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HABITAT DESIGNATION LIKELY TO DELAY DUMP

By **Todd Woody**

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The federal government has erected another roadblock to the construction of a nuclear waste dump in the California desert, designating the landfill site as critical habitat for the imperiled desert tortoise.

That means that the long-delayed dump faces further review before federal land for the **Ward Valley** project can be sold to the state. The site is part of 6.4 million acres in the Southwest identified Monday as essential for the tortoise's survival.

"We think that this should stop the project," said Hannah Bentley, a San Francisco solo practitioner representing dump opponents. "The statute says that federal agencies are not permitted to destroy or adversely modify critical habitat."

"If they transfer the land, we'll file suit," **Bentley** added.

But in another development, a Los Angeles Superior Court judge on Monday cheered dump supporters by ruling that an adjudicatory hearing on the safety of the facility was not required. Environmentalists contend the state violated the California Environmental Quality Act by failing, among other things, to hold such a hearing before issuing a license to dump operator U.S. Ecology Inc.

Interior Secretary Bruce Babbitt has demanded that the state conduct some sort of

safety inquiry before he approves the land transfer, but he has remained vague on whether he would require a full-fledged adjudicatory hearing. Babbitt has delayed the transfer until the outcome of the Los Angeles case, which is set for trial in April.

The critical habitat designation may not necessarily scuttle the facility, government officials and dump proponents said. But all agreed it will inevitably kick off another round of litigation in the decade-old fight to build a low-level radioactive waste facility in San Bernardino County. Radioactive refuse from hospitals, biotech companies and nuclear power plants would be buried in unlined trenches at the facility.

Environmentalists long have argued that the dump could contaminate the nearby Colorado River, which supplies drinking water to 17 million people. When Gov. Pete Wilson attempted to secure the land transfer in the final days of the Bush administration last year, **Bentley's** clients sued to stop the sale. The coalition of advocacy groups argued that the government violated the Endangered Species Act by failing to identify the tortoise's critical habitat.

To settle the suit, Babbitt agreed to halt the land transfer temporarily and designate the tortoise's habitat.

U.S. Fish and Wildlife Service spokeswoman Susan Saul said the dump site's designation as critical habitat does not automat-

ically ban the project.

"Until . . . biologists go out and take a site-specific look at whether those exact square inches of ground where the facility would be built is crucial habitat and whether construction of the facility would cause adverse habitat modification, we can't make a prediction on the effect of the project," she said.

The federal Bureau of Land Management, which controls the site, must request a consultation to review the project's impact on the habitat. The wildlife service then has 135 days to determine if the dump will destroy or harm the habitat. It may condition a finding that the dump will not jeopardize the habitat by requiring that certain mitigation measures be undertaken.

Dump supporters said they're confident that the government will approve the project, noting that the wildlife service previously found that the 90-acre dump site would not jeopardize the tortoise's survival.

"The loss of 90 acres out of 6.4 million is a de minimus loss," said U.S. Ecology counsel Karl Lytz, a San Diego partner with Los Angeles-based Latham & Watkins. The designation "does not mean there's an absolute prohibition against modification of any critical habitat."

State and federal biologists, however, recommended against building the dump, as it would destroy high quality habitat.

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