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With Federal Money Up for Grabs and the Clean Energy Dream Within Reach, the Ninth Circuit Rubber Stamps the Central District's Flawed Judgment in Western Watershed Project v. Salazar: Should NEPA Jurisprudence Be Modified?

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NOTE

WITH FEDERAL MONEY UP FOR GRABS AND THE CLEAN ENERGY DREAM WITHIN REACH, THE NINTH CIRCUIT RUBBER STAMPS THE CENTRAL DISTRICT'S FLAWED JUDGMENT IN *WESTERN WATERSHED PROJECT V. SALAZAR*: SHOULD NEPA JURISPRUDENCE BE MODIFIED?

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> *"Conservation means development as much as it does protection. I recognize the right and duty of this generation to develop and use the natural resources of our land; but I do not recognize the right to waste them, or to rob, by wasteful use, the generations that come after us."*[1]*—Theodore Roosevelt*

INTRODUCTION

Gifford Pinchot is said to have coined the term "conservation" at the turn of the twentieth century.[2] As famous for his friendship with President Roosevelt as he was for his seminal book "The Fight for Conservation," Pinchot fundamentally shaped the role government plays in protecting the natural environment. In his book, Pinchot laid out the

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[1] Theodore Roosevelt, The New Nationalism, (Aug. 31, 1910), *available at* PRESIDENTIALRHETORIC.COM, www.presidentialrhetoric.com/historicspeeches/roosevelt_theodore/newnationalism.html.

[2] Brian Manetta, *John Muir, Gifford Pinchot, and the Battle for Hetch Hetchy*, ITHACA C. HIST. J. (2002), www.ithaca.edu/history/journal/papers/sp02muirpinchothetchy.html (last visited Jul. 25, 2014).

three principles of conservation: (1) development; (2) the prevention of waste; and (3) ensuring that the use of natural resources is for the benefit of the many, not the profit of the few.[3] He recognized that the source of the United States' success related directly to the great wealth of its natural resources.[4] Ensuring that these resources are used wisely, he believed, is the key to prosperity for generations to come.[5]

Since Pinchot's death in 1946,[6] a lot has changed. The United States has advanced a great deal, and the fight to protect the natural environment has extended globally to face the threat of climate change. One thing has remained the same, however: the fight over development—where to do it, how to regulate it, and what to protect.

Clean-energy development, and more specifically solar-energy development, has been a hot issue in the early years of the twenty-first century.[7] Developers are rushing to build large-scale solar- and wind-energy projects in the Southwest,[8] to meet public demand to curb climate change and to protect the natural environment from its ill effects. But many of these projects are being developed in environmentally sensitive areas, raising issues much the same as in Pinchot's time.[9] What is different now is that there are rules and regulations designed to control this development. Rules and regulations have to be enforced, though, and with political pressure being applied to regulatory bodies in order to make room for clean energy development, sometimes the principles laid out by Pinchot get side-stepped.

As a clean-energy leader, California has been rapidly developing clean-energy infrastructure to meet its goal of supplying 33% of its electricity from renewable sources by 2020.[10] The federal government has also been an active participant in this push for a clean-energy future, creating an atmosphere where big projects can thrive on federal land with

[3] GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION ch. V (1910), *available at* www.gutenberg.org/files/11238/11238-h/11238-h.htm#2HCH7.

[4] *Id.* ch. I, *available at* www.gutenberg.org/files/11238/11238-h/11238-h.htm#2HCH3.

[5] *Id.* ch. V, *available at* www.gutenberg.org/files/11238/11238-h/11238-h.htm#2HCH7.

[6] *Gifford Pinchot (1865–1946)*, THE FOREST HISTORY SOCIETY (Aug. 25, 2014), www.foresthistory.org/ASPNET/people/Pinchot/Pinchot.aspx.

[7] *See* U.S. DEP'T OF ENERGY, THE HISTORY OF SOLAR, *available at* http://www1.eere.energy.gov/solar/pdfs/solar_timeline.pdf (last visited Mar. 3, 2014).

[8] Todd Woody, *A Solar Land Rush*, N.Y. TIMES (July 13, 2009, 7:47 AM), http://green.blogs.nytimes.com/2009/07/13/a-solar-land-rush/?_r=1.

[9] *See generally* John Copeland Nagle, *Green Harms of Green Projects*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 59 (2013).

[10] Cal. Exec. Order No. S-14-08 (Nov. 17, 2008), *available at* http://gov.ca.gov/news.php?id=11072.

help from the federal purse.[11] With support from the state and federal governments, large-scale clean-energy projects will become commonplace in the California desert.[12] The Southwest is an ideal place for solar development because of its reliably sunny weather.[13] Unfortunately, the rapid expansion of clean-energy infrastructure has begun to pit clean-energy proponents squarely against conservationists, turning traditional environmental allies against one another.[14] These different groups within the "green" movement have competing visions of how to build the clean-energy future, and this policy disagreement leaves vulnerable the Southwest's limited natural resources and threatened species.[15]

In *Western Watersheds Project v. Salazar*, the United States Court of Appeals for the Ninth Circuit had the opportunity to weigh in on the clean-energy expansion policy battle.[16] Western Watersheds Project (WWP), a nonprofit conservation group, filed a lawsuit in the U.S. District Court for the Central District of California, alleging that the Bureau of Land Management (BLM) had violated the National Environmental Policy Act (NEPA) by preparing a deficient Environmental Impact Statement (EIS) in order to approve a large-scale solar energy project.[17] WWP requested that the district court preliminarily and permanently enjoin BLM from taking actions to further the project that could alter or change the physical environment, until it complied with NEPA and its implementing regulations.[18] The district court denied WWP's request for preliminary injunctive relief.[19] On WWP's appeal, the Ninth Circuit issued a three-paragraph decision,

[11] Press Release, U.S. Dep't of the Interior, Secretary Salazar, Senator Reid Announce "Fast-Track" Initiatives for Solar Energy Development on Western Lands (June 29, 2009), *available at* www.doi.gov/news/pressreleases/2009_06_29_release.cfm; *see also* Energy Improvement and Extension Act of 2008, 26 U.S.C.A. § 54C (Westlaw 2014).

[12] *See* Woody, *supra* note 8.

[13] Ina Jaffe, *A Renewable Energy Debate Heats Up in the Mojave*, NATIONAL PUBLIC RADIO (Apr. 23, 2010, 12:01 AM), www.npr.org/templates/story/story.php?storyId=126173547 (explaining that the Mojave gets 360 days of sun each year on average).

[14] Keith Matheny, *Solar Energy Plans Pit Green vs. Green*, USA TODAY (June 2, 2011, 1:18 PM), http://usatoday30.usatoday.com/news/nation/environment/2011-06-01-solar-energy-tortoise_n.htm.

[15] *Id.*

[16] *See generally* Nagle, *supra* note 9.

[17] Complaint for Declaratory and Injunctive Relief at 1–2, W. Watersheds Project v. Salazar, 993 F. Supp. 2d 1126 (C.D. Cal. 2012) (No. CV 11-00492 DMG (Ex)), *available at* www.westernwatersheds.org/legal/11/california/IvanpahComplaint_1-12-11.pdf.

[18] *Id.*

[19] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *72 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

conclusory in its remarks and cursory in its review of the complex issues involved, holding that the district court did not abuse its discretion in making its decision.[20]

This Note argues that the Ninth Circuit erred in deciding *Western Watersheds Project v. Salazar* by not finding that the district court abused its discretion in denying WWP's request for a preliminary injunction.

Preliminary injunctions have been environmental nonprofit organizations' most effective tool to enforce NEPA.[21] Without the ability to stop projects from proceeding before adequate environmental review and analysis have occurred, these organizations have no way to prevent environmental destruction between the time they file a lawsuit and its final adjudication. If courts fail to recognize legitimate EIS deficiencies and instead defer to biased agency opinions influenced by government policy pressures, then NEPA will have lost its effectiveness in ensuring agencies and the public are making fully informed decisions before moving forward with large-scale project proposals. The decision in this case will have a detrimental effect on threatened species and sensitive ecosystems as more large-scale clean-energy projects are built in the deserts of the Southwest. The district court's decision to deny a preliminary injunction, despite facts presented by WWP indicating BLM violated NEPA, was an abuse of the court's discretion that could set a bad precedent for future litigation.

The Ninth Circuit has described abuse of discretion as "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found."[22] The present case fits clearly into this description, but the ultimate ruling fails to adhere to the appellate court's precedent. The basis for the court's decision is rooted in its conclusion that the district court did not abuse its discretion in its application of the four-factor test set forth in *Winter v. Natural Resources Defense Council, Inc*.[23] The *Winter* formulation is the authoritative test federal courts use to grant preliminary injunctions.[24] According to *Winter*, a preliminary injunction

[20] W. Watersheds Project v. Salazar, 692 F.3d 921, 923 (9th Cir. 2012).

[21] *Appeals Court Upholds Environmentalists' Right to a Preliminary Injunction*, ENV'T NEWS SERVICE (Jan. 27, 2011), www.ens-newswire.com/ens/jan2011/2011-01-27-092.html (quoting Susan Jane Brown, staff attorney for Western Environmental Law Center: "The preliminary injunction is a critical tool for environmentalists because it allows opponents of a project to stave off an imminent destructive project.").

[22] Rabkin v. Or. Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003).

[23] W. Watersheds Project v. Salazar, 692 F.3d at 922.

[24] Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Sierra Forest Legacy v. Rey, 577 F.3d 1015, 1021 (9th Cir. 2009).

may be granted if the plaintiff "establish[es] that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest."[25] Also, in the Ninth Circuit, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest."[26] In this case, the record showed that the district court failed to correctly apply NEPA, which resulted in its misapplication of both of these preliminary-injunction tests.

This Note will first discuss the threatened desert tortoise and the solar project that catalyzed the dispute. Second, it will discuss the outside pressures put on BLM and the district court by the State of California and the federal government. Third, a brief background of the case's procedural history will be provided. Fourth, this Note will dissect BLM's most obvious violations of NEPA and the district court's clear error in failing to recognize those violations. Fifth, the Note will discuss how the district court clearly erred in its application of the *Winter* factors and the serious-questions test. Sixth, it will show how the Ninth Circuit failed to apply its own standard in reviewing the district court's decision for abuse of discretion. And lastly, this Note will call for a bright-line exception for clean-energy projects that would give courts flexibility in regard to NEPA when disputes arise. This flexibility would allow courts to approve clean-energy projects' environmental reviews without setting bad precedents that can be used to justify other types of development projects.

A. THE DESERT TORTOISE AND THE GIANT SOLAR FACILITY

The central character in this story is the desert tortoise, *gopherus agassizii,* a creature unique to the Mojave Desert west of the Colorado River.[27] This species of tortoise spends much of its life underground in burrows to protect itself from the extreme high and low temperatures that occur in the desert.[28] Individuals live roughly thirty to fifty years, but

[25] *Winter*, 555 U.S. at 20; *Sierra Forest Legacy*, 577 F.3d at 1021.

[26] Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding that Ninth Circuit's "serious questions" test survives *Winter*).

[27] *See generally* Mike Jones, *Gopherus agassizii (California) Desert Tortoise*, ENCYCLOPEDIA OF LIFE (Cooper, 1863), *available at* http://eol.org/pages/456478/details.

[28] MARK C. GROVER & LESLEY A. DEFALCO, U.S. DEP'T OF AGRICULTURE, FOREST SERVICE, INTERMOUNTAIN RESEARCH STATION, DESERT TORTOISE (GOPHERUS AGASSIZII):

few reach maturity due to the species' extremely low reproductive rate (only 2%–5% of hatchlings become adults).[29] Unfortunately, California populations of the desert tortoise are estimated to have declined by 90% since 1940, with their habitat being reduced by 50–60% since the 1920s.[30] These losses are mostly due to urbanization, agricultural development, livestock and feral burro grazing, and mortality on roads.[31]

Because of the species' dramatic decline and sensitivity, it was listed in 1990 as "threatened" under the Endangered Species Act (ESA).[32] Now the tortoise must face one more threat, the rapid encroachment of solar- and wind-energy-generating facilities on its habitat.

The facility encroaching on the tortoise's habitat in the present case is BrightSource Energy's Ivanpah Solar Electric Generation System (ISEGS or "Project").[33] The Project is the largest concentrated solar energy facility in the United States, consisting of three 459-foot towers with solar receivers on top and over 300,000 software-controlled mirrors on the ground surrounding them.[34] The mirrors work together by tracking the sun in three dimensions to reflect the sunlight to the receivers on top of the towers.[35] The sunlight hitting the solar receivers creates superheated steam, which is piped down to a conventional turbine to create electricity.[36] The facility produces over 370 megawatts of power, enough to run 140,000 homes.[37]

This pinnacle of human ingenuity is a central player in the clean-energy future, but it requires a lot of space and sunlight to operate. The Project site is on federal land in the Ivanpah Valley, encompassing 5.4

STATUS-OF-KNOWLEDGE OUTLINE WITH REFERENCES, GEN. TECH. REP. INT-GTR-316, at 41-45 (July 1995).

[29] *Id.*

[30] NATURESERVE, DRAFT REGIONAL ASSESSMENT: STATELINE SOLAR FARM PROJECT 23 (2012) (citing KRISTIN H. BERRY, THE DISTRIBUTION AND ABUNDANCE OF DESERT TORTOISES IN CALIFORNIA FROM THE 1920S TO THE 1960S AND A COMPARISON WITH THE CURRENT SITUATION 118–153 (1984)).

[31] DESERT TORTOISE RECOVERY OFFICE, U.S. FISH & WILDLIFE SERV., MOJAVE POPULATION OF THE DESERT TORTOISE (*GOPHERUS AGASSIZII*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 22–44 (2010), *available at* http://ecos.fws.gov/docs/five_year_review/doc3572.DT%205Year%20Review_FINAL.pdf.

[32] *Id.*

[33] *Ivanpah Project Facts*, IVANPAH, http://ivanpahsolar.com/about (last visited July 29, 2014).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

square miles of premium desert-tortoise habitat.[38] This may seem like an insignificant slice of the American Southwest, but it is only a small part of the 4,536 square miles of desert-tortoise habitat energy companies have requested from the BLM to build large-scale solar and wind projects in California, Colorado, New Mexico, Nevada, and Utah to date.[39]

WWP's challenge to the Project focused on its large footprint, which would destroy the tortoise's habitat, and BLM's deficient EIS, which failed to adequately analyze the extent of the impact and alternatives that could virtually eliminate any adverse impact.[40] WWP's push for a preliminary injunction, however, would meet the full force of a political establishment set on building the clean-energy future a new administration had promised.[41]

B. POLITICAL CAPITAL

At the time ISEGS was being considered, both the state and federal governments had initiated the aggressive promotion of clean-energy development.[42] On June 29, 2009, Secretary of the Interior Ken Salazar announced the "Fast-Track" initiative for solar-energy development on western lands.[43] An integral part of the initiative was to increase the speed of the review of industry proposals and their environmental impacts (environmental impact statements, or EISs).[44] At that time, the federal government also had in effect two programs designed to incentivize private companies to invest in clean-energy development: a tax-credit program and a loan-guarantee program, set to expire in 2010 and 2011, respectively.[45]

The tax-credit program, entitled the Energy Improvement and Extension Act of 2008, gave clean energy projects, like ISEGS, a 30%

[38] *Id.*

[39] Woody, *supra* note 8.

[40] Complaint for Declaratory and Injunctive Relief, *supra* note 17, at 1-2.

[41] BARACK OBAMA AND JOE BIDEN: NEW ENERGY FOR AMERICA, *available at* http://energy.gov/sites/prod/files/edg/media/Obama_New_Energy_0804.pdf ("The Obama-Biden comprehensive New Energy for America plan will . . . [e]nsure 10 percent of our electricity comes from renewable sources by, 2012, and 25 percent by 2025.").

[42] Cal. Exec. Order No. S-14-08, *supra* note 10; BARACK OBAMA AND JOE BIDEN: NEW ENERGY FOR AMERICA, *supra* note 41.

[43] Press Release, U.S. Dep't of the Interior, *supra* note 11.

[44] *Id.*

[45] 26 U.S.C.A. § 54C (Westlaw 2014); 10 C.F.R. pt. 609 (Westlaw 2014) (loan guarantees for projects that employ innovative technologies).

tax credit provided they were underway before the end of 2010.[46] The loan-guarantee program was an update to Title XVII of the Energy Policy Act of 2005, permitting the Secretary of Energy to make loan guarantees for projects that "avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued."[47] These two programs, in conjunction with the Department of the Interior's "Fast-Track" initiative, incentivized BLM to accelerate its review of the Project's EIS analysis to make sure it was approved in time to receive the tax credit (estimated at $660 million with a Project cost of $2.2 billion) as well as a $1.375 billion loan guarantee.[48]

California was also insistent that clean-energy projects be built rapidly within its borders. Governor Arnold Schwarzenegger signed Assembly Bill 32, the Global Warming Solutions Act, in 2006.[49] This law gave the Air Resources Board authority to find ways to rapidly reduce California's carbon emissions by one third by 2020.[50] The incentives created by Assembly Bill 32 made California a helpful partner for the federal government when the Obama Administration took the helm in 2009 with hopes to act on the clean-energy portion of its campaign platform.[51]

The clean-energy policy initiatives being pushed by the federal government and California created an environment in which BLM felt comfortable resisting any delay in the Project's approval process, allowing NEPA deficiencies to be swept under the rug even when the public brought them to BLM's attention.[52] WWP and other conservation organizations repeatedly presented their concerns about the Project's shortcomings to BLM. WWP submitted comments to the draft EIS explaining that it failed NEPA's "hard look" requirement because it did not consider or analyze a location on the Ivanpah Dry Lake bed that

[46] 26 U.S.C.A. § 54C (Westlaw 2014).

[47] 74 Fed. Reg. 63,544, 63,549 (Dec. 4, 2009); *see also*, 10 C.F.R. §§ 609.1-609.18

[48] Matheny, *supra* note 14.

[49] California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38500 et seq. (Westlaw 2014).

[50] California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38550 (West 2007).

[51] Mary D. Nichols, *First 100 Days: Obama's First Climate Change Target*, REUTERS (Jan. 22, 2009), http://blogs.reuters.com/great-debate/2009/01/22/first-100-days-obamas-first-climate-change-target/.

[52] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *9-10 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

would have allowed the Project to be built with virtually *zero* impact on the desert tortoise, rare plants, and other scarce resources.[53] BLM dismissed WWP's concerns.

Despite a multitude of serious deficiencies identified by WWP, in the end the district court failed to acknowledge the merits of WWP's claims.[54] Instead, the court deferred to BLM's assurances and an *amicus curiae* brief submitted by Governor Edmund G. Brown Jr. of California, denying the preliminary injunction requested by WWP.[55] This denial allowed the Project to move forward with construction, past the proverbial "point of no return." WWP exercised its only option by appealing the decision to the Ninth Circuit.[56] The appeal would not be heard for nearly a year, allowing the Project to destroy the habitat WWP sought to protect.[57]

I. PROCEDURAL HISTORY

On November 6, 2007, the Bureau of Land Management published notice of its intent to prepare a draft EIS and a final staff assessment to amend the California Desert Conservation Area (CDCA) plan to accommodate the construction of the Ivanpah Solar Electric Generating System.[58] The draft EIS was published on November 4, 2009, which opened a review period for public comments that closed on February 11, 2010.[59] WWP timely submitted comments to BLM explaining that the Project would "have significant direct, indirect and cumulative impacts on desert tortoises, rare plants and visual resources."[60] WWP also highlighted BLM's failure to adequately consider alternatives to the Project and sufficiently document the Project's impacts.[61] After the initial EIS, BLM obtained a biological opinion from the U.S. Fish and Wildlife Service (FWS) that outlined the impact on the flora and fauna,

[53] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *10 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[54] *See generally Id.*

[55] *Id*. at *71-2

[56] W. Watersheds Project v. Salazar, 692 F.3d 921, 921 (9th Cir. 2012).

[57] *Id.*

[58] Notice of Intent to Prepare a Joint Environmental Impact Statement and Final Staff Assessment, and Amend the California Desert Conservation Area Plan; California, 72 Fed. Reg. 2,671 (Nov. 6, 2007).

[59] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *9-10 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[60] *Id*.

[61] *Id*.

most importantly the desert tortoise, of the proposed project site.[62] The biological opinion described the measures that should be taken to limit the detrimental effects on the tortoise and set an incidental take limit[63] to restrict the number of tortoises that could be removed from the site without further investigation.[64]

On August 6, 2010, BLM published the proposed Final Environmental Impact Statement (FEIS) and opened a thirty-day public-comment period.[65] The concerns WWP raised were not addressed. WWP again protested the proposed FEIS with timely comments on September 3, 2010, explaining that the EIS was still unlawful under NEPA because it did not consider adequately a location on the Ivanpah Dry Lake bed that would have allowed the Project to be built without detrimental impacts on the environment.[66] Ignoring WWP's comments again, BLM issued a record of decision approving the proposal to amend the CDCA Plan to include the ISEGS facility and grant the authorizations necessary for the Project to begin pre-construction in October 2010.[67]

In response, on January 14, 2011, WWP filed a complaint in the U.S. District Court for the Central District of California for declaratory and injunctive relief, requesting that the court "[p]reliminarily and permanently enjoin all defendants from initiating any activities in furtherance of the Project that could result in any change or alteration of the physical environment unless and until defendants comply with the

[62] *See generally* Memorandum from Field Supervisor, Ventura Fish & Wildlife Office, Ventura, Cal., to Dist. Manager, Cal. Desert Dist., Bureau of Land Mgmt., Moreno Valley, Cal. (Oct. 1, 2010), *available at* http://docketpublic.energy.ca.gov/PublicDocuments/Regulatory/Non%20Active%20AFC's/07-AFC-5%20Ivanpah%20Solar%20Electric/2010/October/TN%2058750%2010-01-10%20USFWS'%20Biological%20Opinion%20on%20ISEGS.pdf [hereinafter Memorandum from Field Supervisor, Ventura].

[63] An incidental take limit is defined in the incidental take statement (ITS) of a biological opinion. It "expresses the amount or extent of anticipated take of listed animal species caused by the proposed action, along with reasonable and prudent measures to minimize the impact of take and terms and conditions for which there must be compliance. . . . If the federal action proceeds and the take of threatened or endangered species exceeds the level or extent exempted under the ITS, or if the scope of the project changes, the federal agency must reinitiate its consultation with the Services." U.S. FISH & WILDLIFE SERV., ESA REGULATORY REFORM: PROPOSED RULE GOVERNING INCIDENTAL TAKE STATEMENTS; QUESTIONS AND ANSWERS, *available at* www.fws.gov/endangered/improving_ESA/pdf/ITS_FAQs.pdf (last visited July 29, 2014).

[64] Memorandum from Field Supervisor, Ventura, *supra* note 62, at 57.

[65] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *10 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[66] *Id*.

[67] *Id.* at *9.

requirements of NEPA, ESA, . . . and their implementing regulations."[68] Despite the serious concerns raised in the lawsuit filed by WWP, on March 2, 2011, BLM issued two notices to proceed with ISEGS construction.[69] Shortly after perimeter fencing had started, on April 15, 2011, BLM had to issue a suspension decision to halt work, because the construction process had found more desert tortoises than allowed by the incidental-take limit set by the FWS's biological opinion.[70] Multiple tortoises had been killed,[71] which was a problem that WWP had warned of in its EIS comments.

After consulting with FWS, on June 10, 2011, BLM determined that the underestimate of the tortoise population was not an issue.[72] It decided that the new information did not significantly change the NEPA analysis and that further public involvement to comment and review the new and improved biological opinion and tortoise mitigation plan was not necessary.[73] That same day BLM gave the green light for construction to resume.[74]

As a last resort, WWP filed a Motion for Preliminary Injunction and Application for Temporary Restraining Order (TRO) on June 27, to halt the Project from further destroying tortoise habitat until a new NEPA review had been done.[75] The District Court denied the TRO three days later and set the matter for hearing on August 1 to determine the preliminary injunction matter.[76] On July 19, Governor Edmund G. Brown Jr. filed an *amicus* brief in opposition to the preliminary injunction.[77] After the August 1 hearing, on August 10 the district court entered an order denying the request for a preliminary injunction.[78] WWP appealed the decision.

[68] Complaint for Declaratory and Injunctive Relief, *supra* note 17, at 24.

[69] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *10 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[70] *Id*. at *11.

[71] Julie Cart, *Saving Desert Tortoises Is a Costly Hurdle for Solar Projects,* L.A. TIMES (Mar. 4, 2012), http://articles.latimes.com/2012/mar/04/local/la-me-solar-tortoise-20120304.

[72] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *11 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[73] *Id*.

[74] *Id*. at *3.

[75] *Id*. at *3.

[76] *Id*.

[77] *Id*.

[78] *Id*. at *72.

On August 8, 2012, the matter was finally argued before the Ninth Circuit.[79] The Court affirmed the decision of the district court, finding that there was no clear factual error or mistake of law in the lower court's analysis.[80]

II. ANALYSIS

To facilitate a better understanding of the issues presented, this Part will give a brief overview of the NEPA issues involved in this lawsuit, concentrating specifically on portions of the law that are relevant to illustrate shortfalls in both the district court's and the Ninth Circuit's analysis. It will then go into detail to describe the mistakes of law in the district court's analysis of WWP's NEPA claims. Then, this Part will discuss how those mistakes of law led the district court to erroneously apply the accepted preliminary-injunction tests and why that should have compelled the Ninth Circuit to find that the district court abused its discretion.

A. NEPA VIOLATIONS

President Richard Nixon signed the National Environmental Policy Act into law on January 1, 1970.[81] NEPA's central purpose is to give the public a *clear basis of choice*[82] between development actions by requiring federal agencies to consider every significant environmental impact of a proposed action before proceeding.[83] NEPA accomplishes this by informing the public about what the action is, by showing the public that the relevant agency has evaluated the environmental consequences of the proposed action, and by requiring analysis of a full range of alternatives to the proposed action before proceeding.[84] Considered a procedural statute, NEPA requires only that an agency fully comply with the mandates in the statute, not that NEPA review lead to any particular outcome.[85]

NEPA requires an EIS to have an adequate discussion and analysis of a project's direct and indirect environmental impacts, the impacts that

[79] W. Watersheds Project v. Salazar, 692 F.3d 921, 923 (9th Cir. 2012).

[80] *Id.*

[81] LINDA LUTHER, CONG. RESEARCH SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 1 (2005).

[82] 40 C.F.R. § 1502.14 (Westlaw 2014); *see also Watkins*, 808 F. Supp. at 872.

[83] LUTHER, *supra* note 81, at 1.

[84] *Id.*; *see also* California v. Block, 690 F.2d 753, 766–67 (9th Cir. 1982); Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985).

[85] LUTHER, *supra* note 81, at 1.

would occur if no action were taken, and alternatives to the proposed action.[86] This framework is designed so that when an agency makes a decision on a project, it "will have available, and will carefully consider, detailed information concerning significant environmental impacts . . . [and make the information] available to the larger audience [the public] that may also play a role in both the decisionmaking process and the implementation of that decision."[87]

In the present case, BLM's most obvious violations of the NEPA process included its failure to fully inform the public of the likely environmental impacts of the Project and its failure to fully evaluate alternatives to the proposal before proceeding.[88] These violations are illustrated by the EIS's inadequate discussion of habitat fragmentation caused by the Project and its failure to adequately analyze the "Ivanpah Playa Alternative" to the Project, which would have essentially eliminated impacts on the desert tortoise.

Either of these NEPA violations should have rendered the EIS inadequate.[89] However, the district court failed to grant a preliminary injunction based on the deficient EIS. An injunction in this case would have been warranted because it would not have significantly harmed BLM or BrightSource Energy, it would have given BLM time to cure the NEPA violations, and most importantly, it would have provided "a clear basis for choice among options by the decisionmaker and the *public*," which is the central purpose of NEPA.[90] The district court abused its discretion by not issuing the injunction despite evidence of NEPA violations, "a judgment that [was] clearly against the logic and effect of the facts as [were] found."[91]

1. Inadequate Discussion of Habitat Fragmentation

For an EIS to be lawful under NEPA, it must adequately discuss all direct and indirect environmental impacts caused by an action that are reasonably foreseeable.[92]

[86] *Id.*

[87] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

[88] *See* Se. Alaska Conservation Council v. Fed. Highway Admin., 649 F.3d 1050, 1059 (9th Cir. 2011).

[89] *See generally Block*, 690 F.2d 753; *see also* Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011).

[90] 40 C.F.R. § 1502.14 (Westlaw 2014) (emphasis added).

[91] Rabkin v. Or. Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003).

[92] *Ctr. for Envtl. Law & Policy*, 655 F.3d at 1011.

In this case, one reasonably foreseeable impact caused by the Project was habitat fragmentation. Habitat fragmentation is the reduction and isolation of the natural environment from a large patch to smaller isolated patches, typically leading to negative outcomes in sensitive ecosystems.[93] The large footprint of the Project fragments the habitat of the desert tortoise, inhibiting its movement and degrading its adjacent habitat.[94] This fragmentation "directly and adversely affect[s] habitat for a threatened species."[95]

Due to the fragmentation's direct and indirect adverse impact on the desert tortoise, it should have been discussed fully in the EIS. A full discussion and analysis of probable environmental impacts is characterized as a "hard look."[96] An adequate "hard look" in this case would have included discussion of the type of fragmentation caused by the Project and analysis of the impact the fragmentation would have on the desert tortoise and other species.[97] The discussion and analysis has to be scientifically sound, including explanations of the methodologies used (to make sure they are generally accepted), and the conclusions must be based upon the scientific findings of the study.[98]

BLM's EIS lacked all of these elements in its discussion of habitat fragmentation. Instead, the EIS provided only general statements about possible effects and risks to the tortoise.[99] There was nothing in the way of scientific analysis describing how bad the fragmentation would be, or

[93] Alan B. Franklin, Barry R. Noon & T. Luke George, *What Is Habitat Fragmentation?,* 25 STUDIES IN AVIAN BIOLOGY 20 (2002), *available at* www.fws.gov/southwest/es/documents/R2ES/LitCited/LPC_2012/Franklin_et_al_2002.pdf.

[94] Order Re Plaintiff's Motion for Preliminary Injunction at 13, W. Watersheds Project v. Salazar, Case No. CV 11-00492 DMG (Ex) (C.D. Cal. 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf.

[95] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *23 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[96] Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998).

[97] Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179, 182 (9th Cir. 1990) ("[T]he Forest Service did not take a 'hard look' at the impact of the selected salvage and harvest alternative on the Grider drainage biological corridor. Although the FEIS acknowledges that the Grider drainage is a biological corridor, it does not contain a significant discussion of the corridor issue. Instead, the FEIS concludes, without any apparent study or supporting documentation, that the preservation of a ½-mile wide strip bisecting the drainage will be sufficient to maintain the corridor.").

[98] 40 C.F.R. § 1502.24 (Westlaw 2014).

[99] BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, CALIFORNIA DESERT CONSERVATION AREA PLAN AMENDMENT/FINAL ENVIRONMENTAL IMPACT STATEMENT FOR IVANPAH SOLAR ELECTRIC GENERATING SYSTEM, FEIS-10-31, at 5-26 to -27 (July 31, 2010), *available at* www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/needles/lands_solar.Par.19048.File.dat/1-CDCA-Ivanpah-Final-EIS.pdf.

how exactly the fragmentation would effect the tortoise population. These sorts of generalized statements do not constitute a "hard look" as required by NEPA.[100]

The district court recognized this shortcoming in the EIS.[101] The court's opinion went so far as to state that the deficiency "raise[d] a serious question as to whether BLM violated NEPA by engaging in a cursory discussion of habitat connectivity and fragmentation without analyzing the potential impacts . . . on the . . . desert tortoise."[102] In fact, the cursory discussion of indirect impacts of the Project *was* a violation of NEPA, and it had been a fatal flaw in previous cases.[103]

In *Marble Mountain Audubon Society v. Rice*, the Ninth Circuit held that the U.S. Forest Service (FS) failed the "hard look" requirement of NEPA because its EIS lacked discussion or reasoned analysis of the indirect impacts of a proposed project.[104] The Northern District found similarly in 2004, holding that when adverse indirect effects of a project can be predicted, the agency must make their decision based on reasoned discussion and analysis in an EIS to be valid under NEPA.[105]

Here the issue is much the same. BLM's EIS recognized that the Project would have adverse indirect impacts because of fragmentation,[106] but it failed to further discuss the fragmentation and its impacts after mentioning them. Many questions went unanswered, violating the procedure and purpose designed into NEPA's EIS requirement. "[T]he purpose of the EIS requirement is to ensure that 'to the fullest extent possible' agency decisionmakers have before them and take into proper account a complete analysis of the project's environmental impact."[107] BLM's failure to include any reasoned analysis of habitat fragmentation went squarely against the aforementioned EIS requirement, which is why the district court's decision to overlook the NEPA deficiency was an abuse of discretion.[108]

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[100] Or. Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997) (per curiam).

[101] W. Watersheds Project v. Salazar, No. (CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *23 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[102] *Id*. at *24.

[103] Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179, 182 (9th Cir. 1990).

[104] *Id.* (finding that EIS's lack of discussion about the indirect impact on a biological corridor was a violation of NEPA).

[105] Envtl. Prot. Info. Ctr. v. Blackwell, 389 F. Supp. 2d 1174, 1197 (N.D. Cal. 2004).

[106] BUREAU OF LAND MGMT., *supra* note 99, at 5-26 to -27 ("[The Project will] result in habitat fragmentation, which is exacerbated by the presence of the . . . I-15 [and other area projects] that effectively block the migration of terrestrial species from east to west.").

[107] City of Davis v. Coleman, 521 F.2d 661, 673 (9th Cir. 1975).

[108] Rabkin v. Or. Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003)

The Ninth Circuit has stated that, "[w]here the information in the initial EIS was so incomplete or misleading that the decisionmaker and the *public* could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA."[109] The absence of the habitat fragmentation analysis in BLM's EIS made it impossible for BLM or the public to make an informed decision about the Project and its alternatives. Every significant aspect of the direct and indirect impacts of a project must be included in the EIS or it is deficient, and the action should not move forward until the deficiency is cured.[110] The district court's decision to dismiss WWP's claim was an abuse of discretion, "a judgment that [was] clearly against the logic and effect of the facts as [were] found."[111] The court should have granted the requested preliminary injunction to give BLM time to remedy the habitat-fragmentation deficiencies before allowing the Project to move forward.

2. Inadequate Discussion of the Ivanpah Playa Alternative

NEPA also requires federal agencies to rigorously explore and evaluate reasonable alternatives to a proposed action in order to facilitate informed decisionmaking.[112] The alternatives analysis has been described as the "heart" of the EIS.[113] This section of the EIS is designed to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the *public*."[114] The implementing regulations of NEPA state that reasonable alternatives "include[] alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action."[115] They also specify that the range of alternatives "includes all reasonable alternatives, or when there are potentially a very large number of alternatives then a reasonable number of examples

[109] Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 811 (9th Cir. 2005) (emphasis added) (quoting Animal Def. Council v. Hodel, 840 F.2d 1432, 1439 (9th Cir. 1988)).

[110] Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000, 1011 (9th Cir. 2011).

[111] *Rabkin*, 350 F.3d at 977.

[112] 40 C.F.R. § 1502.14(a) (Westlaw 2014).

[113] City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997).

[114] 40 C.F.R. § 1502.14 (Westlaw 2014) (emphasis added).

[115] 43 C.F.R. § 46.420(b) (Westlaw 2014) (implementation of National Environmental Policy Act of 1969).

covering the full spectrum of reasonable alternatives, each of which must be rigorously explored and objectively evaluated . . . ."[116]

The purpose of rigorously evaluating a "full spectrum" of alternatives is to foster a clear basis for choice.[117] Looking at alternatives that are at different sites is essential to an EIS because it helps decisionmakers and the public weigh options with vastly different levels of environmental impact.[118] "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate" and violates NEPA.[119] The Project configuration that was analyzed in the EIS and eventually chosen for development was described in the final EIS as having "adverse environmental impacts to the biological resources of the Ivanpah Valley, affecting many sensitive plant and wildlife species and eliminating a broad expanse of relatively undisturbed Mojave Desert habitat."[120] The alternatives analyzed by BLM in its EIS did not satisfy NEPA's requirement that the agency rigorously explore and evaluate a "full spectrum" of alternatives.

The final ISEGS facility sits West of Highway I-15, in the middle of what was undisturbed Mojave Desert habitat. Nearby Ivanpah Dry Lake is a site that could have been developed under the Ivanpah Play Alternative with virtually no adverse environmental impact on biological resources. This alternative, however, was rejected by BLM without rigorous exploration or objective evaluation.

In BLM's EIS, out of twenty-five identified alternatives, most (including the Ivanpah Playa Alternative) were quickly dismissed. Only three alternatives were chosen for detailed analysis: Mitigated Ivanpah 3, Modified I-15, and No Action.[121] The Mitigated Ivanpah 3 Alternative would have been on the same site as the original proposed Project.[122] The main difference between this alternative and the problematic original proposal was that it would have had a 12.5% smaller footprint and a slightly different configuration.[123] The Modified I-15 Alternative was also on the same site as the original proposed Project, but it would have reduced the footprint by the same 12.5% as Mitigated Ivanpah 3 in a slightly different way.[124] These two alternatives, though technically

[116] *Id.* § 46.420(c) (emphasis added).
[117] 40 C.F.R. § 1502.14 (Westlaw 2014).
[118] California v. Block, 690 F.2d 753, 767 (9th Cir. 1982).
[119] Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985).
[120] BUREAU OF LAND MGMT., *supra* note 99, at 6-1.
[121] *Id.* at 3-5 to 3-6.
[122] *Id.* at 3-26.
[123] *Id.* at 3-27.
[124] *Id.* at 3-36 to 3-38.

different, would have done nothing except reduce by a small percentage the amount of desert tortoise habitat that would be destroyed by the Project through their smaller footprints and altered configurations.

The No-Action Alternative that was analyzed in the EIS did not help fulfill the "full spectrum" of alternatives requirement either. A No-Action alternative is required procedurally by NEPA as a benchmark for the public and decisionmakers to compare the proposed action and its analyzed alternatives' impacts to existing conditions without action.[125] This left just the Mitigated Ivanpah 3 and Modified I-15 alternatives to be objectively evaluated. This fact is disturbing because the two proposed alternatives to the Project were, in fact, really not alternatives at all. They were instead merely two different versions of the original proposed Project, creating an illusion of choice in an attempt to satisfy the alternatives analysis required under NEPA.

What was clearly missing from BLM's EIS was the required "full spectrum" of alternatives, including those on different sites with significantly less environmental impact.[126] NEPA's implementing regulations clearly call for alternatives from this spectrum to be "rigorously explored and objectively evaluated."[127] BLM's EIS failed to analyze any true alternative to the Project, instead evaluating two "alternatives" that were all on the same site, with similar environmental impacts and with negligible differences between them. These alternatives also failed to address important objectives of the Project, outlined by BLM in the Final Staff Assessment and Draft EIS.[128]

Two of those important objectives are to "reduce environmental impacts" and "avoid siting the plant in areas that are highly pristine or biologically sensitive."[129] Unlike the two alternatives that were fully analyzed by BLM, siting the Project on the Ivanpah Dry Lake pursuant to the Ivanpah Playa Alternative would have met or exceeded both of those stated objectives along with five out of six other stated objectives.[130] This close fit with the stated objectives of the Project

[125] DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 10:29 (2d ed. 2013) ("The no-action alternative provides a baseline against which action alternatives are evaluated.").

[126] 43 C.F.R. § 46.420(c) (Westlaw 2014).

[127] *Id*.

[128] *See generally* U.S. BUREAU OF LAND MGMT. & CAL. ENERGY COMM'N, FINAL STAFF ASSESSMENT/DRAFT ENVIRONMENTAL IMPACT STATEMENT IVANPAH SOLAR ELECTRIC GENERATING SYSTEM 07-AFC-5, at 2-5 to 2-6 (Nov. 4, 2009), *available at* www.energy.ca.gov/2008publications/CEC-700-2008-013/CEC-700-2008-013-FSA.PDF.

[129] *Id.* at 2-6.

[130] The only objective the siting alternative would not conform completely with is objective number six, which aims to have the use comply with existing BLM land use objectives. The dry lake is used by up to 5,000 people annually for land sailing. *See id* at 2-5 to 2-6.

should have made a fair and detailed analysis of the Ivanpah Playa Alternative an essential element of the EIS.[131] The district court however, decided that was not the case.[132]

In the EIS, BLM dedicated four short paragraphs to the Ivanpah Playa Alternative and eliminated the proposed site because it "would not be economically feasible, and would be inconsistent with current management objectives for non-motorized recreation on the Dry Lake bed."[133] This quick dismissal of the alternative, which would have eliminated virtually all environmental impacts on threatened tortoises, is puzzling.[134] BLM cited the Lake Bed's propensity to flood as the main barrier to the alternative, commenting that diking could be done to control flooding but that it would likely be economically infeasible.[135] This cursory discussion, followed by a conclusory dismissal of an alternative that avoided a great deal of environmental harm, violated NEPA.[136] BLM's dismissal also went against the Ninth Circuit's instruction that agencies cannot dismiss alternatives that promote the public interest in preventing irreparable environmental injury because of possible economic barriers.[137]

Here, if the district court had followed the logic of the appellate court's precedent, it would have concluded that the public interest in avoiding the irreparable injury to the tortoise and 5.4 square miles of its habitat outweighed BrightSource Energy's economic concerns. In practice, the district court did quite the opposite, weighing heavily the private investments of BrightSource Energy[138] without exploring any savings other alternatives could create.[139]

[131] California v. Block, 690 F.2d 753, 767–68 (9th Cir. 1982).

[132] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *55 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[133] BUREAU OF LAND MGMT., *supra* note 99, at 3-81.

[134] *Cf.* Block, 690 F.2d at 767–68 (holding that U.S. Forest Service violated NEPA by not considering an adequate range of alternatives, and noting that the dismissal of an alternative that had a higher percentage of acreage allocated for wilderness use was "puzzling").

[135] BUREAU OF LAND MGMT., *supra* note 99, at 3-81.

[136] Lands Council v. McNair, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) (discussing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987)), *overruled in part on other grounds by* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

[137] *Id.* ("[T]he public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns . . . .").

[138] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *63 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[139] Strangely, the court didn't even consider the cost savings the Ivanpah Playa Alternative could have created because of the low impact on threatened species and plants when weighing the

The court's failure to consider BLM's lack of discussion or analysis of the cost of diking the Playa in its EIS was tantamount to it burying its head in the sand to avoid recognizing the glaring NEPA deficiencies present in BLM's EIS. Without this analysis, it was impossible for BLM to "present the environmental impacts of the proposal and the alternatives in comparative form . . . providing a clear basis for choice among options by the decisionmaker and the *public*."[140] BLM's failure to complete an adequate analysis of the most feasible site location with virtually no impact on threatened tortoises violated NEPA.[141]

The district court again failed to recognize this. It instead stated that the "rule of reason"[142] used by BLM correctly determined that a lakebed prone to flooding was not consistent with operating an electrical generating facility and thus was not a reasonable alternative.[143] However, this was an erroneous use of the rule of reason. The rule of reason is properly used to determine whether an EIS contains a thorough discussion of probable environmental consequences, adequate in "form, content and preparation foster[ing] . . . informed decision-making and informed public participation."[144] This rule operates to give agencies discretion not to explore every conceivable environmental impact, just those that are within reason.[145] BLM's cursory dismissal of the Ivanpah Playa Alternative, because of unexamined economic concerns and a minor divergence from current management objectives, was not a proper exercise of the agency's discretion. Conversely, it was an unlawful sidestepping of NEPA procedures, because it limited the range of alternatives to essentially three versions of the same project proposal.[146]

economic concerns of BrightSource Energy. In fact, as of 2012, the cost of mitigating damage to the tortoises on the Project site has cost $56 million. *See* Cart, *supra* note 71.

[140] 40 C.F.R. § 1502.14 (Westlaw 2014) (emphasis added).

[141] Sierra Club v. Watkins, 808 F. Supp. 852, 872 (D.D.C. 1991) (explaining that an EIS should rigorously explore and evaluate a full spectrum of reasonable alternatives to a proposed project); *see also* California v. Block, 690 F.2d 753, 767 (9th Cir. 1982).

[142] *See City of Carmel-by-the-Sea*, 123 F.3d at 1150–51.

[143] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *55 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[144] City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1150–51 (9th Cir. 1997).

[145] "[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives." Cnty. of Suffolk v. Sec'y of the Interior, 562 F.2d 1368, 1375 (2d Cir. 1977).

[146] The original proposed Project, the Mitigated Ivanpah 3 Alternative, and the Modified I-15 Alternative. BUREAU OF LAND MGMT., *supra* note 99, at 3-5 to 3-6.

This action was contrary to NEPA's goal of fostering informed decisionmaking.

The Ninth Circuit has held that failing to include an adequate range of alternatives is a violation of NEPA.[147] In *California v. Block*, the State of California brought suit against the FS for failing to comply with NEPA by relying on an inadequate EIS to support its decision to allocate roadless National Forest System land (RARE II).[148] RARE II required the FS to allocate over 62 million acres of National Forest System land for different uses, which the FS categorized in "Wilderness," "NonWilderness," or "Further Planning" designations.[149] The State's biggest concern with FS's EIS was its unfair minimization of the environmental consequences of the Nonwilderness designation.[150] The State argued, and the U.S. District Court for the Eastern District of California held in part, that NEPA had been violated because there was not an adequate range of alternatives analyzed in the EIS.[151]

The district court took particular issue with the fact that the FS only included alternatives that allocated 33% or less of National Forest System land to the "Wilderness" designation.[152] The court held that in order for the EIS to comply with NEPA, it needed to include an alternative that "[a]llocat[ed] to Wilderness a share of the RARE II acreage at an intermediate percentage between 34% and 100%."[153] On appeal by the FS, the Ninth Circuit affirmed the district court's holding, calling the inclusion of alternatives with higher percentages allocated to Wilderness "essential to making a 'reasoned choice.'"[154] The court of appeals explained:

> The policy at hand demands a trade-off between wilderness use and development. This trade-off, however, cannot be intelligently made without examining whether it can be softened or eliminated by increasing resource extraction and use from already developed areas. The economic value of nonwilderness use is a function of its scarcity. Benefits accrue from opening virgin land to nonwilderness use, but the benefits' worth depend upon their relative availability elsewhere, and

[147] *See generally Block*, 690 F.2d 753.

[148] *Id.*

[149] *See generally* FOREST SERV., U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL STATEMENT: ROADLESS AREA REVIEW AND EVALUATION, (Jan. 1979), *available at* www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5116928.pdf.

[150] *Block*, 690 F.2d at 762.

[151] *Id.* at 766–67.

[152] *Id.* at 766.

[153] *Id.*

[154] *Id.* at 767–68.

> the comparative environmental costs of focusing development in these other areas.[155]

A similar issue resulted from BLM's lack of analysis of the Ivanpah Playa Alternative. The policy at hand was a trade-off between destroying 5.4 square miles of threatened species habitat, and developing the Project on a site that would not have had that sort of environmental impact. The fact that an alternative existed by which the Project could be built without having such a high environmental cost required BLM to conduct a rigorous exploration of the alternative. Without such analysis, BLM, like the FS in *Block*, could not make a "reasoned choice."[156] BLM was required to take a "hard look" at the Ivanpah Playa Alternative, and its failure to do so rendered its EIS inadequate, violating NEPA. The district court's decision to dismiss WWP's request for injunctive relief was an abuse of discretion, "a judgment that [was] clearly against the logic and effect of the facts as [were] found."[157]

B. MISAPPLICATION OF *WINTER* AND SERIOUS-QUESTIONS TESTS

With two stark violations of NEPA before the district court, it next had to apply the principles of one of the two accepted preliminary-injunction tests to determine whether equitable relief should be granted to WWP. The court's mistake of law in analyzing WWP's NEPA claims would lead to its misapplication of both of these tests.

A preliminary injunction may be granted when the plaintiff establishes "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest."[158] Injunctive relief should also be granted if a plaintiff raises serious questions going to the merits and the balance of hardships tips sharply in the plaintiff's favor, so long as the plaintiff shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.[159] The Ninth Circuit applies a "sliding scale" when weighing the factors in these tests, allowing a strong showing on one factor to make up for a weaker showing in another, so long as the

[155] *Id.* at 767.
[156] *Id.*
[157] *Rabkin*, 350 F.3d at 977.
[158] Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).
[159] Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

plaintiff shows a likelihood of irreparable injury and not just a possibility of such injury.[160]

In the present case, the district court should have granted a preliminary injunction because WWP was likely to succeed on the merits, there were serious questions going to the merits of its claims, absent injunctive relief WWP would have suffered irreparable harm, the balance of the equities (if they had been properly analyzed) tipped in WWP's favor, and an injunction would have been in the public interest. The four prongs of these tests may be combined into three categories: (1) success on the merits and serious questions; (2) irreparable harm; and (3) balance of the equities making a preliminary injunction in the public interest (combining balancing of equities with the public interest because the factors are interrelated).

1. Success on the Merits and Serious Questions

Regarding the determination whether a claim will succeed on the merits, the Supreme Court has emphasized that the standard for a preliminary injunction requires only "that the plaintiff . . . show a likelihood of success on the merits rather than actual success."[161] As was discussed in the previous section, WWP was likely to succeed on the merits of its NEPA-violation claims,[162] satisfying the merits prong of *Winter*.

As for satisfying the alternate "serious questions" merits prong of the test, the district court's opinion stated outright that WWP "raise[d] a serious question as to whether BLM violated NEPA by engaging in a cursory discussion of habitat connectivity and fragmentation without analyzing the potential impacts . . . on the . . . desert tortoise."[163] This finding by the district court clearly indicated that WWP showed a likelihood of success on the merits, which should have satisfied the merits prong of the "serious questions" test.

According to both preliminary-injunction tests, WWP made a showing that it had a likelihood of success on the merits of its claims, and in the least it had raised serious questions. These findings, having satisfied the first prong of both tests, next mandated that the court

[160] *Id.* at 1131–35 (affirming continuing validity of the "sliding-scale" and "serious questions" test standards post-*Winter*, 555 U.S. 7).

[161] Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987).

[162] *Rabkin*, 350 F.3d at 977; 40 C.F.R. § 1502.14(a) (Westlaw 2014).

[163] Order Re Plaintiff's Motion for Preliminary Injunction at 14, W. Watersheds Project v. Salazar, Case No. CV 11-00492 DMG (Ex) (C.D. Cal. 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf.

determine whether, absent a preliminary injunction, WWP would have suffered irreparable harm.[164] The district court would again incorrectly apply the standard.

2. Irreparable Harm

In order to obtain a preliminary injunction, the plaintiff must show that irreparable harm is likely to occur if equitable relief is not granted.[165] The Supreme Court has long recognized that the destruction of the environment is inherently an irreparable injury.[166] In fact, the district court stated similarly in this case that "[t]he harm to the [tortoise] population at the proposed site brought about by the loss of thousands of acres of desert habitat *is itself a sufficient irreparable injury to warrant equitable relief*."[167]

Here, without a preliminary injunction the Project would certainly have proceeded with construction and destroyed the desert tortoise habitat WWP was attempting to protect with its request for equitable relief. Because the habitat would be destroyed absent the court granting a preliminary injunction, it followed that WWP would suffer irreparable harm. This fact, along with the Supreme Court's precedent recognizing environmental harms as irreparable injury,[168] show that WWP demonstrated that without a preliminary injunction it was likely suffer irreparable harm.

The district court, in its erroneous order, found that an injunction would not likely prevent any irreparable injury to WWP.[169] If it had found that irreparable harm was likely absent a preliminary injunction, the court would next have been required to balance the equities to determine whether a preliminary injunction would be in the public interest.[170]

[164] *Alliance for the Wild Rockies*, 632 F.3d at 1135 (9th Cir. 2011).

[165] *Id.*

[166] *See Vill. of Gambell*, 480 U.S. at 545.

[167] Order Re Plaintiff's Motion for Preliminary Injunction at 32, W. Watersheds Project v. Salazar, Case No. CV 11-00492 DMG (Ex) (C.D. Cal. 2011) (emphasis added), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf.

[168] *Vill. of Gambell*, 480 U.S. at 545.

[169] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *72 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[170] *Alliance for the Wild Rockies,* 632 F.3d at 1138-39 (weighing, in part, the irreparable environmental harm of an action against economic considerations that would be harmed if an injunction were granted).

3. Balance of Equities and the Public Interest

The Ninth Circuit has determined that, in deciding whether a preliminary injunction would be in the public interest, a court should balance equitable considerations, and based on that analysis, determine whether a "critical public interest" would be harmed if a preliminary injunction were to be granted.[171] In this case, the equities the district court should have balanced were the irreparable harm that would be done to the tortoise and its habitat if it did not grant a preliminary injunction, against the public interests that would be harmed by the injunction's *delay* of the Project until the NEPA violations had been remedied.[172]

The district court instead erroneously balanced the irreparable harm to the tortoise against the harm an injunction could cause the Project's expected contribution to "state and federal goals for the increased use of renewable energy and the reduction of greenhouse gas emissions; . . . BrightSource['s expenditure of] more than $712 million constructing the project to date; . . . [the Project's potential] impact upon hundreds of workers and state revenues; . . . and [WWP's delay] bringing its motion for a preliminary injunction until after the project was well underway."[173] This balancing of the equities was erroneous because it incorrectly balanced the irreparable harm the Project would cause the tortoise, against the harm to public interests that would have been caused if the Project were not built at all. It created a framework for analysis based on the false premise that a preliminary injunction would have killed the Project. Preliminary injunctions are not permanent and are intended in the context of NEPA to halt environmental destruction only until the procedural requirements of NEPA are adhered to,[174] so that a fully informed decision can be made.[175]

If the court had applied the law correctly, it would have balanced the irreparable harm the Project would cause the tortoise, against the harm to the public interests that would have been caused by the *delay* of construction. Because a preliminary injunction would be in effect only until BLM had cured its EIS's deficiencies, the delay would not have affected "state and federal goals for the increased use of renewable

[171] *Id.* at 1138.

[172] *Id.* at 1138-39.

[173] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *68-9 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[174] S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior, 588 F.3d 718, 728 (9th Cir. 2009) (per curiam).

[175] *Block*, 690 F.2d at 767.

energy and the reduction of greenhouse gas emissions" or "workers and [contribution to] state revenues."[176] The delay would have been temporary, and the Project would have moved forward once the EIS was adequate under NEPA. Because construction would have recommenced after NEPA violations had been cured, there was virtually no risk of causing harm to the state and federal objectives of the Project. The district court expressed concern that a delay could "frustrate" federal and state public policies underlying the Project's funding and financial incentives it could qualify for.[177] This concern was unwarranted and improper, because the delay needed to cure the EIS deficiencies for which WWP had meritorious claims (inadequate habitat fragmentation and alternatives analyses) would not have been long enough to be fatal to the Project's financing.[178] ISEGS would still have received government money if its completion timeline had been delayed.

The district court also erroneously considered BrightSource Energy's potential financial hardship resulting from delay as a balancing factor. The Ninth Circuit has made clear that courts and agencies may "not . . . consider the [private] investments made on the basis of a defective EIS," especially when construction moves forward "with full awareness of the [plaintiff's] suit and . . . [proceeding is a] gamble on the EIS being [found] adequate."[179] BLM, and by extension BrightSource Energy, recognized WWP's issues with the EIS as early as February 11, 2010,[180] and knew of the lawsuit as of January 14, 2011.[181] Despite its collective knowledge of the serious concerns raised by WWP, BLM issued notices that allowed construction to start on March 2, 2011, and BrightSource began the process of installing perimeter fencing around the Project site.[182] The court's decision to discuss and emphasize the economic loss private investors would suffer due to any delay of the Project illustrates its grave error in its balancing-of-the-equities

[176] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *67-8 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[177] *Id*. at *62.

[178] *See* 10 C.F.R. pt. 609 (Westlaw 2014); *see also* 26 U.S.C.A. § 54C (Westlaw 2014).

[179] N. Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988).

[180] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *9 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[181] Complaint for Declaratory and Injunctive Relief, *supra* note 17, at 24.

[182] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *10 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

analysis.[183] This erroneous analysis led the district court to consider the public-interest prong of both preliminary injunction tests based on a false premise.

The accepted analysis used to determine whether granting a preliminary injunction is in the public interest, as determined by the Ninth Circuit, requires a court to consider whether a "critical public interest" would be harmed if the preliminary injunction were to be granted.[184] In this case, that called for measuring the harm to the public interest caused if the Project were delayed, against the well-established "public interest in preserving nature and avoiding irreparable environmental injury."[185] The Ninth Circuit has also recognized that suspending a project until environmental concerns are cured "comports with the public interest" in many cases.[186]

The Supreme Court has similarly accepted that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms *will usually favor the issuance of an injunction to protect the environment*."[187] With the likelihood of irreparable environmental injury certain in this case, a preliminary injunction would have served the public interest, delaying the Project only until BLM made its EIS's analysis lawful under NEPA. A "critical public interest" would not have been harmed in this case if a preliminary injunction had been granted; it would merely have been delayed. A delay could certainly have added cost to the Project, but private losses incurred because of a deficient EIS are not something the court can lawfully consider.[188]

The facts in the record illustrated that WWP showed a likelihood of success on the merits of its claims, that it would have been irreparably harmed if a preliminary injunction were not granted, and that issuing an injunction was in the public interest because it would have avoided

[183] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *67-8 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[184] *Alliance for the Wild Rockies*, 632 F.3d at 1138.

[185] *McNair*, 537 F.3d at 1005 (en banc) (discussing Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987)), *overruled in part on other grounds by* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

[186] S. Fork Band Council of W. Shoshone, 588 F.3d at 728 (per curiam) ("As to the public interest, Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest.").

[187] *Vill. of Gambell*, 480 U.S. at 545 (emphasis added).

[188] *N. Cheyenne Tribe*, 851 F.2d at 1157.

irreparable injury to the environment without harming the critical public interest in developing clean-energy infrastructure. The district court's decision to deny temporary equitable relief to WWP, despite the record, was an abuse of discretion.[189]

C. THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION BECAUSE IT WAS BASED ON A MISTAKE OF LAW AND WAS AN ABUSE OF DISCRETION

The Ninth Circuit holds that a "district court abuses its discretion when its equitable decision is based on an error of law or a clearly erroneous factual finding."[190] In this case, the district court made its decision to deny equitable relief despite evidence that should have compelled it to grant a preliminary injunction.[191] The court's action was an abuse of its discretion because the decision was based on its erroneous application of NEPA and the two accepted preliminary-injunction tests. The Ninth Circuit's failure to recognize the district court's mistake of law and abuse of discretion was erroneous.

The Ninth Circuit affirmed the district court's decision without examining its NEPA analysis and without discussing its application of the first two prongs of the *Winter* test.[192] The appellate court's limited discussion of the balancing of the equities factor and the public-interest factor of *Winter* to justify the district court's decision completely ignored the court's obligation to reverse when an error of law or a clearly erroneous factual finding exists.[193] If the court had analyzed the district court's NEPA analysis and all prongs of the *Winter* and the "Serious Questions" tests, then it would have reversed the lower court's decision. This leaves the glaring question of why the Ninth Circuit felt it pertinent to overlook the flawed judgment of the district court.

The most illuminating clue to why the Ninth Circuit did not determine that the district court's decision was an abuse of discretion is embodied in its commendation of the lower court's balancing and weighing of the equities.[194] The opinion focused on the fact that the district court properly weighed federal and state goals when determining

[189] *Rabkin*, 350 F.3d at 977 ("a judgment that is clearly against the logic and effect of the facts as found").

[190] United States v. Washington, 157 F.3d 630, 642 (9th Cir. 1998).

[191] *Rabkin*, 350 F.3d at 977.

[192] W. Watersheds Project v. Salazar, 692 F.3d 921, 923 (9th Cir. 2012).

[193] United States v. Washington, 157 F.3d at 642.

[194] W. Watersheds Project v. Salazar, 692 F.3d at 923.

that injunctive relief was not in the public interest.[195] This approbation overlooked, however, the fact that the district court only came to that conclusion after erroneously evaluating BLM's EIS analysis and WWP's NEPA claims.[196]

Further, the Ninth Circuit failed to consider the district court's puzzling decision to deny preliminary injunctive relief despite the fact that it stated in its opinion that WWP "raise[d] a serious question as to whether BLM violated NEPA,"[197] and that "[t]he harm to the [tortoise] population at the proposed site brought about by the loss of thousands of acres of desert habitat . . . [was] itself a sufficient irreparable injury to warrant equitable relief."[198] This oversight, in combination with Ninth Circuit's deviation from the Supreme Court's holding that irreparable environmental injury typically favors preliminary injunctive relief, only further calls into question the court's motivation to affirm the district court's faulty judgment.[199]

It is certainly true that by the time this case was argued before the Ninth Circuit the Project was well on its way to completion,[200] but to paper over obvious errors in the district court's analysis was disingenuous. The policy considerations the appellate court focused on, though an important factor for deliberation, cannot override the evidence illustrating that the district court made a mistake of law.[201] The Ninth Circuit's emphasis on discussing the importance of building clean-energy infrastructure, however agreeable and insightful it may be, did not do anything to address the errors the district court's ruling was based upon. The district court abused its discretion by rendering a decision "that

[195] *Id.* ("The district court properly took into account the federal government's stated goal of increasing the supply of renewable energy and addressing the threat posed by climate change, as well as California's argument that the ISEGS project is critical to the state's goal of reducing fossil fuel use, thereby reducing pollution and improving health and energy security in the state.").

[196] Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998) ("Under this deferential standard, we must defer to an agency's decision that is 'fully informed and well-considered.' However, we need not forgive a 'clear error of judgment.'" (citation and internal quotation marks omitted)).

[197] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *25-6 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[198] W. Watersheds Project v. Salazar, No. CV 11-00492 DMG (Ex), 2011 U.S. Dist. LEXIS 151556, at *58 (C.D. Cal. Aug. 10, 2011), *available at* www.eswr.com/docs/cts/cacd/wwp-v-salazar-gee-order-8-11-2011.pdf, *aff'd,* 692 F.3d 921 (9th Cir. 2012).

[199] *Vill. of Gambell*, 480 U.S. at 545.

[200] Christian Roselund, *Waiting on Ivanpah*, CLEAN TECHNIA (Feb. 21, 2014), http://cleantechnica.com/2014/02/21/ivanpah-solar-power-plant-isnt-quite-complete/.

[201] United States v. Washington, 157 F.3d at 642.

[was] clearly against the logic and effect of the facts as found."[202] The Ninth Circuit's failure to recognize the lower court's mistakes of law and clearly erroneous factual findings sets a bad precedent.

The reality of the basis for the Ninth Circuit's decision sits solely with the judges involved, but the brevity of the order certainly disguised the complexity of the issues raised in this case. This decision may lead to a future in which conservationists have no power to temporarily halt projects that have been approved by federal agencies that have not done their due diligence. Projects could be approved without the government considering every significant environmental impact, without the public being adequately informed of what the proposed actions are, and without sufficient evaluation of the environmental consequences and alternatives to the actions before proceeding.[203] But the importance of building clean-energy infrastructure does raise a serious question; should courts recognize an exception to NEPA requirements for clean-energy projects because of their important role in reducing carbon emissions that contribute to climate change and its macro-effect on the environment?

CONCLUSION

Yes. Development designed to use limited natural resources in a way that benefits the many over the few without waste is what Gifford Pinchot dreamed for the future.[204] Large-scale clean-energy projects undoubtedly fit into his idea of "conservation" because they give society electricity without continuously pumping carbon into the atmosphere. In the face of climate change and in the midst of a stagnating economy, the benefits of these projects are immense, and they are something all "conservationists" should get behind. The Ninth Circuit recognized these benefits, and its decision certainly helped one of these projects steamroll through construction, but it could also help undermine the regulatory framework designed to support smart development.

NEPA was the culmination of the principles set out by Pinchot:[205] regulations designed to make sure that when development occurs, it proceeds in the most beneficial manner possible, both for people and the natural environment.[206] The danger created by the Ninth Circuit's rubber-stamping of the district court's flawed NEPA analysis is that future projects that do not have such great environmental benefits can

[202] *Rabkin*, 350 F.3d at 977.

[203] LUTHER, *supra* note 81, at 1.

[204] PINCHOT, *supra* note 3, ch. 1.

[205] *Id.*

[206] LUTHER, *supra* note 81, at 1.

rely on *precedent* to thwart requests for preliminary injunctions made by conservation groups like WWP.

The best way to protect the NEPA framework, which has helped promote smarter development over the past forty years, is to create within it a bright-line exception for clean energy projects to give them flexibility to build quickly and efficiently. Development always has environmental consequences, but clean-energy projects differ in one important way. Although they have local detrimental effects, on a global scale they help reduce carbon emissions. If these projects don't move forward quickly, climate change may never be curtailed, and if that happens it may be too late for species like *gopherus agassizii*.