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California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: **GENESIS SOLAR, LLC REPLY BRIEF**
DOCKET NOS. (08-AFC-13, 09-AFC-8, 08-AFC-5, 09-AFC-6, 09-AFC-7, 09-AFC-9 & 10-CRD-1)

Enclosed for filing with the California Energy Commission is the original of **GENESIS SOLAR, LLC REPLY BRIEF**, for the Consolidated Hearing on Issues Concerning US Bureau of Land Management Cultural Resources Data (10-CRD-1).

Sincerely,



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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:
Application for Certification for the

Calico Solar (SES Solar One) Project,
Genesis Solar Energy Project,
Imperial Valley (SES Solar Two) Project,
Solar Millennium Blythe Project,
Solar Millennium Palen Project, and
Solar Millennium Ridgecrest Project

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

DOCKET NOS.

08-AFC-13
09-AFC-8
08-AFC-5
09-AFC-6
09-AFC-7
09-AFC-9

10-CRD-1

**GENESIS SOLAR, LLC REPLY
BRIEF**

INTRODUCTION

Genesis Solar, LLC (Genesis) is the Applicant for the Genesis Solar Energy Project (GSEP) which is currently pending before the California Energy Commission (Commission). In accordance with the Notice and Orders For Consolidated Hearing on Issues Concerning US Bureau of Land Management Cultural Resources Data, dated May 21, 2010, Genesis files this Reply Brief. Genesis did not file an Opening Brief because prior to reading the Opening Brief of the California Unions For Reliable Energy (CURE), Genesis did not oppose nor support the Bureau of Land Management's (BLM) objection to CURE's Petition for Copying and Inspection of Confidential Cultural Resources Materials (Petition) docketed at the Commission for the GSEP. However, after reading CURE's Opening Brief, Genesis hereby files this Reply Brief in response to CURE's assertions that it needs the Commission to provide it access to the Confidential Cultural Resources Materials in order to fully participate in the GSEP Proceedings. Genesis strongly disagrees.

For the reasons discussed below we recommend that the Commission and BLM enter into a confidentiality agreement whereby the Commission be given the Confidential Cultural Resource Materials subject to non-disclosure to the public and interveners. CURE simply does not need the material to participate in the Genesis Proceedings.

ANALYSIS

APPLICABLE REGULATORY GUIDANCE

CURE's Opening Brief makes the broad assumption with no legal support that it is a party to the Genesis Proceedings because it is an intervener and as a party is entitled to the same information as Staff. While Genesis agrees that CURE is a party to the Genesis Proceedings¹, any rights derived from the status as an Intervener must come from either the Commission's authorizing Statute or its regulations.²

CURE elected to pursue obtaining the Confidential Cultural Resources Materials through its Petition made pursuant to 20 CCR Section 2506 rather than a Data Request pursuant to 20 CCR Section 1716. It is important to note that Section 2506 is a procedural regulation that determines whether **any person** can "inspect" a record while Section 1716 governs whether **a party** "needs" and can therefore "use" a record in an AFC Siting Proceeding. It is well settled where there are two applicable authorities, specific provisions override general provisions. Therefore, while Genesis neither opposes nor supports CURE's Petition to "inspect" the records, it contends that the Committee should use the standards outlined in Section 1716 to determine whether CURE needs the information to fully participate in the Genesis Proceedings.

Section 1716 governs the substance and process for a party to the proceeding to obtain information. While Genesis, Staff and CURE are all "parties", Section 1716 does not treat all "parties" equally. Section 1716 (a) allows Staff to obtain information that "**is necessary for a complete staff assessment**". Parties on the other hand are governed by Section 1716 (b) and (d) and are limited to only obtaining information that is "**reasonably available**" to the responding party, information that "**cannot otherwise be obtained**" by the requesting party and "**is relevant to the proceeding**" or "**reasonably necessary to make any decision on the notice or application**".

RELEVANT QUESTIONS

Using the language of Section 1716, Genesis believes that the relevant questions are:

1. Is the Confidential Cultural Resources Material necessary for Staff to complete its Staff Assessment?
2. Is the Confidential Cultural Resources Material available to CURE under Section 1716 because it is a party?
 - a. Is the Confidential Cultural Resources Material reasonably available to Staff?
 - b. Is the Confidential Cultural Resources Material information which cannot otherwise be obtained by CURE?
 - c. Is the Confidential Cultural Resources Material relevant to the proceeding?

¹ Title 20 California Code of Regulations (CCR) Section 1207 authorizes the Presiding Member to grant Intervener Status to CURE, which occurred on ____; 20 CCR 1702 defines a "party" to include Interveners.

² Public Resources Code (PRC) Section 25000 et seq; Title 20 California Code of Regulations (CCR) Section 1001 et seq.

- d. Is the Confidential Cultural Resources Material reasonably necessary to make any decision on the notice or application?

In order to answer these important questions it is important for the Committee to understand the nature of the Confidential Cultural Resources Materials that are the subject of the dispute. The information contained in these materials is detailed descriptions of field observations including specific locations where the materials will be found. The public policy behind keeping the information confidential under all of the laws intended to protect these resources is to prevent looting and damage to the resources. Therefore the detailed information and the locations must be kept confidential. An example of the type of information that would be included in the Confidential Cultural Resources Materials would be a description of observations of lithic fragments scattered across the ground surface including its exact location. Another example is detailed information describing, including location of, a known archaeological site that has undergone previous excavation and evaluation and the report was discovered by the Applicant Cultural Resource experts. What Staff has done for decades is review that information and describe the resource in a general way so that the public and all parties understand the potential significance of the resource without revealing how many flakes and composition is contained in the lithic scatter or the exact artifacts that may have been left in place at the known archaeological dig. And in no case does Staff include a map of where these resources are. However, they do identify whether the construction activities could potentially impact such resources and propose mitigation measures that may include avoidance, minimization or further study to evaluate the significance of the resource to determine whether and under what circumstances it might be recovered, treated and archived. Members of the public and parties do not need to know the detailed information to be fully informed of the potential impacts and evaluate the mitigation measures including proposing additional mitigation. This approach is consistent with every other CEQA document prepared in the State of California and more importantly consistent with Commission regulations and decades of past practices.

1. Necessary for Staff to Complete its Staff Assessment

Genesis agrees with Staff that the information is necessary for Staff to describe the environmental baseline of the project and to evaluate and analyze the potential impacts and feasible mitigation measures related to Cultural Resource impacts. Staff has used similar information and has an excellent track record (decades) of describing the setting and environmental baseline of projects as it relates to Cultural Resources in a detailed enough way to allow an understanding of potential impacts and feasible mitigation measures without disclosing the detailed information that must be kept confidential. Staff needs access to the Confidential Cultural Resources Information in order to fulfill its regulatory obligations. Our understanding is that the sole reason Staff is being denied access by BLM is the Commission's recent determination to share the information with CURE. Therefore, the central issue is whether CURE as a party to an AFC Proceeding has a right and is entitled to the Confidential Cultural Resources Materials.

2. CURE Is Not Entitled To The Information Under Section 1716

a. Reasonably Available

Genesis agrees that the Confidential Cultural Resources Materials is “available” to Staff since it has been docketed to them. However, it should be noted that while it is available to Staff, BLM has required the Staff to keep and use the information without disclosure to CURE pursuant to several federal non-disclosure directives³. Therefore, although the information is available to Staff, it belongs to BLM and therefore should be treated like the information is really in the hands of a third party. In past proceedings when CURE has requested information from Applicants and such information was controlled by third parties, the Commission has upheld objections by Applicants that the information was not “reasonably” available to them.⁴ The Commission should treat this information the same way.

b. Otherwise Available to CURE

Genesis is unaware of whether CURE’s expert has access to the previously recorded information or has the ability to apply for a permit to BLM for authorization to conduct its own pedestrian surveys. CURE has stated in workshops that it did hire a biologist who conducted biological surveys on the GSEP site and therefore it may be possible for CURE to employ a similar approach for Cultural Resources and hire a archaeologist, obtain a permit from BLM, and conduct its own Cultural Resource surveys of BLM land.

c. Relevant to the Proceeding

Genesis contends that the details contained in the Confidential Cultural Resources Information is relevant to the proceeding but is relevant only to Staff. While Staff is an independent “party” to the proceeding⁵ it is charged with a responsibility to perform an independent safety assessment and review of environmental issues⁶. The regulations do not impose any regulatory burden on an intervener to perform any assessment. Therefore Staff and CURE are not equal parties and therefore what information may be relevant for Staff can and is different from what information may be relevant to CURE.

³ See BLM letters attached to the Notice of this Proceeding

⁴ See SunriseXXXXXXXXXXXX

⁵ 20 CCR 1712.5

⁶ 20 CCR 1742,1742.5 and 1743

Additionally, Genesis contends that the Commission use the balancing test employed by courts when determining the admissibility of evidence that may be relevant but highly prejudicial. Evidence Code Section 352 while not binding on the Commission can provide instructive guidance. The probative value of the detailed information to CURE is clearly outweighed by the prejudicial value to the Commission and BLM. If the material is provided to CURE, BLM has contended that the Commission will be violating federal law. This prejudicial affect can be averted by not providing the detailed information to CURE and instead providing a redacted version. That redacted version is the Staff Assessment of the information. It is that redacted version that has been acceptable to all interveners for decades and Genesis urges the Committee to reject CURE's contention that the information is "relevant" to its testimony in order to fully participate.

d. Reasonably Necessary to Make A Decision

CURE's Opening Brief is riddled with unsupported statements that the information is needed for its full participation in the proceedings. The Commission should reject this contention. First, CURE has not requested the detailed information in the past and yet it has fully participated.

While CURE will argue that the GSEP and other solar projects are different because they involve large cultural resource sites, this argument is a distraction. The detailed information concerning location and specific observations has not been needed by CURE for several tens of miles of pipelines, several miles of transmission lines and other lengthy linear facilities crossing BLM land in the past. It is simply not persuasive to believe that there is some fundamental threshold of the amount of cultural resource observations that now require independent review by CURE of the detailed information.

In fact, CURE cites in its Opening Brief that the GSPE will affect a Traditional Cultural Property (TCP). CURE's entire contention that the GSEP would affect that TCP is based on the general information described in the SA/DEIS by Staff without review of the Confidential Cultural Resources Material. Staff described the TCP in a general way that identified that the resource was not within the project footprint, included rock art or glyphs, and that was close enough to a linear facility that the potential impact may be increased public access and potential vandalism. Staff further elaborates on potential mitigation to be considered⁷. This information is sufficient for CURE to opine without CURE reviewing the detailed information about the size, specific description, or exact GPS coordinates.

⁷ See GSEP SA/DEIS Pages C.3-21

Staff treats other resources in a similar fashion describing specific impacts to resources with enough detail to enable careful consideration of mitigation without jeopardizing the locational or specific information that could enable looting. The detailed information contained in the Confidential Cultural Resources Materials is simply not necessary for CURE to provide an opinion to persuade the Commission to make a decision regarding mitigation or ultimately on the GSEP.

CURE also supports its contention that it needs the information by claiming it should have the same rights to Confidential Cultural Resources Materials as Native American Tribes. This contention should also be rejected on its face. CURE is merely a party to the proceeding whereby the Native American Tribes are recognized as governmental entities with specific interest in the cultural resources and as such are treated as a government under the federal laws cited by BLM in its letters to the Commission.

CONCLUSION

Ultimately, the Commission and BLM must come to some agreement regarding whether CURE can even inspect the Confidential Cultural Resources Materials. However, for the reasons discussed above, we urge the Committee to reject CURE's contention that the information is needed for them to fully participate in the GSEP Proceedings. If the Commission finds otherwise, CURE will use that decision to unnecessarily delay the GSEP and all other proceedings. Genesis hopes that the Commission will enter into an agreement with BLM which would allow the Confidential Cultural Resources Information to be shared with the Staff while denying access to all third parties, whether a recognized AFC Siting Case Intervener or not. If BLM determines the information can and should be shared with others such as Native Americans, the Commission should defer to BLM in the administration and interpretation of federal law.

Further, we request that the Commission issue a specific order to CURE to refrain from delay tactics such as those employed in the GSEP and other Proceedings.

Respectfully Submitted,

Dated: June 4, 2010

/original signed/

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

Docket No. 08-AFC-13

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(Revised 5/28/10)

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**APPLICATION FOR CERTIFICATION FOR THE
GENESIS SOLAR ENERGY PROJECT**

Docket No. 09-AFC-8

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(Revised 5/20/10)**

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**APPLICATION FOR CERTIFICATION FOR THE
IMPERIAL VALLEY SOLAR PROJECT**
(formerly known as SES Solar Two Project)
IMPERIAL VALLEY SOLAR, LLC

**Docket No. 08-AFC-5
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**APPLICATION FOR CERTIFICATION
FOR THE *BLYTHE SOLAR
POWER PLANT PROJECT***

Docket No. 09-AFC-6

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**APPLICATION FOR CERTIFICATION
FOR THE PALEN SOLAR POWER
PLANT PROJECT**

Docket No. 09-AFC-7

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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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**APPLICATION FOR CERTIFICATION
For the *RIDGECREST SOLAR
POWER PROJECT***

Docket No. 09-AFC-9

**PROOF OF SERVICE
(Revised 5/12/2010)**

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DECLARATION OF SERVICE

I, Marie Mills, declare that on June 4, 2010, I served and filed copies of the attached **GENESIS SOLAR, LLC REPLY BRIEF**, dated June 4, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service lists, located on the following web pages for this project at:

[www.energy.ca.gov/sitingcases/solarone.com]

[http://www.energy.ca.gov/sitingcases/genesis_solar]

[<http://www.energy.ca.gov/sitingcases/solartwo/index.html>]

[http://www.energy.ca.gov/sitingcases/solar_millennium_blythe]

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

[http://www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest]

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

☒ sent electronically to all email addresses on the Proof of Service list;

☒ by personal delivery or by depositing in the United States mail at with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

☒ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (***preferred method***);

OR

☐ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

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

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docket@energy.state.ca.us

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



Marie Mills