

<b>DOCKET</b> 07-AFC-5
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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:

APPLICATION FOR CERTIFICATION  
FOR THE IVANPAH SOLAR  
ELECTRIC  
GENERATING SYSTEM

DOCKET NO. 07-AFC-5

**PETITION FOR RECONSIDERATION OF DECISION BY INTERVENOR  
BASIN AND RANGE WATCH**

September 30, 2010

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APPLICATION FOR CERTIFICATION  
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**PETITION FOR RECONSIDERATION OF DECISION AND STAY  
BY INTERVENOR BASIN AND RANGE WATCH**

Basin and Range Watch requests a reconsideration of the Commission's decision on the Ivanpah Solar Electric Generating System, based on both an error in fact and new information on the status of the Northeastern genetic lineage of Desert tortoise (*Gopherus agassizii*) in Ivanpah Valley, following:

**20 CCR § 1720. Reconsideration of Decision or Order.**

(a) Within 30 days after a decision or order is final, the Commission may on its own motion order, or any party may petition for, reconsideration thereof. A petition for reconsideration must specifically set forth either: 1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in fact or change or error of law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision.

The ERRATA TO THE PRESIDING MEMBER'S PROPOSED DECISION says:

**Several commentators mentioned the genetic uniqueness of the desert tortoises in the Ivanpah Valley as justifying a heightened level of concern and protection. When pressed, however, no definitive evidence or rationale for doing so was presented. (8/24/10 RT, pp. 150 – 153.) At this point we consider the concern to be speculative. (p. 33)**

Basin and Range Watch believes this statement is in error because there is ample

information in the record and the documents provided to the Commission to show the genetic uniqueness of this population of desert tortoise. In addition, Basin and Range Watch has obtained new information concerning the conservation status of the Northeastern Recovery Unit of Desert tortoise, not available during the CEC evidentiary hearings, that shows that this genetically distinct population of tortoise in the Northeastern Mojave Recovery Unit is now the “least abundant” and is in serious need of additional conservation.

The source of the new information is the Biological Opinion (BO) for the Silver State Solar Project (File No. 84320-2010-F-0208)<sup>1</sup>, September 16, 2010, which concerns the NextLight Renewable Power LLC, Silver State Solar Project photovoltaic power plant proposed for a Right-of-Way of 7,925 acres in desert tortoise habitat on Bureau of Land Management land in Clark County, Nevada, located in the northern Ivanpah Valley on the other side of Primm and Ivanpah Dry Lake from the proposed ISEGS project site.

Evidence about the genetic uniqueness of the tortoise population in the Ivanpah Valley was discussed during the hearings and is well established. On November 3, 2004, the Service announced the formation of the Desert Tortoise Recovery Office. The DTRO is revising the 1994 Desert Tortoise (Mojave Population) Recovery Plan and coordinating with regional recovery implementation work groups to develop 5-year recovery action plans under the umbrella plan. A draft revision of the recovery plan was released to the public on August 4, 2008 (Service 2008). The Service anticipates a final recovery plan in 2010. The draft recovery plan identifies three recovery objectives (p. 14):

1. Maintain self-sustaining populations of desert tortoises within each recovery unit into the future.
2. Maintain well-distributed populations of desert tortoises throughout each recovery unit.
3. Ensure that habitat within each recovery unit is protected and managed to support long-term viability of desert tortoise populations.

Recovery does not depend on absolute numbers of tortoises or comparisons to pre-listing estimates of tortoise populations, but rather the reversal of downward population trends and elimination or reduction of threats that initiated the listing (Id. at p. 15).

#### *Northeastern Mojave Recovery Unit*

The 1994 Recovery Plan delineates the Northeastern Mojave Recovery Unit to occur primarily in Nevada, but it also extends into California along the Ivanpah Valley and into extreme southwestern Utah and northwestern Arizona. The general trend for desert

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<sup>1</sup>  
[http://www.blm.gov/pgdata/etc/medialib/blm/nv/field\\_offices/las\\_vegas\\_field\\_office/energy/nextlight\\_-  
\\_other/NextLight\\_BO.Par.54027.File.dat/NextLight\\_Silver\\_State\\_Solar\\_BO%20.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/las_vegas_field_office/energy/nextlight/_other/NextLight_BO.Par.54027.File.dat/NextLight_Silver_State_Solar_BO%20.pdf)

tortoises within the California Desert is one of decline (p. 22), but declines are also observed recently in the Northeastern Mojave Recovery Unit:

On p. 23 the BO for the Silver State project states that for the Northeastern Mojave Recover Unit: "A kernel analysis was conducted in 2003-2004 for the desert tortoise (Tracy *et al.* 2004) as part of the reassessment of the 1994 Recovery Plan. The kernel analyses revealed several areas in which the kernel estimations for live desert tortoises and carcasses did not overlap. The pattern of non-overlapping kernels that is of greatest concern is those in which there were large areas where the kernels encompassed carcasses but not live animals. These regions represent areas within DWMA's where there were likely recent die-offs or declines in desert tortoise populations. The kernel analysis indicated large areas in the Piute-Eldorado Valley where there were carcasses but no live desert tortoises. For this entire area in 2001, there were 103 miles of transects walked, and a total of 6 live and 15 dead desert tortoises found, resulting in a live encounter rate of 0.06 desert tortoises per mile of transect for this area. **This encounter rate was among the lowest that year for any of the areas sampled in the range of the Mojave desert tortoise** (Tracy *et al.* 2004)." (emphasis ours).

"Results of desert tortoise surveys at three survey plots in Arizona indicate that all three sites have experienced **significant die-offs**. Six live desert tortoises were located in a 2001 survey of the Beaver Dam Slope Exclosure Plot (Walker and Woodman 2002). Three had definitive signs of URTD, and two of those also had lesions indicative of cutaneous dyskeratosis. Previous surveys of this plot detected 31 live desert tortoises in 1996, 20 live desert tortoises in 1989, and 19 live desert tortoises in 1980. The 2001 survey report indicated that it is likely that there is **no longer a reproductively viable population of desert tortoises on this study plot**. Thirty-seven live desert tortoises were located in a 2002 survey of the Littlefield Plot (Young *et al.* 2002). None had definitive signs of URTD. Twenty-three desert tortoises had lesions indicative of cutaneous dyskeratosis. Previous surveys of this plot detected 80 live desert tortoises in 1998 and 46 live desert tortoises in 1993. The survey report indicated that the site might be in the middle of a die-off due to the high number of carcasses found since the site was last surveyed in 1998. Nine live desert tortoises were located during the mark phase of a 2003 survey of the Virgin Slope Plot (Goodlett and Woodman 2003). The surveyors determined that the confidence intervals of the population estimate would be excessively wide and not lead to an accurate population estimate, so the recapture phase was not conducted. One desert tortoise had definitive signs of URTD. Seven desert tortoises had lesions indicative of cutaneous dyskeratosis. Previous surveys of this plot detected 41 live desert tortoises in 1997 and 15 live desert tortoises in 1992. The survey report indicated that the site may be at the end of a die-off that began around 1996-1997." (BO at page 23).

"Density estimates of adult tortoises varied among recovery units and years. **Over the first six years of range-wide monitoring (2001-2005, 2007), tortoises were least abundant in the Northeast Mojave Recovery Unit (1 to 3.7 tortoises per kilometer<sup>2</sup> [2 to 10 tortoises per mile<sup>2</sup>]....**" (p. 27).

The Nextlight Renewable Power, LLC Silver State Solar Project Final Environmental Impact Statement<sup>2</sup> says: “The Proposed Project area is within the Northeastern Mojave Recovery Unit, one of six designated evolutionarily significant units within the range of the tortoise (USFWS 1994)” (p. 3-43).

Dr. Kristin Berry identifies Evolutionarily Significant Units (ESU’s) as based on genetics:

“Drawing from concepts outlined in the federal Endangered Species Act, the recovery team used a strategy of protecting evolutionarily significant population units and their associated ecosystems. The six population units, called ‘recovery units,’ were identified using published and unpublished data on genetic variability, morphology, and behavior patterns of populations as well as ecosystem types.”<sup>3</sup>

And, “The recovery team recognized that the tortoise is a widespread species and exhibits substantial variation in genetic, morphological, ecological, physiological, and behavioral characteristics throughout its geographic range (USFWS, 1994a). Drawing from the ESA and the works of Ryder (1986) and Waples (1991), the recovery team decided to use evolutionarily significant units, which they termed ‘population segments’ or ‘recovery units,’ to encompass the genetic and environmental variation present in the species. Six recovery units were identified: Western Mojave, Eastern Mojave, and Northeastern Mojave; Northern Colorado and Eastern Colorado; and Upper Virgin River” (ibid.).

Berry emphasizes genetics in the management of Recovery Units: “Genetic factors, minimum viable population size, sizes of reserves (DWMAs), and the probability of long-term persistence are critical elements in the strategy to recover the ‘Mojave Population’ of desert tortoises (USFWS, 1994a). From a genetic standpoint, the recovery team concluded that a minimally viable population should probably contain at least 2,000–5,000 adult animals (USFWS, 1994a). Three population viability analyses were prepared, and predictions were developed based on the probabilities that tortoise populations would persist for 500 years. Using these analyses, the recovery team concluded that (1) tortoise populations at minimum densities (3.9 adults/km<sup>2</sup>) require reserves of at least 518–1,295 km<sup>2</sup> to be genetically viable; (2) where the discrete

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<sup>3</sup> The Desert Tortoise Recovery Plan: An Ambitious Effort to Conserve Biodiversity in the Mojave and Colorado Deserts of the United States, by Kristin H. Berry, U.S. Department of the Interior, Bureau of Land Management, 6221 Box Springs Blvd., Riverside, CA 92507-0714, USA. Current Agency: U.S. Geological Survey, Biological Resources Division. Proceedings: Conservation, Restoration, and Management of Tortoises and Turtles—An International Conference, pp. 430–440, 1997, New York Turtle and Tortoise Society.

population growth rate ( $\lambda$ ) is slightly below 1.0 but varies over a range of approximately 25%, extremely large reserves (12,950 km<sup>2</sup> to support 50,000 adults at minimal density) are necessary to support populations that would be relatively resistant to extinction within the next half-century; and (3) if  $\lambda$ s fall below 0.975 on average, no population size is sufficient to persist for 500 years” (ibid.).

Berry and other tortoise biologists quote R. Waples on genetic theory, that population segments within a species geographic range are considered ESU’s if they possess two criteria: (1) ‘substantial’ reproductive isolation from other such segments, and (2) evolutionarily important genetic uniqueness (Waples 1991).<sup>4</sup>

New information is also available detailing the significant impacts to the Northeastern Mojave lineage of Desert tortoise at the Silver State Solar Project, which were not analyzed in the CEC hearings for ISEGS. The Silver State project was only mentioned in Cumulative impacts in a brief way, but further 2010 tortoise surveys on that site and analysis of the population and translocation plan bring out much new information. Mortality and fragmentation of this population adjacent to the ISEGS project site will further lead to a decline in this Recovery Unit we believe.

Pages 35 to 38 of BO says:

“The project is located in the Ivanpah Valley, which is bounded by the Lucy Gray Range and McCullough Mountains to the east, the New York Mountains and the Mid-Hills to the south, the Ivanpah Mountains, Mescal Range, and Clark Mountain to the west, and the Clark Mountain and southernmost Spring Range to the north. The project site is located on a broad alluvial fan spreading out to the west from the lower slopes of the Lucy Gray Mountains. The alluvial fan drains into both the Ivanpah Dry Lake to the west and south, and to the Roach Dry Lake to the northwest...

“The Tortoise Regional Estimates of Density Model (TRED) was the basis for the October 2008 and August 2009 pre-project surveys (Karl 2007). The TRED survey methodology was developed prior to the current survey methodology (Service 2010a) and was chosen as an alternative to the 1992 methods to increase sampling effort and improve abundance estimates. The TRED method employs 2.4-kilometer (1.5-mile) long triangular transects configured as an equilateral triangle where four transects are walked in each square kilometer, systematically starting in a corner of the kilometer. Using the TRED method, four live desert tortoises were observed within 17 square miles of the proposed project boundary. In total, 39 transects were surveyed. It is impossible to statistically quantify the error associated with this survey since calibration transects and other sources of variation, which measure observer bias, were not conducted or taken into account, but it is estimated there are 88 (42 to 123) sub-adult and adult desert tortoises to be displaced within the fenced area of the proposed project (2,966 acres). This density only represents an estimation of the number of desert tortoises that are greater than 180

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<sup>4</sup> Waples, R. S. 1991. Pacific salmon, *Oncorhynchus* spp., and the definition of “species” under the Endangered Species Act. *Marine Fisheries Review* 53(2):11–22.

millimeters in size. Desert tortoises that are larger than this size are typically classified as subadult or adult desert tortoises...

“The May 2010 subsequent surveys were conducted within a subset of the area previously surveyed using the Service's updated pre-project survey protocol (Service 2010a). Using this sampling method, 7 live tortoises, 62 burrows, and 23 carcasses were located on Phase I of the project site (685 acres) (NextLight 2010a). Using the formula in the Pre-Project Survey Protocol (Service 2010a), it is estimated that there are 13.7 (5.11 to 36.97) sub-adult and adult desert tortoises on Phase I. Results of these subsequent surveys were consistent with the previous surveys. For detailed information on this survey, see CH2MHILL (2010). Based on the TRED surveys and the subsequent transect survey, the estimated number of desert tortoises to be displaced within the fenced area of the proposed project is estimated to range from 42 to 123 adults and sub-adults. In addition to sub-adult and adult desert tortoises, the project site is likely to contain juvenile desert tortoises. At the Goffs study site in California, Turner et al. (1987) estimated that 31.1 percent to 51.2 percent of the population is composed of juvenile desert tortoises. Using this information, we anticipate that no more than 129 juvenile desert tortoises occur on the site. Based on this number of adults and sub-adults combined with studies by Bjurlin and Bissonette (2004) that investigated nest and neonatal survival, as well as the results from the surveys above, we estimate that the project area may support up to 97 desert tortoises hatchlings. We recognize that the survey data used for these estimates represents a single point in time and the number of individuals in these areas may change over time (i.e., all desert tortoises may not have been detected during the pre-project survey; some desert tortoises may die or may leave the proposed project area before construction of the proposed project commences; other, unaccounted desert tortoises may move on to the site before construction begins; and undetected hatchling desert tortoises may emerge from nests on the proposed project site). However, the information above provides the best available data to establish a baseline for analysis.

“We also expect that the proposed project site is likely to contain desert tortoise eggs. Based on studies performed in Ivanpah Valley and the Goffs study site in California that identified a sex ratio of 1:1 (Turner et al. 1984, Turner et al. 1987), we estimate that approximately half of the sub-adult and adult population is composed of reproductive females. However, it is difficult to estimate the number of eggs that may be within the proposed project area based on the number of reproductive females on the proposed project area because: 1) some territories of female desert tortoises on the proposed project area may extend off of the proposed project area and their nests may be established outside the proposed project area; 2) fewer eggs may be present on the proposed project site at the time of construction depending on the time of the year; 3) the number of eggs that can be produced in a season is dependent on a variety of environmental and physiological factors; and 4) not all reproductive females produce eggs every year. Therefore, we are unable to estimate the number of eggs that may occur on the proposed project area.

The BO also discusses the tortoise translocation plan in much greater detail than for

ISEGS, something the public needs to be able to review.

(Pages 36-38) “Translocation sites must be sufficiently large to accommodate and maintain the resident (if present) and translocated desert tortoises, as well as be free of disease. At a minimum, the translocation site must be equal in size to the proposed project site, and the maximum allowable final density at recipient sites after translocation (includes residents and translocated tortoises) must not exceed 130 percent of the mean density detected in the nearest recovery unit (4.1 per km<sup>2</sup> in the Northeastern Mojave Recovery Unit) (Service 2010b). Because of the potential number of desert tortoises that may need to be translocated and other concerns outlined in the Technical Paper (Service 2010b), the BLM and the Service identified multiple recipient areas: the initial recipient area would be adjacent to the project site to the east and used for desert tortoises found during Phase I, while a second recipient area with multiple release points along State Route 164 (SR 164) just west of Searchlight, Nevada and along US 95 just north of Searchlight, Nevada would be used for subsequent phases of the proposed project.

“Initial recipient area:

“The BLM selected the initial recipient area for translocation of desert tortoises in compliance with guidance from the Translocation Guidance (Service 2010c). This area is approximately 6,125 acres and is contiguous with the proposed project site within the Ivanpah Valley. No natural barriers exist between the project site and the initial recipient area. This would ensure that desert tortoises at the two sites were once part of a larger mixing population and are genetically similar. Because this area is contiguous with the proposed project site, its habitat characteristics are similar to the project site and it provides resources to support all life stages of translocated desert tortoises. In May 2010, surveys were conducted on initial recipient area (6,125 acres or 24.81 km<sup>2</sup>) using 100 percent coverage line distance sampling method. This survey located 8 live tortoises, 70 burrows, and 90 carcasses (CH2MHILL 2010). Using the formula in the Pre-Project Survey Protocol (Service 2010a), we estimate there are 74 (29.18 to 187.71) adult and sub-adult desert tortoises on the initial recipient area. The maximum allowable final density at the initial recipient site must not exceed 101 individuals (Service 2010b); therefore, 27 desert tortoises from the project site can be translocated to this area. If additional resident desert tortoises are located on the initial recipient area during project activities, fewer individual can be translocated to this area. In such case, these additional desert tortoises from the project site would be translocated to the subsequent recipient area.

“Subsequent recipient area and release points:

“This area was selected by BLM and the Service following the Translocation Guidance (Service 2010c). The Service prioritized recovery efforts in depleted or depressed areas and identified areas adjacent to highways as potential recipient areas (Service 2010c). The subsequent recipient area is located within the same recovery unit (Northeastern Mojave) as the proposed project area in the Eldorado Valley within the Piute-Eldorado Critical Habitat Unit. The subsequent recipient area contains three release points which

are 25, 35, and 37 km east of the proposed project site, respectively. Each release point is approximately 3,000 acres (12.14 km<sup>2</sup>) and is fenced along the highway, while the remaining three sides would be temporarily fenced to temporarily restrict desert tortoise movements.”

Similar discussions on the Control site for tortoise translocation are publicly available for the Silver State Project.

For the ISEGS case the public has no Biological Opinion, no Final Translocation Plan, and no publicly available information on tortoise populations in recipient and control sites. Information on fencing highways with tortoise exclusion fencing is vague. The ISEGS project should be delayed until this information, following the latest guidance by US Fish and Wildlife Service, is carried out. All tortoise translocations should follow the latest guidance: US Fish and Wildlife Service, Translocation of Desert Tortoises (Mojave Population) from Project Sites: Plan Development Guidance, Desert Tortoise Recovery Office Reno, Nevada. August 2010.

For the ISEGS project mitigation for the tortoise is summed up in a confusing sentence:

The ERRATA TO THE PRESIDING MEMBER’S PROPOSED DECISION says:

**We are persuaded that, although some tortoises may perish as a result of translocation, the enhanced habitat compensation lands that will be created will allow other tortoises and their offspring to thrive, resulting in no net loss in the tortoise population due to this project.**  
(p. 30)

This sentence is not supported by the evidence, and is a mistake of fact. There are no biological studies that show “tortoises and their offspring” will thrive due to enhancement measures, which have not yet been fully detailed for the ISEGS project. Another problem is that compensation lands may be acquired outside of the Northeastern Mojave Recovery Unit or in areas without the same density of tortoises as exist at the Ivanpah site, further degrading the population status of these tortoises. Current research indicating range-wide declines in the Desert tortoise indicate there is no evidence that “other tortoises” will thrive. A statement of “no net loss” is meaningless when the Recovery Plan states that losses in each Recovery Unit need to be halted, specifically here the Northeastern Mojave population of tortoises.

The September 22, 2010 evidentiary hearing for the Calico Solar Project gave mortality estimates for tortoise translocation based on consultation with US Fish and Wildlife Service and California Department of Fish and Game, and these can apply to the ISEGS case:<sup>5</sup>

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<sup>5</sup>[http://www.energy.ca.gov/sitingcases/calicosolar/documents/2010-09\\_20\\_Partial\\_Transcript.pdf](http://www.energy.ca.gov/sitingcases/calicosolar/documents/2010-09_20_Partial_Transcript.pdf) (page 505)

--Tortoises handled for blood testing could have up to an estimated 5% mortality rate from handling.

--Tortoises translocated could have up to an estimated 50% mortality rate.

--Resident Tortoises on the recipient site could also have up to a 50% mortality rate due to competition from translocated tortoises.

Simple enhancement measures on desert lands that may already be degraded will most likely not double the resident tortoise populations, considering present declining trends, and thus the Ivanpah Valley tortoise population will probably experience a population loss with no mitigation because there will likely not be an increase in the population elsewhere that could off-set these losses.

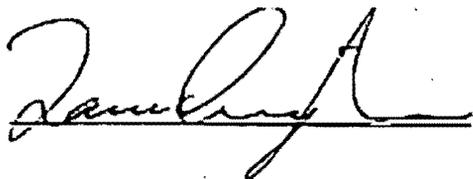
The evidence shows that the ISEGS project will contribute to the decline in the unique genetic population of Desert tortoise, an Evolutionarily Significant Unit, of the Northeastern Mojave Recovery Unit by habitat reduction, fragmentation, mortality from translocation, and increased risks of disease and predation.

We ask the Commission to reconsider the decision to license ISEGS due to the direct, indirect, and cumulative impacts on this important genetic population of tortoise, recognized as existing in the northern Ivanpah Valley by US Fish and Wildlife Service, Bureau of Land Management, Desert Tortoise Recovery Office, and conservation biologists.

We ask for a stay of the decision also because of all these problems of errors in fact and omissions.

Dated: September 30, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Laura Cunningham", written over a horizontal line.

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In the Matter of:

APPLICATION FOR CERTIFICATION  
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DOCKET NO. 07-AFC-5

**DECLARATION OF SERVICE**

I, Laura Cunningham, declare that on September 30, 2010, I served and filed copies of the attached Preliminary Preconference Hearing Statement, dated September 30, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [www.energy.ca.gov/sitingcases/ivanpah]. The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

sent electronically to all email addresses on the Proof of Service list;  
 by personal delivery or by depositing in the United States mail at with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses NOT marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

\_\_\_\_\_ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

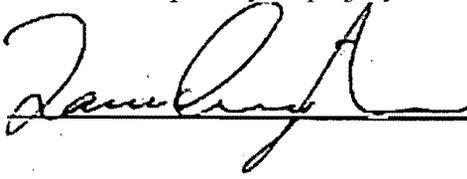
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I declare under penalty of perjury that the foregoing is true and correct.



Laura Cunningham

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