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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11
12 WESTERN WATERSHEDS PROJECT,
13
14 Plaintiff,

v.

15 KEN SALAZAR, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR; BOB
16 ABBEY, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE UNITED STATES BUREAU OF
17 LAND MANAGEMENT; MIKE POOL, IN HIS
OFFICIAL CAPACITY AS DEPUTY DIRECTOR OF
18 THE UNITED STATES BUREAU OF LAND
MANAGEMENT; UNITED STATES BUREAU
19 OF LAND MANAGEMENT, A FEDERAL
AGENCY; ROWAN GOULD, IN HIS OFFICIAL
20 CAPACITY AS DIRECTOR OF THE UNITED
STATES FISH AND WILDLIFE SERVICE; REN
21 LOHOEFENER, IN HIS OFFICIAL CAPACITY AS
REGIONAL DIRECTOR OF THE PACIFIC
22 SOUTHWEST REGION OF THE UNITED STATES
FISH AND WILDLIFE SERVICE; UNITED
23 STATES FISH AND WILDLIFE SERVICE,
A FEDERAL AGENCY; AND UNITED STATES
24 DEPARTMENT OF THE INTERIOR, A
FEDERAL AGENCY,

25
26 Defendants, and

27 BRIGHT SOURCE ENERGY, INC.

28 Intervenor-Defendant.

Case No.:

2:11-cv-00492-DMG-SS

**AMICUS CURIAE MEMORANDUM
OF GOVERNOR EDMUND G.
BROWN JR. IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Date: August 1, 2011

Time: 9:30 a.m.

Courtroom: 7 – 2nd Floor

Judge: Honorable Dolly M. Gee

Trial Date: TBA

Action Filed: 01/14/2011

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TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
ARGUMENT	2
I. Plaintiff must show that enjoining the Ivanpah project is in the public interest	2
II. California has a significant interest in increasing renewable energy sources, which include the Ivanpah project	3
III. California has devoted substantial resources to its renewable energy development programs, including siting large-scale renewable energy facilities such as the Ivanpah project	4
A. Legislation.....	4
B. Regulatory efforts.....	5
IV. The Ivanpah project is an important component of California’s efforts to meet the RPS standard and reduce greenhouse gas emissions	8
CONCLUSION	11

1 **TABLE OF AUTHORITIES**

2 **Page**

3

4 **CASES**

5 *Alliance for the Wild Rockies v. Cottrell*
6 632 F.3d 1127 (9th Cir. 2011)..... 2

7 *Weinberger v. Romero-Barcelo*
8 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)..... 2

9 *Western Watersheds v. Bureau of Land Management*
10 No. 3:11-cv-00053-HDM-VPC, 2011 U.S. Dist. LEXIS 50056
11 (D. Nev. April 28, 2011)..... 2

12 *Winter v. Natural Resources Defense Council, Inc.*
13 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)..... 2

14 **STATUTES**

15 California Health & Safety Code
16 § 38501(a) (West 2011) 5

17 California Public Resources Code
18 § 25301(a) (West 2011) 7

19 **OTHER AUTHORITIES**

20 Assembly Bill 32 (2005-2006 Session) 4

21 Senate Bill X1-2 (S.B. X1-2, 2011-2012 Session) 3, 4

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1 INTRODUCTION

2 In April 2011, Governor Jerry Brown signed into law a “Renewables Portfolio
3 Standard” (RPS) requiring all retail sellers of electricity to serve 33 percent of their
4 load with renewable energy by 2020, the most ambitious renewable energy standard
5 in the United States. The 33 percent RPS statute is new, but California’s
6 commitment to the reduction of the use of fossil fuel is not. The state’s strategy is
7 multi-faceted, including economic incentives, specific requirements for actions by
8 the major utilities, processes for expediting the siting of renewable energy facilities,
9 and improvements to the transmission infrastructure accommodating renewable
10 energy sources. California is committed to a significant and substantial increase in
11 renewable resources for electrical power, the reduction of fossil-fuel based
12 pollutants, and to promoting the green economy, consistent with protection of the
13 environment.

14 The Ivanpah project will contribute 370 megawatts of solar energy towards
15 that commitment and, as set forth below, is an important part of California’s overall
16 efforts to transform its energy future. California has a keen interest in the success
17 of the Ivanpah project. Governor Brown asks this Court to consider California’s
18 interest when determining whether Western Watersheds Project has met its burden
19 of proving that an injunction is in the public interest. In light of the actions taken in
20 conjunction with the project, the public interest here is in the success of responsibly
21 sited renewable energy resources. We therefore ask the Court to deny the request
22 for a preliminary injunction and allow this renewable energy project to proceed.

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ARGUMENT

I. PLAINTIFF MUST SHOW THAT ENJOINING THE IVANPAH PROJECT IS IN THE PUBLIC INTEREST

Under longstanding law, a plaintiff seeking injunctive relief must show that the injunction is in the public interest. As the Supreme Court noted in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982): “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”

Under the public interest prong in the injunctive relief test in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), the Court considered the impact of the Navy’s use of sonar during training exercises on marine mammals. The Court found that although marine mammals would be harmed, the “balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy” (*id.* at 378), and the Court vacated the preliminary injunction issued by the Ninth Circuit.

As the Ninth Circuit stated in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011): “We will not grant a preliminary injunction . . . unless those public interests [in support of issuing the injunction] outweigh other public interests that cut in favor of *not* issuing the injunction.” In a challenge similar to this case, Western Watersheds Project sought a preliminary injunction against the Bureau of Land Management alleging deficiencies in its National Environmental Policy Act review of a proposed wind facility. The district court denied the preliminary injunction, finding that any environmental interests were outweighed by other interests in the case. Specifically, the court found that delaying the project “would harm federal renewable energy goals and delay Nevada’s economic recovery.” *Western Watersheds v. Bureau of Land Management*, No. 3:11-cv-00053-HDM-VPC, 2011 U.S. Dist. LEXIS 50056, at *18 (D. Nev. April 28, 2011). Similarly, this Court should find that an injunction is

1 not in the public interest because of the importance of the project to the state's
2 renewable energy goals.¹ As Randall Hickok testified in his declaration opposing
3 the TRO application, a preliminary injunction could threaten the viability of the
4 project (Hickok Declaration, ¶¶ 18- 24), one which California sorely needs to meet
5 its RPS goals.

6 **II. CALIFORNIA HAS A SIGNIFICANT INTEREST IN INCREASING**
7 **RENEWABLE ENERGY SOURCES, WHICH INCLUDE THE IVANPAH**
8 **PROJECT**

9 California has specifically determined that increasing renewable energy is in
10 the public interest. In enacting the 33 percent RPS into law, the Legislature found
11 that the RPS program will provide unique and important benefits to California,
12 including displacing fossil fuel consumption; adding new electrical generating
13 facilities; reducing air pollution; meeting the state's climate change goals by
14 reducing greenhouse gas emissions from electrical generation; promoting stable
15 retail electricity rates; providing a diversified and balanced energy generation
16 portfolio; and contributing to the safe and reliable operation of the electrical grid.
17 S.B. X1-2, 2011-2012 Sess., Sec. 13. As the California Energy Commission (CEC)
18 has noted, increasing renewable energy in the state's electricity mix reduces the
19 risks and costs associated with potentially high and volatile natural gas prices while
20 also reducing dependence on imported natural gas. CALIFORNIA ENERGY
21 COMMISSION, INTEGRATED POLICY REPORT 2 (2009)².

22 The California Air Resources Board (CARB) has estimated that the 33 percent
23 RPS goal will reduce greenhouse gas emissions from the state's electricity sector by

24 ¹ The plaintiffs may argue that the public interest in protecting the desert
25 tortoise outweighs any public interest in renewable energy. We note that the Energy
26 Commission imposed mitigation conditions to protect the desert tortoise, beyond
27 those required by the federal government, and concluded that there would be no
28 significant impacts to desert tortoise from the Ivanpah project. CALIFORNIA
ENERGY COMMISSION, DECISION ON IVANPAH SOLAR ELECTRIC GENERATING
SYSTEM VI- 42 (2010), found at
<http://www.energy.ca.gov/sitingcases/ivanpah/documents/index.html>

² http://www.energy.ca.gov/2009_energypolicy

1 at least 12 million metric tons of carbon dioxide equivalents.³ In addition, moving
2 to renewable energy will reduce air pollutants and toxic air contaminants that result
3 from fossil-fuel power generation, thus providing positive health benefits. AIR
4 RESOURCES BOARD, PROPOSED REGULATION FOR A CALIFORNIA RENEWABLE
5 ELECTRICITY STANDARD STAFF REPORT: INITIAL STATEMENT OF REASONS ES-3
6 (2010)⁴.

7 The Ivanpah project will help the state meet its 33 percent RPS goal and
8 exemplifies the benefits of renewable resources to California. Because it is a non-
9 polluting thermal solar plant, it will not emit greenhouse gases or any other air
10 pollutants, and its clean energy will displace power derived from fossil fuels.

11 **III. CALIFORNIA HAS DEVOTED SUBSTANTIAL RESOURCES TO ITS**
12 **RENEWABLE ENERGY DEVELOPMENT PROGRAMS, INCLUDING SITING**
13 **LARGE-SCALE RENEWABLE ENERGY FACILITIES SUCH AS THE**
14 **IVANPAH PROJECT**

15 California's efforts to transform its energy supply from one based on fossil
16 fuels to one based on renewable energy is reflected in both legislation and
17 regulatory programs and policies.

18 **A. LEGISLATION**

19 Multiple pieces of California legislation encourage and require the adoption
20 and use of renewable energy. Assembly Bill 32 (A.B. 32, 2005-2006 Sess., "AB
21 32") and Senate Bill X1-2 (S.B. X1-2, 2011-2012 Sess., "SB X1-2") establish
22 California's overall approach, and fundamentally define the actions California must
23 take to supply its citizens with energy.

24 In AB 32, the California Global Warming Solutions Act of 2006, the
25 Legislature found that global warming poses a serious threat to California's

26 ³ This term is a measure used to compare the emissions from various
27 greenhouse gases based upon their global warming potential.

28 ⁴ www.arb.ca.gov/regact/2010/res2010/res10isor.pdf

1 economic well-being, public health, natural resources, and environment. CAL.
2 HEALTH & SAFETY CODE § 38501(a) (West 2011). Aspiring to exercise a “global
3 leadership role” (*id.* at § 38501(e)), the legislation directed the CARB to develop
4 regulations, market mechanisms, and other actions to reduce California’s
5 greenhouse gas emissions, such as carbon dioxide, to 1990 levels by 2020.

6 SB X1-2 is the comprehensive legislation that codifies and implements the
7 RPS goal that by the end of 2020, 33 percent of total retail sales of electricity come
8 from renewable energy resources.⁵ The bill also sets interim targets of 20 percent
9 renewable sources by 2013 and 25 percent by 2016. To achieve these targets, SB
10 X1-2 directs the state’s major utilities to prepare annual renewable energy
11 procurement plans and an annual compliance report, and requires a number of
12 regulatory agencies to undertake specific efforts to ensure that the targets are
13 reached.

14 **B. REGULATORY EFFORTS**

15 California’s substantial and significant efforts to reach its renewable energy
16 goals are evident from looking at the extensive resources the state has devoted to
17 increasing the production of renewable energy. In 2003, two state agencies - the
18 CEC and the California Public Utilities Commission (CPUC) -adopted an Energy
19 Action Plan with a goal of eliminating energy outages and excessive price spikes in
20 electricity or natural gas.⁶ The Plan established an important principle, known as
21 the “loading order,” to guide the agencies’ energy decisions. The agencies agreed

22 ⁵ SB X1-2 is the culmination of a series of legislative and gubernatorial RPS
23 actions. In 2002, Governor Davis signed SB 1078, creating the RPS. It required
24 investor-owned utilities (those regulated by the Public Utilities Commission) to
25 ensure that by 2017 20 percent of their retail sales would come from renewable
26 resources. In 2006, SB 107 modified the program to require the utilities to meet the
20 percent target by 2010. Governor Schwarzenegger then upped the target to 33
percent by 2020 through Executive Order S-14-08.

27 ⁶ The Plan was also adopted by the Consumer Power and Conservation
28 Financing Authority, which has since been phased out and no longer exists.

1 that their highest priority should be to increase conservation and energy efficiency.
2 Any need for new generation should be met first by renewable energy resources
3 (including large-scale projects like Ivanpah) and distributed generation,⁷ and second
4 with clean fossil-fueled generation. CALIFORNIA ENERGY COMMISSION ET AL,
5 ENERGY ACTION PLAN 4 (2003)⁸.

6 Executive Order S-14-08⁹ directed all state regulatory agencies to give priority
7 to reviewing permits for renewable energy projects. Two of those, the CEC and
8 Department of Fish and Game, have joined with the federal Bureau of Land
9 Management and the Fish and Wildlife Service to form the Renewable Energy
10 Action Team. The team meets regularly to coordinate review of renewable energy
11 projects on state and federal lands, including the Ivanpah project, in order to reduce
12 the time and uncertainty of the licensing processes. They are also developing the
13 Desert Renewable Energy Conservation Plan, a road map for renewable energy
14 development in California's desert regions.

15 And to ensure that adequate transmission capacity exists for these new
16 renewable energy sources, state agencies, utilities, the environmental community,
17 and renewable generation developers have formed the Renewable Energy
18 Transmission Initiative. The purpose of this effort is to develop a statewide
19 transmission plan with sufficient capacity to support the 33 percent RPS.

20 The CEC has a multitude of programs devoted to encouraging the
21 development of renewable energy resources.¹⁰ It retains siting jurisdiction over

22 ⁷ Distributed generation consists of small generation sources that are at or
23 very near the location where the energy is used. An example of distributed
generation is a rooftop solar project.

24 ⁸ www.energy.ca.gov/energy_action_plan/2003-05-08_ACTION_PLAN.PDF

25 ⁹ <http://www.dfg.ca.gov/habcon/energy/>

26 ¹⁰ The CEC, for example, provides support to existing, new, and emerging
27 renewable technologies; provides incentives for small wind and fuel cell electricity
28 systems; and provides incentives for solar electricity systems in new home
construction.

(continued...)

1 solar thermal power plants of 50 megawatts or greater, such as the Ivanpah project.
2 As part of its energy policy responsibilities, the CEC is required to prepare a
3 biennial integrated energy policy report, which contains an integrated assessment of
4 major energy trends and provides policy recommendations to, *inter alia*, conserve
5 resources, protect the environment, and ensure reliable and diverse energy supplies.
6 CAL. PUB. RES. CODE § 25301(a) (West 2011). For its 2011 report, the CEC stated
7 that it will prepare a renewable energy plan intended to “expedite permitting of the
8 highest priority renewable generation and transmission projects with the goal of
9 developing 12,000 megawatts of distributed generation and 8,000 megawatts of
10 utility-scale renewable by 2020.” CALIFORNIA ENERGY COMMISSION, INTEGRATED
11 ENERGY POLICY REPORT SCOPING ORDER 9-10 (2011)¹¹. The CEC also has
12 responsibilities under the new RPS legislation to implement portions of the RPS
13 program, including the adoption of regulations governing compliance of publicly
14 owned utilities with the RPS targets.

15 Increasing the state’s sources of renewable energy is also a high priority at the
16 CPUC. SB X1-2 gave new responsibility to the CPUC pertaining to pricing for
17 electricity purchased from renewable energy sources. The CPUC already sets RPS
18 targets for investor-owned utilities and determines whether the utilities have met the
19 targets. It also oversees a process called the Long-Term Procurement Plan
20 proceeding, in which it reviews and approves utilities’ ten-year plans to purchase
21 energy, and considers the impacts of state energy policies on the need for new
22 resources. The CPUC is encouraging the development of renewable energy
23 through the Renewable Auction Mechanism, a program that streamlines the process
24 by which utilities can purchase energy from small renewable distributed generation
25 projects. Finally, the CPUC oversees various rebate programs for customers of

26 _____
27 (...continued)

28 ¹¹ http://www.energy.ca.gov/2011_energy_policy/index.html

1 investor-owned utilities, including programs for solar installations on residential
2 and commercial buildings, solar hot water heaters, and grants to develop solar
3 technologies.

4 The CARB has the major responsibility of implementing AB 32, the
5 legislation directing the state to reduce its greenhouse gas emissions to 1990 levels.
6 In its AB 32 Scoping Plan, the CARB estimated that adding 4,000 megawatts of
7 combined heat and power¹² would reduce greenhouse gas emissions by 6.7 million
8 metric tons of carbon dioxide equivalents. CALIFORNIA AIR RESOURCES BOARD,
9 CLIMATE CHANGE SCOPING PLAN, APPENDIX C at C-126 (2008)¹³. The CARB also
10 has the authority under the RPS program to impose penalties on publicly owned
11 utilities that have failed to comply with the RPS standards.

12 **IV. THE IVANPAH PROJECT IS AN IMPORTANT COMPONENT OF**
13 **CALIFORNIA'S EFFORTS TO MEET THE RPS STANDARD AND REDUCE**
14 **GREENHOUSE GAS EMISSIONS**

15 The CEC's written decision approving the Ivanpah project discusses at length
16 the specific benefits of the project and why it is important to California. After
17 reviewing the benefits of renewable energy in general, the CEC found that the
18 Ivanpah power plant specifically (1) will assist in meeting the state's RPS and
19 greenhouse gas reduction targets; (2) will avoid more than 13 million tons of
20 carbon dioxide emissions as well as 85 percent of air pollutant emissions over its
21 lifecycle in comparison to a natural gas plant of the same size; (3) will reduce
22 California's dependence on fossil fuels; and (4) will reduce the need to operate less
23 efficient power plants. CALIFORNIA ENERGY COMMISSION, DECISION ON IVANPAH
24 SOLAR ELECTRIC GENERATING SYSTEM VIII- 2-4 (2010)¹⁴. The CEC concluded that
25 the project "helps address a global climate change problem of paramount

26 ¹² "Combined heat and power," also known as cogeneration, is the
27 simultaneous production of electricity and heat from a single fuel source.

28 ¹³ www.arb.ca.gov/cc/scopingplan/document/appendices_volume1.pdf

¹⁴ <http://www.energy.ca.gov/sitingcases/ivanpah/documents/index.html>

1 importance and responds to state laws requiring a shift to renewable electricity
2 sources.” (*Id.* at VIII-5.) In its certification hearing for the Ivanpah project, the
3 chair of the CEC explicitly recognized the importance of the project to California’s
4 energy future, stating: “[The Ivanpah project] is tangible evidence of a substantial
5 move away from dependence on fossil fuel for the electricity system in the State of
6 California, and it is the beginning of what we need to do to make that transition
7 fully effective.” Transcript of California Energy Commission Business Meeting at
8 118 (September 22, 2010)¹⁵.

9 In spite of these benefits to the state, Western Watersheds Project contends
10 through its Declaration of Bill Powers, submitted with the application for a TRO,
11 that the project is unnecessary because “there will be no peak demand reliability
12 need for the 370 MW Ivanpah project for at least a decade.” Declaration of Bill
13 Powers, ¶ 4. In reaching this conclusion, Mr. Powers only analyzed the projected
14 peak demand forecast and “surplus” of generation at the time of the system peak
15 (*id.* at ¶¶ 5-16), and did not analyze the need for the project in terms of meeting the
16 state’s RPS or greenhouse gas reduction goals. Thus Mr. Powers simply analyzed
17 whether the project’s megawatts are needed. That inquiry, however, is irrelevant.
18 As explained above, renewable power is needed in the state because the RPS
19 requires utilities to increase their purchases of renewable power. According to the
20 CPUC, in 2010 the large investor-owned utilities served 17.9 percent of their
21 electric load with RPS generation. PUBLIC UTILITIES COMMISSION, RENEWABLES
22 PORTFOLIO STANDARD QUARTERLY REPORT 2 (March 2011)¹⁶. The utilities,
23 therefore, need to increase their purchases of renewable energy, such as the solar
24 energy that the Ivanpah project will produce, in order to meet the RPS target of 20

25 ¹⁵ http://www.energy.ca.gov/business_meetings/index_2010.html

26
27 ¹⁶ <http://www.cpuc.ca.gov/PUC/energy/Renewables>

1 percent by 2013. As Randall Hickok stated in his declaration opposing the TRO
2 application, two of California's largest utilities have contracted for all of the
3 Ivanpah project's power, expressly for the purpose of fulfilling their RPS
4 obligations. Declaration of Randall Hickok, ¶ 7.

5 Moreover, Mr. Powers' conclusion that there will be no need for the project
6 during the peak hours overlooks the fact that the project will generate renewable
7 power during the all daylight hours, not just peak hours. The electricity generated
8 by the Ivanpah project will displace generation that burns fossil fuels, thereby
9 reducing overall emissions from the state's electricity system.

10 Finally, Mr. Powers states that "it would be less costly and more consistent
11 with California's Energy Action Plan for rooftop and other forms of distributed
12 solar [photovoltaic] to provide the 370 MW solar energy output Ivanpah would
13 produce." Declaration of Bill Powers, ¶ 20. California has determined, however,
14 that the state can achieve its aggressive renewable energy and greenhouse gas
15 reduction targets only by taking a multi-pronged development approach. As the
16 CEC stated in its Final Decision, "Distributed solar must be viewed as a partner, not
17 a competitor or replacement for utility scale solar." CALIFORNIA ENERGY
18 COMMISSION, DECISION ON IVANPAH SOLAR ELECTRIC GENERATING SYSTEM II- 17
19 (2010). The CEC found that large scale solar projects are needed to work in
20 concert with renewable technologies such as wind, geothermal, biomass, tidal
21 energy, and wave energy to meet California's RPS and greenhouse gas emission
22 reduction goals. *Id.* at II-20. In his testimony at the CEC's hearings on the Ivanpah
23 project, Mr. Powers acknowledged that the state would need contributions from
24 other technologies besides distributed photovoltaic sources to reach the 33 percent
25 RPS goal by 2020. Transcript of Evidentiary Hearing 295 (January 12, 2010)¹⁷.
26 Thus, while Mr. Powers is correct that the Governor has encouraged increased

27 ¹⁷ <http://www.energy.ca.gov/sitingcases/ivanpah/documents/index.html>
28

1 distributed photovoltaic energy (Dec. of Bill Powers, ¶ 25), the state needs the
2 Ivanpah project as well as distributed photovoltaic energy to accomplish its
3 renewable energy goals.

4 **CONCLUSION**

5 California has set a bold course for its march toward reliance on renewable
6 energy, and the Ivanpah project is a very important step in this effort. California
7 has a strong, demonstrated interest in increasing its renewable energy and
8 decreasing its greenhouse gas emissions. The Court should take these interests into
9 account, and deny Western Watersheds' request for a preliminary injunction on the
10 grounds that an injunction is not in the public interest.

11
12 Dated: July 15, 2011

Respectfully submitted,

13 KAMALA D. HARRIS
14 Attorney General of California
15 SALLY MAGNANI
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