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STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the matter of:

Amendment for the **PALEN SOLAR
ELECTRIC GENERATING SYSTEM**

DOCKET NO. 09-ACF-7C

OPENING BRIEF
OF THE COLORADO RIVER INDIAN TRIBES

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“So from the beginning of time our creator gave us this land and asked us to be stewards of the land, and that’s what we as Mojave and Chemehuevi people do. . . . There is no dollar amount that can pay for, if this project goes in, what we’re going to lose.”

– Wilene Fisher-Holt, Colorado River Indian Tribes

“We ourselves have to come up and start making an aggressive move to protect these things that are happening to what we believe is precious to us. It’s our way of life.”

– Lorey Cachora, Quechan Tribe

“We really don’t ever expect much to happen from this because it’s like we’re in a whole different world. . . . But we have no choice. We have to be here. We have to make a statement.”

–Irene Kingary, Quechan Tribe

“That’s the connection, that’s [] telling us to do something, do something, do something. Don’t just sit back. . . . Understand the stakes are high, the significance of these places are high. And nothing can address, and I say nothing, nothing . . . can address those in any way [] because how do you mitigate a life?”

–Linda Otero, Ft. Mohave Indian Tribe

Introduction

In 2010, the California Energy Commission found that despite significant environmental impacts—including severe impacts to cultural resources—the Palen Solar Power Project should be approved. This finding was made with limited involvement of affected Indian tribes, as the Commission was not yet operating under the directive of Governor Brown’s 2011 Executive Order requiring government-to-government consultation on matters that affect tribal communities. The Colorado River Indian Tribes (CRIT or the Tribes)—whose reservation is located closest to the site at issue—experienced this lack of outreach firsthand, receiving only one form letter and unanswered phone calls. Consequently, the Commission’s 2010 decision omitted any real consideration of the effects of the Palen Solar Power Project on the Tribes as a result of cultural resource impacts.

The original project owner filed for bankruptcy and, in July 2012, BrightSource Energy acquired the project. As the original project would have used solar trough technology, BrightSource filed a Petition for Amendment in December 2012. Through this proceeding, BrightSource seeks approval of two immense and luminous solar towers with nearly 4,000 acres of reflective heliostats, known as the Palen Solar Electric Generating System (Project or PSEGS). As documented by the CEC Staff, this Project will have additional impacts above and beyond the original Project, including the visual destruction of an important cultural landscape.

CRIT’s knowledge of, concern about, and involvement with utility-scale renewable energy projects proposed within the ancestral homelands of its members have all increased since the original project was licensed. In that time period, a number of nearby projects have been approved or begun construction, including the Genesis Solar Energy Project, the Desert Harvest Solar Farm, the Desert Sunlight Solar Farm, the McCoy Solar Energy Project, the Quartzsite Solar Energy Project, and the Blythe Solar Energy Project. This immense industrialization of the

traditional homelands of CRIT members is having negative impacts on the Tribes. Evidentiary Hearing Transcript¹ (TN# 201234), at 93 (Wilene Fisher-Holt, CRIT Member, stating that “the Mojave elders believe that the Genesis project is affecting our community” and “our children are losing their history and not knowing who they are . . . because the land’s being taken from us”); *see also id.* at 151 (Irene Kingary from the Quechan Tribe stating that because sacred sites were on public land “in trust with BLM,” the tribe erroneously believed that “they would be safe”).

CRIT initially sought to convey its concerns regarding the Project using informal mechanisms. CRIT Staff participated in informational sessions with CEC Staff, which CEC Staff now describe as “consultation.” Yet the current prohibitions on *ex parte* communications prevent CRIT from communicating its concerns directly to the Commission—except as an Intervenor—rendering these efforts at consultation ineffective. Similarly, CRIT sought to convey its unique cultural perspective via the ethnographic study that informs the Final Staff Assessment (FSA). But because of the CEC Staff Counsel’s unwillingness to comply with CRIT’s standard tribal laws regarding ethnographic research, CRIT members were never included in the ethnographic study. To make its concerns known to the Commission, CRIT was left with little recourse but to seek intervention.

The proceedings thus far have raised, rather than ameliorated, CRIT’s concerns regarding the Project’s impacts on cultural resources. While CEC Staff have correctly identified a cultural landscape marked by numerous trails, traditional cultural properties, and other sacred sites, and have correctly identified the severe harms that the Project will cause to this landscape, BrightSource now asks the Commission to find that the visual intrusion created by the fifth tallest structures in California *don’t* mar the landscape because their expert *feels* the intrusion will not be significant. Evidentiary Hearing Transcript (TN# 201234), at 68-75. Downgrading the finding of a significant impact to the Chuckwalla Valley landscape would be an abuse of the Commission’s discretion in light of the overwhelming evidence supporting CEC Staff’s conclusions.

CRIT’s review of the FSA has also revealed significant inadequacies. Significant impacts to cultural and visual resources have been left unanalyzed and unmitigated and the environmental review that has been conducted fails to fully and properly analyze cumulative impacts, environmental justice concerns, and feasible alternatives that would reduce the Project’s impacts.

Finally, because of the Project’s significant environmental impacts and inconsistency with state and federal laws, the Commission must make specific “override findings.” CEQA requires that the Commission analyze all potential environmental impacts and adopt feasible mitigation to address all significant impacts. The Warren-Alquist Act requires a finding that a project complies with all applicable local, state, and federal laws, ordinances, regulations and standards (LORS). If these standards cannot be met, as they cannot in this proceeding, the Project cannot be approved unless specific findings can be made. Due to the Project’s massive impacts, however, CRIT does not see how the Commission can make the necessary findings that

¹ As corrections to the Evidentiary Hearing Transcript will not be available until after November 27, 2013, CRIT reserves the right to correct any citations as needed.

(1) alternatives with fewer impacts are infeasible, (2) the project is required for public convenience and necessity, and (3) there are no more prudent and feasible means of achieving such public convenience and necessity. For these reasons, and as further described below, CRIT urges the Commission to deny the amendment. In the event the Commission does move toward Project approval, the inadequacies in both analysis of and mitigation for the Project's impacts must be remedied prior to Project approval.

Statement of Facts

The Chuckwalla Valley is part of the ancestral homeland of both the Chemehuevi and the Mohave, two of the four Tribes that comprise CRIT. Exhibit 8026 (TN# 201047). Since time immemorial, Mohave and Chemehuevi people have lived and survived in this area, leaving indelible marks including trails, archaeological sites, and petroglyphs. *Id.* These sites and features are now considered sacred sites or traditional cultural properties by CRIT members and within the meaning of state and federal law, for their ability to tangibly confirm to CRIT members their oral histories and lifeways. *Id.*; Exhibits 8015-18.² Such sites, including Palen and Ford Dry Lakes, McCoy and Corn Springs, and Alligator Rock, confirm to CRIT members that *this is where they come from.*

Crucially, the Chuckwalla Valley is part of the ongoing "trailscape" of both the Chemehuevi Salt Songs and the Mohave Bird Songs. Evidentiary Hearing Transcript (TN# 201234) at 91-92. These oral traditions, which convey stories of creation, relate specifically and uniquely to this particular landscape. The songs cannot be shifted to other places if these areas are destroyed. Indeed, interruption of the physical landscape interrupts the spiritual travels of CRIT members and their ancestors. Evidentiary Hearing Transcript (TN# 201234), at 92-93 (Wilene Fisher-Holt, CRIT member, explaining that "if these projects go into this area, the visual impacts are going to interrupt and disrupt that [song] cycle"); *see also* Exhibit 2026 (TN# 201047); Exhibit 8015.

BrightSource proposes to construct two massive, glowing power towers in the midst of this cultural landscape. Evidentiary Hearing Transcript (TN# 201234), at 60 (Lorey Cachora aptly describing the Project as "lighthouse[s] in the middle of the desert You can't help but look at [them]."). The heliostat pedestals and maintenance roads will cover nearly 4,000 acres, including areas of known prehistoric sites and trails. The site will be fenced off and inaccessible throughout the 30 year life of the Project, and the effectiveness of site remediation to restore cultural values in the future is at best an unknown. The Project is just one of many utility-scale renewable projects proposed for or under construction in the Chuckwalla Valley and larger region; at last count, nearly 40 projects are proposed within 50 miles of the Colorado River Indian Reservation and projects on nearly 19,000 acres have already been approved. Exhibit 8022 (TN# 200908); *see* Bureau of Land Management, Solar Energy Program Western Solar Plan (available at <http://blmsolar.anl.gov/sez/ca/riverside-east/>). This industrialization of a vast area is having severe impacts on CRIT and other tribes.

² As Exhibits 8015 to 8015 are considered confidential for the purposes of this proceeding, no TN# have been assigned.

When the Project was originally proposed and approved, CRIT had just two contacts with CEC staff, consisting of a form letter sent to its former Museum Director, followed by unanswered telephone calls. Exhibit 8023 (TN# 200907), at 2; Evidentiary Hearing Transcript (TN# 201234), at 97. Lacking specific knowledge about the project and its potentially severe impacts, CRIT provided no information to the Commission. Evidentiary Hearing Testimony (TN# 201234), at 98. Consequently, the initial outreach was clearly ineffective to meet the “meaningful consultation” standard now recognized by state and federal agencies nationwide as essential to facilitating prompt and cogent review of major undertakings such as the Palen Project. Thus, CRIT came into this Project amendment proceeding without the benefit of having had a voice in the original process.

To its credit, the Commission has made some positive improvements to its outreach policy and procedures over the past few years, in part responding to the Governor’s Executive Order on consultation. California Executive Order B-10-11 (claiming that the State is “committed to strengthening and sustaining effective government-to-government relationships”). Nevertheless, CEC Staff’s outreach for this Project amendment remained woefully inadequate, in part because the “consultation” process necessitated by the Commission’s bar on ex parte communication prevents the Tribes from voicing their concerns directly to the decisionmakers. *See also* Evidentiary Hearing Transcript (TN# 201234), at 150 (explaining Quechan’s decision to involve Lorey Cachora with CEC Staff as the Commission cannot “sit at the table and communicate with [the Quechan Tribe] directly, despite its status as a sovereign nation). The Tribes were notified by a letter dated February 25, 2013, that BrightSource had filed a Petition to Amend with the Commission, seeking to revive and revise the Palen project. Exhibit 8011 (TN# 200923). Thereafter, CEC Staff met with CRIT Staff on just two occasions: on March 22, 2013 and during the week of August 12, 2013. FSA 2-4 to 5; 4-3.56 to 57.

At the March 22 meeting, the proposed amendment was described and discussed, and the process by which CEC Staff and the Commission would review the proposed amendment, including the compressed timeline within which that review would be performed, was communicated. Exhibit 8025 (TN# 200907). This compressed timeline allowed little time for the Tribes to engage in the “meaningful dialogue” referenced in the February 25th letter. CRIT representatives conveyed this concern at that time, as well as a concern that many tribes share: while generally supportive of renewable energy development, the proposed Project puts culturally significant resources at unnecessary risk. *Id.* The August 12 meeting continued in the same vein: CEC Staff provided CRIT with some information, CRIT expressed its concern that inadequate time and process was being given to engage in a “meaningful dialogue,” and the meeting was completed. *Id.*

In addition to the inadequate consultation, Commission deadlines and inflexibility also prevented CRIT from participating in the ethnographic study prepared to support the FSA. Initially, CEC Staff member Dr. Thomas Gates conveyed the need for ethnographic review of the amended Project’s likely impacts. *Id.* CRIT Staff notified Dr. Gates that, pursuant to Tribal law, cultural research conducted on the Colorado River Indian Reservation may occur only after the proposed research activities are reviewed by the Tribes’ Ethics Review Board and approved by Tribal Council. *Id.*; Evidentiary Hearing Transcript (TN# 201234), at 98 (noting that these requirements were “established to prevent either unnecessarily intrusive or poorly conceived

research on tribal peoples”). This process takes time, however, and despite CRIT’s commitment to quickly process a research application, CEC Staff Counsel refused to accommodate CRIT tribal law. *Id.* Time ran out, and no formal interviews of CRIT Tribal members were accomplished. *Id.*

CRIT Staff assisted Dr. Gates informally and to the extent practicable and engaged with BrightSource as the opportunity allowed. *Id.* However, with respect to the ethnographic study, which formed the basis of CEC Staff’s cultural resource analysis, CRIT ended up on the outside, looking in, and the ethnographic analysis frankly conceded that it has not accomplished its goal. The final analysis states:

Time limits imposed by the Energy Commission amendment process are another constraint. The Mohave, Chemehuevi, Quechan, and Cahuilla cultures, and traditional cultural practices related to epistemology, world view, and religion, are too complex to understand within the limits of a six month study.

FSA 4.3-61. Moreover, CEC Staff’s claim that CRIT’s inability to participate in the study was “partially surmounted” by the inclusion of other tribes with overlapping cultures is offensive: tribes and their members are not interchangeable.

While CEC Staff has been cordial and professional, neither of its two meetings with CRIT involved anything more than an informational presentation. The highly compressed timeframe of the Project approval process did not allow Dr. Gates or other CEC Staff time to conduct the studies that were necessary in order to understand the CRIT’s deep connections to the Project area, and therefore the tremendous impacts this Project will have.

Argument

I. Standard of Review.

The Commission has a certified regulatory program for conducting environmental review in siting cases like this one. Pub. Res. Code §§ 25500, 25519(c).³ Under this program, the Commission must comply with CEQA’s substantive mandates. *See* 20 Cal. Code Regs. §§ 1741, 1742, 1752.5. Thus, when referring in this brief to the Commission’s legal obligations for environmental review, CRIT cites to CEQA’s statutory provisions and implementing regulations.

Failure to comply with these obligations constitutes a prejudicial abuse of discretion, as does a failure to support conclusions with substantial evidence. § 21168.5; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 392. The Commission fails to “proceed in the manner required by law” if its EIR-equivalent omits relevant information or analysis, or defers analysis or mitigation measures until after project approval. *See Communities for a Better Env’t v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-93; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712. A decision that fails to consider a reasonable range of alternatives is also legally inadequate. *San*

³ Except as otherwise noted, all further statutory references are to the Public Resources Code.

Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus (“*San Joaquin Raptor*”) (1994) 27 Cal.App.4th 713, 735-39.

II. BrightSource’s Attempts to Downplay Impacts to the Chuckwalla Valley Are Unsupported.

The FSA focuses its attention on the landscape level impacts of the proposed Project. In particular, CEC Staff identify the massive Pacific to Rio Grande Trail Landscape (PRGTL), and attempt to situate the known traditional cultural properties, trails, individual archaeological sites, and places between within this cultural and historic landscape. This approach better addresses the cultural resource concerns raised by CRIT members than the individual resource approach frequently taken in considering utility-scale solar projects. *See* Exhibit 8006 (TN# 200918), at 16 (California State Historic Preservation Officer advocating for a landscape level of assessment to ensure the avoidance, minimization and mitigation of impacts from renewable energy projects on public land with rich archaeological deposits); Exhibit 3066 (TN# 201261) (National Park Service similarly advocating for a landscape level approach to understanding cultural resources).

The FSA then rightly asserts that “the amended configuration of the [Project] in combination with the basic physiographic structure of the Chuckwalla Valley combine to amplify the reach of the amended project’s visual presence in the valley.” FSA at 4.3-4; *see also* Evidentiary Hearing Transcript (TN# 201234), at 31 (CEC Staff noting “the extreme intensification of the visual effect that the amended project would have on cultural resources”). The two solar towers will be massive, dwarfing everything else—natural or man-made—in the vicinity. CRIT members have observed the steady transformation of their ancestral homeland into an industrial landscape, and the approach selected by the CEC Staff presents an honest assessment of the concerns raised by this transformation. CRIT concurs that if the Project were constructed, “the landscape would no longer retain the integrity of [setting, feeling, and association] to convey [] unique historic events” and “high artistic values.” FSA at 4.3-154 to 156. There is no “feasible way to mask the visual presence of the towers or the solar receiver steam generators,” and there are no “mitigation measures that would reduce the loss of an entire landscape or a significant portion of one to a less than significant level.” FSA at 4.3-159.⁴ CRIT members attest to the interruption in cultural and spiritual experiences resulting from the construction of utility-scale solar plants. *See* Exhibit 8015-8018, 8026 (TN# 201047).

BrightSource objects to this conclusion, claiming that only a small geographic area would be exposed to visual resource impacts from the proposed Project that were not already exposed to impacts from the already licensed project. Exhibit 1077 (TN# 200806). Moreover, after deriding Staff’s conclusions as “subjective” (*id.*), BrightSource relies on the beliefs and feelings of one individual—Ms. Mary Barger—to claim that the visual intrusion of the Project isn’t so bad. Evidentiary Hearing Transcript (TN# 201234), at 68 (“I feel because of the vastness, the

⁴ While the body of the FSA and testimony at the evidentiary hearing make clear that construction of the proposed Project will result in a project-specific significant impact to the Chuckwalla Valley portion of the PRGTL (FSA 4.3-158 to 161; Evidentiary Hearing Transcript (TN# 201234), at 49), the conclusion section of the FSA appears to inadvertently omit this information. FSA 4.3-174.

visual impacts are significantly reduced.”); 72 (“I don’t feel like the towers are overwhelming”); 73 (“I don’t feel it’s a total intrusion”); 75 (“I believe [] that the landscape is still intact”). The Commission must reject this entreaty. CEC Staff’s conclusion that the amended Project will have significant impacts to the Chuckwalla Valley cultural landscape is thoroughly supported by the record. *See, e.g.*, Evidentiary Hearing Transcript (TN# 201234), at 51 (CEC Staff noting that “the visual intensity aspect of this argument is key. The intensity of the amended project’s visibility greatly exceeds that of the licensed project.”); *id.* at 187-188 (CEC staff testifying that there is no mechanism to accurately represent the brightness of the proposed towers, “given their extremely high levels of luminance.”).

BrightSource also objects to the imposition of CUL-1, which is intended to mitigate for the degradation of the Chuckwalla Valley cultural landscape.⁵ Exhibit 1077 (TN# 200806). Instead, BrightSource proposes that the Commission revert back to the \$35 per acre fee required of the licensed Project. Yet BrightSource’s supporting testimony for this objection focuses not on the *activities* included in CUL-1, but the *uncertainty* created by uncapped obligations. Evidentiary Hearing Transcript (TN# 201234), at 80 (Mr. Stucky noting his concern with “those pieces of uncertainty that cannot be quantified”). The Commission should consider that this concern could be remedied by imposing a reasonable cap on the mitigation activities, rather than removing the mitigation entirely, as BrightSource urges.

III. CEC Staff’s Cultural Resources Analysis Is Legally Defective.

Impacts to cultural resources are considered “environmental impacts” under CEQA. §§ 21084.1; 21083.2; 14 Cal. Code Regs. § 15064.5(a).⁶ Cultural resources include not only those archaeological sites and historic properties valuable for informational purposes, but also those sites, trails, and artifacts “associat[ed] with events significant in the prehistory and history of Native American groups in the region” and “associat[ed] with traditional uses and beliefs important to the continuity of regional Native American groups.” Evidentiary Hearing Transcript (TN# 201234), at 46. As with any other category of environmental impact, CEQA requires the lead agency to identify *all* potentially significant impacts to cultural resources, analyze those impacts to determine whether they will be significant, and consider and require all feasible alternatives and mitigation measures that could reduce significant impacts to a level of insignificance. § 21080.

Here, the FSA accurately concludes that this Project, with its giant power towers and substantial acreage, will significantly impact the rich cultural resources in the area. Despite this blunt admission, the FSA fails to provide the public and decisionmakers with adequate information about the extent of the harm to cultural resources; defers necessary studies of these resources until after project approval; and fails to identify feasible and enforceable mitigation measures that could reduce these impacts.

⁵ *See* Section III(E) on CRIT’s concerns regarding compensatory mitigation.

⁶ The CEQA Guidelines, 14 Cal. Code Regs. § 15000 *et seq.*, are referred to herein as “Guidelines.”

A. Impacts to the Chuckwalla Valley Landscape and Traditional Cultural Properties Are Improperly Downplayed.

While the FSA’s ultimate conclusion that landscape-level impacts will be significant is undoubtedly correct, the analysis nevertheless errs in certain respects. For example, the FSA relies on a 15-mile radius in considering visual impacts on cultural and ethnographic resources. FSA at 4.3-3, 59. However, the FSA also acknowledges that the Project will be visible for up to 30 miles. FSA Visual Resources Figure 2; *see also* FSA at 4.3-42 (“Staff has observed in the field that the project will be plainly visible from *at least* 15 miles away.”) (emphasis added). No evidence was provided to support the artificial geographic restriction on the cultural resource analysis. *See* Evidentiary Hearing Transcript (TN# 201234), at 119-20 (CEC staff explaining that the 15 mile radius was selected because “it felt like . . . it was reasonable,” even though the visual impacts extended further). Given that significant cultural resources are found within the wider viewshed of the Project (*e.g.*, the western flanks of the McCoy and Mule Mountains), the Commission’s analysis must be revised to incorporate the full radius in which the impacts occur. *County Sanitation Dist. No. 2 of L.A. County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1582 (agencies may not artificially limit their geographic analysis of a project’s impacts); *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm’n* (2007) 41 Cal.4th 372, 387-88 (“no statute (in CEQA or elsewhere) imposes any per se geographical limit on otherwise appropriate CEQA evaluation of a project’s environmental impacts. To the contrary, CEQA broadly defines the relevant geographical environment as ‘the area which will be affected by a proposed project.’”) (citations omitted).

In addition, the FSA concludes, without support, that the period of significance for certain traditional cultural properties and the Chuckwalla Valley portion of the PRGTL ended in 1936. FSA at 4.3-104 (Palen Dunes/Palen Lake TCP), 107 (Ford Dry Lake TCP), 118 (North Chuckwalla Prehistoric Quarry District TCP), 119 (Long Tank TCP), 121 (Alligator Rock TCP), 125 (San Pascual Well TCP), 149 (Chuckwalla Valley portion of the PRGTL). Given the ongoing use of these traditional cultural properties and the cultural landscape more broadly—as noted in the FSA itself (*e.g.*, FSA at 4.3-103, 106, 117)—the periods of significance must be revised to include the present day. Without an accurate assessment of these periods, the analysis will understate the impacts of the Project to these significant resources.

B. The Impacts from Impeding Access to Traditional Trails is Never Analyzed.

The Project’s impacts on area trails are of significant concern to CRIT. Trails not only connect individual locations, such as springs, mountains, and sacred places, but trails are themselves of critical cultural importance. For example, for CRIT’s Chemehuevi members, the Salt Songs provide a unique mechanism for understanding and connecting to the landscape surrounding the Project. Traditional practitioners regularly travel through this landscape—both in the western sense and in the supernatural sense—using these songs as their guide. *See* Exhibits 8015, 8018; Evidentiary Hearing Transcript (TN# 201234), at 91-94. Mohave oral history and song also make reference to the trail system in the area. *See* Exhibit 8017; Evidentiary Hearing Transcript (TN# 201234), at 92. Interruption of these trail circuits by construction of the Project and the fencing of the entire Project site (FSA at 3-3) would impede cultural practices in this area. Evidentiary Hearing Testimony (TN# 201234), at 97 (Wilene Fisher-Holt, CRIT Member,

explaining that “[s]o all of this is disrupting [the song] cycle[s] that we know of that make us who we are as a people.”).

The FSA notes that some prehistoric trails (such as the Halchidhoma or Coco-Maricopa Trail) “may run directly through the [Project] facility site” or just outside of the site boundaries. FSA at 4.3-22; *see also* FSA at 4.3-143 (“[W]e can see a vast network of trails in the Chuckwalla Valley, several of which pass directly through the [] project area footprint.”); *id.* (“Movement corridors associated with oral traditions in the vicinity of the Chuckwalla Valley include the Xam Kwatcam Trail along the Colorado River, a trail associated with the Yuman speaker’s oral tradition, and the Salt Song of the Chemehuevi Tribe.”); Evidentiary Hearing Transcript (TN# 201234), at 35 (CEC Staff recognizing the “immense braiding of trails that go through this area”). Astoundingly, *nowhere does the FSA consider the significance of direct impacts to these trails*—which presumably include their ultimate closure—some of which are recorded historic sites.

This lack of analysis violates CEQA (and hence the Commission’s certified regulatory proceeding), which requires disclosure of and development of mitigation for all potentially significant impacts. It also results in an incomplete LORS analysis, as numerous federal laws, including the National Historic Preservation Act, the National Environmental Policy Act, the American Indian Religious Freedom Act, and Executive Order 13007 on Indian Sacred Sites, serve to protect access to sacred sites. The Commission cannot approve the Project with this incomplete analysis.

C. The FSA Improperly Defers Analysis of Numerous Cultural Resource Impacts.

The FSA is unfortunately rife with instances where analysis of cultural resource impacts will be deferred to some future time or simply left incomplete. Such deferral of analysis is unlawful under CEQA. *Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116, 130 (environmental analysis “must be performed *before* a project is approved”) (emphasis added); *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431 (“CEQA’s demand for meaningful information ‘is not satisfied by simply stating information will be provided in the future.’”) (citation omitted).

Here, the FSA acknowledges numerous instances in which cultural resource analysis was deferred until after project approval or left incomplete. For example, the FSA notes that “the project owner ultimately declined to conduct [fieldwork on cultural resources impacts] on a schedule that would have made the resultant data available to staff in time to incorporate in the present analysis.” FSA at 4.3-4; *see also* FSA at 4.3-62. When CEC Staff conducted a severely constrained “walkabout” to determine the extent of cultural resources—finding only an “infinitesimally small” percentage of the total resources—they determined “there’s quite a lot of stuff out there that we didn’t know about.” Evidentiary Hearing Transcript (TN# 201234), at 114.

BrightSource has also undertaken no “substantive consideration of the amended project’s potential visual effects on these mountain resource areas or on the individual cultural resources that are probably present within them.” FSA at 4.3-87. Similarly, BrightSource’s late

development and submission of a trail study resulted in underutilization of the information it contained (FSA at 4.3-62). Instead of “ground-truthing” the information, looking for trails on the ground, and contacting area tribes, the FSA analysis instead relies only on unverified archival information about trails. Evidentiary Hearing Transcript (TN# 201234), at 118. Finally, BrightSource’s “apparently incomplete prehistoric archaeological record search data” has called the accuracy of the FSA into question. FSA at 4.3-89. While the blame for this incomplete analysis may be laid at the Petitioner’s feet, the responsibility to prepare a complete environmental assessment remains with the Commission. 20 Cal. Code Regs. § 1742.

CEC Staff attempted to work around this missing information. However, the resort to after-the-fact studies is insufficient. The FSA proposes CUL-1, which requires completion of field work as *mitigation* for the Project’s impacts. FSA at 4.3-178 to 181. But analysis of a project’s impacts is intended to provide information to help decisionmakers assess the proposal, not to serve as a post-hoc verification of a presumed significant impact. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307 (“A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking . . . [and] is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.”). Indeed, “[b]y deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process.” *Id.*

This type of activity is particularly inappropriate where known information indicates that the Project is likely to cause unique and significant impacts. § 21083.2(a) (agencies required to analyze impacts to unique archeological resources). Such is the case here. Limited field work conducted by CEC Staff confirmed that the requested analysis “was warranted.” FSA at 4.3-62; *see also* FSA at 4.3-85 (“The results of the reconnaissance were both definitive and imprecise; definitive in that the reconnaissance produced positive and intriguing cultural resource findings, and imprecise in that the reconnaissance was conducted with limited staff resources and was a very limited sample of the project area of analysis.”). Under CEQA, assuming that the Project will result in significant impacts, but delaying actual analysis of those impacts to after Project approval, is simply not permitted. *See, e.g., Berkeley Keep Jets Over the Bay Comm’n v. Bd. of Port Comm’rs* (2001) 91 Cal.App.4th 1344, 1371 (agencies may not “travel the legally impermissible easy road to CEQA compliance . . . [by] simply labeling the effect ‘significant’ without accompanying analysis”); *Vineyard Area Citizens*, 40 Cal.4th at 431.

CRIT is also concerned about the Commission’s potential reliance on an incomplete ethnographic study. CEC Staff partially completed an ethnographic study “to identify Native American concerns” and used this study “as a basis for determining the significance of related resources and potential mitigation” FSA at 4.3-24. The FSA identifies this ethnographic study as “final.” FSA at 4.3-53. However, CRIT members have not yet had the opportunity to contribute to this ethnographic study, resulting in an analysis that is incomplete. FSA at 4.3-61.

The FSA inaccurately concludes that omission of CRIT interviews is irrelevant “because the cultures represented within the CRIT tribal membership are also represented by other tribes consulted for this project.” FSA 4.3-61. However, tribes and their members are not interchangeable. For example, the Mohave groups living near Blythe have different histories of

and cultural connections to the land at the Palen site than those living farther north and closer to Needles. Exhibit 8023 (TN# 200906).

As detailed in the testimony of Doug Bonamici, CRIT has developed protocols to ensure that interviews with tribal members regarding cultural and ethnographic resources are conducted in a manner that ensures confidentiality of sacred information and respect for tribal members. Exhibit 8025 (TN# 200907). Working through the necessary conditions and requirements can take time, and in this case, the required documents were not completed in advance of ethnographic interviews. As a result, CRIT members have been left out of the Ethnographic Study, despite their willingness and desire to provide information about the Project site and express their concerns about the Project impacts. The refusal of the CEC Staff, BrightSource, and the Commission to employ a timeline that can accommodate these necessary steps has resulted in a document that cannot yet serve as the basis for Project approval. While CRIT has presented some cultural information to the Commission as an Intervenor, it is no substitute for the type of information that can be gathered in a confidential setting by a culturally competent ethnographer.

D. No Substantial Evidence Supports the Conclusion that Impacts to Buried Cultural Resources Will Be Less than Significant.

1. Disturbance and Removal of Buried Cultural Material Results in a Severe Cultural Harm.

The FSA's analysis of the Project's potential impacts to buried cultural resources is also woefully inadequate. While the new technology proposed by the Project will reduce the amount of needed grading at the Project site when compared with the original project, and hence will reduce potential impacts to buried cultural resources, it remains possible that the Project will impact these resources. FSA 4.3-54 (stating that the potential for buried archaeological deposits is highest in the northeast quadrant; elsewhere on the Project site, such materials are "not likely," but the possibility is not reduced to zero); *see also* Exhibit 8017. As attested to in Exhibits 8007 to 8010 (TN# 200917, 200921, 200920, 200919) and 8016 to 8017,⁷ disturbance of archaeological resources, burials, and cremation sites associated with the ancestors of CRIT members results in severe cultural harm. *See also* Evidentiary Hearing Transcript (TN# 201234), at 153 (Quechan Tribe member commenting on possible cremation burial site uncovered during construction at the Genesis project: "it's just sacrilege to see that, that that's a potential burial site and its got sandbags around it and a steel plate on top").

CRIT also rejects the implied belief of both CEC Staff and BrightSource that installing heliostat pedestals will not result in harm to buried cultural materials, simply because the direct harm will remain unknown. *See* Evidentiary Hearing Transcript (TN# 201234) at 124. In contrast, CEC Staff for paleontological resources readily admit that the insertion of pylons can

⁷ Exhibits 8007 to 8010 (TN# 200917, 200921, 200920, 200919) are declarations originally prepared in support of CRIT's application for a temporary restraining order to halt construction on the Genesis Solar Energy Project. As these declarations describe the cultural harm that results from the disturbance of buried cultural resources, they are relevant here as well.

damage what is underneath (*id.* at 222),⁸ including archaeological resources. Damage or disruption to buried resources does not disappear simply because it cannot be immediately seen. Exhibit 8026 (TN# 201047).

The FSA also reveals that “grubb[ing], blad[ing], and smooth[ing]” will be used to prepare access roads every 152 feet throughout the entire project site. FSA at 3-4. While these activities may be less invasive than grading activities necessary for the originally licensed project, they nevertheless may uncover, disturb or damage undocumented cultural material. The FSA, however, does not appear to consider the potential impacts from this activity.

The FSA details that, in conjunction with the original licensing proceeding, the original project owner excavated just twelve boreholes and eight test pits across a 4,366-acre site, to assess the possibility of encountering buried cultural materials. FSA at 4.3-53. While no buried cultural materials were found, these excavations provided scant coverage of the area of potential disturbance. Similarly, the trenching that occurred at the Genesis Solar Energy Project in the name of site evaluation revealed few resources, yet, in the end, that project eventually dug up thousands of artifacts and thus serves as a grave example of the fallacy of this needle-in-a-haystack approach. *See* Exhibit 8027 (TN# 200979).

As a result of this incomplete analysis, CEC Staff rests entirely on their conviction that the likelihood of encountering buried cultural material is “quite low out there.” Evidentiary Hearing Transcript (TN# 201234), at 122. But neither CEC Staff nor BrightSource have provided any evidence that the likelihood has been reduced to zero, or that the disturbance or destruction of cultural artifacts will not cause cultural harm. As a result, the Commission necessarily must conclude that impacts to unknown prehistoric archaeological resources are potentially significant.

2. Proposed Conditions of Certification Will Not Reduce Potential Harms to Buried Cultural Resources to a Less-than-Significant Level

The FSA’s conclusion that these mitigation measures will reduce the potential impact to “a less than significant level or to the extent feasible” (FSA 4.3-80) is not supported by substantial evidence, as CEQA requires. *See Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116 (remand of approval appropriate where “there is no substantial evidence that the mitigation measures are feasible or effective in remedying the potentially significant [project impacts]”). Areas of concern regarding the conditions of certification are discussed broadly below, with citations to specific proposed language provided to the Commission in Exhibit 8020 (TN# 200998)

⁸ CRIT also objects to the inclusion of PAL-9, which requires subsurface excavations to determine the extent of paleontological resources. FSA at 5.2-37. As these activities appear to require significant ground disturbance for the sole purpose of collecting paleontological information, they put buried cultural materials at unnecessary risk. If the Commission chooses to adopt PAL-9, CRIT requests that Native American Monitors be present for all ground-disturbing activities.

First, and most importantly, the Conditions of Certification must be revised such that *avoidance* of any newly discovered cultural resource is given adequate consideration. Currently, CUL-9 states that any unanticipated discovery will receive a “proposed data recovery plan.” FSA at 4.3-203. But *avoidance* of buried archaeological materials, if feasible, is the preferred type of mitigation under CEQA. Guidelines § 15126.4(b)(3). Language requiring avoidance, if feasible, must therefore be inserted into the Conditions of Certification. To ensure that this measure is enforceable, the Conditions must also require written findings of infeasibility in the event that a significant unanticipated discovery is made during construction and truly cannot be avoided. *See* Exhibit 8027 (TN# 200979). CRIT also urges the Commission to require BrightSource to consider in-situ reburial of any newly discovered resources. While in-situ reburial is less preferable than avoidance, it does circumvent the difficulties created when archaeological resources are shipped to distant curation facilities. To address this important issue, and to ensure that the Conditions of Certification can reduce impacts to a less-than-significant level, CRIT proposes that CUL-5, -8, and -9 be modified as proposed in Exhibit 8020 (TN# 200998).

CRIT does note that BrightSource has agreed to accommodate the request for avoidance in certain circumstances. Exhibit 1081 (TN# 200969). Consequently, the language proposed for CUL-10 is the result of BrightSource’s accommodation. CRIT urges the Commission to adopt this proposed revision.

Second, CUL-5 requires post-approval preparation of a Cultural Resources Mitigation and Monitoring Plan (CRMMP). This crucial document will include protocols to address “newly discovered prehistoric [] archaeological resource types”; “artifact collection, retention/disposal and curation policies”; and use of Native American observers. FSA at 4.3-191 to 192. Deferring its development until after approval of the Project is prohibited under CEQA. Guidelines § 15126.4(a)(1)(B) (“Formulation of mitigation measures should not be deferred until some future time.”); *Communities for a Better Env’t*, 184 Cal.App.4th at 92 (“Numerous cases illustrate that reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA’s goals of full disclosure and informed decision making”). Moreover, without information about the specific protocols and estimates of their efficacy, it is impossible to conclude with certainty that the preparation of this document *will* reduce all impacts. *See id.* at 93 (criticizing agency’s failure to “calculate what, if any, reductions in the Project’s anticipated [impacts] would result from each of these vaguely described future mitigation measures”); *San Joaquin Raptor*, 149 Cal.App.4th at 684 (disapproving a mitigation measure that called for preparation of a future plan but which left the public “in the dark about . . . what specific criteria or performance standard will be met”).

In addition, CUL-5 does not guarantee tribal review and comment on the CRMMP. While the response to comment section of the FSA suggests that such opportunities may be given (*e.g.*, FSA 4.3-169, 171), it is not currently required of BrightSource. Consequently, tribes are given no assurance that concerns about the later-developed document will even be considered. Courts have emphatically condemned development of after-the-fact mitigation measures that cut the public out of the process. *Communities for a Better Env’t*, 184 Cal.App.4th at 93 (“Fundamentally, the development of mitigation measures, as envisioned by CEQA, is not meant to be a bilateral negotiation between a project proponent and the lead agency after project approval; but rather, an open process that also involves other interested agencies and the

public.”). As a result, in the event the Commission intends to approve the Project without first preparing a CRMMP, CRIT requests that the language proposed for CUL-5 be added, as provided in Exhibit 8020 (TN# 200998).

Third, implementation of the CRMMP is left to BrightSource and its hired consultants, raising serious questions about enforceability. FSA at 4.3-190 (“Implementation of the CRMMP shall be the responsibility of the [Cultural Resource Specialist, an employee of BrightSource] and the project owner.”). CEQA requires that all mitigation measures be enforceable. Guidelines §§ 15064.5(b)(4); 15126.4(a)(2) (“Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments.”). As described in CRIT’s testimony, CRIT encountered serious difficulties when it attempted to get nearly identical measures enforced at the Genesis Solar Energy Project. *See* Exhibit 8027 (TN# 200979). Unless it is clear that the measures to be included in the CRMMP will be enforceable, the CEC cannot rely on them to support a conclusion that impacts to unanticipated buried cultural resources will be less than significant. Consequently, CRIT requests that the Commission adopt the language proposed for CUL-5, as provided in Exhibit 8020 (TN# 200998).

Fourth, the use of Native American Monitors (NAMs) is not clearly described. CUL-8 requires BrightSource to hire NAMs “in areas where Native American artifacts may be discovered.” FSA at 4.3-198. Given the location of the Project and the concentration of cultural resource materials in this area, Native American artifacts may be discovered across the entire Project site. Consequently, this geographic modification to the requirement is unnecessary and potentially confusing. In addition, it is not clear whether NAMs are required for data recovery activities; these resources are certainly in areas where Native American artifacts may be discovered, but CUL-11 and CUL-12 do not provide for NAMs. Finally, NAMs must be given the authority to halt construction in the event of a resource discovery—otherwise, their inclusion in monitoring activities is largely for show. CRIT requests that the Commission adopt the language proposed for CUL-5, -7, -8, -9, -11, and -12, as provided in Exhibit 8020 (TN# 200998).

Fifth, communication between affected tribes and the CEC Compliance Project Manager (CPM) regarding discoveries must be strengthened. Monitoring logs must be timely provided to affected tribes, in accordance with the language in CUL-8. FSA at 4.3-202. Notification regarding prehistoric resource discoveries must be given to tribes within 24 hours, and the Commission—not just BrightSource—must be accountable in the event this activity does not occur. FSA at 4.3-203. Finally, tribes must be given a clear contact person within CEC Staff in the event they have concerns related to construction of the Project. These proposed revisions are provided in CUL-5, -8, -9 in Exhibit 8020 (TN# 200998).

The problems associated with buried cultural resources identified here result in part because the FSA focuses primarily on the impacts from the proposed change in technology (FSA at 1-1, 4-3.60), rather than on the impacts that will result from the Project as a whole. However, the unanticipated discoveries at the Genesis Solar Energy Project constitute “[n]ew information of substantial importance.” Guidelines § 15162(a)(3). In particular, the discoveries at Genesis demonstrate that the applicable conditions of certification—which are very similar to those proposed for this Project—were unable to prevent the disturbance and removal of thousands of buried cultural artifacts. Consequently, the Commission must newly consider these potential

impacts to buried cultural material and the ability of the conditions of certification to adequately address unanticipated discoveries. It is not sufficient to rely exclusively on the analysis and mitigation approved for the original project to address these issues.

E. To the Extent Compensatory Mitigation Is Proposed, Specific Activities Must Be Selected in Consultation with Affected Tribes.

The FSA proposes a suite of compensatory mitigation to “ameliorate” the loss of the cultural landscape. FSA at 4.3-159. Included in this suite of measures is funding for “initiatives . . . to directly, albeit partially, compensate Native American communities . . . [for] degradation of the associative and emic ethnographic values of their ancestral homelands.” FSA at 4.3-182, 185. Such initiatives will be developed in the future by a “steering committee” selected to represent the interests of Native American stakeholders. *Id.* The steering committee’s selection of initiatives is required to occur within nine months of their original selection. FSA at 4.3-185.

CRIT members are typically uncomfortable with the idea of receiving monetary compensation as mitigation for disturbance and destruction of cultural resources. In no circumstances can cultural resources be assigned a monetary value, and in no circumstance would CRIT voluntarily allow such cultural harm in exchange for funding. Evidentiary Hearing Transcript (TN# 201234), at 95.

However, in the event that projects are approved within CRIT’s ancestral homeland, over CRIT’s stringent objection, CRIT has stated its preference that any monetary mitigation be directed toward activities, projects, and organizations that preserve tribal culture. However, it is important to note that receipt of such funding is a sensitive issue for affected tribes and consequently, the Commission must be realistic about the amount of time a “steering committee” will likely need to develop appropriate initiatives. Nine months is simply unrealistic. There is no reason why the Commission cannot permit a much longer time frame for such a process.

F. The Proposed Use of Data Recovery at Individual Sites Constitutes Cultural Harm.

The FSA states that the Project will result in direct impacts to three prehistoric archaeological sites containing lithic scatters and fire-affected rocks. FSA at 4.3-82. Although Project construction will necessitate the removal and curation of these artifacts from the landscape, the FSA nevertheless concludes that impacts to such resources will be less than significant. FSA at 4.3-2, 4-3-175. This conclusion is not supported by substantial evidence.

As outlined in Exhibits 8007 to 8010 (TN# 200917, 200921, 200920, 200919) and in Exhibit 8015, for CRIT’s Mohave members, the removal of such artifacts—even in the name of “data recovery”—will result in significant cultural harm. *See also* Exhibit 8015 (CRIT member expressing concern that data recovery often results in loss of access to such resources by the Tribes). Such artifacts provide direct linkages to their ancestors and verification of a traditional oral history. *See* Exhibit 2010 (TN# 200919).

The Commission should consider modifications to the Conditions of Certification that avoid or reduce this significant impact. In particular, the Commission should consider requiring

BrightSource to avoid these three sites. CRIT understands that one benefit of the proposed technology is that individual heliostat pedestals can be moved or removed without significant impacts to the output of the Project. To the extent these sites are contained within the heliostat fields, placement of heliostat pedestals should be modified to avoid these sites.

Even if such modifications are truly infeasible, the Commission should still consider modifications to CUL-11 and CUL-12, which require data recovery efforts at the three prehistoric sites. FSA at 4.3-204 to 209. While data recovery techniques can be used to mitigate for the loss of *scientific value* associated within these sites, such techniques result in significant cultural harm. Instead, the Commission should require in-situ reburial of these materials, completed in conjunction with affected area tribes.

G. Impacts to Certain Biological Resources Are Cultural Resource Impacts.

CRIT members are also concerned about the Project's impacts on biological resources. The redtail hawk and golden eagle are both culturally significant species: hawks are used for guidance on spiritual runs, feathers are used in ceremonies, and birds are incorporated into clan names. *See* Exhibit 8016. Clan names are based on desert species, such as the fox, and harm to these species is felt directly by CRIT members. Evidentiary Hearing Transcript (TN# 201234), at 94 (Wilene Fisher-Holt, CRIT Member, stating that “[i]t was pretty profound to know that [the foxes are] being pushed out of their own territory, where the creator planted them.”). Based on the testimony presented by Center for Biological Diversity and Basin and Range Watch, it appears that numerous legal deficiencies prevent the Commission from adequately analyzing and mitigating for impacts to such species.

CRIT members are also concerned about the impacts of the Project on plant species, including creosote and ash brush, both of which are used in ceremonies. *Id.* The FSA concludes that the Project will result in a “total loss” of the function and value of vegetation on the 3,794 acre site. FSA at 1-6. Moreover, the FSA notes that the Project will likely attract avian species to the Project site (due to the “mirage”-like effect of the heliostats), only to cause injury or death from solar flux. *Id.*; *see also* Exhibits 8015 (referencing bird deaths at Ivanpah), 8019 (TN# 200926) (referencing bird deaths at Genesis); Exhibit 3055 (TN# 200531) (BLM raising concerns that BrightSource has failed to provide the information necessary to assess impacts to Golden Eagles); *see also* Evidentiary Hearing Transcript (TN# 201234), at 96 (CRIT member noting the presence of 8 redtail hawks during site visit). The Commission must consider the *cultural* harm resulting from these impacts along with the biological harm, particularly in considering whether to grant the Project the necessary override.

When the Quechan Indian Tribe asked CEC Staff to further analyze impacts to biological resources through a cultural lens, they stated that “staff assessment of impacts to culturally sensitive plant and animal species . . . is not a required assessment.” FSA at 4.3-171. However, the FSA notes that the Chuckwalla Valley portion of the PRGTL is composed of *natural* and cultural elements, including culturally important plants and animals. FSA at 4.3-133; *see also* FSA at 4.3-151. Given the importance of natural elements to cultural practices, the Commission must reconsider CEC Staff's position and require further analysis of this cross-over issue.

H. The FSA Improperly Downplays Cumulative Impacts to Cultural Resources.

CEQA requires lead agencies to consider not only a project's individual impacts, but also its cumulative impacts. § 21083(b)(2); Guidelines § 15130. This analysis requires agencies to describe the "incremental effects of an individual project . . . when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." § 21083(b)(2). The cumulative impacts analysis is crucial. It provides the only means of disclosing impacts that seem small in isolation but are significant when viewed together with other projects. *See San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79 ("[I]t is vitally important" not to "minimiz[e] cumulative impacts."). The analysis is particularly crucial in this setting, where many additional utility-scale renewable projects are proposed for the area. Evidentiary Hearing Transcript (TN# 201234), at 42 (Quechan Tribe member stating that "I look at the broader range in this area, and it scares me because what is already being proposed").

CRIT agrees with the FSA's conclusion that "the already cumulatively considerable impact from the originally proposed project will be an even greater cumulatively considerable [cultural resource] impact with the amended project." FSA at 4.3-164. Despite this accurate conclusion, the FSA fails to adequately analyze the cumulative impacts resulting from the transformation of CRIT's ancestral homeland into an industrial landscape intended to generate electricity for the American Southwest. For example, the FSA states that "construction of the Chuckwalla Valley and Ironwood State prisons probably caused the most disturbance in the I-10 corridor," totaling 1,720 acres of disturbance. FSA at 4.3-164. Construction of utility-scale renewable energy projects, however, has dwarfed this earlier disturbance. According to our latest calculations, the Commission and BLM have approved renewable energy projects on close to 19,000 acres within the I-10 corridor alone. *But see* FSA at 4.3-165 (claiming that only 7,898 total acres have been disturbed in this corridor). The cumulative impact section must be revised to accurately describe and analyze the impacts of these similar, and similarly destructive, projects.

The FSA proposes using a monetary contribution to mitigate for cumulative cultural resource harms, a strategy approved on prior projects. FSA at 4.3-182. For prior iterations of Palen and Blythe, and for the Genesis Solar Energy Project, which is now under construction, the Commission imposed specific contributions on a per-acre basis. But the FSA provides no information on how the money already collected has been spent, and how the contributions will be used now that the CEC Staff is recommending moving away from the Prehistoric Trails Network Cultural Landscape (FSA at 4.3-83 to 84) or from nominating any landscape-level resource at all (FSA at 4.3-150). Without this additional information, it is impossible to tell whether this mitigation measure is at all effective.

I. The Commission's "Consultation" Process Does Not Conform to State Law and Fails to Result in Adequate Consultation.

Consultation with tribes must be an integral part of any decision that might impact sacred sites or ancestral homeland. The State of California recently recognized this requirement in Executive Order B-10-11, which identifies the importance of "meaningful" and "government-to-government" consultation. In particular, the Executive Order requires every state agency and

department to “encourage communication and *consultation*,” and to allow tribal governments “to provide meaningful input” into their decisions.

Although CEQA does not contain a similar, explicit consultation requirement, the Native American Heritage Commission strongly recommends that agencies consult with tribes during CEQA review as well. *See* NAHC Letter to California Department of Fish and Game Renewable Energy Action Team re: NAHC Guidance for Tribal Consultation Requirements (October 5, 2009) (available at http://www.energy.ca.gov/33by2020/documents/2009-10-13_meeting_comments_bmp_draft/NAHC_Tribal_Guidance_for_Desert%20Plans.pdf). In addition, CEQA requires the Commission to determine whether projects that it approves will have a significant effect on the environment, including on cultural or historic resources. §§ 21080, 21084.1, 21083.2; Guidelines § 15004.5. The only way to make this determination is to consult with affected tribes, including CRIT.

These state requirements parallel numerous federal laws and executive orders that require federal agencies to consult with tribes when considering whether to approve energy projects. In particular, Section 106 of the National Historic Preservation Act requires tribal consultation. 16 U.S.C. § 470 et seq.; 36 C.F.R. Part 800; *see also* Executive Orders Nos. 11593 (requiring preservation of cultural environment), 13175 (requiring coordination & consultation) and 13007 (requiring protection of sacred sites). Moreover, in his November 5, 2009 Presidential Memorandum on Tribal Consultation, President Obama reiterated a crucial fact: “History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.” Exhibit 8000 (TN# 200912).

Contrary to Executive Order B-10-11, the Commission has not consulted with CRIT at all. While CRIT is aware that the Commission’s *ex parte* communication rules prohibit government-to-government consultation, CRIT strongly believes that the importance of government-to-government consultation should take priority over the open government policies implicit in the *ex parte* communication rules. Until these priorities are reevaluated, the Commission is out of conformance with Executive Order B-10-11’s requirements.

“Consultation” efforts with CEC Staff have also failed. CEC Staff met with CRIT Staff on just two occasions: on March 22, 2013 and during the week of August 12, 2013. FSA at 2-4 to 5; 4.3-56 to 57; Exhibit 8025 (TN# 200907). The purpose of both meetings was for CEC Staff to convey information about the Project to CRIT Staff. While CEC Staff has been cordial and professional, neither meeting was anything more than an informational presentation. Exhibit 8025 (TN# 200907). As noted by a representative from the Quechan Tribe: “We get the Power Point presentations, we get the documents, and either we sign off on them or we don’t. We can make our comments, but nothing ever happens.” Evidentiary Hearing (TN# 201234), at 154. Such informational sessions, where agency staff simply informs the tribes of decisions already set in motion, are *not* adequate to ensure that Tribal concerns are given appropriate consideration.

J. While Recognizing the Possibility of Native American Environmental Justice, the FSA Fails to Recognize the Impacts of this Project.

“Environmental justice” is defined in the Government Code as “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.” Gov. Code § 65040.12(e). Although CEQA does not use the term “environmental justice,” several provisions of the law and its Guidelines require that agencies consider how the environmental burdens of a project might specially affect certain communities. First, it has long been established that “[t]he significance of an activity depends upon the setting.” *Kings County Farm Bureau*, 221 Cal.App.3d at 718 (citing Guidelines § 15064(b)). In some settings, new air pollution may not be significant, but if the affected population is already subject to high levels of air pollution, even a slight new addition may be devastating. *Id.* at 720-21. Similarly, a project’s impacts to historic resources may not be significant in an area where those resources are plentiful and local residents are not particularly attached to them. But impacts to tribal cultural resources can be crushing in instances where tribes have already experienced devastating loss of their cultural patrimony, and where the soon-to-be-lost resources form a core part of the tribes’ identity.

Second, and similarly, CEQA requires agencies to analyze cumulative impacts. § 21083(b)(2). In this context, agencies must account for a project’s cumulative impact to particular cultures or populations that may have already experienced significant historic or environmental impacts. Third, economic and social effects are also relevant in determining whether a project has significant impacts. CEQA states that “A social or economic change related to a physical change may be considered in determining whether the physical change is significant.” Guidelines § 15382. Thus, “if the construction of a new freeway or rail line divides an existing community, the construction would be the physical change, but the social effect on the community would be the basis for determining that the effect would be significant.” Guidelines § 15131(b). In the present case, construction of the Palen Project will have undeniable physical impacts that will have immensely significant social effects on the CRIT community. CEQA therefore requires the Commission to fully analyze the Project’s social and cultural impacts.

Last, as explained by the California Attorney General in a paper describing how CEQA requires analysis of environmental justice issues, environmental justice also plays a role in an agency’s statement of overriding considerations:

To satisfy CEQA’s public information and informed decision making purposes, in making a statement of overriding considerations, the agency should clearly state not only the “specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits” that, in its view, warrant approval of the project, but also the project’s “unavoidable adverse environmental effects[.]” ([Guidelines § 15093(a)]) If, for example, the benefits of the project will be enjoyed widely, but the environmental burdens of a project will be felt particularly by the neighboring communities, this should be set out plainly in the statement of overriding considerations.

Kamala D. Harris, *Environmental Justice at the Local and Regional Level, Legal Background* (May 8, 2012), http://oag.ca.gov/sites/all/files/pdfs/environment/ej_fact_sheet_final_050712.pdf.

The FSA rightly concludes that “the Indian tribes affiliated to the Chuckwalla Valley (through ancestral or traditional use claims) [] constitute environmental justice populations.” FSA at 4.3-51. However, an adequate environmental justice analysis includes not only identification of areas potentially affected by impacts and identification of environmental justice populations within those areas, but also “a determination of whether there may be a significant adverse impact on a population of minority persons . . . caused by the proposed project alone, or in combination with other existing and/or planned projects in the area.” FSA at 1-4. *The FSA completely omits this crucial step.* While a significant adverse environmental justice impact is implied by the conclusions of the Cultural Resource section of the FSA, this determination must be made explicitly by the Commission.

IV. The Project Does Not Comply With All Applicable LORS.

A. The FSA Fails to Acknowledge Numerous Federal Laws that Protect Cultural Resources and Sacred Sites.

One of the primary purposes of the FSA is to determine whether a proposed project complies with all “applicable local, regional, state, and federal standards, ordinances, or laws.” § 25523(d); 20 Cal. Code Regs. § 1752(a). The Commission may not certify any project that does not comply with applicable LORS unless it finds both (1) that the project “is required for public convenience and necessity” and (2) that “there are no more prudent and feasible means of achieving such public convenience and necessity.” § 25525; *accord* 20 Cal. Code Regs. § 1752(k). Consequently, identification of all applicable LORS is a crucial step in the siting process.

Unfortunately, the FSA offers little guidance on compliance with LORS related to cultural resource protection. The sole federal LORS considered is the BLM-Cal SHPO-Project Owner Programmatic Agreement. FSA at 4.3-8. The Programmatic Agreement, however, is the mechanism for implementing Section 106 for the *prior* project. Given that BLM is embarking on a new federal undertaking in considering the Project (and, in fact, never approved the *prior* project), BLM must comply anew with the full suite of applicable federal LORS. Consequently, the Commission must consider whether the Project conforms to the National Environmental Policy Act, the National Historic Preservation Act, the Federal Land Policy and Management Act, the American Indian Religious Freedom Act, and Executive Order No. 13007, among other regulations and standards.

The FSA offers reason to doubt conformity with this panoply of federal laws. In particular, the FSA reveals numerous additional impacts on eligible historic resources resulting from the Project’s increased visual impacts, including traditional cultural properties, sacred sites, and archaeological resources. As described above, the Project also impedes access to the prehistoric trails that cross the site, invoking the requirements of federal laws intended to protect access to sacred places, including the American Indian Religious Freedom Act and Executive Order 13007. Consequently, adequate consideration of all applicable LORS will likely reveal a

lack of conformity. And, as discussed below, the public convenience and necessity override standards cannot be met in such circumstances.

B. The FSA's Visual Impact Analysis Is Legally Defective.

In considering the Project's conformance with visual resource LORS, the FSA states that "[t]he project was found to be in compliance with the impact disclosure requirements of the California Desert Conservation Area (CDCA) Plan through the visual impact analysis presented here and in the BLM DEIS for the project." FSA at 4.12-35. However, the CDCA Plan and the Federal Lands Policy and Management Act (FLPMA), under which the CDCA Plan was created, impose more than just "information disclosure requirements." They also impose substantive requirements for Visual Resource Management classes. In performing the required LORS analysis, the Commission must evaluate whether the Project is consistent with these substantive requirements. The FSA has failed to present this analysis, and thus cannot serve as support for any Commission decision.

The FSA attempts to justify this omission by asserting that "[t]he CDCA Plan did not include [a] Visual Resource Management (VRM) inventory or management classes." FSA at 4.12-36. However, the CDCA Plan imposed a requirement that BLM consider compliance with VRM classes on a project-by-project basis. Exhibit 8012 (TN# 200922), at 3.19-3 ("BLM land managers must establish 'Interim VRM Classes' for individual projects on a case-by-case basis."). Consequently, BLM establishes VRM classes for areas within the CDCA Plan when Projects are proposed, and any subsequent projects must comply with the VRM class requirements.

On the Project site, BLM established a VRM Class III designation in its approval of the Devers-Palo Verde 2 Transmission Line. *Id.* at 3.19-3. VRM Class III designations require that any level of change to the characteristic landscape must be "moderate," and that management activities "should not dominate the view of the casual observer." *Id.* at 3.19-4. As noted in the Draft SEIS, this Project *does not conform* with the applicable Class III designations. *Id.* at 4.18-15 to 17. Consequently, the Project does not comply with all applicable federal LORS. The Commission cannot approve the Project unless this lack of conformity is acknowledged and the necessary override finding is made.

V. The FSA's Alternatives Analysis Is Legally Defective.

Every EIR must analyze a reasonable range of project alternatives. § 21100(b)(4); Guidelines § 15126.6(a). The alternatives analysis lies at "[t]he core of an EIR" because it informs decision-makers and the public about ways of accomplishing some or all of the proposed project's objectives with fewer environmental impacts. *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564-65; Guidelines § 15126.6(b). To be "reasonable," the alternatives in an EIR must provide enough variation from the proposed project "to allow informed decisionmaking." *Laurel Heights I*, 47 Cal.3d at 404-05 (citation omitted). Those alternatives must also avoid or substantially lessen the project's significant environmental impacts while attaining most of the project's basic objectives. *See* § 21100(b)(4); Guidelines § 15126.6(a) & (b).

Agencies must identify which alternative is environmentally superior. Guidelines § 15126.6(e)(2). If the project that the agency wishes to approve would cause significant environmental impacts and is not the superior alternative, the agency must “make findings identifying . . . the [s]pecific . . . considerations’ that ‘make infeasible’ the environmentally superior alternatives” *Flanders Found. v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 620-21 (citation and emphasis omitted); *see also* §§ 21002 (“agencies should not approve projects . . . if there are feasible alternatives . . . which would substantially lessen the significant environmental effects of such projects”), 21081(a)(3) (agencies must make findings of infeasibility when rejecting environmentally superior alternatives). The agency’s findings must be based on substantial evidence in the record. *Flanders Found.*, 202 Cal.App.4th at 621 (citing § 21081.5).

Here, the FSA’s analysis of alternatives does not satisfy these requirements. In particular, the FSA unequivocally states that the Project will have far more significant environmental impacts than the other alternatives considered in the document:

Reconfigured Alternative #2 or #3 would be environmentally superior to the proposed modified project. Staff concludes that constructing and operating the Solar PV Alternative with Single-Axis Tracking Technology would avoid or substantially reduce several impacts on Biological Resources, Cultural Resources, Traffic and Transportation, and Visual Resources.

FSA at 6.1-2. In addition, for “the Reduced Acreage Alternative with SPT Technology, staff identifies several impacts on Biological Resources that would be ‘much less than PSEGS’” *Id.*

Despite the FSA’s clear acknowledgement that the Project has far greater impacts than these alternatives, the document offers no findings of infeasibility with respect to the two alternatives. FSA at 6.1-51 to 90. Nor could it, given that both options offer clear mechanisms for carrying out the Project’s primary objective—developing utility-scale renewable energy on-site in order to implement California’s Renewables Portfolio Standard program—and would have reduced cultural impacts. *See* FSA at 6.1-4 (stating Project purpose). The Commission previously rejected a solar PV alternative due to its allegedly greater impacts due to site grading and stormwater management. FSA at 6.1-52. However, as the FSA acknowledges, new solar PV projects can be accomplished with much less grading than they required in the past, so this no longer represents a legitimate rationale for rejecting the alternative. FSA at 6.1-52 to 53.

The FSA does briefly discuss some “potential feasibility issues,” but these do not withstand scrutiny. FSA at 6.1-56 to 57. For example, the FSA states that the PV alternative may have feasibility issues because it would require a change in technology from solar thermal to PV, which would mean that the Commission would no longer have approval authority and BrightSource *might* have to reapply to the BLM for approval, which *might* take longer. FSA at 6.1-56 to 57; *see also id.* at 6.1-76 to 77 (FSA bases its feasibility analysis for the reduced acreage alternative on presumptions and speculation). But the Commission may not rely on such assumptions and speculation; rather, CEQA requires the agency to conduct a “thorough investigation” and “find out and disclose all that it reasonably can.” Guidelines §§ 15144; 15145. Here, the FSA’s assumptions regarding possible difficulties of switching to a PV project or

implementing a reduced size power tower project do not constitute substantial evidence on which the Commission may dismiss the alternatives as infeasible. *Ctr. for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 876, 884 (rejecting agency's finding that an alternative was infeasible because the agency failed to adequately investigate the alternative's feasibility); *Kings County Farm Bureau*, 221 Cal.App.3d at 736-37 (EIR's alternatives analysis was incomplete due to absence of comparative financial data; its conclusion that an alternative was financially infeasible was not supported by substantial evidence). In any event, the BLM has already completed its draft environmental review (FSA at 6.1-77), so there is no reason to believe that obtaining BLM approval would take any longer than obtaining Commission approval.

The FSA also states that changing the Project to a PV system or implementing the reduced acreage alternative might require changes in the applicant's power purchase agreements. FSA at 6.1-56 to 57, 6.1-76 to 77. Courts have emphatically rejected the notion that an alternatives analysis may be limited by an applicant's prior contractual commitments that might prevent a sponsor from implementing otherwise reasonable alternatives. *Kings County Farm Bureau*, 221 Cal.App.3d at 736-37.

In fact, the real reason the Project is selected appears to be that BrightSource wishes to use its own, proprietary power tower technology as opposed to solar PV or a different technology. But as the CEC Staff report acknowledges, and as case law makes clear, an agency may not allow a project proponent's objectives to constrain the agency's analysis of alternatives. FSA at 6.1-5; *Kings County Farm Bureau*, 221 Cal.App.3d at 736 ("Since CEQA charges the agency, not the applicant, with the task of determining whether alternatives are feasible, the circumstances that led the applicant in the planning stage to select the project for which approval is sought and to reject alternatives cannot be determinative of their feasibility."). The Commission cannot fall back on accommodating BrightSource's needs in making its decision regarding feasible alternatives.

The FSA also should have fully analyzed an off-site, distributed generation alternative. The FSA states that off-site alternatives are likely infeasible due to the necessity of obtaining site control and completing the required environmental review to allow development to proceed in a timely manner. FSA at 6.1-7. But this ignores that a distributed generation alternative would not necessarily require environmental review: CEQA exempts from environmental review solar power projects that are placed on rooftops and over parking lots. § 21080.35. Accordingly, such a project would likely be much easier to permit and would not take an undue amount of time to implement.

The Commission may not approve the Project as proposed until it makes legally sufficient findings rejecting the superior alternatives as infeasible; alternatively, it must approve an environmentally superior alternative. Given the facts of this case, there is no evidence on which to base findings of infeasibility for the superior alternatives.

VI. The Commission Cannot Make the Override Findings Necessary to Approve This Project, Which Has Significant, Unmitigable Impacts and Does Not Conform to Applicable LORS.

Public Resources Code section 25525 states that:

The commission may not certify a facility contained in the application when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity.

In addition, CEQA prohibits an agency from approving a project with significant environmental impacts unless there is no feasible mitigation that could reduce those impacts and “specific economic, legal, social, technological, or other benefits . . . of a proposed project outweigh the unavoidable adverse environmental effects.” § 21002; Guidelines §§ 15091, 15093. This is CEQA’s substantive mandate. *Mountain Lion Found. v. Fish & Game Comm’n* (1997) 16 Cal.4th 105, 134.

Here, BrightSource will undoubtedly argue that the benefits of this “renewable” energy project outweigh the significant cultural, visual, and biological impacts, and that there is no more prudent and feasible means of achieving public convenience and necessity. These arguments fall flat for at least four reasons.

First, the impacts of the project will be severe. CEC Staff acknowledged this in the FSA: the Project will severely impact a landscape that is rich in cultural resources, rendering it no longer eligible for listing on the state and national registers of historic places. Testimony and public comment from tribal representatives made this point even more clearly, as highlighted at the beginning of this brief.

Second, building this project will not reduce the world’s greenhouse gas emissions by one bit. This project will add a new source of energy, not replace an existing source.

Third, there are alternatives to the proposed Project, including distributed generation and relocation of utility-scale projects to previously disturbed sites, that could create a new source of renewable energy and create jobs with none of the devastating impacts of this Project. In addition, there is a solar PV alternative that is feasible and could significantly reduce the Project’s impacts.

Fourth, and finally, approval of this Project would be unjust. To the extent the Project will provide public benefits—as opposed to simply enriching BrightSource and its investors—those benefits will be felt broadly across the globe. The harms of the Project, however, will fall particularly on the desert landscape and the tribes that have a unique and long-term connection to it. This unequal distribution of benefits and harms should tip the scale in favor of protecting sacred and finite resources.

For all of these reasons, the Commission cannot make the override findings necessary to approve this Project.

Conclusion

For all of the foregoing reasons, CRIT respectfully requests that the Commission deny the proposed Project amendment. In the event the Commission intends to approve the Project amendment, CRIT respectfully requests that the Commission adopt the proposed changes to the Conditions of Certification for cultural resources.

DATED: November 26, 2013

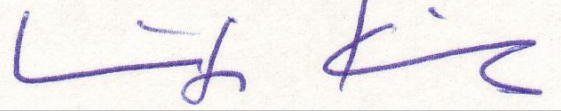
COLORADO RIVER INDIAN TRIBES

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DECLARATION OF SERVICE

I, Sean Mulligan, declare that on November 26, 2013, I served and filed copies of the Opening Brief of Colorado River Indian Tribes, dated November 26, 2013. The most recent Proof of Service List, which I copied from the web page for this project at: <http://www.energy.ca.gov>, is attached to this Declaration.

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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: November 26, 2013

/s/ Sean Mulligan_____



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