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**Re: Incidental Take Permit for Sunshine Valley Solar Project**

Dear Mr. Kunz and Ms. Harrison,

We are writing on behalf of Basin and Range Watch (hereafter “BRW”) regarding Sunshine Valley Solar, LLC’s planned construction of the Sunshine Valley Solar Project (“the Project”) in Amargosa Valley, Nevada. BRW would like to express its concern about the Project’s possible effects on the Yuma Clapper Rail, a species listed as endangered under the Endangered Species Act (“ESA” or “the Act”), 16 U.S.C. §§ 1531-1544, as well as its willingness to work with Sunshine Valley Solar to address these issues prior to commencing construction of the Project. BRW believes it would be both prudent and legally appropriate for Sunshine Valley Solar to initiate the application process for an Incidental Take Permit (“ITP”), as set forth in section 10(a)(1)(B) of the Act, 16 U.S.C. § 1539, for the reasons explained below.

**The Endangered Species Act**

Recognized as the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978), the ESA prohibits the “take” of any member of an endangered or threatened species, without

appropriate authorization. *See* 16 U.S.C. § 1538(a). “Take” is defined broadly, including to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” listed species. *Id.* § 1532(19); *see also* 50 C.F.R. § 17.3 (defining “harass” and “harm”); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995) (explaining that Congress defined “take” in the “broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife”) (citations omitted).

Though the taking of any member of a protected species is illegal under the ESA, a party may in appropriate circumstances obtain an Incidental Take Permit (“ITP”), which allows otherwise prohibited taking of a protected species “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1538(a). To obtain an ITP, the applicant must submit a Habitat Conservation Plan (“HCP”) that describes the likely impact of the taking, “steps the applicant will take to minimize and mitigate such impacts,” the funding for implementation of these measures, alternative actions the applicant has considered, the applicant’s reasons for not adopting these alternatives, and “such other measures that the [Fish and Wildlife Service (“FWS” or “the Service”)] may require as being necessary or appropriate for the purposes of the plan.” *Id.* § 1538(a)(2)(A). If, after reviewing the ITP application and accompanying HCP, and after allowing for public comment, the Service finds the taking at issue will in fact be incidental, the applicant will minimize and mitigate the taking’s impacts “to the maximum extent practicable,” the applicant will ensure the HCP is adequately funded, and the taking “will not appreciably reduce the likelihood of the survival and recovery of the species,” then the agency “shall issue the permit.” *Id.* § 1538(a)(2)(B). If the agency later finds the applicant fails to comply with the ITP’s terms, the agency will revoke the permit, leaving the party unshielded from legal liability for taking a protected species. *Id.* § 1538(a)(2)(C); 50 C.F.R. §§ 13.27, 13.28.

ITPs serve as a means for parties “to insulate themselves from liability under the ESA” while taking appropriate steps to protect listed species. *Animal Welfare Institute v. Beech Ridge Energy, LLC*, 675 F. Supp. 2d 540, 580 (2009); *see also id.* at 581 (“[T]he ITP process . . . allows . . . project[s] to proceed in harmony with the goal of avoidance of harm to endangered species.”). Although “the decision to obtain an ITP under § 10 of the ESA ‘lies with the prospective applicant,’” *id.* at 556, “[t]he ESA . . . require[s] [courts to] carefully scrutinize any activity that allegedly may take endangered species where no ITP has been obtained,” *id.* at 545. Thus, electing not to apply for an ITP leaves parties exposed to serious legal ramifications resulting from a violation of the ESA’s take prohibition.

Obtaining an ITP relatively early in the project development process may prevent future delays to project construction and operation. For instance, in *Animal Welfare Institute v. Beech Ridge Energy, LLC*, 675 F. Supp. 2d 540 (D. Md. 2009), the federal court found that the project developers could not proceed with the project’s construction unless they applied for an ITP. In that case, during the project’s development, the Service had advised the developers the agency was “concerned that the proposed . . . wind power project may harm or kill [members of a] federally-listed [species]” and “encouraged the developers to formulate and implement an adaptive management plan to minimize the risk of harm to federally-listed species.” *Id.* at 554. However, the project developers ignored the Service’s advice and did not apply for an ITP. *Id.* at 581-82. Because the court found the project at issue was “reasonably certain” to take a member

of an endangered species, and the developers had “simply disregarded” what FWS had recommended to avoid violating the ESA, *id.*, the court “concluded that the only avenue available to [the developers] to resolve the self-imposed plight in which they now find themselves is to do belatedly that which they should have done long ago: apply for an ITP.” *Id.* at 583.

### **The Yuma Clapper Rail and FWS’s ITP Recommendation**

The Yuma clapper rail (*Rallus longirostris yumanensis*) is a marsh bird listed as endangered under the ESA. According to a July 2014 letter from the Service to Sunshine Valley Solar providing the agency’s comments on the Project, solar photovoltaic (“PV”) facilities like the Sunshine Valley Solar Project “present a new source of mortality for Yuma clapper rails” because “[t]hese facilities reflect light during the day and night, producing a lake or pond effect that may attract rail species and other water-associated birds.” FWS Letter at 1. Several rail bird mortalities caused by this “lake effect” at PV facilities have been documented, FWS Letter at 1-2, and the actual number of mortalities is likely higher than this documentation reflects, as scavengers often remove bird carcasses before they can be accounted for. FWS Letter at 2.

In its letter, the Service advised that “known occupied marsh habitat for Yuma clapper rails exists approximately eight miles southeast of the proposed project at Ash Meadows National Wildlife Refuge . . . .” FWS Letter at 2. In light of the Project’s “proximity . . . to this occupied habitat; the anticipated 25-year life of the project; and the likelihood of dispersing Yuma clapper rails due to limited habitat availability at the Refuge,” the Service concluded “incidental taking of a Yuma clapper rail is *likely*.” FWS Letter at 2 (emphasis added). Consequently, the Service recommended Sunshine Valley Solar “develop[] an HCP to support an application for an incidental take permit for Yuma clapper rail at the Sunshine Valley Solar PV Electric Facility Project.” FWS Letter at 2.

### **Sunshine Valley Solar’s Permit Applications**

Despite the Service’s warning that the Project will likely take a Yuma clapper rail, Sunshine Valley Solar did not list an ITP among the permits for which it is in the process of applying or has already received in the application the company submitted to the Public Utilities Commission of Nevada (“PUCN”), pursuant to the Nevada Utility Environmental Protection Act, NRS 704.820-.900, and the Nevada Administrative Code, 703.415-.427, to construct the Project. Permit Appl. at Ex. I-J. In addition, in a July 2014 letter to the PUCN regarding FWS’s comments on the Project, First Solar, Inc. stated it was “well aware of the potential risks to avian species posed by . . . solar photovoltaic projects.” First Solar Letter at 1. However, rather than indicate the company would apply for an ITP, the letter simply stated the company is “working with [FWS] . . . to better understand this issue, any potential causal connection, and, if appropriate, effective deterrents.” *Id.*

As previously stated, the Service “believe[s] incidental taking of a Yuma clapper rail [by the Project] is *likely*.” FWS Letter at 2. Indeed, these words of admonition are much stronger than the Service’s comments in *Beech Ridge*, which simply indicated the agency was “concerned that the proposed . . . project *may* harm or kill [members of a] federally-listed [species].” *Beech*

*Ridge*, 675 F. Supp. 2d at 554. As a result, if a court were to find the Project is “reasonably certain” to take a Yuma clapper rail, and that the developers had “simply disregarded” FWS’s counsel to apply for an ITP, it may direct Sunshine Valley Solar “to do belatedly that which [it] should have done long ago: apply for an ITP.” *Id.* at 583. In light of the likelihood of the Project taking a Yuma clapper rail, the Service’s recommendation to apply for an ITP, and the considerable weight courts have afforded these types of recommendations from the Service in the past, applying for an ITP prior to commencing construction of the Project would be a wise step towards avoiding future project delays and would allow Sunshine Valley Solar to consider a full range of steps to mitigate and minimize any effects on the Yuma clapper rail.

### **Conclusion**

We would be happy to discuss the ITP application process and any other issues raised in this letter with you further. We hope you will take steps to ensure the preservation of the Yuma clapper rail and the other invaluable desert resources in this area as you move forward with your proposed solar project.

Sincerely,



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