STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	DOCKET NO. 07-AFC-5
APPLICATION FOR CERTIFICATION FOR THE IVANPAH SOLAR ELECTRIC GENERATING SYSTEM	

REPLY BRIEF OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

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INTRODUCTION

Intervenor Center for Biological Diversity ("CBD") submits this brief to reply to the Staff's Opening Brief and the Applicant's Opening Brief as well as to provide additional briefing on issues raised in the March 22, 2010 hearing.

For the most part, CBD's Opening Brief has already addressed many of the disputed issues raised by the Staff's and the Applicant's opening briefs and CBD will not repeat those arguments here. For example, as to CEQA compliance, both the Staff and the Applicant assume that the environmental review and analysis of impacts to biological resources to date has been adequate to meet the requirements of CEQA and CESA while CBD most emphatically disagrees, as detailed in CBD's Opening Brief. Similarly, Staff and the Applicant assert that the alternatives analysis is adequate, which CBD has shown it is not. Accordingly, CBD has argued that the Commission cannot approve the proposed project nor can it make override findings for significant impacts it has failed to adequately identify and analyze and for which it has failed to adequately consider a range of alternatives that could avoid the significant impacts and failed to adequately consider and adopt minimization and mitigation measures.

Because the environmental review provided to date is inadequate and cannot be relied on by the Commission in approving the proposed project and approval of the proposed project would violate other laws, ordinances, regulations, and statutes, CBD urges the Commission to deny the proposed project application.

REPLY TO STAFF'S OPENING BRIEF AND FSA ADDENDUM

I. FSA Addendum Issues

Impacts to Tortoise and Soils: The FSA Addendum (Exh. 315) does not cure the defects in the FSA. For example, for the desert tortoise the Staff's "analysis" of the so-called mitigated Ivanpah 3 ("MI3") proposal consists simply of reducing the number of acres of "take" in various statements and thereby the needed mitigation in direct proportion to the number of acres that the project footprint would be reduced. The FSA Addendum does not *analyze* the assumed reduction

in impacts from the proposed reduction in acreage at all. (*See* 3/22 Tr. at 65-66 (staff testimony equating less acreage with less fragmentation.) In fact, the MI3 reduces the proposed project in an area of lower quality habitat and does little to reduce significant impacts to desert tortoise and its habitat due to fragmentation. However, as with many impacts to living systems, the analysis of impacts from a small change in the amount of acreage proposed to be impacted, and the resulting fragmentation, require more than a purely a linear calculation. As Dr. Connor pointed out:

> The entire project itself is going to fragment tortoise habitat in the northern Ivanpah Valley. And I think that is one of the principal impacts. As far as the habitat itself is concerned on Ivanpah 3. The area of the project of Ivanpah 3 that would be avoided under the new proposal, in my opinion that's not the best tortoise habitat. There are a couple of issues with it. First of all, as we have heard several times today, this area has, this area is slated for some of the most intense grading of the site. It has these bo[u]lde[r] areas. It's also got this large wash going through the northeastern portion of it. And because of those features I'd be concerned that it's actually of less importance to desert tortoise in this area. Because the desert tortoises there typically prefer the [ba]jada itself.

(3/22 Tr. at 184-85.) Thus, because the areas being excluded are of less value as habitat and the fragmentation would be similar, the Staff's conclusion that the impacts of the MI3 proposal would be less in proportion to the number of acres eliminated is unsupported.

Similarly, the statement in the FSA Addendum that "heavy grading" on the Ivanpah 3 site would be reduced *to* 20 acres is unsupported and staff appears to have simply adopted the assertions made by the applicant. (*Compare* Exh. 315 (FSA Addendum) at 6-1 *to* Exh. 88 at 3-12.) The Staff followed the applicant's lead even though in describing the MI3 proposal, the Applicant went so far as to claim that the reduction would "reducing by 88 percent the area in Ivanpah 3 requiring grading" (Exh. 88 at 1-2), that is *all* grading not just "heavy" grading. This statement is contrary to the evidence in the record that grading could include hundreds of acres on the MI3 site as well as on each of the other two sites. As CBD discussed in our opening brief (CBD Opening Br. at 30-32), there is no definition of "heavy" grading (See 3/22 Tr. 160-161), and the FSA provides no clear statement regarding the actual extent or amount of grading

ultimately proposed to occur on the proposed project site. Nonetheless, he Staff testified that it believed that 20 acres was the *total* amount grading that would be done on the Ivanpah 3 site (3/22 Tr. at 159.) To the contrary, although the complete amount has not been disclosed either to the Staff or the public it is quite clear that there will be far more grading on the Ivanpah 3 site than 20 acres. Discussion of this important issue that significantly affects soils, water quality, and other resources (including air quality and PM_{10}), is unlawfully vague and details are unlawfully deferred until after the decision is made.

GHG Discussion: The FSA Addendum to Air Appendix-1 regarding greenhouse gas emissions (Exh. 315 at 4-23 to 4-27), is both inaccurate and incomplete. As a result it fails to comply with CEQA because it does not provide the public and decision makers with the needed information to fairly review the project.

First, the FSA Addendum to Air Appendix-1 (although only 5 pages long) contained a key inconsistency between the text and the Addendum Greenhouse Gas Table 1. (3/22 Tr. at 153-54.) Staff testified that this was a typographic error and while such errors are generally overlooked, here, where the Commission is rushing the process, CBD believes this error and others are evidence of Staff's lack of adequate time to address these and other issues. The statement in the FSA Addendum should read:

> Based on this updated estimate of GHG emissions, the ISEGS Mitigated Ivanpah 3 project, including stationary sources and onsite and offsite mobile sources, would be permitted, on an annual basis, to emit approximately **[25,359]** metric tonnes of CO2-equivalent (MTCO2E) per year if operated at its maximum permitted level.

(Exh. 315 at 4-24; 3/22 Tr. at 154.) As a result, CBD's arguments in our Opening Brief regarding the significance of these emissions -- which are greater than 25,000 MTCO2E and greater than the significance thresholds set by other agencies --- remain the same. (See CBD Opening Br. at 35-37.)

Second, the information is incomplete. For example, the Staff testified that it is awaiting additional information on the use of the gas boilers and GHG emissions as well as other issues

related to the FDOC revision. (3/22 Tr. at 151, 148-49.). Further, GHGs the FSA Addendum GHG calculations fail to cure the omission of information regarding the full GHG emissions under the FDOC. (See CBD Opening Br. at 35). Just like the FSA, the FSA Addendum only provided information regarding use of the boilers under the CEC's proposed 5% condition and did not analyze emissions or impacts for operating at the permit limit allowed by the Air District in the FDOC of 4 hours per day (for a total of 1460 hours per year) for each of the gas boilers. (Exh. 315 (FSA Addendum) at 4-25, [AQMD, AQ-11 and AQ-22]; Exhibit 307 at 26, 28 (FDOC)[1].) Because the permit conditions for any CEC permit are not yet determined and could still change, the CEQA analysis should have informed the public of the full potential impacts of the project under the air district's FDOC.

In sum, the FSA Addendum considering the applicant's MI3 proposal did not cure the defects in the FSA but rather perpetuated many of the same errors and added new ones. As a result, the Commission cannot rely on these documents to comply with CEQA or other laws.

II. Biological Resources

The Staff asserts that impacts to threatened species and rare plants can be fully mitigated however, as discussed in CBD's Opening Brief, there are significant impacts to biological resources (including but not limited to impacts to the desert tortoise and birds) that have not been adequately identified and analyzed and therefore any conclusion that these impacts can be fully mitigated is premature. Under CEQA, the Commission cannot conclude that the impacts are fully mitigated until it has first identified and analyzed all impacts and looked at ways to avoid such impacts and then provided measures to minimize impacts and mitigate remaining impacts. Under CESA similarly the Commission (to the extent it is can act in the place of DFG, which CBD does not concede) must first identify impacts and avoidance and then fully mitigate those impacts. Here there initial steps have not been accomplished and therefore the Commission cannot lawfully assume what the conclusion of adequate environmental review would be.

[1] As noted above, the Applicant is now seeking a revised FDOC. (*See* 3/22 Tr. at 148-49.)

Moreover, assuming for the sake of argument alone that the identification and analysis of impacts and the alternatives analysis had been adequate, the impacts of the proposed mitigation measures are not analyzed in violation of CEQA. CEQA Guidelines § 15126.4(a)(1)(D) ("If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measures *shall* be discussed . . ." emphasis added); *Save Our Peninsula Comm. v. Monterey Board of Supervisors* (2001) 87 Cal.App.4th 99, 131. Here, the impacts of the proposed mitigation measure requiring construction of a wildlife guzzler were never analyzed although it is undisputed that construction of such a facility will have significant impacts. Similarly, the significant impacts of translocation on tortoises in the translocation areas and other impacts of translocation were not addressed. On this basis as well as others the environmental review is inadequate as a matter of law.

CEQA also requires that mitigation measures provided be fully described and their effectiveness to be addressed and such formulation should not be deferred. (CEQA Guidelines § 15126.4(a)(1)(B).) By deferring evaluation of environmental impacts of the mitigation measures until after project approval, the measures would amount to no more than a *post hoc* rationalization in support of a decision already made-- such procedures are unlawful because they skirt the required procedure for public review and agency scrutiny of potential impacts of the proposed mitigation measures. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307-09 [noting that such practices lead to "the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." Citations omitted].)

Here, both the description and analysis of mitigation measures are lacking particularly for the translocation plan. There is undisputed evidence in the record that translocation will likely not be effective in minimizing impacts to individual desert tortoise and may cause additional impacts to other tortoises. (*See* CBD Opening Br. at pp. 19-21; Exh. 913 at pp. 6-10; Exh. 938 [Rebuttal Testimony of Ileene Anderson at pp. 3-4]; Exh. 942 [Additional Testimony of Ileene Anderson at p. 3 [noting new information on the deaths of translocated tortoises]; Exh. 945 at pp. 14-15 [same].) While CEQA in some instances allows an agency to defer formulation of

mitigation measures (CEQA Guidelines § 15126.4(a)(1)(B)), in such cases performance standards must be clearly set. Here, no clear performance standards have been set to protect the tortoise for the yet to be fully developed translocation plan. In addition, no clear performance standards have been set for other plans to be developed in the future including, for example, the grading plan although grading will have the most significant impact on soils and water quality of any aspect of the proposed project. It is not enough for the Commission to refer generally to best management practices as a mitigation measure, the impacts of the grading should have been disclosed and specific performance standards set that would limit soil impacts and water quality impacts. Deferring development of mitigation measures without clear performance standards violates basic CEQA principles.

III. Alternatives

As CBD's Opening brief discussed, the Commission has to date failed to adequately analyze a reasonable range of alternatives and this omission was not cured by Staff's testimony at the hearings. In addition, by holding an additional evidentiary hearing on March 22 with the narrow purpose of reviewing the applicant's slightly revised alternative and refusing to wait until the BLM issued a Supplemental DEIS which will consider alternatives, the Commission has put itself in the awkward position of not considering all information and alternatives that the land management agency is reviewing. As a result, the Commission may need to hold yet another evidentiary hearing to review the information from the BLM's Supplemental DEIS. Besides being awkward, this process fails to provide the public with a fair opportunity to review and comment on the environmental review for the proposed project as required by CEQA.

Staff's assertion that a reasonable range of alternatives was "included" in the FSA" misses the point, all of those alternatives were *rejected* in the FSA. The Staff's belated attempts to resuscitate its consideration of these alternatives did not cure that defect. Moreover, the vast majority of these alternatives were rejected with little or no analysis but rather based on conclusory statements by staff or the applicant. CEQA requires far more.

As to the I-15 or "Sierra Club" alternative, it appears that the Staff has gone to great lengths to find fault with this proposal. For example, Staff has never clarified why it discounted *impacts to individual tortoises* in evaluating this alternative and focused only on *general comparisons of the habitat quality*. Because the evidence tends to show that this alternative would substantially reduce the number of tortoises that would be displaced, it could significantly avoid significant impacts to the tortoise and is an alternative that should have been fully considered as required under CEQA.

Distributed PV Alternative: Response to Staff

Staff concludes that a distributed generation alternative is not feasible by making three false assumptions. First, that all distributed PV is treated the same as residential distributed PV; second, that the cost of the energy produced by the proposed project will be less than the cost of other renewable energy and should not include the cost of transmission *necessary for* the project; and third, that in order for distributed PV to be an alternative for *this* proposed project it must show that it can replace all large-scale solar development (and other renewable energy development) throughout California. (Staff Opening Br. at 23-24.)

The Staff rejected distributed PV as an option in the FSA and CBD sponsored testimony showing that distributed PV, particularly the "mid" scale PV projects that are being proposed for commercial rooftops and near generating stations, are a reasonable alternative *to this proposed project* in that they could supply 400 MW of renewable energy on a similar time scale and for a similar price. (See Exh. 939 [Opening Testimony of Bill Powers] at pp. 4-5.) The benefits of this alternative include, but are not limited, reducing the need for additional long-distance transmission lines, and avoiding the significant impacts of the proposed project on desert tortoise, birds and rare plants because the distributed alternative would be co-located on lands that have already lost their value as habitat. These avoided impacts are also properly seen as "cost savings" which preserve multiple resources and reduce externalized costs of building the proposed large-scale project in this location but these benefits were not adequately recognized, no less monetized, by the Staff. As a result, a fair comparison was never undertaken.

IV. The Commission Cannot "Override" the Project's Noncompliance with State and Federal LORS

If the Staff were correct, which it is not, that the only significant impacts to project were "visual resources, traffic, and land use" with the latter two being significant cumulative impacts (Staff Opening Br. at 26), then CBD might agree with its weighing of the impacts versus benefits of the project. However, the evidence before the Commission shows that there will be significant impacts to other resources, including most importantly, biological resources. And the evidence further shows that there are likely feasible alternatives that would avoid many of the significant impacts of the project but that the Commission has to date failed to fully consider such alternatives. Thus, because the Commission cannot show that there are no feasible alternatives it cannot lawfully approve the project or make override findings.

REPLY TO APPLICANT'S OPENING BRIEF

The applicant's lengthy opening brief makes number of factual allegations which contradict the facts as established in this proceeding many of which were discussed in CBD's opening brief. Below CBD addresses some of those issues in more detail and provides responses to arguments raised by the applicant particularly regarding the authority of the State of California to protect our native wildlife and plants and other environmental resources.

I. Contested Issues

The applicant wrongly lists many topics as "uncontested" issues that remain contested including the project description, air quality impacts (particularly as to GHG emissions and PM10), impacts to soil and water, and fire protection. CBD contested these issues at hearing and discussed all of these issues in our Opening Brief; we will not repeat those arguments on reply.

II. Alternatives

The applicant's claims regarding the range of alternatives and the weight that should be given the applicant's wish list for the "basic project objectives" are incorrect. The CEQA guidelines not only discuss tailoring alternatives to "feasibly attain most of the project

objectives" but also clearly state that alternatives should be considered "even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." (CEQA Guidelines § 15126.6(a) and (b).)

> An environmentally superior alternative cannot be deemed infeasible absent evidence the additional costs or lost profits are so severe the project would become impractical. (*Citizens of Goleta Valley v. Board of Supervisors, supra*, 197 Cal.App.3d at p. 1181.) Nor can an agency avoid an objective consideration of an alternative simply because, prior to commencing CEQA review, an applicant made substantial investments in the hope of gaining approval for a particular alternative. (*Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 47 Cal.3d at p. 425.)

(*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736.) Further, the project objectives cannot be so narrow as to constrain alternatives analysis and cannot be artificially limited by prior contractual commitments. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736.)

While the applicant would like to be in control of which objectives are considered the "basic" ones, under CEQA it is the lead agency that makes this determination—not the project proponent. Comparing the applicant's list in its opening brief to the FSA shows that the Staff already properly rejected many of the points on the applicant's list including compliance with the provisions of its power sales agreements. (*Compare* Exh. 300 at 2-6 to 2-7 (CEQA Objectives) *to* Exh. 300 at 2-5 to 2-6 (applicant's objectives) *and* Applicant's Opening Br. at 39.)

As CBD has argued, the FSA failed to analyze a meaningful range of alternatives and rejected many reasonable, feasible alternatives from the outset instead including only the action and no action alternatives in the FSA. (See CBD Opening Br. at 46-52.) This defect has not been cured by the FSA Addendum's consideration of the MI3 proposal and the arguments put forward by the applicant do nothing to change these facts.

Distributed PV Alternative: Response to Applicant

The applicant continues to misconstrue the distributed PV alternative and discount its viability. However, as discussed above, CBD has shown that distributed PV is a viable

alternative to *this* project and should have been fully considered in the FSA, but it was not. The applicant's discussion also contains several errors of fact. On page 48, the applicant argues that distributed PV would need to make up the entire amount of all solar in the state in order to find it is a feasible alternative for this project. Beyond being logically wrong, the figures are inflated for central station solar generation. 10,000 MW of in-state central station solar generation is identified in the CPUC Reference Case. This 10,000 MW of central station solar (solar thermal and large-scale PV) is projected by the CPUC to produce 23,565 GWh per year (16,652 plus 6,913= 23,565). (CPUC, 33% RPS Implementation Analysis Preliminary Results - Appendix C, June 2009, p. 87 [Resource Mix – 33% RPS Reference Case, In-State].[2]) These sources are *not* expected to produce 59,000 to 75,000 GWh per year as implied by the applicant in discussing the "renewable resources gap" (59 – 75 TWh/yr). The applicant also overstates the amount of central station solar that would be substituted with distributed PV by approximately a factor of 3. Prioritizing distributed PV or looking at it as an alternative to this proposed project, does not preclude cost-effective central station solar particularly those that are appropriately sited on disturbed or degraded lands served by existing transmission lines.

On page 51, the applicant relies on obsolete pricing data to make case that PV is more costly than the proposed project. However, current state-of-the-art PV cost is the basis for the Sempra Generation statement cited in Mr. Power's expert testimony (sponsored by CBD) that PV costs are comparable to solar thermal. Sempra also stated that power tower technology is not proven commercially (Exh. 939 (Testimony of Bill Powers) at p. 5.) On page 52 of its opening brief, the applicant discusses the current utility renewable compliance strategy which is directed at almost exclusive reliance on remote central station generation. Looking to distributed PV for the solar component of the 33% by 2020 as part of the compliance strategy would simply bring

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[2]Available at http://www.cpuc.ca.gov/NR/rdonlyres/1865C207-FEB5-43CF-99EB-A212B78467F6/0/33PercentRPSImplementationAnalysisInterimReport.pdf This document is also referenced in Exh. 939 (Testimony of Bill Powers) at p.11, fn. 31. The applicant's consultant, Mr. Olsen, was a primary author of the CPUC June 2009 report where this data is provided.

balance to a process that is skewed toward exclusive reliance on remote central station generation.

All solar resources share a reliance on the sun shining to produce power. Many of the issues that the applicant identifies as weaknesses for distributed PV are equally shared by the proposed project itself. (See Applicant's Opening Br. at 52.) However, distributed PV is demonstrably more reliable than a single central station solar plant like the proposed project. For example, a single large cloud could largely idle the entire 370 MW central station solar plant located on a few thousand acres of contiguous property. The same 370 MW at spread over dozens or hundreds of dispersed sites within a county or geographic area would be much less impacted by cloud cover on partly cloudy days. Also, single-point failures of the generator-tie line, steam turbine generator, or the step-up transformer at the proposed plant site could force the entire 370 MW off-line. In contrast, failure at any one of the PV arrays of an equivalent 370 MW of distributed PV would at most reduce output 20 MW, from 370 MW to 350 MW.

The applicant lists several supposed reliability issues with distributed PV that are in fact only issues if too much distributed PV is put on an existing distribution substation without any modifications being made to the substation to accommodate the power inflow. (See Applicant's Opening Br. at 53.) But this is not an insoluble problem issue as was discussed by both Mr. Olson and Mr. Powers. Solutions to assure reliability include: limiting the amount of distributed PV to a level that will not cause any of the listed problems, which as is in the range of 30 percent of peak substation load, or making the necessary modifications to the substation to allow full bi-directional flow as discussed in CBD expert testimony. (Exh. 939 [Testimony of Bill Powers] at p. 5-6.)

The applicant is simply wrong in suggesting (without evidence) that "the vast majority of" distributed PV sites are remote and therefore functionally equivalent to the remote wild lands found at the Ivanpah site. (Applicant's Opening Br. at p. 55.) Again, the applicant conflates the very large-scale PV arrays with the distributed "mid" scale PV and dramatically underestimates large roof PV capacity near existing substations in urban areas by arbitrarily assuming only one-

third of the large roof area available could be used for PV arrays. The amount of commercial roof space within 3 miles of existing substations identified by the applicant's own witness, Mr. Olson is 11,543 MWac. This is more solar capacity than the 10,000 MWac of central station solar assumed in the CPUC Reference Case.

In sum, the applicant understates the potential for distributed PV to play a significant role in meeting the State's renewable energy goals and, more to the point here, completely misrepresents the ability of distributed PV to be *a viable alternative to this project at the proposed site*. Indeed, as CBD has stressed throughout this process, distributed PV is an excellent alternative for this project precisely because it would avoid most if not all of the impacts of the proposed project while helping to meet the RPS goals, thereby providing time for the project applicant to find a more suitable site for its large-scale industrial solar thermal power plant. CBD does not oppose this project or other large-scale solar power being built in appropriate places after adequate environmental review; rather, CBD opposes this project being built at this site in remote wild lands that are occupied by a thriving population of desert tortoise and rare plants and used by other species including golden eagles and migratory birds. And in addition, CBD most particularly opposes approval of this proposed project or any other without adequate environmental review of all of its significant impacts.

III. Biological Resources: Impacts of the Proposed Project as Well as Proposed Mitigation Measures Have Not Been Adequately Analyzed

Despite the applicant's claims to the contrary, the facts regarding the impacts to the desert tortoise area remain in dispute, particularly as to the impacts arising from translocation. Impacts to birds including golden eagles and migratory birds are also significant but have not been addressed in the environmental review documents, nor are they avoided, minimized or mitigated as required by CEQA. The applicant does not address impacts to birds at all. Impacts to

bighorn sheep are similarly unaddressed.[3]

The applicants discussion of the scale of cumulative impacts requires little reply, the scale should be tailored to the impact—as CBD has stated. The question is whether the impacts of this proposed project are regional in scope when looking at certain resources such as land use and the desert tortoise, or visual resources. The applicant's arguments that regional impacts should not be considered in the cumulative impacts analysis for the desert tortoise are not persuasive. Several remaining issues that also relate to biological resources are discussed below.

IV. The State of California Has the Authority and the Duty to Protect Resources and Require Mitigation for Any Authorized Impacts

It is well settled that the State of California has authority to regulate activities on federal lands within the State so long as those regulations do not directly conflict with federal law. (See *Cal. Coastal Com v. Granite Rock Co.*, 480 U.S. 572, 600 (1987).) Because none of the regulatory statutes at issue here, the Warren-Alquist Act, CEQA and CESA, conflict with federal law, their application to the proposed project is not in doubt.

A. Public Trust

Pursuant to statute (as well as common law) the wildlife resources of the State of California are held in trust for the people of the State. Cal. Fish & Game Code §711.7(a); *see also* Fish & Game Code § 1801 (it is "the policy of the state to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state"). The public trust doctrine "places on the state the responsibility to enforce the trust." *Center for Biological Diversity, et al., v. FPL Group, Inc.* (2008) 166 Cal App. 4th 1349, 1368.

As a result the Department, or the Commission if properly acting in its place,[4] must fulfill

[3] Indeed, the only mention of bighorn sheep by the applicant is to complain about the mitigation measure requiring installation of a guzzler—which CBD also opposes. (See Applicant's Attachment B, Conditions of Certification, at 56, fn. 3 (Bio-19).)

[4] As stated in the Center's Opening Brief, the Center contends that the Commission's in lieu permitting does not extend to CESA take permitting. Nonetheless, to the extent the Commission's permitting may affect public trust resources it must also uphold the trust and

its trust duties including maintaining healthy populations of wildlife species and habitats, providing for the beneficial use and enjoyment of the species by all citizens of the State, and perpetuation of the species for its intrinsic and ecological values. Further, under California Fish and Game Code § 1802 the Department, as trustee for fish and wildlife resources, is obligated to provide requisite biological expertise to review and comment upon environmental documents and impacts arising from proposed project activities.

To extent that the Applicant argues that the Commission or the State of California does not have the authority to protect wildlife within the State of California to a greater extent that a Federal land management agency, it is wrong. The State of California has not only the power but the duty to protect these trust resources on behalf of the people of the State. It is highly inequitable for an out-of-state corporation such as the applicant (which is incorporated in the State of Delaware), to seek a permit from a California State Commission and access to the higher rates for the renewable energy in the energy markets within State of California and at the same time complain that it must protect the resources of the State as required by the laws of the State.

B. CESA and ESA Compliance

CESA and the Federal ESA are not the same and do not have the same standards. Applicant's arguments on this issue are simply wrong. For example, the Federal ESA does not include any similar requirement to the "fully mitigate standard" under CESA. CBD will not ask the Commission to rule on questions of Federal law, as it cannot. It is quite clear from even a cursory reading of the two statutes that they are not the same. As CBD explained in our opening brief, CESA requires impacts be minimized and fully mitigated and requires that alternatives be considered and monitoring adopted to ensure mitigation measures are implemented. (Fish & Game Code § 2081(b); CBD Opening Br. at 55-57.) The Federal ESA, in contrast, does not contain any parallel requirements for full mitigation. (See 16 U.S.C. § 1536(a)(2) [duty to consult], (b)(4) [if the action will not jeopardize listed species or adversely modify critical

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protect public trust resources. In this capacity, the Commission must act as a trustee for the people of California.

habitat and the taking is incidental to lawful activity the FWS will provide a biological opinion and incidental take statement ("ITS") specifying the take and reasonable and prudent measures FWS considers necessary or appropriate to minimize such impact and provide terms and conditions to implement such measures] and § 1539 (a) [discussing the terms of a habitat conservation plan resulting in a incidental take permit ("ITP")].)

While it is true that the desert tortoise is the only species on the site protected under the Federal ESA and CESA, it is not the only species protected under federal or state law. Under the terms of the CDCA Plan, BLM is required to affirmatively protect State listed and BLM sensitive species from decline on public lands. (CDCA Plan at p. 20 ("All state and federally listed species . . . will be fully protected."), at p. 29 ("Manage those wildlife species officially designated as sensitive by the BLM for California and their habitats so that the potential for Federal or State listing is minimized").) The CDCA Plan also requires that BLM consider "crucial habitats of sensitive species in all decisions so that impacts are avoided, mitigated, or compensated." (CDCA Plan at p. 29.) The BLM must follow the CDCA Plan and the NEMO plan amendment[5] under federal law. (*Oregon Natural Resources Council Fund v. Brong,* 492 F.3d 1120, 1025 (9th Cir. 2007) ["Once a land use plan is developed, '[a]ll future resource management authorizations and actions . . . shall conform to the approved plan.' 43 C.F.R. § 1610.5-3(a)."].)

The applicant also misconstrues BLM's mitigation requirement as being based on the Federal ESA, it is not. The 1:1 mitigation requirement the applicant focuses on is found in the NEMO plan amendment to the CDCA Plan, it is not a result of the federal ESA requirements. Moreover, while the BLM has stated that it would likely require 1:1 ratio for mitigation the BLM has not *concluded* that it will. Moreover, the 1:1 ratio discussed in the NEMO plan was adopted *for projects of less than 100 acres*, and there is no barrier to the BLM (or the Commission)

[5] The applicant's statement regarding unsuccessful challenges to the NEMO plan contains no citation. App. Op. at 82. While CBD is aware that a challenge was brought against the NEMO route designation by a coalition of off-road vehicle groups, that challenge was never litigated. CBD is unaware of any other "challenge" that would have "affirmed" this mitigation ratio.

requiring a *greater* migration ratio for a project such as the proposed project here which is nearly 4,000 acres. (NEMO Plan at 2-32; *see also* Attachment A to CBD's Opening Brief at pp. 28 [CBD comments provided to the BLM noting that more than 1:1 ratio of mitigation may be needed].)

Further, the applicant's reading of the Supreme Court's discussion in *Environmental Protection and Information Center* to limit its mitigation obligations under CESA is misplaced. (*See* Applicant's Opening Br. at 91-92.) As the Supreme Court noted in response to a similar argument:

> "[w]here various measures are available to meet this obligation [to fully mitigate], the measures required shall maintain the applicant's objectives to the greatest extent possible." (§ 2081(b)(2).) This language does not diminish the extent of a landowner's obligation under CESA, however, but merely provides that when that obligation can be met in several ways, the way most consistent with a landowner's objectives should be chosen. It does not relieve the landowner of the obligation to fully mitigate its own impacts.

Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection (2008) 44 Cal.4th 459, 512. The applicant's bare statement that it cannot achieve its objectives if it must compete with projects outside of California that do not have similar mitigation requirements does not provide any evidence or any lawful basis for undermining California's CESA obligations. As one court put it in the context of CEQA alternatives, "Since CEQA charges the agency, not the applicant, with the task of determining whether alternatives are feasible, *the circumstances that led the applicant in the planning stage to select the project for which approval is sought and to reject alternatives cannot be determinative of their feasibility.* The lead agency must independently participate, review, analyze and discuss the alternatives in good faith." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736 [emphasis added].) So too here, the applicant's prior planning cannot be a factor in the agency's decision regarding the mitigation necessary under CESA and/or CEQA for this proposed project.

If, as the applicant has argued, the proposed project will be infeasible if it is required to be

fully mitigated under CESA (which is the logical conclusion from the applicant's statements regarding the costs of mitigation) *then the project application must be denied.* The Commission cannot override the statutory requirements of CESA. Because CESA's requirements are mandatory and the Federal ESA does not have similar requirements for mitigation and other protections, the Commission should reject the applicant's suggestion that is eschew CESA's requirements and rely on the Federal ESA and BLM's proposed mitigation measures alone.[6]

The Applicant's Lack Of Due Diligence is Not the Commission's Burden

The applicant's repeated complaints that it is somehow unfair that it is required to fully mitigate under the CESA standard should hold no weight with the Commission. The applicant should have understood that a project in occupied desert tortoise habitat could require mitigation from the federal agency *beyond* the 1:1 ratio listed in the NEMO plan *for projects of less than 100 acres*, as well as that additional mitigation would be required under California laws including CEQA and CESA. The applicant's failure to take this important issue into account before it applied for a permit at this site is a failure of its own due diligence and cannot be used as the basis for undermining the laws of the State of California. Indeed, the applicant's statements that it would not have selected this site if it had realized the mitigation requirements might be greater than 1:1 or that there was more than one protected species on site (App. Op. at 81), simply show the applicant's own lack of due diligence. This failure cannot be laid at the door of any other entity or party.

Moreover, the applicant's statements that it "is committed to not building in Desert Wildlife Management Areas (DMWAs) or Areas of Critical Environmental Concern (ACECs)" rings hollow in the face of its proposal to build in *critical habitat for the desert tortoise* in Nevada at Coyote Springs. The Commission should not be distracted by the applicant's claims

[6] Although one of the rare plants on the site of the proposed project is protected as a special status species by BLM, nothing in NEPA or the ESA would ensure protection for other rare plants found on this site. In contrast, as CBD explained in our opening brief, CEQA and other California laws require that impacts to rare plants be identified, analyzed, avoided, minimized and mitigated. (See CBD Opening Br. at 26-30.)

of that it is concerned protecting the environment while the applicant is actively trying to undermine basic environmental protections in California and elsewhere.

The Commission Cannot Make a "Consistency" Determination Here

The applicant misconstrues the role of a consistency determination and overstates the value of the measures it "offers" to put in place for the desert tortoise which do not fully mitigate the impacts the proposed project. The Fish & Game Code Section 2080.1 allows for a discretionary determination of consistency by the *director* after a federal incidental take permit or incidental take statement ("ITP/ITS") is issued to a "person." The "director" is clearly defined in statute as the director of the Department of Fish & Game. (Fish & Game Code § 39; *see also* Fish & Game Code § 67 [defining person; this definition does not include federal agencies].) The Commission cannot make any consistency determination here for several reasons. First, the statute by its own terms requires the director to make such a determination, and the Commission cannot stand in the place of the director of Fish and Game even under its "in lieu" permitting authority as a consistency determination is not a permit. (*See also* CBD Opening Br. at pp. 62-66 [challenging the Commission's ability to issue CESA permits in lieu of the Department of Fish & Game].) Second, even if the Commission could stand in the place of the director, which CBD does not concede, the Commission cannot make the required finding here because the record shows that the proffered 1:1 mitigation and other measures "offered" in the applicant's brief will not meet the CESA fully mitigated standard. Staff as well as DFG's staff have already testified that at least the 3:1 mitigation is required. (*See, e.g.,* 1/11Tr. at pp. 264-266 [Scott Flint, DFG staff, discussing the fully mitigate standard and stating "I believe that the conditions, as outlined, *mostly* get us there." Emphasis added], at pp. 275-76, pp. 279-80, pp. 319-320, pp. 284-86 [Staff discussing mitigation ratio].) Third, no consistency determination can even be contemplated until after receipt and publication of a notice that an ITS/ITP has been provided by FWS—here, FWS has yet to make any decision. The applicant again encourages the Commission to take an unlawful path, to decide an issue before it is ripe and short cut statutory directives.

C. CEQA, Environmental Protection, and Mitigation

The Commission should reject the applicant's invitation to rely on decisions made by the BLM and other agencies rather than reaching an independent decision as required under California law based on robust CEQA compliance. As explained in CBD's Opening Brief, CEQA has many substantive requirements. For example, CEQA provides that it is the policy of the state to "[p]revent the elimination of fish or wildlife species due to man's activities, [and] insure that fish and wildlife populations do not drop below self-perpetuating levels." (Public Resources Code §21001(c).) In adopting CEQA, the Legislature stated its intent that "*all agencies* of the state government which regulate activities of private individuals, corporations and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." (Public Resources Code §21001(g).)

In addition to requiring evaluation of alternatives and adoption of feasible alternatives to *avoid* impacts to resources, CEQA also *requires* adoption of minimization and mitigation measures to substantially lessen or avoid significant adverse environmental impacts whenever feasible. (Public Resources Code § 21002 ("it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects".) Mitigation measures must be capable of:

> (a) avoiding the impact altogether by not taking a certain action or part of an action, (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation, (c) rectifying the impact by repairing, rehabilitating, or restoring the impacted environment, (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action, or (e) compensating for the impacts by replacing or providing substitute resources or environments.

(CEQA Guidelines § 15370.) "Each public agency is required to comply with CEQA and meet its responsibilities, including evaluating mitigation measures and project alternatives." *Citizens*

for Quality Growth v. City of Mt. Shasta (1988) 198 Cal. App. 3d 433, 442, fn. 8. [remanding decision where the city had argued that "it is under no obligation to consider this mitigation measure because the Army Corps of Engineers will protect the wetlands to the fullest possible extent by refusing to issue a permit for any needlessly harmful development project. City cannot so avoid responsibility for its decision . . ."].)

Moreover, lead agencies must also consider competing or antagonistic agency positions from other agencies when performing their responsibilities for environmental review. (See *County Sanitation District No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544, 1604.) If an agency fails to consider other agencies' comments, then "environmental review would contain a gap, and California's environment would be deprived of the benefits that might result from [] consideration of feasible alternatives, cumulative impacts, and mitigation measures." (*Id.*)

In contrast, among other substantive differences between CEQA and NEPA, NEPA requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources" (42 U.S.C. § 4332(2)(E)), but does not require agencies to *adopt* feasible alternatives to avoid significant impacts – unlike CEQA. While NEPA is an important and powerful law and its proper application has resulted in significant protection of the environment, CEQA is a far more effective substantive law and has played a key role in ensuring the California's environment is adequately protected. Similarly, the Federal ESA provides important protections to listed species but does not provide the same protections as CESA and other California laws. As a result, applicant's argument that the Commission should not comply with California law, including CESA and CEQA, but rather, should defer to the federal requirements is not only unwise, it is unlawful.

V. The Commission Should Reject the Applicant's Proposed Findings of Fact and Conclusions of Law

The applicant's proposed findings of fact and conclusions of law suffer from the same errors as its opening brief and should be rejected. The Commission cannot make many of these

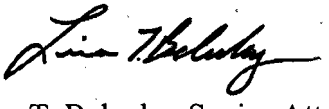
findings because they are factually erroneous while others are based on erroneous interpretations of law. The Commission cannot conclude, for example, that the proposed project has been adequately evaluated under CEQA, cannot conclude that the proffered mitigation that the applicant offers is adequate to meet the fully mitigate standard of CESA, and cannot find that the proposed project complies with other California and Federal laws. For these reasons and others, the Commission should reject the applicant's proposed findings of fact and conclusions of law.

CONCLUSION

In light of the above, the Center for Biological Diversity's Opening Brief, the testimony, exhibits and public comment submitted in this matter, the Center for Biological Diversity urges the Commission to deny the application.

Dated: April 16, 2010

Respectfully submitted,



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APPLICATION FOR CERTIFICATION
FOR THE *IVANPAH SOLAR ELECTRIC GENERATING SYSTEM*

DOCKET NO. 07-AFC-5
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(Revised 3/11/10)

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DECLARATION OF SERVICE

I, Lisa T. Belenky, declare that on Feb. 16, 2010, I served and filed copies of the attached, Reply Brief dated, Feb 16, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[www.energy.ca.gov/sitingcases/ivanpah]**.

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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

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*indicates change