

DATE JUN 09 2010

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COMMITTEE CONFERENCE

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of:)

Application for Certification)
for the Calico Solar (SES Solar) Docket Nos.
One) Project, Genesis Solar Energy) 08-AFC-13,
Project, Imperial Valley (SES) 09-AFC-8,
Solar Two) Project, Solar) 08-AFC-5,
Millennium Blythe Project,) 09-AFC-6,
Solar Millennium Palen Project,) 09-AFC-7,
and Solar Millennium Ridgecrest) 09-AFC-9, and
Project.) 10-CRD-1

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

CALIFORNIA ENERGY COMMISSION

HEARING ROOM A

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

WEDNESDAY, JUNE 9, 2010

2:30 p.m.

ORIGINAL

Reported by:
Peter Petty, CER**D-493
Contract No. 170-09-002

EHLERT BUSINESS GROUP

(916) 851-5976

COMMITTEE MEMBERS PRESENT

Karen Douglas, Chair and Presiding Member

Robert B. Weisenmiller, Commissioner and Associate Member

HEARING OFFICER, ADVISORS PRESENT

Paul Kramer, Hearing Officer

Galen Lemei, Advisor to Chair and Presiding Member Douglas

Eileen Allen, Advisor to Commissioner and Associate Member Weisenmiller

STAFF AND CONSULTANTS PRESENT

Richard Ratliff, Staff Counsel

Terry O'Brien, Deputy Division Chief, Siting

Jennifer Jennings, Public Advisor

WITNESS

Beth Bagwell, Aspen Environmental Group

APPLICANT

Scott Galati, Galati & Blek LLP
Solar Millennium Projects

Ella Foley Gannon, Bingham McCutchen, LLP
Tessera Solar Projects

ALSO PRESENT FOR APPLICANTS

Angela Leiba, URS Corp

Rebecca Apple, AECOM

Meg Russell, NEXtera Energy

Alice Harron, Solar Millennium

Tricia Bernhardt, Tetra Tech for NEXtera

INTERVENOR CURE

Rachel E. Koss, Attorney
Adams Broadwell Joseph and Cardozo

Loulana A. Miles, Attorney
Adams Broadwell Joseph and Cardozo (Via Telephone)

WITNESS

Dr. David Whitley

INTERVENOR CARE

Michael Boyd, President

WITNESS

Alfredo Acosta Figueroa, Center for Biological
Diversity

Lisa Belenky

GOVERNMENT

BLM

Vicky Campbell

Dr. Charlotte Hunter, State Historic Preservation
Office (SHPO)

WITNESS

Milford Wayne Donaldson

ALSO PRESENT

Mavis Scanlon, California Energy Markets

Candace Ehringer, Environmental Science Associates

Betty Kim, Public

Don Decker, Public

Iara West, Public

Penelope LePome, Public

I N D E X

	<u>Page</u>
Proceedings	1
Opening Remarks	1
Introductions	2
Open Issues Discussion	12
Other Matters Raised by the Parties	125
Opportunity for Public Comment	150
Closing Remarks	151
Adjournment	152
Reporter's Certificate	153

P R O C E E D I N G S

2:30 p.m.

ASSOCIATE MEMBER WEISENMILLER: Good
afternoon. I'm Commissioner Weisenmiller.

To my left is our Chief Hearing Advisor, Paul
Kramer.

And all the way to the left is Galen Lemei,
Chair Douglas's advisor.

And to my right is Eileen Allen.

Thank you very much for your participation in
today's hearing.

We have called this special hearing to deal
with the issue of the U.S. Bureau of Land Management's
Cultural Resources Data and to answer the question of
access to that data.

And I want to make it clear that the
Committee takes this very seriously. We feel that our
obligations are certainly to protect the cultural
resources and part of that protection is ensuring
proper treatment of that data and access to it.

And at the same time, given our general
obligation under the Warren Alquist Act, we realize we
have to balance the need to have an open and
transparent process with the need to also maintain our
cordial relationship with the Bureau of Land Management

1 and to act in a responsible fashion with our federal
2 partner in this process.

3 So, with that, I'll turn this back to the
4 Hearing Advisor.

5 HEARING OFFICER KRAMER: Thank you, Dick.
6 Did you introduce Eileen as well?

7 ASSOCIATE MEMBER WEISENMILLER: Yes, I did.

8 HEARING OFFICER KRAMER: Okay. First, we
9 will introduce the parties, then. And this is a unique
10 case, relatively unique in that we've created a
11 separate docket to consider this but, in reality, the
12 parties come to us from six of our cases that are --
13 appear to us to be most potentially affected by this
14 issue.

15 So, in effect, the Siting Committee is acting
16 as the Committees for each of those cases, for the
17 limited purpose of discussing the issue that
18 Commissioner Weisenmiller just summarized.

19 And those are the Calico Solar Project, 08-
20 AFC-13, Genesis Solar Project, 09-AFC-8, Imperial
21 Valley, 08-AFC-5, Solar Millennium Blythe, 09-AFC-6,
22 Solar Millennium Palen, 09-AFC-7, and Solar Millennium
23 Ridgecrest, 09-AFC-9.

24 So, with that, let's go to introductions of
25 those of us that are here in the room and then we will

1 go to the folks on the telephone.

2 On the telephone, if you can mute your phone,
3 if you have a noisy background, that would be
4 appreciated. Although, I do have the capability of
5 muting you remotely here. So, for instance, you were
6 to put us on hold and we got music, which sometimes
7 happen, then I could take care of that.

8 But, please, still try to keep your noise
9 levels down to the lowest levels possible.

10 In the room, from staff, would you introduce
11 yourselves?

12 MR. RATLIFF: Dick Ratliff, Counsel for
13 Staff. With me is Terry O'Brien, the Deputy Division
14 Chief for Siting.

15 HEARING OFFICER KRAMER: And for CURE?

16 MS. KOSS: Good afternoon, Rachel Koss for
17 CURE. Also, on the telephone is Loulena Miles, counsel
18 for CURE in the Calico and Imperial Valley proceedings.

19 HEARING OFFICER KRAMER: Thank you. And you
20 have a witness, Mr. Whitley, he'll be on the phone as
21 well; right?

22 MS. KOSS: Correct.

23 HEARING OFFICER KRAMER: Mr. Whitley, are you
24 there on the telephone?

25 DR. WHITLEY: Yes, I am.

1 HEARING OFFICER KRAMER: Okay, thank you.

2 Mr. Galati, you're here representing which
3 projects?

4 MR. GALATI: I'm representing NEXtera and
5 Solar Millenium on the Genesis Project, Blythe, Palen
6 and Ridgecrest.

7 HEARING OFFICER KRAMER: Okay, and next to
8 you?

9 MS. FOLEY GANNON: Ella Foley Gannon, on
10 behalf of Tessera Solar North America, with the Calico
11 Solar Projects and Imperial Valley Solar Projects.

12 HEARING OFFICER KRAMER: Okay. Mr. Boyd, you
13 were on the telephone, I heard?

14 MR. BOYD: Yeah, Mike Boyd, President of
15 CARE, Californians for Renewable Energy.

16 HEARING OFFICER KRAMER: Thank you.

17 MR. BOYD: And we also have Alfredo Figueroa
18 here, too, he'll be providing testimony along with me.

19 HEARING OFFICER KRAMER: From BLM, do we have
20 representatives?

21 MS. CAMPBELL: Yes, we do, Vicky Campbell.

22 HEARING OFFICER KRAMER: Could you come to
23 the microphone, just so you can be recorded and also
24 heard on the telephone?

25 MS. CAMPBELL: Vicky Campbell, here for BLM.

1 HEARING OFFICER KRAMER: If you don't mind, I
2 think you're going to be participating enough that we
3 could certainly give you that empty seat there.

4 And those people are, in essence, parties,
5 BLM because, in one way, they've gotten us here by
6 filing objections to the release of information in the
7 Energy Commission process.

8 And then we have some other agencies who are
9 interested in, or at least we're interested in hearing
10 from them. One is the State Historic Preservation
11 Office. Mr. Donaldson, are you here? What's Wayne
12 Donaldson, for the record, he's in the audience.

13 And our Public Advisor, Jennifer Jennings, is
14 sitting back there, she just raised her hand.

15 And if any members of the public have
16 questions about how to participate in our proceedings,
17 she is the person to see, to give you advice about
18 that.

19 Not about how to conduct your case so much,
20 but about how to participate in our process.

21 I think we may also have a representative
22 from the -- is it the Quechan Tribe? Bridget Nash-
23 Chrabascz. Are you on the telephone?

24 Okay, I know she sent me an e-mail and was
25 going to be calling in, and she had some time

1 constraints, so perhaps she'll call in, in a few
2 minutes. We'll check back with her.

3 Do we have anybody else who considers
4 themselves a party and wants to introduce themselves at
5 this time?

6 MS. BELENKY: On the phone?

7 HEARING OFFICER KRAMER: Then who do we have
8 on the telephone?

9 MS. BELENKY: This is Lisa Belenky, from the
10 Center for Biological Diversity, and we're intervenors
11 in two of the matters, the Ridgecrest and the Genesis
12 matter.

13 HEARING OFFICER KRAMER: Okay. And as I
14 recall, your last name is spelled B-l-e-n-k --

15 MS. BELENKY: No.

16 HEARING OFFICER KRAMER: No, sorry, two Ls,
17 Bell --

18 MS. BELENKY: No. B-e-l-e-n-k-y.

19 HEARING OFFICER KRAMER: Oh, okay, I was
20 getting there.

21 MS. BELENKY: He was getting there. Thank
22 you.

23 HEARING OFFICER KRAMER: Anyone else on the
24 telephone?

25 MS. SCANLON: Mavis Scanlon, I'm with the

1 California Energy Markets, just following the
2 proceeding.

3 HEARING OFFICER KRAMER: And your first name
4 was?

5 MS. SCANLON: Mavis, M-a-v-i-s.

6 HEARING OFFICER KRAMER: Scanlon, okay.

7 MS. SCANLON: Right, thanks.

8 MS. LEIBA: And this is Angela Leiba, I'm
9 with URS Corporation, with the Imperial Valley Solar
10 and Calico Solar.

11 HEARING OFFICER KRAMER: Ma'am, your voice is
12 really low, can you speak up and repeat yourself?

13 MS. LEIBA: Sure. This Angela Leiba, with
14 URS Corporation.

15 HEARING OFFICER KRAMER: Okay. You're still
16 really low, Angela, but I got it that time.

17 MS. LEIBA: Okay.

18 HEARING OFFICER KRAMER: L-e-i-b-a, correct?

19 MS. LEIBA: Right.

20 HEARING OFFICER KRAMER: Okay. Anyone else
21 on the telephone?

22 MS. BAGWELL: Yeah, this is Beth Bagwell, I
23 work for Aspen and I've been the cultural resources
24 person for the Energy Commission for Genesis and, to
25 some degree, on some of the other nearby projects.

1 HEARING OFFICER KRAMER: Okay, I caught your
2 last name as Bagwell, but not your first.

3 MS. BAGWELL: Bagwell, B-a-g-w-e-l-l, and
4 Beth.

5 HEARING OFFICER KRAMER: Bette, B-e-t-t-e?

6 MS. BAGWELL: Beth Bagwell, B-e-t-h.

7 HEARING OFFICER KRAMER: Oh, Beth. Okay,
8 thank you.

9 MS. APPLE: Rebecca Apple, with AECOM,
10 cultural resource studies for the Solar Millenium
11 Project and Imperial Valley Solar.

12 HEARING OFFICER KRAMER: And that was
13 Rebecca. And was that Apple a singular or a plural?

14 MS. APPLE: Singular.

15 HEARING OFFICER KRAMER: Anyone else?

16 MS. EHRINGER: Candace Ehringer, with
17 Environmental Science Associates.

18 HEARING OFFICER KRAMER: Was that Candace?

19 MS. EHRINGER: Candace.

20 HEARING OFFICER KRAMER: And could you spell
21 your last name?

22 MS. EHRINGER: E-h-r-i-n-g-e-r.

23 HEARING OFFICER KRAMER: G-e-r?

24 MS. EHRINGER: Yes.

25 HEARING OFFICER KRAMER: Okay. You were

1 breaking up just a hair, but I got it.

2 Anyone else on the telephone?

3 MS. RUSSELL: This is Meg Russell, I'm with
4 NEXtera Energy, the Genesis Project.

5 HEARING OFFICER KRAMER: Okay. Please spell
6 your name again, I didn't catch most of it?

7 MS. RUSSELL: Sure. It's Meg, M-e-g, like
8 Megan.

9 HEARING OFFICER KRAMER: Okay.

10 MS. RUSSELL: Russell, R-u-s-s-e-l-l.

11 HEARING OFFICER KRAMER: With NEXtera, okay.

12 MS. RUSSELL: Yes, thank you.

13 HEARING OFFICER KRAMER: Anyone else on the
14 phone?

15 MS. HARRON: Yes, Alice Harron, H-a-r-r-o-n,
16 of Solar Millenium.

17 HEARING OFFICER KRAMER: And it was Alice?

18 MS. HARRON: Yes.

19 HEARING OFFICER KRAMER: Okay.

20 MS. BERNHARDT: Tricia Bernhardt,
21 representing NEXtera, I'm with Tetra Tech. Bernhardt
22 is spelled B-e-r-n-h-a-r-d-t.

23 HEARING OFFICER KRAMER: And was it Patricia
24 or Tricia?

25 MS. BERNHARDT: Just Tricia.

1 HEARING OFFICER KRAMER: Just Tricia, thank
2 you.

3 MS. BERNHARDT: Thank you.

4 HEARING OFFICER KRAMER: More?

5 MR. WEST: Yes, Ira West.

6 HEARING OFFICER KRAMER: Okay. Anyone else?

7 MS. KIM: Betty Kim.

8 HEARING OFFICER KRAMER: Okay, Betty, your
9 last name?

10 MS. KIM: K-i-m.

11 HEARING OFFICER KRAMER: Okay. Any
12 affiliation we should note?

13 MS. KIM: No, actually, I just received this
14 notice regarding this hearing, and asking if I would
15 like to join the hearing, and I just wanted to listen
16 in on what's going on.

17 HEARING OFFICER KRAMER: Okay. Well,
18 welcome.

19 MS. KIM: Thank you.

20 HEARING OFFICER KRAMER: Anyone else?

21 MR. DECKER: This is Don Decker.

22 HEARING OFFICER KRAMER: And did you say John
23 or Tom?

24 MR. DECKER: It's Don, D-o-n.

25 HEARING OFFICER KRAMER: Don, got it.

1 MR. DECKER: D-e-c-k-e-r.

2 HEARING OFFICER KRAMER: Thank you.

3 MS. LE POME: Penelope LePome, just a
4 citizen.

5 HEARING OFFICER KRAMER: If you'd like me to
6 spell your name correctly in the transcript, you'll
7 have to do it?

8 MS. LE POME: All right. L-e-P-o-m-e.

9 HEARING OFFICER KRAMER: Thank you. Okay,
10 did I miss anyone? Anyone else?

11 DR. HUNTER: Charlotte Hunter, I'm with the
12 BLM, but I'm currently in Santa Fe.

13 HEARING OFFICER KRAMER: Okay. Okay, well,
14 do we have others?

15 MR. FIGUEROA: Yes, this is Alfredo Acosta
16 Figueroa. I'm the Tribal State site monitor from
17 Blythe, California.

18 HEARING OFFICER KRAMER: That's Alfredo
19 Figueroa?

20 MR. FIGUEROA: Yes.

21 HEARING OFFICER KRAMER: Okay, yes, we got
22 you.

23 MR. FIGUEROA: Okay.

24 HEARING OFFICER KRAMER: Mr. Boyd introduced
25 you already.

1 MR. FIGUEROA: Okay, that's fine, I just
2 wanted to make sure.

3 HEARING OFFICER KRAMER: Yeah, okay. Well,
4 it sounds like we have a lot of visitors today.

5 Bridgit Nash-Chrabascz, did you come online,
6 yet?

7 HEARING OFFICER KRAMER: All right. Well, we
8 can catch some other names later, as people speak.

9 I'll note that our Chairman, Commissioner
10 Douglas, has joined us, so we have a complete Siting
11 Committee here to hear all the arguments and eventually
12 make a decision.

13 Did you want to say anything?

14 PRESIDING MEMBER DOUGLAS: I'd just like to
15 briefly welcome everybody here, the participants in
16 this proceeding and those who are just here to observe
17 or just here to listen in.

18 We hope to take in sufficient information,
19 both evidence, argument, policy argument in this
20 hearing to be able to make an expeditious decision,
21 because the Committee believes it's important for us to
22 resolve these issues quickly, going forward.

23 HEARING OFFICER KRAMER: Okay. Well, with
24 that, I passed around an exhibit list, which was
25 derived from the exhibits that were submitted from e-

1 mail -- via e-mail last week, by the deadline we had
2 set.

3 Is any part intending to object to the
4 admission of any of these documents into evidence?

5 That would include the folks on the
6 telephone.

7 MR. BOYD: CARE has no objection.

8 HEARING OFFICER KRAMER: Did you say you do
9 have an objection?

10 MR. BOYD: No, I said CARE has no objection
11 to it being submitted.

12 HEARING OFFICER KRAMER: CURE, you're the
13 last one.

14 MS. KOSS: CURE has no objection.

15 HEARING OFFICER KRAMER: Okay. Well, with
16 that, then, we will enter the 15 exhibits by, in
17 effect, the stipulation of the parties, and we can move
18 on.

19 And also, perhaps, to focus and eliminate
20 some discussion, let me ask if any party believes that
21 the cultural resources data that we're talking about in
22 any of the six siting cases should not be given
23 confidential status and protected from release to the
24 general public.

25 If nobody is disputing that point, then we --

1 you know, we won't need to spend a lot of time talking
2 about the details of the data, except as it informs our
3 discussion of how or if it should be released.

4 So, do I hear any objection to that core
5 concept, that it should be confidential and protected
6 from release to the general public?

7 Seeing and hearing none -- let me also note,
8 then, by way of background, that so far we have data
9 that was released or we have requests filed for release
10 of data in five of the cases, and those are Imperial
11 Valley, where the data was released to CURE.

12 Genesis, which the Committee is treating as
13 having the release approved by the Chief Counsel's
14 Office, but then under appeal by the BLM, the release
15 that is, and that's the same for Imperial Valley, that
16 the BLM has requested that the Commission reconsider
17 the release of that data.

18 And then we have pending requests from CURE,
19 that have not been decided in any sort of preliminary
20 or final way in the cases of Calico, Blythe, and Palen.

21 Am I missing any requests on that list, that
22 people are aware of?

23 DR. HUNTER: Ridgecrest?

24 HEARING OFFICER KRAMER: Oh, okay, and
25 Ridgecrest from whom; CURE?

1 Okay, so, ma'am, please give us your name and
2 do you know who made the request in Ridgecrest?

3 DR. HUNTER: This is Charlotte Hunter. In
4 the original list that you read out, you had Calico,
5 Genesis, Imperial, Blythe, Palen and Ridgecrest.

6 HEARING OFFICER KRAMER: Oh, but are you
7 aware of a specific request for the data in Ridgecrest,
8 or just that that --

9 DR. HUNTER: No one.

10 HEARING OFFICER KRAMER: No?

11 DR. HUNTER: I was just going by your list.

12 HEARING OFFICER KRAMER: Oh, okay. No, it is
13 the -- could be the case that one of the cases I named
14 as one of the six does not have a data request in it,
15 yet, but because we were expecting one, we wanted to
16 wrap all those parties into this discussion.

17 DR. HUNTER: Okay.

18 HEARING OFFICER KRAMER: Because the point of
19 this consolidated proceeding is so that we don't have
20 to have this discussion six times -- well, five times
21 and maybe six, and maybe more if several parties make
22 requests.

23 So, it sounds like my list was correct as of
24 today and that the five cases had requests made. And
25 Ridgecrest, I suppose, is the one of the six that has

1 not yet had one.

2 MR. GALATI: Yes, I can confirm, as counsel
3 for Ridgecrest, I have not been served or seen a
4 petition for inspection, a copying, or a data request
5 relating to the confidential cultural material.

6 HEARING OFFICER KRAMER: Okay.

7 MS. KOSS: Hearing Officer Kramer, I hate to
8 interrupt and rush things, we are quickly running out
9 of time for Dr. Whitley.

10 HEARING OFFICER KRAMER: Oh, you're correct.

11 MS. KOSS: And if the Commission has any
12 questions for him, perhaps we could do that now and
13 then return.

14 HEARING OFFICER KRAMER: Yes, thank you for
15 the reminder.

16 Mr. Galati, you were the one party that
17 indicated to me that you wanted to ask some questions
18 of CURE's witness, Mr. Whitley.

19 MR. GALATI: Yeah, would now be appropriate
20 or is there direct testimony?

21 HEARING OFFICER KRAMER: I don't believe
22 there was any direct testimony intended, was there?

23 MS. KOSS: The order said no direct
24 testimony. I would be happy to introduce the witness.
25 We literally have one minute.

1 May I ask Dr. Whitley if he's going to be
2 available later, perhaps he can call back in after his
3 prior commitment.

4 Dr. Whitley, do you know how long your prior
5 commitment will last?

6 DR. WHITLEY: Well, it's scheduled from 3:00
7 to 4:00, but so I can certainly call in after 4:00. It
8 may not take that long, I'm not sure how long you will
9 be here in session.

10 I'd be glad to call back as soon as I'm done
11 with that conference call.

12 MS. KOSS: Is that acceptable to the
13 Commission?

14 HEARING OFFICER KRAMER: We're guessing we'll
15 probably be here still at 4:00 and maybe sooner, if he
16 --

17 MR. GALATI: If I'm the only one that has any
18 questions for this witness, I can probably pare it down
19 to a minute, if he has one minute.

20 DR. WHITLEY: Yeah, I'm delaying on moving to
21 the next one so I'm not signing off right at this
22 instant.

23 HEARING OFFICER KRAMER: Oh, okay. So, how
24 much time do you have, five minutes?

25 DR. WHITLEY: Five to ten minutes.

1 HEARING OFFICER KRAMER: Okay, could we have
2 a one-minute summary of his testimony and then Mr.
3 Galati can ask his questions?

4 And we need to have you sworn in. So, if you
5 would stand and raise your right hand, our court
6 reporter will swear you in. Or sit and raise your
7 right hand.

8 THE REPORTER: This is the court reporter, I
9 hope you can hear me. I'm a notary for the State of
10 California and I'd just ask you to raise your right
11 hand?

12 Whereupon,

13 DR. DAVID WHITLEY
14 was called as a witness herein and, having been first
15 duly sworn, was examined and testified as follows:

16 THE REPORTER: Would you please state and
17 spell your name for the record?

18 DR. WHITLEY: Dr. David Whitley, W-h-i-t-l-e-
19 y.

20 THE REPORTER: Thank you, sir.

21 HEARING OFFICER KRAMER: Please, go ahead.

22 MS. KOSS: Dr. Whitley, whose testimony are
23 you sponsoring today?

24 DR. WHITLEY: My declaration, with the
25 attached CHRIS Access agreement.

1 MS. KOSS: And do you have any changes to
2 your sworn testimony?

3 DR. WHITLEY: Yes, I would like to add the
4 following statement. Not only has the BLM shared its
5 site locational information and technical reports with
6 the CHRIS System for decades, but it has already shared
7 at least the site records and maps from this project
8 with the Riverside Information Center, which is the
9 local clearinghouse for archeological information
10 within the CHRIS System.

11 This was necessary, in fact, to attain the
12 site trinomial designations that are used to label and
13 discuss the site in the draft EIS/draft EIR.

14 MS. KOSS: Dr. Whitley, for clarification are
15 you referring specifically to the Genesis Project?

16 DR. WHITLEY: Correct, I am.

17 MS. KOSS: Thank you. Are the opinions in
18 your testimony your own?

19 DR. WHITLEY: Yes, they are.

20 MS. KOSS: Could you please summarize your
21 qualifications, education and professional experience?

22 DR. WHITLEY: I received --

23 HEARING OFFICER KRAMER: We might be able to
24 skip that step. Does anybody wish to dispute his
25 qualifications to testify?

1 MR. GALATI: No.

2 HEARING OFFICER KRAMER: Seeing or hearing
3 none, go ahead.

4 MS. KOSS: Okay, Dr. Whitley, please provide
5 a summary of your direct testimony?

6 DR. WHITLEY: The purpose of the CURE's
7 request for these documents is to facilitate peer
8 review by professional archaeologists. Professional
9 peer review is a cornerstone of science and it is
10 necessary to ensure that CEQA's objectives, that
11 significant impacts to the environment be fully
12 disclosed, adequately analyzed and properly mitigated.

13 BLM's prohibition of the release of the
14 cultural resource documents is unprecedented and
15 extreme and it violates long-standing professional
16 guidelines and practice.

17 Distribution of archeological technical
18 reports to professionals in the field is common
19 practice, in fact including by the BLM. And while
20 regulations prevent the dissemination of sensitive
21 archeological information to the general public, the
22 California Office of Historic Preservation, CHRIS
23 System, California Historic Resources Information
24 System provides access to and use of this information
25 by professional archaeologists and has done so for

1 almost a half a century.

2 The BLM has shared it's sensitive site
3 location information with the CHRIS System for decades
4 and it has already, in fact, done so in the current
5 circumstance.

6 The point, then, is that the BLM's current
7 stance represents a major change in BLM policy and
8 practice.

9 MS. KOSS: Thank you, Dr. Whitley. The
10 witness is available for cross-examination.

11 HEARING OFFICER KRAMER: Mr. Galati?

12 MR. GALATI: Yes. Dr. Whitley, hello. Are
13 you a lawyer?

14 DR. WHITLEY: No, I am not. I am a
15 practicing archeologist and have been so for over 30
16 years.

17 MR. GALATI: Okay. With regard to your
18 assertion on the legal requirements of CEQA, would you
19 defer to the legal opinion of a CEQA lawyer over your
20 own?

21 DR. WHITLEY: In terms of a comparison
22 between the CEQA process and the NEPA process?

23 MR. GALATI: No, in terms of what the legal
24 requirements are for disclosure for CEQA?

25 DR. WHITLEY: Well, I mean, I know what the

1 disclosure requirements are. I'm not sure that an
2 attorney would necessarily understand them. It would
3 depend on what the attorney's opinion happened to be.
4 Having worked under CEQA applications for 30 years and
5 seen how it's practiced, I would want to -- you know, I
6 wouldn't want to give a blanket deferral to a CEQA
7 attorney on that point.

8 In fact, I'm consulted by attorneys
9 frequently with respect to cultural resource issues and
10 controversies because implementation of CEQA varies
11 and, you know, is not necessarily clearly defined in
12 the statutes and regulations.

13 MR. GALATI: Well, maybe in another
14 proceeding I would have enough time to dissect that,
15 but I think I'll suffice it to say that you will not
16 defer to a legal attorney.

17 DR. WHITLEY: It depends on the attorney's
18 opinion and statement.

19 MR. GALATI: Okay, I cannot set up this
20 hypothetical appropriately in the amount of time given,
21 so I will move to have you reviewed the Genesis staff
22 assessment draft EIS?

23 DR. WHITLEY: This is the California Energy
24 Commission's staff assessment?

25 MR. GALATI: Yes, for the Genesis Project?

1 DR. WHITLEY: Yes, I have.

2 MR. GALATI: And have you reviewed the staff
3 report that was labeled Status Report Number 3?

4 DR. WHITLEY: I have reviewed a document
5 labeled C.3, dated March 2010. I'm not aware of a
6 status report beyond that.

7 MR. GALATI: Okay. Just to possibly refresh
8 your memory, it was a status report that was filed,
9 that had proposed mitigation or condition approach in
10 the Genesis Project presented at a status report --
11 excuse me, a status conference in late May?

12 DR. WHITLEY: That, I have not seen.

13 MR. GALATI: Okay. With respect to the
14 Genesis cultural resource material in the staff
15 assessment draft EIS, would you describe the -- as a
16 robust characterization of the cultural resources found
17 on the site?

18 DR. WHITLEY: Are you -- you're talking about
19 the draft EIS, let me make sure I get this correct?

20 MR. GALATI: That's correct.

21 DR. WHITLEY: Not the California Energy
22 Commission staff testimony?

23 MR. GALATI: In the --

24 DR. WHITLEY: That was dated March 2010?

25 MR. GALATI: The specific document is called

1 "The Staff Assessment and Environmental Impact
2 Statement for the Genesis Solar Energy Project," and it
3 is docked on March 26th, of 2010.

4 DR. WHITLEY: Yes.

5 MR. GALATI: Have you reviewed that document?

6 DR. WHITLEY: I believe I have. And if
7 you're asking me if I think that is a robust document,
8 it depends on whether we're talking about CEQA
9 compliance or National Historic Preservation Act, NEPA,
10 compliance. Because the point is that the two differ
11 in terms of implementation procedures and requirements.

12 MR. GALATI: Is the document sufficient for
13 you to determine whether the resources may be
14 historically significant and worthy of protection?

15 DR. WHITLEY: No, in fact it's not. And if
16 you look to the document that I've referred to, C.3,
17 page 122, you'll see that the staff conclusion is that,
18 in fact, the information available relative to the site
19 is insufficient on a variety of levels.

20 I can quote you that, if you'd be interested
21 in hearing it.

22 MR. GALATI: What page number?

23 DR. WHITLEY: It's 122. Staff had
24 insufficient information to make a determination on the
25 NRHD or CRHR eligibility of these seven resources,

1 that's seven out of eight.

2 MR. GALATI: That's correct. And did you
3 read -- or you didn't read the staff report from, I
4 believe, March -- or May 27th. But would it surprise
5 you that staff's approach is to presume that every
6 resource identified in this document would be deemed to
7 be potentially historically significant for CEQA
8 purposes?

9 DR. WHITLEY: No. No, I'm aware of that and
10 that is exactly the problem. The problem is that in
11 CEQA implementation, in every project I've been
12 involved in, under any jurisdiction, for the last two
13 to three decades, you can only assume significance if
14 you're going to preserve the resource.

15 The problem here is the concept of
16 significance has a variety of levels of value. A
17 small, prehistoric campsite may well be prehistorically
18 significant, but it has a different level of
19 significance than a very large village site that has a
20 cemetery of 300 or 400 people.

21 So, the issue here is assuming it's
22 significant and saying, well, we'll sort it out at the
23 back end of the process, results in projects like Playa
24 Vista and Playa del Rey, an Army Corps project, where
25 following NEPA and NHPA, they knew there was an

1 archeological site there, they didn't do adequate work
2 to fully assess it under CEQA and the result is that
3 they spent about \$20 million and excavated well over
4 300 historical Native American burials in order to
5 create an artificial wetland.

6 So, I'm entirely aware of this assumption of
7 significance. The problem is, under CEQA, that's not
8 good enough.

9 MR. GALATI: And again, I would make a motion
10 to strike the last sentence about what is good enough
11 under CEQA. That is a legal determination and he is
12 not qualified to testify to that.

13 HEARING OFFICER KRAMER: Well, we understand
14 he's just giving us legal advice, so we'll leave it in
15 but take it for what it's worth.

16 DR. WHITLEY: Yeah. No, I'm talking
17 archeological practicality and implementation of CEQA,
18 in fact. I'm not pretending to be an attorney. I'm
19 pretending to provide advice to keep projects out of
20 trouble, frankly.

21 MR. GALATI: So, you believe that assuming
22 that all of the resources are significant and heading
23 towards a mitigation program is not conservative
24 treatment?

25 DR. WHITLEY: No. It's a one-size-fits-all

1 approach and it assumes -- again, a small, prehistoric
2 campsite that may only have a hundred artifacts has the
3 same significance as a major village that may have a
4 cemetery and religious values to Native Americans.

5 Now, let me point out that in fact -- and
6 this is a flaw under the National Historic Preservation
7 Act process, that when significance is determined,
8 which is determined by reference to eligibility to the
9 National Register of Historic places, that means that,
10 you know, if such a determination is made then there's
11 a potential for an adverse affect.

12 But when you actually get to a National
13 Register of Historic Places listing, they recognize
14 that cultural resources have different levels of
15 significance, which range from local, to statewide, to
16 national.

17 And if you have a cultural resource with a
18 national level of significance, it's a very different
19 game than if you have one that's just local.

20 CEQA recognizes the need to identify each
21 potential adverse affect and to provide mitigation
22 measures that are appropriate and adequate for that
23 particular impact. That's the difference here.

24 MR. GALATI: But isn't it possible to group
25 types of sites that are similar and treat them with

1 similar mitigation?

2 DR. WHITLEY: If you know that, in fact, if
3 you have positively affirmed that they are similar
4 through phase two test excavation and determination of
5 significance, as it's labeled under CEQA or,
6 alternatively, under the NHPA process, if you evaluated
7 the sites, which is the same thing, test excavating
8 them and positively affirms that they are similar.

9 The point here is if we knew what was a site
10 represented by just walking over and looking at it, we
11 wouldn't have to test excavate, we wouldn't have to
12 excavate things. We don't know. And that's why
13 archaeologists dig things, quite simply.

14 MR. GALATI: But you don't dig everything;
15 correct?

16 DR. WHITLEY: You dig a representative
17 sample, that's correct.

18 MR. GALATI: That's right, so it is possible
19 to exclude from further testing and digging, so to
20 speak, from information that you've collected from the
21 surface; is that correct?

22 DR. WHITLEY: We're talking about digging
23 versus surface information. I'm not clear on the point
24 or your question, I guess.

25 MR. GALATI: The question is, is it or is it

1 not possible, based on surface information and
2 literature research, to exclude from further digging
3 requirements cultural resources that may have been
4 found on a site?

5 DR. WHITLEY: No.

6 MR. GALATI: I don't have any further
7 questions.

8 DR. WHITLEY: No, absolutely not. I mean, in
9 some cases you can make a guesstimate and you may or
10 may not be right. In other cases, you can really mess
11 up by doing exactly that. I mean, you can't tell
12 whether there's a subsurface archeological deposit.
13 Certainly, you couldn't prove it in a court of law by
14 saying, well, I looked at it and it didn't look like
15 there was one there to me.

16 MR. GALATI: Okay. So, if I could summarize,
17 and if I summarize this incorrectly, please correct me.

18 Is your contention that you need the information or is
19 your contention that the projects in front of the
20 Energy Commission, such as Genesis, must undertake
21 phase two testing before the Energy Commission can
22 conclude its CEQA analysis?

23 DR. WHITLEY: Well, we're talking -- I think
24 the purpose of this testimony and inquiry hearing is to
25 determine whether the information contained in the

1 technical reports should be released to other
2 professional archaeologists for peer review.

3 And my first reaction is before we even get
4 to that point, to the point of discussing whether test
5 excavations are necessary for CEQA review, first we've
6 got to be able to look at the technical reports and
7 make an assessment of them.

8 At this point, based on California Energy
9 Commission's staff assessment of the records in the
10 technical report, there's no indication to me that
11 those reports, themselves, are adequate, but I've got
12 to look at them to see.

13 MR. GALATI: So, you cannot tell from the
14 staff assessment draft EIS which areas you would
15 recommend for additional testing?

16 DR. WHITLEY: That's a very different
17 question. At this point, I -- well, you know, to put
18 it simply, no, without the site records in front of me,
19 without those records and the opportunity to evaluate
20 what was seen on each cultural resource in detail, I
21 couldn't make that -- I couldn't begin to make that
22 assessment.

23 MR. GALATI: I have no further questions.

24 HEARING OFFICER KRAMER: Does any other party
25 have questions?

1 MR. BOYD: This is Mr. Boyd, I have a
2 question.

3 MR. RATLIFF: Mr. Kramer, I do.

4 HEARING OFFICER KRAMER: Okay. Mr. Boyd,
5 let's let Mr. Ratliff go first.

6 MR. RATLIFF: These aren't intended so much
7 as cross-examination but, rather, a request that the
8 witness share his expertise with us. In his changes to
9 his testimony he stated that this is a great departure
10 from BLM practice in terms of sharing information and I
11 would like, if he would, to explain to us what the
12 normal procedure for the sharing of information is when
13 BLM has this kind of information?

14 DR. WHITLEY: Yes. Well, normally, if you
15 are a professional archeologist that meet the Secretary
16 of the Interior's standards and guidelines, you are
17 allowed full access to all archeological information.

18 The CHRIS System, which is our state site
19 inventory system, is set up and established precisely
20 so that archaeologists can share information to conduct
21 projects that are adequate, regardless of whether
22 you're talking about CEQA or NEPA, archaeologists have
23 to be able to access that data.

24 For example, it's important to see what an
25 archeologist might have found on an adjacent property,

1 if you're doing a study, so it would give you some
2 sense of what to expect in your particular case.

3 Quite frankly, this is entirely
4 unprecedented. I've not only never seen this before,
5 it's something that I can't imagine an agency
6 promoting. It's entirely contrary to everything I've
7 seen in my entire career.

8 So, it's a truly remarkable move and I can't
9 understand why. Well, for example, I mean one of the
10 protections of archeological information from
11 dissemination to the general public is specified in the
12 Archeological Resources Protection Act.

13 When I get an -- or ARPA, as it's called.
14 When I get an ARPA permit, I have to agree to keep that
15 information confidential from the general public.

16 Well, I, in fact, have an ARPA permit. I've
17 signed a document stating that I -- and I've signed
18 one, also, with CHRIS. So, normally, these things are
19 not debated, access to them is allowed.

20 And, of course, peer review of any document
21 that is to be used for a decision making process, in
22 this case these technical reports is standard operating
23 procedure.

24 MR. RATLIFF: So, if I understand you, then,
25 there is something that BLM has said that makes you

1 think that they are departing from that process. Can
2 you tell us what that is?

3 DR. WHITLEY: Well, their request that you
4 return the technical reports and their refusal to
5 release the technical report to professional
6 archaeologists that have signed confidentiality
7 agreements with the CHRIS system, and who hold ARPA
8 permits, BLM ARPA permits, which guarantee that we
9 won't disseminate information to the general public.

10 MR. RATLIFF: What makes you say that they
11 have denied you access to that information?

12 DR. WHITLEY: CURE asked for copies of the
13 technical -- I mean, that's the point of this hearing.

14 And the BLM asked that the reports, in fact, not be
15 distributed, and this is a hearing to determine if
16 that's --

17 MR. RATLIFF: Well, this is a hearing to
18 determine, I believe, how the Energy Commission will
19 deal with that data.

20 DR. WHITLEY: Correct.

21 MR. RATLIFF: But I'm not certain the
22 question of how BLM is going to disseminate the data
23 has been answered. Am I incorrect about that?

24 DR. WHITLEY: I'm not following you with that
25 question.

1 MR. RATLIFF: Well, have you requested
2 documents from BLM, that they have denied you, with
3 regard to these archeological ruins?

4 DR. WHITLEY: No, I have not. The requests
5 were made by CURE.

6 MR. RATLIFF: Okay. And does the federal
7 government have a process through which they
8 disseminate that material to cooperating parties, which
9 CURE is -- CURE does have that status.

10 DR. WHITLEY: Well, normally, it is provided
11 for peer review.

12 MR. RATLIFF: I mean, and at some point is it
13 possible that BLM is going to give you that data, when
14 it's been put in the form that BLM would normally do?
15 I mean, what is it that's so apparent that there's a
16 departure from the normal process here?

17 DR. WHITLEY: Well, normally, I would have
18 had these technical reports on my desk shortly after
19 asking for them.

20 MR. RATLIFF: Now, is this the -- when you
21 say "these technical reports," do you mean the reports
22 that are done in the field by a consultant --

23 DR. WHITLEY: Correct.

24 MR. RATLIFF: -- or do you mean the reports
25 that are actually put together by BLM, subsequently?

1 DR. WHITLEY: Correct, these are the
2 technical archeological studies prepared by
3 consultants.

4 MR. RATLIFF: So, you would normally have
5 access to all consultant data that is developed in the
6 course of the initial cataloguing of the artifacts that
7 are found on a site?

8 DR. WHITLEY: Well, yes. I mean, he
9 consultants are required to prepare a technical report
10 which, in the case of archeological resources,
11 constitutes a confidential component of an EIS or EIR.
12 And that is required to prepare the EIS/EIR.

13 So, it is those reports that I'm talking
14 about, inventory reports, survey reports, and if there
15 are any test excavation reports.

16 MR. RATLIFF: Well, this is interesting to me
17 and I'm not disputing your authority on this, but BLM
18 says that it is not the case, that they would not give
19 you the raw field reports that were compiled by
20 consultants, that they would give you a more refined
21 version that they have finished, themselves, and that
22 would be provided, presumably, after it has been
23 produced.

24 Are you saying that is incorrect and you
25 would normally have basically unfettered access that's

1 produced by anyone with regard to the artifacts on the
2 -- that were collected on BLM land?

3 DR. WHITLEY: Yeah, I think there's a point
4 of confusion here between raw data and technical
5 reports.

6 The BLM does not prepare the technical
7 reports, the consultants do. We are required to
8 prepare a report that is submitted and reviewed by the
9 BLM and is used as a confidential, but still supporting
10 document of a draft EIS/draft EIR.

11 That report includes the basic data, which
12 are site records, site location maps, analyses of
13 those, et cetera. And it's upon those reports that
14 decisions are made for the draft EIS/EIR.

15 So, it's those reports that normally I would
16 -- I would expect to be distributed.

17 MR. RATLIFF: Now, just to be clear, are you
18 talking about reports that have been put together by
19 consultants or are you talking about reports that have
20 been put together by BLM based on those consultant
21 reports?

22 DR. WHITLEY: The consultants' reports.

23 MR. RATLIFF: So, you're saying then that you
24 have access to all the information?

25 DR. WHITLEY: That is correct.

1 MR. RATLIFF: And that's under your ARPA
2 permit?

3 DR. WHITLEY: The ARPA permit constrains me
4 from providing confidential site location data to the
5 general public. The ARPA permit doesn't -- frankly, it
6 doesn't address this issue because it's so
7 extraordinary.

8 But as soon as those reports are filed with
9 the CHRIS System, then I will have full access to them.
10 It appears that may be after the comment and review
11 process has occurred for the draft EIS/EIR.

12 MR. RATLIFF: Right. And is that then --
13 that final point that you just made, is that then the
14 objectionable part of the timing of when you would have
15 access to the information?

16 DR. WHITLEY: Absolutely, that is the crux of
17 the matter. If there is to be public comment and input
18 on any kind of environmental review process, then it
19 needs to occur before the record of decision or the EIR
20 certification is made.

21 Absent that ability, then I think, you know,
22 environmental compliance has not been adequately
23 achieved.

24 MR. RATLIFF: Now, one further question about
25 the CHRIS System, any person who has the qualifications

1 that you have, has access to that system, is that what
2 you told us?

3 DR. WHITLEY: Correct. But following the
4 signing an access and confidentiality agreements.

5 HEARING OFFICER KRAMER: And access to that
6 system would give you access to the precise locational
7 data of artifacts?

8 DR. WHITLEY: Absolutely, that is correct.

9 MR. RATLIFF: Okay. Thank you.

10 HEARING OFFICER KRAMER: Mr. Boyd?

11 MR. BOYD: Okay, I have a question about the
12 tribal involvement in the process. And my question is
13 you brought up NEPA, isn't there a NEPA requirement,
14 and I'm asking you based on your experience, not on
15 your legal knowledge, in your experience is there any
16 duty, as part of the NEPA analysis for the United
17 States, in this case BLM, to conduct a government
18 consultant with the effects on the data being released
19 as part of the environmental review process?

20 DR. WHITLEY: Is that question being
21 addressed to me?

22 HEARING OFFICER KRAMER: Yes.

23 DR. WHITLEY: Tribal -- government to
24 government tribal consultation is required in the
25 Section 106 process, which is part of the National

1 Historic Preservation Act.

2 I'm sorry, but I am 20 minutes late on my
3 next conference call.

4 MR. BOYD: Okay, I've got one question. Do
5 you have -- do you know if they've conducted that, yet?

6 And if they've conducted it, would it be appropriate
7 for you to get the information after they conducted
8 that consultation?

9 DR. WHITLEY: I believe that they have, but
10 that would be better asked of a project proponent, the
11 consultant for the applicant.

12 HEARING OFFICER KRAMER: Okay.

13 Mr. Whitley --

14 MR. BOYD: Okay, thanks.

15 HEARING OFFICER KRAMER: -- thank you for
16 testifying. Could you call us back when your next
17 meeting ends?

18 DR. WHITLEY: I will. I'll definitely do
19 that.

20 HEARING OFFICER KRAMER: The Committee has a
21 few more questions for you, but we realize you've given
22 us more of your time than you'd hoped to before the
23 meeting, and we'll wait to hear from you afterwards.
24 Thank you.

25 DR. WHITLEY: Great. Thank you. Bye-bye.

1 HEARING OFFICER KRAMER: Were you trying to
2 say something, Mr. Boyd?

3 MR. BOYD: No, I'm muted off, I can't say
4 anything.

5 HEARING OFFICER KRAMER: Okay. Well, then
6 back to our -- well, let me check one more time to see
7 if Ms. -- I'm going to mangle her last name so badly
8 that I'll just ask for Bridgit Nash, are you on the
9 line?

10 Okay, she had told me that she was hoping to
11 testify before about now and I guess, for whatever
12 reason, she wasn't able to call in.

13 So, back to the order of things. I want to
14 make clear to everyone that this is not a hearing about
15 the merits of any of the projects, whether the
16 Commission should approve or deny them. We're just
17 talking about the release of data during the stages of,
18 basically, discovery, which leads up to hearings, after
19 which the Commission would make a decision.

20 But it really will do no good today to talk
21 about your feelings about a particular project.

22 And as we see it, what we're basically
23 looking at here is, I think Commissioner Weisenmiller
24 started to talk about it in his opening remarks, is a
25 balancing of interests.

1 There's the interest to protect these
2 cultural resources from harm, which might result if
3 somebody's given, you know, in effect a treasure map to
4 go find them. We don't want to call them out to the
5 attention of potential looters and collectors.

6 And, also, it's important to allow an
7 appropriate analysis of the impacts of these projects
8 in the BLM and Energy Commission permitting process.
9 And that's -- there's elements of informing the staff,
10 who prepares a very detail report for consideration at
11 our hearings.

12 And also, to the extent we can, to allow
13 other parties in the proceedings to prepare to, if you
14 will, test and perhaps dispute the testimony that the
15 applicants and the staff provide.

16 And all of this in a background where we are
17 under some time pressure to produce decisions, whether
18 it's up or down about these projects, so that if they
19 are approved, they have an opportunity to qualify for
20 some very significant federal stimulus benefits that
21 would benefit everyone. Because, presumably, they'll
22 reduce the cost to consumers, at least to some degree,
23 of the energy that would result from the projects.

24 Then the question is how do you balance those
25 interests?

1 What I'm going to attempt to do now, very
2 briefly, is summarize what I've gathered are the
3 positions of the parties, from reading their briefs,
4 and then I'll give you an opportunity to tell me if
5 I've got it wrong.

6 But, hopefully, this will set everything in
7 context and it will maybe allow us to speed through
8 some parts that might otherwise take a while to
9 discuss.

10 From BLM, they're telling us that federal law
11 prohibits the release of cultural resources data about
12 federal property, that the Energy Commission doesn't
13 have the authority to release data that it has
14 received, to others.

15 But they are willing to let the Energy
16 Commission staff use that data in the preparation of
17 its analysis.

18 But as to everyone else, if they want to get
19 the data, they need to come to the BLM and ask for it,
20 and receive the data or not under the BLM rules and
21 standards.

22 CURE believes that the Energy Commission
23 should be able to release the data that it receives
24 under a nondisclosure agreement, which they believe
25 adequately protects the data.

1 They believe that the Energy Commission staff
2 needs the data and the Commission, itself, to comply
3 with CEQA, to assess the baseline levels and the level
4 of impacts on the specific resources.

5 And they believe that CURE cannot effectively
6 participate in our AFC proceedings without that data.

7 Tessera Solar asserts that neither the CEC
8 nor the parties really need this data, that we can rely
9 on the federal -- the federal landlords, as I believe
10 they call them, you know, BLM as the owner and overlord
11 of those lands to conduct a proper analysis -- I'll get
12 to you -- and adopt mitigation measures.

13 Where I derived this, just so you know, is
14 from at least one of your arguments was that the
15 Commission could make the standard findings under CEQA
16 that mitigation of these impacts is the province of
17 another agency and they can and should adopt impacts.

18 From Genesis, Blythe and Palen, they
19 similarly suggest that the parties have no right to get
20 this data and would recommend giving them no data or,
21 at best, redacted data so that locational information
22 was not available with the data.

23 And for Mr. Boyd, Mr. Boyd, you're work was a
24 little harder for me to decipher, but one of the things
25 I found in there was that the Energy Commission

1 shouldn't get the data because at least one point in
2 the past it has inappropriately released data that you
3 believe should have been confidential.

4 But kind of --

5 MR. BOYD: Well, there are --

6 HEARING OFFICER KRAMER: No, Mr. Boyd, let me
7 finish the summary and then you'll get a chance, along
8 with the others, to clarify.

9 MR. BOYD: Thank you.

10 HEARING OFFICER KRAMER: But then you say,
11 also, though, that the Commission needs the data in
12 order to conduct a proper baseline analysis.

13 So, let me start at the top of the list, and
14 BLM, did I get it sufficiently correct?

15 MS. CAMPBELL: Yes.

16 HEARING OFFICER KRAMER: CURE?

17 MS. KOSS: Close. I believe you correctly
18 stated CURE's belief is that the Commission needs the
19 information under CEQA to adequately analyze the
20 projects to determine whether there will be significant
21 impacts to cultural resources.

22 A couple of additions, CURE also submits that
23 the Energy Commission needs the data under the Warren
24 Alquist Act and Energy Commission regulations.

25 And not only does the Commission need the

1 data to determine significant impacts but, perhaps more
2 importantly, to compose adequate mitigation which, in
3 this case, is very important if resources need be
4 avoided. The locations are crucial to that
5 determination.

6 HEARING OFFICER KRAMER: So, then you believe
7 you need the locational information?

8 MS. KOSS: Absolutely.

9 HEARING OFFICER KRAMER: Okay. I think
10 that's a question we're also going to ask of Mr.
11 Whitley, when he comes back.

12 Tessera?

13 MS. FOLEY GANNON: Close.

14 HEARING OFFICER KRAMER: And I have the sense
15 you're being charitable.

16 MS. FOLEY GANNON: I wouldn't have started
17 out in the same way of phrasing it as you did. We do
18 not believe that no one needs this information.

19 We believe that to the extent the information
20 is available to staff, to other parties, it is
21 completely appropriate to -- and, I mean, the staff
22 needs to look at cultural resource issues, needs to
23 evaluate the impact on them.

24 What we think is missing from the
25 intervenor's argument is the recognition that there is

1 a recognition that there's a limitation as to what is
2 feasible.

3 And when something is not feasible, what
4 happens? And we believe that under your regulations,
5 under CEQA, you can proceed on limited information, if
6 it is truly infeasible to obtain that information.

7 And this is a case where it can -- it may be
8 truly unfeasible for you to get it. This is
9 information that is owned and controlled by the federal
10 government.

11 And if the case is that the BLM and the CEC
12 cannot work out a process for sharing this information
13 -- and we believe that, we're hopeful that there is
14 going to read that resolution, after reading BLM's
15 papers and reading the CEC staff papers, that there is
16 going to be a resolution that says that this
17 information can be shared and should be -- should,
18 therefore, inform the analysis and the consideration of
19 mitigation measures.

20 But what we were commenting on is if it is
21 not feasible to get that information, what happens?

22 And then as to mitigation measures, we do
23 think it is appropriate, particularly with regard to
24 mitigation measures, to utilize the could and should
25 provisions.

1 Because, again, this is something that is in
2 control of the BLM, it's on BLM lands and there are
3 limitations, legally, on what the CEC could require to
4 happen on those lands.

5 Obviously, you, the Commission, has to make a
6 determination about each project, about whether it
7 should be approved, despite potential significant
8 impacts that may or may not be able to mitigated. And
9 that's a different consideration, rather than what is
10 absolutely required to satisfy the requirements of
11 these various laws.

12 HEARING OFFICER KRAMER: So, the feasibility
13 is the federal prohibition on release and the control
14 of the information by BLM?

15 MS. FOLEY GANNON: Correct.

16 HEARING OFFICER KRAMER: And would you say
17 that it would be appropriate or it would be acceptable
18 if the BLM allowed different levels of data to go to
19 the Commission staff, as opposed to intervenors?

20 In other words, maybe the Commission staff
21 got it with all the locational data and the intervenors
22 had it redacted with -- that data redacted, would that
23 cause you any concern?

24 MS. FOLEY GANNON: I think that that could be
25 an entirely appropriate decision for the BLM to make.

1 You know, we did not object when the
2 intervenors requested the information on the part of --
3 in the Imperial Valley Project. We did not take any
4 position. We recognized that it was the BLM's
5 information and so, again, we were not -- you know,
6 we're not objecting to it or supporting that.

7 The question of can an intervenor, a party to
8 a proceedings meaningfully participate without that
9 level of information? We believe they absolutely can.

10 That they can evaluate whether there are significant
11 impacts, they can comment on it.

12 And I think that the staff assessments and
13 some of these -- the draft assessments, the draft
14 EIS's, which have been released on several of these
15 matters, show that there is a lot of information out
16 there in the record, that describes the types of
17 resources that are potentially impacted, the level of
18 impacts that may occur. And we think that that is
19 sufficient for there to be meaningful participation.

20 And I mean, I think looking towards other
21 review processes, by other state agencies, this issue
22 comes up frequently. I mean, generally, the specific
23 cultural resource information is not released to the
24 public and public often participates in that process
25 and even comments upon cultural resource impacts and

1 potential mitigation measures, and that there can be a
2 meaningful dialogue about those issues.

3 HEARING OFFICER KRAMER: Thank you. Mr.
4 Boyd?

5 MR. BOYD: Okay. You didn't actually get
6 that -- you weren't off that far, but what -- what our
7 issue is, is we don't think that the CEC is qualified
8 to be a repository of the data that's in question here.

9 We believe that data should be maintained at a
10 qualified repository, like the one -- like the
11 clearinghouse in Riverside, for example.

12 We believe that any data is available to
13 qualified persons, to archaeologists.

14 Alfredo?

15 MR. FIGUEROA: Yes, sir?

16 MR. BOYD: Could you be quiet because we can
17 hear you.

18 MR. FIGUEROA: Ah, you hear me? Sorry.

19 MR. BOYD: So, basically, what we're worried
20 about is that that information is being given to CEC
21 staff and that CEC staff have a physical copy of the
22 information and that they, then, can share that
23 information with other folks, as apparently they did.
24 When that information should have been maintained at
25 the repository of the information, where it's qualified

1 to be viewed and not copied.

2 And so, our concern, and the reason that
3 we're concerned about the CEC having the authority to
4 even have a copy of the information of its own, is
5 based on what happened with the Metcalf Project.

6 And what happened there was essentially the
7 CEC allowed the project applicant to remove human
8 remains without notifying the most likely descendent
9 first. And then the most likely descendent had to
10 fight with the company to get the remains back.

11 And so we don't think that the Energy
12 Commission, because of that, is qualified to handle
13 that information the way it's handling it, where
14 they're essentially acting as an unqualified repository
15 for culturally sensitive data.

16 And so, we just want you to give it back,
17 like the BLM asked. And if you guys want to go to the
18 repository and look at it, I don't have a problem with
19 that.

20 And if an archeologist, that's qualified to
21 look at it for CURE wants to go look at it, they should
22 be able to go look at it, too. That's why the system's
23 set up the way it is.

24 And what you guys are doing is what's
25 unusual, not what BLM is doing. BLM is just trying to

1 protect their resources. And they have good cause to
2 be afraid of people getting access to that information
3 because they can go destroy the resource as a result of
4 that.

5 So, that's our -- that, simply put, is our
6 position. We don't have a problem with getting the
7 data, just go to the proper place to view it.

8 HEARING OFFICER KRAMER: Okay. I don't want
9 to get into a debate with you, but I think in these
10 cases the data's actually generated by the applicants,
11 by and large, or their consultants, so they already
12 have access to it because they tend to bundle it up and
13 send it on to BLM and perhaps to our staff.

14 So, I'm not sure that a repository will deal
15 with the particular example you gave us.

16 But Mr. Galati?

17 MR. BOYD: Well, wait a second before you go.

18 The other issue I didn't bring up is the role of what
19 I call the invisible Native American here, which isn't
20 being considered, which is what is their say over that
21 data?

22 And if the government of the United States is
23 supposed to conduct a government-to-government
24 consultation with them, aren't they supposed to do that
25 before that data is released, as part of the NEPA/CEQA

1 process, the same question I asked the doctor.

2 I believe that you have to conduct that
3 government-to-government consultation first, and I
4 don't believe that's occurred.

5 HEARING OFFICER KRAMER: Okay. Well, we
6 understand that point.

7 Mr. Galati?

8 MR. GALATI: Yes, you were pretty close.
9 First, we don't have a problem with qualified people
10 looking at the data.

11 Our issue has to do with whether the data is
12 absolutely necessary for someone to participate and
13 whether or not this late request is going to be used as
14 the delay tactics to postpone these proceedings. So,
15 that's what we object to.

16 The second point I wanted to make, with
17 respect to our reply brief, is we believe that staff
18 needs the data. We believe that staff has looked at
19 and used the data appropriately for many, many years.
20 We believe staff is conducting the first set of peer
21 review of the applicant-conducted data.

22 We implore you to read the cultural resources
23 information in the staff assessment draft EIS, for the
24 Genesis Project, to look at the detailed enough
25 information to determine whether you can make a finding

1 of significance or make a finding of how to mitigate.

2 It's an imperfect world when you conduct that
3 balancing act. Obviously, you can't describe in here
4 the level of detail necessary that somebody like the
5 expert might want to make that determination.

6 But at some point in time, and up until these
7 solar projects, CURE has participated meaningfully in
8 the process before, with lots of cultural resources, on
9 projects that I've been involved with, large pipelines.
10 and they have never needed the background information,
11 nor ever requested it. The staff assessments have been
12 sufficient enough for them to determine whether the
13 mitigation proposed is appropriate or not.

14 And if you look at this document, it speaks
15 for itself. Because there are locational information
16 here, in a general way. It's not the GPS location,
17 but it will tell you whether or not it's within the
18 footprint and is likely to be disturbed.

19 And we had staff assessment workshops on this
20 document. Someone could have said, hey, I'm concerned
21 about this particular document, could you move your
22 project? We would have had that dialogue. But at this
23 late stage and what we heard and why we jumped into
24 this as an active party had to do with CURE claiming
25 that they cannot prepare testimony.

1 We listened to what happened in Imperial, and
2 we don't agree that that should continue in these
3 projects, that they cannot participate without the
4 information.

5 But I want to make absolutely clear, we
6 believe staff needs this information, they've used it
7 in the past and they've produced it, the exact,
8 redacted type of information that is necessary. And
9 that has been good enough for decades.

10 Now, the fact that these projects are larger,
11 I submit to you, if you have two very important
12 resources that are worthy of protection or moving your
13 project, what's the difference of wanting to know
14 exactly the detailed information about those two versus
15 the detailed information about 27?

16 The information is that if you can't
17 determine significance until you see the raw data, and
18 the site record, and the GPS location of it, then it
19 doesn't matter how many there are.

20 I believe this is a delaying tactic, I'll be
21 the bad guy in the room that says it. I think that the
22 Commission ought to continue its practice, deny CURE
23 this, honor BLM's request, allow the staff to use the
24 information, come up with a redacted version, and CURE
25 can come to hearings and say that that redacted version

1 isn't enough and explain to you specifically why on a
2 resource-by-resource basis. That's what's happened in
3 the past, that's what should happen now.

4 HEARING OFFICER KRAMER: Now, conversely, if
5 BLM were willing to let them have the data, would you
6 have any concern about that?

7 MR. GALATI: No. We didn't object to them
8 seeing the petition for the data.

9 Our objection is that they now claim that
10 they cannot participate without it. That is the
11 difference, that is why we're sitting at the table.
12 And we think the data is fundamentally incorrect and it
13 is inconsistent with all of the past practice. When I
14 used to have hair they didn't do it, and they don't do
15 it now, and so this is new.

16 HEARING OFFICER KRAMER: Okay.

17 MR. RATLIFF: Mr. Kramer, the staff also has
18 a dog in this race.

19 HEARING OFFICER KRAMER: You're correct, I
20 forgot to -- please. You'll have to set up your own
21 straw man and then knock him down.

22 MR. RATLIFF: Let me say straight out, the
23 staff has no objection to CURE having this information
24 under a nondisclosure agreement, but that isn't the
25 point here.

1 In our view, what we have here, in essence,
2 is an issue of control. Who controls the information
3 and the access to it?

4 The Bureau of Land Management and the
5 solicitor have both indicated that in order to fulfill
6 their duty, under federal law, they have to have the
7 control and they're now asserting their right to
8 exercise that control.

9 And in staff's view, whatever privileges
10 intervenors have, they will have to basically achieve
11 the obtaining of this information through the process
12 that BLM, itself, has to disseminate information.

13 Now, I'm -- every time you turn a page on
14 this thing and it gets a little murkier, we just heard
15 Mr. Whitley say anyone who's got an ARPA permit can get
16 the information. And if that's true -- if that's true,
17 and unless this is a departure from the process, then
18 this isn't going to be a problem at all.

19 But whether it is or not, I think the Section
20 106 process that the federal government utilizes in
21 these proceedings has got to be the vehicle by which
22 the information is disseminated.

23 There are many pages of this book that set
24 out that very elaborate process through which the
25 federal government allows the dissemination to parties,

1 who participate and obtain information under the
2 National Historic Preservation Act.

3 I think that has to be the vehicle here
4 because if it doesn't, the whole thing breaks down, the
5 wheels come off, we no longer we get the information we
6 need to do our job.

7 And that, I think, is something that has to
8 be prevented.

9 HEARING OFFICER KRAMER: And the reason you
10 don't get the information is, in effect, the feds don't
11 trust the Commission -- I'm sorry, BLM. Feds is kind
12 of pejorative -- to be able to hold onto the
13 information, if they receive it?

14 MR. RATLIFF: I don't know if it's a matter
15 of trust so much as, again, control. The Energy
16 Commission made this information available pursuant to
17 nondisclosure agreement, but without any consultation
18 or taking into consideration the concerns of the BLM
19 when it did so.

20 And it's our understanding that is what was
21 objectionable to BLM and that is what the solicitor is
22 saying cannot happen.

23 MS. CAMPBELL: Commissioner? This is Vicky
24 Campbell, from BLM.

25 HEARING OFFICER KRAMER: Please go ahead.

1 MS. CAMPBELL: Yeah, it's no a matter of BLM
2 not trusting the Energy Commission, it is a matter of
3 control.

4 And the laws that BLM are operating under for
5 archeological resources state that we must make an
6 affirmative decision to allow certain information to be
7 distributed or not.

8 Also, the comment that you made about
9 consultants preparing the reports and that that
10 information goes to the applicants, the consultants
11 preparing the reports and doing the studies on BLM-
12 managed lands actually get a permit to do so from BLM
13 and are subject to certain standards.

14 And in the letters that we've provided
15 before, those permits specifically state that those
16 technical reports and that data come directly to BLM
17 and is then the property of the federal government.

18 And that under federal law, BLM then, at that
19 point, decides what to release, when, where, et cetera.

20 And so, it's not a matter of the applicants
21 actually having the data, the data should come directly
22 to the Bureau of Land Management under federal law and
23 under the permits which the consultants are operating
24 on.

25 HEARING OFFICER KRAMER: So, while you're

1 there, do you want to ask a question?

2 ASSOCIATE MEMBER WEISENMILLER: Yeah, I just
3 had two clarification questions on BLM's position. The
4 first one was the comment in our staff filing that said
5 that, basically, the BLM objection -- well, actually,
6 it's page two.

7 "BLM believes that the Energy
8 Commission's unilateral release of
9 unredacted confidential information
10 compromises its ability."

11 Now, does that mean if we had released
12 redacted -- if we had redacted the GPS locations, that
13 the Bureau would have been comfortable with the release
14 of that information?

15 MS. CAMPBELL: I think we have to start at
16 the beginning. I think that, again, it goes to that
17 it's BLM's decision of what data is released. And if
18 the reports had come directly to BLM, then we had made
19 the decision then to provide them to the Energy
20 Commission, whether it be redacted versions or full
21 versions, we would then -- then when the CEC got a
22 request, we would say to the Energy Commission that,
23 actually, the request needs to come to BLM and BLM will
24 then decide what information to release based on who
25 the requester was.

1 ASSOCIATE MEMBER WEISENMILLER: Okay. Now, I
2 believe CURE's brief indicated that they had asked for
3 this information in a Section 106 consultation, is that
4 correct, and that BLM turned them down?

5 MS. CAMPBELL: They'd asked for it under the
6 Freedom of Information Act and BLM did deny it.

7 HEARING OFFICER KRAMER: So is there an
8 avenue by which they could have received it, do you
9 think?

10 MS. CAMPBELL: At this point you're beyond my
11 knowledge, so my answer would be I don't know.

12 If you don't mind if Charlotte Hunter, who is
13 the BLM's State archeologist, if she's still on the
14 line, maybe she could answer that.

15 HEARING OFFICER KRAMER: She appears to be.
16 Did you hear the question, Ms. Hunter?

17 DR. HUNTER: It's Dr. Hunter. It's a
18 decision that we have to make at the time that it's
19 requested. I don't think that it would be appropriate
20 to answer a general question like that, because we are
21 going back to the issue of process. And we need to go
22 through our process to make that determination.

23 HEARING OFFICER KRAMER: Well, generally, in
24 the past have you released that type of information to
25 parties in a similar position to CURE?

1 DR. HUNTER: We haven't had a situation where
2 a company or organization has no previous interest in
3 archeology asks us for such a thing.

4 HEARING OFFICER KRAMER: Could you speak up,
5 your voice is barely audible here.

6 DR. HUNTER: Okay, let me get off the
7 speakerphone.

8 HEARING OFFICER KRAMER: Wow.

9 DR. HUNTER: Much better?

10 HEARING OFFICER KRAMER: Yes.

11 DR. HUNTER: Okay. We have -- well, in my 25
12 years of archeology and the last, I guess, 11 with
13 federal agency, I've never had an organization who has
14 not been involved in archeological research or data
15 gathering, themselves, ask for this type of
16 information.

17 And so, my answer is that, no, I have not
18 given information to just anyone who has an interest in
19 archeology. They really have to come to me with a need
20 to know, a research question. I mean, a university
21 might want to do a project and would have a legitimate,
22 professional reason for needing the data for research
23 and we would give it to them.

24 But I have never had that experience.

25 HEARING OFFICER KRAMER: So, hypothetically,

1 somebody who is using a professional archeologist and
2 coming to you to ask for the data, so that they can
3 prepare to comment on a permit application, is that
4 something that could possibly be granted or do you have
5 any feeling at all about where that fits in your
6 continuum or under your standards?

7 DR. HUNTER: It is within the realm of
8 possibility, yes. And it is a requirement that we make
9 a judgment on that and determine the need to know,
10 whether or not we believe that the information can be
11 protected, particularly the site location information.

12 And whether they can -- whether redacted
13 information is more appropriate. There are very few
14 times that the location information is necessary to
15 make a decision about eligibility or appropriateness of
16 mitigation methods.

17 It would be more in terms of scientific
18 research that that would be useful data. Or, it is
19 very useful to looters.

20 And it's useful to people who do not
21 understand archeological laws, and federal laws, and
22 collect avocationally.

23 So, we go through a fairly rigorous
24 investigation of anyone who is asking for site location
25 data.

1 PRESIDING MEMBER DOUGLAS: Are you saying
2 that when it comes to projects that are potentially
3 trying to get a permit, that could affect cultural
4 resources, and they're looking at mitigation, that you
5 typically do not consider the specific GPS coordinates
6 and the specific location of sites to be necessary?

7 DR. HUNTER: I'm sorry, I don't -- I really
8 don't understand your question?

9 PRESIDING MEMBER DOUGLAS: You said that
10 typically -- you said that disclosure of site-specific
11 locations is more often done in the context of
12 research, university research, for example, as opposed
13 to assessing the appropriateness of mitigation. Is
14 that what you said?

15 DR. HUNTER: Well, when someone applies for
16 an ARPA permit, or what we call a cultural resources
17 use permit, they have to have professional
18 qualifications and experience, and we make the decision
19 as to whether or not they're qualified to do field
20 work.

21 And that would be like an archeological
22 contractor, or a portion of another company that was
23 doing archeological contracting. And, of course, they
24 would know where the data are located because they're
25 the ones out in the field.

1 But what I'm saying is that if just a person
2 comes to the BLM and says I would like to have the
3 location information of every site that is in the solar
4 array area, no, I would not divulge that information.

5 If you wanted to know what type of sites are
6 generally found in that area, you would have to go to
7 CHRIS and then you would have to have professional
8 qualifications to get that information from CHRIS, or
9 from the SHIPO's office.

10 HEARING OFFICER KRAMER: And either of those
11 would have the precise coordinates?

12 DR. HUNTER: Certainly, CHRIS will, and
13 possibly the SHIPO. Not always. Sometimes.

14 HEARING OFFICER KRAMER: So then, in a sense,
15 you are willing to delegate the decision about who gets
16 the data to the CHRIS, because they'd be the gatekeeper
17 in that case; right?

18 DR. HUNTER: They are the gatekeeper, yes, on
19 specific site location information. They are the
20 repository for the State of California, and they do
21 have confidentiality agreements with the federal
22 government.

23 HEARING OFFICER KRAMER: But maybe this is
24 more for Vicky, than you, or whoever wishes to answer.
25 But it sounds as if you do not wish to delegate the

1 ability to decide who's qualified to receive that
2 information to the Energy Commission?

3 DR. HUNTER: No. I can answer that. No.

4 HEARING OFFICER KRAMER: I think your mike
5 may be off but --

6 MS. KOSS: Maybe I'm just not close enough.
7 How's that?

8 It seems to me, from what Dr. Hunter is
9 saying, and Dr. Hunter correct me if I'm wrong, but it
10 seems to me that BLM is willing to release specific
11 site location information to qualified professional
12 archaeologists who, A, have an ARPA permit and, B, have
13 signed CHRIS agreements. Am I correct?

14 DR. HUNTER: We are not arguing about --

15 HEARING OFFICER KRAMER: Your voice went way
16 down again.

17 DR. HUNTER: Okay. We are not arguing about
18 whether or not we would give information to a
19 professional archeologist. What we are arguing is that
20 in order for us to meet our obligations under federal
21 laws, we are the entity that must make that decision.

22 MS. KOSS: And I'm trying to find a potential
23 resolution to this issue and --

24 DR. HUNTER: We do have a resolution and that
25 is that the information, as it states in the ARPA

1 permit, belongs to the federal government.

2 The information that is gathered by the
3 contractor belongs to the federal government. That is
4 the bottom line, as has been stated by our attorney.
5 It is government information, it belongs to the federal
6 government and we are asking that it be returned to us
7 so that we can make the proper decision that we must
8 make under federal law.

9 HEARING OFFICER KRAMER: And I think what Ms.
10 Koss is trying to do here, on behalf of CURE, is get a
11 sense for whether, if she comes to you and asks if her
12 expert is going to get the data in a relatively --

13 DR. HUNTER: I understand that is the
14 question. But that is not the point of this meeting.

15 HEARING OFFICER KRAMER: Well, no, but it is
16 a very -- it is very relevant to a potential solution
17 of the competing interests we have here if --

18 DR. HUNTER: Oh, certainly, but that's not
19 the question at hand.

20 The question at hand is whether or not the
21 information that was given to the CEC belongs to the
22 federal government and should be returned. Is that
23 correct?

24 HEARING OFFICER KRAMER: That's, perhaps, one
25 element of it, but it's certainly not the only element.

1 And we are -- the Committee has -- we are
2 deciding or going to decide the BLM requests, which
3 were in one case to have the decision to release the
4 information overturned and the information returned.

5 But we are also trying to design some kind of
6 protocol for future requests in these next few months,
7 and we actually have three pending requests.

8 So, for instance, I would suspect if Ms. --
9 if CURE thought that they could come over to your door
10 and ask for the data, and get it, they might very well
11 withdraw their request to the CEC. Because I believe
12 they're more interested in getting the data than they
13 are in banging on the wrong door, so to speak.

14 DR. HUNTER: Uh-hum.

15 MS. FOLEY GANNON: Hearing Officer Kramer,
16 one question that might be pertinent is has the BLM
17 changed its normal procedures for how it submits
18 information to the CHRIS System?

19 I mean, is there something different, is this
20 information being handled differently than it is in
21 every other matter that's on BLM land?

22 DR. HUNTER: No. No, there's no change
23 whatsoever.

24 MS. FOLEY GANNON: So, other qualified
25 experts' access to this information is exactly the same

1 as it is for every other project that's involved on
2 federal land, you can get it through the CHRIS System
3 if you are appropriately qualified?

4 DR. HUNTER: That's absolutely correct.

5 MS. MILES: And I actually have a question,
6 this is Loulena Miles on the phone. And I'm wondering,
7 when is this information typically filed with the CHRIS
8 System, or is there a typical time when it's submitted
9 into that system? And can you tell me generally, Dr.
10 Hunter, if it's submitted prior to a project decision,
11 you know, for approval or not from the agency?

12 DR. HUNTER: Generally, the process is that
13 the contractor goes in the field and produces a
14 preliminary report. The BLM judges whether or not that
15 preliminary report is adequate and correct.

16 At that time, they may request that the
17 contractor go back out in the field, perhaps write the
18 description of the site in a different way, add data,
19 go back out in the field and check on things that we're
20 uncertain about.

21 And it's not until the final report is ready
22 would that information go to CHRIS. And that will be
23 done prior to a decision.

24 HEARING OFFICER KRAMER: But would the raw
25 data, that first comes in, would that go to CHRIS right

1 away or only after you've, in effect, brought it up to
2 your standards?

3 DR. HUNTER: It would only go in after it has
4 been brought up to standards.

5 HEARING OFFICER KRAMER: Okay. It occurs to
6 us that you've been -- some of the things you've said
7 are probably in the order of testimony and perhaps we
8 should have had you sworn in at some point.

9 DR. HUNTER: And that's not what I've been
10 told to do. I've been told to --

11 HEARING OFFICER KRAMER: You're not allowed
12 to offer sworn testimony?

13 DR. HUNTER: No, no at this point.

14 HEARING OFFICER KRAMER: Okay. Does any
15 party object to the consideration of what Dr. Hunter
16 has said as -- in making our decision?

17 MS. FOLEY GANNON: Tessera has no objection.

18 MR. BOYD: I don't, but I have a question
19 regarding it.

20 HEARING OFFICER KRAMER: Okay, we'll get you
21 in a minute, Mr. Boyd. Hearing no objections, we will
22 treat her statements as information about the way BLM
23 handles these matters, as if it were, in effect, sworn
24 testimony. Nobody has raised any objections to the
25 veracity of her information.

1 Let's see, is it on a different line, Mr.
2 Boyd, or a continuation of the topics that are being
3 talked about?

4 MR. BOYD: Well, it's on the same general
5 topic. I'm just trying to find out, what I'm hearing
6 from Dr. Hunter is that she's not saying no or yes to
7 CURE's request.

8 She's basically saying, look, we control the
9 data, the United States has the duty and the
10 responsibility to protect that data, and all you're
11 asking is you let us do our process, our data
12 processing, quality control process before we -- and
13 we'll decide which information can be released and
14 where it can appropriately be released and where the
15 data will be maintained.

16 And, essentially, they're not saying that if
17 you're a qualified archeologist that you can't get the
18 data, but they still have to do their process first.

19 And so, what I'm hearing is that the issue
20 is, essentially, that the CEC was bypassing or taking
21 control of the data away from BLM before BLM could do
22 their process on the data.

23 And so, I don't see what the problem is,
24 except that if you are considering Mr. Galati's
25 concern, which is that we're trying to do this just so

1 we can delay their project, which I think is purely a
2 commercial concern of the applicant and shouldn't have
3 any impact on an independent environmental assessment
4 of the project, I think that what you need to do is
5 face the fact that there's going to be a delay in the
6 amount of time before you have the necessary baseline
7 information to make a final decision.

8 Essentially, you don't have all the facts,
9 yet. And until CURE has access to whatever information
10 that the BLM deems appropriate to release at the
11 appropriate location, they can't make a decision.

12 So, I don't see how the CEC and the CEQA
13 decision can be made by the CEC for the same batter.

14 And I thought these were being done together,
15 NEPA and CEQA. So, I think you just got to bite the
16 bullet, give them the data back and ask them if they
17 could review it in an expeditious basis and I think
18 that's the best you can do.

19 DR. HUNTER: Could I make a comment?

20 HEARING OFFICER KRAMER: Okay, I didn't hear
21 a question there. Did I, Mr. Boyd, that was a comment
22 and argument?

23 MR. BOYD: Well, I asked -- my question was
24 you're not saying you're not going to give them data or
25 you're not going to release data. You're just saying,

1 Dr. Hunter, that you need to process that data
2 according to your BLM protocol, first, before the data
3 can be released in the appropriate manner?

4 DR. HUNTER: That's correct.

5 MR. BOYD: Okay.

6 HEARING OFFICER KRAMER: And so, at what
7 point would that version of the data be available?

8 DR. HUNTER: Are you asking me for a date?

9 HEARING OFFICER KRAMER: No. I mean, just
10 roughly in the process, is it before the final EIS
11 comes out, for instance?

12 DR. HUNTER: It would be probably, I am
13 estimating, approximately 30 days before ROD.
14 Because that would include the report, the treatment
15 plan, an inadvertent discovery plan, a NACPRA plan, and
16 we estimate that that would be 30 days prior to a ROD.

17 HEARING OFFICER KRAMER: And that's the first
18 time that you would be willing to release the data to
19 parties, such as CURE?

20 DR. HUNTER: No, I didn't say that.

21 HEARING OFFICER KRAMER: Okay. Well, that's
22 what I'm trying to understand, where that point in time
23 would be?

24 DR. HUNTER: Well, I would have to review
25 CURE's request. They asked for the data via the

1 Freedom of Information Act and the Freedom of
2 Information Act specifically states that if any other
3 law prohibits the dissemination of the information,
4 that I must redact that information. And that is
5 archeological site location information by ARPA and
6 other laws.

7 And so, I could not give CURE that data via a
8 FOIA.

9 HEARING OFFICER KRAMER: Okay. And then,
10 because they didn't ask for it under Section 106, you
11 did not consider it under that process?

12 DR. HUNTER: They didn't ask for it under any
13 other process. That is the only thing that they asked
14 for.

15 They also asked for it from the SHIPA's
16 office via a FOIA, and the SHIPA's office turned them
17 down.

18 MS. MILES: Oh, can I clarify for a moment,
19 this is Loulena Miles, from CURE.

20 HEARING OFFICER KRAMER: Go ahead.

21 MS. MILES: We actually, just submitted a
22 generalized FOIA to the BLM asking for documents
23 relating to the project. So, we were not specifically
24 asking for a final, or draft technical resources
25 report.

1 But I do want to clarify that we did request
2 the information through the 106 process as a consulting
3 party, and we were told that we could get the
4 information -- no, we were not told we could get the
5 information.

6 What we were told was that the information
7 would not be available to any participants in the 106
8 process until the technical report was finalized. And
9 that includes the Tribe.

10 And so, in the Imperial Valley case, no one
11 has seen the draft technical report in the -- that are
12 106 consulting parties, except for CURE, and so we
13 haven't really been able to participate meaningfully or
14 work with other parties, or discuss anything with
15 anyone because --

16 DR. HUNTER: But you're making the assumption
17 that you cannot meaningfully contribute without site
18 location information. Is that correct?

19 MS. MILES: Well, what I'm saying is, to the
20 extent that we could gain information through that
21 technical report and use it in our participation in the
22 106 process, we have not been able to do that because
23 other parties have not had that information available
24 to them.

25 And so, in particular, we've noted that the

1 tribes have repeatedly asked for the technical report
2 and have been denied that information until the report
3 is finalized. And so, that's why it's so critical --

4 DR. HUNTER: We don't give out draft reports.

5 MS. MILES: Right.

6 DR. HUNTER: The very word "draft" tells you
7 that we do not consider them to be adequate.

8 MS. MILES: Right. And then we've also found
9 that to be true with biological data, draft biological
10 reports that have gone to BLM, now that the applicants
11 are not providing them to the Energy Commission,
12 they're providing them only to BLM. And then when BLM
13 goes through them and decides that they are finalized,
14 then they are being released to the Energy Commission
15 and intervenors.

16 DR. HUNTER: Well, I know from my personal
17 experience as a professional archeologist, I would not
18 publish a draft report because the draft report is what
19 we use to go back and get all of the proper information
20 that we need.

21 It would be tantamount to publishing a
22 incorrect document. And we are professional
23 archaeologists, we are -- we spend our lives protecting
24 cultural resources. This is what we do, not just as a
25 living, but who we are. We care about the resources.

1 We are doing everything that we feel that we are
2 legally required to do to protect this data.

3 And as far as working out a process with
4 CURE, that is something that certainly we entertain.

5 But I cannot give you a decision because I
6 don't know what CURE wants. All I know is that CURE
7 asked for all cultural resource data in the FOIA, it
8 was not just a normal FOIA.

9 In fact, the only FOIAs that I have ever
10 received in my professional life is the one from -- are
11 the ones from CURE. No one else has ever asked for
12 cultural resources data.

13 HEARING OFFICER KRAMER: Okay, let me ask
14 Loulena Miles, you said, in essence, in Imperial you
15 have more information than the other parties. And
16 because they didn't have it, you couldn't use it. Is
17 that an artifact of the nondisclosure agreement or what
18 prevented you from using it?

19 MS. MILES: Well, to the extent that we would
20 discuss the information about how to mitigate impacts
21 on the project sites, or avoid -- whether avoidance
22 would really be an adequate mitigation strategy for
23 example, with other consulting parties we could not do
24 that. And that's because the other consulting parties
25 don't have the information.

1 HEARING OFFICER KRAMER: So, to do that would
2 be, in some kind of way, sharing information that would
3 violate the agreement?

4 MS. MILES: Well, yeah, it would definitely
5 violate the agreement if we share it with parties that
6 have not been granted access to that information from
7 BLM.

8 HEARING OFFICER KRAMER: Okay. And, Dr.
9 Hunter, if you know, is the information that CURE
10 received from the CEC, is -- was that at some earlier
11 part of the process, before the level of the final
12 technical report? I gather it was draft information,
13 is that correct?

14 DR. HUNTER: That's correct.

15 HEARING OFFICER KRAMER: And are you saying,
16 then, that -- or would you confirm what Loulena Miles
17 said, that you do not wish to release anything that is
18 earlier in time than the final technical report?

19 DR. HUNTER: I would have to consult with
20 other people and that is the reason that I did not want
21 to be sworn in, because I have to make certain of
22 certain legalities. I would just prefer not to answer
23 that at this time, but I'd certainly be willing to
24 discuss it after I confer with other people at the BLM.
25 I'd certainly be willing to discuss it with CURE.

1 HEARING OFFICER KRAMER: But is it fair to
2 say that final technical reports are normally released
3 to people, such as CURE?

4 DR. HUNTER: I've never had this experience
5 before.

6 HEARING OFFICER KRAMER: Are they released to
7 the public?

8 DR. HUNTER: No, they are not.

9 HEARING OFFICER KRAMER: Okay, so they still
10 have confidential data in them?

11 DR. HUNTER: Yes, they do.

12 HEARING OFFICER KRAMER: And does that
13 include the locational information?

14 DR. HUNTER: The locational information is
15 the confidential data. I have released reports to the
16 public with the confidential information redacted.
17 Often, federal agencies will prepare a general report,
18 with overview information, previous archeology general
19 information and have the site location -- not just the
20 location, but a description of the character of the
21 site is also confidential and that will be published
22 under a separate cover as confidential information that
23 is not disseminated to the public.

24 HEARING OFFICER KRAMER: Commissioner
25 Weisenmiller had a question.

1 ASSOCIATE MEMBER WEISENMILLER: Just wanted
2 to clarify, in terms of the reports, when are they
3 posted on the CHRIS system?

4 DR. HUNTER: I don't know the answer to that.
5 I don't know --

6 HEARING OFFICER KRAMER: Mr. Donaldson, if
7 you could come to the mike?

8 DR. HUNTER: Yeah, I don't know the answer to
9 that, I'd have to get -- I'd have to speak with the
10 field archeologist to find out when, exactly, they do
11 do that process. Because I don't think there's a --
12 you know, a specific time frame for that.

13 HEARING OFFICER KRAMER: Okay, Mr. Donaldson,
14 before you speak, and do we have anyone else in the
15 audience who's going to testify?

16 Was Mr. Figueroa going to testify, Mr. Boyd?

17 MR. BOYD: Well, we already provided a
18 written declaration and written testimony and unless --
19 we don't have anything to add to that, if that's what
20 you're asking.

21 HEARING OFFICER KRAMER: Okay, does anybody
22 want to cross-examine Mr. Figueroa?

23 Okay, so we'll just have Mr. Donaldson sworn
24 in then, in case he gives us some testimony.

25 THE REPORTER: Please raise your right hand.

1 Whereupon,

2 MILFORD WAYNE DONALDSON

3 was called as a witness herein and, having been first
4 duly sworn, was examined and testified as follows:

5 THE REPORTER: Would you please state and
6 spell your name for the record?

7 MR. DONALDSON: My name is Milford Wayne
8 Donaldson, M-i-l-f-o-r-d, Wayne, like John Wayne, and
9 Donaldson, like Donald Duck with an s-o-n.

10 I am the State Historic Preservation Officer.

11 To try to answer the questions when the
12 reports get back to the CHRIS, this is an access
13 agreement that we have, that's part of the users in
14 terms of gaining access to the CHRIS System.

15 Again, the CHRIS is the California Historical
16 Resources Information Center. It's a relatively old
17 system, but was put under our own regulations after the
18 1966 National Historic Preservation Act came out. It
19 was actually a system that was started back in the
20 1930s, some of the repositories being at the State
21 universities.

22 Currently, we have, now, 11 of these
23 information centers and they're -- they're put together
24 by way of counties. So, if you went on our system and
25 take a look at the CHRIS System, and you were doing

1 work in a particular county, you would go to that
2 particular information center in order to get the
3 information.

4 Part of this is an access agreement and we've
5 heard a couple of archaeologists already note that.

6 I did want to also tell you that there's
7 other folks that could be qualified for gaining access
8 to this, besides archaeologists, and you can also find
9 that on site, including architects, historians and
10 others that meet the Secretary of the Interior's
11 qualifications in order to submit on that, and then
12 also meet certain State requirements.

13 And if you wish me to go into more detail, I
14 can.

15 But part of the access agreement says that "I
16 understand that any CHRIS confidential information I
17 receive shall not be disclosed to individuals who do
18 not qualify for access to such information as specified
19 in our Section 3 of the document, of the CHRIS
20 Information Center Rules of Operation Manuals, or in
21 publicly distributed documents without written consent
22 of the information center coordinator."

23 So, if you're going to distribute this, you
24 need to go back to that particular CHRIS coordinator
25 and get approval to do so, written approval.

1 Then it also says, and this is getting back
2 to the question at hand, "I agree to submit historical
3 resource records and reports based in part on the CHRIS
4 information released under this access agreement to the
5 information center within 60 days of completion."

6 So, basically, we have a criteria that within
7 60 days after you complete your report and, again, this
8 would be the final report that's distributed, that you
9 go back and you deposit this back into the information
10 centers.

11 The reason of that, of course, then that
12 becomes the updated and the most current information,
13 so if another archeologist or another person going in
14 there, they will have the most current information.

15 Also, you agree to pay your bill within 60
16 days as well.

17 Now, anything that is a failure to comply
18 with this access agreement, because we're always asked,
19 okay, what if a person doesn't do this, then we deny
20 access to the CHRIS information and through our State
21 Historical Resources Commission we actually, now, have
22 expanded that to the company that the person works for.

23 So, therefore, for people that have 30 or 40
24 archaeologists, that are currently working on
25 especially a lot of these recovery things, they really

1 abide to this access agreement. And that's just in
2 part, there's other regulations with this.

3 So, I hope that answers the requirement to
4 return this information in its final form back to the
5 CHRIS.

6 HEARING OFFICER KRAMER: So, for this work
7 that we're talking about, that's done by private
8 consultants, but basically under the direction, if you
9 will, of BLM, would it be considered final, do you
10 think, when BLM has labeled it a final report or at
11 some sooner time?

12 MR. DONALDSON: When the report is released
13 as a final document, that's correct.

14 HEARING OFFICER KRAMER: Okay, so it sounds
15 like that report isn't going to come soon enough to
16 allow CURE to prepare for hearings.

17 ASSOCIATE MEMBER WEISENMILLER: I had just a
18 couple of follow-up questions. It sounds like the
19 purpose of CHRIS is to provide data for professional
20 archaeologists, say, to do research, primarily, as
21 opposed to providing a repository for litigation
22 support.

23 MR. DONALDSON: Actually, it has been used
24 for litigation support. Many of the CHRIS coordinators
25 are sworn in to both hearings and to cases. They also

1 are on contracts with cities and counties to provide
2 such information. And, certainly, it has come up for
3 information that is provided in there.

4 And the information varies in terms of its
5 scope, and reliability, and everything else, like any
6 other kind of reports that you may have.

7 ASSOCIATE MEMBER WEISENMILLER: Thank you.
8 But is it likely that it's going to work in timing for
9 folks looking at our specific cases?

10 MR. DONALDSON: That, I don't now.
11 Everything, of course, is always wrapped around time,
12 level of effort to do these reports and, of course, the
13 cost. And if you can get all of this stuff without
14 really going through time, level of effort and cost, it
15 behooves everybody.

16 We, from the Office of Historic Preservation,
17 are interested in all of the same things that you are,
18 it's protection of these sites. Especially given, in
19 terms of the Indian country, we have 106 federally
20 recognized tribes and 47 tribes that are not federally
21 recognized, but that we also need to make sure that we
22 protect these particular resources.

23 So, our bottom line is, as long as those
24 resources are being protected, duly right under the
25 laws that we have, we're fine with however this

1 information goes.

2 But the bottom line is it always comes down
3 as to who owns the information.

4 HEARING OFFICER KRAMER: Thank you.

5 MR. RATLIFF: Before Mr. Donaldson leaves,
6 could I ask him a couple of questions?

7 HEARING OFFICER KRAMER: Go ahead, Mr.
8 Ratliff.

9 MR. RATLIFF: I didn't understand the last
10 sentence that you stated?

11 MR. DONALDSON: It comes down to who owns the
12 information?

13 MR. RATLIFF: Yes.

14 MR. DONALDSON: Yes.

15 MR. RATLIFF: The bottom line?

16 MR. DONALDSON: The bottom line is that we,
17 at the Office of Historic Preservation do not own all
18 the information that's in the CHRIS System. A lot of
19 the information that's in the CHRIS System is owned by
20 that particular university, or institution, or county
21 that controls that information.

22 Therefore, in order to gather that
23 information, you need to go to the CHRIS center, the
24 information center, and through an agreement like this,
25 pay the fees and stuff in order to obtain the

1 information for whatever your project is.

2 MR. RATLIFF: So, does it matter who owns the
3 information to get access to it?

4 MR. DONALDSON: It depends. Not for access
5 to the CHRIS. In other words, if you're qualified to
6 get the information and you pay the fees, then you will
7 be given the information.

8 MR. RATLIFF: Okay, thank you. And one other
9 question, is there any violation of your agreement with
10 CHRIS if you produce an analysis that's based on that
11 information, so long as it doesn't disclose the most
12 sensitive information, such as the locational data?

13 MR. DONALDSON: You mean in terms of the
14 information that you're handing out, whether they're
15 sensitive sites or they're sites that --

16 MR. RATLIFF: Well, if your a party, say, to
17 this proceeding and you wanted to produce testimony on
18 the impact or the significance of the resources, is
19 there any violation of a CHRIS agreement if you
20 actually were to prepare testimony on that, if you
21 didn't disclose the locational data?

22 MR. DONALDSON: No, and that happens all the
23 time.

24 MR. RATLIFF: Okay.

25 MR. DONALDSON: In fact, there was a case

1 that came up several years go, before I became as the
2 State Historic Preservation Officer, where a city
3 actually took the information and on their FTP site
4 went ahead and put all the information, all the
5 sensitive sites, even the burials on there, and
6 published it for anybody to read. And it came down
7 very heavy on them on that particular case.

8 So, as long as you're protecting the
9 resources both from either a trinomial number, or a
10 site location map, or a detailed description of that,
11 according to the CHRIS criteria, then you can certainly
12 go ahead and put a report of findings and what you're
13 determinations are.

14 MR. RATLIFF: Yeah, I don't know if this
15 question is one for you or one for Dr. Hunter, but you
16 heard the statement earlier, by Mr. Whitley, perhaps
17 it's Dr. Whitley, that if you have access to CHRIS you
18 would get not only the final report from BLM, but you
19 would also get access to all the other documents,
20 including the background documents that were done in
21 the field by the consultants. Is that correct?

22 MR. DONALDSON: If they were deposited at the
23 CHRIS, uh-huh.

24 MR. RATLIFF: Deposited, okay.

25 So, there's no restriction once you -- you

1 either have access to CHRIS or you don't then?

2 MR. RATLIFF: Okay, thanks.

3 MR. GALATI: Mr. Kramer, can I ask a few
4 questions of Mr. Donaldson?

5 HEARING OFFICER KRAMER: Go ahead, Mr.
6 Galati.

7 MR. DONALDSON: I'm not a lawyer, guys, I'm
8 an architect.

9 MR. GALATI: I'm not going to ask any more of
10 those questions. Those were particularly effective and
11 I'm done being effective.

12 Let me ask you, I'd like to try and describe
13 to you my understanding of what happens is, okay, if
14 someone is planning a project, they hire a qualified
15 archeologist. The archeologist goes to the CHRIS
16 Center, signs the agreement, shows the appropriate
17 qualification. And what that person, that consultant
18 then does is has access to studies that were done maybe
19 in and around the area.

20 And so the purpose of going to CHRIS in the
21 first place is to get the records that might be within
22 some sort of area of potential affect of a project, to
23 determine if anyone else had done work out there to
24 find stuff that we know about. Right?

25 MR. DONALDSON: Correct.

1 MR. GALATI: Okay. Then the second stage
2 would be to go out in the field and do pedestrian
3 surveys of the site to see, maybe there weren't any
4 studies in the area in the CHRIS information, so you do
5 your own studies. Correct?

6 MR. DONALDSON: That depends upon the
7 project.

8 MR. GALATI: Okay. It's that pedestrian
9 information and the compilation of what was in the
10 CHRIS from the other studies that is then bundled by
11 the consultant and given to BLM. Is that correct?

12 MR. DONALDSON: I'm not sure what the process
13 is, but that would be a good way to describe a project.

14 MR. GALATI: And so is it fair to say that
15 BLM is treating that compilation as draft until they
16 decide that it is representative or enough field work
17 has been done to bundle it into a study that they then
18 can file with CHRIS, so someone else can find it?

19 MR. DONALDSON: Yes.

20 MR. GALATI: Okay, thanks.

21 MS. FOLEY GANNON: I have a question.

22 MR. DONALDSON: Also, I'd like to note that
23 our office, for the Section 106 process, under the
24 National Historic Preservation Act, does not require
25 that you go to the CHRIS for the information.

1 We recommend that you do, unless we have a
2 program agreement, like with the U.S. Forest Service,
3 or with FEMA, or somebody like that, to where they must
4 go to the access.

5 MR. GALATI: So, it is possible, when BLM
6 determines that its report is final, it might have raw
7 data in it, but it's that data that BLM has determined
8 is now sufficiently peer reviewed or sufficient enough
9 to actually make it into the report. Correct?

10 MR. DONALDSON: It's up to them.

11 MR. GALATI: Okay.

12 MS. FOLEY GANNON: And as part of your
13 participation in the 106 process, you frequently get
14 the draft reports; is that correct?

15 MR. DONALDSON: Sometimes we do and sometimes
16 we don't. It really depends on what our intervention
17 is and also what -- we may have a programmatic
18 agreement with some of the larger federal agencies.
19 Some of the smaller ones we don't.

20 For instance, we just recently completed a
21 programmatic agreement with the California Energy
22 Commission.

23 MS. FOLEY GANNON: And if you had the draft
24 report, would you share that with a member of the
25 public?

1 MR. DONALDSON: No.

2 MS. FOLEY GANNON: And would there be a
3 process by which they could obtain that draft report
4 from you?

5 MR. DONALDSON: They can retain any kind of
6 information they want through a Public Records Act
7 request, but they would still not get the confidential
8 information.

9 MS. FOLEY GANNON: Thank you.

10 PRESIDING MEMBER DOUGLAS: One more question,
11 Mr. Donaldson.

12 MR. DONALDSON: Okay.

13 PRESIDING MEMBER DOUGLAS: You indicated that
14 the specific locations of the sites would be viewed as
15 confidential information. What other information, if
16 any, would be viewed as confidential? In this case,
17 the characterization of the sites, descriptions,
18 anything like that?

19 MR. DONALDSON: There is probably more
20 detailed information in the CHRIS manual that really
21 kind of outlines that. I can read those point by
22 point, if you wish.

23 But, essentially, it's anything that would
24 cause harm to a particular site that we consider to be
25 confidential.

1 PRESIDING MEMBER DOUGLAS: Okay.

2 MR. DONALDSON: So anything, any kind of
3 information, because there has been, in the past,
4 certain information in the way it's written, the way --
5 especially, when we're getting into traditional
6 cultural properties, where we're doing view sheds and
7 stuff like that, that almost if you could get to the
8 spot of the way it's being described, you could be at
9 that location.

10 So, we're very wary of that kind of
11 information, even though you're not having a map site,
12 an area of potential affect, and the other things that
13 actually you could GPS to the site, itself.

14 PRESIDING MEMBER DOUGLAS: If someone were to
15 indicate that there was a higher concentration of sites
16 in a certain, say, 500 square feet on the proposed
17 project site, or were to produce a high level scatter
18 plot of where sites were that was not detailed enough
19 to show where the actual site was, but was detailed
20 enough to show at least where the concentration of
21 sites were, that sort of -- that sort of presentation
22 of information, you know, does the SHIPRA provide
23 guidance on how to do that?

24 MR. DONALDSON: You know, I think you're
25 talking about the amoebas or the blogs in this case to

1 kind of show a general area where it's not -- we do not
2 support that as well.

3 PRESIDING MEMBER DOUGLAS: When you say you
4 do not support that as well --

5 MR. DONALDSON: We did not support the blob
6 imagine. In other words, sometimes you've heard about
7 people, in terms of art sites saying, well, this is
8 kind of the area that it's at, we do not support that
9 as well.

10 Rather than being very specific where the
11 actual units were being tested on the ground.

12 HEARING OFFICER KRAMER: So, you think the
13 blob is still potentially too descriptive?

14 MR. DONALDSON: Yes. Because you're
15 indicating within a certain boundary that these things
16 exist.

17 Now, if you go to the information center, the
18 information will give you a list of known sites that's
19 within your area of potential affect, but it will not
20 tell you where those sites are. You have to be
21 qualified in order to get those sites, in the sites
22 records.

23 PRESIDING MEMBER DOUGLAS: So, could you
24 potentially get a list of known sites that were within
25 a project, for example, or could you get a number of

1 known sites that were within, or within a hundred feet,
2 or within half a mile of the project?

3 MR. DONALDSON: We would not tell you that,
4 how close it is within ten feet or that. We would say
5 that it's within your area of potential affect. And
6 you could have a series of different layers of
7 potential affects, especially if you're doing a
8 cultural property analysis.

9 For instance, our Solar Two Project is very
10 similar to that. We have four different layers of
11 potential effects.

12 PRESIDING MEMBER DOUGLAS: I see.

13 ASSOCIATE MEMBER WEISENMILLER: And with
14 those layers, could one look at the potential avoidance
15 or mitigation strategies for cultural resources?

16 MR. DONALDSON: If you were qualified to get
17 that information, of course you could. Because we
18 always -- we always work with her to avoid, minimize or
19 mitigate, in terms of any kind of negative affects or
20 adverse affects to the properties.

21 You look blank?

22 ASSOCIATE MEMBER WEISENMILLER: No, that was
23 good, just looking at the chart.

24 HEARING OFFICER KRAMER: Okay, thank you.

25 MR. DONALDSON: By the way, if you want a

1 detailed in terms of how the agreement, what you're
2 signing to, what you can access, what you can't access,
3 there is some information that you cannot directly
4 access yourself. You'll have to pay one of our
5 coordinators or their staff to go in and get that
6 information and then pay that fee for them to bring it
7 out to you.

8 So, if you're wanting to know how all that
9 works, I invite you to go to our website, it's very
10 detailed, and you can comb through the manual and
11 stuff, if you really want some good reading.

12 (Laughter.)

13 ASSOCIATE MEMBER WEISENMILLER: I'm just
14 curious, do some of the fees that are paid then go back
15 to the owners of the data, is that part of the --

16 MR. DONALDSON: All of the fees do.

17 ASSOCIATE MEMBER WEISENMILLER: Oh, okay, so
18 that's why it's a bottom line thing. To quote you a
19 few minutes ago.

20 MR. DONALDSON: Absolutely.

21 ASSOCIATE MEMBER WEISENMILLER: Got ya.

22 MR. DONALDSON: The information centers are
23 much more than just a library, they provide a lot of
24 services to the public.

25 MS. KOSS: I would like to ask just a couple

1 of questions, if I may?

2 HEARING OFFICER KRAMER: Okay.

3 MS. KOSS: Mr. Donaldson, would you say that
4 the locations of the cultural resources are critical to
5 an evaluation of whether mitigation is adequate?

6 MR. DONALDSON: Yes.

7 MS. KOSS: And if an expert has CHRIS access,
8 if they've signed an agreement, does that mean that it
9 has been determined that release of that specific site
10 location information would not endanger those
11 resources?

12 MR. DONALDSON: To a qualified personnel,
13 that's correct.

14 MS. KOSS: Thank you.

15 HEARING OFFICER KRAMER: So, could there be a
16 resource that's so, so sensitive that you can't even
17 tell a qualified person where it is located?

18 MR. DONALDSON: There are some -- there are
19 some resources, although they're probably not cultural
20 resources, that we do have on military bases, that are
21 not allowed because of the mission critical.

22 HEARING OFFICER KRAMER: So, they're using
23 equipment that's over 50 years old or something?

24 MR. DONALDSON: No, they're probably using
25 state of the art, in an area that you do not want to be

1 in during that time.

2 HEARING OFFICER KRAMER: Okay. Thank you.
3 We may have more questions, but we really do appreciate
4 your coming over.

5 ASSOCIATE MEMBER WEISENMILLER: Actually, let
6 me ask one more. As I understand it, CURE also
7 submitted data requests to you and you basically
8 deferred to BLM on it?

9 MR. DONALDSON: You know, I just heard that
10 today. Personally, I'd have to check with my staff on
11 that, I was not aware of that.

12 ASSOCIATE MEMBER WEISENMILLER: Thank you.

13 MR. DONALDSON: Okay.

14 HEARING OFFICER KRAMER: Okay, Mr. Boyd, did
15 you have any particular presentation that you wanted to
16 make?

17 MR. BOYD: No, sir. You guys heard what I
18 had to say and took our testimony and declarations, and
19 I think you got enough information to do the right
20 thing and I just hope you do.

21 MS. KOSS: Hearing Officer Kramer, I just
22 received an e-mail from Dr. Whitley that he is back on
23 the line.

24 HEARING OFFICER KRAMER: Oh, good.

25 DR. WHITLEY: Yes, I am here.

1 HEARING OFFICER KRAMER: Okay, and you're
2 still sworn.

3 DR. WHITLEY: Yes, I am.

4 HEARING OFFICER KRAMER: We explored with, I
5 think probably right after you left us, the notion of
6 the degree of or level of information you need to
7 properly analyze these proposed projects and testify in
8 our proceedings, and I think you hinted at -- or you
9 may have even said that locational information is a
10 very important part of that. Am I recalling that
11 correctly?

12 DR. WHITLEY: That is correct, yes.

13 HEARING OFFICER KRAMER: So, I think I know
14 your answer, but I'll ask. Actually, that's what we're
15 supposed to do as lawyers, I suppose.

16 So, then, you would not consider it adequate
17 to know just the types of resources that are on the
18 site and also, then, be able to review the mitigation
19 that's proposed, the mitigation plan should those
20 resources be encountered during a project; that's not
21 enough for you, am I right?

22 DR. WHITLEY: Correct, correct. I would need
23 to see the original site records and the location maps.

24 For example, speaking specifically of the Genesis
25 Project, it is close to, if not on, a prehistoric lake

1 shoreline. That's potentially extremely significant in
2 terms of understanding the nature of the resources that
3 might be present there.

4 So, knowing for example that a site was
5 located in that particular spot would tell me quite a
6 lot in terms of its potential for having significance
7 in the environmental compliance since it remains
8 present. That wouldn't show up in just a data table
9 that says, you know, there's such and such site located
10 within the APE.

11 HEARING OFFICER KRAMER: So, location may
12 affect its significance?

13 DR. WHITLEY: Yes. I mean, it's one of a
14 variety of lines of evidence that an archeologist would
15 want to assess.

16 HEARING OFFICER KRAMER: Now, if you have
17 this information would you -- would you go out and
18 visit the locations?

19 DR. WHITLEY: Certainly, in some cases, I
20 have been requested to do that, that does happen. In
21 some -- in CEQA reviews and things of that nature.

22 And in this case, if I was asked to do that,
23 I would do that, yes.

24 HEARING OFFICER KRAMER: But is it also
25 possible for you to simply review the narrative that

1 another of your colleagues prepared, describing the
2 setting and do you get enough information about the
3 setting from that description to substitute, if you
4 will, for a visit to the site?

5 DR. WHITLEY: It depends on what you mean
6 precisely by narrative. I would want to see the
7 original site record, which is the data form that an
8 archeologist fills out to describe a site and that is
9 then archived in the CHRIS information centers.

10 And, frankly, it would depend on how detailed
11 that record might be. If the record is poorly filled
12 out and there's not a whole lot of information on it,
13 then I would probably feel that a site visit would be
14 necessary.

15 If the archeologist -- I mean, here it's
16 partly a qualitative judgment. If they go into detail
17 and it's clear that, you know, they understand the
18 variables and so on, then it might not be necessary.

19 HEARING OFFICER KRAMER: And for the projects
20 that CURE has an interest in, have you made visits to
21 the CHRIS data?

22 DR. WHITLEY: No, I have not.

23 HEARING OFFICER KRAMER: Why not?

24 DR. WHITLEY: I haven't been asked to. And
25 my assumption at the outset, frankly, was that the data

1 had not been released to the CHRIS System, that was a
2 reaction to the BLM's request that you not -- that you
3 return the -- that the Commission returns the
4 information.

5 I was surprised, in fact, to realize this
6 morning that when I was looking over the draft EIS/EIR
7 again, it hadn't occurred to me, frankly, that
8 trinomials existed, so that something might have
9 been -- or something must have been filed in the
10 information center.

11 Now, I don't now if the BLM has also
12 requested those back, those records back or not?

13 HEARING OFFICER KRAMER: Well, but there
14 might have been records at CHRIS that resulted from
15 research done in the past, somewhere more than a year
16 ago, for instance, that would be available; correct?

17 DR. WHITLEY: Well, there might be. I have
18 no way of knowing.

19 I mean, there certainly are records of the
20 previously recorded sites within the APE, those would
21 be within the CHRIS system. But it's the newly
22 recorded sites, I have no idea when those would have
23 been submitted and, you know what their availability
24 might be.

25 HEARING OFFICER KRAMER: So, do you know from

1 the Imperial data, do you have a sense of how much of
2 the information -- because you did receive the draft
3 information; correct?

4 DR. WHITLEY: The draft.

5 MS. KOSS: May I interrupt? Sorry, let me
6 just interrupt for one moment.

7 Dr. Whitley has only been hired for the
8 Genesis proceeding.

9 HEARING OFFICER KRAMER: Oh, okay.

10 MS. KOSS: Claudia Nesley is our expert for
11 the Imperial Valley proceeding and, unfortunately, she
12 is not on the line.

13 HEARING OFFICER KRAMER: Okay. So, then he
14 has not seen, then, any of the data that -- okay,
15 understand.

16 Let me ask if any of the other parties want
17 to comment further on the notion, I think it's been
18 developed by both Ms. Gannon and her -- Gannon Foley --
19 Foley Gannon, I'm sorry, and Mr. Galati that it's not
20 necessary to have the precise locational data in order
21 to perform an adequate analysis.

22 MR. GALATI: I would like to expand on that a
23 bit. I know you don't have the Genesis staff
24 assessment in front of you and I would normally cross-
25 examine Mr. Whitley with it in front of him.

1 But if you were to, after this hearing,
2 please take a look at page 88 through 89 of the
3 cultural resource section, there is about a five-
4 paragraph descriptions that starts with "the site is an
5 oblong prehistoric archaeologic deposit, approximately
6 six, 7,689 square meters in area.

7 It is located in the southeastern portion of
8 the site. It goes on to talk about what they found
9 there. It goes on to talk about what context it's in.

10 The archaeologists for the applicant do not specify a
11 function for the site. They do suggest that the
12 presence of the ground stone is generally consistent
13 with a late archaic period occupation, 8,000 to 6,000,
14 but not explain why the site cannot also be consistent
15 with other time periods.

16 There is a lot of analysis and description of
17 this particular site, which the Energy Commission
18 staff, lacking additional information that you might
19 get from testing, have determined how to mitigate this
20 impact.

21 There is enough information here for Mr.
22 Whitley to say -- for Dr. Whitley to say that he can
23 recommend that that's the wrong mitigation.

24 There's enough information here, and this is
25 the balance, your staff has done it forever. And it's

1 a great balance, and it has worked.

2 And we heard today from the federal agency
3 they've never seen a FOIA like this before, so it's new
4 there, too.

5 So, while Dr. Whitley might get hired by
6 somebody who pays him to go to CHRIS and get the
7 information, this -- what's happening here, today, is
8 something new. We don't have to keep reinventing the
9 wheel on every solar project, they're not that
10 different.

11 So, they are large pieces of property. But
12 as we've discussed that before, what I really want you
13 to focus on here is that I anticipate in four of my
14 cases, Genesis and Blythe being the first two, that
15 come time for evidentiary hearing, we've already
16 submitted testimony on some, we're going to be
17 submitting testimony on Blythe, on Friday, so will
18 CURE, that you will get an argument or a motion from
19 CURE that says they cannot participate and we cannot go
20 forward to evidentiary hearings and you, Energy
21 Commission, can't decide a case without their
22 participation and, therefore, you shall delay.

23 So, if CURE would stipulate that they would
24 not do that information, I will pack up and leave.

25 If they won't, then I would like you to

1 decide today, or on your deliberation, that CURE does
2 not need the information.

3 And I implore you to look at what your staff
4 has done on every project, including the Genesis
5 project, and determine for yourselves whether they have
6 presented and brought that balance, redacted only the
7 information so that you don't go out and loot it, but
8 described it enough.

9 And so, I know that's contrary to Dr.
10 Whitley, I wish your staff would testify, because I
11 think it's enough.

12 HEARING OFFICER KRAMER: Were you referring
13 to the March staff assessment or the May version?

14 MR. GALATI: I haven't got the -- there's no
15 May version, yet.

16 HEARING OFFICER KRAMER: Okay.

17 MR. GALATI: The may was in proposed
18 mitigation. The March staff assessment draft EIS,
19 Section C.3. I would love to take a lot of time and
20 maybe I will in the Genesis proceeding, if Dr. Whitley
21 testifies, to go through each resource, but I can't do
22 that here.

23 He said it's not sufficient, I ask you to
24 please read it and see if you think it's sufficient.

25 DR. WHITLEY: May I respond to that, since I

1 think this started out as a question to me?

2 MR. GALATI: No, it didn't.

3 DR. WHITLEY: Oh, okay.

4 HEARING OFFICER KRAMER: Well, do you happen
5 to have that Genesis staff assessment with you?

6 DR. WHITLEY: Yes, I do, I have it up on my
7 screen and I'm looking at page 88.

8 HEARING OFFICER KRAMER: Okay. Have you
9 finished reviewing that or would you like a little more
10 time to do that?

11 DR. WHITLEY: No, I've read it previously and
12 was able to look it over right away. And my immediate
13 reaction is, yes, there is a lot of information there.
14 Is there all the information and is there enough for
15 me to adequately evaluate the status and significance
16 of the site without the locational information?

17 The answer is simply no. I mean, one of the
18 first things that's noted is that this particular site
19 was found in some proximity to another. In fact, it
20 was found, let me look again, 86 meetings north of
21 another recorded site. That's not very far, 86 meters,
22 that's less than 30 paces.

23 Now, if in fact there's an intervening land
24 form, like an arroyo, between those two sites, then I
25 probably concur that they're two separate cultural

1 resources, two distinct resources.

2 But if there's not, and if there's a
3 continual alluvial surface, for example, or colluvial
4 surface, then I'd look at that and I'd think this
5 surface inspection may not be right, this may be
6 another manifestation of that other resource, and this
7 is just much bigger, and it's been mis-mapped and mis-
8 interpreted at the initial survey level.

9 So, no, I have to disagree, as a professional
10 archeologist, that the locational information is
11 actually pretty important.

12 MS. KOSS: May I also add that not only does
13 Dr. Whitley, in his professional opinion, feel that the
14 location information is critical, but a minute ago we
15 heard from Mr. Donaldson, the State Historic
16 Preservation Officer, that the cultural resources site
17 locations is -- are absolutely critical to determining
18 whether mitigation is adequate. And CURE did not hire
19 Mr. Donaldson.

20 MR. GALATI: Yeah, but what Ms. Koss fails
21 to -- and what Dr. Whitley fails to make a distinction
22 is, is your staff has a different obligation than the
23 intervenor. Okay. And your staff is the person doing
24 that. They are doing that, they've done it for years.

25 So, Dr. Whitley may believe, if I worked for

1 you, at the Energy Commission, I couldn't conclude what
2 your staff has, but that doesn't mean that he can sit
3 in the shoes of your staff and say I, as a party,
4 because there's nothing in the regulations that say he
5 gets the information as staff, and my brief addressed
6 that. Your staff has a higher duty, they've done it,
7 and we need to cut to the chase here and talk about do
8 we need to continue to have a conversation about
9 whether CURE needs this information?

10 It's useful. There's lots of information as
11 an applicant I would like to have, that is useful, that
12 I don't have access to.

13 So, all I can tell you is think about what
14 you might be doing here. If an intervenor came in with
15 a commercial interest in another project, would now
16 your staff, who evaluates a confidential piece of
17 information, that might be confidential commercially,
18 is that now acceptable to that person because they're a
19 party?

20 How about if there is a person who -- let's
21 just take a recent example. Imagine giving the
22 confidential cultural resource information to something
23 like the Eastshore Project number of intervenors, with
24 all professional archaeologists.

25 You need to recognize that your staff has a

1 different obligation. CURE has decided that they would
2 like to be and have the same access as your staff.
3 They don't need to and they've proven time and time
4 again that they can participate fully without it.

5 And if we can get there, then we can let the
6 rest of this happen at the federal level. But I think
7 that's the crux of the decision.

8 PRESIDING MEMBER DOUGLAS: I'd actually to,
9 and I have been meaning to ask Mr. Donaldson for a
10 clarification or a follow-up question on that, if you
11 don't mind coming back up.

12 And, obviously, I think you understand that
13 we, the Energy Commission staff, is performing the role
14 of preparing a CEQA equivalent, but's a CEQA,
15 essentially, lead agency, with an obligation to assess
16 the environmental impacts of a project under CEQA and I
17 think you made it pretty clear that in your opinion the
18 Energy Commission staff needs locational information on
19 the sites. Is that what you said or that they should
20 have it, that they need it?

21 MR. DONALDSON: Yeah, it depends upon what is
22 out there, what research is done, how the reports and
23 the information that you have.

24 And we pretty much focus on the Section 106
25 process, not really the CEQA.

1 We did have a person working for us, who is
2 currently now working for you, that was our CEQA
3 expert, and we're not really doing any CEQA cases
4 because we get about 80 to 100 per day from the State
5 clearinghouse, so we're lucky if we can get two or
6 three.

7 In any case, under the Section 106 or, to a
8 certain degree under the CEQA/NEPA process, the more
9 information that you have on a site, the better then
10 you can plan your particular project.

11 And for instance, like Solar Two I think is a
12 prime example of that. Solar Two was much larger than
13 it is now, but there was more resources that was found
14 to the east and they decided to basically take that out
15 of their project, reduce the amount of SunCatchers that
16 they're going to have, to still meet their requirements
17 with San Diego Gas & Electric in terms of supplying
18 solar power.

19 And that's a clear case that they wanted to
20 avoid those because of the density, the impact,
21 potential cremations and stuff that's there. So, they
22 had really good information on that.

23 But in the same sense, all of the federal
24 agencies that we work with, it really depends on how
25 information -- whether or not you've got adequate

1 information in order to make a findings of effect in
2 what and how you're going to treat the property.

3 And a lot of the programmatic agreements
4 which we write into, which is not necessarily the best
5 way to do it, but it is a way to do it, is that you do
6 write it.

7 And I think you've heard from some of the
8 archaeologists today is you will find some sort of a
9 discovery document in there, you'll find a treatment
10 plan. So, in other words, if you come upon resources,
11 how you're going to treat those.

12 And if you try to rush that, without really
13 getting adequate information, it's just going to make
14 the end findings more difficult.

15 And I think you heard a couple of cases, like
16 down at Playa del Rey, that maybe in their own mind
17 adequate information, adequate research was done, but
18 once the project then started, a big discovery, then
19 ended up spending a lot more money and, you know,
20 delaying the project beyond what you wanted to do.

21 But it really varies with the agency that's
22 performing it, what the site holds, the history of the
23 site, what you get out of the information. How you
24 ground proof some of that information, whether the
25 information is correct.

1 And you do your best during the process that
2 you have and the time limits that you do.

3 By the way, a lot of people think that our
4 office somehow goes out and grounds proof this
5 information, but we act pretty much like other
6 agencies. For those particular reports and stuff that
7 we get, that are done by qualified people, we go on
8 faith as we read those.

9 If we think there's some inadequacy about
10 that we will ask questions, perhaps, to go out and get
11 more information.

12 But again, that information that we get, we
13 do not go out and ground proof, we do not do basic
14 research on the information that comes in to us.

15 PRESIDING MEMBER DOUGLAS: And so,
16 presumably, after a lead agency, either with site --
17 either with locational information or with sufficient
18 information to fulfill its requirements, produces a
19 document for public review that obviously does not give
20 away the location of sites, but characterizes them
21 something like what Mr. Galati read into the record,
22 would you say that's standard in terms of how cultural
23 resources impacts are evaluated and presented?

24 MR. DONALDSON: It's standard under 106.
25 It's perhaps not the best way we can do it, but it is

1 standard for the general public.

2 MS. KOSS: May I respond to Mr. Galati's
3 comments, please?

4 HEARING OFFICER KRAMER: Go ahead.

5 MS. KOSS: Thank you.

6 MR. DONALDSON: Am I done?

7 MS. KOSS: I'm done with you, I'm not -- I
8 just want to make it clear why CURE cannot fully
9 participate without this information. If, for example,
10 staff and the applicant agree on mitigation, it's not
11 contested, but CURE disagrees after reviewing
12 information, I mean, that would be the only way they'd
13 be able to determine that, there would be no way to
14 provide evidence to support our argument and that's our
15 burden.

16 If staff and the applicant agree, the burden
17 shifts from the applicant to intervenor to provide
18 evidence to support their argument.

19 Without the information, we will have no
20 evidence.

21 Also, I want to make that very clear, that is
22 a right as a party to submit testimony, to provide
23 evidence. And, actually, we're mandated to do so if we
24 disagree with the applicant and staff.

25 ASSOCIATE MEMBER WEISENMILLER: Well, let me

1 ask you a question. In the PUC context are you aware
2 of an organization called the Coalition of California
3 Utility Employees?

4 MS. KOSS: Yes.

5 ASSOCIATE MEMBER WEISENMILLER: Okay, is that
6 familiar?

7 MS. KOSS: It is.

8 ASSOCIATE MEMBER WEISENMILLER: Now, would
9 you be surprised if in those proceedings, particularly
10 rulemaking proceeding 05, 06, 040, that in a joint
11 brief the position of CURE -- excuse me, the Coalition,
12 was "as previously noted by joint utilities, market
13 participants wrongly attempt to equate the right to
14 gain access to Commission proceedings, to which they
15 have access, but the right to gain access to
16 confidential information, to which they should not."

17 MS. KOSS: Can you read it one more time?

18 ASSOCIATE MEMBER WEISENMILLER: Sure. "As
19 previously noted by joint utilities" -- this is a
20 filing of a number of parties, including the Coalition
21 -- "market participants wrongly equate the right to
22 gain access to Commission proceedings, to which they
23 have access, but the right to gain access to
24 confidential information, to which they should not."

25 MS. KOSS: I'm not honestly sure I understand

1 that statement. I do know that it's routine for CUE to
2 gain access to confidential information in PUC
3 proceedings through nondisclosure agreements, it's
4 routine.

5 ASSOCIATE MEMBER WEISENMILLER: It --

6 MS. KOSS: I'm sorry, I just don't understand
7 what that statement --

8 ASSOCIATE MEMBER WEISENMILLER: Well, the
9 issue the Commission was struggling with was should
10 market participants, or should their attorneys and
11 representatives, to the extent of -- attorneys and
12 consultants, to the consent they signed an NDA, should
13 they gain access to confidential information?

14 And the conclusion was they shouldn't. So,
15 essentially, they have a much tougher burden in
16 participating in those cases, to the extent they're
17 denied access to confidential information.

18 MR. BOYD: Only to the degree they're a
19 market participant though.

20 ASSOCIATE MEMBER WEISENMILLER: That's
21 correct. But at least I'm saying at least in that
22 case, where a party has a commercial interest, that
23 affects their rights as an intervenor in those cases,
24 and that's certainly been consistent with the
25 Coalition's position.

1 So, I guess what I'm trying to --

2 MS. KOSS: So, CUE is not a market
3 participant.

4 ASSOCIATE MEMBER WEISENMILLER: No, but you
5 certainly, as you indicated in your intervention
6 status, are representing the economic interest of your
7 clients, in terms of the existing projects and future
8 projects.

9 So, again, at least the basic theory is
10 should -- by being an intervenor, should you have the
11 same rights as all other intervenors? At least in that
12 context, the position of your -- I would say the firm
13 at least was representing was no.

14 MR. BOYD: Non-market participants have
15 access to that information, consumer groups, CURE, CUE,
16 all those guys, if they sign a nondisclosure agreement,
17 they can get access to the information. That only
18 applies to market participants and that has to do with
19 commercial interests, nothing to do with cultural or
20 resources, or their confidentiality.

21 MS. KOSS: Yeah, that's correct. For
22 example, we couldn't use proprietary information to
23 harm, you know, the applicant's economic interests. We
24 couldn't release proprietary information about their
25 technology, et cetera, that kind of thing.

1 So I'm not -- I just -- I don't think that's
2 applicable here. Frankly, I don't really know anything
3 about that case.

4 I do know that CUE routinely signs
5 confidentiality agreements in PUC proceedings to gain
6 access to confidential information from utilities, for
7 example. I signed one recently.

8 And the other distinction that I'll make is
9 that in the Energy Commission regulations it does say
10 that intervenors have the same rights as every party,
11 Section 1207.

12 PRESIDING MEMBER DOUGLAS: I think the
13 question that Commissioner Weisenmiller was getting to,
14 and it's also related to what Mr. Galati is asking, is
15 whether adequate access and participation to a process
16 necessarily means that an intervenor has to have access
17 to all confidential information.

18 And I think he was pointing out that in
19 another context CURE or CUE thought that it was
20 reasonable for a process to go forward or advocated for
21 a process to go forward, in which that was not the
22 case.

23 I understand that this is a different
24 context, but I think it's helpful that we indicate to
25 you that, you know, we've heard your argument, we've

1 heard Mr. Galati's argument, we certainly saw your
2 arguments in the brief and so this is helpful. If you
3 want to bring up more information in the context of
4 this proceeding to substantiate either your assertion,
5 or Mr. Galati, on your side, I think that is getting to
6 the crux of the issue or at least one of the core
7 issues that we're here to decide.

8 MS. KOSS: Well, in this case, the -- as Dr.
9 Whitley said, the confidential information is critical
10 to evaluating significant impacts and determining
11 whether mitigation is adequate.

12 As a party to the proceeding, that is our
13 right to do. So, in order to provide testimony and
14 cross-examine, it's all clearly laid out in our brief.

15 I'm not sure if I have any additional information for
16 you.

17 MR. BOYD: Can I ask a question?

18 HEARING OFFICER KRAMER: Yeah, who is this?

19 MR. BOYD: This is Mike Boyd.

20 HEARING OFFICER KRAMER: Go ahead.

21 MR. BOYD: So, is what you're saying that we
22 should just accept on good faith the applicant's claims
23 regarding the presence or absence of cultural
24 resources, as presented in the staff assessment, in the
25 draft EIS, based on the fact that it's not complete

1 information being presented, is that what you're
2 asking?

3 HEARING OFFICER KRAMER: No, I don't think so
4 because it was -- I believe they're talking more about
5 locational data and the ability to go and complete
6 review all of the conclusions that were made.

7 The absence or presence of resources is going
8 to be reported to some level of detail in the staff
9 analysis and --

10 MR. BOYD: Which is based on information the
11 staff independently turned themselves or they got from
12 the applicant.

13 HEARING OFFICER KRAMER: Well, it would be
14 from the applicants, consultants hired by the
15 applicant. But as we heard, who may not even provide
16 the data to the applicant, at least the confidential
17 parts. It just goes to BLM and BLM may choose to
18 release it to Commission staff. I gather that they
19 have in the past.

20 So, one of the questions becomes whether --
21 well, what extent --

22 MR. BOYD: Well, essentially --

23 HEARING OFFICER KRAMER: Go ahead, Mr. Boyd.

24 MR. BOYD: Well, essentially, what we're left
25 with is accepting on good faith the applicant's claim,

1 that's what I see. I don't see any independent review,
2 I don't see -- I mean, essentially, this is what
3 happened with Metcalf. We hired to qualified
4 archaeologists that both concluded there was a high
5 likelihood that human remains were present on the
6 project site.

7 The Commission ignored this and chose to
8 accept, on good faith, the applicant's claim that such
9 remains were unlikely.

10 Then, in June 2002, 17 to 20 human burial
11 remains were discovered, ten cultural artifacts were
12 found, too.

13 And so, my question is that's why I'm asking
14 you this, why should we rely, on good faith, on
15 applicant's claim, because that's what we're doing.
16 Because, obviously, the Commission staff doesn't have
17 the resources to independently collect the data on
18 their own that is needed for them to make an informed
19 decision.

20 So, how can you expect intervenors to accept
21 that is what I'm asking? How can you just expect us to
22 accept the claims that are in the staff assessment, in
23 the draft EIS that, basically, you got that information
24 from the applicant?

25 MS. KOSS: May I just ask if Loulena Miles

1 has any additional comments to make, as counsel for
2 CURE?

3 HEARING OFFICER KRAMER: Go ahead.

4 MS. KOSS: Thank you. Loulena, are you
5 there?

6 MS. MILES: I am.

7 MS. KOSS: Do you have any additional
8 comments to make in response to Commissioner Douglas's
9 question? I just wanted to give you the opportunity,
10 if you do.

11 MS. MILES: I thought you stated it quite
12 well, that's it really that we need this information in
13 order to participate and that it is the basis for our
14 testimony. It is the evidence that supports our
15 testimony.

16 So, I think that pretty much sums it up.

17 HEARING OFFICER KRAMER: Okay, staff, do you
18 want to -- are you willing to respond to Mr. Boyd's
19 rhetorical question?

20 MR. RATLIFF: Well, I don't think it would be
21 a response that would be satisfactory to him. But the
22 check on applicant's data, of course, is that it's
23 provided by BLM and the Energy Commission staff.
24 That's the role of the agencies, that's the burden of
25 the agencies.

1 And I think that there is, in addition to
2 that, something of a misconception that has arisen, and
3 it gets repeated, and I feel like I have to say
4 something about it. That by virtue of becoming an
5 intervenor that you have exactly the same rights as the
6 staffs of the agencies, or of the applicant, itself,
7 and I think that's not only questionable, it's actually
8 wrong.

9 And I'll tell you why. Because the role of
10 intervenors -- intervenors come into a proceeding with
11 no duties, except those that the Committee may assign
12 to them.

13 The duty of the applicant is a very high
14 duty, they have to prepare an application, they have to
15 present a great deal of testimony to go forward with
16 their case.

17 That the role of the staff, the duty of the
18 staff is a very high one because we have to provide an
19 environmental document that is legally sufficient, as
20 does BLM. Not a party to this proceeding, as they were
21 characterized, but also a sister agency with that duty.

22 That's very different. And there is,
23 generally speaking, no due process right and no
24 statutory right and, in the view of staff at least, no
25 right under our regulations to unfettered participation

1 in the same manner that the staff participates in the
2 proceeding.

3 I think the misconception comes because the
4 Energy Commission has, as a cultural matter, always
5 tried to accommodate the interests of intervenors such
6 that they could fully participate and that's certainly
7 a value that we have here, and that is important to us.

8 But it's not the -- that's different, I
9 think, and we have to recognize the distinction between
10 a cultural participation and an agency culture as being
11 different and distinct from a legal right or a legal
12 imperative.

13 And that's -- that's what I think I had to
14 address in view of the comments that preceded.

15 MS. BELENKY: Excuse me, are other parties
16 going to be able to address that point?

17 HEARING OFFICER KRAMER: Are who?

18 MS. BELENKY: Are other parties going to be
19 able to address that point, now that we're far away
20 from the cultural resource issue?

21 HEARING OFFICER KRAMER: Certainly, and I
22 think they have been so far.

23 Mr. O'Brien? Who was that speaking?

24 MS. BELENKY: I'm sorry, this is Lisa
25 Belenky, with the Center for Biological Diversity.

1 HEARING OFFICER KRAMER: Lisa, hold on a
2 second and we'll get -- we certainly invite you to
3 discuss that.

4 But Mr. O'Brien, I think, wanted to follow up
5 to Mr. Ratliff's comment.

6 MR. O'BRIEN: Yeah, thank you, Mr. Kramer. I
7 just wanted to make one point in response to Mr. Boyd,
8 which is the staff performs, the Energy Commission
9 staff performs an independent analysis in the area of
10 cultural resources.

11 And so, while it's true that on these solar
12 projects the applicants hire consultants, who go out
13 and survey the project site, the staff reviews that
14 information. In many instances, the staff is on site,
15 itself, meeting with the agency representatives from
16 the BLM, for example.

17 And so, it's an incorrect statement by Mr.
18 Boyd that the Energy Commission staff does not perform
19 an independent analysis.

20 MS. CAMPBELL: Commissioner, can I add to
21 that? This is Vicky Campbell, with the Bureau of Land
22 Management. I'd like to support what Mr. O'Brien said.

23 And also, address what Mr. Boyd said about
24 the data belonging to the applicant and us just
25 accepting what the applicant has said.

1 As I described and Dr. Hunter described, is
2 the consultants are working on BLM managed lands, in a
3 sense for BLM, even though they are paid by an
4 applicant, and that data belongs to the U.S.
5 government.

6 And as Dr. Hunter explained, that when we do
7 get a draft report from a consultant, that it does go
8 through an analysis by the BLM archaeologists and
9 additional work might be required before BLM ever
10 finalizes it.

11 So, it actually becomes a BLM document and
12 the data becomes BLM even before we pass it to
13 California Energy Commission.

14 HEARING OFFICER KRAMER: Thank you.

15 MR. BOYD: Thank you for that.

16 HEARING OFFICER KRAMER: Okay, Lisa Belenky?

17 MS. BELENKY: Yes, hi. I just wanted to --
18 can you hear me okay?

19 HEARING OFFICER KRAMER: You're fine.

20 MS. BELENKY: Okay. I just wanted to address
21 a few points that have been made and, first, I think I
22 need to go back to this point that was just made, I
23 believe, by Mr. Ratliff, on behalf of the staff.

24 And I think that we're way far away from the
25 cultural resource issue before us. But intervenors are

1 parties and need to be treated equally for many
2 reasons. And if the -- if the Commission is going to
3 change that and treat the parties differently,
4 including the intervenors, we would like an opportunity
5 to brief that issue.

6 I do not believe and I do not accept what Mr.
7 Ratliff said as accurate.

8 Secondly, several times it has been raised in
9 this today, this afternoon, in this hearing that, you
10 know, these issues were raised either at a late stage
11 or it's just this is a mere delaying tactic.

12 And I don't believe that that is accurate and
13 I do not feel that that is fair to the way the issue
14 was raised.

15 And we are clearly operating under an
16 accelerated schedule, which the Commission, itself, has
17 stated many times and, indeed, in the staff -- the
18 staff briefing on this matter, they mention the
19 accelerated schedule.

20 And it is really important to accommodate all
21 of the parties and the public having a full and fair
22 review of these projects.

23 Now, I'm not, at this time -- the Center for
24 Biological Diversity is not at this time taking a
25 specific position on how the data, especially the site-

1 specific, very fine-grained data on cultural resources
2 is released or is provided to various parties.

3 However, we are very concerned that any
4 resources would be destroyed when there hasn't been
5 adequate public review and an ability for the public to
6 be part of that process.

7 We are also concerned that in the State side
8 of this process, before the CEC, the tribes are clearly
9 not represented. They are represented in a government-
10 to-government procedure, in front of the federal
11 government, and that these two processes need to take
12 the time it requires to ensure that all of these
13 resources are adequately protected.

14 I think the standard is quite different if
15 the resources are not impacted by the project, compared
16 to if the resources will be destroyed by the project,
17 and we need to keep that very much in the front of all
18 of our proceedings.

19 You know, we have tried very hard and all the
20 intervenors have, I think, to accommodate the
21 accelerated schedule, but that cannot be done at the
22 expense of the resources or the legal requirements.

23 So, I think those are just the few things I
24 really wanted to say. I really want to thank everyone
25 for giving us this opportunity to flesh out and hear

1 all of these issues, it's been very, very enlightening.

2 HEARING OFFICER KRAMER: I'm not sure I
3 understand the depth, the degree of the argument with
4 regard to the tribes. Are you saying that the tribes
5 need to be consulted in the decision about what data
6 gets released or just that they need to be consulted
7 before a final report is prepared and released to any
8 of the other parties?

9 MS. BELENKY: Well, on the latter, I don't --
10 you know, it's a very complicated area of law because
11 the federal government acts as trustee to the tribe.
12 And I believe that the tribe's position may be somewhat
13 different than the federal government's position in
14 this, and they need to be treated as a government in
15 government-to-government consultation.

16 So, I'm not going to presume to speak to the
17 tribes as to what stage and at what point they need to
18 be consulted and provided with the ability to say that
19 certain documents or information are confidential.

20 HEARING OFFICER KRAMER: Okay. Well, I'll
21 note that not tribe has made a request.

22 I gather one of their complaints is that
23 they're not getting the information from BLM and none
24 of them, to my knowledge, have made a request, similar
25 to CURE's, of the Energy Commission. So, perhaps, it's

1 an academic point.

2 MR. BOYD: Oh, but, sir, they're seeking
3 government-to-government consultation.

4 HEARING OFFICER KRAMER: With the BLM?

5 MR. BOYD: With the BLM, yeah. They haven't
6 been consulted, yet, is the point.

7 HEARING OFFICER KRAMER: Okay, well --

8 MR. BOYD: And you want them to be consulted.
9 The data will be made available when all the protocols
10 have been fulfilled. You haven't done the
11 consultation, which is part of an EIS.

12 HEARING OFFICER KRAMER: You're recognizing
13 the Energy Commission's lack of jurisdiction over the
14 federal government, right?

15 MR. BOYD: Oh, I understand.

16 DR. HUNTER: This is Doctor --

17 MR. BOYD: You have no jurisdiction at all
18 over any of this and that's the whole point.

19 DR. HUNTER: This is Dr. Charlotte Hunter.
20 The tribes have been consulted at the start of the
21 projects. They are continually being consulted.

22 They have not received the draft report
23 because we do not give out draft reports until we have
24 had the opportunity, until we make certain that they
25 are correct and adequate.

1 As I said before, a draft report is exactly
2 what it says it is and we do not give out information
3 that we are uncertain as to its validity.

4 And I also want to add in that in the review
5 of these reports and the field work, we have added a
6 third-party reviewer. Our archaeologists go out into
7 the field, the third-party, reviewing archeological
8 group goes out in the field, in addition to the
9 contractor who was hired by the applicant.

10 This is not simply a case of where the
11 applicant pays to get what they want to hear.

12 We have been very, very cautious about any
13 information getting out before that we know that it
14 meets the requirements of the Secretary of the Interior
15 before it is professionally acceptable.

16 And believe me, we have spent a very, very
17 long time getting that information to be accurate.

18 HEARING OFFICER KRAMER: Mr. Galati, you can
19 comment on this, the general topic we've been talking
20 about?

21 MR. GALATI: Yeah. Yeah, I just want to
22 reiterate in response to Ms. Belenky. The Genesis
23 Project had a staff assessment out in March, we had
24 five workshops on that staff assessment.

25 The information that I read to you was in

1 that staff assessment. There was no participant from
2 CURE, with an archeologist saying this information's
3 not good enough for us.

4 Recently, CURE filed the data response
5 request for us in Blythe and Palen three days before
6 the date was due and after the first brief filed
7 petitions to review inspections of material.

8 The Blythe and Palen Projects were out in
9 March and we had three workshops combined. Cultural
10 resources was on the topic. No member of the public,
11 no party brought up that this information is
12 insufficient to go forward.

13 So, the concept of this being late and, I
14 apologize I keep going back to this, because we're
15 going to end up doing this at every pre-hearing
16 conference if you don't make an order today that this
17 is not necessary for them, or you'll be hearing this at
18 every pre-hearing conference that we have coming up in
19 the next month.

20 But this is late, this CURE intervened in
21 December. They participated and were at different
22 workshops. Both data requests, I think that the latest
23 status report from Genesis was something like 11 to 15
24 public workshops. The adequacy of this information was
25 never disputed.

1 So, I think that if you do not say they need
2 it or not, you can at least say that it's late to be
3 asking for it in time to delay our hearings.

4 So, I disagree with Ms. Belenky on these
5 projects. Maybe on other projects, I'm not involved
6 in, it's not late. Here, it's late.

7 MS. KOSS: May I respond?

8 HEARING OFFICER KRAMER: Yes, go ahead.

9 MS. KOSS: CURE requested this information, I
10 know in the Imperial Valley case and Molina, and you
11 can correct me, but several months ago. And CURE
12 requested the information in Genesis more than a month
13 ago.

14 And CURE is not attempting to delay this
15 process at all. We would happily go forward if we had
16 the information. Unfortunately, it's BLM's decision to
17 withhold this information.

18 I'd also like to make --

19 HEARING OFFICER KRAMER: And that raises a
20 question. So, what can we do here? If BLM is the
21 owner of the data, are you wasting your time asking us
22 for it?

23 MS. KOSS: Well, we didn't think we were.
24 That's why we did. We petitioned under Energy
25 Commission regulations for confidential information as

1 laid out in Section 2506, and Chief Counsel decided to
2 release the information because CURE, number one, under
3 Section 1207, and I quote has, "Any person who's
4 petition is granted by the Presiding Member shall have
5 all the rights and duties of a party under these
6 regulations, intervenor." And that's in Chief
7 Counsel's decision to release the information to CURE.
8 That's number one.

9 Number two, releasing the information would
10 not endanger the debt of the resources because CURE
11 hired a qualified expert to review the data and sign a
12 nondisclosure agreement.

13 And, third, CURE met all of the requirements
14 in CEC regulations 2506 to obtain those documents.

15 So, we thought things were moving along
16 swimmingly. We were granted access.

17 So this is -- the delay is, unfortunately,
18 because of BLM's current stance.

19 We believe that CURE's approach in signing a
20 stringent nondisclosure agreement to ensure
21 confidentiality is sufficient.

22 You know, ultimately, it's going to have to
23 be the State of California that's going to have to
24 resolve this issue with the Department of Interior in
25 order for these projects to go forward.

1 I mean, if the State of California, if the
2 Energy Commission wants to proceed with permitting
3 these projects, they're going to have to resolve it
4 with the Department of Interior.

5 MS. MILES: And if I may, I'd like to ask
6 something. This is Loulena Miles.

7 I've participated in a number of workshops
8 for Imperial Valley where the staff has stated again
9 and again that they cannot go forward with the analysis
10 until they have -- I mean, they can't complete their
11 analysis and their testimony until they final report.

12 And I think that the information provided by Dr.
13 Hunter today, from the BLM, further supports that
14 because there's concerns about whether a draft report
15 has incorrect information in it.

16 And so, and that BLM is uncertain as to the
17 validity of the information of the draft reports, and
18 that there are third-party reviewers undergoing a
19 review of this information.

20 And so, I really think that the Energy
21 Commission shouldn't be relying on the draft report and
22 that a finalized report needs to be provided and that
23 there needs to be agreement, you know, with the BLM to
24 get the final report. And that the Energy Commission
25 cannot rely on the draft report that may have incorrect

1 information and be invalid as information.

2 HEARING OFFICER KRAMER: So, can I have Mr.
3 Ratliff and then I think Ms. Gannon wanted to say
4 something.

5 MR. RATLIFF: Could I just interject
6 something at this point, I mean, it raises -- I think
7 the last comment goes to what I think seems
8 fundamentally the issue that we're left with, and that
9 is the timing of the final reports that go into the
10 CHRIS system.

11 If the draft reports had already been filed
12 and were part of the CHRIS system, all of the data
13 would be available to anyone who cared to hire a
14 qualified person who has access and an agreement with
15 CHRIS and we wouldn't be talking about this. We could
16 tell CURE to go to CHRIS and that would resolve the
17 issue nicely.

18 The only reason we're left with the issue at
19 all, I think, is because that hasn't happened and we
20 don't have a final report from BLM that enables
21 interested parties, with qualified archaeologists, to
22 access that information.

23 And so, I wonder, I wonder if the real
24 question then is, is the timing of that report and
25 whether or not those reports will be available such

1 that both staff and other parties would have access to
2 the information in a way that they could comment
3 effectively on it.

4 DR. HUNTER: Could I interject something at
5 this point?

6 HEARING OFFICER KRAMER: Well, let me,
7 because Ms. Gannon has been waiting a while, is it on
8 this point or --

9 DR. HUNTER: Oh, I'm sorry. Okay.

10 MS. FOLEY GANNON: If it's on this point, she
11 can go ahead.

12 HEARING OFFICER KRAMER: Okay, you'd like her
13 to go ahead. Okay, Dr. Hunter, go ahead.

14 DR. HUNTER: I just wanted to explain that it
15 is standard procedure to have sometimes even first, and
16 second drafts before you have a final report. That
17 this is not unusual in archeology and it's part of the
18 process of getting the best information possible.

19 The CEC cultural resources staff has to have
20 the same types of information and we have worked hand-
21 in-hand with the CEC cultural people in order to get
22 the information that the CEC needs and the information
23 that the BLM needs from the field archaeologists.

24 And it is a refining process. It's not that
25 the contractor did a bad job, it's that we look at it

1 with a magnifying glass and we ask for certain things
2 to happen. And it is just a normal part of the
3 process.

4 But it is what the CEC has to have in order
5 to come up with a staff assessment and it's what we
6 have to have in order to fill Section 106 and NEPA.

7 So, I wanted to make certain that that was
8 understood.

9 HEARING OFFICER KRAMER: Thank you.

10 And Ms. Gannon.

11 MS. FOLEY GANNON: Thank you. I think you
12 just asked the question, so what are you going to do?
13 What should you do?

14 And I think that there's two parts to that,
15 really, what can you do and what should you do.

16 And I think that the answer to what can you
17 do, we addressed in our brief. We do think that you
18 can go forward with an assessment based upon the
19 information that is before you in the staff
20 assessments, at least the ones that we have been
21 involved in and have reviewed. They give you an
22 evaluation of the potential impacts, they set forth the
23 information and we think that is sufficient, certainly
24 to meet the legal requirements of CEQA, the Warren
25 Alquist and your regulations.

1 Again, it's not -- none of those laws or
2 regulations require perfection. They all recognize
3 that there's going to be some limitations.

4 You're going to have to make a judgment here
5 at some point, and make a decision, and maybe you even
6 say with this perfect information we think that there
7 could be a significant impact left. Should we do an
8 override, should we approve the project, should we deny
9 the project? That's all going to come in and inform
10 your final decision.

11 But does this whole process have to stop and
12 be delayed because there is an argument about whether
13 an intervenor can have certain confidential information
14 at their fingertips.

15 And again, I think the answer is no.
16 Particularly when the reason they can't have it is
17 because the federal government has made a decision, the
18 owner of the information has made a decision that it
19 shouldn't be released in this matter, in this way.

20 So, should your process, does your process
21 have to stop? I don't think that it does.

22 And I think that in terms of an intervenor
23 having all the rights of the parties, I think you also
24 have to recognize with relationship to the cultural
25 resources, and it was raised earlier, the applicant

1 doesn't even have access to this information. We have
2 never seen the cultural resource reports because we
3 can't, it's confidential.

4 We had consultants that were paid by Tessera
5 to do this analysis, but we have never seen these
6 reports, we have never seen the maps. We have seen
7 what everyone else has seen, which is a very thorough
8 description of these are the types of resources that
9 are out there. This is basically where they are. This
10 is how we're evaluating them and this is what we think
11 is appropriate mitigation, if avoidance isn't possible.

12 I mean, that's -- that's the same thing that
13 we have.

14 And we have commented on that staff
15 assessment and on the draft EIS. And we made comments
16 about the evaluation of cultural resources, and we
17 think that those comments should be considered by you
18 and we hope that they will inform your decision.

19 I think that Dr. Whitley made some comments
20 about the staff assessment that was read out here,
21 saying, well, then, I would have a question about the
22 connection between these two resources.

23 That question, then, can be asked, and then
24 it can be responded to by staff.

25 I mean, there is certainly -- we're not

1 talking about anyone asking you to act in a vacuum.

2 We did say, and as your summary of our
3 argument in the beginning was saying that we said you
4 don't need any information, you don't need to look at
5 anything.

6 And we did say, you know, we figured you were
7 going to take it to the absolute extreme, we think that
8 there are arguments to be made under California law
9 that you could do that and you'd have to make a
10 decision about whether you want to go forward or not.

11 But we are not there today. Factually, where
12 we are today is you have hundreds of pages of
13 information in most of these staff assessments that
14 describe, very thoroughly, these resources.

15 There are mitigation proposals that have been
16 offered and we think that that's enough.

17 So, what we think you should do is you should
18 move forward. Hopefully, there's a resolution, now,
19 between the BLM and the CEC about how on future
20 projects, and on these projects going forward, this
21 information will be shared with staff and staff has
22 access to it.

23 Staff also has access to the evaluation made
24 by the BLM staff, who have extensive experience in
25 dealing with these resources.

1 Again, under your regulations, it's totally
2 appropriate for you to rely upon an assessment made by
3 another agency, after independently reviewing it.

4 So, we think that there isn't a huge problem
5 here and there is a clear path forward, should you
6 choose to take it.

7 HEARING OFFICER KRAMER: Okay, let's go off
8 the record for a minute and we're going to caucus.
9 Back you in a second.

10 (Off the record.)

11 HEARING OFFICER KRAMER: We're back on the
12 record.

13 We've decided that we've run out of questions
14 for you. So, does any party wish to make a concluding
15 statement?

16 Mr. O'Brien.

17 MR. O'BRIEN: Mr. Kramer, I just wanted to
18 say, you know, on behalf of the staff that, you know,
19 first of all I'm going to state the obvious. That this
20 issue is having an adverse impact on our timely review
21 of the projects and, therefore, we hope and desire that
22 the Committee will reach a timely decision here that
23 will allow us to go forward with this analysis.

24 Obviously, it's having some impact right now
25 in terms of staff's ability to review the information,

1 the confidential cultural information in BLM's
2 possession.

3 And so, I'm confident that the agencies are
4 going to be able to come up with a mechanism that will
5 allow us to be as timely as possible, but clearly a
6 Committee decision on this issue is very important.

7 The other thing I want to state is that the
8 staff does not want to have this issue adversely impact
9 our working relationship with BLM, which is critical, I
10 think, to the State of California and to the timely and
11 comprehensive processing of these renewable energy
12 projects.

13 And the agencies, BLM and the Energy
14 Commission, in conjunction with the Fish and Game, and
15 U.S. Fish and Wildlife Service, as part of the
16 Renewable Energy Action Team, have been working closely
17 together for quite some time. I think it's a very good
18 example of federal and state cooperation and I cannot
19 emphasize too much how important this positive working
20 relationship is to the Energy Commission and to, I
21 think the Renewable Energy Action Team.

22 And so, I definitely want to leave you with
23 that. And so, hopefully, you know, we can move forward
24 on this issue quickly, get resolution.

25 I would also say that the Energy Commission

1 staff, in my estimation, just speaking personally, is a
2 different party. We have an obligation to every
3 citizen in this State. We operate as an objective,
4 independent party, separate from the Commissioners. We
5 provide you with our independent analysis and, as such,
6 I think we are different than intervenors in these
7 proceedings. And, as such, I would just leave you with
8 that thought.

9 HEARING OFFICER KRAMER: Thank you.

10 Anyone else in the room?

11 MS. CAMPBELL: Commissioner, I'd like to.

12 HEARING OFFICER KRAMER: Go ahead.

13 MS. CAMPBELL: This is Vicky Campbell, for
14 BLM. I'd like to entirely agree with what Mr. O'Brien
15 said about the relationship between the federal and
16 state government.

17 And also, reiterate, as we have in numerous
18 of our communications, that BLM did seek and continues
19 to seek return of the data, the sensitive data, so that
20 we can control its dissemination consistent with
21 federal law.

22 And that once the Commission does make its
23 decision and the data is returned to BLM, that we can
24 quickly come to agreement with the Energy Commission on
25 how data is exchanged back and forth. And we do have

1 some recommendations for that, as was put forward in
2 our documents.

3 But, again, we would like to have the data
4 back and be able to control its destiny, as was
5 appropriate under federal law.

6 HEARING OFFICER KRAMER: Anyone else in the
7 room?

8 MR. RATLIFF: None from me.

9 HEARING OFFICER KRAMER: Anyone on the --

10 MS. KOSS: I would like to make a statement.

11 HEARING OFFICER KRAMER: Okay, Ms. Koss.

12 MS. KOSS: Thank you. As CURE stated today
13 and in its briefs, it cannot fully participate in these
14 proceedings without this information. And you heard
15 from our expert the same. It is our right to
16 participate fully under the Energy Commission
17 regulations.

18 And it seems to me that the real concern is
19 the endangerment of these resources by release of the
20 information. There's no evidence that release to
21 qualified archaeologists, for example Dr. Whitley,
22 would endanger the resources.

23 And it seems like because this information is
24 routinely released to professional archaeologists,
25 there may be a solution. I hope that BLM can

1 communicate with CURE to figure out how we can gain
2 access to the same information that staff has had
3 access to, to form their staff assessment.

4 I believe, because it is routine, we may be
5 able to come to agreement. I understand that it's on a
6 case-by-case basis and there's no guarantee.

7 So, although I'm hopeful, CURE still may be
8 left in the lurch if BLM decides, for some reason, that
9 our professional archeologist cannot have access to it.

10 I don't know why they would come to that conclusion,
11 but it is a possibility.

12 I'm just putting that on the table that
13 perhaps that is the solution to the problem, that we
14 could gain access to the information, not through the
15 CHRIS system, but from BLM directly.

16 Perhaps BLM wants to comment on that right
17 now, I don't know.

18 HEARING OFFICER KRAMER: Your choice.

19 MS. CAMPBELL: Those are decisions that would
20 have to be made in the future and I'm not here to do
21 any pre-decisional type of speaking.

22 So, that is something that through the
23 regulatory, the federal regulatory processes that CURE
24 would have to come through to request any information
25 from BLM, so it would have to be consistent, again,

1 with federal law and the regulations that govern how
2 BLM releases sensitive data.

3 MS. KOSS: May I just ask how CURE should
4 request this information from BLM? We've tried FOIA
5 and we've tried through the 106 process, and neither of
6 those processes have produced documents, so I'm not
7 sure what the next step is?

8 HEARING OFFICER KRAMER: Maybe you should
9 have that discussion offline. But we certainly
10 encourage you to do that. Maybe you can have it on the
11 way out of the building, get started.

12 But, yes, we -- I think we would -- anything
13 that you to parties, and then any other party who's
14 interested in getting the data, can do to speak
15 directly with BLM, that does seem to be the most direct
16 and perhaps fruitful approach.

17 MS. KOSS: But without the guarantee, there's
18 still a dilemma.

19 HEARING OFFICER KRAMER: Well, you'll have to
20 wait and see what the Committee decides but, you know,
21 there's no guarantee with -- the Commission process
22 hasn't been exactly smooth, either.

23 Do you want to say something?

24 MR. BOYD: Can I say something, now?

25 HEARING OFFICER KRAMER: Let me finish in the

1 room, Mr. Boyd, and then we'll go to you.

2 MS. FOLEY GANNON: I'd just like to echo what
3 Mr. O'Brien said, we hope to see a timely decision so
4 that we can move forward on these issues. I know that
5 you're well aware of the pressures that are playing in
6 these cases, and particularly upon staff and meeting
7 their deadline. So, we hope that we will hear a timely
8 decision.

9 And on behalf of Tessera, I would just like
10 to thank you for giving us this opportunity to
11 participate in this conversation this afternoon.

12 HEARING OFFICER KRAMER: Mr. Boyd, was it?

13 MR. BOYD: Boyd, yeah.

14 HEARING OFFICER KRAMER: Go ahead.

15 MR. BOYD: You know, first I want to say that
16 CARE fully supports what the BLM is requesting. We
17 have no question about the BLM's ability to impartially
18 analyze the data that they're collecting and
19 appropriately distribute that data through the
20 appropriate legal avenues. That would be available to
21 anyone, I assume, who's qualified to receive that data
22 once the final report is made final and released by the
23 BLM.

24 So, that raises the fundamental issue for
25 these projects, which is the timeline, for them to

1 receive their 30 percent tax grant that they're seeking
2 under ARRA, and that's the concern, that's a commercial
3 concern, a commercial interest of all the applicants
4 that are a party to this matter today.

5 And we believe that the CEC has to do what
6 the BLM is requesting and both the CEC has to comply
7 with their laws, the state law and the federal law.
8 And that should be harmonized, there should be no
9 disparity or any reason for there to be a problem with
10 that.

11 But you just got to take the time to do it
12 right, that's what I'm hearing.

13 And so, I don't hear any pre-judgment on
14 whether CURE can get that information or not. I think
15 that everyone can get the information through the
16 appropriate channels, as defined by the BLM.

17 And I would ask Dr. Hunter if I said anything
18 that is inconsistent with that or if that's wrong in
19 any way?

20 MR. BOYD: Well, I don't hear anything, so I
21 assume this is correct.

22 HEARING OFFICER KRAMER: Any other closing
23 comments?

24 MR. BOYD: My other point, that I wanted to
25 make for my closing comment is I come back to what I

1 call the invisible Native American. We want -- what I
2 look for and the way I determine whether there's
3 adequate information, as an intervenor representing
4 Native American members, is I look for what they tell
5 me is correct and what they tell me is incorrect.

6 And if they tell me there's some cultural
7 resource site here that's significant to them, that is
8 being missed, I'm going to trust them over what your
9 report says. Okay. And I'm going to fight for them to
10 prove their case as far in the courts as I have to go
11 to do that.

12 And so, that's my perspective on it. I just
13 want you to do the right thing. I'm not telling you
14 what to do, I'm just saying let the process do what the
15 law says and consult the tribes.

16 I'm hearing the BLM saying they're
17 consulting, they just want to give them the final
18 report, so that they have something that's meaningful
19 to consult with them about.

20 HEARING OFFICER KRAMER: Okay. Well, that
21 sounds like a conversation you should have with the
22 BLM, not the Energy Commission.

23 MR. BOYD: No, that's the same thing the
24 intervenors want, that's the same thing the Commission
25 staff wants. The staff wants the same information the

1 intervenors want and the tribes want.

2 So, let's just wait for the information
3 before we make a pre-decision on something without all
4 the information at hand. That's all we're trying to
5 say. You can revise your staff analysis at a future
6 data.

7 So, let's just wait until we get the
8 information and then do -- revise the analysis and give
9 the tribes their rightful right to participate in the
10 project.

11 And, you know, it's unfortunate that you
12 can't do all that within the timeline that the
13 companies want.

14 And the job for the Commission, obviously, is
15 to figure out what time is reasonable. And I guess
16 I'll leave it at that.

17 HEARING OFFICER KRAMER: Thank you. Anyone
18 else on the telephone want to make a closing statement?

19 Okay, do we have anyone who wishes to make a
20 public comment, either on the telephone or -- I don't
21 see any members of the public in our audience, but does
22 anyone wish to make a public comment? Oh, do we have
23 one? No.

24 Public comment going once, twice --

25 MR. THOMPSON: This is Robert Thompson.

1 HEARING OFFICER KRAMER: Thank you.

2 Ms. Belenky, we've taken your suggestion that
3 further briefing is necessary on the issue of what the
4 scope of the intervenor's rights are. And we're
5 declining your offer to do that on the basis that the
6 issue was put on the table for these hearings by
7 question number 14, on at least in the sense that it's
8 relevant to what we're discussing in general.

9 By question 14, of Appendix C, of the notice
10 of this hearing. Which asked, in essence, if the CEC
11 staff has access to certain data must some or all
12 parties have access under the Warren Alquist Act, or
13 the Commission's regulations, CEQA, NEPA, other laws.

14 So, we believe that we've heard enough on
15 that topic and we don't feel the need to take further
16 briefing.

17 Procedurally, our court reporter contract
18 will deliver a transcript to us, hopefully, on Monday,
19 that's about three days, and we hope to be able to
20 issue a decision shortly after that. But it may be
21 that we need to wait to be able to make some reference
22 to the transcripts and get some of the quotes exactly
23 right.

24 But we do hope to issue a decision very
25 quickly.

1 And with that, we'll thank you all for coming
2 or calling in. And do you want to make any closing
3 comments?

4 MS. BELENKY: Oh, I'm sorry, I missed when
5 you said my name. This is Lisa again. I touched the
6 phone to get off mute and I missed what you said, but
7 you took my question.

8 HEARING OFFICER KRAMER: Okay. No more
9 briefs. We're not going to invite briefs on the issue
10 of the scope of intervenor's rights.

11 And I'll just refer you to question 14, of
12 Appendix C, of the notice of this hearing, which seems
13 to have put that issue on the table.

14 And we've certainly talked about it, in the
15 Committee's mind, sufficiently today.

16 So, we're not going to invite further
17 briefing on that topic.

18 ASSOCIATE MEMBER WEISENMILLER: Okay. No, I
19 just wanted to thank everyone for their participation
20 today and for their filings, I think they've given us a
21 lot to think about and to move forward. Thanks again.

22 HEARING OFFICER KRAMER: Okay, so we are
23 adjourned.

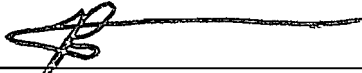
24 (Whereupon, at 6:05 p.m., the
25 Committee Conference was adjourned.)

CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Consolidated Hearing; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said conference, nor in any way interested in the outcome of said conference.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of June, 2010.



PETER PETTY, CER**D-493

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Barbara J. Little
Barbara J. Little, CET**D-520

June 14, 2010