# In the Supreme Court of the State of California

ELK HILLS POWER, LLC,

**Plaintiff and Appellant,**

**v.**

**CALIFORNIA STATE BOARD OF EQUALIZATION AND COUNTY OF KERN,**

**Defendants and Respondents.**

Case No. S194121

SUPREME COURT
FILED

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Deputy

Fourth Appellate District, Division One, Case No. D056943
San Diego County Superior Court, Case No. 37-2008-00097074-CU-MC-CTL,
The Honorable Ronald L. Styn, Judge

**RESPONDENT'S OPPOSITION TO MOTION FOR JUDICIAL NOTICE FILED BY APPELLANT ELK HILLS POWER, LLC**

KAMALA D. HARRIS
Attorney General of California
PAUL D. GIFFORD
Senior Assistant Attorney General
FELIX E. LEATHERWOOD
Supervising Deputy Attorney General
TIM NADER
Deputy Attorney General
State Bar No. 106093
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2210
Fax: (619) 645-2489
Email: Tim.Nader@doj.ca.gov
*Attorneys for Defendant and Respondent*

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## I. INTRODUCTION

Respondent California Board of Equalization ("the Board") objects to the Requests for Judicial Notice (RJN) filed by Appellant Elk Hills Power LLC ("Elk Hills). The Board submits that these requests should be denied on a variety of grounds, including the lack of relevance, lack of foundation, hearsay, failure to meet the criteria for judicially noticeable facts and the outweighing of any slight probative value by undue consumption of time.

Judicial notice by a reviewing court is authorized by Evidence Code sections 451 and 452[1] and California Rules of Court, Rule 8.520(g). Evidence to be judicially noticed, regardless of the ground on which judicial notice is based, must meet a threshold test of relevance to determination of the legal issues at hand. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn.1, matter to be judicially noticed must be relevant to a material issue.)

In this case, Elk Hills advances two bases for its request for judicial notice: section 452, subdivision (c) ("official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States") and section 452, subdivision (h) ("facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"). Section 452, subdivision (c) authorizes a court to take judicial notice of the existence of official documents, but not necessarily of the truth of statements within those documents, which may still be excludable as hearsay. Documents of which the Court has

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[1] All statutory references are to the Evidence Code unless otherwise stated.

discretion to take judicial notice may still be objectionable and excluded on recognized grounds of evidence law. For example, in *Mangini*, *supra,* this Court held that while it could take judicial notice of the issuance of a report by the United States Surgeon General regarding the health consequences of smoking, it could not take judicial notice of the truth of the conclusions stated in the report, which were hearsay notwithstanding that they were contained in an official document. (*Mangini v. R. J. Reynolds Tobacco Co.*, *supra,* 7 Cal. 4th at pp. 1063–1064; see also, *Herrera v. Deutsche Bank Nat. Trust Co.* (2011) 196 Cal.App.4th 1366, 1375, judicial notice of official document does not make hearsay within the document judicially noticeable.)

By its terms, judicial notice under section 452 is discretionary even if the proffered evidence meets the relevance standard. This Court, like a trial court, retains discretion to reject proffered evidence if its probative value is outweighed by undue consumption of time. (§ 352; *Mangini v. R. J. Reynolds Tobacco Co.*, *supra* at 1063, citing *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578.)

This Court should deny Elk Hills's request for judicial notice.

## II. ARGUMENT

### A. The Court Should Not Take Judicial Notice Of Exhibit 1 And Exhibit 7 Because They Are Not Certified Or Properly Authenticated.

**Objection:** Lacks proper foundation as not certified or otherwise properly authenticated.

The proffered exhibits purport to be decisions of the California Energy Commission (CEC). They are neither signed nor certified, and appear to be proposed decisions prepared by staff but not necessarily adopted by the Commission as proposed. The exhibits do not disclose whether the proposed orders were approved as written or amended prior to

CEC action. Because these exhibits are not properly authenticated, Elk Hill's request for judicial notice of exhibits 1 and 7 should be denied. (See Evid. Code, § 403, subd. (a)(3), proponent of evidence has burden of proving authenticity.)

### B. Judicial Notice Should Not Be Taken Of Exhibit 1, Exhibit 5, Exhibit 6, Exhibit 7, Exhibit 8, and Exhibit 9 Because They Are Irrelevant And Have Little Probative Value.

**Objection:** Irrelevant; slight probative value outweighed by undue consumption of time (§ 352).

The CEC "orders", even if identical to orders ultimately adopted by the CEC, and the Authorities to Construct issued by the San Joaquin Valley Air Pollution Control District (the District) are irrelevant to the issues in this case as framed by the Petition for Review and the briefs of the parties. These exhibits apparently are offered to support Elk Hills's new claim, made for the first time in its Reply Brief, that the ERCs were not required for construction of the Elk Hills plant and that even if permits required for construction of the plant are includable as part of replacement value for property tax assessment purposes, permits for operation are not.

But that belated argument is not properly before the Court, because it is newly raised in the Reply Brief. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) Thus, both the allegation that ERCs were not required for construction and the argument claiming a distinction between "construction permits" and "operating permits" are improper.

Moreover, the new factual allegation is improper because it was never raised below and is in conflict with Elk Hills's prior admissions and stipulations. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325.) It also conflicts with Elk Hills prior admissions. For these reasons alone, the proffered material is irrelevant to issues properly before this Court.

Because the parties had long agreed that there are no material undisputed facts at issue, both parties filed briefs indicating that this case addressed purely issues of law. Now, at this late date, Elk Hills tries for the first time to claim that there are material facts in dispute. But the specific timing of the issuance and surrender of ERCs is irrelevant, because there is no legitimate dispute that it was necessary for Elk Hills to deploy ERCs to beneficially and productively use its power plant at its highest and best use. (See Respondent's Answer to Amicus Brief filed by Independent Energy Producers, at pp. 19-21, and Respondent's Consolidated Answer to Amicus Brief filed by Broadband, et al. at p. 17-21.)

The proffered exhibits do not even support Elk Hills's argument. While Elk Hills quotes one portion of its new Exhibit 1 in support of its belated claim that ERCs were not required until operation of the plant, another portion clearly states:

> **AQ – 24** At least thirty (30) days prior to the construction of permanent foundations, the project owner shall provide the [San Joaquin Valley Air Pollution Control] District with:
>
> written documentation that all necessary offsets [ERCs} have been acquired or that binding contracts to secure such offsets have been entered into.

The same condition appears in Elk Hills's Exhibits 5 and 6, the Authorities to Construct issued by the District. (See e.g., page 3 in each exhibit)

Thus, even if these additional documents were accepted at face value, they would not contradict the undisputed fact upon which this case was decided in the trial court, namely that the deployment of ERCs in this case was necessary to construct and operate Elk Hills's power plant at highest and best use. Elk Hills acknowledged this fact in the trial court (I CT 126, 143) and again in its petition and opening brief before this Court. (Petition, pp. 11-12; AOB 9-10, 54.)

Even if, as Elk Hills now belatedly claims, Exhibits 7, 8 and 9 show that the ERCs ultimately required to be surrendered were *fewer* than those initially called for in the Authority to Construct (because Elk Hills was able to further reduce its emissions even after compliance with "Best Available Control Technology" requirements), the exhibits are still irrelevant. This fact is not probative as to any matter at issue in this appeal.

Moreover, it has always been undisputed that the first assessment year at issue in this case was 2004. (I CT 39.) As of the 2004 lien date, the ERCs were surrendered and applied to the power plant real property.

Assuming there is some probative value to be found in these documents on issues before the Court, any minimal value is outweighed by the undue consumption of time, and the Court therefore has discretion to exclude the proffered evidence. (§ 352.) The issues before the Court can be best decided on the existing record. And if the Court entertains argument based on this proffer of evidence, the Board would be prejudiced by the denial of the opportunity to conduct discovery that would have been afforded it if the material had been timely offered in the trial court.

### C. Judicial Notice Should Not Be Taken Of Exhibits 2, 3, and 4 Because They Have Slight Probative Value, Are Hearsay, Irrelevant, and Not Judicially Noticeable Facts Within Common Knowledge.

**Objection:** Irrelevant (§ 350), slight probative value outweighed by consumption of time (§ 352), hearsay (§ 1200), and not judicially noticeable facts within common knowledge (§452, subd. (f)).

This material is irrelevant because issues of environmental or energy policy are relevant only insofar as they may shed light on legislative intent. If this Court finds ambiguity in the language of Revenue and Taxation Code section 110, subdivision (e) ("Taxable property may be assessed and valued by assuming the presence of intangible assets or rights necessary to put the taxable property to beneficial or productive use"), legislative history

and public policy issues may assist in determining legislative intent. Legislative history and public policy are only relevant, however, if there is ambiguity in the statute (as claimed in this case by Elk Hills but denied by the Board).

With these exhibits (and other exhibits in Elk Hills' Motion, discussed *infra*), Elk Hills crosses a line from debating the impact of different constructions of the statute on public policy (a matter properly considered in the courts), to debating the merits of policy (a matter properly considered in the Legislature). Assuming for the sake of argument the truth of everything in the exhibits, the Board submits that these documents shed no light on the appropriate construction of the statutes at issue here. The exhibits at most indicate that natural gas is cleaner than other fossil fuels, less clean than renewable resources, and likely to be an important part of the world's energy supply for the foreseeable future. But neither the Board nor any amici have argued any of these points, and therefore they are not before the Court in this case.

These exhibits are also objectionable hearsay. Although United States government documents, their contents are not government records within the meaning of Evidence Code section 1280, nor "official acts" of the government within the meaning of Evidence Code section 452, subdivision (c). Far from being records of events that have occurred, these documents are in the nature of intelligence assessments and forecasts, and thus constitute expert opinion from a federal agency. The documents themselves frequently acknowledge that their conclusions are subject to change with time, events, and other unpredictable factors. While these assessments may be useful to policy makers, they are not relevant to the issue of state statutory construction before this Court, and do not reflect official acts or "records" of the government.

Any slight probative value in these documents is also outweighed by the consumption of time involved. These documents analyze complex and controversial issues of tangential significance to this case and, by their own acknowledgment, are based on assumptions regarding complex variables. For example, Exhibit 2 acknowledges it has not accounted for the impacts of the Fukushima nuclear disaster (Exhibit 2, p. 2), future limits on greenhouse gas emissions (Exhibit 2, p. 3), and government policies and incentives which may either encourage or discourage the growth of renewable energy alternatives to fossil fuels (Exhibit 2, pp. 5-6, 8, 10-11).

The same exhibit notes that currently, while construction costs of non-fossil fuel renewable energy sources are higher relative to conventional fuels, their operating costs are lower (Exhibit 2, p. 6), further complicating the business of making accurate forecasts. All of this is to say that for the Court to analyze these documents and the numerous assumptions made therein is an effort unlikely to be justified by the minimal light they will shed on construction of the statutes at issue in this case.

Finally, the exhibits obviously do not meet the criteria of Evidence Code section 452, subdivision (h), "Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy". As discussed above, the proffered reports contain numerous acknowledgments that many of their conclusions are uncertain and may be affected by unknown variables. Indeed, this Court, were it relevant, could more appropriately take judicial notice of the fact that issues underlying energy policy, ranging from the relative economic feasibility of various fuels to the environmental impact of their use, are not undisputed and are the subject of daily, vigorous debate.

What is not subject to dispute is that it is the policy of both the federal and state government to reduce air emissions in Clean Air Act non-

attainment areas, and it is the policy of California to tax property in accordance with fair market value. These documents shed no light on how rival constructions of Revenue and Taxation Code section 110, subdivisions (e) and (f) would affect either policy.

## CONCLUSION

For the above reasons, the Board objects to the Requests for Judicial Notice of Elk Hills, and respectfully asks that these requests be denied.

Dated: August 8, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
PAUL D. GIFFORD
Senior Assistant Attorney General
FELIX E. LEATHERWOOD
Supervising Deputy Attorney General

TIM NADER
Deputy Attorney General
*Attorneys for Defendant and Respondent*

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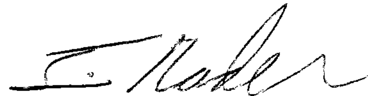
## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPPOSITION TO MOTION FOR JUDICIAL NOTICE FILED BY APPELLANT ELK HILLS POWER, LLC** uses a 13 point Times New Roman font and contains 2,656 words.

Dated: August 8, 2012

KAMALA D. HARRIS
Attorney General of California



TIM NADER
Deputy Attorney General
*Attorneys for Defendants and Respondents*

## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Elk Hills Power v. CA State Board of Equalization, et al.**

No.: **S194121**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 9, 2012, I served the attached **RESPONDENT'S OPPOSITION TO MOTION FOR JUDICIAL NOTICE FILED BY APPELLANT ELK HILLS POWER, LLC** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Paul J. Mooney, Esq.
Mooney, Wright & Moore, PLLC
Mesa Financial Plaza, Suite 16000
1201 South Alma School Road
Mesa, AZ 85210-0001

Jerri S. Bradley
County of Kern Public Defender
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301

Julian W. Poon
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Peter W. Michaels
Law Offices of Peter Michaels
6114 La Salle Avenue, Suite 445
Oakland, CA 94611-2802

Robert W. Lambert
Assistant Chief Counsel
Board of Equalization - Legal Division
P.O. Box 942879 MIC:82
Sacramento, CA 94279-0082

The Honorable Ronald L. Styn
San Diego County Superior Court
Hall of Justice
THIRD FLOOR
Department SD-62
330 West Broadway
San Diego, CA 92101

Fourth Appellate District Court
Division One
750 B Street, Suite 300
San Diego, CA 92101

Cris K. O'Neall
Cahill, Davis & O'Neall, LLP
550 S. Hope Street, Suite 1650
Los Angeles, CA 90071

*Attorneys for California Taxpayer's Association*

Douglas Mo
Prentiss Wilson, Jr.
Sutherland, Asbill & Brennan, LLP
500 Capitol Mall, 19th Floor
Sacramento, CA 95814

Eric S. Tresh
Sutherland, Asbill & Brennan, LLP
999 Peachtree NE, Suite 2300
Atlanta, GA 30309

*Attorneys for Broadband Tax Institute*

Steve Mitra, Esq.
Deputy County Counsel
County of Santa Clara
70 West Hedding St., 9th Floor, East Wing
San Jose, CA 95110

*Attorney for Amici Curiae California State Association of Counties and California Assessors' Association*

John F. Krattli
Albert Ramseyer
Los Angeles County Assessor
500 West Temple Street, Room 648
Los Angeles, CA 90012-2713

*Attorneys for Los Angeles County Assessor*

Kurt R. Wiese
Barbara Baird
So. Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

*Attorneys for South Coast Air Quality Management District*

Wm. Gregory Turner
Council on State Taxation
1415 L Street, Suite 1200
Sacramento, CA 95814

*Attorney for Council on State Taxation*

Paul Hastings, LLP
Peter Weiner
Gordon E. Hart
Sean D. Unger
Jill E.C. Yung
55 Second Street, 24th Floor
San Francisco, CA 94105

*Attorneys for Independent Energy Producers*

Edward G. Summers
Middle Class Taxpayers Association
3737 Camino Del Rio North
San Diego, CA 92108-4007

*Attorney for Middle Class Taxpayers Association*

Richard R. Patch
Jeffrey Sinshmeimer
Charmaine G. Yu
Coblentz, Patch, Duffy & Bass LLP
One Ferry Building, Suite 200
San Francisco, CA 94111-4213

*Attorneys for California Cable and Telecommunications Association*

John Stump
Sierra Club
85 Second St., 2nd Floor
San Francisco, CA 94105

*Attorney for Sierra Club*

Mardiros H. Dakessian
Margaret M. Grignon
Reed Smith LLP
355 South Grand Ave., Suite 2900
Los Angeles, CA 90071-1514

*Attorneys for Institute for Professionals in Taxation*

Richard N. Wiley
775 E. Blithedale Ave., Ste. 369
Mill Valley, CA 94941

*Attorney for Wirelessco., L.P.*

Michael Wall
Alex Jackson
Natural Resources Defense Council
111 Sutter St., 20th Fl.
San Francisco, CA 94110

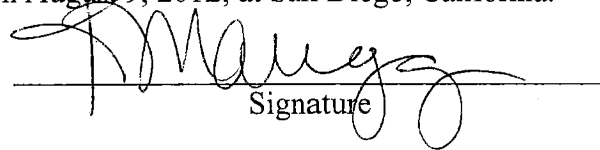
*Attorneys for Natural Resources Defense Council*

Ann Hancock
Climate Protection Campaign
P.O. Box 3785
520 Mendocino Ave., Suite 260
Santa Rosa, CA 95402

*Attorney for Climate Protection Campaign*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 9, 2012, at San Diego, California.

K. Marugg
Declarant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