UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**CV 11-00492 DMG (Ex)**	Date	June 30, 2011
Title	***Western Watersheds Project v. Ken Salazar, et al.***	Page	1 of 4

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

VALENCIA VALLERY	ANNE KIELWASSER
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
Stephen C. Volker	David B. Glazer
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Proceedings: ORDER DENYING PLAINTIFF'S APPLICATION FOR TRO

I.
PROCEDURAL HISTORY

On January 14, 2011, Plaintiff Western Watersheds Project filed a complaint against the Department of the Interior ("DOI"), the Secretary of the DOI, the Bureau of Land Management ("BLM"), BLM's director, the Fish and Wildlife Service ("FWS"), and the FWS director and regional director for the Pacific Southwest (collectively, the "Government"). Plaintiff seeks declaratory and injunctive relief under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq*., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., the Federal Land Policy Management Act, 43 U.S.C. § 1701 *et seq*., and the Administrative Procedures Act, 5 U.S.C. § 701 *et seq*. On April 18, 2011, the Court granted Intervenor Defendant BrightSource Energy Inc.'s unopposed motion to intervene [Doc. # 26].

Plaintiff filed an application for a temporary restraining order ("TRO") on June 27, 2011 [Doc. # 31].[1] The Government filed its opposition on June 29, 2011 [Doc. # 52], as did

[1] The parties held a telephonic conference on June 27, 2011 from approximately 2:00 p.m. to 3:00 p.m. during which Plaintiff failed to inform the Government or BrightSource that it would be filing its TRO application less than nine hours later. (Glazer Decl. ¶¶ 2-4.) Plaintiff states only that "[n]otice of this application and motion has been transmitted to defendants by electronic transmission and United States mail." (Appl. at 2.) Plaintiff thus violated both Local Rule 7-19.1, which requires the attorney filing an *ex parte* application "to make reasonable, good faith efforts orally to advise counsel for all other parties, if known, of the date and substance of the proposed ex parte application," and the Court's Initial Standing Order [Doc. # 29], which provides that "[*e*]*x parte* applications that fail to conform to Local Rule 7-19 and 7-19.1, **including a statement of opposing counsel's position**, will not be considered except on a specific showing of good cause," (Initial Standing Order at 9). Plaintiff has not shown good cause for its failure to comply with the Local Rules and this Court's Order. On that basis, the TRO application is DENIED. The Court also denies the TRO application on the merits as discussed below.

BrightSource [Doc. #53]. The Court held a hearing on June 30, 2011, at which counsel for all parties appeared.

II.
FACTUAL BACKGROUND

On October 7, 2010, BLM approved four right-of-way grants for the Ivanpah Solar Electric Generating System projects ("Ivanpah"). (Volker Decl., Ex. 10.) The grants authorized the use and occupancy of public lands for the Ivanpah project, conditional on compliance with the October 1, 2010 biological opinion (*id*., Ex. 9). (*Id*., Ex. 10 at 5.) On March 2, 2011, BLM issued two Notices to Proceed ("NTPs") authorizing perimeter security and tortoise fencing for two of the three Ivanpah sites (Ivanpah 2 and Ivanpah 3). (Hurshman Decl. ¶¶ 13-14.) On April 15, 2011, BLM ordered the suspension of all fence construction authorized under the March 2, 2011 NTPs because the project had met or exceeded the incidental take limits for desert tortoises. (Volker Decl., Ex. 11.) At that time, the fencing authorized for Ivanpah 2 was complete with the exception of one western buffer zone and the fencing authorized for Ivanpah 3 was complete only on the eastern and southern sides. (*Id*.)

Following the suspension order, BLM reinitiated consultation with the FWS pursuant to the ESA. (*See* Volker Decl., Ex. 15)**;** 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a). On June 10, 2011, the FWS issued a new biological opinion, adjusting the take limits, tortoise handling procedures, and conditions of the October 1, 2010 biological opinion. (*Id*.) On June 10, 2011, BLM cancelled the April 15, 2011 suspension order and authorized the continuation of all previously approved construction activities, *i.e.*, finish the uncompleted tortoise and security fences surrounding Ivanpah 2 and 3, subject to the updated conditions of the June 10, 2011 biological opinion. (*Id*.)

Plaintiff contends that four irreparable injuries will occur absent a TRO: (1) harm to the desert tortoises, (2) harm to golden eagles "and other natural resources," (3) harm to Plaintiff and the public from BLM's inadequate Environmental Impact Statement ("EIS"), and (4) the "unstoppable momentum" that would be afforded the Ivanpah project if construction proceeds, effectively pre-deciding the case. (Appl. at 20.)

III.
LEGAL STANDARD

A plaintiff seeking injunctive relief must show that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Toyo Tire*

Holdings Of Ams. Inc. v. Cont'l Tire N. Am., Inc., 609 F.3d 975, 982 (9th Cir. 2010) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)). An injunction is also appropriate when a plaintiff raises "serious questions going to the merits," demonstrates that "the balance of hardships tips sharply in the plaintiff's favor," and "shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

IV.
DISCUSSION

Plaintiff fails to sustain its burden to demonstrate why allowing Defendants to complete their tortoise and security fences would create irreparable harm, and instead discusses the potential impact of the Ivanpah project generally. A hearing on Plaintiff's motion for preliminary injunction is set for July 25, 2011; Plaintiff does not allege what irreparable harm the government would inflict on the desert habitat or the public in the next four weeks.

Plaintiff references the April 26, 2011 BLM Revised Biological Assessment to support its argument that allowing continued construction would cause irreparable harm. (Connor Decl. ¶ 26.) The Assessment indicates that the BLM has encountered four dead turtles at the Ivanpah site: one a probable kill by a golden eagle, one euthanized after impact with a non-Ivanpah vehicle, one killed during the initial grubbing of the fenceline, and one that died of hypothermia while walking along a silt fence. (Volker Decl., Ex. 12, Attachment B.) Setting aside the tenuous connection between some of these tortoise deaths and Ivanpah construction activity and assuming that granting a TRO could prevent similar tortoise deaths, the higher tortoise population numbers on which Plaintiff relies—528 to 1,435—belie the argument that the death of four individual tortoises constitutes irreparable harm. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) (rejecting claim that "the presence of some negative effects [on wildlife species and habitat] necessarily rises to the level of demonstrating a significant effect on the environment"); *Defenders of Wildlife v. Salazar*, __ F. Supp. 2d __, 2009 WL 8162144, at *4 (D. Mont. 2009) ("[I]t makes no sense to grant a preliminary injunction for the death of a single listed animal when the Court could still offer a meaningful decision even if no preliminary injunction is granted. . . . [T]he measure of irreparable harm is taken in relation to the health of the overall species rather than individual members.").

Plaintiff's evidence that one tortoise has died as a direct result of fence-building at Ivanpah falls well short of a showing of likely irreparable harm for purposes of granting a TRO. Given that a full hearing will be held to assess the impacts of the Ivanpah project beyond the next

four weeks, Plaintiff is not foreclosed from raising arguments at that point regarding alleged irreparable harm to the desert tortoise population and why its substantial delay in seeking injunctive relief does not foreclose such relief.

V.
CONCLUSION

In light of the foregoing, Plaintiff's TRO Application is **DENIED**. The hearing on Plaintiff's motion for preliminary injunction is **CONTINUED** to **August 1, 2011 at 9:30 a.m.** The Government and BrightSource shall file any supplemental opposition briefs no later than **July 18, 2011**. Plaintiff shall file any reply no later than **July 25, 2011**. The July 18, 2011 scheduling conference is **VACATED** and will be reset when the pleadings are finalized.

IT IS SO ORDERED.

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