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STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the matter of:

Amendment for the **PALEN SOLAR
ELECTRIC GENERATING SYSTEM**

DOCKET NO. 09-ACF-7C

REBUTTAL BRIEF
OF THE COLORADO RIVER INDIAN TRIBES

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Introduction

Throughout this proceeding, the Colorado River Indian Tribes (CRIT or the Tribes) identified numerous flaws and inadequacies in the Final Staff Assessment and evidentiary record prepared for the proposed amendment to the Palen Solar Electric Generating System (Palen or Project). Neither the petitioner (BrightSource Energy) nor CEC staff addressed the majority of these issues in their opening briefs. *See* Palen Solar Holdings, LCC's Opening Brief (BrightSource Brief) at 4 ("Disputes with the Interveners will be addressed in PSH's Rebuttal Brief after review of the issues the Interveners raise in their Opening Briefs"); Energy Commission Staff Opening Brief (CEC Brief) at 25-26 (addressing only CRIT's proposed modifications to the conditions of certification, rather than all concerns). Instead, to the extent cultural resource issues are discussed at all, BrightSource Energy and CEC Staff focused their discussion of cultural and visual resource impacts primarily on the adequacy and necessity of a few conditions of certification. While the fundamental flaws identified in CRIT's opening brief remain, this rebuttal brief focuses on the handful of discrete issues raised in the opening briefs of both CEC Staff and BrightSource.

Argument

I. CEC Staff Modifications to Conditions of Certification for Cultural Resources Remain Inadequate.

In its Opening Brief, CEC Staff make some modest efforts to address certain concerns raised by CRIT and other parties. However, as discussed further below, the Conditions of Certification are still inadequate to meet the requirement that the Commission address all feasible mitigation measures that substantially lessen the Project's significant impacts. Pub. Res. Code § 21002; 20 Cal. Code Regs. § 1755.

A. CEC Staff's Efforts to Cap CUL-1 Remain Unclear.

In response to BrightSource's concern about uncapped financial obligations, CEC Staff prepared a table designating the "amount of funding that would be required to be paid," including a breakdown between the activities included in CUL-1. CEC Brief at 5-6. While CRIT does not object to this effort, the table raises significant questions:

- It is not clear how the proposed table is incorporated into CUL-1. Will BrightSource's obligation be capped at \$2,965,430, or do the numbers simply provide "anticipated costs"?
- How did CEC Staff arrive at these estimates? According to BrightSource, the surveying alone could cost millions of dollars. BrightSource Brief at 24. If a cap is imposed, it must adequately ensure that all mitigation can be completed within the cap.
- CEC Staff does not explain what "Tribal Integration as Percentage of Cost of Study" means, or how the money will be spent.
- Funding for initiatives that "directly albeit partially, compensate Native American communities" does not appear in the table. As this portion of CUL-1 is most relevant to the harms caused by the Project to area tribes, it must be fully funded.

The “revisions” to CUL-1 also appear to remove the verifications found in the Final Staff Assessment (FSA). FSA at 4.3-182 to 185. As these verification measures explain in detail how the programs will be carried out—including the convening of a steering committee to select Native American initiatives—they should not be removed.

B. CEC Staff’s Proposed Modifications to CUL-10 Should Apply to All Prehistoric Resources.

CRIT appreciates both BrightSource’s and CEC Staff’s willingness to modify CUL-10 to ensure avoidance of cultural resources where feasible. Exhibit 1081 (TN# 200969), at 7-8; CEC Brief at 10-11. As CRIT has reiterated, avoidance of prehistoric resources is the only mitigation measure that addresses the specific cultural harms suffered by its members when buried cultural resources are unearthed and damaged in these large-scale renewable projects. For that reason, CRIT strongly urges the Commission to require avoidance of cultural resources if feasible and to set forth objective criteria for feasibility (*see* Exhibit 8020 (TN# 200998)). However, the revised condition proposed by BrightSource, which requires the company to avoid historical resources if the company determines that such avoidance is feasible, is certainly a step in the right direction. Exhibit 1081 (TN# 200969), at 7-8.

CEC Staff’s proposed modification cuts back on this proposal by removing unanticipated discoveries from the condition. CEC Brief at 10-11. If the Commission adopts such a condition, CRIT urges the Commission to make the condition applicable to both known *and unanticipated* resources. As the mitigation measure is worded, BrightSource is given significant leeway to make a determination of the feasibility of avoidance. No prejudice will result if this specific mitigation measure applies to all prehistoric resources because BrightSource will have the discretion to say whether avoidance is feasible for both known and unanticipated resources. CEC Brief at 11. (“In the event that the project owner believes that any historical resource . . . could feasibly be avoided . . .”).

Second, CRIT appreciates CEC Staff’s efforts to craft procedural mechanisms regarding avoidance. However, CRIT is concerned that these mechanisms may unnecessarily deter BrightSource from avoiding historical resources, as they require development of both a plan and CPM approval. CEC Brief at 11. To the extent this proposed language would serve as a deterrent, CRIT would welcome the opportunity to discuss with CEC Staff and BrightSource mechanisms for accommodating the concerns of all parties.

C. As CEC Staff Agrees with the Intent of CRIT’s Proposed Mitigation Measures and Acknowledges General Feasibility, CEC Staff Must Identify Specific Mitigation Measures.

In this proceeding, CRIT has proposed specific modifications to the conditions of certification proposed for cultural resources. *See* Exhibit 8020 (TN# 200998). In their Opening Brief, CEC Staff acknowledge that these proposed modifications “would provide enhanced abilities for tribal participation in project construction compliance processes”; importantly, CEC Staff also “*concur[] with the intent of CRIT’s request,*” an implicit acknowledgement that the proposed modifications are warranted. CEC Brief at 25 (emphasis added).

Moreover, while CEC Staff has apparent concerns about the specific language CRIT proposed, CEC Staff unequivocally state that the majority¹ of the proposed modifications *can be feasibly incorporated*, “while maintaining the relatively efficient flow” of compliance. *Id.* at 25-26. As the Commission cannot approve the Project where feasible mitigation measures exist that substantially lessen significant impacts of the project but have not be adopted—which CEC Staff now admit are present here—*the Commission must accept CEC Staff’s offer to prepare edits to the conditions of certification*. Pub. Res. Code § 21002; 20 Cal. Code Regs. § 1755. CRIT is willing to work with CEC Staff to modify the proposed edits to best accommodate all parties, and to do so within a timeframe that acknowledges the Commission’s stated goal of making a decision in January. CRIT respectfully urges the Commission to direct staff to engage in these discussions with the Tribes.

II. Impacts to the Pacific to Rio Grande Trails Landscape Are Adequately Supported.

BrightSource claims that as a result of testimony provided in the Blythe Solar Power Project proceeding, in which CEC Staff allegedly stated that the Blythe Solar Power Project did not impact the Pacific to Rio Grande Trails Landscape (PRGTL), CEC Staff cannot support its conclusion that the *Palen* Project will significantly impact the Chuckwalla Valley of the PRGTL. BrightSource Brief at 17. This claim inaccurately characterizes CEC Staff’s Testimony at the Blythe Proceeding.

During the course of the Blythe proceeding, CRIT requested that CEC Staff provide additional information on the \$35/acre fee originally proposed for the Blythe Solar Power Project, the Palen Solar Power Project, and the Genesis Solar Power Project. Blythe Solar Power Project Evidentiary Hearing Transcript (09-AFC-06C, TN# 201348) at 94-95. Given that CEC Staff in the Palen proceeding proposes to modify the \$35/acre fee, CRIT sought clarity on how the Commission could adequately support a finding that the total sum now available between the three projects could fully fund the required activities. *Id.* Mr. Thomas Gates, appearing for CEC Staff, stated that “because we’re not warranted to do any further analysis [of cultural resources at the Blythe Project], [] the previous mitigation for Blythe [must] stand.” *Id.* at 96. Mr. Gates gave no opinion as to the impacts of the Blythe Project on PRGTL, rather, he simply stated his opinion that CEC Staff couldn’t modify the conditions of certification for cultural resources as licensed for the Blythe Project in 2010, as impacts to cultural resources had decreased.

III. BrightSource’s Claim that CUL-1 is “Unsupported” by Tribes is False.

BrightSource also claims that the mitigation measures contained in CUL-1 “is unsupported by the Native American tribes with interest in the region.” BrightSource Brief at 16. This statement is also inaccurate.

¹ CRIT notes that a reduction in efficiency or alteration of a compliance process does not render a mitigation measure infeasible under CEQA (Pub. Res. Code § 21061.1; 14 Cal. Code Regs. § 15364), as claimed by CEC Staff with respect to certain proposed conditions.

As far as CRIT is aware, it is the only tribe to comment on the adequacy of CUL-1. Consequently, it is untrue to state that all Native American tribes with interest in the region object to the measures provided in CUL-1.

It is also untrue to state the CUL-1 is “unsupported” by CRIT. CRIT specifically urged the Commission to conduct the cultural resource analysis required in the surveys and studies before deciding whether to approve the Project, as required by CEQA. *E.g.*, Exhibit 8023 (TN# 200906), at 5. CRIT also requested additional time for the Native American steering committee to make a decision about mitigation activities. *Id.* at 11. Finally, CRIT noted that compensatory mitigation makes the Tribes and CRIT members uncomfortable, as no price can be put on the destruction or degradation of cultural resources. *Id.* None of these statements can be construed, however, to assert that CRIT somehow supports the removal of CUL-1, as BrightSource now urges. While BrightSource’s offer to pay \$70 per acre (BrightSource Brief at 25) will undoubtedly provide additional funding that can be used for further studies or cultural preservation activities, there is no evidence to suggest that this additional amount will be sufficient to accomplish the proposed mitigation measures.

IV. CEC Staff’s Concerns About this Particular Technology Are Warranted.

Finally, CRIT calls attention to two important statements raised in CEC Staff’s Opening Brief. First, CEC Staff states that information on avian mortality from solar flux “has caused Staff to have serious reservations about whether the benefits of the proposed modified project outweigh the significant adverse environmental effects.” CEC Brief at 39. CRIT concurs with this assessment, particularly given the cultural importance of avian species such as redtail hawks and golden eagles. CRIT would also add that the significant adverse *cultural* impacts from the proposed modification—specifically the visual resource impacts on the Chuckwalla Valley—also tip the scales such that the requisite findings cannot be made.

Second, CEC Staff states that “Staff does not believe that this technology is superior to other renewable projects that have fewer significant adverse impacts.” *Id.* While CRIT has seen the cultural destruction that utility scale renewable projects can bring, regardless of the specific technology, CRIT concurs that this particular technology is particularly ill-suited to this cultural landscape. As CEC Staff have identified environmentally superior alternatives, the Commission cannot approve this amendment unless these alternatives are infeasible. CRIT urges the Commission to take a wide view of feasibility. Area tribes, desert plants and animals, and the public should not be saddled with a more harmful project simply because BrightSource made a financial play to bring its technology to market.

Citing the “rule of reason,” CEC Staff takes the view that feasibility of alternative projects, such as one proposed at the Westlands Solar Park, would be “speculative.” CEC Brief at 23. “The work required to obtain site control and complete the required environmental clearances to allow development to proceed would likely render such an alternative infeasible.” *Id.* The straw-man comparison between this Project and an off-site alternative, however is inapt, as it likens the financial burden, and timeliness of starting a new project from scratch at the Westlands Solar Park, to the cost and burden of proceeding with one that has advanced far into the project approval process. No such linkage could ever be “reasonable.”

Nor is it reasonable to suggest that the Chuckwalla Valley warrants less consideration than the location of the Westlands Solar Park, as CEC Staff seems to suggest: “Also, construction and operation of a solar power plant with SPT technology at Westlands Solar Park would be completely inconsistent with the planned intent to develop the area with much lower profile solar PV arrays.” *Id.* The very same issue is under consideration here: BrightSource is asking to amend an approved “low-profile” project design to one that will incorporate the tallest solar structures in the world, if constructed. Speculative, indeed.

Conclusion

For all of the foregoing reasons, and for the reasons provided in CRIT’s Opening Brief, CRIT respectfully requests that the Commission deny the proposed Project amendment. In the event the Commission intends to approve the Project amendment, CRIT respectfully requests that the Commission adopt CRIT’s proposed changes to the Conditions of Certification for cultural resources.

DATED: December 2, 2013

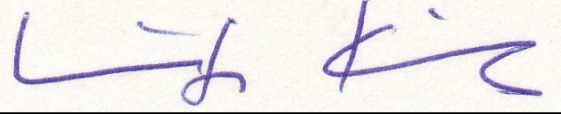
COLORADO RIVER INDIAN TRIBES

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DECLARATION OF SERVICE

I, Sean Mulligan, declare that on December 2, 2013, I served and filed copies of the Rebuttal Brief of Colorado River Indian Tribes, dated December 2, 2013. The most recent Proof of Service List, which I copied from the web page for this project at: <http://www.energy.ca.gov>, is attached to this Declaration.

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/s/ Sean Mulligan_____



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