CHRISTOPHER J. CARR (CA SBN 184076)
E-mail: CCarr@mofo.com
WILLIAM M. SLOAN (CA SBN 203583)
E-mail: WSloan@mofo.com
JAVIER SERRANO (CA SBN 252266)
E-mail: JSerrano@mofo.com
LALA T. WU (CA SBN 281686)
E-mail: LWu@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

Attorneys for Defendant-Intervenor
PANOCHE VALLEY SOLAR, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DEFENDERS OF WILDLIFE, et. al.,

Plaintiffs,

v.

U.S. FISH AND WILDLIFE SERVICE, et al.,

Defendants,

PANOCHE VALLEY SOLAR, LLC,

Defendant-Intervenor.

Case No. 5:16-cv-1993-LHK

DEFENDANT-INTERVENOR PANOCHE VALLEY SOLAR, LLC'S OPPOSITION BRIEF RE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: May 20, 2016
Time: 11:00 a.m.
Courtroom: 8
Judge: Hon. Lucy H. Koh

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. INTRODUCTION

Plaintiffs want to kill a solar project in Panoche Valley (Project) that will provide clean, renewable energy to 68,000 homes and, thereby, avoid more than 150,000 metric tons of greenhouse gas emissions annually. The Project advances federal and California policies to develop renewable energy and reduce emissions that contribute to climate change. The Project's environmental impacts, including those to protected species, were extensively reviewed at the federal, state, and local levels over many years. At the federal level, the U.S. Fish & Wildlife Service (FWS) (responsible for administering the federal Endangered Species Act) reviewed and the U.S. Army Corps of Engineers (Corps) (responsible for administering certain parts of the federal Clean Water Act) approved the Project subject to stringent conditions prescribed by the FWS to protect the species. At the state level, the California Department of Fish and Wildlife (CDFW) (responsible for administering the California Endangered Species Act) and the Central Valley Regional Water Quality Control Board (responsible for water quality) reviewed and approved the Project. At the local level, San Benito County (responsible for local land use) reviewed and approved the Project. These agencies have imposed literally hundreds of conditions on the Project, designed to reduce environmental impacts and conserve species.

The Project enjoys the unanimous support of San Benito County's Board of Supervisors, and the federal and state legislators whose constituents reside in the County. The Project is backed by labor because of the good construction jobs it will provide. Responsible conservation organizations, such as The Conservation Fund, *see* Carr Decl. ¶ 10 & Ex. H, and leading scientists in Central Valley grassland species support the Project because they view its more than 25,000 acres of conservation lands as critical to species conservation and recovery.

For these reasons and as explained below, Defendant-Intervenor Panoche Valley Solar, LLC (PVS) opposes Plaintiffs' motion for a preliminary injunction. PVS agrees and joins in the Federal Defendants' position that Plaintiffs are not likely to succeed on the merits. PVS focuses on Plaintiffs' failure to establish irreparable harm. PVS also highlights why the balance of equities and public interest tip sharply against a preliminary injunction. The issuance of a preliminary injunction cannot be justified.

II. PLAINTIFFS HAVE FAILED TO SHOW IMMINENT IRREPARABLE INJURY

A. Environmental Review for This Project Has Been Lengthy and Robust

Plaintiffs have failed to carry their burden of establishing that "irreparable harm [to them] is *likely*." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (emphasis in original). Indeed, ***every government agency*** involved with the Project has determined that the protected species at issue will not be irreparably harmed. Numerous stringent terms and conditions—including halting the Project if terms and conditions are not met—have been designed precisely to prevent harm to species.

The Project and its environmental impacts, including to species, have been exhaustively studied for over seven years by federal, state, and local agencies. Since it was first proposed in 2009, the Project has been reduced in scale from 1,000 megawatts (MW) to 247 MW. Over that time, the conservation lands preserved to mitigate impacts to species have increased from 4,316 acres to 25,618 acres. All but 1,000 acres of these conservation lands are already under a conservation easement to ensure their preservation and management in perpetuity for the benefit of the species; together they are more than ten times larger than the 2,154-acre Project itself.

B. Plaintiffs Seek to Kill the Project by More and More Delays

Plaintiffs have actively opposed the Project every step of the way. *See generally* Compl., Dkt. No. 1. However, California courts have found no basis to stop the Project. The County's Environmental Impact Report (EIR) for a 399 MW version of the Project was upheld by the San Benito Superior Court in 2010 and the California Court of Appeals in 2013. In 2015, Plaintiffs brought another lawsuit against the present version of the Project. The Superior Court, again, rejected that challenge and entered judgment against Plaintiffs.[1]

Plaintiffs now seek to delay the Project by attacking its federal review and approvals. On

[1] Plaintiffs continue their strategy of trying to win by delay, appealing the Superior Court's September 2015 Order that upheld the EIR. On March 22, 2016, Plaintiffs also filed suit in Los Angeles County Superior Court, challenging the state Incidental Take Permit for the Project issued pursuant to the California Endangered Species Act. *See* Carr Decl. ¶ 3 & Ex. B (*Sierra Club, et al. v. Cal. Dep't. of Fish & Wildlife*, L.A. County Superior Court, Case No. BS161458). Filing in that County was naked forum shopping, intended to avoid the proper state court venue for their challenge—San Benito County. PVS filed a Motion to Transfer to San Benito County on March 25, 2016. *See* Carr Decl. ¶ 4 & Ex. C.

October 5, 2015, pursuant to Section 7 of the federal Endangered Species Act (ESA), FWS issued its Biological Opinion and Incidental Take Statement (BiOp) for the Project, finding that implementation of its terms and conditions would avoid jeopardy to any of the listed species. The next month, CDFW issued its Incidental Take Permit (ITP) for the Project pursuant to the California Endangered Species Act. In January 2016, the Corps re-initiated the Section 7 "consultation process" so that FWS could consider information submitted by Plaintiffs, and changes to the Project that reduced its size and impacts to species. FWS re-issued the BiOp on March 8, 2016. At the end of March, the Corps issued its Clean Water Act (CWA) Section 404 Permit, Record of Decision, and Final Environmental Impact Statement for the Project (which totals more than 5,000 pages).

Plaintiffs tell the Court to ignore the expertise and reasoned conclusions of the federal, state, and local agencies tasked with analyzing the Project's environmental impacts. At the same time, they have failed to establish, by clear and convincing evidence, what is arbitrary and capricious about the agencies' determinations.

C. Plaintiffs Have Failed to Show Irreparable Injury to Listed Species

Plaintiffs have failed to show that the build-out of the Project over the next 18 months, let alone the limited activities over the next six to nine months (the time likely needed to complete this case before this Court), will irreparably harm the protected species they identify.

First, Plaintiffs fail to show the Project is "likely" to "irreparably harm the species as a whole." *Nw. Envtl. Def. Ctr.v. U.S. Army Corps of Eng's*, 817 F. Supp. 2d 1290, 1314–15 (D. Or. 2011) (citations omitted). Where a violation of the ESA is alleged, *imminent, likely irreparable harm* must "be measured at the species level." *Id.* at 1315. In *Defenders of Wildlife v. Salazar*, in denying a request for a preliminary injunction, the court explained that "the measure of irreparable harm is taken in relation to the health of the overall species rather than individual members." 812 F. Supp. 2d 1205, 1210 (D. Mont. 2009); *see also Pacific Coast Federation of*

Fisherman's Assoc. v. Gutierrez, 606 F.Supp.2d 1195, 1207 (E.D. Cal. 2008) (same).[2]

In this case, FWS, the agency with the technical expertise with respect to the listed species, established in the BiOp a detailed set of "species-specific" mitigation measures for the species at issue, plus many general conservation measures.[3] BiOp at 26–34. Such measures include comprehensive on-the-ground preconstruction surveys and monitoring, protective buffers, relocation according to carefully designed and scientifically-accepted protocols, and acquisition and permanent protection of conservation lands for the benefit of the species.

Taking into consideration the implementation of the BiOp's terms and conditions, FWS concluded there would be no jeopardy to any of the species.[4] This determination is entitled to substantial deference. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir. 2004) (deferring to FWS methodology for assessing jeopardy to species); *Audubon Soc. of Portland v. Nat'l Marine Fisheries Serv.*, 849 F. Supp. 2d 1017, 1046 (D. Or. 2011) (denying preliminary injunction motion and paying "substantial deference" to federal agency determination of no jeopardy to species). Further, the no jeopardy determination here is back-stopped by take limits. For example, if more than 435 giant kangaroo rats (GKR) are captured, or more than 9 die as a result of their handling, then the Corps must reinitiate consultation, and any Project activities that are likely to cause additional take should cease; the immunity from take liability provided by the BiOp would not be effective during this review period. BiOp, at 108.

Second, experts on Central Valley species explain that none of the listed species will be jeopardized by the Project's implementation. In fact, these biologists explain that the Project—

[2] The cases cited by Plaintiffs purportedly for the governing irreparable harm standard involved a statute other than the ESA, or a ruling on a request for a permanent, and not, as here, a preliminary injunction. *See* Pls.' Mot. at 20.

[3] In addition to the extra "species-specific" protection measures in the BiOp, the ITP issued by CDFW contains numerous stringent measures expressly designed to protect species, summarized in a thirty-page table of nearly 100 Project conditions. ITP, at 97–126.

[4] In reaching its "no jeopardy" determinations, FWS used conservative assumptions. For example, FWS "assume(d) in our analysis that all 435 relocated [GKR] individuals may be directly lost or ecologically functionally lost by not reproducing." BiOp, at 108. But as the BiOp acknowledges, the data indicates that lethal take will be much lower—the *actual* project with implementation of conservation measures would be even less likely to cause jeopardy. *Id.*

through its protection and active management of more than 25,000 acres of conservation lands—will benefit species and further their recovery.

Specifically as to GKR, Dr. David Germano, one of the country's leading experts on the species, opines that the Project will not jeopardize the GKR. Germano Decl. ¶ 5. Informed by decades of experience with the GKR, Germano bases his opinion on the farmed character of the Project lands, the scale and habitat value of the conservation lands for GKR, and likely recolonization of the Project site by GKR beneath the solar panels once they are in place. *Id.* ¶¶ 5, 6. Dr. Brian Cypher, also a noted expert on the GKR, opines that even if none of the relocated GKR survive, this would amount to a mortality rate of less than one percent of the estimated population on the Project site and conservation lands combined (still an overestimate of the regional GKR population impacted). Cypher Decl. ¶¶ 30–33. Cypher also notes the likelihood of recolonization. *Id.* ¶ 34. Randi McCormick, another expert of the grassland species, explains that the translocation plan here is modeled after and improves upon the success of GKR translocation at a comparable solar project. McCormick Decl. ¶¶ 30, 38. She further opines that "even if the Project activities resulted in 100 percent mortality and the estimated 435 individuals were taken, given the proportion of the population that they represent, this would not jeopardize the GKR population, whether measured across its range, in the Ciervo-Panoche region, or even in the Panoche Valley subpopulation." *Id.* ¶¶ 27–39.

As to the blunt-nosed leopard lizard (BNLL), Dr. Germano opines that while the conservation lands constitutes a "stronghold" for the species, the Project footprint serves as only "marginal habitat." Germano Decl. ¶¶ 5, 6. Consistent with this opinion, McCormick explains that very few BNLL appear to reside on the Project footprint. McCormick Decl. ¶¶ 44–50; during the numerous surveys that were conducted from 2009 to 2015, only one BNLL observation was made in an area formerly designated as within the Project footprint; this location, including a 52.4 acre buffer, has since been excluded from the Project footprint. *Id.* For these reasons, as well as the required BNLL avoidance measures and the conservation lands, McCormick provides her opinion that "the Project will not jeopardize the regional BNLL population." *Id.* at ¶¶ 50–57.

As to the San Joaquin kit fox (SJKF), Dr. Cypher explains that SJKF do not appear to be

solely dependent upon the Project footprint for habitat and, based on available estimates, "the proportion of foxes potentially affected by the Project would be low." Cypher Decl. ¶¶ 35–36. Dr. Cypher notes his support for the Project based on the mitigation measures, the lack of impact on SJKF of two other solar projects sited on the Carrizo Plain, and the benefits of the conservation lands. *Id.* at ¶¶ 37–39. McCormick opines that in light of the SJKF mitigation measures and Conservation Lands, the Project "will not jeopardize the SJKF population throughout its range, in the region, or in the Panoche Valley." McCormick Decl. ¶¶ 63–71.

Consistent with the determination of the federal agencies, these experts all conclude that the conservation lands will avoid jeopardy to the three species. Indeed, these experts view the conservation lands as presenting an unparalleled and long-sought opportunity that would not otherwise be possible to ensure the long-term conservation and recovery of the three species. Cypher Decl. ¶¶ 17–22, 40–45; Germano Dec. ¶ 6; McCormick Decl. ¶¶ 72–91.

Plaintiffs' alleged "aesthetic and ecological" interests are necessarily derivative of the listed species' presence in the Panoche Valley and do not provide an independent basis for irreparable harm.[5] Moreover, these diffuse asserted interests must be viewed through the prism of the statute whose alleged violation purportedly injures those interests. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 337 (D.C. Cir. 1987) (Williams, J., concurring) ("Harm for such purposes of [irreparable harm] is of course defined in terms of the evil that the particular statute was designed to prevent."). The very same limitation was enforced by the Supreme Court in *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531 (1987), where the Court held the Ninth Circuit erred in directing the grant of a preliminary injunction because it "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect." *Amoco*, 480 U.S. at 544; *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314

[5] A CWA section 404 permit is needed to "fill" certain "waters of the U.S." on the Project site. But work will not be done in these jurisdictional waters until mid to late August 2016, several months from now. Owsley Decl. ¶10. Thus, even were Plaintiffs to assert an interest in the waters of the U.S. on the Project site as such, and press a violation of a section of the CWA and its implementing regulations focused not on species, but on those waters themselves, any alleged irreparable injury to such an interest would not occur for many months.

(1982) (the purpose of the CWA is to protect the nation's waters, "not the permit process").

D. Project Activities Over the Next Nine Months Are Limited

Given the onerous terms and conditions imposed by FWS and the Corps on the Project, Plaintiffs cannot show a likelihood of irreparable harm to the species involved—the GKR, the BNLL, or SJKF—even if PVS were going to build the entire Project in the next nine months. But, as explained in the declaration of Arnie Owsley, PVS will be conducting limited activities, primarily in the southwest portion of the Project site, an area of low GKR abundance, in full compliance with the terms and conditions of the BiOp in order to build the infrastructure necessary to connect to the electrical transmission grid in time to meet external deadlines imposed by public utilities. Owsley Decl. ¶¶ 11–20; Cherniss Decl. ¶ 26. There is no evidence of imminent irreparable injury at all, let alone in this period of limited activity.

E. Plaintiffs' Delay in Filing Suit Undercuts Immediate Irreparable Harm

Over a month ago, on March 22, 2016, these same Plaintiffs filed a state suit challenging CDFW's ITP. Notably, they did not seek a preliminary injunction at that time. The ultimate relief sought in that suit would have the same effect as the relief Plaintiffs seek here—halting the Project. This delay and failure by Plaintiffs to seek immediate relief in that case undermines any claim that emergency relief is warranted here or that irreparable harm is imminent.

III. THE EQUITIES AND PUBLIC INTEREST WEIGH AGAINST AN INJUNCTION

As the Federal Defendants explain in their opposition brief, Plaintiffs cannot show that they will succeed on the merits of their claims. The remaining factors—the balance of the hardships/equities and the public interest—need not be reached, but consideration of them, too, weighs decisively against issuance of a preliminary injunction. The two factors can be considered together because of the myriad public benefits provided by the Project.

Plaintiffs' claimed interest in the survival of species at the Project site is undercut by the fact that the Project will include over 25,000 acres of prized conservation lands that will contribute significantly to regional as well as range-wide conservation and recovery efforts for GKR, BNLL, SJKF, and other species, as explained in great detail by Drs. Germano and Cypher and Ms. McCormick in their declarations, as cited above.

PVS has spent millions of dollars to purchase the land underlying the Project and the surrounding conservation lands, and has provided $42.5 million in bonds to secure completion of related conservation measures. Cherniss Decl. ¶ 19. The Project schedule is tight, and is set to be completed within 15–16 months. Owsley Decl. ¶ 5. As Plaintiffs well know, any disruption to the Project now will likely require PVS to amend its contracts, waste additional time and force PVS to incur substantial new costs. Owsley Decl. ¶¶ 22–24; Amirault Decl. ¶¶ 6, 10–11; Cherniss Decl. ¶¶ 32–33. Even a short delay would stop a range of preconstruction activities, require disruptive and costly modifications to the already expedited Project schedule, and make it even more challenging to mobilize the contractors needed to perform the work or secure the necessary construction materials at reasonable cost for several months, resulting in further delays and expense. Owsley Decl. ¶ 27; Amirault Decl. ¶¶ 10–11; Cherniss Decl. ¶ 32.

The Project also must meet specific deadlines for its transmission line interconnection to the energy grid. Owsley Decl. ¶¶ 17–18. The Project is currently on track to interconnect in the coming window of October 15, 2016 to March 15, 2017. *Id.* Any delay now would almost certainly push back interconnection for the Project to the next window in October 2017 (at least a seven month delay). *Id.* Such a delay would have substantial financial implications, because if the Project does not interconnect, it cannot generate and sell power. In other words, any delay caused by this litigation may jeopardize the ultimate viability and construction of the Project. *Id.* ¶¶ 21, 27; Amirault Decl. ¶ 11; Cherniss Decl. ¶ 32.

These very same concerns have led courts to reject similar requests for extraordinary relief. In a recent case also centering on efforts to end a federal and state-approved solar project based on purported harm to species, the court ruled that the balance of harms weighed against an injunction because "delay may severely harm both Defendants and Intervenors, because the construction schedule is already severely truncated." *Defenders of Wildlife v. Jewell*, No. CV 14-1656-MWF (RZx), 2014 WL 1364452, at *15 (C.D. Cal. Apr. 2, 2014). The same is true here.

The requested injunction is also against the public interest. Plaintiff organizations completely ignore the fact that the actual residents and representatives of San Benito County "overwhelmingly support" the Project. Barrios Decl. ¶ 9. The Project, in fact, offers 1,000 to

1,500 well-paying jobs in a region suffering from high unemployment, including in the construction sector. Hartmann Decl. ¶ 7. Plaintiffs' unfounded delay tactics put these jobs in jeopardy, and would deny local residents the substantial tax revenue associated with the Project for at least several years. This is one reason the local and state representatives for San Benito County have submitted declarations supporting the Project and objecting to Plaintiffs' efforts to delay. Alejo Decl. ¶¶ 5–8; Barrios Decl. ¶¶ 8–10.

As State Representative Alejo attests, San Benito County's Latino population has been especially hard-hit by unemployment and would benefit from the job opportunities created by the Project. Alejo Decl. ¶ 6. And, as both State Representative Alejo and Board Chairwoman Barrios explain, the Project includes substantial benefits for the entire San Benito County community, including creation of more than 25,000 acres of permanent conservation lands, $40 million in local and special tax revenues, and energy ratepayer savings through lower prices. Alejo Decl. ¶¶ 6–8; Barrios Decl. ¶¶ 8–10. Many hundreds of individuals are relying on this Project going forward, and a delay in construction not only impacts the viability of the Project itself, but the lives and schedules of many who assume construction will commence as presently scheduled. Cherniss Decl. ¶ 20.

In furtherance of national and state priorities, the Project will generate renewable, emissions-free solar energy for Californians—enough to power nearly 70,000 average-sized homes and, avoid the need to burn 530 million pounds of coal, or 1.15 million barrels of oil. *See Defenders of Wildlife*, 2014 WL 1364452, at *14 (reasoning that "the short- and long-term economic benefit of expanded renewable energy sources in" California and the United States weighed against a preliminary injunction); *see also Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 581 (D. Md. 2009) (recognizing that, despite ESA, "Congress has strongly encouraged the development of clean, renewable energy"); *Consolidated Delta Smelt Cases*, 717 F. Supp. 2d 1021, 1068 (E.D. Cal. 2010) (considering other public interests beyond species protection).

IV. ALTERNATIVELY, THE COURT SHOULD REQUIRE A SUBSTANTIAL BOND

The Federal Rules of Civil Procedure provide that a "court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c); s*ee also Communities For a Better Env't v. Cenco Ref. Co.*, 179 F. Supp. 2d 1128, 1148 (C.D. Cal. 2001) *aff'd*, 35 F. App'x 508 (9th Cir. 2002) (refusing to waive the bond requirement in an environmental citizen-suit case). And, Plaintiffs' non-profit status does not immunize them from this requirement. *See, e.g.*, *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 459–60 (7th Cir. 2010) (Posner, J.) (affirming requirement that non-profit post a bond). In the event that the Court elects to grant some form of preliminary relief, PVS requests that such relief be conditioned upon Plaintiffs posting an appropriate bond. As set forth in the supporting declaration of Justin Amirault, PVS stands to lose many millions of dollars if a preliminary injunction were to issue. The Sierra Club Foundation reported over $89 million in net assets for 2014, and Defenders of Wildlife reported over $25 million in net assets for 2015. Carr Decl. ¶¶ 8, 9 & Exs. F, G. Plaintiffs should be required to post a substantial bond or be required to show why such a bond cannot be secured.

V. CONCLUSION

For the reasons set forth above and in Federal Defendants' Opposition brief, Plaintiffs' motion should be denied in its entirety.

Dated: May 4, 2016

MORRISON & FOERSTER LLP

By: */s Christopher J. Carr*
CHRISTOPHER J. CARR
Attorneys for Defendant-Intervenor
PANOCHE VALLEY SOLAR, LLC