

PATRICK C. JACKSON
600 N. DARWOOD AVENUE
SAN DIMAS, CALIFORNIA 91773

PHONE: (909) 599-9914
E-MAIL: ochsjack@earthlink.net

DOCKET

08-AFC-13

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May 1, 2010

California Energy Commission
Attn: Docket No. 08-AFC-13
1516 Ninth Street, MS-14
Sacramento, California 95814-5512
docket@energy.state.ca.us

[US Mail & e-mail]

Re: Docket No. 08-AFC-13, Application for Certification for the
Calico Solar Project (Formerly SES Solar One)

Dear Docket Clerk:

Pursuant to the California Energy Commission's CEQA-equivalent process and the Bureau of Land Management's NEPA process to participate and consult in the scoping of the environmental analysis of the proposed Calico Solar Project, I hereby submit the first part of my comments on the Staff Assessment and Draft Environmental Impact Statement for the Calico Solar Project Application For Certification (08-AFC-13).

I certify under penalty of perjury that the statements contained in the following report are true, correct and complete to the best of my knowledge and belief.

Respectfully submitted,



Patrick C. Jackson, Intervenor

Enclosure

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:

Application for Certification
for the Calico Solar Project
(Formerly SES Solar One)

Docket No. 08-AFC-13

PATRICK C. JACKSON'S COMMENTS
ON THE
STAFF ASSESSMENT AND DRAFT ENVIRONMENTAL IMPACT STATEMENT
FOR THE
CALICO SOLAR PROJECT
APPLICATION FOR CERTIFICATION (08-AFC-13)
SAN BERNARDINO COUNTY
Part I

May 1, 2010

Patrick C. Jackson
600 N. Darwood Avenue
San Dimas, California 91773
(909) 599-9914 Voice
(909) 599-9914 Facsimile
ochsjack@earthlink.net

The Staff Assessment/Draft Environmental Impact Statement (SA/DEIS) for the Calico Solar Project (formerly SES Solar One) (08-AFC-13) is deficient in that the proposed Calico Solar Project does not comply with all applicable laws, ordinances, regulations and standards (LORS).

I

In May 2008, SES Solar One, LLC, the original Applicant, entered into an Agreement for Private Crossing (Agreement) with BNSF (Burlington Northern Santa Fe) Railway Company and added gates and barricades at the railway crossing at Hector Road. The Agreement and gated crossing prevent others from using the public and private lands north of the BNSF railroad tracks and thereby violates the Unlawful Inclosures of Public Lands Act of 1885, the Federal Land Policy and Management Act of 1976 (FLPMA) and the California Desert Conservation Area (CDCA) Plan 1980 as amended.

The gated crossing prevents the public and private landowners from using Hector Road, a road that has been used for over fifty years, to access the public lands north of the BNSF railway tracks in direct violation of the Unlawful Inclosures of Public Lands Act of 1885. This Act regulates the fencing off of public lands (including fences and gates on private lands) and prohibits the obstruction of “free passage or transit over or through the public lands.”¹

The Bureau of Land Management (BLM) claims, “The right of way, currently held by BNSF, was granted through act of Congress 14 Stat. 292, July 27, 1866. The area gated by BNSF is within the parameters of the right of way granted.”² This claim is not valid as the lands granted to the Atlantic and Pacific Railroad Company by the Act of July 27, 1866, 14 Stat. 292, c. 278, and by grant to the Southern Pacific Railroad Company by the Act of March 3, 1871, 16 Stat. 573, c. 122, were grants *in praesenti* and covered only the public lands grantable by Congress at that time. These Acts do not authorize either railroad company, or its successors, the right to other lands not granted at that time or the right to block access to public lands.³

¹ 43 U.S.C. §§ 1061, 1063 and *Camfield v. United States*, 167 U.S. 518 (1897).

² Roxie C. Trost February 25, 2010 letter to Shawn R. Jackson, Esq.

³ *United States v. Southern Pacific Railway Company*, 146 US 570 (1892).

The Applicant claims the crossing was gated due to “additional safety standards.”⁴ This claim is unfounded as there has never been an accident at the crossing and, “The existing average daily traffic (ADT) on Hector Road near the vicinity of the project site is 31 vehicles per day.”⁵

As to safety issues, the SA/DEIS does not address the alternative of the Applicant and BNSF removing the locked swing gates and installing an active warning system with crossing gate arms and flashing lights.

The Applicant claims, “The private crossing granted to Calico Solar/Tessera is for the purposes of establishing an access to the western side of the proposed project site.” The SA/DEIS is deficient in that it does not note the gated crossing gives the Applicant exclusive control over thousands of acres of BLM-administered land west of the Applicant’s Calico Solar Project site. The SA/DEIS also does not note the gated crossing not only prevents people from using and enjoying the public lands west of the Calico Solar Project site but also prevents other renewable energy developers from accessing the public land even though the Applicant withdrew its Application for its Solar Three project for the area on December 3, 2009.⁶

The SA/DEIS states:

In addition, at the December 22, 2009 Staff Workshop, BLM representatives stated that the crossing was established as a BNSF ROW for access to, and maintenance of, the rail line and, and therefore, the crossing is not a legal road with authorized access for the public (CEC 2009). As such, the crossing is a physical access and not a legal access, and has been used in a passive and unauthorized manner.⁷

This statement is misleading as the crossing was not established by BNSF for its exclusive use. Hector Road and the crossing were constructed by BNSF’s predecessor for the public to access the Hector siding telegraph and office depot north of the railroad tracks from the local road network, including Highway 66 south of the railroad tracks. The Applicant’s Application for Certification states:

⁴ SA/DEIS, p C.8-12.

⁵ SA/DEIS, p. C.11-6.

⁶ Department of the Interior Bureau of Land Management Case Recordation (MASS) Serial Register page, Case CACA-- - 047702, accessed March 21, 2010.

⁷ SA/DEIS, p C.8-12.

In 1897, the A&P was re-designated as the Santa Fe Pacific Railroad. When the A&P took over the Mojave to Needles branch, depots existed at Daggett, Fenner, and Needles. During the 1880s, 1890s, and the first decade of the twentieth century, Santa Fe Pacific constructed facilities at various locations along the line. All of the structures were wood frame, with the exception of brick and reinforced concrete structures in Needles. Santa Fe Pacific railroad sidings in the project vicinity include Troy, Hector, Pisgah, and Lavic. The Hector siding is the closest to the project area. Neither the Pisgah or Troy sidings had any depot facilities. Hector had a 12-by-14-foot wood frame telegraph and train-order office that was constructed in 1906, which was closed in 1923 and moved to Earp in 1934.⁸

The SA/DEIS statement Hector Road “crossing is not a legal road with authorized access for the public” is misleading. BNSF’s predecessors granted easements by necessity and implication across its right of way at Hector Road when:

1. Southern Pacific Land Company conveyed title to Sections 5, 9, 17, 21 and 33, Township 9 North, Range 5 East, to a private individual in 1958.^{9 10}
2. Southern Pacific Land Company conveyed title to Section 1, Township 8 North, Range 5 East, to a private individual in 1958.^{11 10}
3. SF Pacific Properties Inc., a Delaware Corporation, conveyed title to Section 5, Township 8 North, Range 5 East; Sections 13 and 25, Township 9 North, Range 5 East; Section 5, Township 8 North, Range 6 East; and other lands to the United States of America in 2002.^{12 10} These sections were acquired with Land Water Conservation Funds.

The SA/DEIS states on page C.8-12, “[T]he recent blockage of this [Hector] crossing does not result in a conflict with any applicable LORS.” As noted herein, this statement is not true. Hector Road existed prior to the adoption of the Federal Land Policy and Management Act of 1976 (FLPMA) and the FLPMA recognizes existing rights of way.

⁸ SES Solar One Application for Certification, Volume 1, December 2008, p 5.7-23.

⁹ Deed, Southern Pacific Land Company to W. W. Boswell, Jr., recorded October 27, 1958, in Book 4639, Pages 230 & 231.

¹⁰ Cal. Civil Code 1104.

¹¹ Deed, Southern Pacific Land Company to W. W. Boswell, Jr., recorded November 24, 1958, in Book 4662, Pages 165 & 166.

¹² Grant Deed, SF Pacific Properties, Inc., a Delaware Corporation, to the United States of America, recorded August 28, 2002 as Document 2002-0333071.

II

The SA/DEIS states on page ES-29, “Presently open routes that traverse the project area would be closed if any of the Action Alternatives or CDCA Plan amendments are approved.”

Hector Road is a designated open route pursuant to the West Mojave Plan amendment to the California Desert Conservation Area (CDCA) Plan.¹³

In the West Mojave Plan amendment to the California Desert Conservation Plan, the BLM identified motorized vehicle access needs and designated open routes to provide for a variety of activities. The activities identified in the plan include access to private land. Mr. Patrick Jackson may use designated open routes as long as his use does not exceed a level defined as casual use. ‘*Casual use* means activities ordinarily resulting in no or negligible disturbance of the public lands, resources, or improvements.’ (43CFR2801.5)¹⁴

The BLM and Applicant do not have the authority to amend the California Desert Conservation Area (CDCA) Plan to deprive private property owners of their right to use Hector Road or any of the other designated open routes established by the CDCA. The CDCA states,

The need for access across public lands to permit utilization of State and privately owned lands and to permit authorized developments on public lands, including mining claims, is recognized.

III

On February 12, 2010, the Applicant submitted a Calico Construction Milestone Schedule and Figure 1, Project Layout Calico Solar Project. In another submission on February 12, 2010, the Applicant submitted Figure 1, Drainage Layout Figure Calico Solar Project.

On March 8, 2010, the Applicant submitted two additional figures: Figure 1, Existing Project Vicinity Access Routes Calico Solar Project and Figure 2, Proposed Post Project Development Access Routes Calico Solar Project.

At the April 16, 2010 Energy Commission Staff Workshop on the Staff Assessment/Draft Environmental Impact Statement for the Calico Solar Project (formerly SES Solar One)

¹³ Map 55 – Hector Sleeping Beauty, West Mojave Route Designation Program, Bureau of Land Management California Desert Conservation Area (CDCA) Plan 1980 as Amended.

¹⁴ Roxie C. Trost February 25, 2010 letter to Shawn R. Jackson, Esq.

(08-AFC-13) the Applicant submitted a figure of the project entitled Calico Solar Project Layout. This figure shows a proposed access road outside the project fenceline the Applicant claims private property owners can use to access their parcels. This proposed access road can not be constructed or used by private property owners to access their properties.¹⁵ This alternative route would not comply with the National Environmental Policy Act (NEPA) or 43 C.F.R. § 8342.1.

All of these figures show the proposed Calico Solar Project will eliminate Hector Road and thereby landlock the private properties in Section 1, Township 8 North, Range 5 East, and Section 36, Township 9 North, Range 5 East.

The Applicant and the BLM do not have the authority to close existing valid rights of way or designated open routes.^{16 17}

The Applicant and the BLM do not have the authority to designate alternative routes.¹⁸

IV

The SA/DEIS for the Calico Solar Project is deficient as it does not comply with all applicable laws, ordinances, regulations and standards (LORS). The Supplemental Staff Assessment/Final Environmental Impact Statement (SSA/FEIS) must acknowledge routes in existence when the CDCA was adopted and include Conditions of Certification which: (1) require the project to comply with all applicable LORS and court decisions, (2) prohibit the Applicant from closing CDCA designated open routes or substituting alternative routes and (3) mandate the Applicant can not prevent private property owners from using CDCA designated open routes to access their properties.

May 1, 2010

Date



Patrick C. Jackson

¹⁵ Patrick C. Jackson Status Report No. 5, March 13, 2010.

¹⁶ United States Court of Appeals for the Tenth Circuit in *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir.2005).

¹⁷ U.S. District Court for the Northern District of California, No. C 06-4884 SI, *Center for Biological Diversity, et. al. v. U.S. Bureau of Land Management, et. al.*

¹⁸ *Ibid.*

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:

Application for Certification
for the Calico Solar Project
(Formerly SES Solar One)

Docket No. 08-AFC-13

DECLARATION OF SERVICE

I, **Patrick C. Jackson**, declare that on **May 1, 2010**, I served and filed copies of the attached **Patrick C. Jackson's Comments on the Staff Assessment and Draft Environmental Impact Statement for the Calico Solar Project Application For Certification (08-AFC-13) San Bernardino County Part I**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent *Proof of Service* located on the web page for this project at:

<http://www.energy.ca.gov/sitingcases/calicosolar/>

The document has been sent to the Commission, as well as all parties in this proceeding as shown on the *Proof of Service*, in the following manner:

FOR SERVICE TO THE APPLICANT AND ALL OTHER PARTIES:

- XX sent electronically to all e-mail addresses on the Proof of Service list and
XX by depositing in the United States mail at **San Dimas, California**, with first-class postage thereon fully prepaid and addressed as provided on the attached *Proof of Service* to the mailing addresses shown on the Proof of Service NOT marked "E-mail Service Preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

- XX sending the original signed document and one electronic copy, mailed and e-mailed respectively, to the address below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. **08-AFC-13**
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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

May 1, 2010

Date



Patrick C. Jackson



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION
For the CALICO SOLAR (Formerly SES Solar One)

Docket No. 08-AFC-13

PROOF OF SERVICE
(Revised 3/11/10)

APPLICANT

Felicia Bellows,
Vice President of Development
Tessera Solar
4800 North Scottsdale Road,
Ste. 5500
Scottsdale, AZ 85251
felicia.bellows@tesseractosolar.com

Camille Champion
Project Manager
Tessera Solar
4800 North Scottsdale Road,
Suite 5500
Scottsdale, AZ 85251
camille.champion@tesseractosolar.com

CONSULTANT

Angela Leiba
AFC Project Manager
URS Corporation
1615 Murray Canyon Rd.,
Ste. 1000
San Diego, CA 92108
Angela_Leiba@URSCorp.com

APPLICANT'S COUNSEL

Allan J. Thompson
Attorney at Law
21 C Orinda Way #314
Orinda, CA 94563
allanori@comcast.net

INTERESTED AGENCIES

California ISO
e-recipient@caiso.com

Jim Stobaugh
BLM – Nevada State Office
P.O. Box 12000
Reno, NV 89520
jim_stobaugh@blm.gov

Rich Rotte, Project Manager
Bureau of Land Management
Barstow Field Office
2601 Barstow Road
Barstow, CA 92311
Richard_Rotte@blm.gov

Becky Jones
California Department of
Fish & Game
36431 41st Street East
Palmdale, CA 93552
dfgpalm@adelphia.net

INTERVENORS

California Unions for Reliable
Energy (CURE)
c/o: Loulena A. Miles,
Marc D. Joseph
Adams Broadwell Joseph &
Cardozo
601 Gateway Boulevard,
Ste. 1000
South San Francisco, CA 94080
lmiles@adamsbroadwell.com

Defenders of Wildlife
Joshua Basofin
1303 J Street, Suite 270
Sacramento, California 95814
e-mail service preferred
jbasofin@defenders.org

Basin and Range Watch
Laura Cunningham
Kevin Emmerich
P.O. Box 70
Beatty, NV 89003
atombictoadranch@netzero.net

Patrick C. Jackson
600 N. Darwood Avenue
San Dimas, CA 91773
e-mail service preferred
ochsjack@earthlink.net

ENERGY COMMISSION

ANTHONY EGGERT
Commissioner and Presiding Member
aeggert@energy.state.ca.us

JEFFREY D. BYRON
Commissioner and Associate Member
jbyron@energy.state.ca.us

Paul Kramer
Hearing Officer
pkramer@energy.state.ca.us

Kristy Chew, Adviser to
Commissioner Byron
kchew@energy.state.ca.us

Caryn Holmes, Staff Counsel
1516 9th Street, MS-14
Sacramento, California 95814
cholmes@energy.state.ca.us

Christopher Meyer
Project Manager
cmeyer@energy.state.ca.us

Jennifer Jennings
Public Adviser
publicadviser@energy.state.ca.us