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August 20, 2010

Docket Office
Attn: Docket No. 08-AFC-5
California Energy Commission
1516 Ninth Street, MS-4
Sacramento, CA 95814

Re: Imperial Valley Solar Project (08-AFC-5)

Dear Docket Clerk:

Enclosed are an original and copy of **OPENING BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY ON CULTURAL RESOURCES**. Please process this document, conform and return the copy in the envelope provided.

Sincerely,

/s/

Loulena A. Miles

LAM:bh
Enclosure

2218-155a

STATE OF CALIFORNIA
California Energy Commission

In the Matter of: The Application for Certification for the IMPERIAL VALLEY SOLAR PROJECT (formerly SES Solar Two)	Docket No. 08-AFC-5

OPENING BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY ON CULTURAL RESOURCES

August 20, 2010

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I. INTRODUCTION

The Imperial Valley Solar Project ("Project") comprises 6,144 acres of public lands that contain an "extraordinary" number of cultural resources, according to Commission archeologist Michael McGuirt. (August 16, 2010 Tr. p. 80.) Mr. McGuirt estimated that "the ***number of cultural resources*** that we have in this one project area ***exceeds all the cultural resources*** that the Energy Commission has dealt with to date." (August 16, 2010 Tr. p. 80 (emphasis added).) The Historic Preservation Officer of the Quechan Tribe, Bridget Nash, echoed the opinion of Mr. McGuirt: "[t]he project area that is proposed is extremely rich in cultural resources." (Id. at pp. 104-105). In fact, Ms. Nash testified that the Project area is a part of a continuous cultural landscape that must be taken as a whole and includes areas that extend from the Project in every direction. (Id. at p.109.)

A simple visual inspection of the ground surface on the proposed Project site revealed at least 453 cultural resource sites on the site. (Exh. 307, Appendix B, p. 48.) These resources include two prehistoric districts, multiple stone scatters with human worked bones, stone tools, ceramics, geoglyphs, 11 segments of a prehistoric trail system, and a considerable number of cremations on and adjacent to the Project site. (August 16, 2010, Tr. p. 138.) The Project site is located in an area that is ancestral and sacred to a number of Tribes, including the Quechan Indian Tribe, the Cocopah Indian Tribe, and the Kumeyaay Nation.

Despite these extraordinary cultural resources, or perhaps because of it, the Energy Commission Staff deferred the required determination of significance for most of these resources that would establish the environmental setting under the California Environmental Quality Act ("CEQA") upon which to evaluate impacts and identify mitigation measures.

Instead, Staff hypothesized significance findings and deferred the identification of mitigation to future plans, which would be developed after Project approval. Every aspect of this process violates CEQA.

CEQA has two basic purposes, neither of which the Supplemental Staff Assessment ("SSA") satisfies. First, CEQA is designed to inform decision makers and the public about the significant environmental effects of a project before harm is done to the environment. (14 Cal. Code Regs. § 15002(a)(1); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets")*; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

Second, CEQA directs public agencies to avoid or reduce environmental damage by requiring imposition of mitigation measures and by requiring the consideration of project alternatives. (CEQA Guidelines § 15002(a)(2) and (3);

Berkeley Jets, 91 Cal.App.4th 1344, 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400.)

A central purpose of an EIR is to "identify ways that environmental damage can be avoided or significantly reduced." (CEQA Guidelines §15002(a)(2).) If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has "eliminated or substantially lessened all significant effects on the environment where feasible," and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 21081. (CEQA Guidelines § 15092(b)(2)(A)-(B).)

The Commission appears to be poised to approve this Project without having completed these basic requirements of a CEQA analysis. The SSA failed to inform decision makers and the public about the significant environmental impacts that will occur as a result of the project, and the SSA failed to avoid or reduce significant environmental effects. This is due in large part to Staff's failure to make significance determinations in order to determine the existing setting, or baseline, upon which to measure impacts. Further, there is no evidence that the Staff's proposed mitigation for significant impacts to cultural resources will be effective and feasible.

II. THE BASELINE IS FLAWED AND THE PROJECT WILL RESULT IN SIGNIFICANT UNANALYZED AND UNMITIGATED IMPACTS

The Project proposes to install approximately 30,000 SunCatcher units. (Exh. 307, C.3-130) Each unit will be drilled into the ground disturbing any subsurface resources that may lie there. (August 16, 2010 Tr. p. 42.) There will be ***no opportunity for monitors to detect the presence of subsurface remains before they are impacted***. (Id.)

No effort has been made to determine existing subsurface resources on the Project site in order to inform the public and the decisionmakers about subsurface cultural resources that may be lost as a result of the proposed Project. The only effort made with respect to cultural resources was a visual survey of the ground surface and a review of historical survey efforts.

As a result, the identification, analysis and mitigation of most of the resources on the site are proposed to occur ***after Project approval*** and after the public scrutiny phase of the environmental review process has ended. However, at that point, it will no longer be possible to consider alternatives, no matter how significant the resources are that are discovered or evaluated post-approval. In addition, the options for avoidance will be significantly constrained after project approval. This will be true for both buried archeological resources and ethnographic resources.

a. The SSA's Failure to Establish an Accurate Environmental Baseline Precludes an Adequate Analysis and Formulation of Mitigation

The environmental setting, or baseline, refers to the conditions on the ground and is a starting point to measure whether a proposed project may cause a significant environmental impact. CEQA defines the "baseline" as the physical environment as it exists at the time CEQA review is commenced. (14 Cal. Code Reg. §15125(a); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453.) "An EIR must focus on impacts to the existing environment, not hypothetical situations." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.) If the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA... Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the EIR 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, *citing San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722, 729.)

Describing the environmental setting is a prerequisite to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of an environmental analysis was recognized decades ago. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.) Today, the courts are clear that, "[b]efore the impacts of a project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined." (*County of Amador*, supra, 76 Cal.App.4th at 952.) In fact, it is a central concept of CEQA, widely accepted by the courts, that the significance of a project's impacts cannot be measured unless the EIR first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process. (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.)

The SSA's method for determining the baseline of cultural resources fails to satisfy CEQA. The widely followed CEQA standard practice for establishing the environmental baseline for cultural resources includes test excavations and an ethnographic study. (August 16, 2010, Tr. pp. 62, Ex. 499-S.) The SSA could not establish an accurate environmental setting for determining impacts to cultural resources because the Applicant did not conduct an ethnographic study or perform any test excavations to determine if subsurface deposits are present on the Project site. (August 16, 2010 Tr., p. 53.)

All of the information regarding the Project's baseline environmental setting, including the location and boundaries of archaeological sites, was derived from visual examination of the ground surface. (Id., p. 62.) But, Staff admitted that it is not always possible to determine the size and nature of archaeological sites based solely on visual examinations of the ground surface. (Id.) For example, Staff agreed that it cannot be determined whether or not burials are present within sites based solely on visual examination of the ground surface. (Id., p. 53.) Staff also agreed that test excavations are required to determine whether burials are present within a site. (Id., p. 62.)

i. Buried Archeological Resources

The SSA acknowledged that the Project would have a significant impact on an unknown number of 330 *known* prehistoric and historic surface archeological resources. (Exh. 307, p. C.3-1.) Note the 330 number is from a 25% sample survey, the Programmatic Agreement ("PA") identifies 453 resources. (Exh. 307, p. C.3-1.) The SSA further acknowledged that the Project may have a significant impact on an unknown number of buried archeological deposits, many of which may be determined eligible for the National Register and the California Register. (Id.)

At the Energy Commission May, 2010 hearing, a Kumeyaay and Quechan tribal elder expressed concerns about the value of the subsurface resources that may never be known:

> MR. ARROW-WEED: I also heard that potential for discovery for construction, what if you do find -- you haven't looked, you don't even know what's under there. You're only on the surface. It could be more under there. But you want to destroy it before we ever know anyway. (5/24/2010 Tr. p. 199)

Although any subsurface archeological sites are likely to be damaged or destroyed if they are near any of the two-foot diameter SunCatcher units drilled into the ground, Staff did not feel it was necessary to do subsurface testing or consider mitigation for these impacts in the SSA. (August 16, 2010 Tr. pp. 43 and 62.) However, at the evidentiary hearing, Staff admitted that subsurface test excavations are necessary to determine the size and extent of subsurface archeological resources. (Id.)

Thus, there is no dispute that Staff completely failed to evaluate significant impacts on subsurface archaeological sites, as required by CEQA. Until this analysis is completed, the Commission cannot make the required findings under CEQA.

ii. Ethnographic Resources

In addition to archeological resources, the Project site will likely impact a significant number of ethnographic resources, e.g. resources that have religious or cultural significance. These ethnographic resources have not been adequately identified or evaluated. The Applicant did not conduct an ethnographic study beyond a bare literature search. Staff conducted no other survey to identify ethnographic resources.

Claudia Nissley, cultural resource specialist and former State Historic Preservation Officer of Wyoming, testified that the ethnographic investigation for this Project was inadequate and that oral interviews should have been conducted with tribal members who can speak to the significance of the sites. (August 16, 2010 Tr. p. 164.)

Quechan Tribal Historic Preservation Officer Bridget Nash explained that an ethnographic study was necessary to ensure that the cultural significance of the resources impacted by the Project are adequately evaluated:

> MS. Nash: This is one way in which the tribes can really have some input into that associative value of the site, to allow the tribes to sit down and give their history and their knowledge of these areas. It's imperative that the tribe have an opportunity to share their cultural knowledge so that the archeologists have a better understanding of both the cultural and the ceremonial values of these resources.
> (August 16, 2010, Tr. p. 106.)

However, Staff conducted no oral interviews with tribal members who can speak to the significance of the sites, and no ethnographic study was prepared for the proposed Project site and area.

Although the SSA boldly lists Coyote Mountains and Mount Signal as sacred ethnographic resources that may be affected by the Project, in truth, Staff never undertook any effort to determine how the Project may affect these resources:

> MS. MILES: To what extent did the commission staff or you undertake analysis of the project's impacts to Mount Signal or Coyote Mountains?
>
> MR. McGUIRT: Very little. (August 16, 2010, Tr. p. 48.)

Consequently, Staff does not know how these resources are significant, or what mitigation is needed or appropriate. (Exh. 307, p. C.3-107.) Staff's consideration of potentially significant impacts to these resources simply is not based upon substantial evidence in the record.

iii. Failure to Establish an Accurate Baseline Renders Any Analysis Meaningless

Because test excavations and an ethnographic study were not conducted, Staff did not (and could not) assess the Project's potential to significantly impact buried cultural resources, including human burials, and ethnographic resources. Consequently, Staff also could not design mitigation that would reduce impacts to a level below significant.

Mitigation measures will vary depending on the nature and significance values of the specific resources. Without baseline data acquired through test excavations and an ethnographic study, Staff could not identify the significance values of the resources or their eligibility for the National or California registers and therefore could not apply appropriate mitigation.

> MS. APPLE: Until it is determined what the eligibility is, specific mitigation measures cannot be defined. The mitigation requirements are based on the eligibility determination, the eligibility determinations have been -- recommendations have been made to BLM, and the mitigation will follow once those determinations have been made. (Hearing 8/16/2010 Tr. p. 22.)

Staff has thus departed from standard CEQA practice and failed to determine the Project's environmental baseline. Staff's rationale for this departure from CEQA, a desire to quickly permit the project, is not adequate under law:

> "Energy Commission staff believes…that it is an unavoidable consequence of the accelerated schedule to which this licensing process has been and continues to be subject that there will have been insufficient time to develop a thoughtful and integrated cultural resource avoidance plan for the present configuration of the project area. The absence of formal recommendations and determinations on the historical significance of the entire inventory of cultural resources prior to a decision on the license application or prior to the onset of construction, should the project be approved, precludes the possibility of developing such a plan." (Exh. 307, p. C.3-158 – 159.)

By failing to establish the environmental baseline for cultural resources, the SSA violated CEQA's basic requirement that the environmental baseline be

determined at the first step in the environmental review process. (*Save Our Peninsula Committee v. Monterey Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.) Consequently, if the Commission approves the Project as proposed, the Commission will violate CEQA as a matter of law.

b. Staff Did Not Adequately Analyze Significant Impacts to Cultural Resources

CEQA requires the Commission to identify the Project's environmental impacts and provide mitigation measures for each adverse impact. (14 Cal. Code Regs. § 15126.4(a)(1).) Under CEQA, "a project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment." (Pub. Res. Code § 21084.1.) Specifically, adverse impacts consist of destruction of the significant characteristics, attributes and qualities that make those resources eligible for the listing in the California Register or the National Register. (Exh. 499-S.)

According to California law, there are four criteria that make a resource historically significant: (1) the resource is associated with events that have made a significant contribution to the broad patterns of our history; (2) the resource is associated with the lives of persons significant in our past; (3) the resource embodies the distinctive characteristics of a type, period or method of construction, or represents the work of a master, or possesses high artistic values; or (4) the resource has yielded, or may be likely to yield, information important to history or prehistory. (Pub. Res. Code § 5024.1.) Historical resources must also possess sufficient integrity of location, design, setting, materials, workmanship, feeling and association to convey their historical significance. (14 Cal. Code Regs. § 4852(c).)

To determine what the qualities of the resources are that make them significant, test excavations and consultations with tribes are necessary. (Ex. 499-S.) Because an ethnographic study and test excavations were not performed and consultation has only just begun, the qualities or characteristics that make these sites significant have not been identified. Rather, Staff just assumed that some of the resources would be significant, while admitting that much of the analysis has not been completed and the process of evaluation will be deferred until after the project is certified.

> MR. McGUIRT: What we did was is we by – through the 25 percent sample that our staff assessment and the supplemental staff assessment was based on, we were able to characterize the universe of archaeological site types that were in the project area. And on that basis, to be able to say that if the, absent flat-out avoidance, which did not appear to be an option in all cases, that the effect of the project as a whole would

> have a significant effect on the environment because there would be eligible properties that would be destroyed or disturbed at least partially. And so that was the basis for our conclusion on that.
>
> MS. MILES: But at this time you have not made a determination of eligibility in terms of individual archaeological sites.
>
> MR. McGUIRT: No. (Hearing 8/16/2010 Tr. p. 61.)

The Tribal Members who attended the meetings held by the CEC and BLM were not able to weigh in on future significance determinations because they were not provided with any cultural resources technical information until just recently, effectively excluding them from having the opportunity to provide their input on the cultural value of the identified resources.

> MS. NASH: And it's really concerning because still, to date, even though we received a notification letter in 2008 about this project, to date there's no cultural information. We don't have a cultural report…Here we are, it's almost June [2010], I know the deadlines, I heard a lot about deadlines today, ah, I can't believe I'm going to have this at the end of June, or of the beginning of July and, you know, the record of decision for BLM has to be signed by September, and yet there's still no cultural report.
>
> There's no sit-down with the Tribe, there's been no meaningful -- you know, the Tribe does not have all the information before it to be able to fully sit down and say, okay, these are the impacts that are going to happen to these sites, to these resources, to the areas outside. It's very much like a puzzle, you really need to have all those pieces to that puzzle to be able to figure out what is going to happen. (Hearing 5/24/2010 Tr. pp. 302-303.)

Since appropriate Tribal representatives could not review the technical report, they were effectively excluded from being able to provide input on the significance of the found resources.

CEQA and the Commission's regulations mandate that Commission Staff prepare a report to "demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and…permit the

significant effects of the project to be considered in the full environmental context." (*Cadiz Land Co., supra*, 83 Cal.App.4th at p. 92.) CEQA requires "a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences . . . [t]he courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*County of Amador*, *supra*, 76 Cal.App.4th at 954, *quoting* CEQA Guidelines § 15151; see also *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Commrs.* (2001) 91 Cal.App.4th 1344, 1367.)

Commission Staff did not adequately analyze signficcant impacts because Staff did not conduct any subsurface testing for buried resources or obtain input from the Tribes through an ethnographic study or oral interviews for ethnographic resources.

c. Cumulative Impacts to Cultural Landscape

When significant impacts to cultural resources from this Project and other past, present and reasonably foreseeable future projects are considered cumulatively, the Project would contribute to the potential destruction of a significant cultural landscape that has not been identified or discussed by Staff.

Bridget Nash explained the Project's significant cumulative impacts to the cultural landscape in her testimony:

> There is no substantive quantification or detailed analysis of how these [other proposed projects in proximity] in conjunction with the Imperial Valley Solar Project are expected to impact the cultural resources of the surrounding area or the broader California desert conservation area… In fact, there are trails that are located within the project area that trend south… Some of them start trending towards the southwest over to another project area, which also contains a large number of cremations where the Schneider Dance Circle is, and some of the geoglyphs, some of the intaglios… whatever happens within this project area is going to affect the Yuha Desert towards the south…. (August 16, 2010, Tr. pp. 108-110.)

Ms. Nash concluded, that the projects must be considered together to assess the cumulative impacts on the cultural landscape.

Carmen Lucas, a Kwaaymii Indian also shared concerns about the cumulative impacts on the landscape in the Project region:

> MS. LUCAS: I work as a Native American monitor, I see what goes on in the southern area here, and I've very, very concerned with the overall picture, both here, as well as these power lines, and windmills, and geothermals travel up the mountains and through the grades, I wonder what we're offering to the future generations. (Hearing 5/24/2010 Tr. p. 299.)

Despite the impending destruction of this nonrenewable cultural landscape, Staff did not adequately analyze or mitigate the Project's direct and cumulative significant impacts to cultural resources.

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

Staff admittedly has not completed its analysis of the Project's potentially significant impacts to ethnographic resources. (Hearing 8/16/2010 Tr. p. 48.) Staff suggests that BLM's National Historic Preservation Act ("NHPA") section 106 consultation process will substitute for Staff's CEQA analysis. "One of the purposes of the Programmatic Agreement (PA) is to identify the analytical processes that will be used to determine the significance of cultural resources and ensure appropriate mitigation for any impacts to those resources." (Exh. 307, p. C.3-107.) ***This is wrong***.

There are four reasons why Staff must analyze the Project's potentially significant impacts to ethnographic resources now rather than after Project approval, as proposed in BLM's PA.

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 that will be conducted in the future by the BLM. It must make its own determination now based on evidence in its own record.

Third, site significance (and hence the potential for significant adverse impacts) is defined differently under CEQA than 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.

Finally, 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.

Staff did not attend most of the meetings where tribal members came and spoke out about their concerns with the development of the PA. (Hearing 8/16/2010 Tr. p. 155.) Staff should have consulted with Native Americans who have expressed concerns about the Project's impacts on cultural resources and who have been willing to consult with Staff. (Exh. 498-Y.)

BLM's section 106 process is not an open process and does not meet CEQA's public disclosure requirements. In *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112), the California Supreme Court explained in detail the purposes and framework of the CEQA review process:

> We have repeatedly recognized that the EIR is the 'heart of CEQA.' Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR protects not only the environment but also informed

> self-government. To this end, public participation is an essential part of the CEQA process.

An EIR's role as an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return… (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.) "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law.'" (*Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors* (2001) 87 Cal.App.4th 99, 118.) If the deficiencies in an EIR preclude informed decision making and public participation, the goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred. (Id. at p. 128.)

On the other hand, BLM, in consultation with other agencies, can determine who is allowed to participate in its processes of preparing a PA:

> Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties. (36 CFR Sec. 800.2)

Energy Commission Staff archeologist Mike McGuirt had to admit that the 106 process is not open to all:

> MS. MILES: But it's definitely not a process whereby anyone in the public would be guaranteed an opportunity to participate.
>
> MR. McGUIRT: That's a fair statement.
> (Hearing 8/16/2010 Tr. p. 61.)

It is a bald violation of CEQA to defer the entire environmental review process – from the identification of the baseline environment to the evaluation of significant impacts to the formulation of mitigation measures – until after the Energy Commission approves the Project. Furthermore, to defer the identification of impacts and development of mitigation to a different BLM process where members of the public would have to apply and demonstrate an interest before they would be allowed to participate, offends the fundamental public participation requirements woven throughout the fabric of CEQA.

IV. STAFF DID NOT ADEQUATELY MITIGATE SIGNIFICANT IMPACTS

CEQA requires the Commission to formulate mitigation measures sufficient to minimize the Project's significant adverse environmental impacts. (Pub. Res. Code, §§ 21002.1(a), 21100(b)(3).) Mitigation measures must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. (14 Cal. Code Regs., § 15370.) A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727.)

CEQA's preference for avoidance of significant 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).)

Staff proposes to mitigate significant impacts through the imposition of a **single** condition of certification, the execution of a programmatic agreement ("PA").

> CUL-1 The applicant shall be bound to abide, in total, to the terms of the programmatic agreement that the BLM *is to* execute under 36 CFR § 800.14(b)(3) for the proposed action. If for any reason, any party to the programmatic agreement were to terminate that document and it were to have no further force or effect for the purpose of compliance with Section 106 of the National Historic Preservation Act, the applicant would continue to be bound to the terms of that original agreement for the purpose of compliance with CEQA until such time as a successor agreement had been negotiated and executed with the participation and approval of Energy Commission staff.

(Exh. 307, pp. C.3-158 and159.)

The PA lays out a process by which the BLM will make decisions about the Project construction and mitigation after "taking into account" the views of other parties. The PA ***does not detail specific mitigation*** but requires that treatment plans will be developed to mitigate impacts that have been or will be identified in the future. The PA includes an appendix that provides suggestions for the formulation of mitigation in the future.

Appendix B: "Historic Properties Treatment Plan(s)" requires the Applicant to supply a list of historic properties that will be avoided. However, there is nothing explaining any category or types of properties that ***must be*** avoided or how much

buffer space must be available to avoid them. In other words, recommendations are made to avoid certain resources, but these recommendations have no teeth. They are unenforceable.

The "Plan" requires the Applicant to describe the measures to avoid, minimize or mitigate the adverse effects on historic properties. What was supposed to be a consultation process now falls squarely to the responsibility of the Applicant – to list all the sites to be avoided and every measure that will be taken by the Applicant to minimize or mitigate the adverse effects.

The "Plan" then provides a list of mitigation for adverse effects beyond data recovery:

> (1) Placement of construction within portions of historic properties that do not contribute to the qualities that make the resource eligible
>
> (2) Deeding cemetery areas into open-space in perpetuity and providing the necessary long-term protection measures
>
> (3) Public interpretation including the preparation of a public version of the cultural resources studies and/or education materials for local schools
>
> (4) Access by tribes to traditional areas in property after the project has been constructed
>
> (5) Support by Applicant to cultural centers in the preparation of interpretive displays
>
> (6) Consideration of other off-site mitigation

The first of these mitigation options, "construction within the boundary of a historic property in an area that doesn't contribute to the defining characteristics" does not constitute mitigation. This provision simply allows construction within the boundaries of a historic property, which, in all likelihood, would render the historic property ineligible post-construction.

The second, deeding a cemetery to open space, does not apply to this Project because the Project would be built on BLM land and cannot be deeded or protected in perpetuity.

Provision (4), access by tribes to traditional areas, is not mitigation because it is required under the American Indian Religious Freedom Act and Executive Order 13007.

The remaining three points, (3) a public version of the report, (5) interpretive displays, and (6) off-site mitigation, do little to reduce the significant impacts on the Project site and, in any event, do not appear to ever be specifically required.

The plan purports to satisfy CEQA by including specific types of resources that are required to be avoided, with the caveat that the avoidance is only required "where feasible" or "where achievable" and there is no criteria defined for what is feasible or achievable. One can only speculate that the limits of feasibility and achievability would be dictated by the Applicant's engineers who are actively seeking to finalize the Project design. (Hearing 8/16/2010 Tr. p. 51.) This type of negotiation should occur in the public view, when Project approval still hangs in the balance and can be calculated into the Applicant's decision whether avoidance is achievable.

This treatment plan menu does not include anything that constitutes enforceable mitigation. Thus, the "mitigation" in the PA is of uncertain efficacy. In effect, there is no mitigation to which the Applicant would be bound if the PA were terminated.

> MS. MILES: Is it true that the mitigation is in the PA, or is it that there are directions to develop mitigation through future plans?
>
> MS. NISSLEY: …the answer is no, there aren't any mitigation developments in the text of the PA, they're all -- they're simply stipulations that say the mitigation plans will be developed at some point in the future.
>
> MS. MILES: So if you have a signed PA, that is not sufficient to hold the applicant to specific provisions of mitigation because the mitigation plan hasn't been completed; is that correct?
>
> MS. NISSLEY: That is correct. (Hearing 8/16/2010 Tr. p. 172.)

This mitigation strategy – to defer the formulation of mitigation until after Project approval – also constrains what mitigation is feasible. Once the Project layout has been finalized, it will be very difficult or impossible to require that the Applicant avoid a significant resource, although avoidance is the preferred mitigation for archeological nonrenewable resources under CEQA. Staff does not dispute this:

> MR. McGUIRT: The further they are, the further the applicant is along in the design process, and it narrows down the further in time you get, the less options there are to introduce major changes into the

> design of the project. And that's just a function of where we are. And so you know, in theory -- and I'm not sure that this happens terribly often under any circumstances -- if you had all of your cultural resources information in hand before you put pencil to paper to design your project at all, in theory you could design an avoidance plan where you physically avoided all these resources. And the further we get along in the process, that constrains your ability to do that.

(Hearing 8/16/2010 Tr. p. 51.)

Thus, the SSA defers the formulation of mitigation to the PA that will potentially be finalized and executed after the Commission approves the Project. The PA defers the formulation of mitigation to the Treatment Plan that will be developed after the Project has been approved. This double deferral is wholly prohibited under CEQA.

Courts have held that deferral of the formulation of specific mitigation complies with CEQA if "the lead agency: (1) undertook a complete analysis of the significance of the environmental impact, (2) proposed potential mitigation measures early in the planning process, and (3) articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented." *Communities for a Better Environment v. City of Richmond*, (2010) 184 Cal.App.4th 70.

Here the Energy Commission failed to evaluate the significance of the resources, did not complete the studies and testing necessary to determine the baseline, explained that mitigation will be constrained after Project approval, did not include any triggers that would require avoidance of certain types of resources and created no objective criteria for measuring success."[1] For these reasons, the PA is not adequate mitigation under CEQA.

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

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.)

[1] *Id.*

"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, 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 met this burden.

VI. CONCLUSION

The Commission's approval of the Project, as proposed, would contribute to the loss of a wholly unknown number of buried archeological resources, an unidentified number of ethnographic resources and an area that currently represents a critical piece of a cultural landscape that is significant to tribes in the region. 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,

prior to deciding on whether to approve the Project. Thus, pursuant to CEQA, the Commission cannot approve the Project as proposed.

Dated: August 20, 2010 Respectfully Submitted,

_____/s/_____

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STATE OF CALIFORNIA
California Energy Commission

In the Matter of: The Application for Certification for the Imperial Valley Solar Project (formerly known as SES Solar Two)	Docket No. 08-AFC-5

PROOF OF SERVICE

I, Bonnie Heeley, declare that on August 20, 2010, I served and filed copies of the attached **OPENING BRIEF OF CALIFORNIA UNIONS FOR RELIABLE ENERGY ON CULTURAL RESOURCES.** 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/solartwo/Imperial_Valley_POS.pdf. 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 via email and by U.S. Mail with first-class postage thereon, fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred." An original paper copy and one electronic copy, mailed and emailed respectively, were sent to the Docket Office.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on August 20, 2010.

_____/s/_____
Bonnie Heeley

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