

BEFORE THE  
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA

<b>DOCKET</b>	
<b>09-AFC-8</b>	
DATE	AUG 3 2010
RECD.	AUG 3 2010

Applications for Certification for the ) Docket No.  
 )  
Genesis Solar Energy Project, ) 09-AFC-8  
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\_\_\_\_\_ )

In behalf of CALifornians for Renewable Energy, Inc (CARE) we respectfully submit the following Opening Brief on Cultural Resources.

**Introduction**

Our Brief is concerning the Genesis Solar Energy Project, located in Eastern Riverside County along the I-10 corridor, that local Native American tribes consider the most sacred area of the North American Continent, La Cuna de Aztlan [the cradle of the Aztec civilization]. It is the area where the Aztec Calendar is geographically outlined and located in the form of geoglyphs [AKA intaglios], petroglyphs [rock art], and interconnecting trails that have been used by tribal runners for thousands of years. The area entails from the Kofa Mountains in Arizona, west to the human head image (Copill-Quetzalli) on the crest of the San Jacinto Mountains above the city of Palm Springs, Ca.

Another nearby project proposed Blythe Solar Power Project is overlaid on more than 25 large geoglyphs that we have been identified by still photograph and GPS location to the BLM throughout the area. They include the world known image of Kokopilli, Cicimitl (The Great Spirit that takes human spirits to their final resting place in the Topock Maze, "Mictlan"). Included in the area is the image of Tosco, over 5 large windrow mazes, a 9 level pyramid and over 25 sacred images (that we have not yet deciphered). The main East/West & North/South trails all lead to and from the Blythe Giant Intaglios. One trail leads to Kokopilli and Cicimitl which traverses west through the south end of the McCoy Mountains to the McCoy Springs. Here the image of Quetzalcoatl takes a bath then goes to the Palen Mountains "Hue-Hue- Tlapallan" (Reddish Earth), were he is lead to

the underworld by Xolotl (The Dog), as shown in the petroglyphs at the Palen Mountain Mural Wash. The trail comes down from the Palen Mountain Wash and meets with another trail from the McCoy Springs area that is in the Genesis project. The trail then runs west along the plains of the Palen Mountains then crossed southwest towards the Chuckawalla Mountains where it meets the main trail coming west from the Mule Mountains towards Desert Center, Ca. These two trails meet at the proposed Palen Mountain Project and the southwest trail leads towards Com Springs (Tula) located in the center of the Chuckawalla Mountains.

### **NEPA and RFRA**

The proposed Genesis Solar Energy Project conflicts with local Native American tribes' freedom to practice American Indian religions. Under the Religious Freedom Restoration Act of 1993 ("RFRA"), the federal government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a). "Exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A); see also *id.* § 2000cc-5(7)(B) (further specifying that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise"). Subsection (b) of § 2000bb-1 qualifies the ban on substantially burdening the free exercise of religion. It provides, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Approving the proposed action does not serve a compelling governmental interest in avoiding conflict with the Establishment Clause. The Supreme Court has repeatedly held that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604

(1984). "Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* (citations omitted); see also *Hobbie v. Unemp. App. Comm'n of Fla.*, 480 U.S. 136, 144-45, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.")

The Draft EIR/EIS inadequately analyzes the social and cultural impacts of the proposed action on these local Native American tribes. NEPA requires agencies to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment." 42 U.S.C. § 4332(2)(A). Agencies must "identify and develop methods and procedures ... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." *Id.* § 4332(2)(B). Finally, agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(2)(C). The regulations define "human environment" broadly to "include the natural and physical environment and the relationship of people with that environment," and note that "[w]hen an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated, then the [EIS] will discuss all of these effects on the human environment." [40 C.F.R. § 1508.14] The "effects" that should be discussed include "aesthetic, historic, cultural, economic, social, or health" effects, "whether direct, indirect, or cumulative." *Id.* § 1508.8

Under the RFRA, the federal government may not "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." [42 U.S.C. § 2000bb-1(a)] "Exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A); see also *id.* § 2000cc-5(7)(B) (further specifying that "[t]he use, building, or conversion of real property for the purpose of religious

exercise shall be considered to be religious exercise"). Sub-section (b) of § 2000bb-1 qualifies the ban on substantially burdening the free exercise of religion. It provides, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>1</sup>

Approving the proposed action does not serve a compelling governmental interest in avoiding conflict with the Establishment Clause. The Supreme Court has repeatedly held that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). "Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* (citations omitted); see also *Hobbie v. Unemp. App. Comm'n of Fla.*, 480 U.S. 136, 144-45, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.").

#### **42 USC § 1996**

##### **Protection and preservation of traditional religions of Native Americans**

The American Indian Religious Freedom Act (AIRFA) expresses the strong federal public trust policy in favor of respecting the traditional religious beliefs and practices Native Americans. AIRFA provides for the protection and preservation of traditional religions of Native Americans.

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The proposed Genesis Solar Energy Project will endanger traditional

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<sup>1</sup> This is why findings of overriding considerations for these "other concerns and policy considerations" must be adopted as part of the Final EIS.

religious, tribal, and cultural beliefs and interferes with native people's traditional rights and freedom to worship. The proposed Genesis Solar Energy Project will destroy many cultural sites. The CEC's analysis failed to properly analyze and to properly identify mitigation measures or remedial actions to prevent harm to the cultural sites of religious significance in consultation with the Most Likely Descendant(s) (MLD).

### **Due Process Violations**

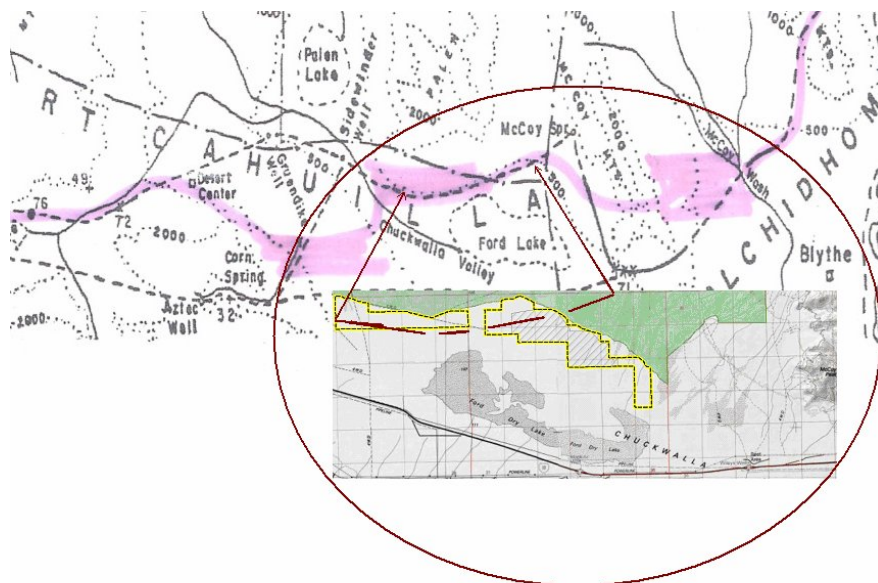
The CEC's review did not include any direct consultation with the affected tribal governments and therefore the draft SA/EIS has not been made public for comment and review.

Section 1983 of title 42 of the U.S. Code is part of the Civil Rights Act of 1871. This provision was formerly enacted as part of the *Ku Klux Klan Act of 1871* and was originally designed to combat post-Civil War racial violence in the Southern states. Reenacted as part of the Civil Rights Act, section 1983 is today the primary means of enforcing all constitutional rights.

Section 1983 provides that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Fourteenth Amendment to the United States Constitution protects individuals against the deprivation of liberty or property by the government without due process of law. *Portman v County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). A procedural due process claim under 42 U.S.C. § 1983 must allege three things: "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." *Id.*

### Public Highways [Trails] within the Subject Area



**Figure 1 trail between Corn Spring and McCoy Spring bisects the Genesis project site**

The applicant proposes to decommission or vacate public highways that are trails that have existed for thousands of years and to otherwise impair public use of historically established road and ways within the subject area. The proposal put forth by the applicant would prohibit access of their property and dictating terms of use. By proposing such schemes, the Agency ignores native people's inalienable rights that are protected by the United State Constitution, California Constitution, California State law, Federal law, and/or Presidential authority affixed with the original land patents, and possibly even rights protected by the *Treaty of Guadalupe Hidalgo*.

All of the main arterial highways passing over the subject public lands were clearly established before Congressional passage to the Federal Land Policy Management Act of 1976, which repealed Federal Revised Statute 2477. Many of these highways were, in fact, established during the prehistoric era and continued in use during the Spanish and Mexican Periods, were protection of the

*Treaty of Guadalupe Hidalgo* and later perfected under Revised Statute 2477 and the California Act Granting to Roads and Highways a Right of Way over the Public Lands of this State (California 1866:855). Revised Statutes 2477 states as follows:

Sec. 2477. The right of way for construction of highways over public lands, not reserved for public uses, is hereby granted. (U.S. 1875:456.)

An early California legal definition for the term highway clearly included a broader interpretation than might be considered today. The 1911 Highway Code define Highway as follows:

§ 2618. In all counties of this State public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property.

The Act Granting to Roads and Highways a Right of Way over the Public Lands of this State, approved by the sixteenth session of the California Legislature, states:

Section 1. Whenever any corporation, company or individual shall, in accordance with the general laws of this State, lay out and construct any road or highway over any unoccupied public lands of this State, or over any lands that the State by donation of Congress, otherwise, may hereafter acquire, such corporation, company or individual, and their respective assigns, are hereby granted the right of way for such roads or highways over such public lands. This act shall apply to roads heretofore as well as hereafter laid out and constructed. (Approved April 2, 1866. Statutes 1865-66:855.)

The United States Constitution, ninth and tenth amendments provide addition explanation regarding the rights and powers of the Unites States, the State, and the people:

Amendment 9 - The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10 - The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Based on these early laws, it is clear that both the United States Congress and the California State Legislature distinctly understood that the public had a right to pass over the public lands and there was an expressed expectation for the people to use or otherwise construct highways to facilitate their rights and rights of ways, to, from, over, and across these public lands. The Agency cannot grant or charge fees for rights or rights of ways that are preexisting, protect by the by the United State Constitution, the California Constitution, California State law, Federal law, international treaty and/or Presidential authority affixed with the original land patents.

Decommissioning roads, the county's abandonment of roads, or otherwise vacating roads only affect the government's responsibility to the roads, but in no way impairs the public's right to use or maintain the public road or way (*Chollar-Potosi v. Kennedy* 93 Am. Dec. 409; *Brown v. Stone* 69 Am. Dec. 303). Additionally, the long history of uninterrupted use and enjoyment of the roads and right of way conferred titled to the private property assignees in common, and perhaps in common with the public, and have also established prescriptive right to continue to enjoy the roads and rights of ways (*Pierce v. Cloud*, 82 Am. Dec. 496; *Chollar-Potosi v. Kennedy* 93 Am. Dec. 409; *Hill v. Crosby*, 13 Am. Dec 448).

Historically established public highways within the subject area include, but are not limited to, the roads and trails as marked on the Patrick Johnson Map 4-1-1957. Based upon CARE Exhibit 609 trails historically established public highways, roads, ways, and rights of ways that were established and granted by laws, treaties, rights, and court decisions that supersede the Agency's authority to grant other right of way. The Agency lacks authority to convert preexisting rights into privileges. Research is incomplete regarding other public highways existing in the subject area.



Respectfully submitted,



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August 3<sup>rd</sup>, 2010

**Verification**

I am an officer of the Intervening Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on this 3<sup>rd</sup> day of August 2010, at San Francisco, California.



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Lynne Brown Vice-President  
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09-AFC-8 POS attached



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**APPLICATION FOR CERTIFICATION FOR THE  
GENESIS SOLAR ENERGY PROJECT**

**Docket No. 09-AFC-8**

**PROOF OF SERVICE  
(Revised 7/23/10)**

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**DECLARATION OF SERVICE**

I, Lisa Belenky, declare that on August 13, 2010, I served and filed copies of the attached Opening Brief of CBD, dated \_\_\_\_\_, 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: [[http://www.energy.ca.gov/sitingcases/genesis\\_solar](http://www.energy.ca.gov/sitingcases/genesis_solar)].

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. 09-AFC-8  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
[docket@energy.state.ca.us](mailto: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.

