April 16, 2010

California Energy Commission
Attn: Paul Kramer, Hearing Officer
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: **Ivanpah Solar Electric Generating System, Docket No. 07-AFC- 5**

Dear Mr. Kramer,

Please find enclosed for filing the original and one extra copy of Sierra Club's Reply Brief. Please return a file-endorsed copy in the self-addressed, stamped envelope provided. If you have any questions or need additional information, please contact me at (415) 977-5766 or violet.lehrer@sierraclub.org. Thank you for your attention to this matter.

Sincerely,

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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	)	
	)	
The Application for Certification for	)	
the	)	Docket No. 07-AFC-5
IVANPAH SOLAR ELECTRIC	)	
GENERATING SYSTEM	)	
	)	

SIERRA CLUB'S REPLY BRIEF

April 16, 2010

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I. Introduction

Sierra Club is a strong proponent of responsibly-sited renewable energy projects; and, it is a long time advocate of protecting desert tortoise and its rapidly dwindling desert habitat. Assuming these two principles need not be mutually exclusive, Sierra Club intervened in this proceeding and offered a Project alternative in the spirit of cooperation. The Sierra Club alternative would allow the full Project to go forward in a timely manner while protecting the most important desert tortoise habitat from destruction and fragmentation. Sierra Club recognizes that Staff too has worked in good faith to resolve the myriad of issues presented by this application, even though Sierra Club may not agree with all of Staff's recommendations.

Unfortunately, we cannot say the same of the Applicant. Applicant's opening brief presented highly adversarial arguments concerning the Project's impacts on biological impacts, evidencing no interest whatsoever in resolving outstanding issues among the Parties. The brief dismissed facts regarding the Project's impacts on desert tortoise and rare plants, and advanced legal theories contrary to precedent and logic. Below, Sierra Club addresses only a few of the Applicant's most egregious arguments.

II. Arguments on Reply

A. The Applicant Does Not Understand the Endangered Species Act Requirements Applicable to this Project

In its opening brief, the Applicant evidenced a rudimentary understanding of state and federal wildlife agencies' statutorily-mandated consultation processes to avoid Project-related "take" of the state and federally listed desert tortoise.[1] Nevertheless, contrary to state and federal requirements, the Applicant is requesting that the Commission ignore or bypass the California Endangered Species Act ("CESA"), and instead defer to BLM's 2002 EIS (NEMO EIS)[2] that amended the California Desert Conservation Area Plan pursuant to the Federal Land Policy and Management Act. (App. Opening at pp. 81-82.) The only explanation for the Applicant favoring measures found in the NEMO EIS, a programmatic non-project-specific plan, is that it recommended mitigation in the form of compensatory replacement lands at a simple 1:1 ratio; well below the 3:1 Staff and CDFG recommendations. (Ex. 314 at p. 4-10.) According to the Applicant, anything beyond the 1:1 requirement would be excessive, disproportionate and "manifestly unjust." (*See e.g.*, Applicant's Opening at pp. 81, 91, 95.)

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[1] However, note that the Applicant **mischaracterized** the ESA in the CESA comparison graph on pages 87 and 88. All of the statutory quotes are from the inapplicable ESA Section 10 which covers habitat conservation planning. The Applicant is not seeking an HCP for the Project. The Applicant should have quoted the more stringent 16 U.S.C. 1536(a)(2), which covers the federal interagency consultation process at issue here.

[2] Northern and Eastern Mojave Desert Management Plan (NEMO), an amendment of the 1980 Bureau of Land Management California Desert Conservation Area (CDCA) Plan. (Dec. 2002.)

The Applicant is simply wrong that the NEMO 1:1 scheme is legally binding. (App. Opening at p. 82.) On the contrary, the NEMO is a planning guidance covering some **3.3 million acres**, and expressly does not supplant BLM's specific NEPA and ESA compliance for large projects like the proposed Ivanpah Project.

Specifically, the NEMO's programmatic ESA consultation for desert tortoise did **not** cover "projects that disturb more than 100 acres; projects that require an EIS and projects that require a CDCA plan amendment." (NEMO FEIS at 2-32.) Unsurprisingly, the Ivanpah Project meets all three criteria, triggering project-specific NEPA and ESA review. Similarly with respect to ESA Section 7 consultation:

> Biological consultation would occur with wildlife agencies on measures in the CDCA Plan and would continue on all projects proposed in desert tortoise habitat **on a case-by-case basis**. Projects not covered by Biological Opinions would be considered on a case-by-case basis, may involve consultation with USFWS or CDFG and **may include additional terms and conditions for the conservation and recovery of the desert tortoise and its habitat.** (NEMO 2-16 (emphasis added).)

Clearly, the Project is not eligible for NEMO's bare-bones measures. Nor is the Project covered by any of the biological opinions listed in the NEMO because those biological opinions cover moderate land use, such as cattle grazing (BO 1-5-94-F-107, April 20, 1994), or small scale projects that do not exceed two acres (BO 1-8-97-F-17, March, 1997). (NEMO 2-16.) When discussing small-scale projects, the NEMO plan is clear that the "standard mitigation measures apply" only for small scale projects, i.e., 1:1 ratio. (*Id.*)

Because the Project does not fall within a current biological opinion, it requires Section 7 consultation with the U.S. Fish & Wildlife Service (USFWS). That is why the BLM provided USFWS with a biological assessment in December 2009. Thus, the Applicant's argument, that the NEMO plan precludes any agency from imposing mitigation measures stronger than 1:1 because BLM's boilerplate measure is legally binding, is patently false.

In sum, this situation is no different than any other application for a large project seeking to take a listed species, except here the Applicant is going to extraordinary lengths to avoid statutory obligations.

B. The Commission Cannot Make a State and Federal Endangered Species Act Consistency Determination

Just as the USFWS must make an independent determination to protect desert tortoise from Project-related unlawful take, CDFG is bound by similar obligations. (Fish & Game Code § 2081.) The Applicant appears to be requesting that the Commission issue a "consistency determination" pursuant to CESA as part of the Commission's final licensing determination for this proceeding reflecting the NEMO 1:1 habitat compensation ratio. (App. Opening at pp. 89, 94.) This request contains so many flaws it is hard to know where to begin. Fortunately, one need only review the entire CESA provision in question to understand how an actual consistency determination works. (Fish & Game § Code § 2080.1.) In a nutshell, the process unfolds as follows.

To begin with, before any consistency determination can be considered, the Applicant must first obtain a final incidental take statement from the Secretary of the Interior pursuant to ESA Section 7. (Fish & Game Code § 2081.9(a) *citing* 16 U.S.C. § 1536.) Next, once the Applicant has the federal incidental take statement in hand, it can notify the director of CDFG[3] in writing of its receipt and provide the director with a copy of the final incidental take statement. (Fish & Game Code § 2081.1(a)(1)(2).)

Once the director has the Applicant's notice and copy of the incidental take statement, the director then publishes a public notice of the request for a consistency determination in the California Regulatory Notice Register. (*Id.* § 2081.1(b).) After such notice is published, the director has 30 days to "determine whether the incidental take statement is consistent with this chapter [of CESA]." If the director determines within the 30-day period that the incidental take statement is not consistent, then any take of the listed species may only be authorized by CESA. (*Id.* at § 2081.1(c).) The director then must immediately publish the determination. (*Id.*)

The Applicant's first error has to do with the fact that Staff's and CDFG's independent, site-specific review rejected the Applicant's 1:1 compensatory mitigation scheme, recommending instead a 3:1 ratio to mitigate the Project's impacts on desert tortoise. (Ex. 315 at p. 4-9.) Therefore, based upon the science in the record, CDFG cannot make a consistency determination under CESA. Indeed, in its opening brief, Sierra

[3] (Fish & Game Code § 39.)

Club outlined the evidentiary and legal reasons why an in-lieu fee program even at a 3:1 ratio, and a translocation plan, would not fully mitigate direct impacts on desert tortoise in the Ivanpah Valley.

Second, the Applicant implied that the state and federal wildlife agencies were required to reach the same conclusions concerning Endangered Species Act compliance, i.e., that their incidental take measures must be identical. More troubling is the Applicant's insistence that the wildlife agencies agree to the lowest common denominator in BLM's 1:1 ratio. (App. Opening at p. 89.) As shown above, the BLM's boilerplate 1:1 ratio is simply inapplicable in this proceeding. The record is replete with evidence showing that the Project will present significant, unmitigated impacts on desert tortoise. The Applicant's only response, which lacks any legal or biological foundation, is that a 3:1 ratio would cost more than a 1:1 ratio. (*Id.* at 91.) As a matter of law, whether or not the Applicant may choose to accept the terms and conditions of an incidental take permit, financial considerations are not among the factors agencies may consider.

Third, the Commission can only issue a decision on the record before it based on the licensing requirements for a solar thermal power plant in the Warren-Alquist Act. Measures that the BLM and USFWS come up with for a right-of-way permit are separate, and may well be different. Given the separate statutory requirements, the Applicant will have to comply with both a federal biological opinion and the state incidental take statement.

Moreover, there is precedence for CDFG and the Commission requiring 3:1 and even 4:1 ratios for replacement habitat for solar projects in the desert. In the Victorville 2 proceeding, the Applicant accepted a 3:1 replacement habitat ratio for Mojave ground squirrel, burrowing owl, and creosote rings for power plants. (*See* Victorville 2 Final Commission Report at pp. 180-82 (July 16, 2008.) Therefore, the Applicant was on notice that similar requirements could be expected of it; there is no surprise here.

Fourth, the Applicant's request for a consistency determination is premature. The company does not have a final biological opinion from the Secretary of the Interior or an incidental take permit from the state, so there is no way for the director of CDFG to make a consistency determination at this time. Or, assuming for the sake of argument, the Commission itself would assert authority to issue an incidental take permit and make a consistency determination under the Fish & Game Code, the Commission would not be able act under the current, fast-tracked schedule for this Project because the Department of the Interior's process is unfolding under a separate schedule. (Tr. at pp. 190-192 (Mar. 22, 2010); testimony of BLM project manager Tom Hurshman). Regardless of which state agency would make a consistency determination, the Commission would have to put this docket in abeyance until the final ESA section 7 consultation concluded and the Department issued an incidental take statement. CEQA, CESA and the Warren Alquist Act all require that the Commission show that the Project's

significant impacts on the desert tortoise are fully mitigated ***before*** the Project is approved; the Applicant's request takes none of this into consideration. (*See e.g., Envtl. Prot. Info. Ctrt. v. Cal. Dept. of Forestry & Fire Prot.* (2008) 44 Cal.4th 459.)

Finally, the Applicant appears to assume that the Secretary of the Interior's (via the USFWS) final incidental take statement will simply allow the company to comply with a BLM policy pursuant to the Federal Land Policy and Management Act (FLPMA), i.e., the FLPMA-based 1:1 in-lieu fee program. (App. Opening at p. 94.) There is no evidence in the record that a final USFWS incidental take statement would simply require BLM's bare-bones in-lieu fee program. Put differently, the Applicant is working from the assumption, or is trying to convince the Commission, that the USFWS would not require anything beyond the BLM's 1:1 in-lieu fee program to protect listed desert tortoise. This is pure speculation, because the NEMO plan expressly requires project-specific Section 7 consultation here.

The Applicant is really seeking a mechanism that would allow it to completely bypass CESA and ESA species-based compliance, in favor of BLM's negligible land use measures. (App. Opening at pp. 86-95.) However, as shown above, if the Applicant is correct, and USFWS concurs with BLM's boilerplate, FLPMP-based 1:1 ratio, then the state would not be able to make a consistency determination for its thermal power plant citing decision because the record would not support such a finding.

Tracking the Applicant's arguments regarding state and federal duties to protect endangered species is not unlike trying to follow a game of Three-Card Monty.

C. As State Law, CEQA Protects the California Environment

The Applicant charges Staff with committing "clear legal error" by applying CEQA in a "California-centric" manner. (App. Opening at p. 114.) Specifically, the Applicant argued that CEQA mitigation measures were unnecessary for the special-status plants destroyed by the Project because these particular plant species may not be imperiled out of state, namely Nevada. (App. Opening at p. 116.)

Courts have consistently held that "[t]he foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.*, (2007) 41 Cal. 4th 372, 381 quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390; see also *Friends of Mammoth v. Board of Supervisors*, (1972) 8 Cal. 3d 247, 259.) In carrying out this mandate, Staff was required to mitigate impacts on all species, paying special attention to those that are rare, threatened, or endangered.

In manifestly twisted logic, the Applicant seeks to turn CEQA on its head by suggesting that the Commission survey the entire "environment" to

ascertain whether Project-caused impacts on these plant species might be relatively insignificant because these plants might exist elsewhere. Under this notion, the question then becomes how far afield would an agency have to survey? Neighboring states? Neighboring countries? Within the continent or beyond?

1. There is No Authority to Support the Applicant's Claim

Because nothing in California jurisprudence supports this far-fetched idea, the Applicant cited an inapposite 1975 Attorney General opinion. (App. Opening at p. 116.) The question there was whether "CEQA applies to the whole of a project including those parts of a project occurring beyond the boundaries of the state." (58 Ops. Cal. Atty. Gen. 614 (1975).) The facts surrounding the Attorney General opinion were that certain California cities were joining forces with Utah cities to construct a coal plant in Utah that would provide power to California. As part of the project, transmission lines would have to be built from Utah into California. The Attorney General, reiterating the goals of the Legislature to ensure the utmost environmental protection, required that any project-related EIRs had to examine the environmental consequences of the project as a whole. As the project area spanned multiple states, local California agencies were required to look at the impacts of the project as a whole. This is consistent with CEQA's mandates. That scenario was, however, completely different from what the Applicant attempts to argue here.

If the project were in fact situated in multiple states, CEQA would require an analysis of impacts to the environment caused by the project as a whole. This would require looking at the effects in states other than California. This is different, however, than the argument the Applicant attempts to shoe-horn in under the guise of additional environmental protection. According to the Attorney General opinion, the scope of environmental impact considerations "extends, regardless of the location, to the environment that will be affected **by the proposed project**." (58 Ops. Cal. Atty. Gen. 616 (emphasis added).) Courts have held this to mean that the "project area" does not "define the relevant environment for purposes of CEQA when a project's environmental effects will be felt outside the project area. (*See Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.) Here, the Project simply does not extend into Nevada. Additionally, even if the project *did* extend into Nevada, the occurrence of special-status plant species in Nevada would not affect whether the project impacted the rare California variety of the species. The expansion of the concept of "project area" is meant to be **more** protective of the environment not less. Even if these rare plants in the Ivanpah Valley are more numerous in Nevada, that does not affect the analysis as to their status as they exist in California.

Setting aside the fact that if the Applicant was so enamored with this approach it could have surveyed the state of Nevada itself, the common sense

rebuttal is that the record shows the Project will permanently destroy rare plant communities. As shown above, the scope of the environmental impact discussed in the Attorney General's opinion was not related to individual species, but rather whether significant project-caused impacts in other states should be included in an EIR. Because CEQA must protect the environment as a whole, the Attorney General correctly held that the impacts outside of the state should be considered. At bottom, it is unfortunate the Applicant has aimed to distract the Commission with meritless claims in this proceeding.

D. Sierra Club Proposed a Clearly Defined Alternative

According to the Applicant and Staff, Sierra Club's proposed alternative is ill-defined and simply conceptual. (App. Opening at p. 44; Staff Opening at p. 21.) But the record shows that Sierra Club has continued to refine its alternative based on an evolving understanding of the Project and the Ivanpah Valley's biological resources. Sierra Club's supplemental testimony along with a map show that the Project could feasibly be reconfigured to lands closer to the Primm golf course and along the interstate, thereby avoiding development in the Ivanpah Valley's highest quality habitat, and also reducing habitat fragmentation. (Ex. 612 at p. 5; Fig. 1.) Moreover, Sierra Club's proposed reconfiguration is not constrained by other proposed development as Staff argued. (Staff Opening at p. 23.) Sierra Club's mapped alternative excludes the 1000-foot Caltrans ROW for

the Joint Point of Entry and a 0.25-mile ROW for the Los Angeles Department of Water and Power line. (Ex. 612 at p. 5; Fig. 1.)

The evidentiary record shows that Sierra Club's reconfiguration is feasible. It would allow the full 400 MW Project to go forward on disturbed land adjacent to Interstate 15 and eliminate the project's most significant impacts to biological resources, including direct loss of high quality and relatively undisturbed habitat, fragmentation and degradation of adjacent habitat, loss of connectivity, and the spread of invasive non-native plants and desert tortoise predators. (Ex. 300 at p. 6.2-1.) Sierra Club's proposed reconfiguration would:

> … reduce impacts on desert tortoises and desert tortoise habitat. [It] encompasses land that contains approximately one-half the density of desert tortoises as the proposed project site. Furthermore, it encompasses land known to provide lower value to the organism due to its proximity to I-15, the golf course, and other types of anthropogenic disturbance; these considerations are particularly important to the long-term recovery of the species … [Sierra Club's proposal] encompasses approximately 3,072 acres of land adjacent to anthropogenic disturbance and known to have low plant species richness. Overall, the proposed location occupies the lower elevation region that has lower species diversity. From an ecological perspective, the [proposal] would aggregate anthropogenic disturbance, and thus reduce the many indirect project impacts (e.g., fragmentation, invasive species, edge-effects) on the desert tortoise.

(Ex. 612 at p. 6.)

Neither Staff nor the Applicant have refuted these facts.

1. Sierra Club Conducted a Valid, Scientific Survey of Disturbed Lands Adjacent to Interstate 15 that Demonstrates the Feasibility of the Sierra Club Alternative

Staff is incorrect that expert biologist Scott Cashen's fieldwork of the lands adjacent to Interstate 15 was too limited in scope to yield conclusive results. (Staff Opening at p. 22.) Mr. Cashen's quantitative, scientific survey employed the recommended U.S. Fish and Wildlife Service's protocol survey guidance for desert tortoise. Mr. Cashen specifically designed his study to compare desert tortoise occupancy at the Project site with the I-15 Alternative lands.[4] Mr. Cashen conducted a four-day field study with a crew of eight individuals, and another desert tortoise expert, covering approximately 150 miles of transect lines throughout the proposed Project site and the I-15 Alternative site. The survey assessed both habitat quality as well as desert tortoise abundance through identification of desert tortoise burrows. (Ex. 611 at pp. 8-11.)

Significantly, Mr. Cashen's survey results were consistent with the recommendation of the expert agency, California Department of Fish and Game.[5] The survey concluded that the Sierra Club Alternative would "not

[4] "The objectives of the study were to: 1. Collect empirical data on tortoise abundance, such that I could test whether there was a significant difference in relative abundance between the two sites. 2. Thoroughly evaluate the two sites, such that I could assess the presence, distribution, and abundance of tortoise resources and threats at the two sites. 3. Evaluate the suite of biological resources present in the region so that I could formulate an educated opinion on whether the I-15 alternative site was appropriately configured to minimize impacts to sensitive biological resources." (Ex. 611 at pp. 8-9.)

[5] The CDFG recommended that the FSA present a "**full analysis of alternative siting locations and scenarios … given the fact the current Project area is excellent tortoise habitat [and] … lower quality habitat is clearly within the range to potentially reduce the overall Project impacts to endangered and sensitive species.**" (Ex. 609 (emphasis added).)

have the same ecological system-level impacts as the proposed project site, and its impacts to individual plant and animal species would be less severe than the proposed project. Because the Sierra Club alternative is located adjacent to the freeway and the Primm Valley Golf Club, it would result in less habitat fragmentation and community-level disturbance." (Ex. 611 at pp. 6-7.)

In contrast, Staff conducted a one-day, qualitative reconnaissance of the site that cannot support Mr. Anderson's ultimate conclusion that "there was little difference in the quality of the habitat for either tortoise or rare plants" and that the "I-15 alternative would not significantly reduce impacts to sensitive plant and wildlife species." (Staff Opening at p. 22.) Staff's testimony implied that a single biologist was able to representatively sample 7,128 acres (the area occupied by the two sites) in a single day in the August heat. (Tr. at pp. 213-215 (Jan. 14, 2010).) Moreover, the assessment failed to employ any protocol desert tortoise or special-status plant species surveys. (Ex. 300 at p. 4-44, 4-45.) Indeed, Mr. Anderson admitted that his own study was "subjective," "qualitative," and a "rather informal reconnaissance survey" for desert tortoise. (Tr. at p. 328 (Jan. 12, 2010); Tr. at p. 208 (Jan. 14, 2010).)

The Staff's methods for comparing habitat quality seemed to lack any established scientific method.[6]

Finally, we remind the Commission that Staff biologists and other experts generally affirmed the results of the Sierra Club survey and the feasibility of project reconfiguration on disturbed lands adjacent to Interstate 15. (Ex. 305 at 7, Staff testimony; Ex. 88 at 3-2, Applicant testimony; Tr. at pp. 419 (Jan. 11, 2010), testimony of Dr. Ron Marlow; Tr. at pp. 436-437 (Jan. 11, 2010), testimony of Dr. Michael Connor; Tr. at pp. 447, 465 (Jan. 11, 2010), testimony of Mark Jorgensen; Tr. at p. 311 (Jan. 12, 2010), testimony of Scott Cashen.) Staff and Intervenors' experts agree that significant lands adjacent to the interstate would allow reconfiguration of all of Ivanpah 3 and most of Ivanpah 2 on degraded lands, while mitigating and avoiding the Project's most significant impacts to biological resources. (Sierra Club Opening at pp. 17-18.) In fact, the Staff's own rebuttal testimony stated:

> Staff believes that the northernmost portion of the I-15 Alternative likely have lower value habitat for both plants and desert tortoise … About 1,500 acres of the I-15 Alternative are located below 2,800 feet of elevation. This is the elevation below which the habitat characteristics change, reducing the likelihood of rare plant presence … the "I-15 Alternative" area

[6] "We traveled throughout the site. We stopped numerous times, probably, I don't know, 30, 40 times. Walked around looked for animal sign, looked for tortoise sign. Looked for any sign." (Tr. at p. 328 (Jan. 12, 2010); testimony of Richard Anderson.) "The work that I did out there was qualitative. I did jot down some values, score for habitat quality. But it was subjective, qualitative study … But I didn't document things at every site. I documented things approximately every half mile to a mile. And what I did was I looked for large areas of similar habitat and that's where I did my things." (Tr. at pp. 208, 214 (Jan. 14, 2010), testimony of Richard Anderson.) *See also* Dr. Michael Connor, addressing the failure to conduct any survey documenting desert tortoise abundance at the site: " … just because 10 tortoises or 50 tortoises or 90 tortoises are seen in an area that does not tell you that's how many tortoises are there. You need to do some kind of real, you know, scientific estimate of the abundance." (Tr. at pp. 433-434 (Jan. 11, 2010).)

> [is identified] as being in very high potential desert tortoise zones. The area with lowest potential is immediately south and west of the golf course, the same areas as the portion below 2,800 feet of elevation. In conclusion, it appears that there may be 1,500 acres or more of lower quality habitat at the north end of the I-15 Alternative that could be used for solar development … Rebuttal Testimony Figure 2 shows a yellow square that is the size of Ivanpah 3, the 200 MW phase. If Ivanpah 3 were reduced in size and Ivanpah 1 were expanded in size and relocated as shown in yellow, the overall 400 MW generation output might be retained, while still avoiding most valuable biological resources.

(Ex. 305 at p. 7.)

While Sierra Club has shown that Staff underestimated the amount of land actually suited for project reconfiguration, the record also shows that Staff and Sierra Club are largely in agreement.

2. Project Reconfiguration to Lands Adjacent to Interstate 15 Would Not Increase Glare or Present Visual Safety Issues

Both Staff and Applicant were concerned that Project reconfiguration adjacent to Interstate 15 would increase impacts to visual resources. (Staff Opening at p. 22; App. Opening at p. 43.) Sierra Club agrees that more of the Project could be seen from Interstate 15. However, there is no evidence in the record indicating that this is a negative impact. No party to this proceeding or member of the public has complained about visual impacts from the highway or across Interstate 15 as being unacceptable. However, among the environmental intervenors, their opposition to the Project is based on the unmitigated impacts on biological resources. A marginal increase in

visual impacts would certainly offset a reduction in desert tortoise and rare plant mortality.

Most relevant, in its comments to BLM on the FSA/DEIS, Sierra Club showed that Project reconfiguration along the Interstate 15 corridor would not present any significant human health impacts or safety hazards from glare beyond what is already anticipated by the current footprint. (Sierra Club Opening, Attachment A at pp. 10-12.) Moreover, the impacts from glare are expected to be minimized further by TRANS-3 and TRANS-4, as long as the power tower receivers and **only** the I-15 facing-heliostats are located at least 1,000 meters from the interstate. (*Id.*; Ex. 300 at p. 6.10-16.)

The record shows that visual impacts are not an impediment to the Sierra Club alternative.

3. The Sierra Club Alternative is the Most Studied and Biologically Defensible Alternative Before the Commission

Now that the Applicant has proposed the Mitigated Ivanpah 3 alternative, Sierra Club's alternative is presently the most studied option before the Commission. Staff's analysis, combined with Sierra Club's and other expert analyses, show that the Sierra Club/Modified I-15 Alternative is the most biologically defensible option. More significantly, this alternative is the only way the Project's significant unmitigated impacts on desert tortoise can be substantially avoided while allowing the full Project to go forward in a timely manner.

III. CONCLUSION

Sierra Club reiterates its request that the Commission ensure that the significant impacts to the listed desert tortoise are fully mitigated as described in our opening brief. If this is not possible, the Commission must either impose the Sierra Club alternative, which significantly mitigates Project impacts on desert tortoise in the Ivanpah Valley, or it must deny the application for certification.

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, Violet Lehrer declare that on April 16, 2010, I served and filed copies of the attached, reply brief dated, April 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].

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

✓ sent electronically to all email addresses on the Proof of Service list;

___ by personal delivery;

✓ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

✓ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (***preferred method***);

OR

___ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-5
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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.

Violet Lehrer

*indicates change