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**DOCKET**

**09-AFC-8**

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August 11, 2010

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

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

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

Sincerely,

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STATE OF CALIFORNIA

Energy Resources  
Conservation and Development Commission

In the Matter of:

Application for Certification for the  
Genesis Solar Energy Project

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

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

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In accordance with the Committee direction at the evidentiary hearings held on July 12, 13 and 21, 2010 Genesis Solar, LLC (Genesis) submits this Reply Brief in response to the Third Day Opening Brief of the Californians for Renewable Energy (CARE).

I.

**INTRODUCTION**

CARE's Opening Brief is verified suggesting that it should be treated as testimony. It should not be treated as testimony as the close of the evidentiary record on Cultural Resources occurred on July 21, 2010 and CARE has not made a motion to re-open the record. Therefore, the Committee should ignore any new facts introduced in CARE's Opening Brief and treat it as argument, speculation, or supposition and give it no evidentiary weight.

CARE's alleges that the Committee would be interfering with the Native American tribes' freedom to practice its religion; has violated due process in conducting these proceedings, and will be violating federal law in abandoning a highway. All of these allegations are unfounded, untrue and not supported by any evidence in the record. The foundation of all of these allegations is the existence of a Prehistoric Trail across the Genesis Solar Energy Project (GSEP) site, that Native Americans use this trail and site to worship, and that the development of the GSEP will destroy this trail and prevent this worship. There is no evidence that any Prehistoric Trail exists on the GSEP site

and therefore there is no possibility that the GSEP would negatively affect it or any other trail. Without a direct affect on the trail it is not possible for the GSEP to interfere with any Native American tribe from conducting religious or spiritual practices.

**I.  
THE GSEP DOES NOT AFFECT ANY SACRED SITE AND DOES NOT  
INTERFERE WITH NATIVE AMERICAN RELIGIOUS PRACTICES**

CARE asserts:

local Native American tribes consider the most sacred area of the North American Continent, La Cuna de Aztlan [the cradle of the Aztec civilization]. It is the area where the Aztec Calendar is geographically outlined and located in the form of geoglyphs [AKA intaglios], petroglyphs [rock art], and interconnecting trails that have been used by tribal runners for thousands of years. The area entails from the Kofa Mountains in Arizona, west to the human head image (Copill-Quetzalli) on the crest of the San Jacinto Mountains above the city of Palm Springs, Ca.<sup>1</sup>

Genesis does not challenge this system of beliefs in any way. The area of land described ranging from Arizona through the desert to a point near Palm Springs represents hundreds of square miles. Surely, CARE could not reasonably advocate that no development can occur anywhere within that area. While the area may be deemed sacred, the Committee should focus its analysis on whether or not the GSEP will destroy or interfere with any of the components that CARE asserts make this area sacred. When the facts in the evidentiary record are assessed and considered it is clear that GSEP does not.

**A. The GSEP Site Does Not Include Any Known Native American Religious Site or Traditional Cultural Properties**

The GSEP does not interfere with any of the geoglyphs identified by CARE or any other form of rock art because the site is devoid of any such resource. Every one of the geoglyphs identified by Mr. Figueroa in the video (Exhibit 615) are not present at the GSEP, nor even alleged by Mr. Figueroa to be within the disturbance area of the GSEP. In fact, Staff expert, Dr. Bagwell testified:

no specific formally identified traditional cultural property has been mentioned in or near Genesis by Native American groups, which were contacted.<sup>2</sup>

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<sup>1</sup> CARE Opening Brief, Page 1

<sup>2</sup> 7/21/10 RT 152

## **B. The Prehistoric Trail Identified By CARE Is Not Present Within The GSEP Disturbance Area**

On page 2 of the brief, CARE states:

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

Later, CARE provides a copy of a map showing a trail from running west from McCoy Springs, then intersecting with a trail that runs south to Corn Springs. The caption states that the trail “bisects the Genesis project site”.

For the Committee’s information, the map is taken from a 1957 report (Johnston and Johnston 1957)<sup>3</sup> from the University of California Archaeological Survey entitled “An Indian Trail Complex of the Central Colorado Desert: A Preliminary Survey.” The text of the report points out that the main object of the study is the trail designated CA-RIV-53T that runs from the southern foot of the McCoy Mountains (east of the GSEP) northwest to McCoy Springs (CA-RIV-132) – (North of GSEP). It is outside the Area of Potential Effect (APE)<sup>4</sup> of the GSEP though it was identified in the file search conducted for the project.

The trail identified on the map by CARE as “bisecting” the GSEP is CA-RIV-72. As borne out in the text of the study, this trail is designated with a dashed line, which means it is only a “reported trail”. The authors note that “[t]his information was supplied by a local resident and has not been recorded as yet.”<sup>5</sup> The authors relied upon informants and did not visit the trail.

The trail section on the map referred to by CARE is in reality a schematic display of informant information never verified in the field. The authors were honest enough to designate it as a “reported trail” on their map and describe how they found out about it.

The fact is, there has never been any conformation that this bisecting trail exists – or ever existed. What is interesting to note is what was actually found in the GSEP APE during pedestrian surveys and geoaerchology studies. The field crews conducting the GSEP survey were well aware of what prehistoric trails look like and how to record

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<sup>3</sup> Johnston, F. J. and P. H. Johnston, 1957 “An Indian Trail Complex of the Central Colorado Desert: A Preliminary Survey,” *Reports of the University of California Archaeological Survey*, vol. 37, pp. 22–41; Referenced as it is the report that contains the map contained in CARE Opening Brief.

<sup>4</sup> The Area of Potential Effect (APE) for the GSEP includes the area that could undergo temporary and permanent ground disturbance to construct and operate the GSEP and its ancillary facilities.

<sup>5</sup> Johnston, F. J. and P. H. Johnston, 1957, p. 24

them. Prehistoric trails are generally only visible in this region, in areas of desert pavement that are geologically stable. No trails were observed within the GSEP APE during the pedestrian and geoarcheology field surveys. Although CARE made a video of the region and submitted it as evidence,<sup>6</sup> the video does not show any trail within or near the GSEP site or disturbance area.

Finally, it is most interesting to note that the McCoy Spring 15 minute USGS topographic map dating from 1948 shows a trail leaving McCoy Spring and heading to the southwest. This trail seems to correspond somewhat to the location of CA-RIV-72 shown on the Johnston and Johnston map – that is the unverified informant information. If this is the same trail, this trail is located north of and outside of the GSEP APE. So even if CA-RIV-72 actually exists, there is no evidence in the record that it exists within the GSEP APE and in fact, the only evidence is that if it does exist it is outside the GSEP APE.

**C. CARE fails to establish that the Commission’s approval of the GSEP would interfere with Native American religious practices in such a manner that would violate RFRA.**

As discussed above there is no evidence that the trails that CARE claims are being impacted by the GSEP will be impacted in any way because they do not exist within the project disturbance area. CARE’s claims that the GSEP if approved by the Commission would amount to the Commission interfering with Native American religious practices is unfounded.

In a Decision by the Ninth Circuit Court of Appeals sitting en banc, entitled *Navajo Nation v. United States Forest Service* 535 F. 3<sup>rd</sup>. 1058 (9<sup>th</sup> Cir. 2008) (*Navajo Nation*), the court articulated the following standard to determine whether government action of approving a project interferes with Native American religious practices. In *Navajo* the United States Forest Service after complying with NEPA and Section 106 of the NHPA, approved the use of a portion of a mountain side and recycled water for the use of making artificial snow. Several Native American tribes claimed the mountain was sacred and the approval would interfere with their religious practices. The court held that in order for a party to be successful in challenging on these grounds under the Religious Freedom Restoration Act of 1993 (“RFRA”)<sup>7</sup>, same law that CARE relies on in its Opening Brief, that party must.

To establish a prima facie RFRA claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an “exercise of religion.” See *id.* § 2000bb-1(a). Second, the government action must “substantially burden” the

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<sup>6</sup> Exhibit 615

<sup>7</sup> 42 U.S.C. §§ 2000bb *et seq.*

plaintiff's exercise of religion. See *id.* If the plaintiff cannot prove either element, his RFRA claim fails.<sup>8</sup>

The court summarized earlier holdings relating to answering the threshold question of what constitutes a substantial burden as follows.

The Supreme Court's decisions in *Sherbert* and *Yoder*, relied upon and incorporated by Congress into RFRA, lead to the following conclusion: Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.<sup>9</sup>

The court then applied these principles to the use of recycled water to make artificial snow on the sacred mountainside and held.

Applying *Sherbert* and *Yoder*, there is no "substantial burden" on the Plaintiffs' exercise of religion in this case. The use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*. The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*. The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl.<sup>10</sup>

The court further compared and contrasted other applications of this principle as well.

The Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), is on point. In *Lyng*, Indian tribes challenged the Forest Service's approval of plans to construct a logging road in the Chimney Rock area of the Six Rivers National Forest in California. *Id.* at 442, 108 S.Ct. 1319. The tribes contended the construction would interfere with their free exercise of religion by disturbing a sacred area. *Id.* at 442-43, 108 S.Ct. 1319. The area was an "integral and indispensable part" of the tribes' religious practices, and a Forest Service study concluded the construction "would cause serious and irreparable damage to the sacred areas." *Id.* at 442, 108 S.Ct. 1319 (citations and internal quotation marks omitted).

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<sup>8</sup> *Navajo Nation v. United States Forest Service* 535 F. 3<sup>rd</sup>, 1058 (9<sup>th</sup> Cir. 2008) at page 1068

<sup>9</sup> *Ibid* at page 1070

<sup>10</sup> *Ibid*

The Supreme Court rejected the Indian tribes' Free Exercise Clause challenge. The Court held the government plan, which would "diminish the sacredness" of the land to Indians and "interfere significantly" with their ability to practice their religion, did not impose a burden "heavy enough" to violate the Free Exercise Clause. *Id.* at 447-49, 108 S.Ct. 1319. The plaintiffs were not "coerced by the Government's action into violating their religious beliefs" (as in *Yoder*) nor did the "governmental action penalize religious activity by denying [the plaintiffs] an equal share of the rights, benefits, and privileges enjoyed by other citizens" (as in *Sherbert*). See *id.* at 449, 108 S.Ct. 1319.<sup>11</sup>

First, CARE has failed to establish that Native Americans use the area for religious practices. Notwithstanding that Native Americans may have strong religious beliefs tied to the large desert area ranging from Arizona through California as described in CARE's Opening Brief, without a showing that the Commission in approving the GSEP would even interfere with those practices, there is can be no violation of RFRA. Further, even if there was some interference, of which there is no evidence, interference alone is not enough. CARE would have to prove that the Commission approval of the GSEP coerced those practicing the religious activities into violating their religious beliefs or penalize religious activity by denying an equal share of the rights, benefits and privileges enjoyed by other citizens. Even where the court has found that the Government action did significantly interfere with the Native American's ability to practice their religion (as in the *Yoder* case) there was no violation of RFRA. Since there is no evidence of any interference in the GSEP there can be no violation of RFRA.

## II. THE COMMISSION STAFF ENGAGED IN NATIVE AMERICAN CONTACTS IN ACCORDANCE WITH PAST PRACTICES AND SUFFICIENT TO DISCHARGE IT'S RESPONSIBILITIES UNDER THE COMMISSION REGULATIONS

CARE claims that the Commission Staff failed to properly engage Native Americans in the Commission permitting process. CARE fails to acknowledge the following undisputed facts in the evidentiary record.

The beginning of the permitting process for the GSEP was jointly coordinated between BLM and the Commission. This resulted in a jointly prepared SA/DEIS with BLM taking the lead on Native American contacts. Tables 4 and 5, of the Cultural Resources Section of the RSA Supplement, document the initial outreach and contacts to the Native American community.<sup>12</sup> As explained by Dr. Bagwell, no member of the Native

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<sup>11</sup> Ibid. Footnote 13 of the Decision provides: "That *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng*, to interpret RFRA. See 42 U.S.C. § 2000bb(a)(5) ("[T]he compelling interest test as set forth in ... Federal court rulings [prior to *Smith*] is a workable test for striking sensible balances between religious liberty and competing prior governmental interest")

<sup>12</sup> Exhibit 403

American community responded to those contacts.<sup>13</sup> The traditional government to government consultation is currently taking place with BLM, as the federal lead agency implementing Section 106 of the National Historic Preservation Act (NHPA).<sup>14</sup>

In addition to these contacts, the Commission followed all of its regulation in publishing numerous notices for public participation in over 15 public workshops and 3 evidentiary hearings and several Committee-conducted Status Conferences or Scoping Hearings. Genesis believes that Staff has gone out of its way to encourage and provide opportunity for public participation. CARE itself has been a party to this proceeding since December 22, 2009 and to our knowledge has only participated in one public workshop. The evidentiary record does not contain any evidence or basis to accuse the Commission for denying any member of the public due process to participate in the Commission Proceedings. Therefore, the Committee should reject CARE's claim that the Commission is violating anyone's Due Process Rights.

**III.  
CARE HAS FAILED TO ESTABLISH ANY ROADWAY THAT WOULD  
BE ABANDONED**

CARE has failed to establish in the evidentiary record the existence of any roadway that should be protected under any of the laws it cites. As discussed above, the Prehistoric Trail, if it exists, is simply not within the area that would be disturbed by construction of the GSEP and may not exist at all. Therefore, further discussion of the actual applicability of any of the laws CARE cites to the Commission process is unnecessary and moot. The Committee should reject CARE's arguments that it would violate federal law if approving the GSEP.

**V.  
CONCLUSION**

The Committee should reject all of the arguments presented by CARE in its Opening Brief as they are unsupported by any credible evidence in the evidentiary record.

Dated: August 11, 2010

/original signed/

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Scott A Galati  
Counsel to Genesis Solar, LLC

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<sup>13</sup> 7/21/10 RT 152

<sup>14</sup> Ibid at page 161







BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
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**APPLICATION FOR CERTIFICATION FOR THE  
GENESIS SOLAR ENERGY PROJECT**

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

**PROOF OF SERVICE  
(Revised 8/5/10)**

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**DECLARATION OF SERVICE**

I, Ashley Garner, declare that on August 11, 2010, I served and filed copies of the attached: **GENESIS SOLAR, LLC REPLY TO THE THIRD OPENING BRIEF OF CARE – EVIDENTIARY HEARING DAY 3 TOPICS** dated **August 11, 2010**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[[http://www.energy.ca.gov/sitingcases/genesis\\_solar](http://www.energy.ca.gov/sitingcases/genesis_solar)].**

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:  
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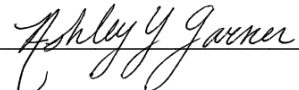
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



Ashley Garner