



# When Uncertainty Surrounds California Solar Project, Court Defers to Agency not Tortoise

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Project opponents have been invoking the Endangered Species Act (ESA) with increasing regularity in an attempt to block the construction of large-scale renewable energy projects. On March 30, a federal court rejected this strategy, holding that the U.S. Fish and Wildlife Service (Service) complied with its section 7 obligations under the ESA when it issued a "no jeopardy" biological opinion for a large-scale solar-energy development project in California, even though the science underlying the opinion was admittedly uncertain, because the ESA "tolerates uncertainty so long as the agency relies on the 'best scientific data available.'" *Defenders of Wildlife v. Jewell*, Case No. CV 14-1656 (C.D. Cal. Mar. 30, 2015). The court also found that a reduction in "gene flow" could not be considered adverse modification of designated critical habitat under the ESA, and the Service was not required to discuss prior seemingly inconsistent statements in the biological opinion because the prior statements were merely part of an "evolving deliberative process."

On September 30, 2013, the Service issued a "no jeopardy" biological opinion for the Silver State South Solar Project (SSS Solar Project), a 2,400 acre large-scale solar-energy development project located on federal land that is also habitat for threatened desert tortoises. The biological opinion found that habitat connectivity is a key component to the survival and recovery of the tortoise, and that other large-scale solar projects in the area have already significantly reduced that connectivity. The biological opinion also found that as a result of the SSS Solar Project, the primary habitat corridor between two tortoise populations would be narrowed, limiting the corridor to 1.39 miles at its narrowest point and 2 miles wide at its widest point. The biological opinion concluded that while the reduced connectivity from narrowing the habitat corridor is likely to temporarily adversely impact the tortoise's prospects for recovery, the effects would not be large enough to jeopardize the continued existence of the species.

After the Service issued the biological opinion a lawsuit was filed in federal court alleging that the biological opinion failed for three separate reasons: (1) it failed to consider the impact of the project on formally

designated critical habitat; (2) it improperly based the "no jeopardy" determination on unspecified remedial measures; and (3) the discussion of the proposed corridor is both internally contradictory and inconsistent with the record as a whole.

### **No Adverse Modification to Critical Habitat**

Section 7 of the ESA requires federal agencies to insure that the proposed action will not destroy or adversely modify designated critical habitat. Adverse modification has been broadly defined to include direct or indirect alterations that severely diminish the "primary constituent elements" that were the basis for designating the area as critical habitat. The biological opinion for the SSS Solar Project concluded that the project would not directly or indirectly adversely modify or destroy designated tortoise critical habitat.

The plaintiff argued that contrary to the conclusion in the biological opinion, the SSS Solar Project would adversely modify the tortoise's designated critical habitat because it would negatively impact gene flow between designated critical habitat areas. The court made short work of this argument, however, rejecting it on the basis that the "primary constituent elements" that comprise the tortoise's critical habitat are "physical characteristics" of the habitat, and gene flow is simply not a physical characteristic.

The plaintiff also argued that the biological opinion's critical habitat analysis was deficient because it failed to analyze how the "conservational value" of the designated critical habitat would be indirectly impacted by the project's narrowing of the habitat corridor. Again, the court rejected plaintiff's argument, explaining that under the ESA the issues of "habitat fragmentation and connectivity is properly analyzed as part of the 'no jeopardy' analysis, rather than the critical habitat analysis."

### **Determination Not Based on Unidentified Remedial Measures**

Plaintiff argued that the Service improperly based its "no jeopardy" determination on continued monitoring and future unspecified remedial actions, in violation of the ESA. The court declined to address the substance of this argument, however, as it disagreed with the underlying premise of plaintiff's position. Specifically, the court found that the Service's determination was not based on continued monitoring or unspecified remedial measures; instead, the determination was based on "equivocal evidence" concerning the impacts from narrowing of the corridor, and the measures identified in the biological opinion (e.g., continued monitoring) were merely imposed in light of that uncertainty in order to further protect the tortoise. As such, the court stated that it would not "penalize" the Service for taking a cautious approach, and "accounting for the possibility that the best available science now may be replaced by new information later."

### **No Inconsistency, Just An Evolving Deliberative Process**

Finally, plaintiff argued that in light of the Service's comments on the draft environmental impact statement for the SSS Solar Project regarding the optimal width for the habitat corridor and adverse affects associated with "constricting the critical linkages to a narrow corridor," the Service was required to discuss these comments in the biological opinion and explain why it reached a different conclusion in the biological opinion. The court rejected this argument, stating that as "the two findings at issue in the present case were not responsive to the same question," they were not inconsistent. Further, the court explained that the "two reports' discussions of optimal corridor width can be seen as consecutive steps in an evolving deliberative process, rather than two contradictory answers to the same question. The [Service's comments on the draft environmental document] raised the issues, and the [biological opinion] reached an ultimate conclusion."

The court also rejected a handful of other factual arguments, finding that the record provided adequate support for the Service's determination.