

## DOCKETED

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## DOCKETED

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# COLORADO RIVER INDIAN TRIBES

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### **Via Electronic Mail Only**

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Dockets Unit, MS-14  
Docket No. 09-AFC-7C  
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Re: Comments of the Colorado River Indian Tribes on the Preliminary Staff Assessment for the Palen Solar Electric Generating System (09-AFC-7C)

Dear California Energy Commission Staff:

The Colorado River Indian Tribes ("CRIT" or "the Tribes") submit these comments on the California Energy Commission's ("CEC" or the "Commission") Preliminary Staff Assessment ("PSA") prepared for the Palen Solar Electric Generating System ("Palen" or the "Project"). CRIT is a federally recognized Indian tribe whose members include Mohave, Chemehuevi, Navajo, and Hopi people. The Colorado River Indian Reservation, home to the Tribes, is approximately 45 miles due east from the Project site; however CRIT's members have lived and traveled in the Project area since time immemorial.

Because of the Tribes' past, present, and future connection to the land on which the Project is proposed, CRIT has grave concerns about the Project's potential for significant impacts on the culture and way of life of its members. CRIT members tell stories and sing songs related directly to the area where the Project is proposed. CRIT members consider the plants and animals that will be impacted by the Project, as well as traditional gathering places, to be sacred. CRIT members speak of the petroglyphs and traditional trails that surround the area, which tell of the existence of their ancestors. The destruction of these landscapes risks the desecration of sacred songscapes and storyscapes.

The Palen Project is one of dozens of renewable energy projects in the area either approved or under consideration by the Commission and the Bureau of Land Management ("BLM"). The collective impact of this transformation of the desert has had, and will continue to have, considerable adverse impacts on the Tribes and the cultural, spiritual, and religious practices of CRIT members. CRIT is concerned that California and the federal government intend to approve all

renewable energy projects proposed by private companies in this region, no matter what the cost to affected tribes, native plants and animals, and the desert ecosystem as a whole. This “approval at all costs” strategy is apparent from the failure of both the state and federal government to halt or significantly curtail destructive projects—such as McCoy, Ocotillo Express, Ivanpah, and Genesis—after tribes and members of the public brought legitimate concerns to their attention.

The recent unearthing of likely cremation sites and scores of buried cultural resources in and around the nearby Genesis Solar Energy Project underscores the need for caution in this sensitive environment. However, the CEC’s expedited review of the Project is once again superficial and potentially devastating to sacred landscapes. The area that would be affected by the Project falls within a significant trail corridor still in active use by CRIT members and other traditional practitioners in the region. *See Exhibit 1* (maps indicating known or reported trails in the vicinity of the Project); *see also* PSA 4.3-21. Yet while the Applicant proposes to build the fifth-highest structure in California—including two towers that would be visible for nearly thirty miles—the PSA offers no analysis of the impact of this drastic industrialization on the cultural landscape. Instead, it largely defers analysis of the Project’s key impacts on cultural resources and CRIT’s traditional practices until the Final Staff Assessment (“FSA”). The failure to properly consider the full ramifications of the Project at this stage of project review is almost certain to lead to irreparable harm to the tribal community.

Given the short timeframe allowed for public comments, this letter focuses on impacts to cultural and visual resources as well as the proposed mitigation for these impacts. The lack of comments on other sections does not indicate approval. CRIT reserves the right to raise other concerns later in the review process.

**I. The Commission Must Delay Review of the Project Until Impacts to Countless Ethnographic and Archaeological Resources Are Evaluated.**

Under the regulations implementing the Warren-Alquist Act, the Commission cannot certify an electrical generation facility like Palen unless “the benefits of such facility outweigh its unavoidable adverse effects.” 20 C.C.R. § 1741(b)(1). However, the PSA simply does not provide the necessary information to complete this analysis. The PSA does not evaluate the Project’s visual, physical, or cumulative impacts on cultural resources. The PSA does not evaluate a single Project Alternative. The PSA does not incorporate any ethnographic analysis of the area or the Project’s impacts. Instead, CEC staff asks both tribes and the public to wait until the release of the FSA to review this information.

The obvious problem presented by this approach is that it insulates the CEC staff assessment, and ultimately, staff testimony, from public comment. The CEC has established a project review timeline that includes public comment at very specific times. Relevant here, the public is permitted a 30-day opportunity to review and comment on the PSA, such that corrections can be made in the FSA. As the FSA serves as the basis of CEC staff’s testimony to the Commission, it is crucial that this document is accurate. If the bulk of the analysis is reserved until the FSA, the public will have no opportunity to alert staff to necessary changes.

Given the evident cultural resource impacts of the Palen Project, CRIT is alarmed at the PSA's repeated deferral of both analysis and mitigation to a later time. Throughout the cultural resources section, the PSA indicates that additional information will be provided in the Final Staff Assessment ("FSA"). For example:

- The research and analysis of cultural resource impacts to the expanded geographic scope of the revised Project is apparently incomplete because of "protracted deliberations" and a lack of "responsive data" from the Applicant. PSA at 4.3-3, 4.3-40, 4.3-49 fn. 21. However, "the broad contextual framework" provided in the PSA gives little insight into the actual impacts of the Project on cultural resources. The fact that "[s]taff anticipates being able to develop this analysis for the Final Staff Assessment," *id.* at 4.3-3, is of little assurance to CRIT that the analysis will be conducted comprehensively, if at all, in the FSA.
- Field investigations have not yet been completed for the Project site. *Id.* at 4.3-52, fn. 21, fn. 23. Of particular concern is the CEC Staff's and Applicant's failure to conduct "reconnaissance" near the Palen and Coxcomb Mountains, an area known to include a number of traditional trails. *Id.* at 4.3-58; *see also* Exhibit 1.
- The PSA's analysis of traditional trails is missing essential information from Tribal interviews. *See* PSA at 4.3-58 (discussion of trails "based on archival research conducted thus far," rather than field research or interviews).<sup>1</sup> Staff has stated that it is seeking permits to interview CRIT members and anticipates that "some" information from these oral interviews will be included in the FSA. *Id.* The scope of the Project's impacts on cultural resources, however, cannot begin to be understood without input from CRIT members on their present and historic relationship with the land in the Project area.
- The analysis of impacts to ethnographic resources and recommended mitigation will not be completed until the FSA "due to lack of data." *Id.* at 4.3-93. To date, 11 possible ethnographic resources, including both the Palen Dry Lake and the Ford Dry lake, have been identified in the vicinity of the Project. *Id.* at 4.3-4; *see also id.* at 4.3-103. Yet, while Staff is fully aware that that "certain site types, particularly those associated with dry lakes may [be] disproportionately affected [by ground disturbing projects]," (*id.* at 4.3-99), analysis of these sites is woefully incomplete. There are reports of cremation sites at the Palen Dry Lake. *Id.* at 4.3-62. And the Ford Dry Lake was already the site of a significant discovery of sacred artifacts during construction of the Genesis project. CEQA requires that a detailed review of these resources should have formed the foundation of the PSA.

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<sup>1</sup> The PSA indicates that the Staff invited 16 tribes to participate in the ethnographic study. PSA at 4.3-23. Cultural Resources Figure 3 (as well as the other Cultural Resource Figures), which allegedly provides locational information for each of these tribes, does not appear to be included in the PSA. The missing figure reinforces the incomplete nature of the PSA and is further evidence that a revised PSA should be issued prior to the FSA.

- The analysis of the cumulative impacts to archeological and ethnographic resources and recommended mitigation measures “will be completed for the FSA.” *Id.* at 4.3-99. As Staff itself noted in the PSA, “[i]nformation available at this time lacks specificity and has no analysis of the area has been performed in accord with a prescribed methodology.” (sic) *Id.* at 4.3-101 to 102. Given the intense industrialization of the area around the Palen Project and the recent lessons from the Genesis project, this section must be developed prior to presentation to the Commission with the opportunity for public comment.
- The Conditions of Certification to mitigate the Project have not been updated to reflect the additional impacts from the modified Project. *Id.* at 4.3-104. The PSA only made “minor” changes to the 2010 conditions to serve as a “starting point” for discussion while research and analysis is “ongoing.” *Id.* It is inappropriate to delay substantive edits of these conditions such that public comment is effectively foreclosed.<sup>2</sup>

This deferral and lack of public involvement raises serious questions about the ability of the CEC to analyze cultural resource impacts in compliance with the Warren-Alquist Act.

CRIT also notes that this delay has occurred, in part, because the Applicant has been unable or unwilling to supply information necessary for a robust analysis. *See, e.g., Id.* at 4.3-58 (noting that the “the trail study requested of the project owner (Data Requests 29, 30, 31) has not yet been initiated [and] the results will only be included in the final ethnographic report that will inform the FSA”). CRIT acknowledges that Commission Staff is working under tight deadlines imposed by statute and the Commission, but shortchanging the opportunity for public comment cannot be the correct response to an applicant’s recalcitrance. If the Applicant is unwilling to supply the necessary information, it should not receive the benefit of a fast-tracked review process.

Given that the PSA, by Commission Staff’s own admission, contains very little of the requisite information, the PSA must be revised and re-released for public comment before the application can move closer to Commission review. *See Pub. Res. Code § 21092.1* (requiring recirculation of an environmental review document when “significant new information” is added after the public review period).

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<sup>2</sup> While the Conditions of Certification remain in flux, CRIT nevertheless provides substantive comments in Section VII.

## II. CEC Staff's Focus on Visual Effects from the Modified Proposal Ignores New Information Related to the Presence of Buried Cultural Resources.

According to CEC staff, the cultural resource section of the PSA can primarily focus on the difference in the visual profiles between the original project and the amended Project. *E.g.*, PSA at 4.3-3. In light of the recent discovery of scores of buried cultural resource materials during the construction of the Genesis project at Ford Dry Lake, however, supplemental review is required to reexamine the physical impacts of the modified Project on cultural resources in the Project area.

Under Public Resource Code section 21166 and section 15162 of the CEQA Guidelines, a subsequent EIR is required when "new information of substantial importance" shows that "[s]ignificant effects previously examined will be substantially more severe than shown in the previous EIR." 14 C.C.R. § 15162(B). The initial review of the Project indicates potential impacts to nine prehistoric archeological sites that contribute to CRIT's traditional trail network. PSA at 4.3-1. At that time, the CEC concluded that the benefits of the original the Palen Project outweighed any direct and indirect physical impacts resulting from the construction and operation of the Project to these cultural resources. *Id.* at 4.3-1; *see also* Commission Order 10-1215-19. In the intervening years since the CEC made this finding, however, hundreds of eligible cultural resources were uncovered at Ford Dry Lake during the construction of the Genesis project less than ten miles away. Given the similarities in topography, prehistoric use, and geology between the two sites, the finds at Genesis constitute significant new information requiring a reexamination of the analysis in the original PSA. Yet the PSA fails to even mention these significant finds and the adverse impacts the disturbance had on CRIT and other tribes.

Based on staff's myopic focus on visual resource impacts (which CRIT does not dispute are important), the PSA fails to reevaluate the Project's physical impacts to archeological and ethnographic resources under review in the PSA. The likelihood that the Palen Project will disturb, damage, and destroy cultural artifacts is of tremendous concern to CRIT. Several prehistoric trails overlay the Project site. The Project is site is also in close proximity to no less than eleven traditional cultural properties likely to contain myriad cultural resources. PSA at 4.3-73. Known discoveries of cultural resources within the Project area consist of lithic scatter, fire affected rock, and rock cairns<sup>3</sup> of critical historical and spiritual significance for CRIT members. The PSA dismisses the importance of these sites because the lithic scatter is "sparse." *Id.* at 4.3-78. The discovery at Genesis, however, illustrates that the density of lithic scatters is a poor predictor of a Project's actual impact to a site. Cultural resources are not evenly scattered in an area, but rather tend to be concentrated. During construction of the Genesis project the cultural resources uncovered far exceeded the number of resources initially analyzed in the

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<sup>3</sup> The rock cairns were previously identified and analyzed in the 2010 RSA. PSA at 4.3-93. The PSA for the modified Project accepts the Staff's prior conclusion that the that the rock cairns sites at Palen are ineligible for listing in the California Register of Historic Places without further consideration or explanation. To the extent that the modified Project still impacts these rock cairn sites, CRIT urges that Project be required to avoid impacting these areas.



project's EIR. The disturbance of even one burial site or other sacred object is a significant impact to the descendants of the people who left these objects behind.

Moreover, despite the somewhat reduced scale of the Project, the risk of compromising the integrity of unknown cultural resources at the Project site remains high. Like Genesis, the Palen Project abuts a sizable dry lake spanning over 3,600 acres. *Id.* at 4.3-63. The PSA does not consider the possibility that construction of the Palen Project might result in the disturbance of a similar find. In fact, the PSA does not appear to require any Phase II archeological analysis of potential buried resources. In the Evaluation of Archaeological Resources based on surface observation, the PSA acknowledges that the previously identified archeological deposits "may include subsurface components," but summarily concludes that "[n]one are likely to be significant." *Id.* at 4.3-78. Review of the Phase I evaluations of archaeological resources does not support this conclusion. Two prehistoric archeological sites known to be on the Project site were found not far from the Palen Dry Lake. *Id.* at 4.3-78. Additionally archeological field investigations conducted in 2009 indicate that that the greatest potential for archeological deposits at Palen is in the "northeast quadrant"—i.e. the portion of the site closest to the Palen Dry Lake. *Id.* at 4.3-51.

When CRIT members attended a site visit in March 2013, they requested additional information on how the Project Applicant would protect buried cultural resources. In response, the Applicant stated that they do not and would know not what is below the ground before forcefully inserting thousands of heliostat pedestals. While the developer may not realize that it has damaged or destroyed buried cultural material, cremation sites, or burial grounds, CRIT emphasizes that this action is still a grave cultural harm.

Because the PSA has identified the possibility, but failed to properly consider, the physical impacts to cultural resources affected by the Project, CEC Staff must revise and recirculate the PSA.

### **III. The PSA Fails to Consider the Cultural Implications of Impacts to Biological Resources.**

The Cultural Resource section of the PSA narrowly focuses on archaeological resources. However, for CRIT and its members, cultural resources are defined far more broadly and include plants, animals, and other features of the desert landscape. The PSA must be revised as a result of the ethnographic studies currently underway to incorporate an adequate discussion of these resources.

In particular, CRIT notes the significant impacts the Project is likely to have on bald and golden eagles, redtail hawks, and other avian species. PSA at 4.2-5 to 6. When CRIT members visited the site this spring, they witnessed eight redtail hawks soaring in the area; impacts to this sacred and majestic species will adversely impact CRIT and its members. Yet this impact is never mentioned, much less adequately analyzed, in the PSA.



**IV. CRIT Objects to the Artificially Narrow Analysis of the “Prehistoric Trails Network Cultural Landscape.”**

The PSA identifies only one ethnographic landscape that overlays the Project site: the “Prehistoric Trails Network Cultural Landscape” (“PTNCL”). PSA at 4.3-79. The PTNCL as defined in the PSA broadly refers the “important destinations in the Colorado Desert near Blythe, California, the network of trails that tie them together, and the features and sites associated with the trails.” *Id.* The PSA admits that the boundaries of the PTNCL “need to be refined.” *Id.* But the general analysis presented in the PSA appears to be limited to the Halchidhoma Trail (CA-Riv-0053T). *Id.* This isolated review of the PTNCL not only severs the trail from the broader trail network that is truly regional in scale, it also artificially narrows the scope of the PSA’s analysis.

The Palen Project proposes to put two towers that would stand an imposing 750 feet high. *Id.* at 4.12-4. These structures would be the fifth tallest structures in the State of California. *Id.* Given the significant visual impact of two solar power towers on the natural landscape, the PSA should have also considered the Project’s impacts all traditional trails near the site, including the Salt Song Trail and the Xam Kwatcan Trail. The decision not to analyze the Project’s impact on these trails is not discussed or explained even though portions of these trails or subsidiary trails fall within the fifteen mile radius used to define the viewshed. *See* Exhibit 1; PSA, Visual Resource Figure 3. Accordingly, there is a very real potential for visual degradation to ethnographic landscapes with important spatial, spiritual, and cultural connections to CRIT and its members.

**V. CRIT Objects to the Selection of the Key Observation Points in the Visual Resources Section.**

The Visual Resources section of the PSA does not address the potential cultural implications of the Project’s disruption of the visual landscape on Tribal members. The PSA considers impacts to motorists on Interstate Highway 10 as well as recreational users of Joshua Tree National Park, the Palen McCoy Wilderness, and the Chuckwalla Mountain Wilderness. *See, e.g.,* PSA at 4.12-14. However, the desert landscape affected by the Project is more than a transit and recreational resource, particularly for affected tribes. The Coxcomb, Chuckwalla and McCoy Mountains and surrounding valleys have longstanding cultural and spiritual significance as ancestral lands. The omission of tribal considerations belies the PSA’s claims that the chosen Key Observation Points are “representative of the most critical locations from which the project would be seen.” *Id.* at 4.12-7. The CEC must consult with the Tribes’ representatives to determine the full significance of the visual landscape in the vicinity of the Coxcomb, Chuckwalla, and McCoy Mountains as a cultural resource, and to explore possible additional or alternative mitigation that would best minimize visual impacts as a whole.

The PSA’s reliance on the Environmental Checklist in Appendix G of the CEQA (“Checklist”) Guidelines also masks the Project’s potential impacts to cultural visual resources. The Checklist is based on section 21084 of the Public Resources Code, which discusses damage to designated scenic vistas and resources as it relates to CEQA exemptions. However, it is clear under CEQA that a lead agency has a duty to analyze *all* potentially significant impacts of a project, regardless of whether the potential impact falls specifically within one of the categories outlined in Appendix G. *Protect*

*the Historic Amador Waterways v. Amador Water Agency*, 116 Cal.App.4th 1099, 1109 (2004). Consequently, the PSA must be revised to analyze the *cultural* implications of visual resource impacts regardless of the list of potential visual impacts contained in Appendix G.

The Tribes' visual connection to the desert terrain is at serious risk of being damaged by the Project unless consultation is undertaken to identify and protect these resources. To facilitate this process the CEC must reevaluate its conclusion that site will cause unavoidable visual blight on landscape. *See, e.g.*, PSA at 4.12-13 ("Given the large scale of the impact area and the height and glare of the solar towers, no available mitigation measures were identified that would be adequate to mitigate the significant visual impacts to less than significant levels."). CEQA requires more than superficial surface mitigation. Instead, the CEC must evaluate alternatives, including alternate sites, that would prevent the massive towers from interrupting key physical and terrestrial landmarks along traditional trails. Pub. Res. Code § 21002 (projects must not be approved "if there are *feasible alternatives* or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects") (emphasis added).

#### **VI. CRIT Objects to the PSA's Absence of Analysis of the Visual Impacts to Traditional Trails.**

The analysis of the Project's impacts to the PTNCL does not address the cultural implications of the Project's disruption of the visual landscape. The PSA concludes that resources found in the PTNCL are significant "for their ties to important events in American history." PSA at 4.3-81. In doing so, the PSA falsely suggests that primary importance of the PTNCL comes from the presence of archeological resources such as petroglyphs, pot drops, etc. While the cultural value of these artifacts cannot be understated, the various trails comprising the PTNCL continue to have cultural meaning and importance to CRIT members. Any large-scale visual alteration to this space disturbs the sanctity of the outdoor environment and constitutes a significant impact.

Despite this special significance, the PSA does not mention the visual impact to the PTNCL in either the cultural resources or visual resources sections of the PSA. Nor do Conditions of Certification require the Project Applicant to take steps to mitigate these impacts. Instead, the PSA states simply that the Staff lacks "new information" to analyze the potential for visually degradation of archaeological resources. *Id.* at 4.3-4. The lack of information is particularly troubling as the PSA also states that the visual effects beyond the Project site will be included in the FSA "if" information can be obtained from the Project owner or some other means. *Id.* The willingness of the CEC to issue both a PSA and an FSA with little to no analysis of visual impacts of the Project on cultural resources renders the entire review process suspect.

#### **VII. CRIT Objects to the Applicant's Premature Mitigation and Monitoring Plan of Cultural Resources on the Project site.**

As already discussed, there is a very real possibility of encountering buried resources during Project construction despite the PSA's contention to the contrary. Because the CEC's mitigation strategies do not appear to have changed in light of the events at Genesis, the Tribes are concerned that the Project's mitigation and monitoring plan will be similarly ineffective. At the Genesis project, measures were developed to protect cultural resources uncovered during project

construction, including provisions to halt construction, notify and consult with affected tribes, and avoid any new, significant resources. When a significant deposit of cultural resource artifacts was uncovered along the former shore of Ford Dry Lake during project construction, the BLM waited a few days to halt construction and over a week to notify CRIT about the find. BLM and the project developer then developed a treatment plan without adequate tribal consultation. Eventually, BLM determined that project construction could proceed, without making any finding that avoidance was infeasible. These activities caused great cultural harm to the Tribes and its members.

Unfortunately, the PSA does not reflect any attempt to learn from these previous harms. Instead, the proposed mitigation measures to address buried cultural resource appear crafted to ensure that construction of the Palen Project will result in a similar, seemingly intractable, situation. With these broad concerns in mind, CRIT's specific comments on the Conditions of Certification are as follows:

- CUL-1: As the CEC staff has concluded that the most significant impact of the proposed Project is its visual intrusion on cultural resources, the condition must specify that the amount of contribution (\$35 per acre) must be based on the number of acres on which the Project visually intrudes, rather than acres of ground disturbance.
- CUL-3: This condition must specify that Native American Monitors are required for all ground-disturbing activities at the Project site, to harmonize with CUL-8. The situation that occurred at Genesis, whereby scores of buried cultural material was uncovered and affected Tribes were not properly notified must not be repeated here, where buried shallow archaeological deposits are probable within the site. PSA at 4.3-51. CUL-5 must be similarly revised.
- CUL-5: The Cultural Resources Monitoring and Mitigation Plan (CRMMP) must be developed in consultation with affected Tribes and approved by CEC staff prior to Project approval. This important document, which sets forth how the Applicant will address cultural resource impacts on the ground, cannot be delegated to the Applicant and its consultants.
- CUL-5: In addition, the condition must be revised to state that implementation of the CRMMP is the responsibility of the CRS, the Project owner, *and* the CEC and its staff. Again, implementation of the CRMMP impacts cultural resources directly. CEC cannot cede its authority over such important issues.
- CUL-9: Native American Monitors must be given the authority to halt construction. In addition, the CRS must notify all affected Tribes within 48 hours of the discovery. The CEC staff next must ensure that adequate consultation has taken place and that all feasible mitigation measures and alternatives are adopted prior to allowing construction to proceed. These provisions must be enforceable by both the CEC and affected Tribes.
- CUL-11 and 12: CRIT strongly objects to the use of data collection to treat prehistoric sites. Such disturbances of cultural material do not constitute mitigation for cultural harm; instead, the act of disturbance further exacerbates the harm caused by the Project. A more

culturally appropriate mitigation measure must be developed in consultation with affected Tribes.

**VIII. CRIT Objects the Absence of Any Review of Project Alternatives in the PSA.**

As one of its core substantive requirements, CEQA provides that “public agencies should not approve projects as proposed if there are feasible alternatives . . . which would substantially lessen the significant environmental effects of such projects.” § 21002. Accordingly, a major function of the environmental review process “is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.” *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376, 400 (1988) (quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197). To achieve this purpose, the PSA must consider a “reasonable range” of alternatives “that will foster informed decisionmaking and public participation.” CEQA Guidelines § 15126.6(a). The PSA does not include any discussion of alternatives. See PSA at 6-1 (“Staff is preparing an alternatives analysis for publication in the Final Staff Assessment”). The “magnitude of changes” to the Project is not a reasonable excuse for skipping this section in the PSA. *Id.* at 1-5. The public must be given the tools to engage in meaningful public discourse about the Project. A robust Project Alternatives section is particularly crucial in this case given changes to the Project size and scale provides added flexibility in the siting of the Project components away from sensitive cultural resources. The PSA does not, and cannot, satisfy the basic requirements of CEQA absent the revision of the PSA. CRIT therefore cannot condone the Staff’s decision to move forward with the Project.

**IX. The PSA’s Discussion of Environmental Justice Fails to Capture the Disproportionate Impacts to Tribes.**

The PSA defines the study area for its environmental justice analysis as the area within six miles of the proposed Project site. PSA at 4.8-6. Using this buffer, the PSA concludes that there are no people, much less minority or below poverty level populations, living within the six-mile radius of the Project. *Id.* at 4.8-7. It is not surprising then that the PSA concludes there is no further review of environmental impacts is necessary. *Id.* This analysis, however, is not only too narrow to capture the disproportionate impacts felt by Native Americans, it is also largely artificial. The PSA’s reliance on a six-mile buffer from the Project site for counting residents is arbitrary. The buffer is based on air quality modeling showing that “project-related impacts from pollutants decrease to less than significant within six miles of the emission site.” *Id.* at 4.8-6. Arguably, however, one of the Palen Project’s most devastating impact is visual degradation to the desert landscape. Relying on the emission-related data to set the scope of the environmental justice is patently misleading and wholly unjustified.

Furthermore, Executive Order 12898 requires agencies to consider whether their activities result in “environmental effects [that] are disproportionately high and adverse.” Guidance issued by the Council of Environmental Quality states that in making this determination agencies should consider “whether there is or will be an impact on the natural or physical environment that significantly . . . and adversely affects a minority population, low-income population, or Indian

tribe.” Council on Environmental Quality, Environmental Justice Guidance under the National Environmental Policy Act at 26 (December 10, 1997) (“Guidance”).<sup>4</sup> Therefore, the determination that an Indian tribe will experience disproportionate and adverse effects as a result of Project impacts is sufficient on its own to demonstrate an adverse environmental justice impact.

The purpose of the Environmental Justice analysis “is to identify potentially sensitive populations, which could be disproportionately impacted by the proposed action.” *Id.* at 4.8-3. Native Americans in the vicinity of the Project site will undeniably feel a disproportionate effect caused by the damage and destruction of cultural resources because of their past and present connection to those resources. The demographic screening as used in the PSA can only serve one form of justice. Because the Guidance recognizes that a “disproportionate and adverse effect” may be a cultural impact (Guidance at 26), the PSA must be revised to acknowledge and mitigate for this environmental justice harm.

**X. Additional Time Must Be Provided for Comments on the PSA.**

Finally, CRIT respectfully requests that Commission Staff provide thorough and detailed responses to the issues raised in this letter and provide a future comment period on any FSA. At the public workshop on July 22, 2013 the staff made it clear the next document related to the Palen Project would be the FSA. The sheer volume of material and the number of issues still left unresolved in the PSA raise questions about the efficacy and fairness of a limited public comment period. A critical element of the CEQA process is public comment and response. CEQA Guidelines § 15088 (requiring “good faith, reasoned analysis in response” to public comments). By providing clarity regarding the agency’s position, lead agency responses can potentially eliminate later conflict.

CRIT respectfully requests that CEC staff reconsider its position that the FSA will be released in August. Given the vast amount of information and analysis left to complete, the PSA must be revised and recirculated for public comment before the FSA can even be considered.

Sincerely,

COLORADO RIVER INDIAN TRIBES

  
Chairman Wayne Patch, Sr. Acting  
Colorado River Indian Tribes

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<sup>4</sup> While this guidance relates directly to federal law, Commission staff have used this guidance for their analysis and thus its requirements are relevant here. PSA at 4.8-6.