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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
(Western Division)

12 **DEFENDERS OF WILDLIFE,**)
13)
14 Plaintiff,)
15 v.)
16 **SALLY JEWELL,** Secretary,)
Department of the Interior, **DANIEL M.**)
17 **ASHE,** Director, U.S. Fish and Wildlife)
Service, **NEIL KORNZE,**)
18 Director, Bureau of Land Management)
19 Defendants.)

2:14-CV-1656

20 **COMPLAINT FOR**
21 **DECLARATORY AND INJUNCTIVE**
22 **RELIEF**

23 1. This case concerns two massive new solar facilities to be constructed by a private
24 company on land managed by the Bureau of Land Management (“BLM”), in the crucial but
25 dwindling Ivanpah Valley habitat of the threatened Mojave Desert Tortoise population
26 (“Tortoise”). These two projects collectively threaten the survival of the Tortoise in the Ivanpah
27 Valley, which, in turn, poses grave risks to the survival and recovery of the entire Mojave
28 population of the Tortoise.

1 2. Although the U.S. Fish and Wildlife Service’s (“FWS” or “Service”) had urged
2 that one of these massive facilities – “Silver State South,” to be built between an existing solar
3 facility (“Silver State North”) and the Lucy Gray Mountains in Clark County, Nevada – should
4 *not be built at all* because it threatens to destroy a key Tortoise habitat linkage, on September 13,
5 2013, the FWS issued a Biological Opinion (“Stateline/State South Bi-Op”), pursuant to the
6 Endangered Species Act, *as amended*, (“ESA” or “the Act”), 16 U.S.C. § 1531, *et seq.*, that
7 inexplicably authorizes both of these projects, notwithstanding grave risks to the Tortoise.
8 Subsequently, on or about February 14, 2014, BLM issued two Records of Decision (the
9 “Stateline and Silver State South RODs”), pursuant to the National Environmental Policy Act
10 (“NEPA”), 42 U.S.C. § 4321, *et seq.*, giving final approval for the applicant to proceed with
11 these two projects.
12

13 3. The Bi-Op and RODs are fundamentally flawed in their consideration of the
14 devastating threats these two projects pose to the Tortoise. Moreover, by conducting separate
15 NEPA reviews on each of these projects, BLM has further failed to consider their collective
16 impacts on the species. Accordingly, in issuing and relying upon the Stateline/State South Bi-
17 Op, and in issuing the Stateline and Silver State South RODs, the federal defendants are
18 violating the ESA, NEPA and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706.
19

20 4. Plaintiff therefore seeks preliminary and permanent injunctive relief to enjoin the
21 implementation of the Stateline and Silver State South RODs until the federal defendants come
22 into compliance with federal law.
23

24 **JURISDICTION AND VENUE**

25 5. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540(g),
26 5 U.S.C. § 706, and 28 U.S.C. § 1331.
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1 injured by the federal defendants' violations of NEPA, the ESA and the APA because, by
2 violating these statutory provisions, the federal defendants are preventing the recovery, and
3 hastening the extinction, of the species.

4 11. Defendant Sally Jewell is the Secretary of the Interior, and is ultimately
5 responsible for the implementation of the ESA for Interior agencies such as FWS.

6 12. Defendant Dan Ashe is the Director of the FWS, the agency within the
7 Department of the Interior which has been delegated responsibility for implementing the ESA,
8 including issuing the Biological Opinion at issue in this case.

9 13. Defendant Neil Kornze is the acting Director of BLM, and is responsible for all
10 BLM activities, including the RODs and other authorizations allowing construction of the solar
11 projects at issue in this case on public lands.

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14 **STATUTORY FRAMEWORK**

15 **A. The Endangered Species Act**

16 14. Recognizing that certain species of plants and animals "have been so depleted in
17 numbers that they are in danger of or threatened with extinction," 16 U.S.C. § 1531(a)(2),
18 Congress enacted the ESA with the express purpose of providing both "a means whereby the
19 ecosystems upon which endangered and threatened species depend may be conserved, [and] a
20 program for the conservation of such endangered species and threatened species" *Id.* at
21 § 1531(b). The duties the Act imposes on the Secretary of the Interior for species such as the
22 Tortoise have been delegated to the FWS. 50 C.F.R. § 402.01(b).

23 15. The ESA requires that the Service take affirmative steps to protect and recover
24 listed species such as the Tortoise. For example, the Service must "develop and implement . . .
25 'recovery plans' . . . for the conservation and survival of [protected] species" 16 U.S.C. §
26 1533(f)(1). These plans must include "site description management actions" to recover the
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1 species, “objective, measurable criteria” to determine whether the species is in fact recovering,
2 and estimates of the time needed to achieve the plan's ultimate and intermediate goals. 16 U.S.C.
3 § 1533(f)(1)(B).

4 16. Section 9 of the ESA, and implementing regulations, prohibit the “take” of any
5 protected animal. 16 U.S.C. § 1538(a)(1); 50 C.F.R. §§ 17.21, 17.31. The term “take” is broadly
6 defined to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or []
7 attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Harm and harassment in turn
8 include significant disruptions to behavioral patterns such as breeding. 50 C.F.R § 17.3
9

10 17. Section 7 of the ESA requires that, “in consultation with and with the assistance
11 of the [Service],” each federal agency shall “insure that any action authorized, funded or carried
12 out by such agency . . . is not likely to jeopardize the continued existence of any [protected]
13 species or result in the destruction or adverse modification of [critical] habitat of such species
14” 16 U.S.C. § 1536(a)(2). Where, as here, a private party requires federal authorization for
15 a project that may affect listed species, the permitting agency – called the “action agency” – must
16 engage in a consultation with the FWS to evaluate the impacts of the project on the species. 16
17 U.S.C. § 1536(a)(2).
18

19 18. That consultation must rely on “the best scientific and commercial data
20 available,” *id.* § 1536(a)(2), to evaluate those impacts, including the extent to which the project
21 may “take” the species, and must culminate in a Bi-Op from the Service determining whether the
22 project, considered along with the other activities and threats impacting the species, is, or “is not
23 likely to jeopardize the continued existence of” the species, or “result in the destruction or
24 adverse modification of [critical] habitat” *Id.* § 1536(a)(2). “Jeopardy” is evaluated by
25 considering whether the project “reasonably would be expected, directly or indirectly, to reduce
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1 appreciably the likelihood of both the survival and recovery of a listed species in the wild by
2 reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

3 19. Even where a Bi-Op concludes that no jeopardy will occur, the Bi-Op must
4 analyze the extent to which the project will result in the “take” of listed species, including the
5 amount of “incidental take” that will occur (called an “incidental take statement”), and must
6 include “reasonable and prudent measures” – as well as terms and conditions to implement those
7 measures – to minimize the extent of the take. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(i)(1)(i).
8 Take in excess of the incidental take statement is prohibited, and thus once the take authorization
9 is reached the action agency must reinitiate consultation to comply with the Act.
10

11 20. Section 7 also requires Interior to review its programs “and utilize such programs
12 in furtherance of the purposes of” the ESA, and requires that all federal agencies “shall, in
13 consultation with and with the assistance of the Secretary, utilize their authorities in furtherance
14 of the purposes [of the ESA] by carrying out programs for the conservation of endangered
15 species” 16 U.S.C. § 1536(a)(1). The ESA defines “conservation” to include “all methods
16 and procedures which are necessary to bring any endangered species . . . to the point at which the
17 measures provided [in the ESA] are no longer necessary.” 16 U.S.C. § 1532(3).
18

19 **B. The National Environmental Policy Act**

20 21. NEPA, our Nation’s “basic national charter for protection of the environment,”
21 40 C.F.R. § 1500.1(a), requires federal agencies to prepare an environmental impact statement
22 (“EIS”) for all “major Federal actions significantly affecting the quality of the human
23 environment” 42 U.S.C. § 4332(C). This EIS must describe, *inter alia*, the “environmental
24 impact of the proposed action,” and “alternatives to the proposed action.” *Id.*
25

26 22. The Council on Environmental Quality (“CEQ”) – an agency within the
27 Executive Office of the President – has promulgated regulations implementing NEPA that are
28

1 “binding on all federal agencies.” 40 C.F.R. § 1500.3. Those regulations require that after an
2 agency issues an EIS, the agency must issue a ROD formally declaring how the agency will
3 proceed with the project in light of the EIS. *Id.* § 1505.2.

4 23. The CEQ regulations also require a *single* EIS for projects that are “closely
5 related” and have “similarities” such as “common timing or geography.” 40 C.F.R. § 1508.25.
6

7 **FACTS GIVING RISE TO PLAINTIFF’S CLAIMS**

8 **1. The Imperiled Desert Tortoise**

9 24. In its 2011 Recovery Plan for the Mojave population of the desert tortoise
10 (*Gopherus agassizii*), which consists of all Tortoises north and west of the Colorado River, the
11 FWS emphasized that preservation of the species’ remaining habitat is one of the key recovery
12 actions necessary to protect remaining populations. Over a lifetime one Tortoise may use more
13 than 1.5 square miles of habitat, and it may make periodic forays of more than 7 miles at a time.
14 The species also experiences relatively high mortality early in life, requires 13 to 20 years to
15 reach sexual maturity, and has low reproductive rates over many years.
16

17 25. Given these large home ranges and reproductive challenges, in the most recent
18 Recovery Plan the FWS concluded that “long-term persistence of extensive, *unfragmented*
19 *habitats is essential for the survival of the species.*” 2011 Recovery Plan at viii. In particular,
20 applying the best available science, the Service has explained that while over a lifetime an
21 individual Tortoise inhabits a utilization area of approximately 1.4 miles, “[*m*]ultiple lifetime
22 *utilization areas are necessary*” in any given area to allow Tortoises to “find mates, reproduce,
23 and maintain populations during years of low habitat quality, periodic fire, and disease
24 outbreaks.”
25

26 26. Despite these habitat needs, in recent years *well more than 100,000* acres of
27 Tortoise habitat have been removed. As set forth in the FWS’s 5-Year Status Review, in recent
28

1 years “almost 80,000 acres of modeled habitat have been” destroyed due to urban development
2 alone. The FWS has also authorized myriad specific projects in Tortoise habitat, both removing
3 *tens of thousands of additional acres* of habitat altogether, and seriously degrading the remainder
4 through, *inter alia*, the edge effects of various projects as well as the fragmentation of remaining
5 habitat.

6
7 27. As regards solar projects alone, in the past several years the Service has issued Bi-
8 Ops for massive projects that have removed more than 35,000 additional acres of Tortoise
9 habitat, and have killed or otherwise taken more than 1,500 Tortoises. While various purported
10 mitigation measures have been offered for these and other projects, the FWS has acknowledged
11 that it has been “unable, to date, to determine whether the measures have been successful.”
12 When combined with the additional threats posed by climate change and drought – which, in its
13 2010 5-Year review for the Tortoise, the FWS explained are becoming “significant factors in the
14 long-term persistence of the species” – the Tortoise is under siege on multiple fronts.

15
16 28. In light of the massive disruption and fragmentation of Tortoise habitat, in the
17 2011 Recovery Plan the FWS recognized the vital need for a comprehensive “cumulative
18 impacts assessment” for the Tortoise. Thus, acknowledging that the Recovery Plan itself fails to
19 set forth any “strategy for addressing renewable energy,” the Service explained the need for an
20 analysis that “comprehensively address[es] this threat” and determines what “recovery
21 implementation will look like in light of renewable energy development.” In particular, the
22 Service explained the urgent need for an analysis that addresses the “[l]andscape level effects of
23 renewable energy development on the desert tortoise,” including “how such development may
24 contribute to tortoise habitat loss and/or fragmentation.” No such analysis has been made
25 publicly available, and on information and belief no such analysis has been completed.
26
27
28

1 **2. Fragmentation of Desert Tortoise Habitat and Corridors in the Ivanpah Valley**

2 29. As the FWS has recognized, the Ivanpah Valley population of Tortoises is “an
3 important component of the Northeastern Mojave Recovery Unit” in light of its “relatively large
4 number of desert tortoises across a range of habitat types.” As the Service explains in the Bi-Op
5 challenged here, the “[f]ailure to maintain a viable population of desert tortoise in the Ivanpah
6 Valley would have negative implications for” the species as a whole.

7
8 30. Recent research has demonstrated that in most of the Tortoise’s present remaining
9 desert habitat, they face grave risks from climate change within the foreseeable future due to the
10 combination of drought conditions and increasing temperatures, which will render most of the
11 presently occupied habitat unusable by the Tortoise. Recent research also demonstrates that the
12 Ivanpah Valley will become one of the few remaining refugia for Tortoises, as the Valley will
13 retain the precipitation and temperature levels necessary to sustain the species.
14

15 31. However, despite the vital need to protect the Tortoise in the Ivanpah Valley, the
16 ongoing toll on Tortoise habitat has been particularly severe in and near this area, where
17 numerous projects have already been approved. As the Service itself recognizes in the Bi-Op at
18 issue here, “the joint port of entry, Ivanpah Solar Electric Generating System, Primm Valley
19 Golf Course, and DesertXpress,” a high speed train project, “have caused or will cause the loss
20 of thousands of acres of habitat” in the Valley, while “[o]ther actions, such as those occurring in
21 the Boulder Corridor and the Mountain Pass lateral pipeline have degraded additional habitat.”
22 In addition, roads have removed “hundreds of acres of habitat,” and have led to the “likely
23 degradation of additional areas as sheet flow across the valley’s alluvial fans was disrupted” – in
24 addition to severing habitat linkages and causing additional Tortoise mortality when Tortoises try
25 to cross the roads. The construction and maintenance of various utility and transmission lines in
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1 the Valley also have both removed additional habitat, and pose an ongoing threat as use of
2 unpaved roads to service these lines leads to ongoing take of Tortoises.

3 32. Two other solar projects have also already been approved and constructed in the
4 Ivanpah Valley, the “Ivanpah” project and “Silver State North.” For example, in 2010 BLM
5 authorized the construction of the Ivanpah solar project, a 370-megawatt facility in more than
6 3,000 acres of Tortoise habitat in the Ivanpah Valley 4.5 miles southwest of Primm, Nevada.
7 The FWS issued an initial Bi-Op on that project – the “Ivanpah Bi-Op” – in 2010, but
8 consultation was reinitiated after the contractor vastly exceeded the amount of incidental take of
9 Tortoise that the Service had authorized.

10
11 33. The revised Ivanpah Bi-Op, issued in June, 2011, acknowledges that the Ivanpah
12 project resulted in the deaths of far more Tortoises than the FWS had anticipated, and authorizes
13 an overall take of as many as 1,136 Tortoises. However, the FWS continued to conclude that the
14 project would not jeopardize the Tortoise, in significant part because the project would not
15 impair the connectivity of Tortoise habitat in Ivanpah Valley, concluding that “[u]nder *current*
16 *conditions*, population connectivity can be maintained through the habitat linkages that would
17 remain” Revised Ivanpah Bi-Op at 84 (emphasis added).

18
19 34. Of those remaining habitat linkages, the FWS’s revised Ivanpah Bi-Op focused
20 particularly on the linkage east of the Silver State North solar project, between that project and
21 the Lucy Gray Mountains – *precisely where the Silver State South project is proposed*. The
22 Service explained that because this area “has the lowest level of existing habitat degradation and
23 likely provides the most reliable potential for continued population connectivity,” protection of
24 this area is “*critically important*.” *Id.* at 73-74 (emphasis added).

25
26 35. Thus, while the Service emphasized that loss of Tortoise connectivity between the
27 northern and southern ends of Ivanpah Valley “would have far-reaching implications” because it
28

1 would “likely create a nearly closed population in the southern end of the Ivanpah Valley,” the
2 agency was able to conclude that this connectivity would remain despite the Ivanpah project,
3 because of the undisturbed habitat east of Silver State North, now under threat.

4 **3. The Two Additional Solar Projects Approved In The Ivanpah Valley**

5 36. This case concerns the construction of still two more massive solar projects in the
6 species’ dwindling remaining habitat in the Ivanpah Valley near Primm, Nevada on the
7 California-Nevada border – the Stateline and the Silver State South projects. Both projects are
8 located on federal lands administered by BLM.
9

10 37. At both sites, the project will include vegetative removal, and mowing and
11 grading to prepare the area for solar panel installations. The solar arrays will occupy the entire
12 site, which will be surrounded by fencing designed to insure that Tortoises are completely
13 excluded from access. These projects will take up to 2,115 tortoises (including adults, subadults,
14 juveniles, hatchlings and eggs); may kill as many as 150 adult tortoises; threaten to destroy the
15 value of the essential habitat linkages for Tortoises in the Ivanpah Valley; and will further
16 fragment the dwindling remaining high quality Tortoise habitat.
17

18 **A. The 1,600 Acre Stateline Solar Project**

19 38. The Stateline Project, located on BLM land in San Bernardino, California,
20 approximately 2 miles southwest of Primm, Nevada, will be a 300-megawatt solar facility. The
21 facility will be just east of the Ivanpah solar project, and will remove an additional
22 approximately 1,600 acres of Tortoise habitat.
23

24 39. The FWS estimates that in the habitat where the Stateline project will be
25 constructed, there are approximately 94 larger Tortoises and 853 smaller Tortoises. All of the
26 Tortoises on the site will either be relocated or killed as a result of the project. The Service itself
27 anticipates that up to three Tortoises will be killed during construction, and two during
28

1 translocation. The Service also anticipates take of up to two Tortoises per year during the 30
2 year life of the project – for an additional 60 Tortoises.

3 **B. The 2,400 Acre Silver State South Solar Project**

4 40. On the other side of Primm, less than a mile east, one solar facility has also
5 already been constructed – known as “Silver State North.” That facility removed more than 600
6 acres of Tortoise habitat in the area.

7
8 41. Silver State *South*, at issue here – which is also on federal lands administered by
9 BLM – will remove an approximately 2,400 acres of additional Tortoise habitat, and will be
10 placed just east of Silver State North, between that project and the Lucy Gray Mountains further
11 to the East. The project will leave only an approximately 1.4 mile corridor of Tortoise habitat in
12 this area.

13
14 42. According to the Bi-Op, the habitat in which the Silver State South project will be
15 built contains as many as 115 large Tortoises, and more than a thousand smaller Tortoises. As
16 with Stateline – and all the other solar projects in the Ivanpah Valley – all of the Tortoises on the
17 site will either be relocated or killed as a result of the project. The FWS itself anticipates that up
18 to five Tortoises will be killed during construction and an additional two will be killed from the
19 translocation process. The Service further anticipates take of up to three additional adult
20 Tortoises per year over 30 years – for an additional 90 Tortoises.

21
22 **4. The FWS’s Pronouncement That The Silver State South Project**
23 **Should Not Be Built.**

24 43. On November 16, 2012, the FWS submitted formal comments on the Draft EIS
25 for the Silver State South project, urging BLM to reject the application.

26 44. FWS’s principal concern was the size of the habitat corridor that would remain
27 between the Silver State South project and the Lucy Gray Mountains to the East. Consistent
28 with the Service’s views as expressed in the Ivanpah project Bi-Op, the FWS explained that of

1 the remaining potential Tortoise habitat linkages in the Ivanpah Valley, this specific corridor is
2 “the widest of those linkages and likely the most reliable for continued population connectivity.”

3 45. The Silver State South project would destroy the utility of that linkage by leaving
4 only a 1.4 mile wide corridor. As the agency had concluded in the Recovery Plan, 1.4 miles is
5 simply not biologically sufficient, since it only encompasses a *single* “lifetime utilization area” –
6 *i.e.*, the area necessary to support the needs of a single tortoise over its lifetime – while a corridor
7 sufficient to accommodate *multiple* “lifetime utilization areas” is critical to allow for genetic
8 interchange between Tortoise populations in the Ivanpah Valley. FWS thus urged that BLM
9 reject any version of the project that does not leave a remaining linkage corridor “wide enough to
10 accommodate *multiple desert tortoise ranges, spanning up to several times the desert tortoise*
11 *lifetime utilization area.*” Nov. 16, 2012 Letter at 2 (emphasis added).

12
13
14 **5. The Service’s September 30, 2013 Bi-Op On These Projects**

15 46. Ten months after the submission of the FWS’s formal comments, in a document
16 that neither refers to the same agency’s comments on the Silver State South Draft EIS, nor
17 otherwise addresses the Service’s expert biological views expressed in either those comments,
18 the Ivanpah project Bi-Op, or the Service’s own Recovery Plan, the FWS issued a final Bi-Op
19 finding that the Stateline and Silver State South projects do not jeopardize the survival or
20 recovery of the Desert Tortoise in Ivanpah Valley.

21
22 47. In the Stateline/State South Bi-Op the Service continues to recognize that the
23 habitat corridor where the Silver State South project is proposed is the last viable habitat linkage
24 for the Desert Tortoise in Ivanpah Valley, explaining that because it “has the lowest level of
25 existing habitat degradation and is wider (approximately 2 miles in the vicinity of the existing
26 solar project),” this corridor “provides the most reliable potential for continued population
27 connectivity throughout the Ivanpah Valley.”
28

1 48. The agency also continues to acknowledge that “habitat patches for corridor-
2 dwelling species like the desert tortoise” should be large enough to “accommodate *multiple home*
3 *ranges*” (emphasis added). Thus, the Bi-Op flatly states that “strongly territorial species” such as
4 the tortoise “require a minimum corridor width that is *substantially larger than the width of a*
5 *home range*” because, otherwise, “in a narrow corridor, an occupied home range that spans the
6 corridor could impede movement by other individuals through the corridor.” *Id.* (emphasis
7 added).

9 49. Nonetheless, in direct contravention of the best available science as previously
10 articulated by the Service itself in the Tortoise Recovery Plan, the Ivanpah Bi-Op, and the
11 agency’s own earlier comments, in the Stateline/State South Bi-Op the Service no longer rejects
12 the proposal to reduce this corridor to only 1.4 miles wide. Rather, the Bi-Op purports to resolve
13 this fundamental conflict with its prior pronouncements by simply asserting – without further
14 explication or support – that “although desert tortoises are territorial and will fight among
15 themselves, their territories also frequently overlap.” *Id.* On the basis of that unremarkable fact
16 – *i.e.*, that although territorial, Tortoises nonetheless may come into contact with each other – the
17 agency asserts, with respect to the impact of the Silver State South project, that “although the
18 width of the remaining corridor would be narrower than optimal, territorial desert tortoises are
19 unlikely to block the movement of other desert tortoises through the corridor.” *Id.* The Bi-Op
20 cites no scientific studies, analyses by Tortoise experts, or anything else to support this assertion.
21

23 50. The Service’s conclusion in the Bi-Op not only contradicts the FWS’s formal
24 views expressed elsewhere, but also conflicts with the published views of leading Tortoise
25 experts, including those within the FWS, who have also found that multiple home ranges are
26 vital for Tortoise travel corridors. For example, Dr. Roy Averill-Murray, in a 2013 paper
27 “Conserving Population Linkages For the Mojave Desert Tortoise,” published in *Herpetological*
28

1 Conservation and Biology, explained that the “minimum widths for corridor dwellers such as the
2 Mojave Desert Tortoise should be substantially larger than a home range diameter.” Given that
3 Dr. Murray is not only a renowned expert on the Tortoise, but also an official in the FWS’s own
4 Desert Tortoise Recovery Office, the Service’s unexplained rejection of his formally published
5 research is inexplicable.
6

7 51. The Bi-Op’s analysis of habitat fragmentation due to the Stateline Project is
8 similarly flawed. While the Bi-Op recognizes that the Tortoise population in this area already
9 faces significant threats due to other projects, and that the Stateline project “is likely to promote
10 or exacerbate these effects” by removing additional habitat and “further fragment[ing] the small
11 population west of Interstate 15,” the Service summarily dismisses concerns with habitat
12 fragmentation in this area on the grounds that, in light of the “existing extensive loss of habitat in
13 this portion of the valley,” the loss of additional “suitable habitat that would result from the
14 proposed action is likely more detrimental to desert tortoises in this area than the reduced
15 connectivity.” The Service also ignores the fact that *all* of the Tortoises are to be removed from
16 the area to make way for the project, and the impact this loss of population itself will have on the
17 persistence of Tortoises in this area.
18

19 52. The Bi-Op’s analysis of the degree to which habitat fragmentation caused by
20 these two massive projects will impair the Tortoise’s recovery prospects also flies in the face of
21 the best available science. With regard to the Stateline project, the FWS claims that recovery
22 prospects will not be diminished because the Tortoise’s habitat in the area is already “largely
23 isolated,” and thus the new project is “not likely to measurably effect connectivity.” In other
24 words, the Service has simply written off the connectivity of the habitat in this area in light of the
25 projects it has already approved. The Service also once again ignores the fact that all of the
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1 existing Tortoise's are to be removed from the project area and the inevitably adverse impacts
2 that will have on the species' persistence and recovery there.

3 53. For Silver State South, the Bi-Op recognizes that the project "is likely to impede
4 recovery of the desert tortoise, at least temporarily." It reaches this inevitable conclusion
5 because it recognizes both how important this area is for habitat connectivity, and the fact that
6 the project "is likely to reduce connectivity," particularly given the 1.4 mile corridor that will
7 remain after the project is constructed.
8

9 54. The Bi-Op nonetheless purports to conclude that Tortoise recovery will not be
10 impaired over the *long-term* because a United States Geological Survey study will monitor
11 whether future "changes in demographic and genetic stability" of the Tortoises in this area are
12 "related to the proposed solar projects."
13

14 55. In relying on this study, the Bi-Op fails to explain how the monitoring of
15 Tortoises will allow the Service to discern whether changes in population stability are related to
16 these solar projects, as distinct from any of the other myriad threats facing the Tortoises in this
17 area, including other solar projects and even impacts such as climate change.
18

19 56. Even assuming this connection could be discerned, the Bi-Op also fails to explain
20 what steps would be taken in the event that that the projects are deemed to be undermining
21 population stability. Rather, the Bi-Op simply asserts that the FWS will "determine an
22 appropriate course of action" at that time without providing any indication as to what will (or
23 even could) be done once the project has irreversibly destroyed Tortoise habitat in the corridor.
24 Nonetheless, "[i]ntegral to [its] conclusion" that the projects are not likely to impede long-term
25 recovery of the Tortoise is the assumption that, in the event that the agency discovers that, in
26 fact, they *do* "degrade demographic or generic stability" in the long-term, the Service "will be
27 able to detect degradation of those values and implement remedial actions if necessary."
28

1 57. The Service’s vague pronouncement that it will somehow figure out how to
2 protect the Tortoise’s recovery prospects if it turns out that the anticipated short-term impairment
3 in the species’ recovery prospects due to these projects is in fact permanent does not in any event
4 satisfy the Service’s fundamental obligation to analyze the impacts of the project on species
5 recovery. The Bi-Op’s acknowledgement that “the most apparent threats to the desert tortoise
6 are those that result in mortality and permanent habitat loss across large areas, such as
7 urbanization and large-scale renewable energy projects,” and that the Service remains “unable to
8 quantify how threats affect desert tortoise populations,” further demonstrates the fundamental
9 deficiency in the Bi-Op, for in the face of this admitted uncertainty it is contrary to the ESA for
10 the Service to be approving even more wide-scale habitat destruction and fragmentation.
11

12 58. The Bi-Op also ignores whether the habitat fragmentation engendered by these
13 projects may “result in the . . . adverse modification” of critical habitat for the tortoise. 16
14 U.S.C. § 1536(a)(2). While the Bi-Op explicitly states that it “doe[s] not address critical habitat”
15 at all, the projects may have serious impacts on critical habitat areas by impairing corridors that
16 can connect Tortoises to such habitat.
17

18 59. To address the hundreds of Tortoises living on the two project sites, the Bi-Op
19 approves a translocation strategy that the Service has conceded to be ineffective when employed
20 in the past. The translocation effort will also further exacerbate the habitat fragmentation caused
21 by Silver State South because it requires that the hundreds of Tortoises found in the two solar
22 project areas be relocated into already compromised habitat linkages that are occupied by
23 naturally occurring Tortoises. For the Silver State South project in particular, Tortoises will be
24 relocated into precisely the inadequately small habitat area between Silver State South and the
25 Lucy Gray Mountains.
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1 60. Although the Bi-Op purports to conclude that “post-translocation survival rates
2 will not significantly differ from that of animals that have not been translocated,” this assertion
3 also flatly contradicts the best available science as well as the FWS’s comments on the Silver
4 State South Draft EIS, in which the agency explained that it “does not support translocation as a
5 proven minimization measure for development projects,” and that “translocation of desert
6 tortoises could result in considerable effects to both translocated individuals and individuals that
7 are resident to any identified translocation site.”

9 61. The FWS’s EIS comments – not the Bi-Op’s conclusions – are consistent with
10 evaluations of the efficacy of Tortoise translocation in other projects, including one conducted by
11 the U.S. Geological Survey at Ft. Irwin finding that almost half of translocated Tortoises died
12 within a few years of being uprooted from their natural habitat, and another study finding more
13 than 10 translocated Tortoises dead within a few months.

15 62. The Bi-Op also fails to meaningfully analyze the overall impact on the Tortoise of
16 the numerous projects for which the FWS has authorized the death and injury of Tortoises in
17 recent years. For example, while the Bi-Op recognizes that the Service issued an Incidental Take
18 Permit in connection with a county-wide Habitat Conservation Plan (“HCP”) for Clark County,
19 Nevada, the Service simply acknowledges that the permit “allows the incidental take of covered
20 species,” without even disclosing or discussing the amount of take involved. Moreover, as
21 reflected in the 2000 Bi-Op for that HCP, from 1989 to 2000, “a total of 342 biological opinions
22 have been issued for Federal actions that may affect desert tortoise in Clark, Nye, and Lincoln
23 counties, Nevada,” which “covered disturbance of 292,098 ac of desert tortoise habitat and
24 authorized the incidental take of 16,897 desert tortoises (6,107 harassed and 10,790 killed or
25 injured) and an additional 195 tortoises (148 harassed and 47 killed or injured) for each year the
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1 biological opinion is in effect.” These massive take numbers are not discussed in the Bi-Op, let
2 alone analyzed in conjunction with the significant adverse impacts of the projects at issue.

3 63. The Bi-Op also ignores the fact that the take authorized in the HCP was premised
4 in part on BLM’s retirement of 2.2 million acres of grazing allotments in Tortoise habitat. This
5 included the Jean Lake Allotment where the Silver State South project is to be located, and
6 where BLM itself stated that closure is necessary precisely because the area is “especially
7 important for desert tortoise population connectivity.” The Bi-Op does not explain how the
8 closure of this grazing allotment to benefit Tortoises – also noted in the Service’s 5-year Review
9 for the species – can be reconciled with the current decision to allow a large-scale development
10 on the same habitat, thereby removing its utility for Tortoises altogether.

11
12 64. Even as to the Ivanpah Valley, while the Bi-Op includes a list of the total number
13 of Tortoises impacted by projects there – more than 1,500 in total – the FWS fails to discuss
14 whether, in combination, the additional incidental takes caused by these projects – particularly
15 taken together with the incremental effect of additional habitat fragmentation and the actual
16 number of relocated Tortoises likely to die – is likely to jeopardize the survival and recovery of
17 the Desert Tortoise in Ivanpah Valley, and within adjacent portions of the Eastern Mojave
18 Recovery Unit, including the Ivanpah Critical Habitat Unit.

19
20 65. In light of the unsubstantiated claim in the Bi-Op that all translocated Tortoises
21 will survive and thrive in their new locations, the Service’s analysis also proceeds on the
22 erroneous premise that, apart from removing habitat, the Silver State South and Stateline projects
23 will not otherwise impact the more than 1,500 translocated Tortoises. Thus, while other Bi-Ops,
24 such as the Ivanpah Bi-Op, specifically authorize mortality and injury to Tortoises – separately
25 from the harassment associated with translocation – the Bi-Op here fails to disclose and discuss
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1 the impacts of the total number of Tortoises the Service anticipates will collectively be injured or
2 die from these projects.

3 66. The premise that all transported Tortoises will survive in their new locations also
4 contradicts, without explanation, the Service's Bi-Ops on other projects. For example, the
5 Ivanpah Bi-Op alone authorized "mortality or injury" to up to 1,136 Tortoises. Rather than
6 ignoring the massive take of Tortoises that has already been authorized elsewhere, the FWS must
7 also fully disclose and analyze the amount of take – particularly from mortality and injury – the
8 Service has elsewhere authorized from translocation and other impacts before determining
9 whether the additional take anticipated at these projects threaten to jeopardize the species in
10 Ivanpah Valley, the Ivanpah Critical Habitat Unit, or the Eastern Mojave Recovery Unit as a
11 whole.
12

13 67. The Bi-Op also ignores the extent to which translocating Tortoises within Ivanpah
14 Valley poses risks to other Tortoises already living in the receiving areas. Given recent drought
15 conditions Tortoises are already at their carrying capacity in the Valley, and putting more
16 tortoises into a smaller area poses significant risks to both the transported and resident tortoises
17 additionally stressed by competing with each other for scarce resources.
18

19 **6. The BLM's Stateline and Silver State South RODs**

20 68. BLM prepared two separate EIS's for the two solar projects. On or about
21 February 14, 2014, BLM issued two separate RODs.
22

23 69. Although the RODs recognize that the "environmentally preferred alternative"
24 would be to deny the applications to build the solar projects, the RODs approve the applications,
25 granting the rights of way necessary for project construction.
26

27 70. The RODs adopt the FWS's Biological Opinion concerning the impacts of the
28 projects on the Tortoise.

1 71. In the RODs BLM explains that the FWS considered both projects in one Bi-Op
2 “due to (1) the proximity of the projects, (2) timing of the consultations, (3) similarity between
3 the effects of the projects; (4) fact that the same company proposed both projects; and (5) need to
4 comprehensively address impacts to habitat and connectivity” for the Tortoise.

5
6 **7. Plaintiff’s Notice of Intent to Sue**

7 72. In light of the fundamental deficiencies in the FWS’s September 30, 2013 Bi-Op
8 for the Stateline and Silver State South Solar Projects, on November 6, 2013 Defenders sent a
9 formal notice letter of intent to sue for violations of the ESA, in compliance with ESA Section
10 11(g). 16 U.S.C. § 1540(g). Although on December 6, 2013 FWS issued an “Errata” to the Bi-
11 Op correcting several typographical errors and other minor omissions – none of which addressed
12 any of the concerns raised in the notice letter – neither FWS nor BLM has contacted Defenders
13 in response to the notice letter.
14

15 **PLAINTIFF’S CLAIMS FOR RELIEF**

16 **Claim One**
17 **(Violations of the ESA)**

18 73. By issuing, and relying upon, the Stateline/State South Bi-Op, which ignores and
19 otherwise fails to rely on the best scientific and commercial data available, fails to provide
20 rational bases for the conclusions reached, contradicts without explanation the FWS’s own
21 expert views expressed before this Bi-Op was issued, and fails to analyze whether and the extent
22 to which the project will impair the value of formally designated critical habitat, the federal
23 defendants are violating Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and are acting in a
24 manner which is arbitrary and capricious and contrary to law in violation of the APA, 5 U.S.C. §
25 706.
26

27 74. By continuing to approve projects in the Tortoise’s Ivanpah Valley habitat that the
28 Service recognizes will both take additional Tortoises and further fragment the species’ habitat,

1 without having completed the comprehensive plan the Service has recognized is necessary to
2 reconcile the development of large-scale renewable energy projects with tortoise survival and
3 recovery, the federal defendants are violating ESA Sections 4(f)(1) and 7(a)(1), 16 U.S.C. §§
4 1533(f)(1), 1536(a)(1), and are acting in a manner which is arbitrary and capricious and contrary
5 to law in violation of the APA, 5 U.S.C. § 706.

6
7 75. One of the specific recovery actions in the 2011 Recovery Plan is to “[d]etermine
8 the importance of corridors and physical barriers to desert tortoise distribution and gene flow [in
9 order to] allow population models to be made spatially explicit relative to current land
10 management (e.g., population and habitat fragmentation due to roads, urbanization, and energy
11 development) and potential distributional shifts resulting from climate change.” On information
12 and belief no such determination or analysis has been completed. By continuing to approve
13 projects in the Tortoise’s Ivanpah Valley habitat without having carried out this specific element
14 of the Recovery Plan, the federal defendants are violating ESA Sections 4(f)(1) and 7(a)(1), 16
15 U.S.C. §§ 1533(f)(1), 1536(a)(1), and are acting in a manner which is arbitrary and capricious
16 and contrary to law in violation of the APA, 5 U.S.C. § 706.

17
18 76. Plaintiff is injured by these legal violations in the manner set forth in Paragraphs
19 7-10 above.

20
21 **Claim Two**
22 **Violations of NEPA**

23 77. As the FWS has recognized, the Stateline and Silver State South projects are
24 “closely related” and have “similarities,” including “common timing or geography.” 40 C.F.R. §
25 1508.25. Accordingly, by failing to prepare one comprehensive EIS for the Stateline and Silver
26 State South solar projects, the federal defendants are violating NEPA and the implementing CEQ
27 regulations, and are acting in a manner which is arbitrary and capricious and contrary to law in
28 violation of the APA, 5 U.S.C. § 706.

1 78. Plaintiff is injured by these legal violations in the manner set forth in Paragraphs
2 7-10 above.

3 WHEREFORE, plaintiff respectfully requests that this Court:

4 (1) declare that defendants have violated, and continue to violate, the Endangered
5 Species Act (“ESA”) and implementing regulations, the National Environmental Policy Act
6 (“NEPA”) and the implementing CEQ regulations, and the Administrative Procedure Act
7 (“APA”);

8 (2) declare that the FWS’s September 30, 2013 Stateline/State South Biological
9 Opinion (Bi-Op”) for the Stateline and Silver State South solar projects violates the ESA and the
10 APA;

11 (3) declare that the BLM’s RODs for the Stateline and Silver State South projects
12 violate NEPA, the ESA, and the APA;

13 (4) vacate and remand the Bi-Op and RODs;

14 (5) preliminarily and permanently enjoin the implementation of BLM’s RODs for the
15 Stateline and Silver State South solar projects;

16 (7) award plaintiff their costs, attorneys’ fees, and other disbursements for this action,
17 including any expert witness fees; and

18 (8) grant plaintiff such other and further relief as this Court may deem just and
19 proper.

20 Dated: March 6, 2014

21 Respectfully submitted,

22 /s/ Donald B. Mooney

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/s/ Howard M. Crystal
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