

DOCKET

07-AFC-5

DATE APR 16 2010

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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:

APPLICATION FOR CERTIFICATION
FOR THE IVANPAH SOLAR
ELECTRIC
GENERATING SYSTEM

DOCKET NO. 07-AFC-5

**IVANPAH SOLAR ELECTRIC
GENERATING SYSTEM (ISEGS)
(07-AFC-5)**

REPLY BRIEF OF INTERVENOR WESTERN WATERSHEDS PROJECT

**Submitted to the
California Energy Commission
Submitted by
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April 16, 2010

REPLY BRIEF OF INTERVENOR WESTERN WATERSHEDS PROJECT

Pursuant to the *Notice Of Additional Evidentiary Hearing, Revised Briefing Schedule, and Ruling On Environmental Intervenors' Motion To Compel Prehearing Conference, Set Briefing Schedule and Clarify Other Procedural Matters* issued March 11, 2010 and the email of Paul Kramer *Updated Briefing Schedule and Exhibit List* dated March 25, 2010, Intervenor Western Watersheds Project provides this *Reply Brief* on the Application for Certification for the Ivanpah Solar Electric Generating System Project.

ARGUMENT

Because this power plant project is proposed to be built on public lands, the Commission must ensure that its decision is based on informed consideration of all relevant environmental issues in a full and adequate analysis that complies with both CEQA and NEPA. The record shows that the project environmental analysis has been hurried and is incomplete. The Commission should therefore deny the project application.

In our opening brief we summarized the extensive evidence attesting to the importance of the North Ivanpah Valley desert tortoises and their habitat. The desert tortoise population that will be affected by this project, known as the Northeastern Mojave Evolutionarily Significant Unit ("ESU"), occurs in California only in the Ivanpah Valley. The Northeastern Mojave desert tortoise population is the most genetically divergent of California's desert tortoise populations. The Ivanpah Valley provides the linkage for the "connectivity", i.e. the avenue for gene flow, between the tortoise populations outside California and those found inside the state. The current tortoise density in the Northeastern Mojave ESU is the lowest of the six ESUs identified in the 1994 Recovery Plan. Although tortoise populations in the Valley have declined, the desert tortoise density at the proposed power plant site is still higher than the average for the ESU. The tortoises in the North Ivanpah Valley form one of the highest elevation breeding populations, and preserving them may be important if the species is to survive climate change effects.

The CEQA statute specifies that state policy is to:

Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history. (Pub. Resources Code 21001.c).

The power plant project will result in a massive loss of habitat, take of tortoises, increased fragmentation of remaining populations and habitat, and loss of connectivity. In considering approval of the power plant, the Commission cannot ignore the intent of CEQA. It must consider if the power plant will push the desert tortoise further below "self-perpetuating levels" or not, and if the population will be "preserved[d] for future generations."

The Applicant claims that the Ivanpah site and lands within the vicinity are previously disturbed, include existing infrastructure, or are developed. (Applicants Brief at 69) They cite the presence of dirt roads, cattle, etc on the site. However, these are authorized activities that formerly occurred throughout all desert tortoise habitat and that currently continue to be authorized in many areas by the BLM. Livestock grazing is allowed even in designated Wilderness Areas.¹ We agree that these activities do have impacts on tortoises and thus should be fully considered in the cumulative effects analysis. We also proposed that buy-out of the grazing privilege be considered as a mitigation measure. While these activities may be indicative of BLM's long history of poor wildlife management they are not indicative of habitat quality. Notwithstanding the Applicants protestations to the contrary, the project record clearly shows that these are good to high quality, relatively undisturbed lands.

The Applicant also continues to assert that the Ivanpah site is not important tortoise habitat “nor is it located within one of the last habitats of any endangered species”. (Applicants Brief at 74) However, the North Ivanpah Valley amounts to one quarter of the entire habitat for the Northeastern Mojave desert tortoises in California. It also provides important linkage habitat for connectivity with other populations. The project footprint will consume 4-5% of the actual Northeastern Mojave ESU desert tortoise habitat in California. (Exhibit 517 at 7). Given the relative percentages, it is inconceivable that the project would not have an enormous negative effect on the tortoise population.

The Applicant claims that the mitigation ratio should be 1:1 based on its reading of BLM’s NEMO Plan. In the face of the enormous impacts of the power plant, this is clearly absurd. In any event, testimony shows that the NEMO Plan does not cover projects greater 100 acres. (Exhibit 516 at 4)

We have already presented, as have other intervenors and witnesses, extensive evidence rebutting the Applicants continued claim that the North Ivanpah Valley desert tortoises do constitute an important, essential population. Applicants claim that the entire Northeastern Mojave Recovery unit is vast, and therefore loss of this population would be insignificant. In doing so, the Applicants ignore both the strategic location of the Ivanpah Valley which provides the only connectivity between the California desert tortoise populations and those outside the state (see maps in Exhibits 503 and 518), and the biological structure within the ESU. (Exhibit 510) Compromising gene flow through this linkage places the entire listed population in California at risk.

Contrary to Applicant’s assertions, the number of desert tortoises at the power plant site is relatively high. Based on applicant’s data in Supplemental Data Response, Set 2J at 16 (Exhibit 47), as corrected by applicants witnesses during cross examination, Dr. Connor estimated numbers of adult desert tortoises as 2.9 tortoises/sq km (7.5 per square mile) on Ivanpah 1; 1.74 tortoises/sq km (4.5 per square mile) on Ivanpah 2; and, 2.6 tortoises/sq km (7.7 per square mile) on Ivanpah 3. (01-11-10 Transcript at 434) These population estimates are about the twice the number of adult tortoises encountered during the project surveys.

¹ In addition to recommending inclusion of the North Ivanpah Valley in the proposed Ivanpah DWMA, the 1994 Recovery Plan at F14 recommended specific actions for the area including closure of the Clark Mountain grazing allotment.

The FSA/DEIS failed to fully analyze the impacts of this project. It failed to even provide an estimate of the size of the Northeastern Mojave desert tortoise habitat in California. It simply mentions such impacts as increased fragmentation, but fails to provide any specific analysis of this fragmentation, the size of the resulting fragments, and the viability of the fragmented tortoise populations. It mentions “connectivity” but fails to provide any description of this connectivity or analysis of the impacts on it. Because the analysis is deficient it is impossible to determine if the mitigation proposed is sufficient to compensate for these impacts. This is compounded by the lack of specificity of the proposed mitigations. The project will consume a large tract of contiguous habitat. While obtaining replacement habitat, if this is even available, within the recovery unit in California could potentially offset the direct habitat loss, there is no evidence presented by either staff or the applicant that this will mitigate the fragmentation caused by the project or the loss of connectivity. As staff explained their brief, the “fully mitigated” provision [of CESA] means that mitigation must be sufficient to prevent listed species from becoming more threatened and endangered than they were before the proposed project was built. Here, the direct, indirect, and cumulative impacts of the project will endanger the Northeastern Mojave ESU tortoise population in California and place the entire listed population at risk with no surety as to the value of the mitigation.

“CESA requires that incidental take of listed species be “fully mitigated.” (Fish & Game Code, § 2081(b)(2).) The CEC Staff are implicitly assuming that all impacts to desert tortoise can be mitigated by acquisition of “offset habitat” or improvement of existing habitat, and *a priori*, that this habitat is available. Neither assumption was evaluated in the FSA. Nor will habitat acquisition mitigate the direct, indirect, and cumulative effects of the project on connectivity between the ESUs which require maintaining the status quo.

Dated: April 16, 2010

Respectfully submitted,

A handwritten signature in black ink that reads "Michael J. Connor". The signature is written in a cursive style and is underlined with a single horizontal line.

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**California Energy Resources Conservation
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DECLARATION OF SERVICE

I, Michael J. Connor, declare that on April 16, 2010, I served and filed copies of the attached REBUTTAL BRIEF OF INTERVENOR WESTERN WATERSHEDS PROJECT dated April 16, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [www.energy.ca.gov/sitingcases/ivanpah].

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

FOR SERVICE TO ALL OTHER PARTIES:

sent electronically to all email addresses on the Proof of Service list;
 by personal delivery or by depositing in the United States mail at with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses NOT marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

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I declare under penalty of perjury that the foregoing is true and correct.





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APPLICATION FOR CERTIFICATION
FOR THE *IVANPAH SOLAR ELECTRIC
GENERATING SYSTEM*

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(Revised 3/11/10)

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