IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00859-WJM-BNB

AMERICAN TRADITION INSTITUTE, and
ROD LUECK,

Plaintiffs,

v.

JOSHUA EPEL,
JAMES TARPEY, and
PAMELA PATTON,

Defendants,

ENVIRONMENT COLORADO,
CONSERVATION COLORADO EDUCATION FUND,
SIERRA CLUB,
THE WILDERNESS SOCIETY,
SOLAR ENERGY INDUSTRIES ASSOCIATION, and
INTERWEST ENERGY ALLIANCE,

Defendant-Intervenors.

PLAINTIFFS' EARLY MOTION FOR PARTIAL SUMMARY JUDGMENT

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PLAINTIFFS' EARLY MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Rod Lueck and the American Tradition Institute ("ATI"), by and through their counsel, hereby move for partial summary judgment on all claims that the Colorado Renewable Energy Standard ("RES"), C.R.S. § 40-2-124, violates the dormant Commerce Clause.

INTRODUCTION

This action challenges the constitutionality of Colorado's RES statute. Certain kinds of dormant Commerce Clause violations are subject to strict scrutiny and struck down without further inquiry if the state statute fails one of three simple tests: where (1) "a state statute directly regulates or discriminates against interstate commerce";[1] or (2) "its effect is to favor in-state economic interests over out-of-state interests";[2] or (3) the statute regulates extraterritorially.[3] Because each of Plaintiffs' merits claims falls within one of these three kinds of dormant Commerce Clause violations, and because the undisputed material facts prove the violations, they are well suited to resolution through summary judgment.

MOVANT'S STATEMENT OF MATERIAL FACTS

1. The State of the Colorado, operating through a voters' initiative and later through legislative action, adopted and revised its RES codified at C.R.S. § 40-2-124. Scheduling Order, Dkt. 149, at 11.

2. The Legislative Declaration of Intent in Section 1 of Amendment 37 (the voters' initiative initially adopting the RES) states that "Colorado's renewable energy resources are

[1] *Granholm v. Heald*, 544 U.S. 460, 487 (2005).
[2] *Id.*
[3] *See Healy v. Beer Inst.*, 491 U.S. 324, 333 (1989) ("projection of … extraterritorial 'practical effect[s],' regardless of the statute's intention," is unconstitutional (citations omitted)).

currently underutilized" and that, to "attract new businesses and jobs, promote development of rural economies, … [and] diversify Colorado's energy resources," Colorado should "develop and utilize renewable energy resources to the maximum practicable extent."

3. All Colorado retail electrical service is connected to an interstate electrical "grid"—the wires and associated apparatus between generators and the electrical service line to end users. Defs' Ans. ¶¶ 43, 50, 51, 53 & 57.

4. All electricity serving Colorado is integrated and pooled through the Western Interconnection, an interstate grid. Defs' Ans. ¶¶ 50, 57.

5. The Western Interconnection pools electricity and serves 11 western states, two Canadian provinces and one state within Mexico. These include Colorado, Wyoming, Montana, Idaho, Washington, Oregon, California, Nevada, Utah, New Mexico, Arizona; British Columbia and Alberta (Canada); and, Baja California (Mexico).[4]

6. Public Service Company of Colorado ("PSCo") is connected to the Western Interconnection and is an interstate generator, buyer and seller of electricity and Renewable Energy Credits ("RECs").[5]

7. All retail electricity serving Colorado is in interstate commerce.[6] Defs' Ans. ¶ 57.

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[4] U.S. EIA "Form EIA-411 Data", Figure 2 (tab "2005-2010") *available at*, http://www.eia.gov/electricity/data/eia411/ (*accessed on* 8/14/2013).

[5] PSCo (2011), G-022 Available Transfer Capability Implementation Document (ATCID), *available at* http://www.oatioasis.com/PSCO/PSCOdocs/PSCO_ATCID.pdf (*accessed* 8/12/2013).

[6] *See New York v. FERC*, 535 U.S. 1, 7 (2002) ("[A]ny electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce."); *FERC v. Mississippi*, 456 U.S. 742 (1982), ("It is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in

8. Colorado is a net importer of electricity, and energy that is generated in other states, such as Wyoming, is used in Colorado.[7]

9. The physical electricity generated by renewable sources and supplied to the grid is indistinguishable from the physical electricity generated by nonrenewable sources and supplied to the grid. Defs' Ans. ¶ 46.

10. Alpha Natural Resources, through its subsidiaries Alpha Coal West and Alpha Coal Sales, mine coal in Wyoming and sell it into Colorado.[8]

11. Coal sales into Colorado are in an interstate market.[9]

12. The Colorado RES and its implementing regulations establish a system of tradable Renewable Energy Credits ("RECs") which can be used to comply with the RES's renewable energy mandate. C.R.S. § 40-2-124(1)(d); 4 CCR 723-3-3659(a).

13. RECs can be purchased independently from the associated electric energy through "[r]enewable energy credit contract[s]," 4 CCR 723-3-3652(u); 4 CCR 723-3-3659(a); through "[r]enewable energy supply contract[s] … for the sale of renewable energy and the RECs associated with such energy," 4 CCR 723-3-3652(y); or "acquired through a system of tradable renewable energy credits, from exchanges or from brokers," 4 CCR 723-3-3659(V).

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this respect.") *and Pennsylvania Water & Power Co. v. Federal Power Com.*, 343 U.S. 414, 419-420 (1952) ("A complete integration and pooling of the power producing and transmitting facilities" is sufficient to demonstrate electricity is in interstate commerce.).

[7] U.S. EIA , State Electricity Profiles, Colorado, Table 10 (Supply and Disposition of Electricity 2000 and 2004 Through 2010), *available at* http://www.eia.gov/electricity/state/colorado/pdf/colorado.pdf (*accessed on* 8/17/2013); Colorado Governor's Energy Office, 2010 Colorado Utilities Report, at 3-4 (Dec. 2010).

[8] *See* U.S. Department of Energy, The Energy Information Administration (EIA), Fuel Receipts and Cost Time Series File, 2013 May, Form EIA-923 detailed data, *available at*, http://www.eia.gov/electricity/data/eia923/ (*accessed* 8/12/2013).

[9] *Id.*

14. Under color of 4 CCR 723-3, PSCo and/or Xcel and/or Western Area Power Administration ("WAPA") sold to Intermountain Rural Electric Association ("IREA") RECs generated outside Colorado,[10] some which qualify for use under the Colorado RES,[11] and some which do not.[12]

15. Colorado retail electricity suppliers comply with the RES using RECs reflecting both in-state and out-of-state renewable-energy generation.[13]

16. RECs subject to Colorado regulation are traded in an interstate market.[14]

17. RECs reflecting the environmental attributes of energy generated by hydroelectricity units in existence on January 1, 2005, with nameplate rating of greater than thirty megawatts; or "new" units with a nameplate rating of greater than ten megawatts are prohibited for use in Colorado. C.R.S. § 40-2-124(1)(a)(VII); & 124(1)(d) *and see*, 4 CCR 723-3-3656(e) & 3657.

18. The Colorado Public Utilities Commission admits that the RES, as amended, "require[s] utilities to increasingly obtain energy from renewable resources."[15]

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[10] Letters from Xcel to IREA "2009 REC Transfers for Full Requirements Purchases and Calculation of . . . REC Rider": 4/30/2009, p.2 (Plaintiffs' Production: RL 000599-600); 4/30/2010, p. 2 (Plaintiffs' Production RL 000612-613); 4/29/2011, p. 2 (Plaintiffs' Production: RL 000624-625); 5/4/2012, p. 2 (Plaintiffs' Production: RL 000636-637 [letter] & RL 000638 [REC source Foote Creek III, WY]; 5/1/2013, p. 2 (Plaintiffs' Production: RL 000648-650).

[11] Letters from Xcel to IREA "2009 REC Transfers for Full Requirements Purchases and Calculation of . . . REC Rider": 5/4/2012, p. 2 (Plaintiffs' Production: RL 000636-637 [letter] & RL 000638 [REC source Foote Creek III, WY].

[12] Email from Langenberger (WAPA) to Atkinson (IREA), " Western Area Power Administration 2012 LAP REC Program Allocations – IREA (Plaintiffs' Production: RL 000661-662 [>30 MW hydro RECs from MT & WY]).

[13] *See*, PSCo Annual RES Compliance Reports; (Plaintiffs'' Production: PSCo 20, 95, 173.

[14] See notes 12, 13, 14, 15 and 19.

[15] Joshua B. Epel, Chairman, Colorado Public Utilities Commission, Witness Testimony Before the House Committee on Energy and Commerce, Subcommittee on Energy and Power, at 1-2 (Mar. 19, 2013) , *available at*

19. The RES explicitly requires Colorado "qualified retail utilities" to "generate, or cause to be generated," electricity from" Colorado-approved renewable sources to comply with the RES's renewable-energy quota. C.R.S. § 40-2-124(1)(c)(I),(V) & (V.5) and C.R.S. § 40-2-124(3)&(4).

20. C.R.S. § 40-2-124(1)(a)(II) defines what methane from coal mines is eligible as a renewable energy resource; and C.R.S. § 40-2-124(1)(a) states that resources using coal mine methane and synthetic gas produced by pyrolysis of municipal solid waste are only eligible energy resources if the Colorado Public Utility Commission determines that the electricity generated by those resources are greenhouse gas neutral.

21. Coal mine methane as a fuel for electricity generation is available and used as a renewable energy resource in Utah.[16]

22. Renewable energy credit contracts and renewable energy compliance plans must be approved by the Colorado PUC. 4 CCR 723-3-3656(e) & 3657.

23. These renewable energy credit contracts and bundled energy contracts (that bundle RECs with the electricity from which they arise) control sales of non-Colorado generation sources.[17]

24. Federally approved RECs from hydroelectricity generation units with nameplate capacity greater than 30 megawatts, such as WAPA large dams,[18] are sold to Colorado utilities but are

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http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Epel-EP-Regulators-Grid-Operators-2013-3-19.pdf (last visited Aug. 18, 2013).

[16] U.S. EPA, "State Renewable Energy Programs", *available at*, http://www.epa.gov/cmop/docs/state-programs.pdf (*accessed on* 8/14/2013).

[17] *See, e.g.*, Letters from Xcel to IREA, "2009 REC Transfers for Full Requirements Purchases and Calculation of . . . REC Rider": 5/4/2012, p. 2 (Plaintiffs' Production: RL 000636-637 [letter] & RL 000638 [REC source Foote Creek III, WY].

[18] Email from Langenberger (WAPA) to Atkinson (IREA), " Western Area Power Administration 2012 LAP REC Program Allocations – IREA (Plaintiffs' Production: RL 000661-662 [>30 MW hydro RECs from MT & WY])

prohibited for use in meeting Colorado RES quotas.[19]

25. RECs approved by other states, such as ocean thermal and ocean wave generation and hydropower with a nameplate capacity greater than 30 megawatts, as approved in California,[20] are prohibited for use in Colorado.[21]

26. Coal, natural gas, and nuclear generation from out-of-state sources are barred from competing for electricity sales restricted to renewable energy in Colorado.[22]

27. Even though the physical electricity produced from wholly out-of-state coal, natural gas, and nuclear generation is physically identical to that produced by wholly out-of-state renewable energy generation (Defs' Ans. ¶ 46), the RES sets aside a portion of the Colorado electricity market for electricity that is either generated in Colorado by Colorado-approved renewable sources or generated wholly out of state by Colorado-approved renewable sources. C.R.S. § 40-2-124(1)(c).

28. The Colorado Public Utilities Commission has admitted that "[a] state RES creates demand for" renewable energy technology and that the RES has "provided many … economic benefits to" Colorado, stating that the RES "served to jump-start Colorado's renewable energy

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[19] *See*, U.S. Department of Energy, "Federal Renewable Energy Requirement Guidance Under EPACT 2005 and Executive Order 13423" section 2.2.9; *available at* http://www1.eere.energy.gov/femp/pdfs/epact05_fedrenewenergyguid.pdf (*accessed on* 8/13/2013).

[20] *See*, California Energy Commission, "Renewables Portfolio Standard Eligibility," Fifth Edition, Commission Guidebook (May 2012, CEC-300-2012-002-CMF), pp. 13-15 & 19, *available at* http://www.energy.ca.gov/2012publications/CEC-300-2012-002/CEC-300-2012-002-CMF.pdf, (*accessed* 8/13/2013).

[21] *See*, C.R.S. § 40-2-124(1)(d).

[22] *Id.*

industry."[23]

29. Colorado's Governor has admitted that SB 13-252, which expanded the RES in 2013, "aims to … promot[e] economic development," stating that it "will expand economic opportunities across Colorado through the development of" in-state renewable resources and "will create jobs in the newly eligible waste-to-energy and coal mine methane industries…."[24]

30. Colorado's Governor has also admitted that "promot[ing] economic development in Colorado" to "create jobs" and "[e]ncourag[ing] Colorado-based … solutions that include … renewable energy sources" are priorities of Colorado's energy policy.[25]

31. The Colorado House Sponsor of SB 13-252 stated that this expansion of the RES will "reduce [Colorado's] … dependence on fossil fuels" and will "create jobs across Colorado…."[26]

32. Colorado State Senator Gail Schwartz stated that "rural Colorado offers tremendous potential for increased renewable energy production and new jobs as a result of SB 252."[27]

33. Between 2004 (the start of the RES) and 2012, total annual Colorado generation increased by 11.9 percent, from 48,059 to 53,774 GWh. Over the same time period, coal-fired power generation dropped by 10.17 percent of total Colorado power generation while wind-

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[23] Testimony of Ronald Binz Before the U.S. House of Representatives, Subcommittee on Energy and Environment (Feb. 26, 2009) *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Binz-EE-Renewable-Energy-2009-2-26.pdf (*accessed on* 8/20/2013).

[24] Governor John W. Hickenlooper, Executive Order B 2013-004, at 2 (June 5, 2013) *available at* http://tinyurl.com/n3bq4ne (*accessed on* 8/20/2013).

[25] *Id*. at 1.

[26] Colorado House Democrats, Press Release, "Creating Jobs: Expanding Colorado's Energy Portfolio (Apr. 24, 2013), *available at* http://cohousedems.com/creating-jobs-expanding-colorados-energy-portfolio/ (last visited Aug. 15, 2013).

[27] Colorado State Senate Majority Office, "Renewable Energy Bill to Benefit Economy, Employment, and Environment" (6/5/2013), *see* http://tinyurl.com/lqg8vr7 (*accessed* 8/15/2013).

generated power rose by 10.78 percent and the percentage shares of other power sources were virtually unchanged; this constitutes a near-exact replacement of coal by wind power and a shrinkage of the Colorado portion of the interstate market for coal that is near-perfectly associated with the mandated increase in renewable energy in Colorado.[28]

34. Since the RES was enacted in 2004, Alpha Natural Resources' coal sales in Colorado have been reduced by 22%.[29]

35. Wholesale electricity sold into Colorado either must meet the Colorado RES quota or be linked with sufficient RECs from other sources as needed to achieve the Colorado RES in order for retail sales to comply with the RES. 4 C.C.R 723-3-3654.

36. Xcel sold electricity generated outside Colorado to Intermountain Rural Electric Association ("IREA") that was bundled with associated RECs.[30]

37. C.R.S. § 40-2-124(1)(a)(VIII) defines retail distributed generation as "a renewable energy resource that is located on the site of a customer's facility and is interconnected on the customer's side of the utility meter."

38. 4 CCR 723-3-3652(aa) defines retail distributed generation as "a renewable energy resource that is located on the premises of an end-use electric consumer located within the service territory of a qualified retail utility ("QRU") or an electric utility that is eligible to

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[28] *See*, U.S. EIA "Electricity – detailed State Data" available at http://www.eia.gov/electricity/data/state/generation_monthly.xls (*accessed on* 8/14/3013).
[29] U.S. EIA Form EIA-923 "Fuel Receipts and Costs" http://www.eia.gov/electricity/data/eia923/ (*accessed on* 8/20/2013).
[30] Letters from Xcel to IREA "2009 REC Transfers for Full Requirements Purchases and Calculation of . . . REC Rider": 4/30/2009, p.2 (Plaintiffs' Production: RL 000599-600); 4/30/2010, p. 2 (Plaintiffs' Production RL 000612-613); 4/29/2011, p. 2 (Plaintiffs' Production: RL 000624-625); 5/4/2012, p. 2 (Plaintiffs' Production: RL 000636-637 [letter] & RL 000638 [REC source Foote Creek III, WY]; 5/1/2013, p. 2 (Plaintiffs' Production: RL 000648-650).

become a QRU pursuant to C.R.S. § 40-2-124(5)(b), and is interconnected on the end-use electric consumer's side of the utility meter.

39. All retail distributed generation that is used to comply with RES for the years 2011 through 2020 is generated only within Colorado.[31]

40. At least one-half of the RES's distributed generation requirement must be "derived from retail distributed generation." C.R.S. § 40-2-124(1)(c)(II)(A).

41. For the years 2011 through 2020, distributed generation derived from retail distributed generation must equal one-half, and growing to one and one-half percent of retail electricity sales. C.R.S. § 40-2-124(1)(c)(I) & (II)(A) *and* 4 CCR 723-3-3655 (a) & (b).

42. The intent of the renewable energy standard's distributed generation requirement is to promote in-state economic development by increasing RES-mandated in-state renewable energy generation by creating demand for distributed generation, a type of renewable-energy generation that necessarily occurs in Colorado.[32]

43. The RES rules, codified at 4 CCR 723-3-3650 *et seq.*, are intended to apply to "all jurisdictional [Colorado] electric utilities," including investor owned utilities, some municipally owned electric utilities (those that are qualifying retail utilities) and some cooperative generation and transmission associations. 4 CCR 723-3-3000(a), (b) & (c).

44. For purposes of stimulating rural economic development and for projects up to thirty

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[31] Governor's Energy Office, Colorado's 30% Renewable Energy Standard: Policy Design and New Markets (Aug. 2010) at p.5, [hereinafter "2010 Governor's Energy Office Report"] *available at* http://cnee.colostate.edu/graphics/uploads/HB10-1001-Colorados-30-percent-Renewable-Energy-Standard.pdf (*accessed on* 8/15/2013).

[32] Colorado Governor's Energy Office, "Strategic Transmission and Renewables: A Vision of Colorado's Electric Power Sector to the Year 2050," at 3, 14, 61 (December 2010) *available at* http://tinyurl.com/lpsska4 (*accessed on* 8/15/2013).

megawatts of nameplate capacity that have a point of interconnection rated at sixty-nine kilovolts or less, each kilowatt hour of electricity generated from renewable energy resources that interconnects to electric transmission or distribution facilities owned by a cooperative electric association or municipally owned utility may be counted for the life of the project as two kilowatt hours for compliance with the requirements of C.R.S. § 40-2-124(1)(c) by qualifying retail utilities. C.R.S. § 40-2-124(1)(c)(IX).

45. The purpose of in-state compliance-value multipliers is to promote in-state development of renewable energy projects.[33]

46. The Colorado Public Utilities Commission has admitted that "[t]he primary purpose of [C.R.S. § 40-2-124(1)(c)(IX)] was to establish a special RES compliance multiplier" and that "[t]he intent of the multiplier is to stimulate rural economic development through the construction and operation of renewable energy resources up to 30 megawatts in size."[34]

47. Only those renewable-energy projects located in Colorado can meet both statutory requirements to qualify for the compliance-value multiplier: (1) thirty megawatts of nameplate capacity or less and a point of interconnection rated at sixty-nine kilovolts or less; and (2) interconnection to electric transmission or distribution facilities owned by a Colorado cooperative electric association or municipally owned utility *See* C.R.S. § 40-2-124(1)(c)(IX).

STANDARD OF REVIEW

The Court will review this case under the familiar standards described in *White*, *Anderson*

[33] 2010 Governor's Energy Office Report at 5.
[34] Doug Dean, Director, Colorado Public Utilities Commission, Report in Accordance with C.R.S. § 40-2-124(1)(c)(IX), Established in HB 10-1418, at 1 (Dec. 31, 2011)) *available at* http://tinyurl.com/kko3j7b (*accessed on* 8/15/2013).

and *Celotex*.[35]

ARGUMENT

Daniel A. Farber, Sho Sato Professor of Law and Co-Director of the Center for Law, Energy & the Environment, UC Berkeley School of Law, correctly describes this case as placing the Colorado PUC and its RES statute between a "Between a Rock and a Hard Place."[36] If the RES applies only to in-state electricity generation, it creates (i) an economic island, (ii) preferences for in-state generation, and (iii) a patent facial violation of the dormant Commerce Clause. If, on the other hand, the RES is read to include out-of-state renewable energy, the RES (i) favors some out-of-state electricity sources (renewable energy) over others (coal, natural gas,

[35] The purpose of a summary judgment motion is to assess whether trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Fed. R. Civ. P. 56 (a) provides that "[t]he [C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir.1994). Summary judgment is appropriate when no "rational trier of fact" could find for the nonmovant based on the showing made in the motion and response. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The movant bears the initial burden of showing an absence of evidence to support the nonmovant's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Then, "the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc*., 36 F.3d at 1518 (citation omitted). The nonmovant may not rest solely on the allegations in the pleadings, but must designate "specific facts showing that there is a genuine issue for trial." *1-800 Contacts, Inc. v. Lens.Com, Inc.*, 2013 U.S. App. LEXIS 14368, *26 (10th Cir. 2013) (citation omitted); *accord Celotex Corp.*, 477 U.S. at 324. The factual record must be viewed in the light most favorable to the nonmovant. *Concrete Works, Inc.*, 36 F.3d at 1517. But evidence that is merely colorable or not significantly probative is inadequate to withstand a summary judgment motion, *Anderson*, 477 U.S. at 249; *Redmon v. United States*, 934 F.2d 1151, 1155 (10th Cir. 1991), as are immaterial factual disputes. *Palermo v. First Nat'l Bank & Trust Co.*, 894 F.2d at 366-67; *see Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001) (fact only "material" if "essential" to disposition of claim).

[36] Farber, D. "Regulators Between a Rock and a Hard Place: The Extraterritorial Dilemma", Legal Planet – The Environmental Law and Policy Blog, BerkeleyLaw & UCLA Law, June 24, 2013, *available at*, http://legalplanet.wordpress.com/2013/06/24/regulators-between-a-rock-and-a-hard-place-the-extraterritorial-dilemma/ (*accessed on* 8/15/2013).

and nuclear); and (ii) projects one state's laws onto out-of-state commerce and effectively regulates out-of-state production practices entirely unrelated to the physical attributes of the product (electricity) that is being imported into Colorado.[37] All are disallowed.

I. The dormant Commerce Clause prohibits preferences/extraterritorial regulation.

The central premise of dormant Commerce Clause law is that the centralization of commercial regulatory authority in Congress implies judicially enforceable restraints on states' regulation of interstate commerce.[38] "[T]he purpose of the commerce clause was … to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign."[39] This free-trade intent remains the foundation of dormant Commerce Clause law.[40]

The Supreme Court has structured dormant Commerce Clause analysis into two tiers:

> "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [the Court has] generally **struck down the statute without further inquiry**."[41] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the Court has] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578-79, (1986) (*emphasis added*). In this Motion we argue only first-tier violations, to which the Court applies

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[37] As Defendants necessarily admit, all physical electricity is identical regardless of how or where it is produced. *See* Defs' Ans. ¶ 46.

[38] Brannon P. Denning, Reconstructing the Dormant Commerce Clause Doctrine, 50 WM. & MARY L. REV. 417 (2008), http://scholarship.law.wm.edu/wmlr/vol50/iss2/3 (citation omitted).

[39] *DiSanto v. Pennsylvania*, 273 U.S. 34, 43-44 (1927).

[40] *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) ("[T]he Commerce Clause … directly limits the power of the States to discriminate against interstate commerce.); *see Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529, (1959) ("[S]tate regulations that run afoul of the policy of free trade reflected in the Commerce Clause must bow."); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985), *rev.* on other grounds; *see Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1184 (D. Colo. 2001).

[41] *Citing to Granholm v. Heald*, 544 U.S. 460, 487 (2005).

strict scrutiny. *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). There is no *de minimis* defense to first-tier violations: the volume of commerce affected by a discriminatory or extraterritorial state statute is irrelevant. *Wyoming v. Oklahoma*, 502 U.S. 437, 455-56 (1992); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 581 (1997); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307 (10th Cir. 2008).

The first kind of first-tier violations we argue in this Motion turns on "whether the challenged law ... **discriminates** against interstate commerce," *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1039-1040 (10th Cir. 2009) (*emphasis added*), in one of three ways: (a) **facially**, (b) **purposefully**, or (c) **in practical effect**.[42] *See Wyoming v. Oklahoma*, 502 U.S. at 454-55 (emphasis added). Discriminatory laws "mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). A statute "may be neutral in its terms and still discriminate against interstate commerce." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-52 (1977).

A state cannot statutorily reserve a portion of an in-state market for in-state producers. *Wyoming v. Oklahoma*, 502 U.S. at 455-57 (requiring in-state utilities to generate electricity using at least 10% in-state coal violates dormant Commerce Clause). The Supreme Court has held that in-state quotas are virtually per se invalid under the dormant Commerce Clause, regardless of the percentage of the in-state market set aside for in-state producers.[43] *Id.* This

[42] "'[D]iscrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citations omitted).

[43] And, note: "[O]nce a state law is shown to discriminate against interstate commerce either on its face or in practical effect, the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available

presents an "insurmountable constitutional objection," (*Ill. Comm. Comms. v. FERC*, 2013 U.S. App. LEXIS 11560, *39 (7th Cir. 2013)), to the RES, because a state "cannot, without violating the commerce clause … , discriminate against out-of-state … energy," *see id.* at *38-39.

The second form of first-tier violation we argue in this Motion is extraterritorial regulation. It is fundamental to our system of federalism that "[n]o state can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881). "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." *Brown-Forman Distillers* 476 U.S. at 582. A state "may not project its legislation into other states." *Id*. Such extraterritorial regulation categorically violates the dormant Commerce Clause.[44] *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (invalid per se if the practical effect is extraterritorial); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003) ("require[ing] people or businesses to conduct their out-of-state commerce in a certain way" is "per se invalid"). Strict scrutiny applies to any attempt to "control conduct beyond the boundary of the state," *Healy*, 491 U.S. at 336-37, "whether or not the commerce has effects within the State," *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982). There is no defense to an extraterritorial dormant Commerce Clause violation.[45] The offending statute is simply struck. To the extent that the RES regulates extraterritorially, it is "invalid per se." *Quik Payday, Inc.*, 549 F.3d at 1307.

These, then, are the rock and the hard place—discrimination in favor of in-state economic

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nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citations and internal quotation marks omitted).

[44] State statutes that exceed a state's "regulatory jurisdiction," even if nondiscriminatory, are subject to strict scrutiny and struck without further inquiry. *See Healy*, 491 U.S. at 336.

[45] *See American Beverage Assoc. v. Rick Snyder*, 700 F.3d 796, 810 (6th Cir. 2013).

interests or extraterritorial regulation. The Colorado RES, and some of its ancillary provisions, inevitably do one or the other—but not neither.

II. The retail distributed generation mandate discriminates against interstate commerce through an unconstitutional in-state preference.

The RES establishes a retail 'distributed generation' (hereinafter "DG") quota, requiring utilities to acquire retail DG equal to a specified percentage of retail electricity sales.[46] By definition, retail DG sources must be located in Colorado. C.R.S. § 40-2-124(1)(a)(VIII).[47] The purpose of this requirement is to promote in-state economic development.[48] As a result, out-of-state electricity generation sources may not compete for the portion of the Colorado electricity market set aside for in-state DG. This set-aside facially violates the dormant Commerce Clause.

No facts support the argument that the retail DG requirement serves a legitimate local purpose that could not be served as well by available nondiscriminatory means, such as voluntary programs or subsidies. The Colorado legislature and multiple state officials have expressly stated that the retail DG quota's purpose is to promote in-state economic development. But this is never a legitimate local purpose – indeed, it is expressly abjured.[49] *Brown-Forman Distillers Corp*, 476 U.S. at 578-80. Defendants thus cannot meet their heavy burden of adducing

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[46] C.R.S. § 40-2-124(1)(c)(I) & (II)(A); 4 CCR 723-3-3655(a) & (b).

[47] *And see* 2010 Colorado Governor's Energy Office Report at 5 ("[r]etail DG, by definition, is sited in-state since the systems are located behind a Colorado customer's meter.").

[48] Material Facts at ¶¶ 2, 28-32.

[49] *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-223 & n. 38 (5th Cir. 2013). Nor does "the mere incantation of a purpose to promote the public health or safety … insulate a state law from Commerce Clause attack." *Blue Circle Cement v. Board of County Comm'rs*, 27 F.3d 1499, 1512 (10th Cir. 1994); "[A] State cannot avoid the operation of [the Commerce Clause] by simply invoking the convenient apologetics of the police power." *Dep't of Revenue v. Davis*, 553 U.S. 328, 365-366 (2008) (citing *Kansas City Southern R. Co. v. Kaw Valley Drainage Dist.*, 233 U.S. 75, 79 (1914) (Holmes, J.)).

"concrete record evidence" showing that "nondiscriminatory alternatives will prove unworkable." *Heald*, 544 U.S. at 493; *see also Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

III. The wholesale distributed generation mandate creates an unconstitutional in-state preference or establishes an unconstitutional extraterritorial mandate.

Identical to the "retail" DG mandate, the RES requires an equal amount of electricity to be generated by "wholesale" DG.[50] After filing of this litigation, the Colorado legislature struck from the definition of wholesale DG energy the express requirement that it be generated "in Colorado." This change places the wholesale mandate firmly between a rock and a hard place.

4 CCR 723-3-3650(a) restricts application of the RES provisions to "all investor owned jurisdictional electric utilities in the state of Colorado that are subject to the Commission's regulatory authority." These provisions include 4 CCR 723-3-3655(a) & (b), which mandate generation of wholesale DG. If Colorado restricts the wholesale mandate to "jurisdictional" utilities, then the in-state preference analysis of the preceding section applies and the wholesale DG requirement must be struck.[51] Colorado may replace it with a voluntary subsidy program.

If by its recent amendment to the statute, however, Colorado intended to allow use of out-of-state wholesale DG to count against its RES quotas, then it runs afoul of the bar against extraterritorial regulation.[52] This is because REC contracts of any size, and renewable energy supply contracts with renewable DG, must be reviewed and approved by the Colorado PUC (4

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[50] C.R.S. § 40-2-124(1)(c)(I) & (II)(A); 4 CCR 723-3-3655(a) & (b).

[51] The wholesale DG mandate suffers from the identical lack of a legitimate local purpose as the retail DG mandate for the same reasons.

[52] *Healy v. Beer Inst.*, 491 U.S. 324, 335-337, 337 n.14 (1989) ("[N]o State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another"; and a state law "that has the " '**practical effect' of regulating commerce** occurring wholly outside that State's borders is invalid under the Commerce Clause." (*emphasis added*)).

CCR 723-3-3656(e)) and under Colorado law are restricted to 30 megawatts or less (4 CCR 723-3-3652(ff) & C.R.S. § 40-2-124(1)(a)(IX)). Both the rules and the statute limit a wholesale DG source operating outside of Colorado from participating in the renewable electricity and credit markets unless it enters into a contract approved by the Colorado PUC and meets Colorado definitions of acceptable distributed energy, thus engaging in extraterritorial regulation.

In addition, regardless as to whether wholesale DG is limited to Colorado generation or not, the wholesale DG mandate does not allow out-of-state renewable and non-renewable electricity generation sources that do not qualify under the Colorado RES definition as DG to compete for that portion of the Colorado electricity market set aside for DG. This is not allowed.

As the intent, and the practical effect, of the RES's DG requirement is to promote in-state economic development by increasing RES-mandated in-state renewable energy generation, the DG requirements should be struck. As the DG mandates are unconstitutional, the Court should grant Plaintiffs the relief sought under the Third and Fourth Claims for Relief.

IV. The coop and municipal DG multiplier creates an unconstitutional in-state preference or establishes an unconstitutional extraterritorial mandate.

Under C.R.S. § 40-2-124(1)(c)(IX), the Colorado RES establishes another form of unconstitutional preference. This provision doubles the value of RECs for projects up to thirty megawatts of nameplate capacity that have a point of interconnection rated at sixty-nine kilovolts or less and that interconnects to electric transmission or distribution facilities owned by a cooperative electric association or municipally owned utility. This preference is to promote in-state economic development by "stimulating rural economic development."[53] The multiplier

[53] C.R.S. § 40-2-124(1)(c)(IX)., *and see* Doug Dean, Director, Colorado Public Utilities

benefit applies only to "projects statewide that report having achieved commercial operations to the commission." *Id.* And the entity that owns or develops a project must notify the Colorado PUC under a strict schedule. *Id*. If this section of the RES applies only to in-state entities, it is an unconstitutional in-state preference under the rule of *Brown-Forman*, 476 U.S. at 580. Based on the face of the statute, Colorado has done precisely that. An analysis of whether the multiplier program serves a legitimate local purpose that could not be served as well by available nondiscriminatory means is identical to that discussed in the preceding sections addressing the retail and wholesale DG mandates.[54]

If, despite the obvious targeting of Colorado cooperatives and municipalities, the Court finds that out-of-state rural projects also may receive the multiplier benefit, then the RES projects itself on wholly out-of-state entities, requiring them to meet Colorado's qualifying criteria and to report to the Colorado PUC—an unconstitutional extraterritorial mandate.

For these reasons, the Court should grant Plaintiffs the relief sought under the Fifth and Sixth Claims for Relief.

V. The Colorado renewable energy standards create an unconstitutional in-state preference or establish an unconstitutional extraterritorial mandate.

We now come to the central functional mandate of the Colorado RES—the electric resource standards of C.R.S. § 40-2-124(1)(c)—the quotas. These standards require retail utilities to acquire specific levels of renewable energy from wholesale electric suppliers, or an

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Commission, Report in Accordance with C.R.S. §40-2-124(1)(c)(IX), Established in HB 10-1418, at 1 (Dec. 31, 2011)) *available at* http://cospl.coalliance.org/fedora/repository/co:12130 (*accessed on* 8/15/2013); *see* 2010 Governor's Energy Office Report at 5.

[54] A voluntary state subsidy program for coops would is an alternative that would serve the statutory purposes in a non-discriminatory manner.

equivalent amount of either RECs, or documented and verified energy savings through energy efficiency and conservation programs, or a combination of both.

These provisions have the practical effect of either reserving a portion of the Colorado electricity market for in-state renewable energy generation, *see Wyoming v. Oklahoma*, 502 U.S. at 455-57, or projecting Colorado's regulations extraterritorially on wholly out-of-state renewable and non-renewable energy generation and on the interstate market for hydrocarbon fuels used in electrical generation, *see Healy,* 491 at 335-37. If the Colorado RES applies exclusively to in-state renewable generation, it creates an unconstitutional in-state preference and must be struck. But aside from the above discussed exceptions, the RES' practical effect has been to allow utilities to use out-of-state renewable generation to meet the Colorado renewable quotas. Material Facts at ¶ 14. We thus examine the extraterritorial projection of Colorado law on out-of-state electricity generation and its impact on interstate hydrocarbon commerce.

A comparison with the facts of *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), demonstrates how the Colorado RES violates the dormant Commerce Clause's categorical proscription against extraterritorial regulation. *Baldwin* involved a state licensing statute requiring milk dealers to pay a minimum price for milk purchased out of state. *Id.* at 521.The state argued that regulating the price paid for out-of-state milk was necessary because farmers who are underpaid will be tempted to save the expense of sanitary precautions. *See id.* at 523-24. For that reason, according to the state, "exclusion of milk paid for in Vermont below the New York minimum will tend … to impose a higher standard of quality and thereby promote health." *Id.* at 524. The Court rejected this argument in toto, reasoning that, while a state may regulate products that are imported into its jurisdiction, it cannot statutorily pressure out-of-state

producers to adopt ***its preferred standards and production practices.*** *See id.* (*emphasis added*).

New York's license requirement in *Baldwin* is indistinguishable from Colorado's RES. Whether the purpose of the Colorado RES is economic development, increased diversity in electricity generation, environmental quality, or prevention of climate change, as *Baldwin* explains, "the legislature of Vermont [substitute Wyoming or California or Utah or Canada or Mexico] and not that of New York [substitute Colorado] must supply the fitting remedy" within their states. *Id*. at 523-524. Three examples of out-of-state renewables generation demonstrate the extraterritorial nature of the Colorado RES' projection into other states that produce electricity the Defendants admit is identical to any form of renewable-generated electricity, regardless of its origin. Defs' Ans. ¶ 46.

Colorado's RES defines what methane may be considered renewable energy based upon what portion of methane captured from coal mining operations is used to generate electricity. The statute only allows that methane "escaping to the atmosphere" and in the case of active mines, only that vented in the normal course of mine operations that is naturally escaping to the atmosphere, to be considered "renewable." C.R.S. § 40-2-124(1)(a)(II). The only state within the Western Interconnect that also defines coal mine methane as a renewable energy fuel source is Utah. *See* Material Facts at ¶ 21. In Utah, their statute defines a renewable energy source as a generation facility that derives its energy from, among other things, "waste gas and waste heat capture or recovery whether or not it is renewable, including methane gas from an abandoned coal mine; or a coal degassing operation associated with a state-approved mine permit. Utah Code 54-17-601(10)(a)(vi). In Utah, degassing methane counts, in Colorado it does not. In order to sell RECs generated from Utah coal mine methane, the Utah electricity generator would need

to obtain Colorado PUC review and approval of their generation and in so doing go the extra step of distinguishing which coal mine methane generation came from naturally escaping methane, versus that portion rising from degassing operations. Other nearby states whose electricity generation is connected to the grid either have no RES (*e.g.,* Wyoming) or do not define coal mine methane as a renewable generation fuel (*e.g.,* California). Coal mine methane RECs generated from within those states would only be regulated under Colorado laws. With regard to coal mine methane, then, Colorado improperly projects its rules onto other states.

Hydropower generation from a facility with a nameplate capacity of greater than 30 megawatts qualifies for RECs for the federal government and for California, but cannot be used to meet Colorado RES quotas. C.R.S. § 40-2-124(1)(d). And, where a Colorado cooperative received federal non-conforming hydropower RECs as part of a bundled energy contract with PSCo, the Colorado RES does not allow the coop to resell them to utilities in Colorado. *Id*. Further, RECs generated from sources that will never be available to Colorado generation sources, such as ocean thermal and ocean wave generation (California) are barred from use to meet the Colorado RES quotas because Colorado does not include those sources within its definition of renewable energy. C.R.S. § 40-2-124(1)(a) & (d).

Electricity not paired with sufficient Colorado-approved RECs is barred from competing in the retail market reserved exclusively for Colorado-approved energy. Defendants admit that electricity generated wholly outside of Colorado by RES-approved renewable energy sources and "imported" into Colorado is physically identical to electricity generated wholly outside of Colorado by nonrenewable sources (e.g., coal, nuclear, natural gas). Defs' Ans. ¶ 46. Thus, the RES is not establishing standards for the physical electricity imported into and used in Colorado

but rather is imposing ***its preferred standards and production practices*** for electricity generation produced entirely outside of Colorado. Therefore, to the extent that out-of-state electricity generation is used to comply with the RES, the RES is necessarily regulating wholly out-of-state *production* practices.

This extraterritorial regulation is impermissible. "States and localities may not attach restrictions to … imports in order to control commerce in other States." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) (*citation omitted*). And states may not "condition importation upon proof of" ***out-of-state production practices***. *Baldwin*, 294 U.S. at 524; *see Healy*, 491 U.S. at 341-42 (price regulations "geared to prices in other states" per se invalid under the dormant Commerce Clause); *see also Brown-Forman*, 476 U.S. at 575, 582-84. The RES has precisely this prohibited extraterritorial effect. Colorado's regulation of wholly out-of-state electricity generation practices is analytically indistinguishable from a state statute requiring proof that factory workers who produced a consumer product wholly out of state were paid a certain wage by their out-of-state employer, *cf. Baldwin*, 294 U.S. at 524 (statute "condition[ing] importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business," would violate dormant Commerce Clause), and is no less unconstitutional, *see, e.g.*, *Rocky Mountain Farmers Union v. Goldstein*, 843 F. Supp. 2d 1071, 1090-93 (E.D. Cal. 2011) (statute penalizing wholly out-of-state fuel *production* practices to incentivize California-favored production practices violates dormant Commerce Clause).

Under the Colorado RES, the renewable energy mandates will grow to 30 percent of the electricity sold into Colorado. This has the practical effect of projecting Colorado's RES onto every megawatt of non-renewable generation sources in Wyoming, Montana, Idaho,

Washington, Oregon, California, Nevada, Utah, New Mexico, Arizona; British Columbia and Alberta (Canada); and, Baja California (Mexico). "No state has the authority to tell other polities what laws they much enact or how affairs must be conducted outside its borders," regardless of whether a state may view its own standards as "environmentally sound." *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (state cannot condition landfill use on adoption of Wisconsin's preferred recycling standards); *see also BMW v. Gore*, 517 U.S. 559, 571 (1996) (state cannot "impose its own policy choice on neighboring States").

The RES was specifically intended to regulate out-of-state production practices unrelated to the physical properties of the commodity imported into Colorado (electricity) and has the practical effect of controlling wholly out-of-state conduct. The dormant Commerce Clause categorically prohibits states from burdening interstate commerce where, as here, the "practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy* 491 U.S. at 336 (citation omitted). "Control" may, for example, take the form of influencing private conduct, *see, e.g., Baldwin,* 294 U.S. at 521, 524, or of pressing other jurisdictions to adopt a state's preferred policies, *see, e.g., Nat'l Solid Wastes Mgmt. Ass'n*, 165 F.3d at 1154. State legislation that effectively "controls" wholly out-of-state conduct "exceeds the inherent limits of the enacting State's authority and is invalid…."[55] *Healy*, 491 U.S. at 336. This bright-line constitutional limit prohibits a state from using economic carrots and sticks to impose its vision of enlightened public policy on other states. This is exactly what the RES has accomplished.

In each of the above examples, Colorado projects its RES requirements onto entities

[55] This is evaluated "by considering the consequences of the statute itself … [and] how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id*.

wholly operating in other states and even other nations, a clear unconstitutional extraterritorial projection of Colorado law. Canada and Mexico are part of the Western Interconnection. And Colorado's projection of its regulations onto those nations is also sufficient to strike the entire RES, because it is not possible to distinguish foreign electricity from domestic electricity. *Cf. Baldwin*, 294 U.S. at 521-522 (state cannot impose duties and imposts on foreign commerce).

Finally, the practical effect of the Colorado RES is a contraction of the interstate market for coal used to power generating utilities. Absent the RES, the coal-fired generation of electricity within Colorado would not have dropped by the exact amount that Colorado-approved renewable generation grew.[56] The inevitable effect of this trade-off is a limitation in the size of the market for coal sold into Colorado. This is not an incidental effect of the rule. It was intended.[57] It is directly observable in the reduction of Alpha Natural Resources coal sales from its Wyoming mines into Colorado. Thus, the practical effect of the RES is the forbidden extraterritorial regulation of the sale of coal into Colorado.

The Colorado RES is thus unconstitutional, and the Court should grant Plaintiffs the relief sought under the First and Second Claims for Relief in their Second Amended Complaint.

CONCLUSION

For the foregoing reasons, the Court should GRANT Plaintiffs' Early Motion for Partial

[56] *See* Material Facts at ¶ 33.

[57] Colorado Senate President John Morse, Press Release, "Legislation introduced to expand access to clean renewable energy to more Coloradans" (April 3, 2013) (*endorsing the statement of* Pete Maysmith, Executive Director of Conservation Colorado "[The RES, as modified by the recent legislation is] expanding the generation of renewable energy, strongly preferring it over developing other fossil fuel sources") *available at* http://coloradosenate.org/home/press/legislation-introduced-to-expand-access-to-clean-renewable-energy-to-more-coloradans (*accessed* 8/16/2013).

Summary Judgment in its entirety.

Respectfully submitted August 30, 2013

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