
Clokey greasebush (*Glossopetalon clokeyi)*
Smooth pungent (dwarf) greasebush (*Glossopetalon pungens* var. *glabrum)*
Pungent dwarf greasebush (*Glossopetalon pungens* var. *pungens)*
Red rock canyon aster (*Ionactis caelestis)*
Hidden ivesia (*Ivesia cryptocaulis)*
Jaeger ivesia (*Ivesia jaegeri)*
Hitchcock bladderpod (*Lesquerella hitchcockii(*
Charleston pinewood lousewort (*Pedicularis semibarbata* var. *charlestonensis)*
White-margined beardtongue (*Penstemon albomarginatus)*
Charleston beardtongue (*Penstemon leiophyllus* var. *keckii)*
Jaeger beardtongue (*Penstemon thompsoneae* var. *jaegeri)*
Parish's phacelia (*Phacelia parishii)*
Clokey mountain sage (*Salvia dorrii* var. *clokeyi)*
Clokey catchfly (*Silene clokeyi)*
Charelston tansy (*Sphaeromeria compacta)*
Charelston kittentails (*Synthyris ranunculina)*
Charleston grounddaisy (*Townsendia jonesii* var. *tumulosa)*
Limestone violet (*Viola purpurea* var. *charlestonensis)*
No common Name (*Anacolia menziesii)*
No common Name (*Claopodium whippleanum)*
No common Name (*Dicranoweisia crispula)*
No common Name (*Syntrichia princeps)*[4]

In the Implementing Agreement for the MSHCP, parties agreed that significant modification of management actions and activities permitted in the areas set forth in the MSHCP, substantial adverse impacts upon habitats, and impacts to the likelihood of survival or recovery in the wild of one or more Covered Species occurred, then this may be grounds for

[4] https://files.clarkcountynv.gov/clarknv/Website_Covered%20Species.pdf?t=1656444695718&t=1656444695718

suspension, termination, or revocation of all or a portion of the MSHCP permit. (Implementing Agreement at 14-15).

Although the authorization agreed upon was intended to remain in effect for 30 years, by 2007, more than 45 percent of the authorized take (measured in terms of development on private lands in Clark County) had already occurred. The USFWS formally proposed an amendment to the MSHCP in 2009, but that process was never completed. *See* Attachment 7, Amendment to the Clark County Multiple Species Habitat Conservation Plan, 74 Fed. Reg. 50239 (Sept. 30, 2009). Some 22,650 acres of take authorization were added to the permit by legislative amendment in 2014, bringing the total take authorization to 167,650 acres. As of February 2019, the Permittees had developed 103,494 of the 167,650 acres.

The MSHCP requires specific conservation measures to be implemented on federal lands, including those administered by the Forest Service, BLM, and NPS. For example, the MSHCP provides that BLM will: "[E]nsure that [grazing systems are] consistent with the conservation of BLM special status species," "[p]rovide adequate law enforcement presence to ensure that management actions and restrictions are implemented for the conservation of covered and/or evaluation species," designate the Gold Butte desert tortoise critical habitat as an Area of Critical Environmental Concern ("ACEC"), and "[c]lose all allotments, to livestock grazing, within the planning unit except for Hidden Valley, Mount Stirling, Lower Mormon Mesa, Roach Lake, White Basin, Muddy River, Wheeler Wash, Mesa Cliff, Arrow Canyon in Battleship Wash, Flat Top Mesa, Jean Lake, and Arizona administered allotments." MSHCP at 2-227, 2-243, 2-244, 2-249. In addition, Clark County committed to purchase additional grazing privileges on BLM lands so that they could be closed to grazing and used for conservation. MSHCP at 2-196. The MSHCP requires that USFWS "[a]ssure full and continuing implementation of existing management policies and actions, and monitoring of sensitive habitats and species." MSHCP at 2-237 (USFWS (42)). BLM, the Forest Service, the NPS, and USFWS all signed the IA, which binds them to implement the MSHCP.

All of the conservation and management measures in the MSHCP, including the ones discussed above, are incorporated as mandatory terms and conditions of the BiOp:

> All of the conservation and management measures in the MSHCP and accompanying agreements, together with the terms identified in the associated IA and the special permit terms and conditions, are hereby incorporated by reference as reasonable and prudent measures, and terms and conditions for this incidental take statement pursuant to 50 CFR 402.14(1). Such terms and conditions are non-discretionary and must be undertaken by the Applicants for the exemptions under section 10(a)(l)(B) and section 7(o)(2) of the Act to apply. If the Applicants fails to adhere to these terms and conditions, the protective coverage of the Permit and section 7(o)(2) may lapse.

BiOp at 8.7-8.8. The ITP terms and conditions specify that the "authorization granted by this permit is subject to compliance with, and implementation of the Clark County Multiple Species Habitat Conservation Plan (MSHCP), and executed Implementing Agreement, both of which are hereby incorporated by reference." ITP at 1 (section F).

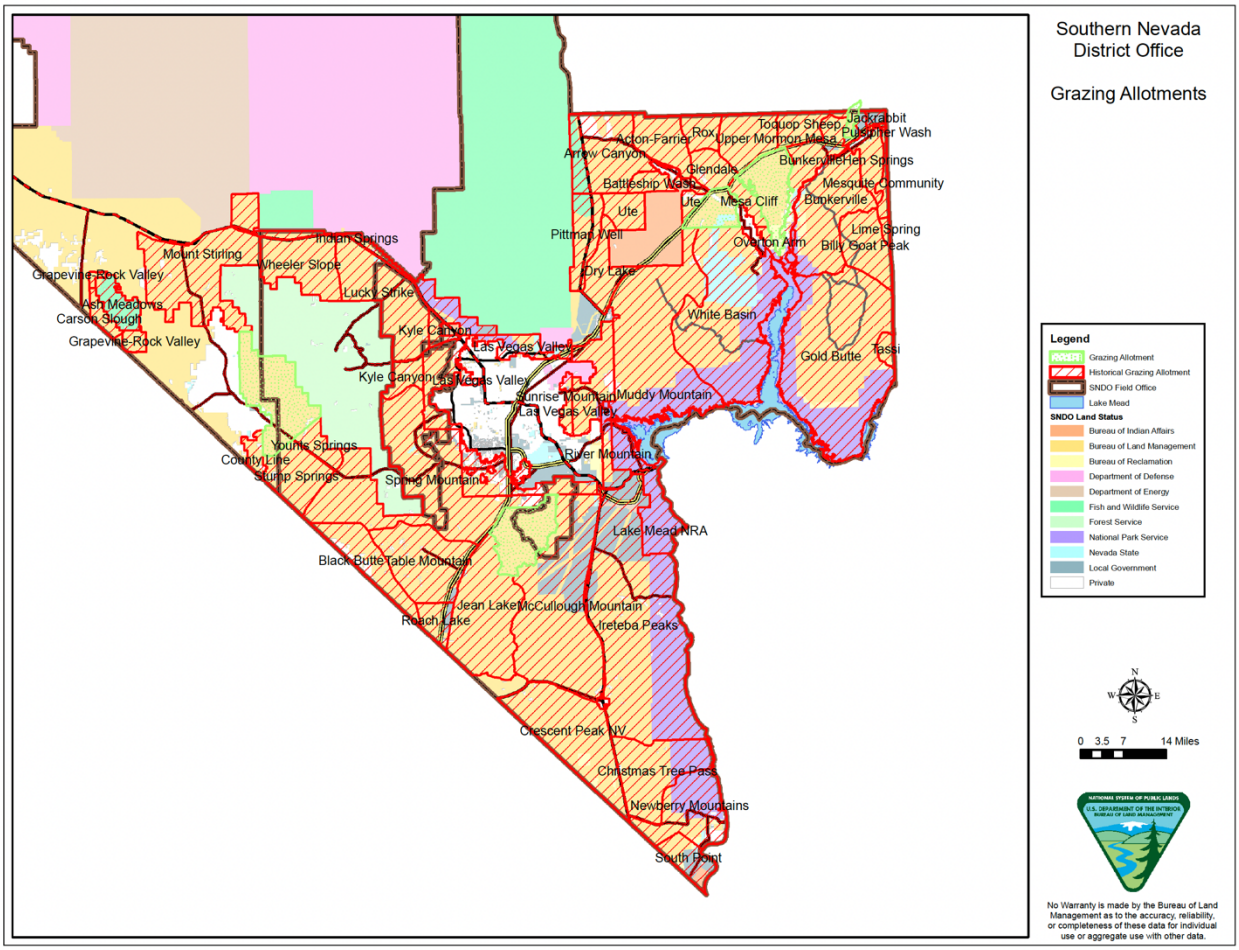

Figure 2. Map showing historic grazing allotments that were administratively closed to conserve desert tortoise habitat. Funding by third party land conservation groups allowed grazing permit users to voluntarily waive their grazing permit back to the federal government in exchange for compensation. Most Clark County grazing allotments managed by the Bureau of Land Management are now retired, with the expectation was that this was to be in perpetuity. Source: BLM.

The BiOp and MSHCP assume that federal lands, even those managed for multiple-use, will serve as species habitat, allow for habitat connectivity, and act as a buffer for areas with more intensive use. BiOp at 2.7; MSHCP at 2-57. The MSHCP divides the landscape into four categories: Intensively managed areas ("IMAs"), Less intensively managed areas ("LIMAs"), Multiple use managed areas ("MUMAs"), and Unmanaged areas ("UMAs"). IMAs are "lands in which management is oriented toward actions that reduce or eliminate potential threats to biological resources, such as wilderness areas, biodiversity hotspots, wilderness study areas, or the conserved/critical habitat areas established for the Mojave Desert tortoise." MSHCP at 2-74 to 2-75. LIMAs "are lands on which management generally limits the range of uses allowed to primarily low-impact recreational uses" and include BLM lands managed as National Conservation Areas. MSHCP at 2-75 to 2-76. MUMAs are defined as undesignated BLM lands "on which human activities are not precluded and may, at times, be intense but which

nevertheless continue to support significant areas of undisturbed natural vegetation." MSHCP at 2-76. UMAs are intensively developed areas such as landfills, mines, and others. *Id*. "The IMAs and LIMAs are proposed as representing the "reserve system" in Clark County, with MUMAs providing conservation value as corridors, connections, and buffers for the IMAs and LIMAs *where management preserves the quality of habitat sufficient to allow for unimpeded use and migration of the resident species in the IMAs and LIMAs*." MSHCP at 2-57 (emphasis added).

The IA relies upon these classifications. It provides that "the Parties agree that in the event of any…modification of management actions or activities permitted within [IMAs, LIMAs, or MUMAs] which are significantly different from those set forth in the MSHCP, substantial adverse impacts upon habitats and Covered Species could occur…[and such changes which have] an adverse impact upon the likelihood of the survival and recovery of the species in the wild may be grounds for the suspension, termination, or revocation [of the MSHCP]…." IA § 9.03, pp. 14-15. The IA makes clear that signatories, including BLM, are not free to simply haphazardly implement actions that will impact the value of federal lands as desert tortoise habitat. Rather, the IA provides:

> [P]rior to any significant change of the size or location of IMAs, LIMAs, or MUMAs or a significant modification of management actions or activities permitted within those areas, different from those set forth in the MSHCP and existing management plans adopted by the land managers, they shall consider the likely effects on the habitats and Covered Species and the MSHCP Permit, [and] shall report to the IMC and the Service the exact nature and extent of such proposed modification….

Id. § 9.04.

BLM and the USFWS have not complied with the BiOp terms and conditions. By the terms of the Las Vegas Resource Management Plan (RMP) and MSHCP, the Gold Butte Allotment is closed to livestock grazing. In 2012, the Center for Biological Diversity sent a Notice of Intent to sue for violations of the ESA related to implementation of the MSHCP because of unchecked trespass grazing by Cliven Bundy's cattle in the Gold Butte Allotment. This continues a decade later, and continues to violate the MSHCP, BiOp, and, by extension, the ESA.

Bundy's illegal trespass grazing has had significant ecological consequences. According to BLM, "heavy grazing pressure exists in the GBNM [Gold Butte National Monument] from over 15 years of illegal cattle grazing and overpopulated herds of wild burros. BLM Assessment, Inventory, and Monitoring (AIM) data over the last 7 years shows high cover of invasive annual grasses throughout the GBNM, almost no native perennial grasses where one would expect to see high cover of perennial grasses due to the site 17 potential, and moderate to extreme departures from reference conditions due to all of these factors." *See* Attachment 8. Modeling of threats to desert tortoises in the Gold Butte – Pakoon area indicates that grazing by livestock and wild burros constitutes the threat with the greatest propensity to cause population declines (Attachment 9). Degradation of desert tortoise habitat on the Gold Butte allotment includes the spread of an invasive annual grass called red brome (*Bromus rubens*). *See* Attachment 10. This species, once established in the understory, creates the flammable fine fuels needed to sustain

large-scale fire. In 2005, approximately 82,000 acres in the Gold Butte area burned in the Fork Fire and the Tramp Fire, part of the Southern Nevada Complex of fires. In the wake of these fires, red brome and cheatgrass (*Bromus tectorum*) expanded their dominance, while many native Mojave Desert plant species were largely eliminated. In the absence of such invasive weeds, Mojave Desert habitats lack the fuels to sustain extensive fires. *See* Attachment 11.

In addition, a new threat from solar development not contemplated by the MSHCP looms and undermines the important assumption of the MSHCP and BiOp that federal lands will continue to provide desert tortoise habitat. The MSHCP does not explicitly consider or provide for solar development on federal lands that destroys their value as wildlife habitat. Yet, vast swaths of federal lands in Clark County are being developed, or proposed for development, for solar electricity generation at a rapid rate. Solar developments exclude the tortoise from using lands that otherwise would serve as habitat, or significantly degrade such habitat. BLM has recently approved at least four large solar developments spanning more than 13,000 acres within lands covered or partially covered by the MSHCP.

Additional solar developments are proposed. Most recently, BLM published a notice of intent to prepare an Environmental Impact Statement ("EIS") and amend its Resource Management Plan ("RMP") to allow the Rough Hat Clark County Solar Project to move forward—a project that would destroy four square miles (or approximately 2400 acres) of desert tortoise habitat, and would modify the RMP to do so. At least 18 other proposed and approved solar projects would cover approximately 26,000 acres, or nearly 40 square miles of federal lands that otherwise would serve as habitat for desert tortoise (see Attachment 12). A wind energy application, Kulning Wind Project, is active on land managed by the BLM in southern Clark County (see Attachment 12). BLM is weighing plans to authorize these impactful developments despite potential to cut off desert tortoise habitat connectivity and isolate populations. *See* BLM 2021. Attachment 13, Bonanza Solar Project Priority Determination Worksheet, NVN-100224 (Sept. 8, 2021).

In addition, and possibly most importantly, desert tortoise populations are plummeting. Comprehensive, rangewide surveys to estimate total desert tortoise numbers have been ongoing since 2001 and show that the species is in long-term decline. Spatial population viability analysis using data from 12 capture-recapture plots in Nevada, Arizona, and Utah found negative population growth and higher probabilities of local extinction in the vicinity and north of Eldorado Valley, Clark County, Nevada, between 1977 and 2003. This regional negative trend has continued since 2004. *See* Attachment 14, USFWS 2022, May, 5-year Review Mojave Desert Tortoise (*Gopherus agassizii*), U.S. Fish and Wildlife Service Desert Tortoise Recovery Office Southern Nevada Fish and Wildlife Service, Las Vegas, Nevada.

The latest sampling data from surveys analyzed by U.S. Fish and Wildlife Service (*see* Allison and McLuckie 2018, Attachment 15) indicates all Recovery Units have declined drastically from 2004 to 2014 except for the Northeastern Mojave Recovery Unit. Rangewide, the species' abundance fell 32% just in this ten-year period. By 2014, three of the five Recovery Units fell below the minimum viable population density to avoid extinction, of 3.9 adult tortoises per square kilometer. For example, Ivanpah Valley in CA and NV historically had a density of 100 tortoises/square km. This number dropped to 2.3 tortoises /km2 by 2014. (*Presentation by*

Corey Mitchell, report on spatial density models of tortoise populations, Desert Tortoise Council Symposium, February 21, 2020, Las Vegas, NV (Mitchell et al. 2020, abstract of presentation, see Attachment 16).

Solar Energy Zones were designated for solar projects, yet most of these in Nevada have gone undeveloped. Areas classified as Variance Lands (designated under the 2012 Solar Programmatic Environmental Impact Statement[5]) for solar development in Clark County (*see* Attachment 17) now in places have higher tortoise densities than Critical Habitat. For example, tortoise surveys undertaken at the proposed Rough Hat Clark Solar Project site in south Pahrump Valley were found to have 5.6 tortoises/square kilometer (Rough Hat Clark Solar Project scoping meeting held virtually by Bureau of Land Management, November 15, 2022). The Eastern Mojave Recovery Unit in Nevada and California had 1.9 tortoises/square kilometer in 2014 (see Table 1).

Table 1. Summary of 10-year trend data for 5 Recovery Units and 17 Critical Habitat Units and Tortoise Conservation Areas for Mojave desert tortoise.

Recovery Unit: Designated Critical Habitat Unit/Tortoise Conservation Area	**Surveyed area (km²)**	**% of total habitat area in Recovery Unit & CHU/TCA**	**2014 density/km² (SE)**	**% 10-year change (2004–2014)**
Western Mojave, CA	**6,294**	**24.51**	**2.8 (1.0)**	**–50.7 decline**
Fremont-Kramer	2,347	9.14	2.6 (1.0)	–50.6 decline
Ord-Rodman	852	3.32	3.6 (1.4)	–56.5 decline
Superior-Cronese	3,094	12.05	2.4 (0.9)	–61.5 decline
Colorado Desert, CA	**11,663**	**45.42**	**4.0 (1.4)**	**–36.25 decline**
Chocolate Mtn AGR, CA	713	2.78	7.2 (2.8)	–29.77 decline
Chuckwalla, CA	2,818	10.97	3.3 (1.3)	–37.43 decline
Chemehuevi, CA	3,763	14.65	2.8 (1.1)	–64.70 decline
Fenner, CA	1,782	6.94	4.8 (1.9)	–52.86 decline
Joshua Tree, CA	1,152	4.49	3.7 (1.5)	+178.62 increase
Pinto Mtn, CA	508	1.98	2.4 (1.0)	–60.30 decline
Piute Valley, NV	927	3.61	5.3 (2.1)	+162.36 increase
Northeastern Mojave	**4,160**	**16.2**	**4.5 (1.9)**	**+325.62 increase**
Beaver Dam Slope, NV, UT, AZ	750	2.92	6.2 (2.4)	+370.33 increase
Coyote Spring, NV	960	3.74	4.0 (1.6)	+ 265.06 increase
Gold Butte, NV & AZ	1,607	6.26	2.7 (1.0)	+ 384.37 increase
Mormon Mesa, NV	844	3.29	6.4 (2.5)	+ 217.80 increase
Eastern Mojave, NV & CA	**3,446**	**13.42**	**1.9 (0.7)**	**–67.26 decline**
El Dorado Valley, NV	999	3.89	1.5 (0.6)	–61.14 decline
Ivanpah, CA	2,447	9.53	2.3 (0.9)	–56.05 decline
Upper Virgin River	***115***	***0.45***	***15.3 (6.0)***	***–26.57 decline***
Red Cliffs Desert	*115*	*0.45*	*15.3 (6.0)*	*–26.57 decline*
Range-wide Area of CHUs - TCAs/Range-wide Change in Population Status	**25,678**	**100.00**		**–32.18 decline**

The table above includes the area of each Recovery Unit and Critical Habitat Unit ("CHU)/Tortoise Conservation Area ("TCA"), percent of total habitat for each Recovery Unit and CHU/TCA, density[6], and the percent change in population density between 2004 and 2014.

[5] https://solareis.anl.gov/documents/docs/Solar_PEIS_ROD.pdf

[6] Density means number of breeding adults/km2 and standard errors = SE.

Populations below the viable level of 3.9 breeding individuals/km2[7] (10 breeding individuals per mi2) and showing a decline from 2004 to 2014 are in red. *See* Attachment 18, Desert Tortoise Council (2018) letter by Ed LaRue, Jr., RE: Opposition to Senator Mike Lee's "Desert Tortoise Habitat Conservation Plan Expansion Act," S. 3297, 115th Congress 2nd Session (2017-2018); and Allison and McCluckie 2018.

Between 2012 and 2022, the USFWS conducted a status review of the Mojave desert tortoise. *See* Attachment 19. Presenting those findings at the October Management Oversight Group meeting, Kerry Holcomb, Acting Desert Tortoise Recovery Coordinator for USFWS, admitted that the Mojave desert tortoise has not improved since 2014. Most Recovery Units continue to decline drastically, although a trend analysis has not yet been undertaken to ascertain the rates of decline since 2014. The West Mojave Recovery Unit has experienced the largest declines, measured at 50% of the tortoise population between 2004 and 2014. Two recent utility-scale solar projects under construction in the western Mojave Desert of California were monitored by USFWS. Tortoises were cleared from the solar project sites and moved during translocation efforts. During 8,000 acres of clearance surveys (where biological monitors dig out burrows to retrieve all tortoises and translocate them to a recipient site away from the solar project Right-of-Way) no juvenile tortoises were found under 180 millimeters shell length. Another solar project area of 5,000 acres was cleared and the smallest tortoise found had a shell length of 227 millimeters—with an estimated age of greater than 35 years old. This indicates a lack of survivorship and no recruitment into adulthood of the tortoise population in this region. Habitat destruction from large-scale solar projects was indicated as a major cause, including indirect effects of project development extending outwards on adjacent tortoise habitat. Preserving connectivity of population segments was also emphasized.

In the ESA, Congress defined an "Endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range…" Because most of the populations of the Mojave desert tortoise were non-viable in 2014; most continue to decline; and the threats to the Mojave desert tortoise are numerous and have not been substantially reduced throughout the species' range, the Council believes the Mojave desert tortoise should be designated as an Endangered species by the USFWS. *See* Desert Tortoise Council 2018 letter *op. cit*.

Other Covered Species need updated management plans to address new significant threats in the last 20 years, including utility-scale solar development on habitats. Three-cornered milkvetch is a Covered Species, yet has been impacted by the Gemini Solar Project. Milkvetch sand habitat has been disturbed by solar development, and sand-transport corridor connectivity has been fragmented by the Gemini Solar Project, currently under construction. The U.S. Fish and Wildlife Service in April, 2021, issued a positive 90-day finding (Attachment 19) on a petition (Attachment 20) filed by the conservation groups Basin and Range Watch and Western Watersheds Project to list the species as threatened or endangered under the Endangered Species Act. In 2020, the BLM approved the 11-square-mile utility-scale Gemini Solar Project in California Wash, Clark County, Nevada, on top of a substantial population of Three-cornered milkvetch. The project will remove 700 acres of important habitat for the species. The project will also require a new gen-tie transmission line, and disturbance from construction will enable

[7] This number assumes a 1:1 sex ratio.

more invasive weeds such as Sahara mustard, Russian thistle, and Arabian splitgrass to colonize the region. Based on their review, USFWS found that the petition presented substantial scientific or commercial information indicating listing the rare plant may be warranted. A 12-month status review has begun.[8] This status change to this Covered Species is not reflected in current management decisions in Clark County.

Phainopepla may be impacted in disturbance of their mesquite habitat in the Pahrump Valley by several proposed solar projects. Pahrump buckwheat may also be impacted by solar project development in western Clark County. Since the Covered Species were delineated for the MSHCP, status has changed for several species: the yellow-billed cuckoo has now been listed as federally threatened.[9] Thus, updated in the terms of the Incidental Take Permits are urgently needed.

III. VIOLATIONS OF LAW

USFWS and/or BLM are violating the ESA in three key respects: First, USFWS is violating the ITP by failing to ensure that the BiOp mandatory terms and conditions drawn from the MSHCP and barring grazing within the Gold Butte allotment are carried out. Second, USFWS is violating the ESA by failing to reinitiate consultation on the MSHCP in the face violations of the BiOp terms and conditions, a new threat from large-scale solar development on federal lands in Clark County, and the concurrent, precipitous decline of the desert tortoise. Third, by ignoring trespass grazing, Clark County, USFWS, and BLM are allowing unauthorized "take" of the desert tortoise, in violation of Section 9 of the ESA.

A. Violations of the BiOp Terms and Conditions and Incidental Take Permit

Violation of any permit issued under the Endangered Species Act constitutes a violation of the ESA, 16 U.S.C. § 1540(a), which can be enforced through the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). As detailed above, the ITP conditions are not being met in material regard as to implementation of the MSHCP by the BLM, which has not complied with permit conditions and the MSHCP requirements that it manage certain public lands for the conservation of the desert tortoise. Specifically, BLM has failed to provide law enforcement to ensure that the management action—closing grazing allotments at Gold Butte in desert tortoise critical habitat—are implemented for the conservation of the species. This is a material violation of the MSHCP and the IA and, thereby, a violation of the ITP. Both Clark County and USFWS have also failed to ensure that the needed conservation and management measures were undertaken, in violation of the permit.

B. Violation of ESA Section 7: Failure to Reinitiate Consultation

The USFWS must reinitiate consultation over the MSHCP because "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" and "the identified action [has been] subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in

[8] https://ecos.fws.gov/ecp/species/5196
[9] https://ecos.fws.gov/ecp/species/3911

the biological opinion or written concurrence." 50 C.F.R. § 402.16(a)(2-3). Failure to comply with the BiOp terms and conditions modifies the action so as to require reinitiation. New information about desert tortoise population decline and the new threat from solar development also warrants reinitiation.

a. Failure to comply with the BiOp terms and conditions warrants reinitiation

The USFWS has failed to reinitiate consultation even though the terms and conditions of the BiOp and ITP are not being met, in violation of the ESA. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(4). The terms and conditions require that BLM exclude grazing from the Gold Butte Allotment, and commit to adequate enforcement to ensure that is carried out. Yet BLM has allowed trespass grazing to occur on the Gold Butte Allotment for decades unchecked. As a result, "the identified action [has been] subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence," and the FWS must immediately reinitiate consultation. 50 C.F.R. § 402.16(a)(3).

Due to the demonstrated failure to adhere to the conservation and management measures agreed to in the BiOp and ITP, the FWS has also failed to ensure that development under the MSHCP has not exceeded the incidental take allowances for desert tortoise in the ITP. Through its failure to ensure that the ITP take limit for desert tortoise has not been exceeded, the FWS is thereby failing to ensure that the MSHCP and associated activities are not likely to jeopardize the continued existence of the desert tortoise, and/or result in the destruction or adverse modification of desert tortoise critical habitat. 16 U.S.C. § 1536(a)(2).

b. The new threat from solar development warrants reinitiation of consultation

Information about new and expanding solar development on federal lands that limits or destroys their value for the desert tortoise also warrants reinitiation of consultation (see Attachment 3 for maps of known solar projects that are approved or in application phase for a Right of Way, and photographs of impacts to tortoise habitat from solar projects under construction in Clark County). The MSHCP and BiOp assumed that federal BLM lands—including lands allocated for multiple-use—would provide habitat and connectivity for the desert tortoise and other species covered by the MSHCP. BiOp at 2.7; MSHCP at 2-57. They also assumed that BLM lands long committed to conserving the desert tortoise through the 1995 Desert Conservation Program (including the Gold Butte ACEC), along with other "intensively managed areas" and "less intensively managed areas" would serve as a "reserve" system for the desert tortoise and other species. MSHCP at 2-75, 2-57. And they assumed grazing privileges would be bought out, retired, or otherwise terminated on the majority of BLM lands in the planning area to conserve the desert tortoise and other species. *See* MSHCP at 2-249 (providing BLM would close all allotments in the planning area with a few exceptions); 2-237 (assuming MSHCP terms would be adhered to). See Attachment 3 for mapped Clark County allotments that have been retired or closed in the Gold Butte area.

But those assumptions have not held true and many lands closed to grazing through the MSHCP or RMP are now being used for solar developments, which destroy habitat for, or

exclude, the desert tortoise. For example, the Jean Lake allotment was partially closed to grazing in the 1998 RMP and remaining permits and preferences were bought out following adoption of the MSHCP (*see* Attachment 12, BLM 2018—letter from the Southern Nevada Office to a permittee denying an application to graze the Jean Lake allotment); yet Silver State South Solar was constructed on those lands in 2014. The 49,000-acre Stump Spring allotment, closed to grazing, is now occupied by Yellow Pine Solar and hosts thousands of acres of additional applications. The 43,000-acre Dry Lake allotment, again, closed to grazing, now hosts about 3,000 acres of solar development projects (see Attachment 3). We expect this trend to continue. The MSHCP did not consider the threat to the tortoise from extensive solar development on federal lands in Clark County. Consequently, the USFWS must reinitiate consultation on the MSHCP to ensure that the authorized development on non-federal lands will not jeopardize the desert tortoise in light of new threats from industrial development on federal lands not considered by the MSHCP, BiOp, and IA. The failure of the USFWS and BLM to reconsider the MSHCP activities in light of the threat from solar development on federal lands also violates sections 9.03 and 9.04 of the IA.

c. Desert tortoise population decline warrants reinitiation of consultation

Reinitiation is also warranted in light of new information about the decline of the desert tortoise. At the most recent Desert Tortoise Management Oversight Meeting on October 11, 2022, the forecast for the species was grim, with all recovery units except for the northeastern recovery unit in decline and several critical habitat units having fallen below viable population thresholds. The West Mojave unit is no longer recruiting juveniles into adulthood.

In its threat analysis, USFWS stated that renewable energy and grazing are impacts driving population declines:

> Factor A: Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range Summary from Service (2010a)*: Since the time of listing, many threats associated with Factor A continue to impact the desert tortoise. In particular, human populations, paved and unpaved roads, non-native invasive plants and the associated threat of wildfire, and prospective energy development (especially renewable energy development and associated utility corridors) have increased. These threats result in continued habitat loss, population fragmentation, nutritional compromise, soil erosion, and indirect impacts associated with increased human presence, including illegal dumping, human-subsidies for predators, and introduction of toxins. Since the time of listing, off-highway vehicle areas and trails have been formally designated, but unauthorized use continues to be a significant source of habitat degradation. Many grazing allotments within Critical Habitat have been retired; however large areas are also still grazed.*
>
> …
> As habitat is lost and fragmented, habitat patches become smaller, patch populations (e.g., clusters of tortoises) have fewer tortoises and become more disjunct, extinction probabilities within patches increase, and the number of occupied patches decreases (Fahrig 2002; Ovaskainen *et al*. 2022).

> Of particular note since the completion of the previous 5-year review, large areas of desert tortoise habitat have been developed or approved for development for utility-scale solar energy. These developments are located outside of TCAs, but in aggregate they would result in development of approximately 74,000 acres of desert tortoise habitat (Table 2; Fig. 6). In fact, solar energy development is the second-ranked threat in the Boulder City Conservation Easement, and it is the top threat outside of TCAs within the Northeast Mojave Recovery Implementation Team's Southeastern Nevada Workgroup area (Service 2014b). Solar development has increased dramatically within the Northeastern Mojave Recovery Unit in the last three years (Fig. 6). To minimize the impacts of such developments, construction of projects in Nevada increasingly have allowed native vegetation to regrow and desert tortoises to reoccupy the sites (approximately 13,000 acres), **although the success of this approach in maintaining functional habitat remains to be determined.**

USFWS, May, 2022, 5-year Review *op. cit.* at 5.

Averill-Murray et al. (2021) summarize how the historic distribution of Mojave desert tortoises was relatively continuous across the range of the species, and how important tortoise habitat outside of designated tortoise conservation areas (TCAs) and Critical Habitat Units is to recovery. Attachment 21. The Authors summarize historic tortoise population connectivity (*ibid.* at 4):

> The historic distribution of Mojave desert tortoises was relatively continuous across the range, broken only by major topographic barriers, such as the Baker Sink and Death Valley, California, and the Spring Mountains, Nevada (Germano and others, 1994; Nussear and others, 2009, respectively). Although desert tortoises generally do not move long distances over their lifetimes, historically, modest dispersal and connected home ranges occurred over a relatively continuous distribution across the tortoise's range. This contiguous distribution fostered historically high levels of gene flow and a population structure characterized as isolation-by-distance (Murphy and others, 2007; Hagerty and Tracy, 2010; Hagerty and others, 2011). Maintaining functionally connected landscapes is necessary to conserve historic genetic gradation (Frankham, 2006). Large, connected landscapes also are necessary to facilitate natural range shifts in response to climate change (Krosby and others, 2010; National Fish, Wildlife, and Plants Climate Adaptation Partnership, 2012; Hilty and others, 2020). Nevertheless, though gene flow and adaptive capacity are critically important in the long term, the need for extensive, unfragmented habitat is of more immediate concern for supporting populations that are demographically viable on time scales relative to management (Kuo and Janzen, 2004).

Desert tortoise populations continue to decline within most TCAs (Allison and McLuckie 2018), and it is unlikely that trends are better in populations outside protected areas. Fragmentation exacerbates negative trends by increasing the probability that isolated populations will suffer irreversible declines due to stochastic (unpredictable) effects acting on their smaller local abundances, especially when combined with multiple external threats within the population fragments. Enhanced threat reduction to reverse declines within TCAs and maintained occupied habitat in the surrounding matrix would help reduce the variability in population growth rates and improve the resilience of protected populations, while implementing efforts to improve connectivity.

Averill-Murray et al. (2021) warn that utility-scale solar projects can fragment tortoise habitat. Maintaining an ecological network (a recovery network) for the Mojave desert tortoise, with a system of core habitats connected by linkages is necessary to support demographically viable populations and long-term gene in Mojave desert tortoise habitat across southern Nevada.

Table 2 represents a partial table of solar projects in Mojave desert tortoise habitat (more solar project applications have been docketed since May 2022), including those projects using drive and crush with mowing methods for construction and operation (marked with an asterisk). USFWS May, 2022, 5-year Review *op. cit.* at 16. In the Northeastern Mojave Recovery Unit, the Gemini Solar Project is still under construction, and is experimenting with drive-and-crush construction methods on 65% of tortoise habitat while the rest of the solar project will be constructed using traditional grading and complete desert tortoise habitat removal methods. As the table indicates, and the USFWS' status review states, the contemplated projects risk destruction of nearly 75,000 acres of desert tortoise habitat.

Allison and McLuckie (2018), after analyzing desert tortoise population declines across the range of the species, recommend that threshold triggers are needed to warn of population crashes. Triggers would be based on monitoring results, and would signal the need for adaptive management conservation measures. At present these are absent from most recovery planning and have not yet been integrated into the management for *G. agassizii*.

Violation of ESA Section 9: Allowing Unauthorized Take of Desert Tortoise.

Clark County, Nevada took steps required of it to retire grazing allotments on public lands managed by the BLM for the benefit of desert tortoise conservation, and BLM took steps on paper to close those allotments. However, in fact, BLM has allowed and continues to allow trespass grazing on the allotments at a more intensive level than before the allotments were nominally closed. In addition, BLM has authorized and continues to authorize widespread solar development on lands devoted to desert tortoise conservation without considering the effects of habitat destruction on those lands in undermining the key assumptions about the value of federal lands made in the MSHCP.

As a result, Clark County and the BLM have, in fact, failed to comply with the terms and conditions of the BiOp, ITP and IA regarding closing allotments as mandatory conservation measures for desert tortoise under the MSHCP; therefore, the ITP must be suspended and any additional "take" of desert tortoise under the MSHCP ITP is unauthorized and in violation of the ESA. Because the USFWS and BLM are in ongoing violation of the terms and conditions of the BiOp, ITP and IA regarding conservation measures for the desert tortoise, no further take of desert tortoise may be authorized by USFWS under the ITP and the ITP should be immediately suspended.

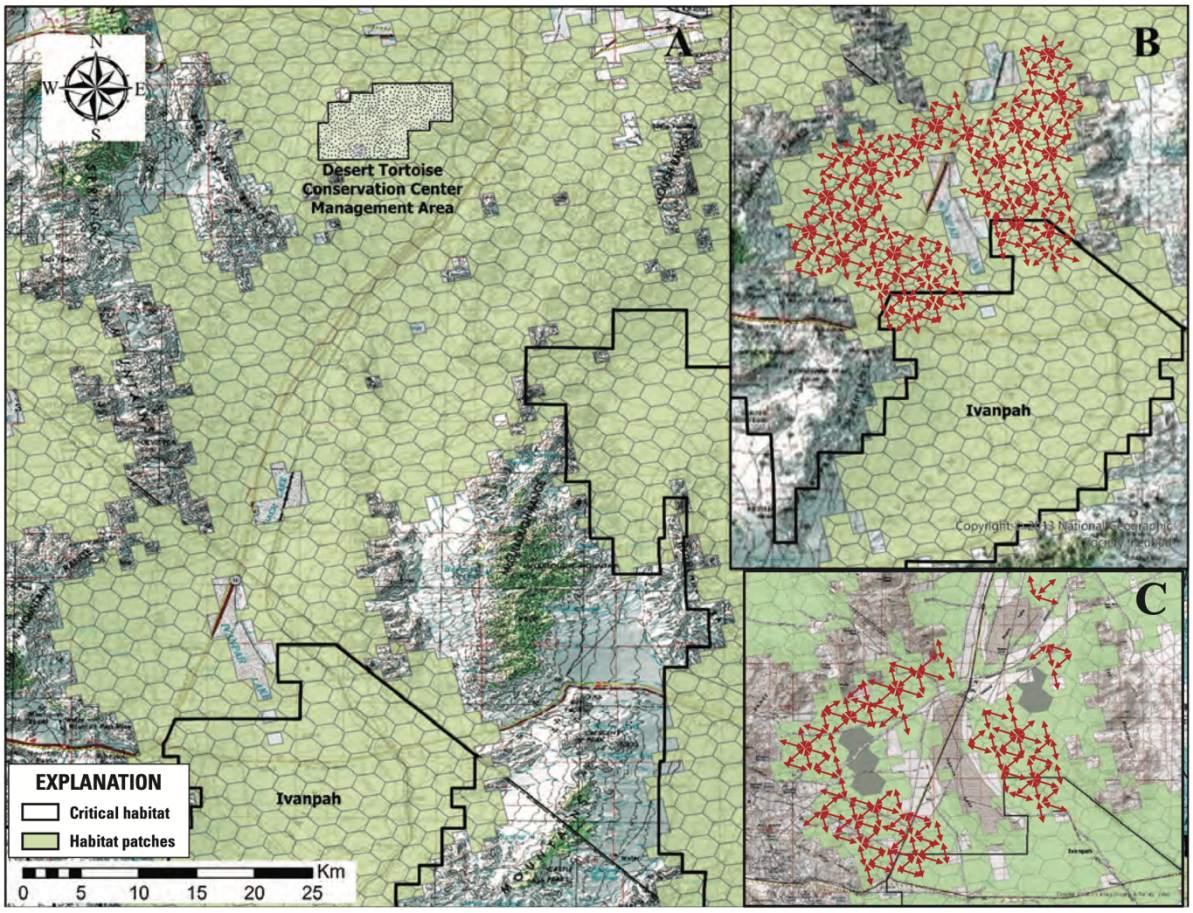

Image source: National Geographic Society. Copyright:© 2013 National Geographic Society, i-cubed.

Figure 2. Inter-patch habitat connectivity of Mojave desert tortoises. Each hexagon represents a 259-hectare (640-acre) habitat patch. *A*, Historically interconnected habitat constrained by major topographic barriers; *B*, Inter-patch relationships across a part of the landscape are represented by red arrows; and *C*, Reduction in patch connections occurs with habitat loss and fragmentation, conceptually represented by gray patches.

Figure 3. Map model of Mojave desert tortoise genetic connectivity in Ivanpah Valley, Clark County, Nevada, and adjacent San Bernardino County, California, after the construction of approved utility-scale solar projects: Ivanpah Solar Electric Generating System and Stateline Solar Project in CA and the Silver State North and South in Nevada. Utility-scale solar projects cause pinch-points (shown in red arrows) in tortoise connectivity between solar projects and mountain ranges which are not suitable tortoise habitat, and these projects that block tortoise connectivity could hinder recovery of the species.

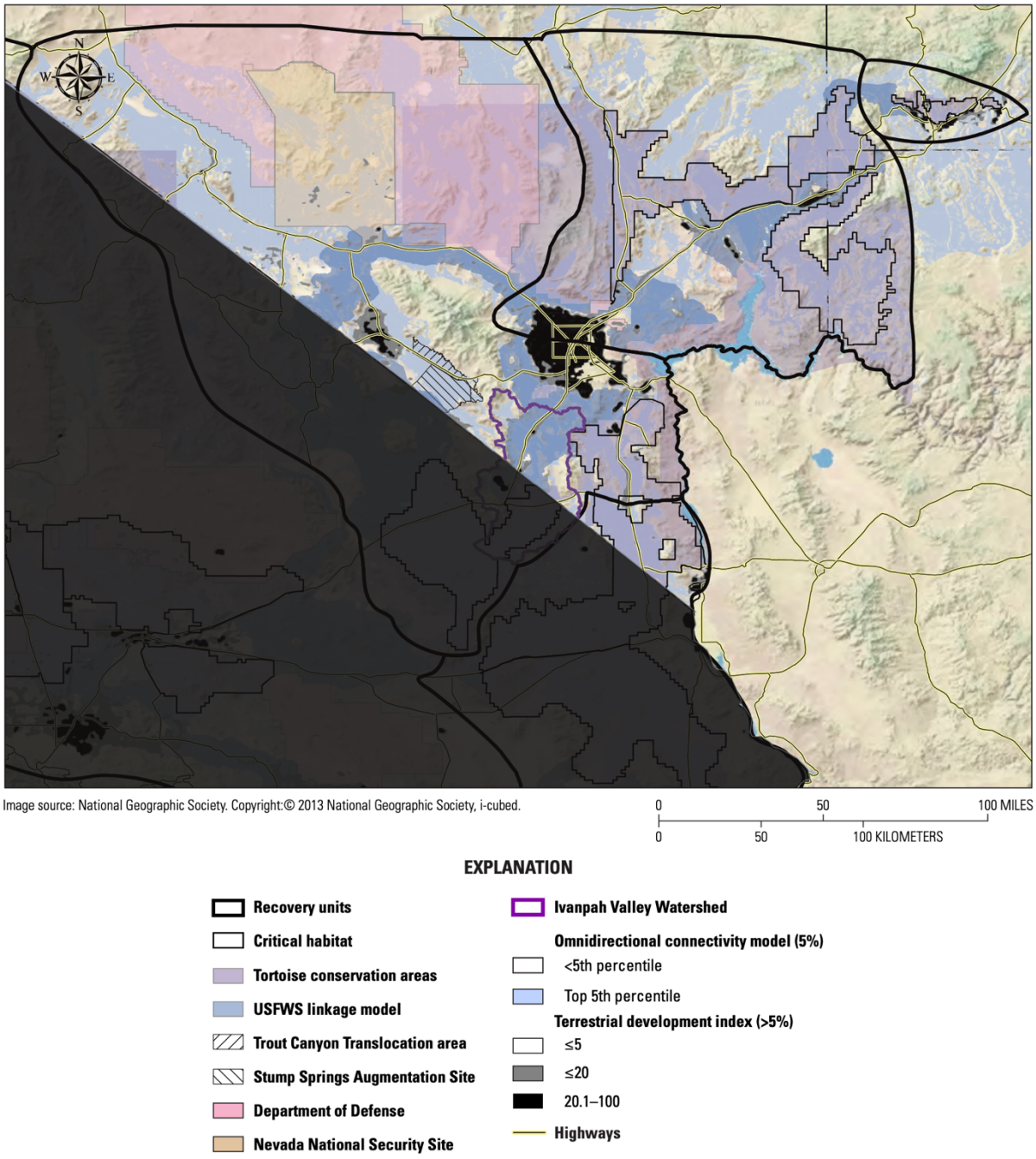

Figure 4. Tortoise conservation areas, linkages, and other habitat managed for desert tortoise population connectivity in Nevada, Utah, and Arizona (Averill-Murray et al. 2021). Most solar projects and applications are in the blue USFWS linkage model areas in southern Nevada.

Table 2. Partial list of solar projects in Mojave desert tortoise habitat.

Table 2. List of solar projects and impacted acreage that have received biological opinions or incidental take permits, 2010–2021. Asterisks indicate projects allowing vegetation to regrow and desert tortoises to reoccupy the sites.

Recovery Unit	Project	Habitat (acres)	Citation
Eastern Mojave			
	Ivanpah Solar Electric Generating System	3,582	Service 2011b
	Stateline	1,685	Service 2013a
	Silver State North	685	Service 2010b
	Silver State South	2,427	Service 2013a
	Nevada Solar One	400	Burroughs 2012
	Copper Mountain North	1,400	Burroughs 2012
	Copper Mountain	380	Burroughs 2012
	Townsite	885	Service 2014d
	Techren Boulder City	2,200	Service 2012b
	Valley Electric Association*	80	Service 2015a
	Canyon Mesa*	123	Service 2019b
	Yellow Pine	4,285	Service 2020b
Subtotal		**18,132**	
Western Mojave			
	Mojave	0[a]	Service 2011c
	Cinco	500	Service 2015b
	Soda Mountain	1,726	Service 2015c
	High Desert	547	Service 2019c
Subtotal		**2,773**	
Northeastern Mojave			
	Res Americas Moapa Solar Energy Center	951	Service 2014e
	Moapa K Road	2,141	Service 2012c
	Playa	1,538	Service 2015d
	Invenergy Harry Allen	594	Service 2015d
	NV Energy Dry Lake Solar Energy Center	751	Service 2015d
	NV Energy Dry Lake Solar Energy Center at Harry Allen	55	Service 2015d
	Aiya	672	Service 2015e
	Mountainview	146	Wise 2018
	Gemini*[65%]	7,113	Service 2019d
	Eagle Shadow Mountain*	2,285	Service 2019e
	Arrow Canyon Solar Project*	2,124	Service 2020c
	Southern Bighorn Solar 1 Project*	2,642	Service 2021b
	Southern Bighorn Solar 2 Project*	1,025	Service 2021c
Subtotal		**22,037**	
Colorado Desert			
	Genesis	1,774	Service 2010c
	Blythe	6,958	Service 2010d
	Desert Sunlight	4,004	Service 2011d
	McCoy	4,533	Service 2013b
	Desert Harvest	1,300	Service 2013c
	Rice	1,368	Service 2011e
	Palen	3,140	Service 2018b
	Desert Quartzite	2,831	Service 2019f
	IP Athos	3,440	Service 2019g
	Crimson	2,201	Service 2020d
Subtotal		**31,549**	
Grand Total		**74,491**	

[a]Primarily in abandoned agricultural fields

Because USFWS continues to allow Clark County to authorize, approve, and allow projects and activities that may take desert tortoise under the ITP despite the violations of the terms and conditions of the BiOp, ITP and IA, the USFWS is in ongoing violation of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1536(d); 50 C.F.R. § 17.31(a).

CONCLUSION

For the above reasons, Clark County, BLM, and USFWS have violated and continue to violate the MSHCP, ITP and BiOp and the ITP should be suspended or revoked. In addition, USFWS and BLM have violated and remain in ongoing violation of Section 9 of the ESA for allowing take to occur without a valid take permit or take statement, and USFWS has also violated and remains in ongoing violation of section 7 of the ESA for failing to reinitiate consultation.

The Clark County MSHCP is a ground-breaking and successful conservation plan. Large areas of habitat were preserved for numerous species, supposedly in perpetuity, to mitigate the metropolitan growth in the Las Vegas Valley. Much of the Northeastern Mojave Recovery Unit is the exception to Mojave desert tortoise declines, with many tortoise populations stable or slightly increasing. This may be in part because of the past success of the MSHCP in Nevada, where most livestock grazing was removed from Critical Habitat, and impacts from large-scale disturbance of adjacent public lands was less than in other areas of the Mojave Desert. Yet the renewable energy boom may threaten the success of the plan, and lead to the loss of viable populations of desert tortoise in the wild.

This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,

Erik Molvar
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Western Watersheds Project

Signing on behalf of

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List of Attachments

1. Clark County MSHCP Biological Opinion
2. Clark County Multi-Species Habitat Conservation Plan
3. Maps of Mojave Desert Tortoise Habitat, Historic Grazing Allotments, and Current Renewable Energy Projects in Clark County, Nevada.
4. Clark County Incidental Take Permit
5. Southern Nevada Public Land Act
6. Clark County Implementing Agreement
7. 2009 MSHCP Amendment Federal Register notice
8. 2018 Gold Butte Manager's Report
9. Tuma et al. 2019
10. Photos of cattle trespass by Bundy Ranch and associated weed invasion
11. Brooks 1999

12. BLM Proposed Grazing Decision, 2018

13. BLM 2021 Bonanza Solar determination

14. USFWS desert tortoise 5-year report

15. Allison and McLuckie 2018

16. Mitchell et al. 2020 abstract

17. Solar PEIS variance map, Nevada

18. Desert Tortoise Council letter

19. Threecorner milkvetch 90-day finding

20. Threecorner milkvetch listing petition

21. Averill-Murray et al. 2021