June 1, 2010

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 one copy of CALIFORNIA UNIONS FOR RELIABLE ENERGY BRIEF ON ISSUES CONCERNING US BUREAU OF LAND MANAGEMENT CULTURAL RESOURCES DATA. 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
Applications for Certification for the
Calico Solar (SES Solar One) Project,
Genesis Solar Energy Project,
Imperial Valley (SES Solar Two) Project,
Solar Millennium Blythe Project,
Solar Millennium Palen Project, and
Solar Millennium Ridgecrest Project.

Consolidated Hearing on Issues
Concerning US Bureau of Land
Management Cultural Resources Data

Docket Nos.
08-AFC-13,
09-AFC-8,
08-AFC-5,
09-AFC-6,
09-AFC-7,
09-AFC-9, and
10-CRD-1

CALIFORNIA UNIONS FOR RELIABLE ENERGY
BRIEF ON ISSUES CONCERNING US BUREAU OF LAND
MANAGEMENT CULTURAL RESOURCES DATA

June 1, 2010

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California Unions for Reliable Energy ("CURE") files this brief in opposition to the Bureau of Land Management’s Request for Reconsideration, pursuant to the Committee’s May 21, 2010 Notice and Orders for Consolidated Hearing on Issues Concerning US Bureau of Land Management Cultural Resources Data ("Order"). The Commission should promptly deny BLM’s request for reconsideration so that it can proceed with its analysis of the impacts of projects on cultural resources.

The Committee directed the parties to file briefs responding to numerous questions related to data pertaining to cultural resources on BLM land, as listed in Appendix C to the Order. CURE answers those questions in Appendix C to which it can provide information useful to the Committee’s decision. Specifically, CURE addresses the questions in the context of the Genesis Solar Energy Project ("Genesis") and Imperial Valley Solar Project ("Imperial Valley"). However, CURE’s analysis is generally applicable to all of the solar power plant siting cases listed in the Order.

Preliminarily, CURE thanks the Committee for recognizing that the availability of cultural resources data is a critical issue in solar power plant siting proceedings that requires quick resolution. As discussed below, BLM is prohibiting the Commission from fulfilling its statutory obligations and is preventing CURE, the affected Tribes and others from fully participating in the Energy Commission process.
I. INTRODUCTION

In both the Genesis and Imperial Valley proceedings, the project applicants, Genesis Solar, LLC and Imperial Valley, LLC, filed a number of documents with the Energy Commission under confidential cover relating to the cultural resources in the project areas. The confidential documents provide detailed inventories and locations of cultural resources in the defined project areas of analysis. Unlike most prior siting cases involving only a few dozen acres, according to the Staff Assessment for the Genesis proceeding, the area of analysis contains over 300 cultural resources, including historic and prehistoric archaeological sites, and isolates, potential ethnographic resources and linear built-environment resources.\(^1\) In Imperial Valley, the Staff Assessment concluded that there are approximately 330 known prehistoric and historical surface archaeological resources and an unknown number of buried archaeological deposits.\(^2\)

However, details regarding the cultural resources were deemed confidential by the Energy Commission, and therefore are not included in the Staff Assessments. Details regarding the cultural resources are essential to enable the Commission to determine whether the Genesis and Imperial Valley projects will result in significant impacts to cultural resources, what

\(^2\) Staff Assessment and Draft Environmental Impact Statement, SES Solar Two [Imperial Valley] Project (08-AFC-5) p. C.2-1.
the mitigation measures should be and whether those mitigation measures will reduce significant impacts to below a level of significance.

Commission Staff reviewed detailed cultural resources data for the Genesis and Imperial Valley projects, and determined that both projects would result in significant impacts to cultural resources.\(^3\) Staff is currently developing mitigation measures for significant impacts to cultural resources for Genesis. A programmatic agreement is being developed to mitigate cultural resource impacts posed by the Imperial Valley project.

CURE petitioned to inspect the detailed cultural resources data for the Genesis and Imperial Valley projects to enable CURE to evaluate the impacts to cultural resources related to the projects and to prepare expert testimony regarding the identification, avoidance, alternatives and mitigation of cultural resources impacts associated with the projects. In order to ensure confidentiality, CURE proactively proposed to enter into nondisclosure agreements, and included proposed non-disclosure agreements with its petitions.

Despite CURE’s reasonable approach to obtaining the reports, BLM objects to disclosing the data. In the Genesis proceeding, BLM is preventing CURE from obtaining the data necessary to analyze the project’s potentially significant impacts on cultural resources under CEQA and the project’s compliance with all applicable laws, ordinances, regulations, and standards

\(^3\) Id. at C.3-1.; C.2-1.
("LORS"). In Imperial Valley, BLM delayed the release of the data until only a few days before CURE’s testimony was due. Consequently, CURE could not assess the project’s potentially significant impacts on cultural resources or the project’s compliance with LORS for testimony. Now, BLM requests that the Commission actually return all cultural resource documents\(^4\) and prohibits applicants from submitting additional cultural resource reports to the Energy Commission.\(^5\) BLM is trying to prevent the Commission, CURE and anyone else from retaining the information.

Herein lays the Commission’s dilemma. The Commission cannot satisfy its obligations under CEQA, the Warren-Alquist Act, and Commission regulations without reviewing the detailed cultural resources data and including that data in its evidentiary record. Without the data, there will simply be no evidence on which to base the Commission’s decision. Yet, BLM seeks to prevent the Commission from obtaining and retaining the data.

In addition, CURE, as a party to the Genesis and Imperial Valley proceedings, has an equal right to that data. Yet BLM has prohibited CURE from reviewing the data in the Genesis proceeding and has substantially delayed releasing the data in the Imperial Valley proceeding. CURE’s testimony for the Genesis proceeding is due on June 18, 2010, yet we still do not have the information on which to base our testimony. CURE could not

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\(^{4}\) Letter from J. Abbott to M. Jones, May 18, 2010, p. 3.

\(^{5}\) Letter from J. Farrell to G. Kline re: Final Draft Class II and Class III Cultural Resources Inventories for the Genesis Solar Energy Project, Riverside County, California—Supplemental Corrected CD, May 25, 2010 (Docketed with Energy Commission on May 28, 2010).
file testimony on cultural resources for Imperial Valley because it did not receive the data in time. BLM is preventing CURE from fully participating as a party in the Genesis and Imperial Valley proceedings.

If BLM continues to prohibit the release of cultural resources data (even though release would be pursuant to nondisclosure agreements), the Commission will not be able to perform its statutory duties, and CURE, the Tribes and other parties will not be able to fully participate in numerous Energy Commission proceedings.

II. DISCUSSION

CURE’s answers to questions posed in Appendix C to the Order are as follows:

3-4. Who submitted the data to the Commission? What is the data?

On numerous occasions, the applicants for the Genesis and Imperial Valley projects filed several documents related to cultural resources data under confidential cover. The confidential documents provide detailed inventories and locations of cultural resources in the defined project areas of analysis. According to the submittal cover letters, the documents, “specifically identif[y] site locations and areas of potential cultural significance.”

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6 Letter from to J. Farrell to M. Jones re: Confidential Cover Submittal of the Genesis Solar Energy Project Draft Class II and Class III Cultural Resources Inventories for the Genesis Solar Energy Project, Riverside County, California, August 31, 2009; Letter from to J. Farrell to M. Jones re: Confidential Cover Submittal of the Genesis Solar Energy Project Application for Certification (09 AFC 08) Data Adequacy Supplement Confidential Cultural Resource

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5. **Is there restricted access to the land on which the cultural resources are found?**

The Genesis project site is located on public land that is administered by BLM. Under BLM’s California Desert Conservation Area Plan (“CDCA”) and Northern and Eastern Colorado Desert Coordinated Management Plan, the Genesis project site is categorized as “Class M (Moderate Use).” Class M allows for a variety of uses, such as backpacking, camping, hiking, and vehicle touring on approved routes. Similarly, the majority of the Imperial Valley site is located on public land administered by the BLM. The Imperial Valley site is located within the “Limited Use” category of BLM’s CDCA Plan. This allows for camping and recreation but vehicles are restricted to approved routes of travel.

6. **Should local tribal entities with an interest in the project site have access to the data and the land?**

Certainly, there is no one better to determine the significance of impacts to culturally valuable resources than members of the communities.

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9 Staff Assessment and Draft Environmental Impact Statement, SES Solar Two [Imperial Valley] Project (08-AFC-5) p. C.8-9.
who hold those resources valuable. Moreover, the National Historic Preservation Act (“NHPA”) recognizes this right. Section 101(d)(6)(B) of the NHPA requires the agency official [BLM] to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. The regulations implementing the NHPA require that consultation in the section 106 process provides the Indian Tribe a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.\(^{10}\)

In the Genesis proceeding, Staff recognized that potentially significant impacts to McCoy Spring would be determined from the perspective of Native Americans and mitigation measures would be developed based on recommendations by Native Americans.\(^{11}\) Thus, it is appropriate, if not necessary, for tribal entities with an interest in resources located in the project area to have access to the data and the land.

Several Native American Tribes expressed concerns about the potential for the Genesis project to destroy cultural resources and traditional cultural properties.\(^{12}\) The Quechan Tribe requested copies of the cultural

\(^{10}\) 36 C.F.R. § 800.2  
\(^{12}\) Id., p. C.3-59.
resources data related to the Genesis project from BLM on numerous occasions.\textsuperscript{13} Despite the numerous requests, BLM has not released the data to the Quechan Tribe.

By refusing to release cultural resource data to the Tribes, BLM has stultified the consultation process with the Tribes under section 106 of the NHPA. In the Imperial Valley proceeding, Bridget Nash-Chrabascz submitted expert testimony that the BLM has even not initiated consultation with the Tribes pursuant to section 106 because BLM has not divulged the cultural resources reports.\textsuperscript{14} Thus, the Commission cannot find that the Imperial Valley project complies with LORS. The outcome would be the same in Genesis.

Furthermore, the Tribes have not been given a meaningful opportunity to participate in identifying potentially significant impacts to cultural resources on and around the project sites, or developing alternatives and mitigation measures under CEQA. Without the Tribes’ input, Staff cannot complete its statutorily required assessments of the Genesis and Imperial Valley projects under CEQA, the Warren-Alquist Act, and the Energy Commission regulations (see sections 10 and 11 below for a full discussion of the Commission’s obligations pursuant to CEQA, the Warren-Alquist Act, and the Energy Commission regulations).

\textsuperscript{13} \textit{Id.}, pp. C.3-58-61.
\textsuperscript{14} Testimony of Bridget Nash Chrabascz, Quechan Tribe to CEC, 5/17/2010
9. What are the cultural resource issues in the proceedings?

In the Genesis proceeding, Staff concluded that the project would have a significant direct impact on 14 historically significant archaeological resources and a potential significant indirect impact on one ethnographic resource. Specifically, the resources include eight Native American archaeological sites, including potential contributing elements to a prehistoric trails network (a cultural landscape), six potential contributing elements to the World War II Desert Training Center, and McCoy Spring, which, according to Staff, is potentially traditional cultural property.

Tribes have expressed concerns regarding the potential for the Genesis project to destroy cultural resources and traditional cultural properties. Specifically, the Quechan Tribe considers the Genesis project site to be a part of its traditional land and requests that “traditional areas rich in cultural resources be avoided.” In addition, the Chemehuevi Tribe is concerned about the Genesis project’s adverse impacts to sacred petroglyph sites in the Palen Mountains and at McCoy Spring, and to the ancient trails that run between them. According to Mr. Figueroa of the Chemehuevi Tribe, the proposed projects along the I-10 corridor, including Genesis, Blythe, and

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16 Id.
17 Id., p. C.3-59.
18 Id.
19 Id., pp. C.3-59-60.
Palen, are located in “the most Sacred area of the North American Continent.”

For Imperial Valley, Staff identified extensive evidence of prehistoric use and settlement. The locations that are still visible range from the sites of the short-term manufacture of stone tools to larger sites for the harvesting of seasonal natural resources. Cremated human remains were recorded in a number of locations indicating longer-term settlement in the project. Overall, the BLM and Staff focused on collecting archaeological data. However, there are traditional cultural properties adjacent to the project site in the Coyote Mountains, Mt. Signal, the project site itself, and the Yuha Area of Critical Environmental Concern that is located adjacent to the project site. This information has been shared with the BLM and Energy Commission Staff at various meetings, but it was not analyzed in the Staff Assessment. Moreover, the Tribes have explained that, despite numerous requests, they have not been given an opportunity to review the technical report or adequately consult on the Imperia Valley project’s effects to traditional cultural properties.

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10. What does the Commission need, under the Warren-Alquist Act, the CEC regulations, CEQA, NEPA, the cultural resources laws, and the APA, to resolve those issues?

In order to fulfill its duties under CEQA, the Warren-Alquist Act, and Energy Commission regulations, the Commission must review the detailed cultural resources data contained in the inventories submitted to the Commission by the project applicants and include that data in the evidentiary record to support its decision.

First, the data establishes the environmental setting on which the Commission must base its analyses of the Genesis and Imperial Valley projects’ potentially significant environmental impacts to cultural resources and its identification of mitigation measures and alternatives pursuant to CEQA. Second, the data is necessary to the Commission’s obligations under Energy Commission regulations to evaluate the projects’ significant environmental consequences. Finally, the data is the foundation upon which the Commission must evaluate the projects’ compliance with LORS.

Although Staff reviewed cultural resources data for the Genesis and Imperial Valley projects, BLM now requests that the Commission return all cultural resource documents\(^\text{23}\) and prohibits applicants from submitting additional cultural resource reports to the Energy Commission.\(^\text{24}\) Without the data to review and include in the evidentiary record, the Commission’s

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\(^{23}\) Letter from J. Abbott to M. Jones, May 18, 2010, p. 3.

\(^{24}\) Letter from J. Farrell to G. Kline re: Final Draft Class II and Class III Cultural Resources Inventories for the Genesis Solar Energy Project, Riverside County, California—Supplemental Corrected CD, May 25, 2010 (Docketed with Energy Commission on May 28, 2010).
analyses would be inadequate and its decision would not be supported by substantial evidence in the record.

a. CEQA Requires the Commission to Review the Data

The existing environmental setting is a starting point to measure whether a proposed project may cause a significant environmental impact.\(^{25}\) CEQA defines environmental setting, or “baseline,” as the physical environment as it exists at the time CEQA review is commenced.\(^{26}\) Describing the environmental setting is critical to an accurate, meaningful evaluation of environmental impacts. The importance of having a stable, finite, fixed environmental setting for purposes of CEQA’s environmental analysis was recognized decades ago.\(^{27}\) 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.”\(^{28}\) 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.\(^{29}\)


\(^{26}\) CEQA Guidelines, §15125(a) (emphasis added); Riverwatch v. County of San Diego (1999) 76 Cal.App.4th 1428, 1453 ("Riverwatch").

\(^{27}\) County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185. 193.


\(^{29}\) Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal.App.4th 99, t 125.
In the Genesis proceeding, Staff recognizes its duty to establish the environmental setting before embarking on an impact analysis. Staff notes, [a] cultural resources inventory specific to each proposed or alternative action under consideration is a necessary step in any staff effort to determine whether each such action may cause, under CEQA, a substantial adverse change in the significance of any cultural resources that are on or would qualify for the California Register of Historical Resources (CRHR), may, under NEPA, significantly affect important historic and cultural aspects of our national heritage, or may, under Section 106, adversely affect any cultural resources that are on or would qualify for the National Register of Historic Places (NRHP).30

Without the detailed cultural resources data, Staff cannot complete its CEQA analysis. CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.31 CEQA requires that an agency’s environmental review document be prepared “with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences.”32 Without reviewing detailed cultural resources data that identifies the locations of resources and areas of potential cultural significance, the Commission cannot determine whether a project will result in significant direct, indirect, or cumulative impacts to those resources.

32 CEQA Guidelines, § 15151.
Furthermore, the Commission must avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. CEQA requires an environmental review document to describe mitigation measures sufficient to minimize the significant adverse environmental impacts. The Commission may not rely on mitigation measures of uncertain efficacy or feasibility.

Without the detailed cultural resources data, it would be impossible for the Commission to know enough about the resources to determine whether mitigation is adequate to reduce impacts to below a level of significance. CEQA favors the preservation of cultural resources and the avoidance of impacts to such resources. The CEQA Guidelines provide that “[p]ublic agencies should, whenever feasible, seek to avoid damaging effects on any historical resource of an archaeological nature.” Further, “[p]reservation 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.”

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33 Id., § 15002(a)(2) and (3). See also Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564; Laurel Heights Improvement Ass’n v. Regents of the University of California (1988) 47 Cal.3d 376, 400.
34 Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).
35 Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).
36 CEQA Guidelines, § 15126.4(b)(3).
37 Id., § 15126.4(b)(3)(A).
avoid and preserve the cultural resources that will be impacted by the proposed projects, one must know the specific locations of the resources.

The Commission also must study “...a range of reasonable alternatives to the project, or to the location of a project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.” 38 Without a clear understanding of the location and significance of the direct, indirect and cumulative impacts to cultural resources, the Commission cannot complete the required analysis of alternatives.

Before the Commission approves the Genesis project, or any other project, the Commission is required to make findings under CEQA. Specifically, the Commission must find that either: (1) changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen each identified significant impact; (2) such changes or alterations are within the jurisdiction of another public agency and such changes have been adopted by such other agency or can and should be adopted by such other agency; or (3) specific economic, legal, social, technological, or other considerations make infeasible identified mitigation measures or project alternatives. These findings must be based on substantial evidence in the record. 39

38 Id., § 15126.6(a).
Unless the Commission obtains, retains and reviews the detailed data identifying the location of the cultural resources, the Commission cannot evaluate a project’s impacts or identify adequate mitigation. Consequently, the Commission will lack substantial evidence to make a finding that the mitigation measures will reduce the particular impacts to a less than significant level. The Commission will also not know if it must consider making findings of overriding considerations.\footnote{CEQA Guidelines, § 15093.} Thus, it is imperative that the cultural resources data be available to the Commission.

b. The Energy Commission Regulations Require the Commission to Review the Data

Energy Commission’s regulations for power plant site certification require the Commission 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.”\footnote{Id., § 1742.5(b) and (c).} The regulations require “a complete consideration of significant environmental issues in the proceeding.”\footnote{Id., § 1742.5(d).}

Without reviewing data that identifies the locations of resources and areas of potential cultural significance, the Commission cannot completely consider the significant environmental issues of the Genesis and Imperial Valley projects. As a result, the Commission’s environmental documents would fail to inform decision makers, parties, or the public about the
significant environmental consequences of the projects, as required by the
Commission's regulations. Thus, unless the Commission reviews the cultural
resources data, the Commission cannot satisfy its regulatory obligations, and
the cultural resources issues would go unresolved.

The Energy Commission’s regulations also require the Commission to
base its decisions only on evidence in its record. As a result, the
Commission cannot merely rely on a determination by BLM or any other
agency about the significance of impacts or the efficacy of mitigation. It must
make its own determination based on evidence in its own record.

c. The Warren-Alquist Act Requires the Commission to
Review the Data

The Warren-Alquist Act requires the Commission to determine
whether a project complies with LORS. Thus, the Commission must ensure
that the Genesis and Imperial Valley projects comply with the NHPA, among
other LORS.

The NHPA requires that BLM, prior to the approval of the Genesis and
Imperial Valley projects, identify the historic properties within the respective
areas of potential effects and evaluate the potential effects that the projects
may have on historic properties. BLM must then resolve the adverse effects
through development of mitigation measures.

44 Pub. Resources Code §§ 25523(d)(1); 25525.
45 36 C.F.R. §§ 800.4-800.5.
46 36 C.F.R. § 800.6.
The Commission must review the detailed data identifying the location of the cultural resources to determine whether historic properties within the area of potential effects have been identified, and whether the effects have been adequately evaluated and mitigated pursuant to the NHPA. Thus, unless the Commission reviews the data, it cannot conclude that the Genesis and Imperial Valley projects comply with LORS.

Again, as described above, the Commission’s determination as to whether a project complies with LORS must be based on evidence in the Commission’s own record.

In sum, the Commission must review the detailed cultural resources data in its evidentiary record to fulfill its obligations under CEQA, the Warren-Alquist Act, and Energy Commission regulations. If BLM continues to prohibit the Commission from reviewing cultural resource reports, the Commission’s analyses will be inadequate and its decision will not be supported by substantial evidence in the record.

11. **For projects proposed on BLM land, can the CEC defer, partially or entirely, to BLM’s decisions on cultural resource issues, under the Warren-Alquist Act, the CEC regulations, CEQA, NEPA, the cultural resources laws, and the APA?**

The Commission cannot defer to BLM’s decisions on cultural resource issues. The Commission is obligated under CEQA, the Warren-Alquist Act, and Energy Commission regulations to independently assess a project’s potentially significant environmental impacts and compliance with all
applicable LORS, and to identify mitigation measures. In addition, the requirements of CEQA and NEPA/NHPA differ with regards to identifying and evaluating significant adverse impacts/effects, including the means used to determine the significance of cultural resources.

First, as lead agency under CEQA, the Commission must determine whether a project would result in significant direct, indirect or cumulative impacts to cultural resources.47 If the Commission identifies a significant impact, the Commission must require mitigation measures sufficient to minimize, reduce, or avoid the impact or to rectify or compensate for that impact.48

Second, the Warren-Alquist Act requires that the Commission determine a project’s conformity with LORS.49

Third, the Energy Commission’s regulations for power plant site certification require 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.”50 Staff shall “ensure a complete consideration of significant environmental issues in the proceeding.”51

Pursuant to CEQA, the Warren-Alquist Act, and Energy Commission regulations, the Commission is statutorily obligated to independently assess

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48 CEQA Guidelines, § 21002; § 21081; Cal. Code Reg. §15370.
49 Pub. Resources Code §§ 25523(d)(1); 25525.
50 Id., § 1742.5(b) and (c) (emphasis added).
51 Id., § 1742.5(d) (emphasis added).
a project’s potentially significant environmental impacts and compliance with all applicable LORS, and to identify mitigation measures. By demanding the recall and return of all cultural resource reports, and by prohibiting project applicants from submitting additional cultural resource reports to the Commission, BLM is preventing the Commission from satisfying its independent legal obligations.

Even were it not for these independent obligations of the Commission, the Commission could not defer to BLM because the Commission’s impact analysis required under CEQA is different from the analyses BLM is required to conduct under NEPA and NHPA.\textsuperscript{52} There are two important distinctions between impact analyses under CEQA and NEPA/NHPA.

First, CEQA requires that each significant adverse impact be identified and that mitigation measures for all significant impacts be proposed in an environmental review document.\textsuperscript{53} CEQA prohibits deferring determination of mitigation measures until after the project is approved.\textsuperscript{54} Thus, 100% of a project site must be surveyed to inventory cultural resource sites. Subsequently, test excavations are conducted to determine the significance for each identified site.

\textsuperscript{52} Testimony of David S. Whitley, p. 3.
\textsuperscript{53} Pub. Resources Code, §§ 21100(b)(1), 21002, 21002.1(a).
In contrast, the BLM NEPA Handbook allows for sample inventories of project areas. Data gaps are permitted pursuant to the BLM NEPA Handbook but they must be identified, and an estimate of their implications must be outlined and justified. Treatment of the cultural resources, including their NRHP evaluation, is instead outlined in a preservation management plan, which specifies the procedures to identify and evaluate all cultural resources after project approval. Critically, under NEPA, full site identification and significance evaluation may occur after the record of decision is issued. This is in direct contrast to CEQA’s requirement for completing these steps prior to approving an environmental review document.

Second, site significance (and hence the potential for significant adverse impacts) is defined differently under CEQA and the NHPA/NEPA. Sites are significant under the NHPA if they are determined to be eligible for listing on the NRHP. NRHP eligible sites are also significant under CEQA. However, under CEQA, sites are also significant if they are listed in any historical registry. Thus, the potential for significant adverse impacts is greater under CEQA.

In sum, the Commission cannot defer to BLM’s analysis of significant impacts under NEPA and the NHPA because the identification
and analysis of significant impacts is more stringent under CEQA. Consequently, 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. Thus, unless the Commission conducts an independent analysis of significant impacts pursuant to CEQA, the Commission’s analysis will be inadequate and its decision will not be supported by substantial evidence in the record.

The Commission is obligated under CEQA, the Warren-Alquist Act, and Energy Commission regulations to independently assess a project’s potentially significant environmental impacts and compliance with all applicable LORS, and to identify mitigation measures. Furthermore, the requirements of CEQA and NEPA/NHPA differ with regards to identifying and evaluating significant adverse impacts/effects, including the means used to determine the significance of cultural resources. As a result, the Commission cannot defer to BLM’s decisions regarding cultural resource issues.

12. In a Commission proceeding for a project(s) proposed on private land, are there similar issues of who should be permitted access to confidential cultural resources data?

The Commission is obligated to perform its duties under CEQA, the Warren-Alquist Act, and Energy Commission regulations regardless of whether the project is proposed on public or private land. Thus, the Commission must review the detailed cultural resources data under both
scenarios. Furthermore, if Staff reviews the data, all parties to a proceeding have the right to review it.\textsuperscript{59} However, in a project on private land, it is unlikely that the Commission would be faced with the obstacles presented by BLM for projects on public land.

13. What data are parties entitled to, under the Warren-Alquist Act, the CEC regulations, CEQA, NEPA, the cultural resources laws, and the APA?

CEQA requires that the Commission’s decision regarding approval of a project be based on substantial evidence in the record.\textsuperscript{60} Pursuant to Energy Commission regulations, the Commission’s decision regarding approval of a project must be “based exclusively upon the hearing record, including the evidentiary record, of the proceedings on the application.”\textsuperscript{61} Thus, parties must submit evidence into the record upon which the Commission can base its findings. If the parties do not have access to the detailed cultural resources data, the hearing record will not include substantial evidence. Consequently, the Commission’s decision will not be supported by substantial evidence, as required by CEQA and Energy Commission regulations.

\textsuperscript{59} 20 Cal. Code Regs., § 1207(c).
\textsuperscript{60} Pub. Resources Code, § 21081.5.
\textsuperscript{61} 20 Cal. Code Regs., § 1751(a).
14. If the CEC Staff has access to certain data, must some or all other parties have access, under the Warren-Alquist Act, the CEC regulations, CEQA, NEPA, the cultural resources laws, and the APA?

Pursuant to Energy Commission regulations section 1207(c), intervenors “shall have all the rights and duties of a party…” Thus, CURE, and any other party to a proceeding, is entitled to any data to which any other party has access. Because Staff reviewed the detailed cultural resources data in the Genesis and Imperial Valley proceedings, and the applicants’ consultants have created that data, CURE also has the right to review the data.

15. If the data is revealed to any party, including but not limited to the CEC Staff, what appropriate nondisclosure agreements, if any, should be made?

BLM is creating a problem where none exists. CURE has no interest in disclosing the detailed cultural resources data to the public. To ensure confidentiality of the cultural resources data in the Genesis and Imperial Valley proceedings, CURE proactively proposed to enter into nondisclosure agreements. CURE included nondisclosure agreements with its petitions to inspect the cultural resources documents. CURE’s petitions provided that the purpose of the nondisclosure agreements is to ensure that the requested materials remain confidential and will not be used except as necessary to participate in the proceedings and the NHPA Section 106 consultation processes for the projects. CURE’s counsel and consultants have routinely

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62 20 Cal. Code Regs., § 1207(c).
been parties to nondisclosure agreements in California Public Utilities Commission proceedings and are experienced at protecting confidential, sensitive information from public disclosure.

16. May the Commission legally remove information from the docket of an adjudicative proceeding?

All parties to a proceeding are legally entitled to review any information that has been reviewed by Energy Commission Staff.\textsuperscript{63} Thus, once Staff reviews information, it cannot be removed from the docket.

III. CONCLUSION

CURE appreciates the opportunity to brief these crucial issues related to the availability of cultural resources data. Until BLM’s obstructionism is resolved, the Commission will be prohibited from carrying out its legal obligations, and CURE (and other parties) will be prevented from fully participating in Energy Commission proceedings.

\textsuperscript{63} 20 Cal. Code Regs., §1207(c).
Dated: June 1, 2010

Respectfully submitted,

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DECLARATION OF SERVICE

I, Bonnie Heeley, declare that on June 1, 2010, I served and filed copies of the attached CALIFORNIA UNIONS FOR RELIABLE ENERGY BRIEF ON ISSUES CONCERNING US BUREAU OF LAND MANAGEMENT CULTURAL RESOURCES DATA dated June 1, 2010. The original document, filed with the Docket Office, 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/solar_millennium_ridgecrest/Ridgecrest_POS.pdf.

http://www.energy.ca.gov/sitingcases/genesis_solar
http://www.energy.ca.gov/sitingcases/solartwo
http://www.energy.ca.gov/sitingcases/solar_millennium_blythe/index.html
http://www.energy.ca.gov/sitingcases/solar_millennium_palen/index.html

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 Office via email and U.S. Mail as addressed below.

I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, CA on June 1, 2010.

/s/
Bonnie Heeley
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Docket No. 09-AFC-8

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