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California Energy Commission
Attn Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Genesis Solar Energy Project; 09-AFC-8

Dear Docket Clerk:

Enclosed are an original and copy of Second Reply Brief of California Unions for Reliable Energy.

Please docket the original, conform the copy and return the copy in the envelope provided.

Thank you for your assistance.

Sincerely,

/s/

Rachael E. Koss

REK:bh
Enclosures

STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

The Application for Certification
for the GENESIS SOLAR ENERGY
PROJECT

Docket No. 09-AFC-8

SECOND REPLY BRIEF
OF
CALIFORNIA UNIONS FOR RELIABLE ENERGY

August 11, 2010

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I. INTRODUCTION

This reply brief responds to issues related to cultural resources raised in Genesis Solar, LLC's ("Applicant") and Staff's opening briefs. This brief also addresses issues related to the Transition Cluster Phase II Interconnection Study Report (Exh. 405).

The Genesis Solar Energy Project ("Project") is proposed to be built on approximately 1,800 acres of relatively undisturbed desert public land where significant prehistoric remains exist. As one Native American elder stated, the Project is proposed to be built in "the most Sacred area of the North American Continent." (Exh. 614, p. 2.)

Staff's opening brief paints an eye-opening picture of what will happen if the 13 projects proposed to be built along the I-10 corridor (including this Project) are approved—48,056 acres of desert lands (39 percent of the total I-10 corridor) would be disturbed and at least 816 cultural resource sites would be destroyed. (Staff's Opening Brief for Issues Raised at July 21 Evidentiary Hearings ("Staff Opening Brief"), p. 3.) On a broader scale, if the projects proposed to be built within the Southern California Desert Region (including this Project) are approved, 1,000,000 acres (over 1,560 square miles) of desert lands would be disturbed and at least 17,000 cultural resource sites would be destroyed. (Staff Opening Brief, p. 4.) The Commission cannot take this lightly.

Staff's opening brief also paints another picture—one where the only effect of the destruction of at least 17,000 cultural resource sites is the *loss of scientific information*. Staff's portrait could not be more troubling and misleading. Not once does Staff mention that any of these 17,000 sites could be considered sacred to Native Americans. Staff totally ignores the *spiritual values* that may be contained in these resources. Staff's complete disregard for Native American values is highly insensitive to Native Americans, particularly to those who have vigorously opposed this Project.

The failure to consider Native American values of these resources appears to be a theme in this proceeding, as it is also reflected in Staff's approach to analyzing and mitigating the Project's significant impacts to cultural resources. Despite Native Americans' expressions of overwhelming concern for the Project's impacts to sacred sites, Native Americans' active participation in the Energy Commission's licensing process for this Project, and Native Americans' clear willingness to consult with Staff, Staff completely failed to analyze the Project's impacts to ethnographic (or spiritual) resources.

Furthermore, in the absence of test excavations, Staff assumed that 27 resources directly impacted by the Project would be significant only for a single significance value—scientific research importance. However, scientific research importance is not the only criterion that makes a resource significant. For example, burial sites contain religious and sacred values, in addition to scientific importance. Staff's proposed mitigation, data recovery, also assumes that scientific research importance is the only potential value that the sites may contain, and that mere data recovery is adequate in every case to mitigate the sites' destruction. Importantly, at evidentiary hearings, Staff admitted that data recovery does not mitigate the loss of other values

that would be part of these resources, such as spiritual values. Staff also admitted that it did not know if its other proposed measures would effectively mitigate the destruction of sacred burial sites.

The Applicant's brief also completely ignores the crux of the issue here—that Staff only analyzed and mitigated for the loss of the scientific value of cultural resources. Instead, the Applicant goes on tirelessly about the inadequacies of “Dr. Whitley's opinion.” In a nutshell, the Applicant argues that Dr. Whitley's opinion does not show that Staff failed to accurately establish a baseline or adequately analyze and mitigate the Project's significant impacts to cultural resources.

The fact of the matter is that the evidentiary hearing made it quite clear that Dr. Whitley and Staff agree that: (1) test excavations (which were not conducted for the Project) are standard practice for establishing a baseline and analyzing impacts to cultural resources; (2) surface evidence alone is insufficient to establish archaeological site size and significance; (3) archaeological sites' size could have been underestimated and therefore any avoidance already undertaken may be inadequate; (4) the probability of the archaeological sites containing human remains is high; (5) test excavations are necessary to determine whether burials are present within a site; (6) Staff did not analyze the Project's significant impacts to buried cultural resources, including human burials; (7) what the archaeological sites contain has not yet been determined and therefore we don't accurately know how much archaeology will be destroyed by the Project; and (8) data recovery only mitigates for the loss of scientific value of cultural resources—not spiritual, cultural, or sacred values. In other words, Dr. Whitley and Staff agree that in the absence of test excavations, Staff could not and did not establish an accurate baseline or adequately analyze and mitigate the Project's significant impacts to cultural resources.

It is encouraging that Staff and CURE now agree that the Project's significant impacts to cultural resources have not been adequately analyzed or mitigated, but more still needs to occur for the Commission to satisfy its obligations under CEQA. It is time for the Commission to take the next step here. The Commission should require the Applicant to perform test excavations, or require Staff to directly contract for test excavations. In the alternative, because the BLM is requiring the Applicant to conduct test excavations for the National Historic Preservation Act section 106 process (*see* Exh. 515, pp. 26-27), the Commission should require Staff to complete its impact analysis and identification of mitigation measures after data from the Applicant's test excavations for the BLM is available.

II. IT IS INDISPUTABLE THAT STAFF FAILED TO ANALYZE SIGNIFICANT IMPACTS TO HUMAN BURIALS

The Applicant is the only party that contends that “there is not a high likelihood of discovering human remains within the disturbance area.” (Genesis Opening Brief, p. 5.) Staff and CURE agree that there is a high likelihood that burials are present on the Project site. At the evidentiary hearing, Staff testified to this issue.

Ms. Michael: Since this area was used mostly as temporary camps, and according to the site descriptions. Are temporary camps used generally for burial sites? You just

mentioned that burial sites might be along the lake. But I just wondered if temporary camps are used for that purpose as well?

Dr. Bagwell: First of all, it's important to understand that we haven't excavated a lot of sites along the edges of these lakes. And so we're not sure if there were actually permanent long-term villages around these edges. Also, keep in mind that we're talking about the last 10,000 years. And during that time, the environment has changed a great deal, and those lakes had water in them some of those times. Getting the resolution about when that level of water was available, we can talk maybe several hundreds of years, but being able to get down to a five-year period when there was enough water for people to live there full-time, and then they would have potentially considered burying people there, we just don't know. And so when you identify potential habitation site in this region, ***the idea that there might be burials is very high, and so we must assume that that's the case.***

(July 21, 2010 Tr., pp. 210-211.)

Similarly, CURE's witness Dr. Whitley testified that

...we're dealing with a bunch of sites along a dry lake bed. And one thing that you should be clear about, these dry lake beds are dry today. They are seasonally moist. They periodically refill with water. There was a circumstance in the 1940s where Lake Mojave in the Mojave Desert held water for over two years. It's been documented and published by Robert Heizer, a famous California archaeologist. There were locations where Native Americans went and settled and created villages. We have sites in the project area that give me every indication...these are major villages. And the ***likelihood of them having burials in them, frankly, is very high...***

(*Id.*, p. 260.)

Despite substantial evidence showing a high likelihood that the archaeological sites contain human burials, Staff ***admittedly did not analyze*** the Project's significant impacts to human cemeteries.

Ms. Koss: Were potential impacts to human cemeteries analyzed?

Ms. Bastian: Okay. I was incorrect in saying they were analyzed...They're not analyzed...

(*Id.*, p. 178.)

Ms. Koss: Did you determine whether the site, the Genesis site, does or does not contain burials?

Dr. Bagwell: No.

(*Id.*, p. 179.) This is **indisputable evidence** that Staff did not analyze the Project's significant impacts to human burials. Consequently, Staff's analysis does not comply with CEQA's basic requirement that each significant environmental impact be identified and analyzed. (14 Cal. Code Regs. § 15126.4(a)(1).) Therefore, if the Commission approves the Project, the Commission will violate CEQA.

III. VISUAL EXAMINATION OF THE GROUND SURFACE WAS NOT SUFFICIENT TO ESTABLISH THE BASELINE OR DETERMINE SIGNIFICANT IMPACTS TO CULTURAL RESOURCES

The first step in the environmental review process is to establish the environmental setting, or baseline. (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.) Subsequently, an EIR must identify and describe a project's significant direct and indirect environmental impacts. (Pub. Res. Code § 21100(b)(1); 14 Cal. Code Regs. § 15126.2(a).) An impact analysis must be prepared with a sufficient degree of analysis to provide decisionmakers with the information needed to draw intelligent conclusions concerning a project's impacts. (14 Cal. Code Regs. § 15151.) Disagreements with the adequacy of an EIR's impact analysis will be resolved in favor of the lead agency if substantial evidence in the record supports the approach used. (*Laurel Heights Improvement Ass'n., v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 409.)

The Applicant insists that test excavations were not necessary for Staff to establish the baseline or adequately analyze the Project's significant impacts to cultural resources. Rather, the Applicant claims that its visual examination of the ground surface alone was "more than sufficient." (Genesis Solar, LLC Opening Brief – Evidentiary Hearing Day 3 Topics ("Genesis Opening Brief"), p. 2.) CEQA and its implementing guidelines, case law and the record here show otherwise. In actuality, Staff's method for determining the baseline and Staff's impact analysis fall way short of CEQA's most basic requirements.

First, the record shows that Staff and CURE agree that conducting test excavations is standard practice. (July 21, 2010 Tr., p. 183.; Exh. 512, p. 2.) However, test excavations were not conducted for the Project to determine if subsurface deposits are present on the site. (July 21, 2010 Tr., pp. 165, 216.) The record shows that Staff and CURE agree that surface evidence alone can be deceptive with respect to archaeological site size and significance. (*Id.*, p. 182.) Thus, Staff and CURE agree that archaeological sites' size could have been underestimated. (*Id.*, p. 183.) The Applicant recognizes that if it had conducted "a testing program, we might have a better handle on site boundaries." (*Id.*, p. 215.) The record shows that both CURE and Staff are concerned that the archaeological sites on the Project site have buried deposits and that the probability of the archaeological sites containing human remains is high. (*Id.*, pp. 185, 261.) The record shows that Staff and CURE agree that test excavations are necessary to determine whether burials are present within a site. (*Id.*, pp. 169-170.) Staff did not analyze the Project's significant impacts to buried cultural resources, including human burials. (*Id.*, pp. 177-179.) The record shows that Staff and CURE agree that what the archaeological sites contain has not yet been determined and therefore we don't accurately know how much archaeology will be destroyed by the Project. (*Id.*, pp. 187-188.) Simply put, the record shows that in the absence of

test excavations, Staff could not and did not establish an accurate baseline or adequately analyze the Project's significant impacts to cultural resources.

Second, case law is clear that if the environmental baseline is "inaccurate, incomplete or misleading," it necessarily follows that "it **cannot** be found that the" environmental review document "adequately investigated and discussed the environmental impacts of the development project." (*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 87 (emphasis added).) Here, Staff's baseline method is nothing short of inaccurate, incomplete and misleading. Staff admitted that it is not always possible to determine the size and nature of archaeological sites based solely on visual examination of the ground surface. (July 21, 2010 Tr., pp. 169, 182.) Yet, Staff did not conduct or require the Applicant to conduct any investigations other than pedestrian surveys to establish the baseline. (*Id.*) Rather, all of the information regarding the Project's baseline, including the location and boundaries of archaeological sites, was derived from visual examination of the ground surface only. (*Id.*) Consequently, Staff (admittedly) could not assess the Project's potentially significant impacts to buried resources, including human burials. (*Id.*, pp. 169-170.) Given Staff's candid admissions, Staff misled decisionmakers and the public when it asserted that the Project's significant impacts to cultural resources were fully analyzed and mitigated to a less than significant level. Staff's conclusions are unsupported and contradicted by its own testimony. Staff's conclusions do not constitute substantial evidence.

Third, CEQA Guidelines provide that an EIR **must** evaluate environmental impacts to the extent that it is reasonably feasible to do so. (14 Cal. Code Regs. § 15151.) There is **nothing** in the record that shows that test excavations could not have been conducted, either by the Applicant or by the Commission directly contracting for the excavations, in order for Staff to adequately analyze the Project's impacts. On the contrary, **undisputed evidence** shows that test excavations were feasible. Dr. Whitley testified that his firm conducted test excavations involving 85 archaeological sites in six weeks. (Exh. 512, p. 3.) Staff determined that the Project site contains at least 27 archaeological sites and according to the Applicant, it conducted fieldwork for the Project for three years. (Genesis Opening Brief, p. 6.) Staff's reason for departing from standard CEQA practice was a tight timeframe and the large Project site size. (July 21, 2010 Tr., p. 197.) But, if **85 sites** were tested in **six weeks**, certainly **27 sites** could have been tested in **three years**. The record clearly shows that test excavations were "reasonably feasible." There is **no** evidence to support Staff's approach here. Staff was required to investigate and evaluate the Project's potentially significant impacts to cultural resources, including buried resources. (14 Cal. Code Regs. § 15151.) Staff did not. Thus, Staff's analysis does not satisfy CEQA.

Finally, when there is a standard, accepted methodology used to analyze a significant impact, an EIR **must** evaluate the impact unless a reasoned basis for not doing so is provided. (*Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1370.) Staff and CURE agree that conducting test excavations is standard practice for determining a project's impacts. (July 21, 2010 Tr., p. 182; Exh. 512, p. 2.) Again, the only reason provided for Staff's departure from this standard practice was a tight timeline and the large Project site size. (July 21, 2010 Tr., p. 197.) And again, the record shows that these reasons carry no weight. Test excavations could easily have been conducted during the

Applicant's three years of fieldwork. There is *nothing* in the record that provides a valid basis for Staff's deviation from the standard practice of test excavations. Consequently, Staff was required to analyze the Project's significant impacts to cultural resources, including burials, based on the standard practice of test excavations. Staff did not.

In sum, substantial evidence shows that: (1) test excavations are standard practice for evaluating impacts; (2) absent test excavations, Staff could not establish an accurate baseline or adequately analyze the Project's significant impacts to buried cultural resources; and (3) test excavations were feasible. Staff was therefore required to conduct an impact analysis of buried cultural resources, including human burials. Staff did not. Therefore, if the Commission approves the Project as proposed, the Commission will violate CEQA.

IV. BLM'S SECTION 106 CONSULTATION IS NOT A SUBSTITUTE FOR STAFF'S CEQA ANALYSIS OF SIGNIFICANT IMPACTS TO ETHNOGRAPHIC RESOURCES

Staff admittedly did not analyze the Project's potentially significant impacts to ethnographic resources. (Exh. 401, pp. C.3-2-3.) The Applicant suggests that BLM's National Historic Preservation Act ("NHPA") section 106 consultation process is a substitute for Staff's CEQA analysis. (Genesis Opening Brief, p. 2.) The Applicant is wrong. There are three reasons why Staff must analyze the Project's potentially significant impacts to ethnographic resources.

First, as lead agency under CEQA, the Commission must independently review and analyze a project's potential adverse environmental impacts and include its independent judgment in an environmental review document. (Pub. Res. Code § 21082.1(c); *Plastic Pipe and Fittings Assn. v. California Building Standards Comm'n* (2004) 124 Cal.App.4th 1390.) CEQA Guidelines specifically require a lead agency to subject information submitted by others to the lead agency's own review and analysis before using that information in an environmental review document. (14 Cal. Code Regs. § 15084(e).) Furthermore, when certifying an environmental review document, the lead agency must make a specific finding that the document reflects its independent judgment. (Pub. Res. Code § 21082.1(c).)

Second, the Commission's regulations require the Commission Staff to "present the results of its environmental assessments in a report" which "shall be written to inform interested persons and the commission of the environmental consequences of the proposal." (20 Cal. Code Regs. § 1742.5(b) and (c).) The regulations require "a complete consideration of significant environmental issues in the proceeding." (*Id.* at § 1742.5(d).) The Energy Commission's regulations also require the Commission to base its decisions only on evidence in its record. (*Id.* at § 1751(a).) As a result, the Commission cannot merely rely on an analysis of the significance of impacts or the efficacy of mitigation conducted by the BLM. It must make its own determination based on evidence in its own record.

Finally, site significance (and hence the potential for significant adverse impacts) is defined differently under CEQA and the NHPA. The identification and analysis of significant impacts is more stringent under CEQA than under the NHPA. Specifically, sites are significant

under the NHPA if they are determined to be eligible for listing on the National Register of Historic Places (“NRHP”). (36 C.F.R. § 800.5.) NRHP eligible sites are also significant under CEQA. However, under CEQA, sites are also significant if they are listed in any historical registry. (14 Cal. Code Regs. § 15064.5(a).) Thus, the potential for significant adverse impacts, the need to design mitigation measures and the obligation to determine the effectiveness of mitigation is greater under CEQA. Unless the Commission conducts an independent analysis of significant impacts pursuant to CEQA, the Commission cannot “ensure a complete assessment of significant environmental issues,” as required by the Commission’s regulations. (20 Cal. Code Regs., § 1742.) Further, the Commission’s decision will not be supported by substantial evidence in the record.

BLM’s section 106 consultation process is not a substitute for Staff’s CEQA analysis. CEQA and the Commission’s own regulations require Staff to analyze the Project’s impacts to ethnographic resources. Staff admittedly did not conduct the required analysis and did not provide a valid reason why it failed to do so. On the contrary, as CURE explained in its opening brief, Staff should have consulted with Native Americans who have expressed concerns about the Project’s impacts on cultural resources and who are willing to consult with Staff. (CURE Third Opening Brief, p. 6.)

V. PROPOSED MITIGATION AND “AVOIDANCE” ALREADY UNDERTAKEN WOULD NOT REDUCE THE PROJECT’S SIGNIFICANT IMPACTS TO CULTURAL RESOURCES TO LESS THAN SIGNIFICANT LEVELS

In its opening brief, the Applicant asserts that Staff’s proposed conditions of certification and “avoidance” the Applicant has already undertaken will adequately mitigate the Project’s significant impacts to cultural resources. (Genesis Opening Brief, p. 4.) Nothing could be further from the truth. In reality, there are likely numerous unidentified resources that would be significantly impacted by the Project that would not be avoided and would not be mitigated by Staff’s proposed mitigation.

A. Significant Impacts Would Be Greater Than Staff Assumed

Substantial evidence shows that the Project’s impacts on cultural resources would be greater than Staff assumed. Staff assumed that 27 resources directly impacted by the Project would be significant. However, because text excavations were not performed, Staff could not analyze the Project’s potential to significantly impact buried cultural resources, including human burials. (July 21, 2010 Tr., pp. 177-179.) Staff and CURE agree that because the Project is located adjacent to a dry lake, the probability of the archaeological sites containing human remains is high. (*Id.*, p. 261.) The Applicant also recognized “that there was a high potential for cultural resources in the area, as it was and is a dry lake.” (*Id.*, p. 214.) Staff’s assumption that 27 resources would be directly impacted by the Project does not account for the likely presence of burials. Thus, there are likely numerous unidentified buried resources that would be significantly impacted by the Project.

In addition, despite Native Americans’ explicit concerns about the Project, Staff admittedly did not analyze the Project’s potentially significant impacts to ethnographic

resources. (Exh. 401, pp. C.3-2-3; July 20, 2010 Tr., pp. 97-99, 106-116; Exh. 600; Exh. 605; Exh. 606; Exh. 609; Exh. 615.) Had Staff consulted with Native Americans, it could have analyzed the Project's impacts to ethnographic resources. Instead, in clear violation of CEQA, Staff deferred analysis of ethnographic resources until after Project approval. (14 Cal. Code Regs. § 15126.4(a)(1); *see* Exh. 441, p. 23, Cul-16 ("prior to the start of construction, the project owner shall have the PE consult with local Native American groups to determine what indirect GSEP impacts they identify for the McCoy Spring National Register Archaeological District for four petroglyph sites...and to determine what mitigation they recommend").)

Staff completely failed to analyze the Project's impacts on buried resources and ethnographic resources. Consequently, Staff could not design mitigation that would reduce impacts to these resources to a level below significant. As explained in CURE's opening brief, mitigation measures vary depending on the nature and significance values of the specific resource. (CURE Third Opening Brief, p. 3.) Because, absent test excavations, Staff could not evaluate significance values of resources, Staff could not design appropriate mitigation to reduce impacts to a level below significant.

B. Without Knowing Site Boundaries, There Is No Assurance Resources Would Be Avoided

Absent tests excavations, there is no assurance that buried resources impacted by the Project would be avoided. As CURE explained in its opening brief, Staff and CURE agree that the size of sites could have been significantly underestimated because formal site boundaries were not determined. (CURE Third Opening Brief, p. 7.) The Applicant also appears to understand the importance of test excavations for determining site boundaries.

Mr. Galati: Mr. Farmer...I guess the crux of the issue is, have we moved far enough away from what we think is the extent of the site? What's your opinion on that?

Mr. Farmer: There have been some good points made, as far as that goes. And, you know, I do understand that *if we had had a testing program, we might have a better handle on site boundaries...*

(July 21, 2010 Tr., p. 215.) Staff and CURE agree that because site boundaries were not determined, it is impossible to know whether resources would actually be avoided. (*Id.*, p. 187.) Thus, the Applicant's list of "63 sites that were located within the original project ROW [that] have been avoided by reconfiguring the project APE" is misleading. (Genesis Opening Brief, p. 4.) The Applicant's list does not change the fact that because test excavations were not performed, site boundaries were not determined. Consequently, it is impossible to know with reasonable certainty if resources would be avoided.

C. Staff Failed To Propose Any Measures That Would Mitigate The Project's Direct Impacts To A Less than Significant Level

Staff proposed data recovery to mitigate the Project's significant direct impacts to cultural resources. However, substantial evidence shows that data recovery would not reduce the Project's impacts to cultural resources to a less than significant level.

CEQA's preference for avoidance of cultural resources was not proffered without reason. "Preservation in place is the preferred manner of mitigating impacts to archaeological sites" because "[p]reservation in place maintains the relationship between artifacts and the archaeological context" and "[p]reservation may also avoid conflict with religious or cultural values of groups associated with the site." (14 Cal. Code Regs. § 15126.4(b)(3)(A).) Data recovery, on the other hand, only mitigates for the loss of scientific value of cultural resources. (July 21, 2010, pp. 148, 174-175, 251.) This too was settled at the evidentiary hearing.

Hearing Officer Celli: ...it seemed to me that an artifact is going to do better in a drawer in some museum than it is out in the wild being rained on and earthquaked and ridden over by off-road vehicles or whatever. And I just – is that the case or do I have that wrong?

Dr. Bagwell: ...archaeology sites are not just the artifacts. They are this larger thing that has to do with the physical relationships between the artifacts and the features and the eco facts...And so the information that's contained within them is not just what you would learn from studying, for example, a piece of pottery, but where the pottery is found, where it's found in relation to other pieces of pottery. And so to a certain extent, leaving it in place preserves that contextual information...Along the edge of the lake shore, there's far more potential for buried sites. And so to a certain degree, they're protected, but then again they're potentially larger in three dimensions. So it's going to be a tradeoff. And when you're talking about direct effects, then sometimes gathering as much information as you can is one kind of...mitigation. It's better than finding out nothing about it and just bulldozing it. But *professionally speaking, we prefer to preserve. And the only way to do that with archaeology is to avoid it.*

(Id., pp. 209-210.) It appears that data recovery is merely one step above "just bulldozing" resources. And despite Staff's clear understanding that avoidance is the only way to truly preserve resources' values, its mitigation strategy goes straight to data recovery without any chance for avoidance. (Id., p. 180.) What is left is "gathering as much information as you can" to mitigate for the loss of the scientific value of cultural resources. But in no way would data recovery mitigate the loss of resources' other values, including Native American religious or sacred values. (Id., p. 148.) From a religious or sacred perspective, data recovery is not mitigation at all – rather, it is a form of destruction. (Id., p. 262.)

The Applicant asserts that a "compressed Phase II – Phase III protocol that calls for immediate data recovery in the event that any Phase II activities identify buried deposits" is the solution here. (Genesis Opening Brief, p. 5.) But the combined Phase II testing and Phase III

data recovery approach is precisely the problem. The approach goes straight to data recovery without any opportunity for avoidance. As explained by the Applicant,

What you do is, in essence, a testing program through the site to see where you do gather data, to where you can find out more about the conditions. And then you go back based upon that information you've given, and meet with the CPM to discuss exactly specifically *where you're going to dig* and why, and what you hope to see.

(*Id.*, p. 220 (emphasis added).) There is no opportunity here for avoidance. So, what happens when a human cemetery is unearthed? The burials, like any other resource on the Project site, would be excavated. In other words, the burials would be destroyed. (*Id.*, p. 262.)

Although Staff understands that data recovery would not mitigate the loss of any significance criterion other than scientific value, Staff claimed that other proposed measures would adequately mitigate impacts to the destruction of burial sites. If truth be told, there is *no* evidence that other proposed measures would mitigate the Project's impacts to burials.

Ms. Koss: ...would it be fair to say that the assumption of research significance and the plan to mitigate impacts by data recovery really only properly pertains to one of the potential significance criteria that the sites may hold?

Dr. Bagwell: True, but that was why we were suggesting a number of different types of mitigation. Not just the data recovery, particularly, for example, parts of Cul 1 and Cul 16.

Ms. Koss: And *would Cul 1 and Cul 16 mitigate for the destruction of burial sites?*

Dr. Bagwell: Potentially, but *I don't know*. When you are talking about mitigation of damage to something sacred, you would have to ask the people who that thing is sacred to. I certainly wouldn't want anybody to excavate a major cemetery, if we could avoid it.

(*Id.*, p. 175.)

Staff appears to be confused here. Staff: (1) stated that "the idea that there might be burials is very high, and so we must assume that's the case" (*Id.*, pp. 210-211); (2) agreed with CURE that data recovery would not mitigate the Project's significant impacts to buried resources, including human burials (*Id.*, pp. 174-175); (3) does not know if other proposed measures would reduce significant impacts to human burials to a level below significant (*Id.*, p. 175); and (4) clearly believes that the excavation of burials is wrong. (*Id.*) Yet, Staff provided *no* means to achieve avoidance. Instead, Staff's approach goes straight to data recovery (i.e. destruction). Notably, this whole mess could easily have been avoided had test excavations been conducted as the first step in Staff's environmental review process, as is the standard practice. Unfortunately, that is not the case. The result is that there are no measures that would mitigate the Project's direct impacts to cultural resources to a less than significant level.

VI. THE COMMISSION CANNOT MAKE A FINDING OF OVERRIDING CONSIDERATIONS WITHOUT AN ADEQUATE IMPACT ANALYSIS

“...[S]taff supports a finding of overriding considerations based on extensive mitigation and data collection that Genesis would be subject to” and “the direct impacts to cultural resources on the Genesis site that would be mitigated to levels of less than significant...” (*Id.*, p. 158.) Staff has skipped two steps here. The Commission cannot make a finding of overriding considerations unless and until each of the Project’s significant impacts has been disclosed and analyzed, and until the Commission has required all feasible mitigation, including avoidance. (*San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738; *Woodward Park Homeowners Association, Inc. v. City of Fresno* (2007) 160 Cal.App.4th 683.)

“There is a sort of grand design in CEQA: Projects which significantly affect the environment *can* go forward, but only after the elected decision makers have their noses rubbed in those environmental effects, and vote to go forward anyway.” (*Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 530 (emphasis in original).) An EIR that fails to adequately inform decision makers presents an unsound basis for a statement of overriding considerations and exposes the lead agency to legal challenge under CEQA. (*See San Bernardino Valley Audubon Society, Inc, supra*, 155 Cal.App.3d 738 (statement invalidated for the same reasons that EIR was found invalid); *Woodward Park Homeowners Association, Inc., supra*, 160 Cal.App.4th 683.) As discussed above and in CURE’s opening brief, Staff completely failed to analyze the Project’s significant impacts to ethnographic and buried cultural resources. Consequently, Staff failed to adequately inform the Commission of the Project’s environmental impacts. In other words, the Commission has not had “their noses rubbed in” the Project’s environmental effects. Therefore, an override finding by the Commission would be premature at this point.

Further, a statement of overriding considerations cannot mislead the reader “about the relative magnitude of the impacts and benefits the agency has considered.” (*Woodward Park Homeowners Association, Inc. v. City of Fresno* (2007) 160 Cal. App.4th 683, 718.) Because Staff failed to adequately analyze the Project’s impacts to cultural resources, a statement of overriding considerations based on Staff’s analysis would not fairly portray the Project’s impacts. Because it would otherwise mislead the public, the Commission cannot proceed with an override finding until the Project’s significant impacts are adequately disclosed and analyzed.

The Commission cannot go forward with an override of the Project’s significant impacts to cultural resources until it has dealt with each and every significant impact to cultural resources. The Commission has not.

VII. STAFF FAILED TO ANALYZE POTENTIALLY SIGNIFICANT IMPACTS FROM TRANSMISSION NETWORK UPGRADES THAT ARE NECESSARY FOR PROJECT OPERATION

The Transition Cluster Phase II Interconnection Study Report identified the following transmission project upgrades that would be required for Project operation: (1) loop the Colorado

River – Devers 500 kV transmission line into Red Bluff Substation; (2) Colorado River Substation expansion; (3) upgrade Mira Loma – Vista No.2 220 kV T/L drops at Vista Substation; (4) develop a SPS for N-2 of Devers-Red Bluff 500 kV T/Ls; and (5) develop a SPS for N-1 of Colorado River AA-Bank. (Exh. 405.) However, Staff’s assessment only analyzed potentially significant impacts from the Colorado River Substation expansion. Staff’s failure to evaluate the potentially significant impacts from the remaining upgrades violates CEQA’s requirement that Staff analyze the “whole of the project.”

Under CEQA, the definition of “project” is “given a broad interpretation in order to maximize protection of the environment.” (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1180 (internal quotation omitted); see also, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 381-83; *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 796-97; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 277-81.) A “project” is “the whole of an action” directly undertaken, supported or authorized by a public agency “which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378(a).) Under CEQA, “the term ‘project’ refers to the underlying activity and not the governmental approval process.” (*California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1241, (quoting *Orinda Assn. v. Bd. of Supervisors* (1986) 182 Cal.App.3d 1145, 1171-72.) (14 Cal. Code Regs. § 15378(c) (“The term ‘project’ refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term ‘project’ does not mean each separate governmental approval.”).)

Recently, the First District Court of Appeal in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70 (“*CBE v. Richmond*”) described CEQA’s statutory and regulatory requirements and existing case law regarding whether a lead agency unlawfully segmented its environmental review of a project under CEQA. The Court of Appeal explained that “[t]here is no dispute that CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project.” (*Id.* at p. 98, citing *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358 (“*Berkeley Jets*”).) Rather, CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences.” (*Id.*, citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.) Thus, CEQA defines “project” broadly as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” (*Id.*, citing 14 Cal. Code Regs. § 15378(a).) The court explained that the question of which acts constitute the “whole of an action” for purposes of CEQA is “one of law which we review de novo based on the undisputed facts in the record.” (*Id.*, citing *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1224 (“*Tuolumne County*”).)

The Court of Appeal first looked to the California Supreme Court’s decision in *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376 that set aside an EIR for failing to analyze the impacts of a reasonably foreseeable second phase of a multi-phased project. The EIR in that case analyzed a university plan to move its school to a

new building, of which only about one-third was initially available to UCSF. The EIR failed to analyze the environmental effects of the eventual occupation of the remainder of the building once that space became available. The California Supreme Court established a test that requires an analysis of the environmental impacts of a future expansion or other action if: (1) “it is a reasonably foreseeable consequence of the initial project;” and (2) “the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” (*CBE v. Richmond* at p. 19, citing *Laurel Heights*, 47 Cal.3d at 390.)

In *CBE v. Richmond*, the Court summarized existing case law requiring environmental review of related projects.

Some courts have concluded a proposed project is part of a larger project for CEQA purposes if the proposed project is a crucial functional element of the larger project such that, without it, the larger project could not proceed. For example, in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, the court concluded the description of a residential development project in an EIR was inadequate because it failed to include expansion of the sewer system, even though the developer recognized sewer expansion would be necessary for the project to proceed. (*Id.* at pp. 729-731.) Because the construction of additional sewer capacity was a “required” or “crucial element[]” without which the proposed development project could not go forward, the EIR for the project had to consider the environmental impacts from such construction. (*Id.* at pp. 731-732.)

More recently, in *Tuolumne County, supra*, 155 Cal.App.4th 1214, the court held that a proposed Lowe’s home improvement center and a planned realignment of the adjacent Old Wards Ferry Road were improperly segmented as two separate projects in light of the dispositive fact that the road realignment was included by the City of Sonoma as a condition of approval for the Lowe’s project. (*Id.* at p. 1220.) The court held that this was really one project, not two, because “[t]heir independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project. [Citation.]” (*Id.* at 1231.)

(*Id.* at p. 20.)

The court also noted other decisions which did not require combined environmental review of separate projects. In *National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, the court found that an EIR for a landfill was not inadequate for failing to discuss impacts from materials recovery facilities (“MRFs”) needed to process solid waste before transport to the landfill because the MRFs were not “crucial elements” without which the landfill project could go forward, and the exact location of the MRFs were not yet known. (*Id.* at p. 1519.) In *Christward Ministry v. County of San Diego* (1993) 13 Cal.App.4th 31, the court found that even though there were a number of separate waste management projects occurring at the same time, there was “no record reflecting a contemplated larger project . . .” that should have been considered in an EIR for a landfill expansion. (*Id.* at p. 46.) Furthermore,

the court noted that the other projects were addressed in the cumulative impacts analysis of the EIR. (*Id.* at p. 47.) Finally, in *Berkeley Jets*, the court rejected an argument that an EIR for an airport development plan should have included long-range plans for potential runway expansions, because the potential runway expansions were unnecessary for completion of the airport plan. (*Berkeley Jets, supra*, 91 Cal.App.4th at pp. 1361-1362.) The court noted, the airport plan “does not depend on a new runway and would be built whether or not runway capacity is ever expanded.” (*Id.* at p. 1362.) Because the runway expansion was not a crucial element of the airport plan or a reasonably foreseeable consequence of the airport plan, the court concluded the EIR’s project description was adequate and did not violate the policy against piecemealing. (*Id.*)

The court in *CBE v. Richmond* concluded that the facts in CBE’s case presented a similar scenario to that considered in *National Parks, Christward Ministry*, and *Berkeley Jets*. The court found that a hydrogen pipeline to supply excess hydrogen from the refinery to consumers was not part of the refinery project because the two projects “are not interdependent.” (*CBE v. Richmond* at p.101.) According to the Court,

Because Chevron’s efforts to process a larger percentage of California fuel at the Refinery does not ‘depend on’ construction of the hydrogen pipeline, the City’s treatment of the hydrogen pipeline as a separate project does not constitute illegal piecemealing. (See *Berkeley Jets, supra*, 91 Cal.App.4th at p. 1362.)

(*Id.*)

The facts here are easily distinguished from *CBE v. Richmond* and instead present a similar scenario to those considered in *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal.App.4th 713 and *Tuolumne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214. Here, the Project *is* dependent on the transmission upgrades identified in the Transition Cluster Phase II Interconnection Study Report.

Ms. Belenky: And so when you’re talking about what’s needed here, in the Phase 2 study that it discusses, you’re also talking about the cluster as a whole?

Mr. Hesters: Exactly.

Ms. Belenky: ...have you, yourself, or has the staff considered what this particular project needs in order to go forward?

Mr. Hesters: ...As a whole, the cluster needs these upgrades. It isn’t therefore assigned to any particular project.

Ms. Belenky: But each project needs them as much as any project needs them, would that be fair to say?

Mr. Hesters: I don’t have any information to state otherwise at this point...

(July 21, 2010 Tr., pp. 46-47.) Therefore, Staff was required to analyze all of the transmission system upgrades identified in the Transition Cluster Phase II Interconnection Study Report. Staff did not. Consequently, Staff's assessment does not satisfy CEQA's requirement that the "whole of the project" be analyzed.

The Applicant argues that the Commission is not required to analyze impacts from the downstream transmission upgrades identified in the Transition Cluster Phase II Interconnection Study Report because the upgrades would occur regardless of the Project. (July 13, 2010 Tr., pp. 150-153.) The Applicant misses the mark here. The issue is not whether the upgrades could proceed without the power plant, but ***whether the power plant can proceed without the transmission upgrades***. It cannot. Consequently, the impacts caused by downstream upgrades must be analyzed as part of the "whole of the project."

VIII. CONCLUSION

The Commission's approval of the Project as proposed would contribute to the loss of at least 17,000 cultural resource sites in the California desert. As lead agency under CEQA, the Commission has been entrusted with the duty to identify, analyze and mitigate the Project's significant impacts to irreplaceable cultural resources. Importantly, the Commission's duty includes consideration of the sacredness to Native Americans that these resources may hold. Staff and the Applicant seemingly discount Native American values that would be destroyed by the Project. The Commission cannot.

Dated: August 11, 2010

Respectfully Submitted,

/s/

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 11, 2010 I served and filed copies of the attached **SECOND REPLY BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY**. 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 www.energy.ca.gov/sitingcases/genesis. The document has 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 electronically to all email addresses on the Proof of Service list and by either depositing in the U.S. Mail at South San Francisco, CA with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred," via personal service or via overnight mail as indicated.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 11, 2010.

_____/s/_____
Bonnie Heeley

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