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June 4, 2010

California Energy Commission
Attn Docket No. 09-AFC-8; 10-CRD-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Genesis Solar Energy Project; 09-AFC-8; 10-CRD-1

Dear Docket Clerk:

Enclosed are an original and one copy of **CALIFORNIA UNIONS FOR RELIABLE ENERGY REPLY BRIEF ON ISSUES CONCERNING US BUREAU OF LAND MANAGEMENT CULTURAL RESOURCES DATA**. Please docket the original, conform the copy and return the copy in the envelope provided.

Thank you for your assistance.

Sincerely,

/S/

Rachael E. Koss

REK:bh
Enclosures

2364-070a

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

Applications for Certification for the	Docket Nos.
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.	08-AFC-13, 09-AFC-8, 08-AFC-5, 09-AFC-6, 09-AFC-7, 09-AFC-9, and
Consolidated Hearing on Issues Concerning US Bureau of Land Management Cultural Resources Data	10-CRD-1

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

June 4, 2010

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I. INTRODUCTION

California Unions for Reliable Energy (“CURE”) strongly urges the Commission to deny BLM’s request for the return of all cultural resource data to BLM and to deny BLM’s request for the reconsideration of the Commission’s decisions to release cultural resources data for the Genesis Solar Energy Project (“Genesis”) and Imperial Valley Solar Project (“Imperial Valley”). Without this data, the Commission cannot meet its obligations under CEQA, the Warren-Alquist Act and Energy Commission regulations.

As lead agency under CEQA, the Commission has been invested with a duty to the people of the State of California to identify, analyze and mitigate impacts to irreplaceable cultural resources. The Imperial Valley and Genesis projects, along with a number of other fast-track energy projects currently undergoing permitting, present high-profile examples of massive projects on relatively undisturbed desert public lands where significant prehistoric remains may date back thousands of years.

The Commission must not only determine whether these projects will result in significant impacts to cultural resources but also what the mitigation measures for significant impacts to cultural resources should be. Without the data that the BLM seeks to remove from the Commission files, the Commission simply cannot make these determinations, much less provide substantial evidence to support its determinations. In order to do the job entrusted to the Commission by the people of California, the Commission must review the detailed cultural resources data,

including the location of the resources and the relationship of the resources to each other, and conduct an analysis based upon this data included in its evidentiary record.

Tessera Solar North America, Inc. (“Tessera”) argues that the Commission need not conduct an analysis of projects’ impacts and that the Commission cannot impose mitigation measures for projects on BLM land. Tessera’s claims are unsupported and fly in the face of the Commission’s jurisdiction over these projects. Moreover, Tessera ignores the Commission’s statutory obligations.

CURE provided a reasonable approach to obtaining the cultural resources data through nondisclosure agreements. The Chief Counsel of the Commission agreed.¹ CURE’s approach would allow the Commission to obtain, review, and retain the data necessary for carrying out its legal obligations, while maintaining confidentiality of the data. CURE’s approach would allow CURE, the Tribes and other parties to fully participate in Energy Commission proceedings, while maintaining confidentiality of the data. CURE’s approach would resolve the Commission’s dilemma.

In contrast, BLM’s informal proposal to release the data without facts regarding the location of cultural resources would not resolve the Commission’s dilemma. Without knowing the location of resources, the Commission cannot satisfy its obligations under CEQA, the Warren-Alquist Act or Energy Commission regulations.

¹ Energy Commission Staff Brief on Cultural Resource Data on BLM Lands, pp. 4-5.

Staff's approach will also not solve the Commission's dilemma. Staff proposes that parties seek cultural resources data from BLM through the National Historic Preservation Act ("NHPA") section 106 process. However, Staff's approach does not guarantee that parties will be able to obtain the data. Recent history shows that BLM will not even release the data to affected Tribes.

II. DISCUSSION

A. The Commission Must Assess Environmental Impacts

Tessera claims that the Commission need not assess a project's impacts and need not prepare its own environmental review document.² Rather, Tessera argues that "[t]he *only* requirement is that the Commission base its decision on 'substantial evidence.'"³ Certainly, the Commission's decision must be based on substantial evidence in the record (which is why the Commission must review the cultural resources data identifying the location of the resources and include it in its evidentiary record). However, CEQA, Energy Commission regulations and the Warren-Alquist Act also require the Commission to independently analyze potentially significant impacts.

1. CEQA Requires the Commission to Independently Analyze Potentially Significant Impacts

As lead agency under CEQA, the Commission must independently review and analyze a project's potential adverse environmental impacts and include its

² Brief of Tessera Solar North America, Inc. on Issues Concerning US Bureau of Land Management Cultural Resources Data, p. 2.

³ *Id.* (emphasis added).

independent judgment in an environmental review document.⁴ CEQA Guidelines specifically require a lead agency to subject information submitted by others to the lead agency's own review and analysis before using that information in an environmental review document.⁵ Furthermore, when certifying an environmental review document, the lead agency must make a specific finding that the document reflects its independent judgment.⁶

Importantly, the Commission cannot shape its independent judgment of the Genesis and Imperial Valley projects' significant impacts to cultural resources until it reviews the cultural resources data identifying the locations of the resources. Staff recognizes this.⁷ Moreover, without including the data in the evidentiary record, the Commission's analyses would be inadequate and its decision would not be supported by substantial evidence in the record.

2. Energy Commission Regulations Require the Commission to Independently Analyze Potentially Significant Impacts

The Energy Commission must conduct its own impact analysis to "ensure a complete assessment of significant environmental issues..."⁸ Article 3 of the Energy Commission regulations repeatedly describes the Commission's obligation to independently analyze a project's significant impacts. The plain language of the regulations makes clear that it is not *either* the Commission *or* another agency

⁴ Pub. Resources Code, § 21082.1(c); See *Plastic Pipe and Fittings Assn. v. California Building Standards Com'n* (2004) 124 Cal.App.4th 1390 (appellate court upheld requirement of California Building Standards Commission to independently review the potential environmental impacts from the approval of PEX plastic potable water pipe).

⁵ CEQA Guidelines, § 15084(e).

⁶ Pub. Resources Code, § 21082.1(c).

⁷ Energy Commission Staff Brief on Cultural Resource Data on BLM Lands, p. 7.

⁸ 20 Cal. Code Regs., § 1742(c).

that may analyze a project's significant impacts, as Tessera contends;⁹ both the Commission **and** any concerned agencies must conduct analyses. Staff recognizes this.¹⁰

Section 1742 of the Energy Commission regulations state "...the commission staff **and** all concerned environmental agencies shall review the application and assess whether the report's list of environmental impacts is complete and accurate..."¹¹ and "the staff **and** concerned agencies shall submit the results of **their** assessments at hearings..."¹² Energy Commission regulations section 1748 confirms that both the Commission **and** concerned agencies must conduct their own analyses. It states, "[t]he applicant's environmental information and staff **and** agency assessments required by Section 1742 shall be presented" at hearings.¹³

In addition, Energy Commission regulations section 1742.5 provides that "staff shall review the information provided by the applicant and other sources and assess the environmental effects of the applicant's proposal..."¹⁴ Further, the regulations require Staff to "present the results of its environmental assessments in a report..."¹⁵ "The staff report shall indicate staff's positions on the environmental issues affecting a decision on the applicant's proposal."¹⁶

⁹ Brief of Tessera Solar North America, Inc. on Issues Concerning US Bureau of Land Management Cultural Resources Data, p. 2.

¹⁰ Energy Commission Staff Brief on Cultural Resource Data on BLM Lands, p. 8.

¹¹ 20 Cal. Code Regs., § 1742(b) (emphasis added).

¹² *Id.*, § 1742(c) (emphasis added).

¹³ *Id.*, § 1748(a) (emphasis added).

¹⁴ *Id.*, § 1742.5(a).

¹⁵ *Id.*, § 1742.5(b).

¹⁶ *Id.*, § 1742.5(c) (emphasis added).

Clearly, Energy Commission regulations require Staff to independently analyze a project's potential adverse environmental impacts and include its assessment in an environmental review document. Here, Staff's assessment of the solar projects' impacts to cultural resources, independent of BLM's, is particularly important because the Commission's impact analysis required under CEQA is different from the analyses BLM is required to conduct under NEPA and NHPA.¹⁷ As described in CURE's opening brief, the identification and analysis of significant impacts is more stringent under CEQA than under NEPA and NHPA. The potential for significant adverse impacts, the need to design mitigation measures and the obligation to determine the effectiveness of mitigation is greater under CEQA. Unless the Commission conducts an independent analysis of significant impacts pursuant to CEQA, the Commission cannot "ensure a complete assessment of significant environmental issues,"¹⁸ its analysis will be inadequate and its decision will not be supported by substantial evidence in the Commission's record.

3. The Warren-Alquist Act Requires the Commission to Independently Analyze Potentially Significant Impacts

The Warren-Alquist Act requires the Commission, when approving a project, to find that the project conforms with any applicable laws, ordinances, regulations, or standards ("LORS").¹⁹ "In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the

¹⁷ Testimony of David S. Whitley on behalf of California Unions for Reliable Energy on Issues Concerning US Bureau of Land Management Cultural Resources Data, par. 6.

¹⁸ 20 Cal. Code Regs., § 1742.

¹⁹ Pub. Resources Code, §§ 25523(d)(1); 25525.

impacts of the facility on the environment...” and “[t]he basis for these findings shall be reduced to writing and submitted as part of the record...”²⁰

The Commission’s determination as to whether a project complies with LORS includes consideration of the project’s significant impacts. In addition, the determination must be based on evidence in the Commission’s own record. Thus, unless the Commission reviews cultural resources data identifying the locations of the resources and includes it in the evidentiary record, it cannot conclude that the Genesis and Imperial Valley projects (or any other project) comply with LORS.

The Warren-Alquist Act also contemplates the Commission’s role as lead agency under CEQA to analyze a project’s significant impacts and include its assessment in an environmental review document. The Warren-Alquist Act provides that “[t]he Commission shall be the lead agency as provided in Section 21165 for all projects that require certification pursuant to this chapter...”²¹ Under Public Resources Code section 21165, “the determination of whether the project may have a significant effect on the environment shall be made by the lead agency, and that agency shall prepare, or cause to be prepared by contract, the environmental impact report for the project...” Clearly, the Warren-Alquist requires the Commission to assess projects’ potentially significant impacts on cultural resources.

In sum, the Commission cannot defer to BLM’s analysis of the Genesis and Imperial Valley projects’ impacts on cultural resources. CEQA, Energy Commission regulations and the Warren-Alquist Act each require the Commission to

²⁰ Pub. Resources Code, § 25525.

²¹ Pub. Resources Code, § 25519(c).

independently analyze potentially significant impacts. Importantly, without reviewing detailed cultural resources data that identifies the locations of resources and areas of potential cultural significance, the Commission cannot determine whether a project will result in significant direct, indirect, or cumulative impacts to those resources.

B. The Commission Must Impose Mitigation Measures to Reduce Significant Adverse Effects

Tessera boldly claims that the Commission cannot impose mitigation when projects are located on BLM land.²² Tessera attempts to strip the Commission of its jurisdiction over thermal power plants that have electric generating capacities of 50 megawatts and larger.²³ Furthermore, Tessera ignores the Commission's statutory obligation to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.²⁴

CEQA requires the Commission to include mitigation measures sufficient to minimize a project's significant adverse environmental impacts in its environmental review document.²⁵ For significant impacts to cultural resources, the Commission must try to avoid and preserve cultural resources that will be impacted by the proposed projects.²⁶

²² Brief of Tessera Solar North America, Inc. on Issues Concerning US Bureau of Land Management Cultural Resources Data, p. 3.

²³ 20 Cal. Code Regs., § 25500.

²⁴ *Id.*, § 15002(a)(2) and (3). See also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400.

²⁵ Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).

²⁶ CEQA Guidelines, § 15126.4(b)(3).

Before the Commission approves a project, the Commission must find, based on substantial evidence, that either: (1) mitigation measures or alternatives will avoid or substantially lessen each identified significant impact; (2) the measures are within the jurisdiction of another public agency and have been adopted by the other agency or can and should be adopted by the other agency; or (3) economic, legal, social, technological, or other considerations make infeasible identified mitigation measures or alternatives.²⁷

A finding disclaiming the duty to mitigate a significant impact because the measures are within the jurisdiction of another agency is appropriate only when another agency is *exclusively* responsible to mitigate the impact.²⁸ That is not the case here. Because the Energy Commission and BLM have *concurrent* jurisdiction over the projects at issue in this proceeding, the Commission cannot find that changes or alterations to avoid or minimize significant impacts are solely within the jurisdiction of the BLM.²⁹ Thus, the Commission must impose mitigation measures to reduce significant impacts to below a level of significance.

C. Release of Cultural Resources Data Without Facts Regarding the Location of the Resources Does Not Solve the Commission's Dilemma

In its brief, Staff mentions that BLM may agree to release of cultural resources data “pursuant to nondisclosure agreements if facts regarding the location

²⁷ Pub. Resources Code, § 21081; CEQA Guidelines, § 15091(a).

²⁸ *City of Marina v. Board of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 341, 366; *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 442.

²⁹ CEQA Guidelines, § 15091(c).

of sensitive resources are fully redacted.”³⁰ This does not solve the Commission’s dilemma.

CURE explained in its opening brief that without reviewing detailed cultural resources data that identifies the locations of resources and areas of potential cultural significance, the Commission cannot determine whether a project will result in significant direct, indirect, or cumulative impacts to those resources, as required by CEQA and Energy Commission regulations. Thus, without obtaining, reviewing, and retaining facts regarding the location of cultural resources, the Commission could not satisfy its statutory obligations.

CURE also explained that without the details regarding the location of cultural resources, it would be impossible for the Commission to determine whether mitigation is adequate to reduce impacts to below a level of significance. The location of resources is especially critical given CEQA’s preference towards preserving cultural resources and avoiding impacts to such resources.³¹ To avoid and preserve the cultural resources that will be impacted by the proposed projects, the Commission must know the specific locations of the resources. Only with that information could the Commission, for example, determine how to modify the footprint of a project to avoid significant impacts to specific cultural resources.

Similarly, CURE explained that to comply with CEQA’s requirement to analyze alternatives that would avoid or substantially lessen significant impacts of a project, the Commission must know the location of cultural resources.

³⁰ Energy Commission Staff Brief on Cultural Resource Data on BLM Lands, p. 2.

³¹ CEQA Guidelines, § 15126.4(b)(3).

Finally, CURE explained that the Commission must know the location of cultural resources to determine that projects comply with LORS. For example, the Commission must establish that historic properties within the area of potential effects have been identified, and whether the effects have been adequately evaluated and mitigated pursuant to the NHPA.

The Commission cannot fulfill its obligations under CEQA, Energy Commission regulations and the Warren-Alquist Act without reviewing the specific locations of the cultural resources. Thus, BLM's proposal will not solve the Commission's dilemma.

D. Obtaining Cultural Resources Data Through the NHPA Section 106 Process Does Not Solve the Commission's Dilemma

Staff proposes to resolve the Commission's dilemma through the NHPA section 106 process.³² Staff suggests that consulting parties in the section 106 process request the cultural resources data directly from BLM.³³ Staff's proposal does not solve the Commission's dilemma.

First, Staff's proposal entails obtaining consulting party status pursuant to the section 106 process. However, BLM has discretion to grant or deny a request for consulting party status based on a party's legal or economic interest in the project, or a party's concern for the project's impacts on cultural resources.³⁴ Thus, there is no guarantee that, despite a party's legitimate interest in obtaining the cultural resources data, it will achieve consulting party status.

³² Energy Commission Staff Brief on Cultural Resource Data on BLM Lands, p. 7.

³³ *Id.*

³⁴ 36 C.F.R. § 800.2(c)(5).

Second, even if a party seeking to obtain cultural resources data does attain consulting party status pursuant to the section 106 process, there is no guarantee that BLM will release the data. “BLM itself decides who will have access to sensitive cultural resources information...”³⁵

CURE, which has been granted consulting party status by the BLM for both the Genesis and Imperial Valley projects, requested cultural resources documents from BLM but was denied access.³⁶ The Quechan Tribe, a consulting party to the Genesis and Imperial Valley projects, also requested cultural resources reports from BLM on numerous occasions. To date, BLM has not provided the cultural resource reports to this affected Tribe.³⁷

Recent history shows that BLM cannot be relied upon to release cultural resource data to consulting parties, including affected Tribes, in the section 106 process. As a result, the NHPA section 106 process is not a sound approach to obtaining the cultural resources data and will not solve the Commission’s dilemma.

III. CONCLUSION

CURE respectfully requests that the Committee deny BLM’s request for the return of all cultural resource data and to deny BLM’s request for the reconsideration of the Commission’s decisions to release cultural resources data. The Commission must independently analyze projects’ impacts on cultural resources, must impose mitigation measures for significant impacts, and must make

³⁵ Energy Commission Staff Brief on Cultural Resource Data on BLM Lands, p. 6.

³⁶ Letter from J. Abbott to M. Jones, April 19, 2010, p. 2; Letter from J. Abbott to M. Jones, May 18, 2010, p. 2.

³⁷ Testimony of Bridget Nash Chrabascz, Quechan Tribe to CEC, 5/17/2010.

findings based on substantial evidence that the measures reduce significant impacts to below a level of significance. To complete these obligations, the Commission must obtain, review and retain cultural resources data identifying the location of cultural resources.

As we said in our opening brief, BLM is creating a problem where none need exist. CURE offered a reasonable approach for obtaining the data that would allow the Commission to satisfy its legal obligations, would allow CURE, the Tribes and other parties the opportunity to fully participate in Energy Commission proceedings, and would maintain confidentiality of the data. No other party has offered a solution to the Commission's dilemma.

Dated: June 4, 2010

Respectfully submitted,

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Attorneys for the CALIFORNIA UNIONS
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DECLARATION OF SERVICE

I, Bonnie Heeley, declare that on June 4, 2010, I served and filed copies of the attached **CALIFORNIA UNIONS FOR RELIABLE ENERGY REPLY BRIEF ON ISSUES CONCERNING US BUREAU OF LAND MANAGEMENT CULTURAL RESOURCES DATA** dated June 4, 2010. The original document, filed with the Docket Office, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:

http://www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest/Ridgecrest POS.pdf.

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

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

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

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

http://www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest/Ridgecrest POS.pdf.

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Office via email and U.S. Mail as addressed below.

I declare under penalty of perjury that the foregoing is true and correct.
Executed at South San Francisco, CA on June 4, 2010.

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Bonnie Heeley

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IMPERIAL VALLEY SOLAR PROJECT
DOCKET NO. 08-AFC-5

CALIFORNIA ENERGY
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Blythe Solar Power Plant Project

Docket No. 09-AFC-6

CALIFORNIA ENERGY
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PALEN SOLAR POWER PLANT PROJECT
DOCKET NO. 09-AFC-7

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RIDGECREST SOLAR POEWR PROJECT
Docket No. 09-AFC-9

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