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In the Matter of:

APPLICATION FOR CERTIFICATION  
FOR THE HIDDEN HILLS SOLAR ENERGY  
GENERATION SYSTEM

Docket No. 11-AFC-02

**OPENING BRIEF OF  
INTERVENOR OLD SPANISH TRAIL ASSOCIATION**

March 29, 2013

Jack Prichett  
President, Tecopa Chapter  
Old Spanish Trail Association (OSTA)  
857 Nowita Place  
Venice, CA 90291  
310 895-4747  
[jackprichett@ca.rr.com](mailto:jackprichett@ca.rr.com)

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## INTRODUCTION

The Old Spanish Trail Association (OSTA) intervened in this proceeding in order to protect and preserve the Old Spanish National Historic Trail, in accord with the Association's mission. OSTA is a national, 501(C) 3 not-for-profit corporation affiliated, under the terms of the National Trails System Act of 1968 with the National Park Service (NPS) and the Bureau of Land Management (BLM) as a volunteer citizen group involved in the planning, development, maintenance, and management, where appropriate, of the Trail (P.L. 90-543, as amended through P.L. 111-11, March 30, 2009; see Sec. 2(c) [16 USC 1241]).

Portions of the Old Spanish National Historic Trail (OSNHT) and the later Mormon Road (MR) wagon trail passed through the site of the proposed Hidden Hills Solar Energy Generating System (HHSEGS, hereafter referred to as "the project" or HHSEGS). In the proceedings of this Application for Certification, the two transportation routes are jointly referred to by the Applicant's designation of OST/MR or OST/MR NC). Extant portions of the OST/MR exist near the project site to the east and southeast in Nevada and to the southwest in California.

The project site lies in the Pahrump Valley, a few miles from the base of the Spring Mountains to the east. A series of northwest/southeast trending springs along a fault at the base of the Spring Mountains, was used by travelers on the OST/MR to obtain water and as a source for fodder for the animals. These springs marked a key "jumping off" point for westbound travelers: the trek west across the Pahrump Valley marked the first leg of many days' travel across the dry, harsh California Mojave desert, where water was often scarce.

Thus, the springs and the Pahrump valley marked a transition point in the OST/MR. From the project site, it is possible today to enjoy vicariously the desert environment as travelers 170 years ago experienced it. Moreover, portions of the OST/MR remain to be discovered and recorded in the region. OSTA in the years between 2007 and 2011 has identified and recorded seven miles of a previously unrecorded segment of the 1829-1848 OSNHT. This segment leads west from near the project's southwest boundary to the summit of Emigrant Pass (OSTA 2012: 13-14, 34).

### **A. OSTA's position with regard to the evidence and the project site.**

OSTA has shown through evidence and testimony that portions of the OST/MR lie within the project site (OSTA 2012: 18-26; March 15, 2013 testimony of Jack Prichett at Evidentiary hearing, transcript, pp. 34-79). The CEC's Final Staff Analysis (FSA), issued in Dec. 2012 concurs with OSTA's conclusions (FSA: 4.3-48; 4.3-111).

**B. OSTA objects to the CEC Staff's failure to provide a witness at the March 15, 2013 Evidentiary Hearings of the CEC and the on-the-spot decision to consider OST/MR portions of the FSA only as comment.**

OSTA relied, in the preparation of its testimony and of this brief upon the CEC staff findings, as reported in the FSA. OSTA's hearing and expert witness preparation envisioned citing and quoting from the FSA as evidence. OSTA Tecopa chapter President, Jack Prichett, formulated and spearheaded the intervention with assistance from Chapter members, national OSTA members and a various network of qualified professional individuals, all of whom contributed to the effort without pay. OSTA was unable to pay such professionals or lawyers; as a result all effort was volunteer and unpaid, with the exception of minor expenses for travel.

Under these circumstances, OSTA had a right to rely on the FSA and a legitimate expectation that it could do so.

At the March 15 Evidentiary Hearing, Ms. Willis of the CEC staff declared to Hearing Officer Ken Celli that "we [staff] do not have a staff witness for Old Spanish Trail [portions of the FSA]. This left all parties, in the words of Mr. Harris, attorney for the Applicant, in the position of having "a [Staff] document with no witness" (CEC transcript of March 15, 2013, p. 15). Celli said, shortly after, "This is unprecedented in my experience," to which Willis responded "And mine as well." (CEC transcript of March 15, 2013, p. 17.)

Following more discussion, Celli and Harris, on behalf of applicant, decided to have staff separate in the FSA portions that are Dr. Thomas Gates' testimony regarding Ethnographic resources and the other portions regarding Historical Cultural resources, which includes the OST/MR. The separation was to be done through colored highlighting of Chapter 4, Cultural Resources. This was done and posted on the CEC web site ([http://www.energy.ca.gov/sitingcases/hiddenhills/documents/2013-03-22\\_CEC\\_Staffs\\_Numbers\\_331\\_and\\_333\\_re\\_Cultural\\_Resources\\_TN-70022.pdf](http://www.energy.ca.gov/sitingcases/hiddenhills/documents/2013-03-22_CEC_Staffs_Numbers_331_and_333_re_Cultural_Resources_TN-70022.pdf)). In that redacted version of the Cultural Resources chapter sections highlighted in yellow are treated as testimony; Unmarked sections are treated as "non-germane to ethnographic portions of the cultural resources section."

Harris suggested at the March 15 hearing that the "non-ethnographic" portions of Cultural Resources be treated as "public comment," to which Celli replied, "That's a great idea, Mr. Harris." (CEC transcript of March 15, 2013, pp. 18-19.)

This ad hoc decision left OSTA in the position of relying on "public comment," rather than evidence and sworn testimony of CEC staff. Mr. Prichett registered his objection to the decision, explaining that OSTA had sought clarification before the hearing on who would be the Staff witness for OST/MR findings. (CEC transcript of March 15, 2013, p. 27.)

This last minute decision has the effect of removing evidence upon which OSTA relied heavily and may result in depriving OSTA of an important basis upon which it relied in its assessment of the Project for the hearing. Therefore, OSTA renews its objection and restates it in this Opening Brief, requesting that the Chapter 4, “Cultural Resources,” of FSA be considered in full as evidence, including portions germane to the OST/MR NC.

**C. OSTA opposes the granting of certification for the HHSEGS project.**

OSTA believes that there are feasible alternatives to the project, including alternative project sites on “brown,” or disturbed, land in California and distributed renewable energy generation that would substantially avoid many of the significant impacts of the proposed project to the OSNHT and the MR, as well as to Biological, Visual, and Water resource in the project area. OSTA also feels that the FSA inadequately deals with cumulative effects of HHSEGS and other energy plants proposed for nearby areas.

Should the Commission grant the Application for Certification, OSTA calls for conditions for certification to include much stronger mitigation measures for impacts to the OST/MR, as described in Section III.

**STANDARD OF REVIEW AND BURDEN OF PROOF**

The Commission has exclusive power to certify sites and related facilities for large solar plants in California (Public Resources Code § 25500). A certificate issued by the Commission may operate in lieu of other permits and supersede most otherwise applicable ordinances, statutes, and regulations (*ibid*). Accordingly, the Commission itself must determine whether the proposed project complies with “other applicable local, regional, and stat...standards ordinances, or laws,” and whether the Commission believes the proposed project is consistent with Federal standards ordinance, or laws (§ 25523(d); see also Siting Regs. § 1752(a)). The Commission may not certify any project that does not comply with applicable LORS unless the Commission finds both (1) that the project “is required for public convenience and necessity” and (2) that “there are not more prudent and feasible means of achieving public convenience and necessity” (§ 25525; Siting Regs. 1752(k)).

The Commission also serves as lead agency for purposes of CEQA (§ 25519(c)). Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that “mitigate or avoid” any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects (§ 21081; Siting Regs. § 1755). These findings must be supported by substantial evidence in the record (§ 21081.5; CEQA Guidelines § 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4<sup>th</sup> 1212, 1222-23). The Applicant bears the burden of providing sufficient substantial evidence to support each of the findings and conclusions required for



certification of the Project (Siting Regs. § 1748(d)). The Commission must determine whether sufficient substantial evidence is in the record to support its findings and conclusions. In this instance there is insufficient substantial evidence to support the required findings and, therefore, the Commission should not certify the Project. However, as stated above, should the Commission grant the Application for Certification, OSTA calls for conditions for certification to include much stronger mitigation measures for impacts to the OST/MR, as described in Section III.

## ARGUMENT

### **I. APPROVAL OF THE PROJECT WOULD VIOLATE CEQA**

The Commission's power plant siting process is a certified regulatory program for purposes of CEQA. (See § 21080.5; CEQA Guidelines § 15251(j).) Although certification exempts the Commission from CEQA's environmental impact report requirement, the Commission still must comply with CEQA's substantive and procedural mandates. (Public Resources Code §§ 21000, 21002, 21080.5; *Sierra Club v. Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road Areas Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal.App.4<sup>th</sup> 656, 667-68. The Commission must ensure adequate environmental information is gathered and that the environmental impacts of a proposed project are fully identified and analyzed before it is approved. Environmental review documentation "is more than a set of technical hurdles for agencies and developers to overcome." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 449-450.)

#### **A. CEQA applies to the OSNHT/MR, which crosses the HHSEGS project site.**

##### **1. OSNHT/MR meets the criteria of CEQA, as defined in Section 5024.1 (g).**

Testimony and evidence presented by the Old Spanish Trail Association establish that branches of the OSNHT/MR cross the project site. OSTA's report on Cultural and Visual Resources in the Near Vicinity of the Proposed HHSEGS Plan (OSTA 2012), presented archival evidence, data from historical maps, and OSTA archaeological pedestrian survey data presented the evidence in detail. In addition, the oral testimony of OSTA's Jack Prichett before the Commission on March 15, 2013, reviewed these evidentiary points at length.

The Commission's Final Staff Assessment (FSA) concurred in this conclusion. The Staff wrote that "While many have endeavored to trace a single route for the OST, or even a main route with some alternates, it seems more appropriate to call the resource a corridor, as it is referred to by the [National Park Service] feasibility study [for Congressional designation as a National Historic Trail] (NPS 2001). The Northern Route of the OST, as documented in the Feasibility Study, is located in the HHSEGS built-environment PAA."

The FSA goes on to state that portions of the OSNHT/MR northern corridor “are located within close proximity to the project site, and traces on the project site have not been adequately studied to determine whether or not they are contributors to the OST-MRNC.” Nonetheless, the FSA concluded “it is clear that the project site lies squarely among all of these tracks and traces and therefore, within the OST-MRNC, a regionally and nationally significant travel and trade corridor that aided the exploration and shaped the development of the southwestern United States...*Staff has concluded that there is a high probability that these tracks and traces, although not formally included in the Act, would be CRHR eligible under Criterion 1 as part of the Old Spanish National Historic Trail* [emphasis added].

Earlier in the FSA, CEC staff had written that the OSNHT itself meets eligibility criterion 1 for the California Register of Historic Resources (FSA 4.3-48 and 49).

With regard to discernible mule traces or wagon tracks on the project site, the FSA states that historic roads and trails reported by the applicant in DR-125 “have not been adequately studied” to make a determine whether they actually form part of the OST-MRNC. OSTA proposes later in this brief that the CEC seek to resolve this uncertainty, either through implementing a Phase II investigation or via the OSTA-led study prescribed in mitigation measure CUL-9.

## 2. OSNHT/MR also meets criteria of the NRHP

High-potential segments of the OST-MRNC also meet three of the four criteria for nomination to the National Register of Historic Places (only one is necessary):

- **Criterion 1:** is associated with events that have made a significant contribution to the broad patterns of our history. The OST-MRNC is associated with John C. Fremont’s explorations and with Mexican and Mormon immigration to California.
- **Criterion 2:** is associated with the lives of persons significant in our past. The OST-MRNC is associated with explorers Kit Carson and John C. Fremont, as well as California immigrants who played formative roles in the state’s history. These include “Mountain Man” Jedediah Smith, California pioneer George Yount, and William Workman (memorialized in the Workman and Temple Family Homestead Museum near Los Angeles).
- **Criterion 4:** has yielded, or may be likely to yield, information important to history or prehistory. The OST-MRNC is already the subject of numerous books, cited in OSTA’s cultural resources report filed with the CEC. Moreover, OSTA’s (2007-2011) documentation of a previously unrecorded segment of the OSNHT mule trace leading

west from the project site indicates that historical and archaeological data are still being discovered.

**3. Furthermore, OSNHT met the standard of National Park Service certification required for Congressional designation as a National Historic Trail.**

The National Park Service, as a manager with the Bureau of Land Management, is an interested party in the Application for Certification. In a public comment submitted in 2012, NPS' Michael Elliott wrote: "The route need not currently exist as a discernible trail to qualify, but its location must be sufficiently known to permit evaluation of public recreation and historical interest potential." The trail was determined to be nationally significant (NPS 2001:23) in terms of National Historic Trail criteria—*a much more restrictive standard than National Register evaluation.* [Emphasis added.]

**4. CEQA allows the CEC to determine the historical significance of the OSNHT/MR. CEC should determine that the OSNHT/MR is CRHR-eligible.**

The preceding points 1, 2, and 3 make clear that the OST/MRNC corridor does fall within in the project site and that the OSNHT as a resource "for public recreation and historical interest" will be impacted. Furthermore, segments of the mule trace and wagon roads that crossed the site, though not currently listed or determined to be eligible for listing in the CRHR, likely meet the eligibility standards, while the OSNHT successfully met the Congressional criteria for National Historic Trail designation. CEQA allows a lead agency—in this case, the CEC—to make a determination as to whether the OST/MRNC is a historical resource and therefore, historically significant (Pub. Resources Code, § 21084.1). The assessment of potentially significant adverse impacts to historical resources, and the mitigation that may be required of a proposed project to reduce any such impacts, depend on a CRHR-eligibility determination by the Commission.

**B. The project will cause significant adverse impacts that have not been avoided or minimized or mitigated to a less than significant level.**

**1. OSTA testified (both in written submissions and on March 15 at the evidentiary hearings) that archival evidence from 19<sup>th</sup> century traveler's accounts document the use of springs along the eastern edge of the project site.**

The archival record, plus the knowledge that the OST/MR proceed from the Nevada springs toward Emigrant Pass, lead to the conclusion that trail users crossed the dry lake bed in Pahrump Valley, crossing the project site on their westward journey. OSTA also testified that the use of CH2MHill's "assumption of the most efficient route" reinforces the conclusion that travelers crossed the project site as they headed west from camp sites at the springs.

The FSA backed up this conclusion, citing Applicant's DR125 and stating that "for the sake of historical realism, it is assumed that there is no "one" road on the surface, and that the OST/MR is a braided or anastomosing network of tracks." The project site, the FSA, concluded "is located within this corridor, with traces running throughout the project site" (FSA, 4.3-115).

With regard to impacts, the CEC staff's conclusion is clear and unambiguous. "The project would significantly impact the OST-MRNC by erasing potential tracks and traces on-site. Any OST-MRNC tracks and traces on the HHSEGS project site would be destroyed—directly, physically impacted by the project's construction. **Destruction of the tracks and traces and the resulting loss of integrity, is irreversible. Staff has concluded that this impact on the informational values of the OST-MRNC is significant and must be mitigated** (FSA, 4.3-116, emphasis added).

**2. Today, from the ground, the Pahrump Valley looks much to a visitor as it did during the 19<sup>th</sup> century Trail use period of the OSNHT/MR.**

The view of the surrounding Spring Mountains and the Nopah Range is unimpeded and majestic; the expanse of the desert landscape provoking admiration for those who traversed it on animal back or in wagons.

OSTA's Jack Prichett testified that the construction of the proposed project would cause a substantial adverse change in the significance of the OST/MR Northern Corridor, both by altering the ability of persons today to "vicariously enjoy the OSNHT/MR as experienced by its 19<sup>th</sup> century users," (a NRHP criterion for historical rural landscapes). The erection of twin 750-foot towers will alter those perceptions, bringing to mind the technological-industrial present rather than the 19<sup>th</sup> century.

**3. The project would also significantly impact VISUAL RESOURCES in the Pahrump Valley.**

These impacts would have a "spill-over" effect on NRHP-eligible segments of the OST/MR. As a result, "The integrity of the setting, feeling, and association of the tracks and traces outside of the HHSEGS project site would thus be significantly impacted by the project, which is within the viewshed of the NRHP-listed OST-MR District in Nevada, discussed above. KOP 2 in the **VISUAL RESOURCES** section of the FSA clearly shows that the power towers would be visible from the Stump Springs area. At a minimum the Stump Springs segment of the OST-MR District, as described in the NRHP nomination form, would be impacted, based on the visual simulation at KOP 2. The HHSEGS project would significantly degrade three of the aspects of integrity that contribute to the OST-MR District's significance—setting, feeling and association."

**4. The Staff has concluded that the impact of the project on the informational values of the OST/MR NC is significant and must be mitigated.**

The FSA states: “As discussed above, staff considers the OST-MRNC a historical resource for the purposes of CEQA, and therefore potential impacts resulting from the HHSEGS project must be evaluated. The project would significantly impact the OST-MRNC by erasing potential tracks and traces on-site. Any OST-MRNC tracks and traces on the HHSEGS project site would be destroyed—directly, physically impacted by the project’s construction. Destruction of the tracks and traces, and the resulting loss of integrity, is irreversible. Staff has concluded that this impact on the informational values of the OST-MRNC is significant and must be mitigated.”

**5. Like OSTA, CEC staff also concluded that the project would result in a significant and unavoidable direct, perceptual impact to the OST/MR NC.**

The FSA states: “The installation of this large number of heliostats and 750plus-foot towers would substantially alter the vast, open landscape that is a character-defining feature of this historical resource. The visual quality of this section of the OST-MR would be permanently damaged by the project’s presence, resulting in a substantial adverse change in the significance of a historical resource and a significant and unmitigable impact. This impact cannot be avoided or reduced if the project is constructed as designed and in the proposed location. Given the extended period of both the HHSEGS proposed project’s operation (a minimum of at least 30 years) and the physical presence of the proposed project facilities, the impact of the project on the resource must be considered permanent. Staff is unaware of any suite of mitigation measures that would fully mitigate the impacts of the proposed project and reduce the impacts to a less than significant level. The historical significance of the OST-MR in the Pahrump Valley is largely tied to its view of the vast, unobstructed, flat expanse of desert landscape, which would be impeded by any type of screening that might be proposed to attempt to block views of the project, especially the power towers. Eliminating project elements along the project site boundary would not lessen the visual impact, as the existing views are unobstructed for several miles.”

**C. The Commission cannot make the findings necessary to “override” the project’s significant impacts.**

**Cultural Resources, and the OST/MR in particular, are unique with respect to the totality, permanence, and the irreversibility that the project would have upon them.**

Impacts to other types of resource, such as Water Resources or Biological Resources, would be quantitative and their precise extent of the impact impossible to determine in advance (e.g., the precise number of Golden eagles

killed or desert tortoises displaced). But with the OST/MR the FSA states that: “Any OST-MRNC tracks and traces on the HHSEGS project site would be destroyed—directly, physically impacted by the project’s construction. **Destruction of the tracks and traces, and the resulting loss of integrity, is irreversible**” [emphasis added]. Additionally, the impacts to Visual Resources and the integrity of the landscape surrounding this segment of the OST/MR will likewise be massive and irreversible—at least until the towers are removed after end of project life.

Given the total and irreversible impacts to the on-site Cultural Resources, the No Project Alternative is the only viable alternative to irreversible destruction of Cultural Resources on the project site and significant impact to nearby portions of the OSNHT and MR and to Visual Resources in the Pahrump Valley.

The CEC’s Preliminary Staff Assessment stated the case succinctly: “[CEC] staff is unaware of any action, short of project relocation or denial that would directly avoid or substantially minimize the significant effects that the proposed project would have on the OST-MR Northern Corridor identified in this document.” (CEC Preliminary Staff Assessment, Cultural Resources, p. 72, emphasis added; <http://www.energy.ca.gov/2012publications/CEC-700-2012-003/CEC-700-2012-003-PSA.pdf>).

OSTA concurs with that judgment. To approve the project despite its irreversible impacts on the OST/MR and to Visual Resources, the Commission must find (1) that mitigation measures or alternatives to lessen these impacts are infeasible, and (2) specific overriding benefits of the project outweigh its significant environmental effects. In the case of the OST/MR the threshold for mitigating total destruction is very high; on the other hand, OSTA takes the position that the significant environmental impacts of HHSEGS on water, biological, and cultural resources, as well as the cumulative impacts of HHSEGS with other proposed projects, override the benefits of the project. The Commission should not “override” the project’s significant impacts to the environment.

## II. THE PROJECT IS INCONSISTENT WITH FEDERAL LAW AND STANDARDS

### A. Federal Laws, Orders, Regulations, and Standards

#### 1. The National Trails System Act (United States Code, Volume 16, Sections 1241-1251) designates the Old Spanish Trail a National Historic Trail.

The Act states (Sec. 2 [16 USC 1241] that it is the policy of the U.S. government “in order to provide for the ever-increasing outdoor recreation needs of an expanding population and in order to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air,

outdoor areas and historic resources of the Nation, trails should be established (i) primarily, near the urban areas of the Nation, and (ii) secondarily, within scenic areas and along historic travel routes of the Nation which are often more remotely located.”

**a. The OSNHT is unlike other NHTs in that its route has been determined largely from historical (i.e., archival documents such as old maps, travelers’ journals and reminiscences) rather than archaeological features (i.e., wagon ruts, large known camping sites or wagon train gathering points that remain visible on the landscape.**

This unique aspect of the OSNHT is due to the fact that the 1829-1848 Mexican mule caravans left little by way of archaeological record. The total number of mule caravans during that period was 16 (Lawrence 1932: 27-38). Most of these expeditions numbered fewer than 100 men and approximately twice that number of mules (ibid.) The mules traveled single file, following a horse mare (Eggenhofer 1961:17). An illustration in Eggenhofer’s book (pp. 14-15) shows mules following a bell mare along a track. Moreover, the Mexican caravan’s cultural inventory consisted primarily of cloth, leather, or wood, meaning that few metal or glass artifacts were present or likely to be found today.

Considering that there was but one caravan a year, the relatively small number of men and mules, plus the fact that the mules traveled single file and the paucity of glass or metal artifacts, it is not surprising that few archaeological traces remain from the 1829-1848 Old Spanish National Historic Trail. But that fact does not alter the Trail’s significance as one of the earliest, and the longest, Historic Trails.

**b. Further, especially since the OSNHT route was determined largely through historical sources, it is not essential that archaeological traces be present.**

In comments submitted to the CEC on July 23, 2012 [HHSEGS Docket; TN 66318], Michael Elliott, a National Park Service cultural resources specialist whose purview includes the OSNHT, wrote:

Many historic sites exhibit no currently visible surface archaeological manifestations. These include trails, battle sites, cultural water routes, traditional cultural properties, cultural landscapes, shipwrecks, treat trees, and others. All these sites can have great historical significance, often under Criterion A, so the question of their eligibility revolves around integrity. The seven aspects of integrity are location, design, setting, feeling association, materials, and workmanship. With no tangible surface remains, non-feature

sites must exhibit a high degree of integrity in location, setting, feeling, and location. Any undertaking that diminishes the integrity of a property along any of these aspects must be considered an adverse effect.

**2. Parts of the OSNHT are listed on the National Register of Historic Places. Others near the project site are under consideration, and given the documented presence of John C. Fremont and Kit Carson, the segments of Trail corridor on the HHSEGS property could be NRHP-eligible.**

**a. In 2001, the Nevada Office of Historic Preservation listed segments of the OST in Nevada on the NRHP, labeling it the OST-MR Historic District.**

It was found significant under NRHP Criteria A and D in the areas of transportation, exploration/settlement, and archaeology/historical with a significance period of 1844-1857. The Stump Spring segment of the OST-MR Historic District lies within a few miles of the Project site.

**b. In 2010 the BLM accepted American Recovery and Reinvestment Act (ARRA) funds to conduct a multi-state initiative focused on identifying, field inventorying, and assessing the cultural and visual resources of six National Historic Trails.**

The OSNHT is one of the six. Among the not-yet-concluded Inventory's goals are:

- Conduct visibility analyses for selected high potential route segments and high potential historic sites...
- Conduct a field inventory program that will describe and document the visual resources and settings associated with selected historic sites and high potential route segments for the national trails involved.

The California portion of the Inventory includes an Emigrant Pass segment of the OSNHT. Emigrant Pass, as noted in OSTA's March 15 testimony at CEC Evidentiary Hearing, is the point from which OSTA's started its field recording of the mule trace (OSTA 2012: 18-26; March 15, 2013 testimony of Jack Prichett at CEC Evidentiary hearing, transcript, pp. 39). That segment of the westward-bound mule trace leads away from the HHSEGS project site. Thus, the HHSEGS project site is bracketed to the east and west with NRHP and potentially NRHP-eligible OST-MR segments.

In addition, as noted in Section I.A.2, above, the segment of the OST-MR crossing the project site is closely associated with Kit Carson and Col. John C. Fremont, figures important in American and California history, meeting another criterion for NRHP eligibility.



**c. Pahrump Valley segments of the OST-MR are likely NRHP-eligible under the Rural Historic Landscapes provisions for the NRHP.**

The Department of the Interior's National Register Bulletin 30 ([http://www.nps.gov/nr/publications/bulletins/nrb30/nrb30\\_2.htm](http://www.nps.gov/nr/publications/bulletins/nrb30/nrb30_2.htm)) specifies the characteristics of such cultural landscapes. It details how National Register criteria can be applied, significance and integrity evaluated, and boundaries drawn for rural properties having significant acreage. These criteria would apply to OST-MR segments on BLM lands adjacent to and near the Project site.

Under the typology of Bulletin 30, the OST-MR would be classed as a migration trail (NRB 30: 4). This is particularly true with respect to the Mormon Road, which was the route followed by Mormon immigrants who settled San Bernardino (Lyman 2004:41-43; Sutak 2012: 272-400).

**d. NRHP-designation can apply to sites or trails where physical traces no longer remain.**

The Department of the Interior's National Register Bulletin 15 (<http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf>) states:

All properties change over time. It is not necessary for a property to retain all its historic physical features or characteristics.

The property must retain, however, the essential physical features that enable it to convey its historic identity. The essential physical features are those features that define both *why* a property is significant (Applicable Criteria and Areas of Significance) and *when* it was significant (Periods of Significance).

The OST/MR segments in the Pahrump Valley fulfill the significance properties spelled out in Bulletin 15, as argued in Section II.A.2.c, above.

**3. The U.S. Government's Federal Trail Standards defines characteristics for NHTs that apply to the OST-MR.**

The Department of the Interior has published Federal Trail Standards that apply to various types of federally designated trails within the U.S. Appendix B of the Federal Trail Standards ([http://www.nps.gov/gis/trails/Doc2/Appendix\\_B\\_NHT\\_Corridor\\_and\\_Condition\\_Categories\\_11\\_08\\_2011\\_master.pdf](http://www.nps.gov/gis/trails/Doc2/Appendix_B_NHT_Corridor_and_Condition_Categories_11_08_2011_master.pdf)) describes the "Corridor concept" as it applies to National Historic Trails. The description of NHT<sup>2</sup> Heritage Resources distinguishes between the Congressionally-designated route (the line on the official NPS map) and the actual route, as follows:

**NHT<sup>2</sup> Heritage Resources:** What and where is the route and sites where history actually occurred? [NHT<sup>2</sup> occurs on all NHTs, although

physical evidence and/or remnants may no longer be present. Location may be other than the congressionally designated route.]

**B. The Commission cannot make the findings necessary to “override” the project’s significant impacts.**

**1. Cultural Resources, and the OST/MR in particular, are unique with respect to the totality, permanence, and the irreversibility that the project would have upon them.**

Impacts to other types of resource, such as Water Resources or Biological Resources, would be quantitative and their precise extent of the impact impossible to determine in advance (e.g., the precise number of Golden eagles killed or desert tortoises displaced). But with the OST/MR the FSA states that: “Any OST-MRNC tracks and traces on the HHSEGS project site would be destroyed—directly, physically impacted by the project’s construction. **Destruction of the tracks and traces, and the resulting loss of integrity, is irreversible**” [emphasis added]. Additionally, the impacts to Visual Resources and the integrity of the landscape surrounding this segment of the OST/MR will likewise be massive and irreversible—at least until the towers are removed after end of project life.

Given the total and irreversible impacts to the on-site Cultural Resources, the No Project Alternative is the only viable alternative to irreversible destruction of Cultural Resources on the project site and significant impact to nearby portions of the OSNHT and MR and to Visual Resources in the Pahrump Valley.

The CEC’s Preliminary Staff Assessment stated the case succinctly: “[CEC] staff is unaware of any action, short of project relocation or denial that would directly avoid or substantially minimize the significant effects that the proposed project would have on the OST-MR Northern Corridor identified in this document.” (CEC Preliminary Staff Assessment, Cultural Resources, p. 72, emphasis added; <http://www.energy.ca.gov/2012publications/CEC-700-2012-003/CEC-700-2012-003-PSA.pdf>).

OSTA concurs with that judgment. To approve the project despite its irreversible impacts on the OST/MR and to Visual Resources, the Commission must find (1) that mitigation measures or alternatives to lessen these impacts are infeasible, and (2) specific overriding benefits of the project outweigh its significant environmental effects. In the case of the OST/MR the threshold for mitigating total destruction is very high; on the other hand, OSTA takes the position that the significant environmental impacts of HHSEGS on water, biological, and cultural resources, as well as the cumulative impacts of HHSEGS with other proposed projects, override the benefits of the project. The Commission should not “override” the project’s significant impacts to the environment.

**2. The intent of the National Trails System Act is to preserve and protect as National Historic Trails transportation corridors that were crucial in the building of the nation.**

If the project is licensed and proceeds, portions of the Trail corridor will be impacted, both as a historical cultural resource and as a Visual Resource. Federal lands in California and Nevada look onto the project site, and OSTA has presented the case that the Trail corridor in the Pahrump Valley is likely NRHP-eligible as a Rural Historic Landscape (NRHP Bulletin (Nrb 30).

**3. A corollary to the previous point: significance of the OSNHT resides to some extent in the fact that sections of the corridor pass through relatively unaltered "cultural landscapes" from the 1829-1848 period of significance.**

These rural cultural landscapes afford "an opportunity for the public to vicariously share the experience of the original users of the historic route." Locales such as the Trail corridor in the Pahrump Valley can still be appreciated today because the sights, sounds, and ecological conditions resemble those of 170 years ago. If the standards of National Register eligibility for "rural cultural landscapes" are met, then CEC approval of the project will have an adverse effect on a National Register-eligible cultural landscape.

### **III. THE CEC'S MITIGATION MEASURES CUL-9 AND CUL-10, AS DESCRIBED IN THE FSA, ARE INADEQUATE AND NEED TO REQUIRE MORE FROM THE APPLICANT BY WAY OF COMPENSATION.**

#### **A. OSTA's position**

OSTA recommends that the CEC deny the HHSEGS application. OSTA's position is based upon the complete, irreversible destruction of portions of the Old Spanish National Historic Trail/Mormon Road Northern Corridor (OSNHT/MR NC) that will result from building the plant in the proposed location.

Construction of the plant would result in grading and later site use that would permanently destroy and remove all vestiges of the OSNHT/MR NC with no possibility to preserve or restore them at the end of project life. No set of mitigation measures could ever compensate entirely for what is lost to us and to posterity.

**B. If the project is licensed and proceeds, damage to the OST/MR on the project site and in adjacent areas will be significant and irreversible.**

The irreversible destruction of portions of the OSNHT that would result from construction and operation of the HHSEGS plant represent an immeasurable loss of historical, cultural, and visual resources. The portion of the Trail in the Project marked a point at which westbound travelers left the Spring Mountains and

prepared for the next few days of trek across long, harsh sections of the Mojave Desert. Today, it is still possible for visitors to the Pahrump Valley to enjoy vicariously what travelers 180 to 120 years ago experienced on the OSNHT/MR NC.

Nothing can ever replace the heritage and history that will be lost if the project is built. If the Trail in the Pahrump Valley is obliterated; if the broad vistas are replaced with views of skyscraper-height towers, then mitigating measures must be commensurate with the enormous loss of place and historical identity that will disappear for today's Californians and for posterity.

**C. Deficiencies in CUL-9 and CUL-10 and OSTA's measures to strengthen the measures as described in the FSA.**

Seen in this light the only mitigating measures that can even partially compensate for the loss must be a large, comprehensive, and extensive artificial re-creation of what has been lost. Such a re-creation must embody findings and knowledge about the lost resources and environment, based upon the most complete and technologically sophisticated techniques of modern scientific data recovery.

Moreover, the capturing and analysis of these data must then be rendered into highly engaging, easy-to-understand, yet scientifically and historically accurate means of communications for the purpose of informing and educating a public that can no longer visit the real thing. Means for achieving this goal will include: video production for use on the Internet, in museums and schools, and on television; interactive displays for museum visitors; attractive and state-of-the-art museum space; strong public education and outreach programs, and more.

It is OSTA's considered opinion that mitigation measures CUL-9, CUL-10, as set forth in the FSA fall woefully short of meeting the mitigation goals just outlined. The three measures propose too little, are too limited in their scope and vision, and would not adequately compensate California and its citizens for what they will lose.

In light of OSTA's position and in light of the deficiencies we find in CUL-9 and CUL-10, OSTA proposes the following reformulation of these measures. The reformulated measures not only increase the scientific rigor and comprehensiveness of field methodologies in CUL-9, but prescribe for CUL-10 a much broader view of re-creating and presenting lost cultural resources to the general public. I will now present the enhancements to CUL-9 that are needed for the measure to ensure the best, most comprehensive, technologically possible data recovery from the project site. These will be data capable of being used by future scientists, archaeologists, movie-makers, and educators.

## 1. OSTA-proposed revisions to CUL-9

*This section copies the text of CUL-9 directly from the FSA. In this brief, OSTA has used strike-out text to show changes and inserted the OSTA-proposed replacement text in red italics.*

CUL-9 Prior to the start of construction-related ground disturbance or grading, boring, and trenching, as defined in the General Conditions for this project; and/or surface grading or subsurface soil work during pre-construction activities or site mobilization, and/or mowing activities and heavy equipment use in loose or sandy soils, at the project site and at laydown areas, roads, and other ancillary areas in California, the project owner shall fund a study of the Old Spanish Trail-Mormon Road Northern Corridor (OST-MRNC) by the Old Spanish Trail Association (OSTA). The project owner shall submit the OSTA study research design *developed in cooperation with OSTA* to the CPM for review and approval prior to the start of the investigation. The study shall not begin prior to CPM approval. No ground disturbance shall occur prior to completion of the OSTA study, unless such activities are specifically approved by the CPM. The OSTA study shall, at a minimum:

- a. *Gather remote-sensing data capable of revealing tracks, trails, traces, swales, vegetation changes, and other evidence of past activity on and immediately adjacent to the HHSEGS site. The remote sensing data to be gathered include aerial photography, both visible light and infrared; and LIDAR data from an airborne LIDAR survey of HHSEGS site and immediately adjacent areas.*
- b. *On the basis of these remote sensing data*, ground-truth all potential OST-MRNC tracks and traces within the identified OST-MRNC in the Pahrump Valley; and
- c. Produce a report, *based upon the remote-sensing data and the ground-truthing*, identifying the confirmed OST-MRNC tracks and traces in the Pahrump Valley and justifying the confirmation or rejection of each, with a map showing the confirmed tracks and traces; and
- d. Complete a DPR-5231 form for each confirmed track and trace located on the HHSEGS project site and submit these forms with the report required in Part b.

At the same time as or after the completion of the OSTA study, the project owner shall fund the research, analysis, and publication of a study of the OST-MRNC, to be conducted by an independent qualified ~~historian~~ academic *in partnership with OSTA This co-principal investigator with OSTA could be a qualified historical archaeologist, a historian, a cultural geographer with relevant experience, or an academic research center or instituted with expertise in historical archaeology. Such a research institute or center would preferably be associated with the University of California or a branch of the California State University system. A qualified cultural resources contract firm could also*

*serve as the co-principal investigator, provided that the firm has no ties with the project, BrightSource LLC, or CH2M Hill.*

*OSTA will participate in selection of the qualified co-principal investigator and will also share in the development of a research design, data analysis and interpretation, and preparation of the study report.*

The project owner shall submit the follow-up study research design to the CPM for review and approval prior to the start of the investigation. The study shall not begin prior to CPM approval. This OST-MRNC documentation and evaluation study shall, at a minimum:

- a. Produce a local historical context of the OST-MRNC in the Pahrump Valley; This historical-archaeological context will synthesize a variety of data needed to produce a scientifically and technologically record of all the on-the-ground resources that would be lost if the HHSEGS project proceeds. The historical-archaeological context will include the following elements:*

  - information from the OSTA report and the Old Spanish Trail Documentation Project*
  - information from historical accounts, archival manuscripts, and historical maps of the OSNHT/MR NC*
  - evaluating the role of the Mound, Browns, Weeping Rock, Hidden Hills Ranch, and Stump springs as key natural water sources for those traveling along this portion of the OST-MRNC*
  - aerial and satellite photography of the project area, as well as an aerial LIDAR survey to be performed of the project site and boundary areas*
  - integration of the above data into a series of GIS overlay maps to allow easy synthesis, analysis, and presentation of complex data sets.*
- b. Incorporating, and evaluating the role of the Mound, Browns, Weeping Rock, Hidden Hills Ranch, and Stump springs as key natural water sources for those traveling along this portion of the OST-MRNC;
- c. Evaluate the identified OST-MRNC tracks and traces for NRHP and CRHR eligibility in the local context of the Pahrump Valley;
- d. Evaluate the identified OST-MRNC for inclusion in the National Register of Historic Places (NRHP)-listed Old Spanish Trail-Mormon Road Historic District (Nevada), and the Old Spanish Trail National Historic Trail;
- e. Produce a report of investigations, including full documentation of the OST-MRNC and a recommendation, with full justification, on nominating the OST-MRNC for inclusion in the CRHR and/or the NRHP-listed Old Spanish Trail-Mormon Road Historic District (Nevada); documentation shall adhere to the Secretary of the Interior's Guidelines for Architectural and Engineering Documentation and the National Park Service guidelines for Historic American Landscape Surveys.

*From this point on, OSTA has no proposed changes to CUL-9.*

## **2. OSTA-proposed revisions to CUL-10**

*This section copies the text of CUL10 directly from the FSA. In this brief, OSTA has inserted the OSTA-proposed replacement text in **red italics**.*

The project owner shall negotiate, design, plan, cause to be built, staff, and maintain the infrastructure, and architectural and interior improvements necessary to implement interpretive and preservation objectives that will reduce the project's significant and feasibly unmitigable effects to the Pahrump Metapatch Mesquite Woodland-Coppice Dune Archaeological Landscape, the Pahrump Paiute Home Landscape, the Ma-hav Landscape, and the Old Spanish Trail-Mormon Road Northern Corridor in Pahrump Valley. The interpretive and preservation objectives that the project owner shall implement include, at a minimum:

### **[NEW OSTA CONDITION: PRODUCE A VIDEO]**

*A professional quality video with an initial production length of 52 minutes would be created to help disseminate information about the cultural, paleontological, geological and historical aspects of the trail.*

*The video would be produced to ensure three major purposes are met:*

- Integrity. The video would accurately reflect the cultural, historical and scientific data produced by the CUL-9 studies.*
- Quality. The video would be broadcast quality, developed by an established production company specializing in cultural productions.*
- Versatility. It would be capable of use in many ways, capable of repackaging for diverse audiences and purposes.*

*The core video would be shown to large audiences while vignettes taken from the core video would be used in museums, for broadcast, at conferences, and for interactive displays.*

*The video will provide an overview of the OSNHT/MR, depicting the vast scale of the 2000+ mile route from New Mexico to southern California. It will describe the commerce and immigration of both the OST and the later MR.*

*Video provides an easily distributed medium with which to preserve virtually for audiences the Trail corridor as it presently exists in and around the project site. In addition to capturing the current visual environment, the video will incorporate re-enactments based on archival accounts and present historical maps. It will also incorporate*

archaeological data collected from the OSTA study carried out for CUL-9 and based on OSTA's research on the previously unrecorded section of mule trace leading to Emigrant Pass.

Reenactments would be based on careful research. They would depict, for example, how the mules were loaded, how the people who used them looked in authentic costumes. Every effort would be taken to ensure the historical integrity of how the people at that time would have used the trail. Other notable historical people including Kit Carson and John C. Fremont who had explored and scouted the area and possibly named the trail would be depicted.

#### **[NEW OSTA CONDITION: CREATE A MOBILE MUSEUM ]**

The planning, design, construction and maintenance of a mobile museum to supplement OSTA interpretive and preservation objectives of the small stationary museum display proposed for the Shoshone Museum in order to reach a broader interested public at distant locations. The mobile museum would contain interactive and passive displays outlining the cultural, paleontological, geological and historical features being affected by the project.

A mobile museum will reach a wide and interested population that cannot conveniently get to museums in Pahrump and Shoshone. A precedent mobile museum example is the Van of Enchantment, a mobile museum sponsored by the New Mexico Department of Cultural Affairs and the New Mexico Department of Transportation. <http://www.vanofenchantment.org/> This mobile museum travels all over the state of New Mexico presenting statewide topics of interest to schools, neighborhoods, small towns and at special events where a large portion of the population does not have access to permanent museums and for those who may not have the resources to get to a museum.

The mobile museum van and its associated costs would be paid for by the Applicant as part of the CUL-10 mitigation. It would be maintained, updated, and staffed for the life of the project or 30 years, whichever is greater.

- 1. The construction and maintenance of an interpretive kiosk within one hundred yards of the facility site that presents broad overviews of the Pahrump Metapatch Mesquite Woodland-Coppice Dune Archaeological Landscape, the Pahrump Paiute Home Landscape, the Ma-hav Landscape, and the Old Spanish Trail-Mormon Road Northern Corridor along with information on the nearby interpretive facilities where the public shall be able to access more in-depth interpretive programs for each resource.**



The presentation of the overviews and the delivery of information on nearby interpretive facilities could occur in conjunction with the implementation of **VIS-6**, as long as the implementation of that condition occurred within the specified distance from the facility site.

**2. The delivery of passive museum displays and multi-media presentations, *and* hands-on, interactive exhibits, at extant interpretive facilities in Pahrump or adjacent valleys, the primary purposes of which shall be to facilitate the interpretation of the cultural landscapes and corridor, and visual resources.**

The specific interpretive modes shall include, at a minimum, the development and delivery of accessible<sup>1</sup>, separate displays, presentations, *and* exhibits, of museum quality<sup>2</sup>, for the following topics:

- the genesis, paleoecology, and archaeology of the Pahrump Metapatch Mesquite Woodland-Coppice Dune Archaeological Landscape,
- the seasonal subsistence cycle of the Pahrump Paiute Tribe, and
- the Old Spanish Trail-Mormon Road Northern Corridor.

The interpretation of each of the above topic and subtopic areas shall facilitate separate consideration of the chronologic phases and sociocultural themes relevant to each such area. The planning, development, maintenance, and periodic renewal of these modes shall be done in consultation with stakeholders that actively participated in the consultation process conducted in conjunction with the review of the project owner's application for certification for this project.

**3. The delivery of ethnographic reconstructions,<sup>3</sup> at an extant interpretive facility in Pahrump or adjacent valleys, the purpose of which shall be to facilitate the interpretation of the Native American use of the local landscape in the prehistoric and ethnographic periods.**

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<sup>1</sup> “accessible” shall be herein defined as comporting with the *Smithsonian Guidelines for Accessible Exhibition Design* (<http://accessible.si.edu/pdf/Smithsonian%20Guidelines%20for%20accessible%20design.pdf>)

<sup>2</sup> “museum quality” shall be herein defined as comporting with the *Standards for Museum Exhibitions and Indicators of Excellence* as developed by the Standing Professional Committees Council of the American Association of Museums (<http://name-aam.org/about/past-winners/standards-for-museum-exhibitions>)

<sup>3</sup> “museum quality” shall be herein defined as comporting with the *Standards for Museum Exhibitions and Indicators of Excellence* as developed by the Standing Professional Committees Council of the American Association of Museums (<http://name-aam.org/about/past-winners/standards-for-museum-exhibitions>)

The specific interpretive modes shall include, at a minimum:

- Native American installation and maintenance of an aboriginal horticultural garden reliant on natural spring water to the extent feasible, for public interpretation, and
- the conjunctive Native American installation and maintenance, of an exploratory reconstructed village consisting of a few replica dwellings that allow public access to walk in, about, and through the village and garden area. Providing direct visitor access to a real garden, featuring native garden varieties, such as pumpkins, beans, and corn, set near the interpretive materials provided per item 2, above, will greatly enhance the visitor education experience beyond what passive interpretive materials would solely provide.

From this point on, OSTA has no proposed changes to CUL-10.

### CONCLUSION

OSTA urges, in light of the foregoing arguments, the exhibits and the evidence submitted during this application process, that the Commission deny the application for certification for the HHSEGS project. Construction of the plant would significantly impact the corridor of the Old Spanish National Historic Trail, a Congressionally designated route with historical significance for immigration, exploration, and commerce in the Southwest United States.

If however, the Commission decides to approve the application for certification, then at the same time it should strongly enhance mitigation measures CUL-9 and CUL-10, as outlined in Section III, above. The impacts to a National Historic Trail corridor and to the rural historic landscape of the Pahrump Valley demand significant and lasting mitigation. What will be lost is irreversible and irreplaceable.

Dated: March 29, 2013

Respectfully submitted,



Jack Prichett  
President, Tecopa chapter  
Old Spanish Trail Association

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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
1-800-822-6228 – WWW.ENERGY.CA.GOV**

**APPLICATION FOR CERTIFICATION FOR THE  
HIDDEN HILLS SOLAR ELECTRIC  
GENERATING SYSTEM**

**Docket No. 11-AFC-02**

**PROOF OF SERVICE  
(Revised 3/25/13)**

**SERVICE LIST:**

**APPLICANT**

BrightSource Energy  
Stephen Wiley  
Amanda McCoy  
Bradley Brownlow  
1999 Harrison Street, Suite 2150  
Oakland, CA 94612-3500  
swiley@brightsourceenergy.com  
amccoy@brightsourceenergy.com  
bbrownlow@brightsourceenergy.com

BrightSource Energy  
Clay Jensen  
Gary Kazio  
410 South Rampart Blvd., Suite 390  
Las Vegas, NV 89145  
cjensen@brightsourceenergy.com  
gkazio@brightsourceenergy.com

**APPLICANTS' CONSULTANTS**

Strachan Consulting, LLC  
Susan Strachan  
P.O. Box 1049  
Davis, CA 95617  
susan@strachanconsult.com

CH2MHill  
John Carrier  
2485 Natomas Park Drive, Suite 600  
Sacramento, CA 95833-2987  
jcarrier@ch2m.com

**APPLICANT'S COUNSEL**

Chris Ellison  
Jeff Harris  
Samantha Pottenger  
Ellison, Schneider and Harris, LLP  
2600 Capitol Avenue, Suite 400  
Sacramento, CA 95816-5905  
cte@eslawfirm.com  
jdh@eslawfirm.com  
sgp@eslawfirm.com

**INTERVENORS**

Jon William Zellhoefer  
P.O. Box 34  
Tecopa, CA 92389  
jon@zellhoefer.info

Center for Biological Diversity  
Lisa T. Belenky, Sr. Attorney  
351 California Street, Suite 600  
San Francisco, CA 94104  
lbelenky@biologicaldiversity.org

Center for Biological Diversity  
Ileene Anderson  
Public Lands Desert Director  
PMB 447  
8033 Sunset Boulevard  
Los Angeles, CA 90046  
ianderson@biologicaldiversity.org

Old Spanish Trail Association  
Jack Prichett  
857 Nowita Place  
Venice, CA 90291  
jackprichett@ca.rr.com

**INTERVENORS (Cont'd.)**

Cindy R. MacDonald  
3605 Silver Sand Court  
N. Las Vegas, NV 89032  
sacredintent@centurylink.net

Richard Arnold  
P.O. Box 3411  
Pahrump, NV 89041  
rwarnold@hotmail.com

Amargosa Conservancy  
Donna Lamm, Executive Director  
Brian Brown  
Watershed Coordinator  
Route 127, P.O. Box 63  
Shoshone, CA 92384  
donnalamm@amargosaconservancy.org  
dates@chinaranch.com

County of Inyo  
Randy H. Keller, County Counsel  
Dana Crom  
Deputy County Counsel  
244 N. Edwards St., P.O. Box M  
Independence, CA 93526  
dcrom@inyocounty.us

William D. Ross  
Law Offices of William D. Ross  
520 South Grand Avenue  
Suite 300  
Los Angeles, CA 90071-2610  
wross@lawross.com

**INTERVENORS (Cont'd.)**

Southern Inyo Fire Protection District  
Larry Levy, Fire Chief  
410 Tecopa Hot Springs Road  
Tecopa, CA 92389  
Levy2717@access4less.net

**INTERESTED AGENCIES**

California ISO  
e-recipient@caiso.com

Great Basin Unified APCD  
Duane Ono  
Deputy Air Pollution Control Officer  
157 Short Street  
Bishop, CA 93514  
dono@gbuapcd.org

Nye County  
Lorinda A. Wichman, Chairman  
Board of County Supervisors  
P.O. Box 153  
Tonopah, NV 89049  
lawichman@gmail.com

Nye County Water District  
L. Darrel Lacy  
Interim General Manager  
2101 E. Calvada Boulevard  
Suite 100  
Pahrump, NV 89048  
llacy@co.nye.nv.us

National Park Service  
Michael L. Elliott  
Cultural Resources Specialist  
National Trails Intermountain Region  
P.O. Box 728  
Santa Fe, NM 87504-0728  
Michael\_Elliott@nps.gov

Southern Inyo  
Fire Protection District  
Larry Levy, Fire Chief  
P.O. Box 51  
Tecopa, CA 92389  
sifpd@yahoo.com

**ENERGY COMMISSION STAFF**

Mike Monasmith  
Senior Project Manager  
mike.monasmith@energy.ca.gov

Richard Ratliff  
Staff Counsel IV  
dick.ratliff@energy.ca.gov

Kerry Willis  
Staff Counsel  
kerry.willis@energy.ca.gov

**ENERGY COMMISSION –  
PUBLIC ADVISER**

Blake Roberts  
Assistant Public Adviser  
publicadviser@energy.ca.gov

**COMMISSION DOCKET UNIT**

California Energy Commission  
– Docket Unit  
Attn: Docket No. 11-AFC-02  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
docket@energy.ca.gov

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Adviser to Associate Member

\*Kelly Foley  
Adviser to Associate Member

Eileen Allen  
Commissioners' Technical  
Adviser for Facility Siting

**DECLARATION OF SERVICE**

I, Jack Prichett, declare that on March 29, 2013, I served and filed copies of the attached Opening Brief for the Old Spanish Trail Association, the most recent Proof of Service, which I copied from the web page for this project at: <http://www.energy.ca.gov/sitingcases/hiddenhills/>.

The document has been sent to the other persons on the Service List above in the following manner:

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**For service to all other parties and filing with the Docket Unit at the Energy Commission:**

- I e-mailed the document to all e-mail addresses on the Service List above and personally delivered it or deposited it in the US mail with first class postage to those parties noted above as "hard copy required"; **OR**
- Instead of e-mailing the document, I personally delivered it or deposited it in the US mail with first class postage to all of the persons on the Service List for whom a mailing address is given.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am over the age of 18 years.

Dated: March 29, 2013



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