



The Endangered Species Act and Climate Change

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Legislative Background

- “I have today signed S. 1983, the Endangered Species Act of 1973. At a time when Americans are more concerned than ever with conserving our natural resources, this legislation provides the Federal Government with needed authority to protect an irreplaceable part of our national heritage – threatened wildlife . . . Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we share as Americans. I congratulate the 93d Congress for taking this important step toward protecting a heritage which we hold in trust to countless future generations of our fellow citizens. Their lives will be richer, and America will be more beautiful in the years ahead, thanks to the measure that I have the pleasure of signing into law today.”

The Purpose of the ESA

- Findings: “The various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation”;
- “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people”
- Purpose: “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”

Section 4: Listing as Endangered or Threatened

Listing of “Species” – includes any “subspecies or fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature”;

Listing based on five factors: including “present or threatened destruction, modification, or curtailment of its habitat or range”; or any “other natural or manmade” factor;

“Best available” science standard; economic factors should play no role

Endangered v. threatened definitions: Endangered: “any species which is in danger of extinction throughout all or a significant portion of its range”; Threatened: “any species which is likely to become an endangered species within the foreseeable future throughout all of a significant portion of its range”

Listing Case Study: Polar Bear Listing



Listing Case Study: the Walrus





Listing Case Study: Florida Keys Mole Skink

Section 7 – Interagency Consultation

- Section 7(a)(1): agencies' obligation to “utilize their authorities in furtherance of the purposes of this Act”
- Section 7(a)(2): agencies' obligation, in consultation with FWS or NMFS, to “insure that any action authorized, funded, or carried out by such agency . . . Is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of” critical habitat;
- The consultation process: informal and formal; “may affect” threshold for any consultation; cumulative effects only considered in formal consultation
- The God Squad.

Section 7(a)(2): what about
(e.g.) impacts on staghorn
coral?



The “Bernhardt Memo” (2008)

- -- “Guidance on the Applicability of the Endangered Species Act’s Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases”;
- -- agency actions need to satisfy a low “may affect” test in order to require consultation;
- -- Memo’s conclusion: “we conclude that where the effect at issue is climate change in the form of increased temperatures, a proposed action that will involve the emission of GHG cannot pass the ‘may affect’ test and is not subject to consultation under the ESA and implementing regulations”; based on then available science
- -- pending litigation over auto mileage standards.

Section 9: The “Take” Prohibition

Broad prohibition on “take” of an endangered species by anyone; only exceptions are in sections 7 and 10; for threatened species, take prohibition is extended by regulation pursuant to section 4(d) of the Act

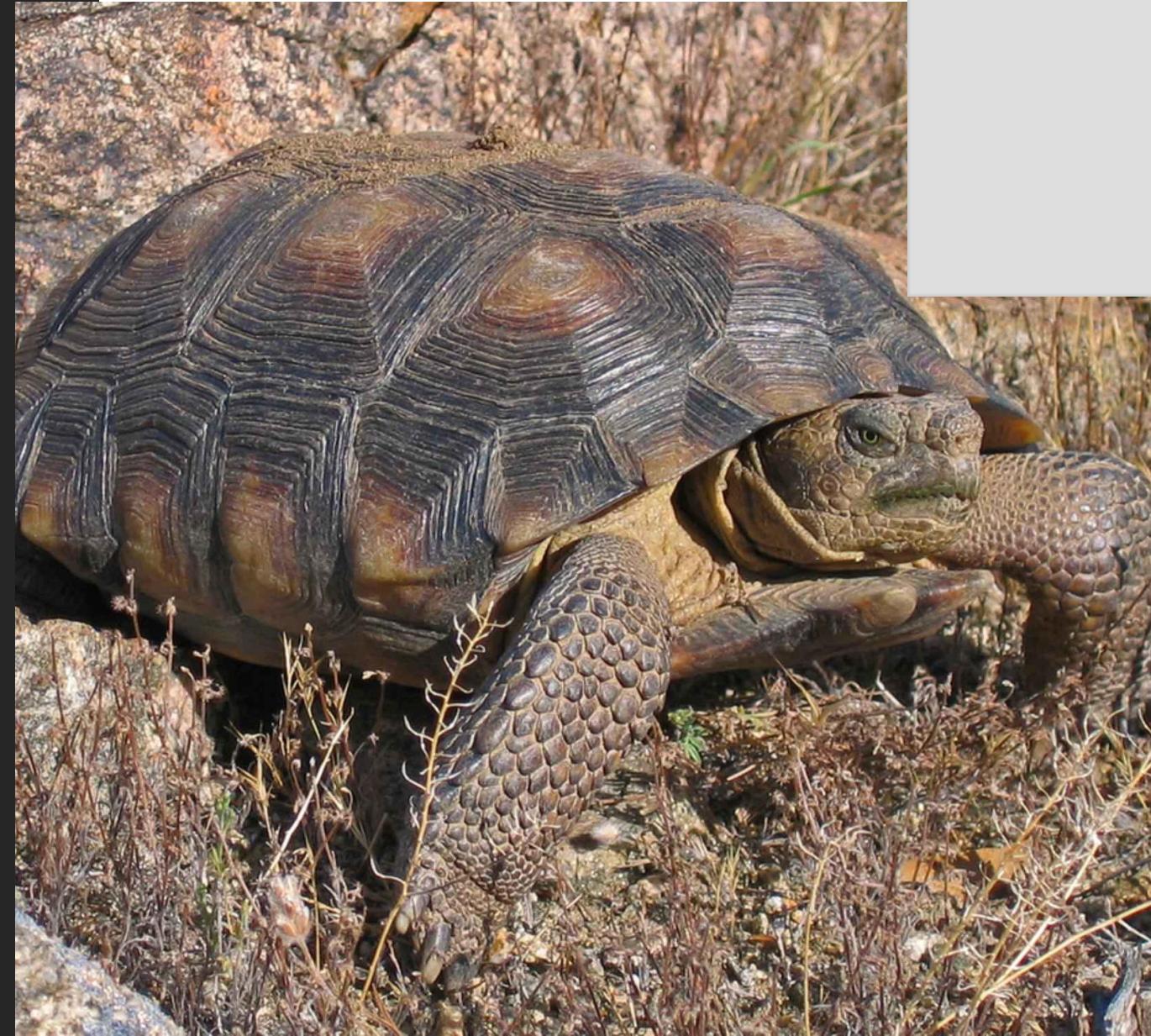
Take = “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”;

Regulatory definition of “harm” = “an act which actually kills or injures wildlife,” which “may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behaviors patterns, including breeding, feeding or sheltering”;

The “take” prohibition and climate change

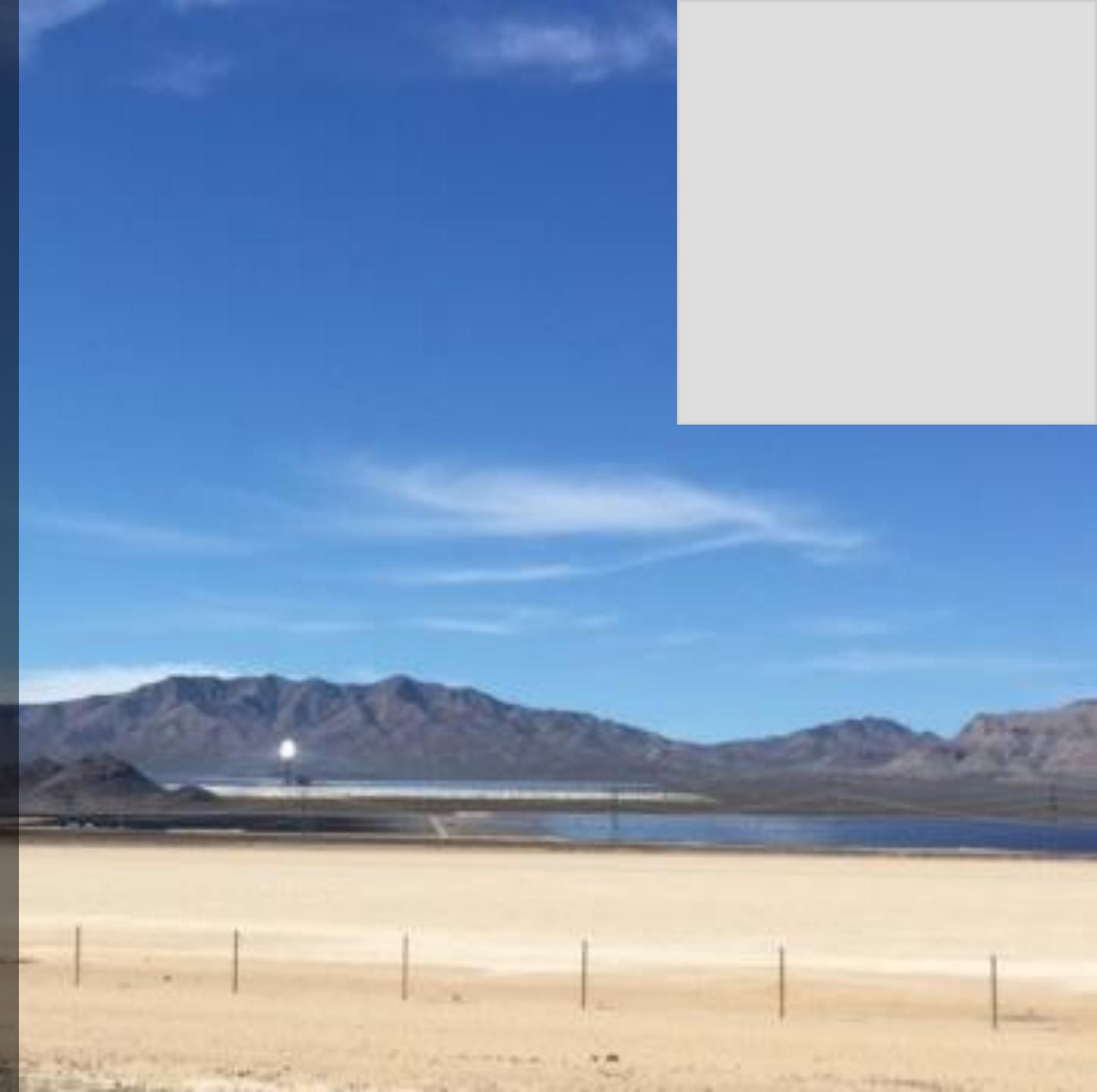
- -- 4(d) rule for the polar bear;
- -- what about other species (e.g., coral)?

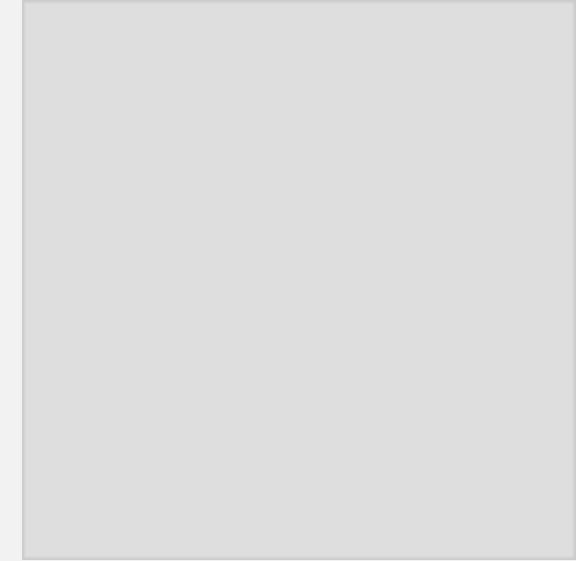
The need to do
renewable
energy right:
industrial solar
and the desert
tortoise





The Ivanpah Valley





The need to do
renewable
energy right:
industrial wind
power and the
Indiana bat