

<b>DOCKET</b>	
<b>09-AFC-8</b>	
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August 11, 2010

California Energy Commission  
Dockets Unit  
1516 Ninth Street  
Sacramento, CA 95814-5512

Subject: **GENESIS SOLAR, LLC REPLY TO THE THIRD OPENING BRIEF OF CURE  
– EVIDENTIARY HEARING DAY 3 TOPICS  
GENESIS SOLAR ENERGY PROJECT  
DOCKET NO. (09-AFC-8)**

Enclosed for filing with the California Energy Commission is the original of **GENESIS SOLAR, LLC REPLY TO THE THIRD OPENING BRIEF OF CURE – EVIDENTIARY HEARING DAY 3 TOPICS**, for the Genesis Solar Energy Project (09-AFC-8).

Sincerely,



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STATE OF CALIFORNIA

Energy Resources  
Conservation and Development Commission

In the Matter of:

Application for Certification for the  
Genesis Solar Energy Project

**DOCKET NO. 09-AFC-8**

**GENESIS SOLAR, LLC REPLY TO  
THE THIRD OPENING BRIEF OF  
CURE – EVIDENTIARY HEARING  
DAY 3 TOPICS**

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In accordance with the Committee direction at the evidentiary hearings held on July 12, 13 and 21, 2010 Genesis Solar, LLC (Genesis) submits this Reply Brief in response to the Third Day Opening Brief of CURE, as follows:

I.

**INTRODUCTION**

CURE alleges in its Opening Brief that the environmental baseline is not sufficiently defined for certain plant species that are the subject of Condition of Certification **BIO-19**. Genesis has addressed these contentions in its Reply Brief to CBD and requests the Committee review that Reply Brief when considering the biological issues raised by CURE.

CURE also alleges in its Opening Brief that the environmental baseline is inadequate for Cultural Resources because it contends that subsurface excavation prior to Licensing is mandated by the California Environmental Quality Act (CEQA). CURE is simply wrong and completely ignores the affect of the Conditions of Certification will include additional investigation and analysis of each known archaeological site to refine the conservative assumptions of significance prior to construction in those areas. Therefore, the threshold question for the Committee is whether such excavation must be done prior to Licensing or can such further work to refine the conservative assumptions be done as part of the mitigation. CURE ignores that in either case any potential impact will be mitigated in the same manner. CURE has assumed that nothing discovered during

further refinement activities prior to construction in the potential resource area could be preserved in place. This assumption is unfounded and ignores that the Conditions of Certification include the preparation and implementation of a Plan<sup>1</sup> (standard practice for the Commission over the last decade) that will ensure that where possible resources may be preserved in place.

CURE is fond of citing case law in such a manner as to construe a fatal flaw for the GSEP when none actually exists. Genesis agrees that in order for an appropriate analysis to be conducted, the Commission must understand the conditions of the site at a sufficient level of detail to determine what the effects of the project will be. However, as described in earlier briefs, “CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project, [t]he fact that additional studies might be helpful does not mean that they are required.”<sup>2</sup> A study, required by an agency, which “takes place over two winters could conflict with the requirement that EIR’s for private projects be prepared and certified within one year.”<sup>3</sup> CEQA requires the EIR performed on a potential project to “reflect a good faith effort at full disclosure”, does not “mandate perfection or the EIR to be exhaustive” and “will be judged in light of what was reasonably feasible.”<sup>4</sup>

Lastly, CURE has exaggerated the potential to discover human remains at the site and has not disclosed to the Committee the comprehensive existing legal structure that is in place to address the accidental discovery of human remains during construction.

## II.

### **THE BASELINE ESTABLISHED BY STAFF FOR CULTURAL RESOURCES IS ACCURATE AND WITH THE MITIGATION PROPOSED WILL ENSURE THAT NO SIGNIFICANT UNANALYZED AND UNMITIGATED IMPACTS OCCUR**

GSEP concurs with CEC Staff the RSA has established an accurate environmental baseline to formulate mitigation for cultural resources.

CURE has made a number of statements in its Opening Brief that misinterpret earlier testimony and docketed information, misrepresent archaeological practices, or selectively present only partial information on particular issues.

For example on page 1 of its Opening Brief CURE states:

For example, as Staff acknowledged, “the impacts to ethnographic resources have not yet been evaluated. Consequently, Staff does not

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<sup>1</sup> Cultural Resources Monitoring and Mitigation Plan (CRMMP) pursuant to Condition of Certification **CUL-5**

<sup>2</sup> *Gray v. County of Madera*, (2008) 167 Cal. App.4th 1099. (Quoting *Associated of Irrigated Residents v. County of Madera*, (2003) 107 Cal.App.4th 1383).

<sup>3</sup> Id. (See also, Public Resources Code 21100.2, 21151.5; CEQA Guidelines 15108)

<sup>4</sup> *City of Long Beach v. Los Angeles Unified School District*, (2009) 176 Cal. 889.

know if these resources are significant, or if any mitigation is needed or appropriate. (*Id.*, pp. C.3-2-3.)

Unfortunately, this statement totally ignores the fact that both the GSEP and BLM have been consulting with state and federally recognized Native American groups about the project for the past three years. The agencies have also requested information from the Sacred Lands File at the Native American Heritage Commission (NAHC). These efforts are documented in detail in Tables 4 and 5 of section 3.4.4 of the Exhibit 403. Despite repeated requests, the NAHC and the tribes have not identified any specific Traditional Cultural Properties (TCPs) anywhere in or around the GSEP area<sup>5</sup>. No tribe has requested that the GSEP or BLM provide the assistance of an ethnographer to help them identify any such properties. As Exhibit 403 states on page C.3-184, “Only members of the community who value the resource culturally and/or spiritually, in this case Native Americans, can determine impacts and suggest possible mitigation,” and to this point no Native Americans have identified any specific resources or impacts. Additionally, CURE ignores that Staff has recommended, and Genesis has agreed to implement Condition of Certification **CUL-1** which funds a regional study specifically to mitigate any potential contribution to a cumulative impact to the Prehistoric Trails Network as a cultural landscape and **CUL-14** which ensures further consultation with Native American groups. As staff expert Dr. Bagwell explained in her testimony:

A number of comments by Dr. Whitley expressed a concern that our conditions and our discussion hadn't sufficiently addressed what he refers to as the Heritage Resources. And I guess that's what we're trying to talk about with spiritual resources or ethnographic resources. And I just would really like to say that that's very much been an important part of our conditions, not just Cul 16, which is one that we've been working on in our workshop recently, but particularly Cul 1, which created the prehistoric trails network cultural landscape. That's very much intended to deal with not just the information aspects of archaeological sites, but the more cultural spiritual aspects as well.<sup>6</sup>

CURE's statement is correct that “...impacts to ethnographic resources have not yet been identified...” but only because no ethnographic resources have been identified in the course of three years of good faith effort in compliance with CEC and BLM requirements to do so.

An extension of this same point is made later on page 1 of CURE's Opening Brief:

Staff also admitted that data recovery only mitigates the scientific value of cultural resources; “data recovery does not mitigate the loss of other kinds of values that would be part of these resources, spiritual values, cultural values.” (*Id.*, p. 148.) Thus, Staff's proposed data recovery mitigation will not mitigate the Project's significant impacts to any cultural resource value

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<sup>5</sup> 7/21/20 RT 152

<sup>6</sup> *Ibid* at pages 153 and 154, we believe Dr. Bagwell was referring to CUL-14 not CUL-16

other than scientific value. Staff admittedly did not adequately analyze or mitigate the Project's significant impacts to cultural resources. Given Staff's candid admissions, the Commission cannot approve the Project without violating CEQA.

CURE's hasn't established that **any other values** are present in the sites that require mitigation, and ignores the fact that GSEP, the BLM, and the CEC are fully compliant with state and federal law in their efforts to identify any "...spiritual values, cultural values..." that those sites may have. CURE's entire argument is that there could be a cultural resource that provides cultural and spiritual value and that the only way to mitigate such resource would be to preserve it in place. However, they fail to show any evidence that any such resource could exist. The idea that excavation could somehow uncover some evidence that resources with such values exist on the site without involvement and response from the Native American community is a red herring. CURE also fails to acknowledge that **CUL-13** requires Genesis to flag and avoid certain sites.

CURE fails to acknowledge that the evidence supports that the potential significance value for any of the sites is scientific and the Conditions of Certification adequately mitigate for that impact. For example, Condition of Certification **CUL-10** requires specific data recovery plans be prepared prior to construction and that they be implemented when ground disturbance could occur within 30 meters of the potential archaeological or cultural resource site.

In another part of the brief (p. 3) CURE wildly overstates the certainty involved in any archaeological investigation and the wide variability in the types of data available to the archaeologist:

"Staff admitted that it is not always possible to determine the size and nature of archaeological sites based solely on visual examinations of the ground surface. (*Id.*) For example, Staff agreed that it cannot be determined whether or not burials are present within sites based solely on visual examination of the ground surface. (*Id.*, pp. 169-170.) Staff also agreed that test excavations are required to determine whether burials are present within a site. (*Id.*, p. 170, 250.) However, no excavations were conducted to determine whether the Project site contains human cemeteries. (*Id.*, p. 169.) Because test excavations were not conducted, Staff did not (and could not) assess the Project's potential to significantly impact buried cultural resources, including human burials."

In the case of some sites, it's entirely possible to determine whether burials are present without test excavations. On the Imperial Valley Solar Project (08-AFC-5) Remains of a significant number of human cremations were found exposed on the ground surface and no test excavations were needed to establish their presence.

In other cases, extensive test excavations on sites have completely missed human burials that were encountered later. Test excavations, especially in large sites, are just a

first brush at seeing what is there. This would be especially true in the case of the GSEP where the BLM places strict limits on the amount of excavation that can be done on any site.

In point of fact, an archaeologist does not have all of the data about a site until it has been completely excavated, and must therefore move forward taking a risk management approach based upon the data that he or she has. CEQA lead agencies recognize this, as this one has, by providing for construction monitoring and requiring unanticipated discovery plans.

In Genesis' Opening Brief on Cultural Resources, it has demonstrated that the risk for encountering human burials at these sites is low, based upon the nature of the Holocene deposit (one foot thick), the fact that it is subject to erosion, and the fact that despite these two conditions no exposed remains have been observed by GSEP's consultant or any other archaeologist unaffiliated with the project who has worked on these sites. As the geoarchaeology study demonstrated, Ford Dry Lake was a playa lake, and only held water seasonally at intervals.<sup>7</sup> It was never the permanent water source that would allow the prehistoric inhabitants to establish permanently occupied villages. The nature of the artifacts and features observed at the sites are consistent with this as they are dispersed artifact scatters and deflated hearths represented multiple temporary camps. No one has seen any remains consistent with large villages: exposed dark midden soil, very thick artifact or bone scatters, pithouse depressions, or depressions that may indicate burials. In a geologic setting like this, with a thin Holocene soil subject to erosion, remains of extensive villages with associated burials should have been seen or indicated if they were present. It may be more common practice to pursue subsurface test excavations when surficial surveys reveal artifacts or sign that significant subsurface resources such as burial sites are likely to be present. Note that in any event the conditions require, that careful, methodical subsurface data recovery be conducted at all sites deemed "potentially eligible" based on what was found at the surface and such data recovery will be implemented pursuant to plans approved by the CEC and BLM that are designed to ensure that any unforeseen artifacts are handled appropriately.

CURE also fails to disclose the comprehensive legal structure directing activities associated with the discovery of human remains during construction as staff expert Ms. Bastian alluded in her testimony.<sup>8</sup> CURE implied that the only available mechanism for mitigating such an event would be to preserve the remains in place. In fact, the CEQA Guidelines do not specify that the only means of mitigating the discovery of human remains is preservation in place and specifically addresses the procedures that occur if human remains are discovered during construction. Section 15064.5 (e) provides:

**(e) In the event of the accidental discovery or recognition of any human remains in any location other than a dedicated cemetery, the following steps should be taken:**

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<sup>7</sup> Exhibit 29

<sup>8</sup> 7/21/RT 178-179

**(1) There shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent human remains until:**

**(A) The coroner of the county in which the remains are discovered must be contacted to determine that no investigation of the cause of death is required, and**

**(B) If the coroner determines the remains to be Native American:**

**1. The coroner shall contact the Native American Heritage Commission within 24 hours.**

**2. The Native American Heritage Commission shall identify the person or persons it believes to be the most likely descended from the deceased Native American.**

**3. The most likely descendent may make recommendations to the landowner or the person responsible for the excavation work, for means of treating or disposing of, with appropriate dignity, the human remains and any associated grave goods as provided in Public Resources Code Section 5097.98, or**

**(2) Where the following conditions occur, the landowner or his authorized representative shall rebury the Native American human remains and associated grave goods with appropriate dignity on the property in a location not subject to further subsurface disturbance.**

**(A) The Native American Heritage Commission is unable to identify a most likely descendent or the most likely descendent failed to make a recommendation within 24 hours after being notified by the commission.**

**(B) The descendant identified fails to make a recommendation; or**

**(C) The landowner or his authorized representative rejects the recommendation of the descendant, and the mediation by the Native American Heritage Commission fails to provide measures acceptable to the landowner.<sup>9</sup>**

These procedures incorporate the mandates of Public Resources Code Section 5097.9 et seq. CURE implies from Dr. Whitley's testimony that unless subsurface testing is done prior to Licensing, there is not a valid mechanism to deal with the unanticipated discovery of human remains. As the above section illuminates, not only is there a comprehensive method for handling such event, preservation of the remains at the exact location where discovered is not the mandated outcome. The Conditions of Certification ensure this procedure is followed by requiring monitoring during construction activities (**CUL-8**), providing the Cultural Resource Specialist the authority to halt work if there is any kind of discovery including human remains (**CUL-9**), training of workers to recognize potential cultural resources and their responsibilities if they discover such resources (**CUL-7**).

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<sup>9</sup> Title 14 CCR Section 15064.5 (e), **emphasis added**

Further at page 3 of its Opening Brief, CURE attempts to insinuate that the CEC diverges significantly from the practices of other CEQA lead agencies:

According to Dr. Whitley, in the last 25 years of his 35-year career as an archaeologist in California, he has not seen one project “move ahead without test excavation, where final determinations of adverse effect could be specified, and appropriate mitigation measure presented and provided.” (*Id.*, p. 254.) On the other hand, during the first 10 years of Dr. Whitley’s career, it was common practice to approve a project prior to performing test excavations. (*Id.*) But, “city halls were picketed, burials were flying all over the place. It was a recipe for a catastrophe.... ***That’s why every CEQA agency I’ve worked in the last 25 years, we want to see test excavation data before we’ve got a draft EIR.***” (*Id.*, pp. 254-255 (emphasis added).)”

These observations are anecdotal in nature, and limited due to the fact that Dr. Whitley is only one archaeologist and there are a large number of certified EIRs that he has not been associated with. A short list of certified EIRs that we are aware of, where resources were recorded and no Phase II work conducted, would include:

- **Magnolia Power Project** Los Angeles County (01-AFC-6)
- **Oak Valley Substation System Project PEA/EIR** Riverside County
- **Hyundai/Kia Automotive Test Course** Kern County
- **Ocean Meadows Residences and Open Space Plan EIR**, Santa Barbara County
- **Comstock Homes Development and Ellwood Mesa Open Space Plan EIR**, Santa Barbara County
- **Faculty and Family Student Housing Open Space Plan & LRDP Amendment EIR, UC Santa Barbara**, Santa Barbara County

A review of these EIRs would show that there are a wide variety of approaches taken in gathering data for evaluating site significance for CEQA compliance. The “standard practice” described by Dr. Whitley -- Phase I, then mandatory Phase II investigations -- is really anything but standard, and he paints an overly simplistic picture of how cultural resources are evaluated.

For example, at the Magnolia Power Plant site, a project licensed by the CEC, historic air photos and historic maps showed that a historic farm house was located on the project site. The CEC did not require test excavations to locate possible remains such as a privy or trash pits. Instead it required construction monitoring to look for the remains with a plan to respond if they were encountered.

This is especially true with previously recorded sites. In some of the EIRs cited, the CEQA-lead agency was very comfortable with using the extent of surface manifestation as site boundaries and never required Phase II work. On others, academic research

excavations in sites made 40 or 50 years ago were judged to be adequate even when a search for site boundaries was not conducted.

GSEP concurs with CEC Staff that the RSA's approach to impact analysis and mitigation ensures CEQA compliance.

On page 6, CURE makes a second attempt to assert that the CEC staff has ignored ethnographic resources:

Although CEQA does not specifically require the Commission to consult with Native Americans, as the National Historic Preservation Act does, CEQA does require the Commission to identify the Project's significant environmental impacts and discuss mitigation measures for each adverse impact. (14 Cal. Code Regs. § 15126.4(a)(1).) Thus, Staff was required to conduct an analysis of the Project's potentially significant impacts to ethnographic resources. Staff did not.

And

"To satisfy CEQA's requirements, Staff should have (and could have) consulted with Native Americans. The record shows that Native Americans are concerned about the Project's impacts, that Native Americans are actively participating in the Energy Commission's approval process for the Project, and that Native Americans are willing to consult with Staff. (July 21, 2010 Tr., pp. 97-99, 106-116; Exh. 600; Exh. 605; Exh. 606; Exh. 609; Exh. 615.) Yet Staff did not consult.

To reiterate an earlier point, Staff did not analyze impact to ethnographic resources because no ethnographic resources have been identified. This despite the fact that GSEP, the BLM, and the CEC are fully compliant with state and federal law in three years of effort of working with Native American groups to identify them, as documented in the RSA.

Frankly, Staff should be credited for the fact that the views they put forward in the RSA and in Testimony recognize the possibility that TCPs/ethnographic resources, could at some future date be identified through the Section 106 consultation process. However, Staff cannot analyze a future unknown.

On page 7, CURE criticizes CEC staff for requiring mitigation measures based on scientific value of the sites affected, and not requiring measures based on "spiritual and cultural values."

"Staff proposed data recovery to mitigate the Project's impacts to cultural resources. (July 21, 2010 Tr., p. 180; Exh. 441, pp. 16-21.) However, Staff admitted that data recovery only mitigates for the loss of scientific value of cultural resources. (*Id.*, pp. 148, 174-175, 251.) According to Staff, "data recovery doesn't mitigate the loss of other kinds of values that would be

part of these resources, spiritual values, cultural values.” (*Id.*, p. 148.)  
CURE agrees.

Once more, CURE can’t identify any cultural resources that may have “spiritual values, cultural values” and ignores three years of documented attempts compliant with state and federal law to do so.

Further along on page 7, CURE criticizes Staff for not requiring avoidance as a mitigation measure:

“Similarly, it appears that Staff is aware of CEQA’s explicit preference for preservation in place for mitigation of archaeological sites and admitted that data recovery does not satisfy CEQA’s preference. (*Id.*, pp. 180-181.) Again, however, Staff’s mitigation approach goes straight to data recovery without requiring avoidance. (*Id.*, p. 180.) Staff stated that conditions of certification do not have to require the Applicant to avoid sites because “[t]hey volunteered to do that...Yes, avoidance has happened. Yes, I feel we’re satisfying CEQA in that sense.” (*Id.*, p. 181.) However, Staff then admitted that the size of theists could have been significantly underestimated because formal site boundaries were not provided. (*Id.*, pp. 183-184.) Obviously, if sites’ boundaries are not determined, it’s impossible to avoid the sites.”

CURE ignores the data provided in Genesis Opening Brief that documents the GSEP has been redesigned to avoid 53 cultural resources. Contrary to its assertion that formal boundaries haven’t been assigned for the sites, they actually have. BLM has conducted a third-party field check for quality assessment of the GSEP fieldwork, and has accepted that the fieldwork is of sufficient quality to move forward to with Programmatic Agreement.

### III.

#### **THE BASELINE ESTABLISHED BY STAFF FOR BIOLOGICAL RESOURCES IS ACCURATE AND WITH THE MITIGATION PROPOSED WILL ENSURE THAT NO SIGNIFICANT UNANALYZED AND UNMITIGATED IMPACTS OCCUR TO SPECIAL STATUS PLANTS**

The contentions raised by CURE relating to Condition of Certification **BIO-19** are addressed in the Genesis Reply Brief to CBD – Third Day Topics and Genesis requests that it be incorporated herein by reference and that the Committee refer to it when considering CURE’s contentions.

V.

**CONCLUSION**

The Committee has sufficient information to conclude that the environmental baseline has been adequately identified and that the GSEP will not cause significant unmitigated impacts to native plants or Cultural Resources.

Dated: August 11, 2010

/original signed/

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Scott A Galati  
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**APPLICATION FOR CERTIFICATION FOR THE  
GENESIS SOLAR ENERGY PROJECT**

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

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**DECLARATION OF SERVICE**

I, Ashley Garner, declare that on August 11, 2010, I served and filed copies of the attached: **GENESIS SOLAR, LLC REPLY TO THE THIRD OPENING BRIEF OF CURE – EVIDENTIARY HEARING DAY 3 TOPICS** dated **August 11, 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)].

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Ashley Garner