

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:)
)
Application for Certification for the Ivanpah Solar)
Electric Generating System)
)
)
_____)

Docket No. 07-AFC-5

DOCKET	
07-AFC-5	
DATE	<u>OCT 14 2008</u>
RECD.	<u>OCT 14 2008</u>

**APPLICANT'S RESPONSE TO STAFF,
DISCUSSION OF SCHEDULING ALTERNATIVES
AND
APPLICANT'S COMPROMISE SCHEDULE**

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Procedural History, Introduction and Summary of Arguments

The *Revised Committee Scheduling Order* for the Ivanpah Solar Electric Generating System project (“Ivanpah SEGS”) (07-AFC-5) dated September 26, 2008, directs the Parties to “inform the Committee, either in their periodic status reports or by an intermediate report, of any steps that can be taken to advance the schedule.” Applicant has done so by its filing on October 1, 2008 proposing a revised schedule (“Applicant’s Proposed Schedule”). Upon review of the Staff’s October 10th filing in response to the Proposed Schedule, Applicant remains tremendously concerned about the schedule delays, the impacts to Ivanpah SEGS, the first utility-scale solar project to come before the Commission in the last 20 years. We provide the compromise schedule herein in a good-faith attempt to chart a path that will allow this project to move forward in a reasonably timely way (the “Compromise Schedule”). It is essential that the Commission makes a schedule decision that allows the timely review of Ivanpah SEGS, but that it does so in a manner that will send the right signal to the fledgling California large-scale solar industry, which is closely watching this process. That signal is that the Commission and BLM will work together to support the addition of solar to California’s energy mix by timely processing solar applications, as promised in their Memorandum of Understanding (“MOU”).

On October 1, 2008, Applicant filed Applicant’s Proposed Schedule and request for order or a Scheduling Conference. By order dated October 1, 2008, the Committee for the Ivanpah SEGS project invited comments from the parties in response to Applicant’s filing. By order dated October 3, 2008, the Committee for the Ivanpah SEGS project set a Committee Conference for Wednesday, October 15, 2008, at 10:00 a.m. in Hearing Room B. On October 10, 2008, the Commission’s Staff and CURE filed their responses to the Committee invitation for comment.

To understand how the Ivanpah SEGS project has arrived at this critical juncture, we begin by recounting the procedural history associated with the Project. Section I below discusses the Applicant’s role in the development of the joint state and federal permitting process that ultimately resulted in the Memorandum of Understanding (the “MOU”) executed by the Commission and the BLM, effective August 8, 2007, that forms the foundation for the processing of the Ivanpah SEGS application. Section II discusses the Applicant’s reasonable reliance on the MOU forged by the Commission and the United States Bureau of Land Management (the “BLM”). Section III then describes how the CEC Staff continues to rely on the MOU for guidance. Section IV discusses the apparent breakdown of the joint Commission/BLM process and the implication for Ivanpah SEGS.

After recounting this history and its potential effects on Ivanpah SEGS, the Applicant then offers the Committee, in the alternative, two paths to the successful and efficient integration of state and federal permitting processes. In Section V, the Applicant reiterates that the Applicant’s Proposed Schedule (as filed on October 1, 2008) satisfies all legal requirements and does not require any deviation from the existing MOU. The Committee should give very serious consideration to adopting the Applicant’s Proposed Schedule as filed on October 1, 2008.

Finally, in Section VI, the Applicant offers for the Committee’s consideration a second path to success, a “Compromise Schedule.” Under this Compromise Schedule, the Staff’s Preliminary Staff Assessment (“PSA”) will become a CEC-only document and CEC workshops on this initial Staff work product would proceed in late November or early December of this

year, with BLM's participation. The Draft Environmental Impact Statement ("EIS") would not be issued at this stage; instead, the Staff's Final Staff Assessment ("FSA") would be linked to the BLM's Draft EIS. Other links between the CEC and BLM processes would also be moved toward the end of the joint schedule. Most significantly, the Committee's Presiding Member's Proposed Decision ("PMPD") would be linked to the BLM's Final EIR and the BLM's Record of Decision ("ROD") would be linked to the Commission's Final Decision. The Compromise Schedule, as described herein, will far better align the CEC and BLM processes, and allow the Commission and the BLM to move forward with the efficient integration of the state and federal permitting processes. As set forth below, like the Applicant's Proposed Schedule of October 1, 2008, the Compromise Schedule would allow for a final decision during the Summer of 2009.

Why is it so urgent to revise the schedule? The current path for the Ivanpah SEGS project uses sequential processing of tasks instead of the efficient integration of state and federal processes; and hence, it will result in a decision in late 2009 or early 2010. This approach effectively means that construction on this much needed renewable solar project could not begin until 2010. The Applicant's parent company, BrightSource Energy, an Oakland-based solar company, has contracted with PG&E to deliver up to 900 megawatts ("MWs") of solar power to PG&E to meet PG&E's Renewable Portfolio Standard ("RPS") requirements. To meet those contractual obligations and begin delivering power to PG&E in 2011, the Ivanpah Solar Project must have a decision during the Summer of 2009 so that construction can begin in 2009. As set forth herein, a decision in the Summer of 2009 is desirable, feasible, and imperative. Accordingly, the Committee should adopt either: (1) the Applicant's Proposed Schedule of October 1, 2008; or (2) the Compromise Schedule that directs CEC Staff to work closely with their BLM counterparts to allow for a decision during the Summer of 2009.

I. Permitting History: Ivanpah SEGS, the CEC, the BLM, and the Agencies' Development of the CEC-BLM Memorandum of Understanding

To understand how the schedule for the Ivanpah SEGS should proceed, it is instructive to recount how the project has proceeded to date.

Well before the August 31, 2007, filing of the AFC for the Ivanpah SEGS project, the Applicant met with both the Commission and the BLM to discuss the interesting yet complex integration of the Commission certified regulatory program under CEQA and the BLM's Right-of-Way ("ROW") grant process under NEPA. As one result of those pre-filing meetings, BLM determined that it would also process a land use plan amendment to the 1980 California Desert Conservation Area Plan, as amended, sometimes referred to generically as the Resource Management Plan amendment or "RMP amendment."

After numerous, productive sessions with the Commission and the BLM, the joint agencies said to the Applicant, in effect, "Thank you for your input; it is now time for the agencies to spend time together reaching an agreement on how we will process your Application." The result of that agency-to-agency consultation was the MOU between the Commission and the BLM, effective August 8, 2007.

The MOU, executed by the Executive Director of the Commission and the State Director of BLM, included, among other objectives, the following:

It is in the interest of the Parties to share in the preparation of an environmental analysis of each of the Projects in a public process in California to avoid duplication of staff efforts, to share staff expertise and information, to promote intergovernmental coordination at the local, state, and federal levels, and to facilitate public review by providing a joint document and a more efficient environmental review process. (MOU, p. 2.)

The MOU also included an important attachment, the “BLM & CEC Combined Processing Plan,” Attachment B to the MOU. Significantly, the BLM & CEC Combined Processing Plan in the MOU provides a schedule for the processing of solar power plant applications *within one year of the project being deemed Data Adequate*. With Data Adequacy shown as “Day 1” on the BLM & CEC Combined Processing Plan, significant milestones are set forth that result in a CEC Decision and the BLM Issuance of the ROW grant on Day 365.

The Ivanpah SEGS project was deemed Data Adequate on October 31, 2008. Under the BLM & CEC Combined Processing Plan, the Ivanpah SEGS project would receive a license two weeks from this Friday, on October 31, 2008.

II. It Was Reasonable for the Applicant to Rely on the MOU and the MOU’s “BLM & CEC Combined Processing Plan” for the Ivanpah Project that Promised a Decision in 365 Days from Data Adequacy

From the outset, it was reasonable for the Applicant to rely on the MOU and the BLM & CEC Combined Processing Plan.

Applicant met with both agencies pre-filing. Applicant also respected the agencies’ request to stand down while the agencies went through the process of formalizing their commitment to a joint process through the MOU. Further, as a matter of sound public policy, it is reasonable for the Applicant to rely on the MOU as executed by the agencies duly-authorized representatives. Thus, it was reasonable for the Applicant to rely on the MOU and the BLM & CEC Combined Processing Plan to guide the processing of the Ivanpah SEGS project in one year, by October of 2008.

The urgency of the current circumstances is simply this: the schedule for this proceeding as reflected in the latest Committee Order will mean it will take twice the time agreed to in the MOU to process this Application – i.e., more than two years – jeopardizing the essential construction start in 2009.

III. CEC Staff's Response Indicates that the Staff Also Reasonably Relies on the MOU for Scheduling Guidance

The Staff's October 10, 2008, filing confirms that the Commission's Staff still values the MOU to guide this proceeding. Indeed the Staff's two-page filing is replete with citations to the MOU as authority:

- "Prior to the outset of the ISEGS proceeding, BLM staff and Commission staff entered into a Memorandum of Understanding (MOU) regarding the joint production of the PSA/DEIS document and the Final Staff Assessment/DEIS document. The goal of the MOU is to provide simultaneous and consistent state and federal environmental review." (Staff Response, p. 1)
- "According to the MOU attachment titled "BLM & CEC Combined Processing Plan," the PSA/DEIS is to be issued during the *same approximate time frame* as the circulation (for federal NEPA purposes) of the DEIS." (Staff Response, p. 2; emphasis added.)
- "However, BLM staff believe that such a shortcut is inconsistent with the MOU and with the agencies' agreement to release the PSA/DEIS as a joint document that meets federal NEPA requirements, including NOA review and Federal Register publication before its release." (Staff Response, p. 2.)

There are, in total, nine different references to the joint CEC-BLM "MOU" in the Staff's brief Response, all intended to support Staff's opposition to the Applicant's Proposed Schedule. Clearly, like the Applicant's initial reasonable reliance, it is clear that Staff still relies on the MOU as authority. This reliance cannot be one-sided; the solar industry needs to know that the Commission values not only portions of the MOU, but the portions of the MOU that matter the most to solar developers: the commitment to a timely and efficient process.

IV. The Specter of a CEC-BLM "Divorce" and "Breakdown" of the MOU Permitting Process Threatens Unreasonable Delay

Notwithstanding the Staff's reliance on the MOU when it serves its advocacy, Applicant has heard loudly and clearly from representatives of both agencies that the Applicant's insistence on adherence to the timelines set forth in the MOU is divisive and unworkable. Indeed, Staff's Response even refers ominously to a potential "divorce" of the CEC and BLM and the specter of a "breakdown" of the joint state-federal process.

This can only reasonably be understood as a warning that the CEC and BLM may part ways, forcing the Applicant into separate state and federal processes. In addition to being contrary to CEQA and NEPA's unambiguous directives favoring a joint state and federal process, a "divorce" would most certainly delay the project's schedule well beyond the Summer of 2009 and expose the project to multiple paths for administrative and judicial litigation. This result would not further the State of California's RPS goals, or AB 32's intent to bring non-carbon producing energy into the state expeditiously. Further, it would not comply with BLM's 2007 Solar Policy, which directs that the processing of a solar ROW must be a priority for the agency field offices.

“Justice delayed is justice denied.” In this case, permitting delay could undermine California’s first utility-scale solar project under the RPS program, with reverberations throughout the solar industry.

V. The Applicant’s Proposed Schedule of October 1, 2008: Fortunately, Rather than Divorce and Breakdown, the MOU Itself Affords Sufficient Flexibility for the Applicant’s Proposed Schedule

Both the subtext of the Applicant’s interactions with BLM and CEC Staff and the text of the Staff’s Response suggest that the Commission has limited options for efficient integration of the state and federal permitting processes. This is simply not the case.

First, the Committee could insist on faithful adherence to the MOU. However, this seems impractical, a form of brinkmanship that is to the advantage of none. (As discussed in the next section below, the MOU and the BLM & CEC Combined Processing Plan may be modified by agreement of the Parties without amending the MOU.)

Second, the Committee could implement the Applicant’s Proposed Schedule as filed on October 1, 2008. Applicant maintains that this schedule as filed is both workable and consistent with the MOU. As a matter of law, NEPA is sufficiently flexible to allow the BLM to place a separate federal cover on the same base environmental document, the Commission Staff’s PSA, and publish its NOA while the CEC-only workshops proceed in parallel. There is no need for a separate, BLM-only environmental document to be created. Instead, NEPA allows BLM to add its own covering document to the same base environmental information (the PSA) and publish a legally-sufficient Draft EIS as part of the federal NOA process.

NEPA is procedural, not substantive, and its intent is to convey information to the public and decision makers. The packaging of that NEPA-compliant information need not follow any one specific format. The Applicant believes that the BLM’s Solicitor’s Office can confirm that NEPA is sufficiently flexible to allow the PSA-only document and PSA-only workshops to proceed without interfering with the NEPA NOA process. As such, the Applicant’s Proposed Schedule, as filed on October 1st, can be adopted by the Committee.

VI. A Compromise Schedule: The MOU Affords Sufficient Flexibility for the Applicant’s Proposed “Compromise Schedule”

While the Applicant’s Proposed Schedule of October 1, 2008, is legally sufficient and most closely parallels the existing MOU processes, there is another “Compromise Schedule” that Applicant would like to offer to avoid a divorce and breakdown of the permitting process envisioned by the MOU.

In simplest terms, the MOU is sufficiently flexible to allow the following:

- Publish the PSA as a CEC-only document.

- CEC and BLM participate in CEC-only PSA workshops in late November or early December.
- Publish a joint FSA-DRAFT EIS. *This departure from using the PSA as the Draft EIS and instead relying on the FSA is the underpinning of the Compromise Schedule, and better aligns the nature and substance, as well as the procedural stance, of the documents.*
- Allow the CEC-only proceedings to continue during the 90-day DEIS comment period (CEC would continue with the filing of testimony, the Prehearing Conference, evidentiary hearings, briefing, and PMPD production).
- Publish the PMPD and issue the NOA for the Final EIS simultaneously, or very close in time, allowing time for response to comments on the Draft EIS.
- Issue the CEC Final Decision, the BLM ROD and the ROW grant close in time during the Summer of 2009.

Under this Compromise Schedule, the Staff's Preliminary Staff Assessment ("PSA") will become a CEC-only document and CEC workshops on this initial Staff work product would proceed in late November or early December of this year, with BLM's participation. As discussed above, the Draft Environmental Impact Statement ("EIR") would not be issued at this stage, but instead would be linked to the Staff's Final Staff Assessment ("FSA"). This will allow the BLM to review and provide comments on the PSA without delaying its issuance. BLM's comments can be submitted to the CEC staff along with the comments received from others. Other links between the CEC and BLM processes would also be moved toward the end of the joint schedule. Most significantly, the Committee's Presiding Member's Proposed Decision ("PMPD") would be linked to the BLM's Final EIS and the BLM's Record of Decision ("ROD") would be linked to the Commission's Final Decision. The Applicant's Compromise Schedule is attached hereto as both a Table and a Flow Chart. (See Appendix A.)

Significantly, this shifting of the BLM documents toward the end of the process (linking the FSA instead of the PSA to the Draft EIS) will not require any changes to the MOU:

Attachment B consists of a flow chart describing how the integrated CEC/BLM process is expected to function. *This flow chart may be modified by agreement of the Parties without amending the MOU*, as we continue to work with the process. (MOU, p. 3.)

Thus, the CEC and the BLM can make the linkage adjustments suggested above without need to amend the MOU.

Applicant believes that shifting of BLM timelines towards the end of the joint schedule as set forth in the Compromise Schedule is sub-optimal, for reasons we will discuss at the October 15th Committee Conference. Nevertheless, we believe this Compromise Schedule merits the Committee (and BLM's) further consideration.

Prayer for Relief


The Applicant respectfully requests that the Committee issue a revised Scheduling Order consistent with the discussion above. First, the Applicant's Proposed Schedule as filed on October 1, 2008, satisfies all legal requirements and does not require any deviation from the existing MOU. Second, and in the alternative, the Compromise Schedule—described herein—will allow the Commission and the BLM to move forward to the efficient integration of the permitting processes of the Commission and the BLM.

To begin delivering power to PG&E in 2011, the Ivanpah SEGS must have a decision from the CEC and the BLM during the Summer of 2009. Accordingly, the Applicant respectfully requests that the Committee adopt either: (1) the Applicant's Proposed Schedule of October 1, 2008, or (2) the Compromise Schedule describe herein with a view toward success: a final decision no later than the during the Summer of 2009.

October 14, 2008

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By  _____

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APPENDIX A

APPLICANT'S COMPROMISE SCHEDULE

Table and Flow Chart

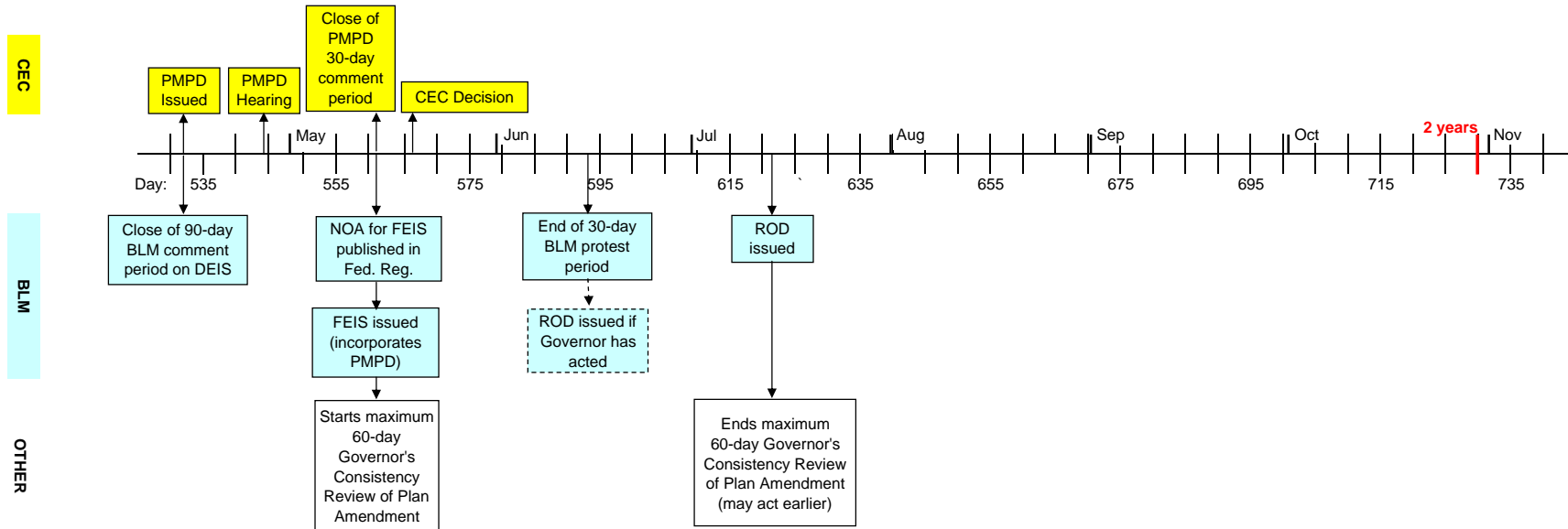
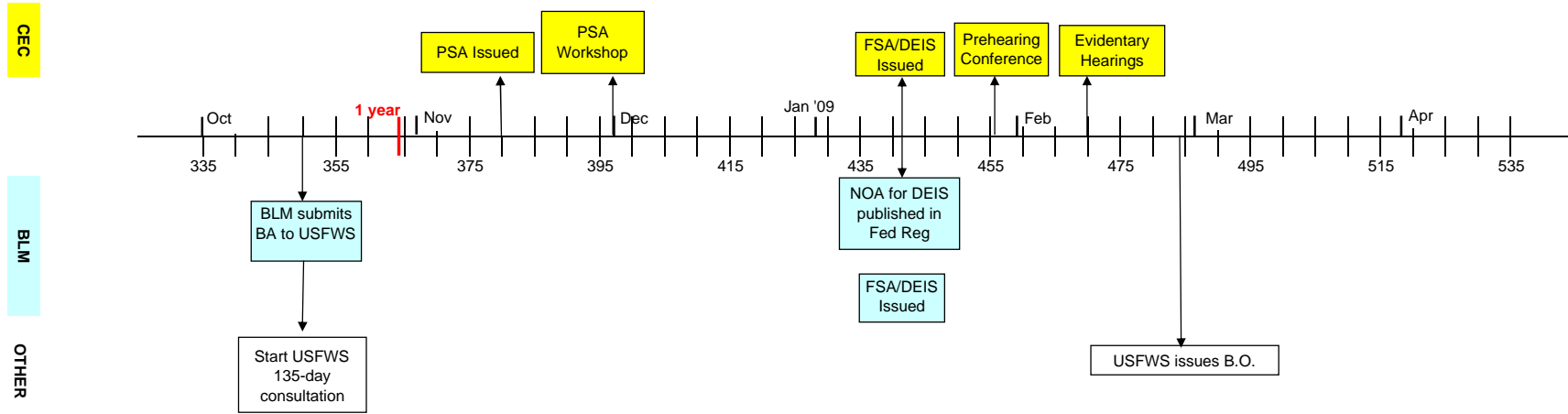
**APPENDIX A-1
COMPROMISE SCHEDULE
Ivanpah SEGS
A Final Decision No Later than the Summer of 2009**

EVENT	CEC ACTIONS	BLM ACTIONS
Staff Identifies Remaining Information Requests	Record of Conversation Pending	
Biological Assessment Submitted for Consultation		Expected on or about 10-14-08
Preliminary Staff Assessment (“PSA”) issued	11-14-08	None
PSA Workshops	12-1-08	Participate in CEC PSA workshops; provide comments to CEC; start review of NOA for DEIS with WO and ASLM
Final Staff Assessment (“FSA”) issued	1-15-09: Joint Document; One cover	
<i>BLM Notice of Availability (“NOA”) of the Draft Environmental Impact Statement (“DEIS”) published in Federal Register; starts 90-day comment period</i>		<i>1-15-09: Joint document; one cover</i>
Prehearing Conference	1-29-09	
Evidentiary Hearings	2-12-09	
Biological Opinion issued		2-26-09: 135 days after initiation
BLM DEIS 90-day comment period concludes		4-15-09; start review of NOA for FEIS
PMPD issued	4-15-09	
Hearing on PMPD	4-27-09	
Comment period on PMPD concludes	5-15-09	
<i>BLM NOA of the FEIS published in Federal Register</i>	<i>BLM-only document, bundling FSA/DEIS, response to comments, and PMPD</i>	<i>5-15-09</i>
Governor’s Consistency Review period begins ¹		Begins concurrent with NOA of FEIS targeted for 5-15-09
30-day protest period for FEIS		Begins concurrent with NOA of FEIS targeted for 5-15-09; concludes 6-15-09
CEC Decision	Business Meeting on 5-20-09	

¹ The BLM process provides up to a 60-day review period to the Governor of the state in which the RMP (amendment) is being proposed to ensure consistency with state and local plans, policies, and programs. (43 CFR 1610.3-2.)

EVENT	CEC ACTIONS	BLM ACTIONS
Governor's Consistency Review period concluded		No later than date that is 60 days after NOA of FEIS (7-14-09); however, Governor may act in less than 60 days
BLM ROD issued		30 days after NOA of FEIS (6-15-09), or Governor's Consistency Review (7-14-09), whichever is later
BLM issuance of ROW grant and RMP Amendment as "Full Force and Effect"		Concurrent with the ROD
Construction Allowed to Begin At Risk	June 2009, or as soon as Governor's Consistency Review ends and BLM can thereafter issue ROD and ROW grant	

**APPENDIX A-2
COMPROMISE SCHEDULE**
[Days are days from data adequacy determination]



STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Application for Certification for the IVANPAH)
SOLAR ELECTRIC GENERATING SYSTEM) Docket No. 07-AFC-5
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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on October 14, 2008, I served the attached *Applicant's Response To Staff, Discussion Of Scheduling Alternatives And Applicant's Compromise Schedule* via electronic mail to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.



Karen A. Mitchell

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