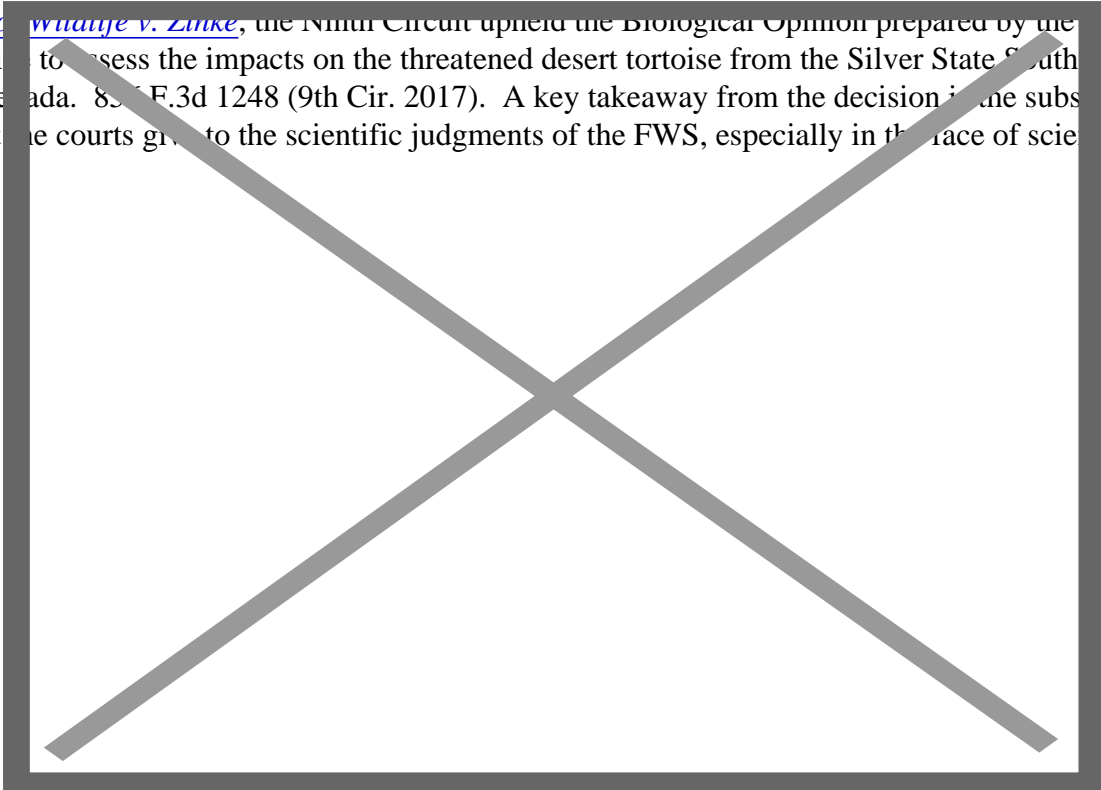


Ninth Circuit Upholds Biological Opinion for Silver State South Solar Project in Nevada

In [Defenders of Wildlife v. Zinke](#), the Ninth Circuit upheld the Biological Opinion prepared by the U.S. Fish & Wildlife Service to assess the impacts on the threatened desert tortoise from the Silver State South Solar project in southern Nevada. 835 F.3d 1248 (9th Cir. 2017). A key takeaway from the decision is the substantial deference that the courts give to the scientific judgments of the FWS, especially in the face of scientific



uncertainty.

The

Biological Opinion The principal issue in the case was that the project, which required approval by the Bureau of Land Management of a right-of-way over federal land, would narrow the corridor for the movement of the desert tortoise through the Ivanpah Valley in southern Nevada, although the project and the affected corridor were located outside of the species' designated critical habitat. The Biological Opinion recognized that the project's impact on the "connectivity" of the tortoise's movement through the Valley was uncertain in light of the available data. But it found that the corridor provided for the species' movement was likely to be sufficiently wide and it included a monitoring program that would be used to develop conservation measures to identify and address any negative impacts if they did occur. In accordance with the procedures for "formal consultation" under the Endangered Species Act, the Biological Opinion made a "no jeopardy" finding, which determined that the project would not jeopardize the continued existence of the tortoise. The Biological Opinion further concluded that formal consultation was not required to assess the potential modifications to the critical habitat for the tortoise, and instead relied on the more summary process of "informal consultation" to find that the project was not likely to affect this habitat. Based on the Biological Opinion, in 2014 the BLM approved the federal right-of-way for the project. **The Ninth Circuit's Decision** In upholding the Biological Opinion, the Ninth Circuit first rejected the plaintiff's claim that the FWS did not adequately specify the applicable mitigation

measures to support the "no jeopardy" finding. The court reasoned that nothing in the ESA required firm, binding mitigation to address negative effects that are uncertain to occur. The court explained that "our precedents do not require mitigation measures to be identified or guaranteed when the mitigation measures themselves may be unnecessary." The court further explained that, while a Biological Opinion must use the best scientific data that is available, the court was required to defer to the FWS in the face of scientific uncertainty. As the court cautioned, "it is not our job to task the FWS with filling the gaps in the scientific evidence" and "we must respect the agency's judgment." The court quoted the district court's finding that "the FWS cannot be expected to respond to data that is not yet available to surmise potential mitigation actions that are not needed under the agency's current interpretation of the data." Additionally, the court found that the FWS was not required to use the ESA's formal consultation procedures to undertake a detailed assessment of the project's potential effects on the tortoise's critical habitat. While this habitat was included as part of the "action area," which defines the geographical range for evaluating the potential impacts to the species, the court deferred to the joint finding by the FWS and the BLM that the project was not likely to have a direct or indirect effect on the factors (or "primary constituent elements") that make the habitat critical to the species. The court further reasoned that the potential impacts on a species that occur outside of the species' designated critical habitat – such as the potential impacts here on the connectivity for the tortoise's movement – do not fall with the text of the ESA's critical habitat regulations, which apply only to "adverse modifications" of such habitat. The court issued three additional rulings on the Biological Opinion. First, the court dismissed the importance of comments provided by the FWS' field office to the BLM that expressed concerns about the project's impacts on the tortoise. "Agencies are allowed to change the minds," the court explained, so the fact that preliminary comments from an agency's local staff are "later overruled at a higher level within the agency does not render the decision-making process arbitrary and capricious." Second, the court rejected the claim that the Biological Opinion contained inconsistent statements about the necessary width of the corridor for the movement of the tortoise. The Biological Opinion indicated that a minimum width of 1.4 miles was generally preferable, but further explained that the actual width needed was a fact-specific question that depended on a number of variables. Thus, that the width was reduced to below this specific distance at a particular location was not fatal to the analysis. Lastly, the court rejected the plaintiff's challenge to the standards included in the Biological Opinion for reinitiating the ESA consultation process in the event new information comes to light on the project's impacts to the desert tortoise. The court concluded that the monitoring program for the project was sufficiently clear and specific to define the circumstances under which this reinitiation would be required. The decision helps to clarify the requirements for assessing impacts to species and their critical habitat as part of the ESA consultation process, and it emphasizes the judicial deference to the scientific findings and expertise of the FWS.

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