

SUPREME COURT
FILED

AUG 28 2012

Frank A. McGuire Clerk

Deputy

No. S194121

IN THE
SUPREME COURT OF CALIFORNIA

ELK HILLS POWER, LLC, **FILED WITH PERMISSION**
Plaintiff and Appellant,

v.

CALIFORNIA STATE BOARD OF EQUALIZATION AND
COUNTY OF KERN,
Defendants and Respondents.

After A Decision By The Court of Appeal
Fourth Appellate District, Division One, Case No. D056943,
San Diego Superior Court Case No. 37-2008-00097074-CU-MC-CTL

**APPELLANT'S APPLICATION FOR LEAVE TO FILE REPLY TO
RESPONDENT CALIFORNIA STATE BOARD OF
EQUALIZATION'S OPPOSITION TO
APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE**

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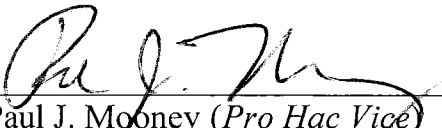
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TO THE CHIEF JUSTICE:

Appellant Elk Hills Power, LLC (“Appellant”) respectfully requests permission from the Court to file the attached Reply to Respondent California State Board of Equalization’s Opposition to Appellant’s Motion Requesting Judicial Notice (the “Reply”). Appellant’s Reply addresses the legal basis for Appellant’s Motion Requesting Judicial Notice and explains that the documents for which Appellant seeks judicial notice are proffered in direct response to new issues raised by the amicus curiae briefs filed in this case, which were not previously raised or briefed by the parties. Appellant’s Reply will assist the Court in determining whether to grant judicial notice as requested by Appellant.

RESPECTFULLY SUBMITTED this 23rd day of August, 2012.

LAW OFFICE of PETER MICHAELS
and
GIBSON, DUNN & CRUTCHER, LLP
and
MOONEY, WRIGHT & MOORE, PLLC

By: 
Paul J. Mooney (*Pro Hac Vice*)
Attorneys for Plaintiff/Appellant EHP

CERTIFICATE OF SERVICE BY MAIL

Elk Hills Power, LLC v. California State Board of Equalization, et al.

Court of Appeal No. D056943

Superior Court Case No. 37-2008-00097074-CU-MC-CTL

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My business address is 1201 S. Alma School Rd., Ste. 16000, Mesa, AZ 85210.
3. On August 23rd, 2012, I enclosed copies of

**Appellant's Application for Leave to File Reply to Respondent
California State Board of Equalization's Opposition to Appellant's
Motion Requesting Judicial Notice**

in envelopes and deposited the sealed envelopes with the U.S. Postal Service, with the postage full prepaid.

4. The envelopes were addressed as follows:

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5. I am a resident of or employed in the county where the mailing occurred. The document was mailed from Mesa, Arizona.

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

Date: August 23rd, 2012

Kim Simonis
Printed Name


Signature

No. S194121

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Elk Hills Power, LLC

INTRODUCTION

Appellant Elk Hills Power, LLC (“EHP”) hereby replies to Respondent California State Board of Equalization’s (“Board”) Opposition to Motion for Judicial Notice Filed by Appellant Elk Hills Power, LLC (“Opposition”). EHP respectfully requests that the Court grant judicial notice of the documents submitted for consideration with EHP’s Motion Requesting Judicial Notice. The proffered documents are relevant to factual allegations and arguments raised by the amicus curiae briefs filed in this case, and are judicially noticeable pursuant to Sections 452, 453 and 459 of the Evidence Code.

ARGUMENT

A. The Documents Are Relevant To EHP’s Response To The Amicus Curiae Briefs.

In its Opposition, the Board claims that EHP’s proffered documents are “irrelevant to the issues in this case as framed by the Petition for Review and the briefs of the parties.” (Opposition, p.3.) The Board further suggests that the “material is irrelevant because issues of environmental or energy policy are relevant only insofar as they may shed light on legislative intent.” (*Id.* at p.5.) The Board misunderstands the purpose and timing of EHP’s request for judicial notice. EHP’s Motion Requesting Judicial Notice was *not* filed in conjunction with EHP’s Opening Brief or Reply Brief on the Merits. Rather, EHP’s Motion was filed in conjunction with

EHP's Consolidated Answer to Amicus Curiae Briefs Supporting Respondents ("Consolidated Answer"). The proffered documents are relevant to EHP's *response* to the amicus curiae briefs, which notably reach beyond the scope of the record in this case, introducing issues of environmental policy and appraisal theory.

"It is not unusual for an amicus curiae brief to include factual material that is outside the record." (Eisenberg *et al.*, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 9:210.1, p.9-54.2 [citing *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 590, fn.20].) That is precisely what occurred in this case. Certain amici have raised factual allegations and issues that are outside the record. By way of example, amicus Middle Class Taxpayers Association of San Diego ("MCTA") asserted in its letter brief that EHP "pollutes in violation of the Clean Air Act," a factual misrepresentation, which was never alleged by either the Board or Kern County in the case below. (MCTA Letter, p.5.) Other amici likewise suggest that EHP is a "polluter" seeking a tax break. (Sierra Club Brief, p.6; Climate Protection Campaign Letter, p.6; Natural Resources Brief, pp.13-17.) In order to fully respond to these factual allegations, EHP has requested judicial notice of documents contradicting these allegations, reflecting that the natural gas "combined-cycle" technology utilized at EHP's plant, is one of the cleanest and most efficient

sources of electric power generation available today. (Appellant's Motion Requesting Judicial Notice, Declaration of Paul J. Mooney, Exhibits 2, 3 and 4.)

The amicus brief filed by John R. Noguez, Los Angeles County Assessor ("Noguez") argues that "appraisal theory" requires the addition of intangible ERCs to the assessed value of EHP's Plant as "costs of construction." (Noguez Brief, pp.8-11.) To properly counter Noguez's argument, EHP has requested judicial notice of documents that refute Noguez's position by establishing that EHP was required to surrender ERCs prior to *operation*, not prior to *construction* of the Plant. (See Appellant's Motion Requesting Judicial Notice, Declaration of Paul J. Mooney, Exhibits 1, 5, 6, 7, 8 and 9.)

The Board suggests that EHP, in its Motion Requesting Judicial Notice, is trying "for the first time to claim that there are material facts in dispute." (Opposition at p.4.) This is not EHP's position. Rather, EHP has always agreed with the Board that this case presents a legal dispute, based on undisputed facts. (1 CT 2:11-12 [Plaintiff's Complaint]; 1 CT 108:4-8 [Plaintiff's Motion for Summary Judgment]; 4 CT 860:17-20 [Plaintiff's Motion for New Trial]; Petition for Review, p.10; Consolidated Answer to Amicus Curiae Briefs Supporting Respondents, p.2, fn.2.) EHP is not suggesting, nor has it ever suggested, that there are material facts in

dispute. Rather, in its Consolidated Answer and in the accompanying Motion Requesting Judicial Notice, EHP is simply responding to and refuting allegations and issues raised by the amici. The documents for which EHP seeks judicial notice are relevant to and directly related to EHP's response to those amicus curiae briefs.

B. Sections 452 And 453 Of The Evidence Code Require Judicial Notice Of The Documents.

Section 452(c) of the Evidence Code provides that judicial notice may be taken of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code §452(c).) Section 453 *requires* that judicial notice be taken if a party requests it and “(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.” (Evid. Code §453.) The requirements of Sections 452 and 453 of the Evidence Code have been met in this case.

Each of the documents for which EHP seeks judicial notice qualifies as an official government act under Section 452(c). “Official acts” have been interpreted to include “records, reports and orders of administrative agencies.” (*Ordlock v. Franchise Tax Bd.* (2006) 38 Cal.4th 897, 912 n.8 [quoting *Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518].) In this case,

the proffered documents are records, reports and orders of the California Energy Commission, the United States Energy Information Administration or the San Joaquin Valley Air Pollution Control District. (See Appellant's Motion Requesting Judicial Notice, Declaration of Paul J. Mooney, Exhibits 1- 9.) They are precisely the types of documents for which courts routinely grant judicial notice. (See, e.g., *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 898, fn.2 [granting judicial notice of bulletins published by the Department of Water Resources]; *Ojavan Investors, Inc. v. California Coastal Comm'n* (1994) 26 Cal.App.4th 516, 527 [granting judicial notice of restrictions found in coastal development permits]; *Nipper v. California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35, 44 [granting judicial notice of a decision by the insurance commissioner]; *White v. State* (1971) 21 Cal.App.3d 738, 743, fn.1 [granting judicial notice of a publication of the United States Army Corps of Engineers]; *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 661-62 [granting judicial notice of a public utilities commission decision].) Thus, pursuant to Sections 452 and 453 of the Evidence Code, EHP's request for judicial notice should be granted.

C. There Is No Requirement That The Documents Be Certified.

The Board objects to two of the proffered documents included in EHP's Motion Requesting Judicial Notice on the basis that the documents

are “not certified or otherwise properly authenticated.” (Opposition at p.2 [objecting to Exhibits 1 and 7].) The Board, however, cites no rule imposing such a procedural requirement of certification. Conversely, Section 1530(a) of the Evidence Code provides that: “A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if: (1) The copy purports to be published by the authority of the nation or state, or public entity therein in which the writing is kept.” (Evidence Code §1530(a)(1).) In this case, the two documents challenged by the Board are both publications of the California Energy Commission (“CEC”) and were obtained directly from the CEC’s website. (Appellant’s Motion Requesting Judicial Notice, Declaration of Paul J. Mooney, Exhibits 1 and 7.) The documents, therefore, are in the custody of the CEC and purportedly published by the authority of the CEC. Accordingly, they meet the requirements of Section 1530(a)(1), and their certification is not required.

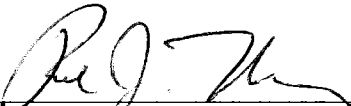
CONCLUSION

For the foregoing reasons, EHP respectfully requests that the Court grant its Motion Requesting Judicial Notice. The documents at issue are relevant to EHP’s Consolidated Answer to Amicus Curiae Briefs Supporting Respondents. The amici have raised issues of appraisal theory and environmental policy that go beyond the scope of the record in this

case. Because these new factual allegations and issues are now before the Court, it is appropriate for the Court to provide Plaintiff and Appellant EHP the opportunity to respond thoroughly and adequately to the same.

RESPECTFULLY SUBMITTED this 23rd day of August, 2012.

LAW OFFICE of PETER MICHAELS
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By: 
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CERTIFICATE OF SERVICE BY MAIL

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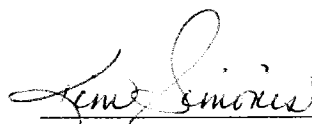
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5. I am a resident of or employed in the county where the mailing occurred. The document was mailed from Mesa, Arizona.

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

Date: August 23rd, 2012

Kim Simonis
Printed Name


Signature