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DOCKET
08-AFC-13
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August 15, 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 am submitting my Reply Brief on the Private Property Access Issue and Objection and Motion to Strike Applicant's Exhibit 82-B.

I certify under penalty of perjury that all of the statements made in the following document 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

REPLY BRIEF ON THE PRIVATE PROPERTY ACCESS ISSUE
AND
OBJECTION AND MOTION TO STRIKE APPLICANT'S EXHIBIT 82-B

August 15, 2010

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I. INTRODUCTION

The California Energy Commission (CEC) docketed the Calico Solar Power Project Supplemental Staff Assessment (SSA) on July 21, 2010. The Prehearing Conference for the SSA was conducted on July 30, 2010, and Evidentiary Hearings were conducted on August 4 through August 6, 2010.

At the Prehearing Conference, Hearing Officer Kramer invited the Parties to submit briefs on Mr. Jackson's access issue by August 11 to be considered at the Evidentiary Hearing to be conducted by the Committee designated by the Energy Commission (Committee) on August 18, 2010.

The Applicant's legal counsel filed the Applicant Calico Solar's Brief RE Access to Patrick Jackson's Property (Applicant's Brief) on August 11, 2010.

I, Patrick C. Jackson, hearby file this reply brief on my behalf and on the behalf of two other owners of adjacent private properties. I am submitting this document to encourage the Committee to **rule the Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA DO NOT COMPLY with all applicable laws, ordinances, regulations and standards (LORS) as required by the California Environmental Quality Act (CEQA).**

I request the Committee rule: (1) **Hector Road must remain an "open route" as designated by the California Desert Conservation Act (CDCA) 1980 as Amended** and (2) **rule Hector Road can not be closed by amendment to CDCA** which will:

1. landlock the adjacent private properties and
2. deprive the property owners of the adjacent private lands their right to use, enjoy and develop their properties.

I further request that IF the Committee rule to approve a CDCA amendment to close Hector Road, **the Committee rule the Applicant purchase the landlocked private properties at their fair market value as required by § 25528(e) of the Warren-Alquist Act**.

I further request the Committee strike the Applicant's Exhibit 82-B, Maps of the Pre- and Post-Project Public Access Routes, presented in the Applicant's Submittal of Rebuttal Testimony on July 29, 2010, on the grounds set forth in this document.

II. THE CALIFORNIA ENERGY COMMISSION HAS JURISDICTION

The California Energy Commission (CEC) has jurisdiction in this matter.[1] Section 25500 of the Public Resources Code states, in pertinent part:

> The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.[2]

The CEC is required to complete a document, documents or environmental impact report that must meet the legal requirements of the California Environmental Quality Act (CEQA).[3] On this issue, the SSA is the equivalent of an environmental impact report and all sections of the SSA must therefore meet CEQA Guidelines. Section 15151 of CEQA Guidelines states:

> An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure. [Emphasis added]

In light of the above requirement and with the absence of significant information for the "decision makers" that has resulted from BLM not providing all of the required and necessary information, **I request the Committee rule the SSA is currently "out of compliance" with CEQA Guidelines.**

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1 Pub. Resources Code, § 25000 et seq; Title 20, Cal Code Reg. § 1752.

2 *Id.*, § 25500 et seq.

3 *Id.*, § 21000 et seq.

The California Public Resources Code and Title 14 California Code of Regulations (CEQA Guidelines) give the CEC jurisdiction to rule on the Private Property Owners' Access Issue in terms of environmental consequences and all applicable laws, ordinances, regulations and standards (LORS).

III. THE PRIVATE PROPERTY OWNERS' ACCESS ISSUE HAS ENVIRONMENTAL CONSEQUENCES

In terms of environmental consequences, the Private Property Owners' Access Issue pertains to Hector Road which has been used by the public and the owners of private lands adjacent to the Project for access for over fifty years.[4]

As currently proposed, the Project will close Hector Road and provide an alternative route.[5] **I request the Committee rule the closing of Hector Road and the use of an "alternative" route would have serious and adverse consequences both to the adjacent property owners and the wildlife that will be affected by changing "access routes" and interfere with the human and animal life that has grown accustomed to the Hector Road.**

In addition to the legal and environmental consequences of closing Hector Road, it is important for the Committee to understand some of the personal consequences. The following excerpt is from an August 13, 2010, letter written by Ira West, one of the adjacent property owners, to Christopher Meyer, Project Manager.

> *On August 8, 1959, my mother made an initial payment on the purchase of 40 acres of land (0529-281-21-0000APN, San Bernardino County, California) in Newberry Springs. The Grant Deed was recorded in the names of my mother, brother and my self on July 24th 1968. My mother, now deceased, initiated this purchase as an investment in the future for my brother and me. Understandably, we have an emotional attachment to this land as well as having owned and paid taxes on it for over 50 years.*
>
> *Our land is located just south of Pat Jackson's property. I know you are aware of Pat's fight to maintain access to his property as well as that of others. My brother and I feel that Pat speaks on our behalf as well as his own and we are behind him 100%.*

[4] Patrick C. Jackson Status Report No. 5; Application for Certification, p. 5.7-131.

[5] Applicant's Submittal of Rebuttal Testimony, Exhibit 82-B, July 2010.

I well understand that times have changed in the past half century that we have owned our land and that progress is being made in the surrounding property that is being developed for solar energy. This is certainly good use of the land and it is not our intent to stand in the way of progress.

Mr. West's letter goes on to add:

More importantly, we have had free access to our land for more than 50 years. Now that access has been cut off. This is not right and I believe a reasonable person would agree with us. My brother, I and the other property owners in the same situation urgently need your help in preserving free access to our land. We look to you to help us correct this situation.

The Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA do not comply with CEQA Guidelines as these sections do identify the environmental impacts of closing Hector Road or the Proposed Public Access Routes depicted on the Applicant's Exhibit 82-B. CEQA Guidelines Section 15002(a)(1) through (3) state, in pertinent part:

The basic purposes of CEQA are to:

(1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities.

(2) Identify ways that environmental damage can be avoided or significantly reduced.

(3) Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible.

Prior to the Applicant installing gates and barricades blocking Hector Road at the Burlington Northern Santa Fe (BNSF) railway crossing, the private property owners in Sections 1 and 36 traveled approximately 4.5 miles on Hector Road from Interstate 40 to access their lands. The gated BNSF crossing and the Applicant's Proposed Public Access Routes will force the private property owners and the public to use approximately 24 miles of mostly desert dirt roads from Newberry Springs or approximately 17 miles of desert dirt roads from Ludlow to access their lands. The additional traffic on Applicant's Proposed Public Access Routes will increase the threat to endangered desert tortoises.

The Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA do not comply with CEQA Guidelines on the grounds the sections do not identify the environmental impacts of closing Hector Road or the "ways that environmental damage that can be avoided or significantly reduced" by keeping Hector Road open. **I request the Committee rule to keep Hector Road open** so as to not negatively impact the adjacent private property owners and the desert tortoises.

IV. HECTOR ROAD IS A VALID FEDERAL LAND POLICY AND MANAGEMENT ACT (FLPMA) RIGHT OF WAY

The public and the private property owners of the lands adjacent to the Project have been using Hector Road for over fifty years to access the lands in the Project area and Hector Road is a valid Federal Land Policy Management Act (FLPMA) right of way.[6] Sec. 701. [43 U.S.C. 1701 note] (a) of The Federal Land Policy and Management Act of 1976 as amended states:

> Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.

Hector Road is a valid FLPMA right of way and the Bureau of Land Management can not terminate the right of way or the adjacent private property owners' "land use right" to use Hector Road to access their lands. The Courts have upheld FLPMA rights-of-way and land use rights.

The decision by the 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) (hereinafter *SUWA v. BLM*), reads, in pertinent part:

> In 1866, Congress passed an open-ended grant of "the right of way for the construction of highways over public lands, not reserved for public uses." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, *repealed by* Federal Land Policy Management Act of 1976 (FLPMA), Pub.L. No. 94-579 § 706(a), 90 Stat. 2743. This statute, commonly called "R.S. 2477," remained in effect for 110 years, and most of the transportation routes of the West were established under its authority. During that time congressional policy promoted the development of the unreserved public lands and their passage into

[6] Patrick C. Jackson Status Report No. 5; Application for Certification, p. 5.7-131.

private productive hands; R.S. 2477 rights of way were an integral part of the congressional pro-development lands policy.

In 1976, however, Congress abandoned its prior approach to public lands and instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation. *See* FLPMA, 43 U.S.C. § 1701 *et seq.* As part of that statutory sea change, Congress repealed R.S. 2477. There could be no new R.S. 2477 rights of way after 1976. But even as Congress repealed R.S. 2477, it specified that any "valid" R.S. 2477 rights of way "existing on the date of approval of this Act" (October 21, 1976) would continue in effect. Pub. L. No. 94-579 § 701(a), 90 Stat. 2743, 2786 (1976). The statute thus had the effect of "freezing" R.S. 2477 rights as they were in 1976. *Sierra Club v. Hodel*, 848 F.2d 1068, 1081 (10th Cir. 1988), overruled on other grounds by *Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 971 (10th Cir. 1992) (en banc).

The difficulty is in knowing what that means. Unlike any other federal land statute of which we are aware, the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested. As the Supreme Court of Utah noted 75 years ago, R.S. 2477 "'was a standing offer of a free right of way over the public domain,'" and the grant may be accepted "without formal action by public authorities." *Lindsay Land & Live Stock Co. v. Churnos*, 285 P. 646, 648 (Utah 1929), (quoting *Streeter v. Stalnaker*, 85 N.W. 47, 48 (Neb. 1901)). In its *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands* 1 (June 1993), the Department of the Interior explained that R.S. 2477 highways "were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority." [Emphasis added]

The Tenth District's ruling in *SUWA v. BLM* holds that valid R.S. 2477 rights-of-way cannot be identified and therefore the BLM cannot contend Hector Road is or is not a valid FLPMA right of way.

In its decision, the Tenth District also stated:

Until very recently, the BLM staunchly maintained that it lacked authority to make binding decisions on R.S. 2477 rights of way.(7) Illustrative of this position is the BLM's decision (or lack thereof) in *Alfred E. Koenig*, A-30139 (November 25, 1964). There, an applicant seeking to purchase certain tracts of land asked the BLM to adjudicate the validity of an asserted R.S. 2477 right of way. The BLM refused on the ground that courts, not it, should be the final arbiter of R.S. 2477 claims. The Secretary of the Interior affirmed:

The Bureau's decision does leave the question of the status of the [R.S. 2477] road uncertain both for appellant and for the small tract lessees who may be affected by any determination regarding the status of the road insofar as it conflicts with lands leased by them or which may be patented to them. However, ... this Department has considered State courts to be the proper forum for determining whether there is a public highway under that section of the Revised Statues and the respective rights of interested parties. Thus, although the Bureau's conclusion may seem unsatisfactory to all of the parties concerned here, it was the proper conclusion in the circumstances as the questions involved are matters for the courts rather than this Department. *Id.* at 2-3. This refusal to adjudicate R.S. 2477 disputes has been the consistent position of the BLM and the IBLA for over one hundred years.(8) In its 1993 Report to Congress, the BLM explained that "[n]o formal process for either asserting or recognizing R.S. 2477 rights-of-way currently is provided in law, regulations, or DOI policy," and that "[c]ourts must ultimately determine [sic] the validity of such claims." U.S. Department of the Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands* 25 (June 1993) (hereinafter cited as *1993 D.O.I Report to Congress*). [Emphasis added]

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(7) *Kirk Brown*, 151 IBLA 221, 227 n.6 (1999) ("Normally, the existence of an R.S. 2477 road is a question of state law for adjudication by state courts."); *Sierra Club*, 104 IBLA 17, 18 (1988) ("[T] he Department has taken the position that the proper forum for adjudicating R.S. 2477 rights-of-way is the state courts in the state in which the road is located."); *James S. Mitchell, William Dawson*, 104 IBLA 377, 381 (1988) ("[T]he Department has taken the consistent position that, as a general proposition, state courts are the proper forum for determining whether, pursuant to [R.S. 2477], a road is properly deemed to be a 'public highway.'"); *Leo Titus, Sr.*, 89 IBLA 323, 337 (1985) ("[T]his Department has considered State courts to be the proper forum for determining whether there is a public highway under [R.S. 2477] and the respective rights of interested parties."); *Nick DiRe*, 55 IBLA 151, 154 (1981) ("[T]he question of the existence of a 'public highway' [under R.S. 2477] is ultimately a matter for state courts . . . ."); *Homer D. Meeds*, 26 IBLA 281, 298 (1976) ("[T]his Department has considered State courts to be the proper forum to decide ultimately whether a public highway under [R.S. 2477] has been created under State law and to adjudicate the respective rights of interested parties. *Herb Penrose*, A-29507 at 1-2 (July 26, 1963) ("State courts are the proper forums for determining the protestant's rights and the rights of the public to use the existing . . . [R.S. 2477] road."); Solicitor's M-Opinion, *Limitation of Access to Through-Highways Crossing Public Lands*, M-36274, 62 I.D. 158, 161 (1955) ("Whatever may be construed as a highway under State law is a highway under [R.S. 2477], and the rights thereunder are interpreted by the courts in accordance with the State law.").
(8) .*Wason Toll Road Co. v. Creede*, 21 Pub. Lands Dec. 351, 354-55 (1895) appears to go the other way, holding that a townsite patent would issue subject to an existing R.S. 2477 right of way. But the Land Department abandoned this position the next year in *Dunlap v. Shingle Springs & Placerville R.R. Co.*, 23 Pub. Lands Dec. 67, 68 (1896). *See The Pasadena and Mt. Wilson Toll Road Co. v. Schneider*, 31 Pub. Lands Dec. 405, 408 (1902) (noting supersession).

In summing its decision, the Tenth Circuit states, in pertinent part:

> In sum, nothing in the terms of R.S 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder, and we decline to infer such authority from silence when the statute creates no executive role for the BLM. This decision is reinforced by the long history of practice under the statute, during which the BLM has consistently disclaimed authority to make binding decisions on R.S. 2477 rights of way. Indeed, there have been 139 years of practice under the statute--110 years while the statute was in force, and 29 years since its repeal--and the BLM has not pointed to a single case in which a court has deferred to a binding determination by the BLM on an R.S. 2477 right of way. We conclude that the BLM lacks primary jurisdiction and that the district court abused its discretion by deferring to the BLM.
>
> This does not mean that the BLM is forbidden from determining the validity of R.S. 2477 rights of way for its own purposes. The BLM has always had this authority. It exercises this authority in what it calls 'administrative determinations.' [Emphasis added]

The Tenth Circuit ruling in *SUWA v. BLM* mandates the BLM lacks the unilateral authority to make binding determinations on the validity of R.S. 2477 rights-of-way and therefore the BLM can not close Hector Road as the closing of Hector Road would constitute as an irreversible binding determination.

While the *SUWA v. BLM* ruling holds the BLM lacks the authority to make "binding determinations," the ruling does permit the BLM to make "administrative determinations." The BLM, however, twice refused to make an administrative determination on Hector Road.

On September 5, 2010, I submitted my first request and on October 25, 2009, I submitted a second request to the BLM asking the BLM to make an administrative determination Hector Road is a valid Revised Statute 2477 right-of-way where it crosses public lands administered by the BLM. The requests were made in keeping with 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 BLM declined to make a non-binding determination on November 5, 2009.

While the Committee does not have jurisdiction to rule on the BLM's authority on FLPMA rights-of-way, **the Committee is bound by the Tenth Circuit's decision in *SUWA v.***

BLM and rule BLM's proposed closure of Hector Road is a "binding determination" and, as such, the closing of Hector Road is "out of compliance" with FLPMA.

V. HECTOR ROAD IS A CALIFORNIA DESERT CONSERVATION ACT (CDCA) DESIGNATED OPEN ROUTE

The public and the private property owners of the lands adjacent to the Project have been using Hector Road for over fifty years to access the lands in the Project area and Hector Road is a CDCA designated open route.[7]

The SA/DEIS states, "Currently, open Bureau of Land Management (BLM) routes traverse the project area. Those routes would be closed if any of the action alternatives or California Desert Conservation Area (CDCA) Plan amendments are approved."[8] The SSA also states, "If the BLM decides to approve the issuance of a ROW grant, the BLM will also amend the CDCA Plan as required."[9]

Hector Road is a designated open route pursuant to the West Mojave Plan amendment to the California Desert Conservation Area (CDCA) Plan.[10]

> 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)[11]

The BLM and Applicant do not have the authority to amend the CDCA to deprive the private property owners of adjacent lands the use Hector Road or any of the other CDCA designated open routes. The CDCA states, in pertinent part:

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7 Patrick C. Jackson Status Report No. 5; Application for Certification, p. 5.7-131.
8 SA/DEIS, p. C.11-1.
9 SSA, p. A-13.
10 Bureau of Land Management California Desert Conservation Area (CDCA) Plan 1980 as Amended, West Mojave Route Designation Program, Map 55 - Hector Sleeping Beauty.
11 Roxie C. Trost February 25, 2010 letter to Shawn R. Jackson, Esq.

> 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.[12]

Given the above facts and law, I request the Committee rule Hector Road shall remain open and its "use" shall be in accordance to the same use and derivative expansion of that use.

As for permitting "utilization of . . . privately owned lands", the Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA do not provide sufficient information to meet the legal requirements of Title 20, California Code of Regulations § 1752(d)(3) which states, in pertinent part:

> The presiding member's proposed decision shall contain the presiding member's recommendation on whether the application should be approved, and proposed findings and conclusions on each of the following: . . .
>
> (3) Whether the commission should require as a condition of certification that the applicant acquire, by grant or contract, the right to prohibit development of privately owned lands in areas surrounding the facilities in order to control population densities and to protect public health and safety.

VI. THE APPLICANT HAS TAKEN STEPS TO LANDLOCK THE PRIVATE PROPERTIES SURROUNDED BY THE PROJECT

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 (Crossing). This Crossing is identified as DOT 919188X.

The Agreement prevents others from using the Crossing. Section 3 of the Agreement states:

> It is expressly stipulated that the Crossing is to be a strictly private one, to be solely used for the purposes set forth in Licensee's Application for Crossing attached hereto as Exhibit B, stipulated in Exhibit 'C' and specified in Exhibit

[12] U.S. Department of Interior Bureau of Land Management, *The California Desert Conservation Area Plan 1980 as amended,* p. 11.

> 'D', and is not intended for and shall not be used for public use. The Licensee, without expense to Licensor, will take any and all necessary action to preserve the private character of the Crossing and prevent its use as a public road.

The Agreement and gated Crossing prevent others from accessing the public and private lands north of the BNSF railroad tracks and thereby violates the Unlawful Inclosures of Public Lands Act of 1885, FLPMA and CDCA.

The gated Crossing violates 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."[13]

The Bureau of Land Management (BLM) contends, "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."[14] This contention 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.[15]

The Applicant contends the Crossing was gated due to "additional safety standards."[16] 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."[17] As to safety issues, the Applicant and BNSF have the alternative of removing the locked swing bar gates and installing an active warning system with crossing gate arms and flashing lights. This type of system is used throughout San Bernardino County.

Although I reserve the right to a more formal comment/rebuttal to the Applicant's Brief, a few comments are necessary for the Committee to understand the various statements and

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13 43 U.S.C. §§ 1061, 1063 and *Camfield v. United States*, 167 U.S. 518 (1897).
14 Roxie C. Trost February 25, 2010 letter to Shawn R. Jackson, Esq.
15 *United States v. Southern Pacific Railway Company*, 146 US 570 (1892).
16 SA/DEIS, p C.8-12.
17 SA/DEIS, p. C.11-6.

counter statements. As per the Applicant's Brief, with specific excerpts cited below, the Applicant's counsel fails to fully embrace the "nature of a landlocked parcel of property." Certainly, in the various "public policy" decisions as well as protecting the property rights of individual land owners, the Courts have clearly stated that a 100% obstruction to access to one's land is prohibited. In addition, the Courts also recognized that forcing a landowner to take a burdensome circuitous route to gain access to the parcel of land is also prohibited.

In this case, **CONTRARY TO APPLICANT"S CONTENTION**, the "alternative routes" will place an undue burden on the affected private property owners in accessing their land...not to mention the facts that closing Hector Road, a recognized public right of way, and negatively affecting the desert tortoise are certainly outside the Applicant's jurisdiction and power.

The Applicant's Brief contends:

> *Mr. Jackson purports to speak for all of the property owners in Not A Part 1 in objecting to being landlocked. However, the properties in Not A part 1 will not be landlocked. As shown in Attachment B to Exhibit 82, there are Proposed Public Access Routes And Post-Construction Route Designations that will continue to provide access to the properties in Not A Part 1. Mr. Jackson still has access to his property via roads to the east and to the west of the BNSF crossing at the Hector Road exit from I-40.*

CONTRARY TO THE APPLICANT'S CONTENTION:

1. The record shows that I have never purported "to speak for all of the property owners." For the record, I speak on my behalf and the behalf of two other property owners.

2. The proposed "alternative routes" will place an undue burden on the affected private property owners in accessing their lands...not to mention the facts that closing Hector Road, a recognized public right of way, and negatively affecting the desert tortoise are certainly outside the Applicant's jurisdiction and power.

3. As detailed in this document, the Applicant's Exhibit 82-B is vague and inconclusive; false and misleading; arbitrary and capricious; and does not meet the legal requirements of CEQA Guidelines.

The Applicant contends, "*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*." This contention is not valid as 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 gated Crossing not only prevents people from using and enjoying the public lands west of the Calico Solar Project site but also prevents other renewal 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.[18]

Although, once again, I reserve the right to a more formal comment/rebuttal to the Applicant's Brief, a few more comments are necessary for the Committee to understand the various statements and counter statements. As per Applicant's Brief, with specific excerpts cited below, the Applicant's counsel fails to understand the various impacts related to the access issues and the Applicant's suggested "alternative routes."

The Applicant's Brief contends:

> *Mr. Jackson also seeks to move beyond issues of access, and use these proceedings to establish the type of access he has to his property. He argues that the current railroad crossing, which BLM concluded is not a legal crossing, must be maintained without restriction. As Mr. Jackson acknowledges, BLM has rejected all of Mr. Jackson's contentions. Noting that Mr. Jackson will have continued access to his property, BLM has found that '[t]he crossing was established as a BNSF ROW for access to, and maintenance of, the rail line and, therefore, the crossing is not a public road. Therefore, the installation of the gate at this crossing does not result in conflict with any applicable laws or regulations.' FEIS, Appendix G, G-129. Staff has also noted BLM's position. See SSA C.8-13 ('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.').*

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

CONTRARY TO THE APPLICANT'S CONTENTION:

1. The record shows that I have never claimed any type of access other than Hector Road is a valid FLMPA right-of-way and designated CDCA open route.

2. In this case, the Applicant again appears not to embrace the necessary and requisite collateral issues with the "access issue." As noted within this document and contrary to the Applicant's statements, the Applicant and the BLM do not have the authority to simply reject all of my contentions. As to Hector Road, the record is too clear and the history too long for the Applicant or the BLM to state that Hector Road is not a valid right-of-way. Again, as noted in this document, the "absence" of information requested under FOIA is critical to the Committee making a fully informed ruling on this matter.

3. As to the gated crossing, the BLM's contention 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" is not supported by the record.[19]

The record shows 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:

> 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

[19] Patrick C. Jackson's Comments on the Draft Environmental Impact Statement for the Calico Solar Project, June 26, 2010.

constructed in 1906, which was closed in 1923 and moved to Earp in 1934.[20]

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.[21] [22]

2. Southern Pacific Land Company conveyed title to Section 1, Township 8 North, Range 5 East, to a private individual in 1958.[23] [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.[24] [10] (These sections were acquired with Land Water Conservation Funds.)

The Agreement and gated Crossing do not meet the legal requirements of California Civil Code 1104 which states:

> A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

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 in this document, this statement is misleading. 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.

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

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

[22] Cal. Civil Code 1104.

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

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

VII. THE APPLICANT CONTENDS THE ADJACENT PRIVATE PROPERTY OWNERS WILL NOT BE LANDLOCKED BUT WILL BE ABLE TO ACCESS THEIR LANDS VIA PROPOSED PUBLIC ACCESS ROUTES

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) (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 as this alternative route does not comply with the National Environmental Policy Act (NEPA) or 43 C.F.R. § 8342.1.[25]

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

On July 21, 2010, the Applicant filed and docketed the Applicant's Submittal of Rebuttal Testimony (Rebuttal Testimony). The Rebuttal Testimony includes Exhibit 82-B consisting of two figures. These figures are identified as:

1. Figure No. 1 - Current Public Access Routes And Pre-Construction Route Designations Calico Solar Project.

2. Figure No. 2 - Proposed Public Access Routes And Post-Construction Route Designations Calico Solar Project.

[25] Patrick C. Jackson Status Report No. 5, March 13, 2010.

The Applicant's Exhibit 82-B is significantly different from the Applicant's previous submittals. Exhibit 82-B shows Proposed Public Access Routes extending approximately 24 miles from Newberry Springs and approximately 17 miles from Ludlow. These extensive access routes are not depicted on the Applicant's previous submittals and represent "significant new information." In light of this significant new information, **I request the Committee rule the Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA be revised and recirculated pursuant to CEQA Guidelines.**

Section 15088.5(a) of the CEQA Guidelines state:

> A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term "information" can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement. [Emphasis added]

The fact the Applicant has not presented any evidence to show environmental studies were conducted on the 24 and 17 miles of Proposed Public Access Routes is significant, and, therefore, the Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA do not comply with CEQA Guidelines. As such, **I request the Committee rule the SSA does not meet the legal requirements of CEQA Guidelines §§ 15088.5(a), 15151.**

VIII. OBJECTION AND MOTION TO STRIKE APPLICANT'S EXHBIT 82-B

I hereby object and motion to strike the Applicant's Exhibit 82-B on the following grounds:

1. Exhibit 82-B is arbitrary and capricious as the Applicant did not present any definitions or criteria for the different route designations.

2. Exhibit 82-B is inconclusive as the Applicant did not present any evidence the

Current Public Access Routes or Proposed Public Access Routes are useable.

3. Exhibit 82-B does not meet CEQA Guidelines as the Applicant did not present environmental impact reports on the Proposed Public Access Routes to Newberry Springs or to Ludlow.

4. Exhibit 82-B is vague and inconclusive as the Applicant did not present evidence the public can cross the private railroad crossing within the Southern California Edison (SCE) easement. This crossing is identified as DOT 026041E and "is a private roadway on SCE's easement, for use by SCE only at this time."[26]

5. Exhibit 82-B is misleading as it does not depict CDCA designated open routes AF058 or AF298.

6. Exhibit 82-B is false and misleading as Figure 2 depicts Hector Road between Sections 1 and 36 as an "Undefined Route." Private land with frontage on Hector Road is:

> Subject to an easement for road purposes over a strip of land fifteen (15) feet wide within and contiguous to the outside boundaries of the land herein conveyed, with the provision that the public shall at all times have the right of unobstructed use of such designated road easement.[27]

7. Exhibit 82-B is vague and inconclusive as the Proposed Public Access Route crosses private land [28] and the Applicant did not present evidence the public can cross these

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[26] BNSF July 26, 2010 Letter to Mr. Fred Stearn responding to Mr. Stearn's May 6, 2010 Letter to BNSF.

[27] For example: Grant Deed dated November 19, 1965, by and between Matthew Simmons, a Married Man, as his separate property, and David G. Falk, a married Man, as his separate property (Grantors) and Alayne Greenwald, a Married Women, as her sole and separate property (Grantee) recorded November 29, 1965, in Book 6521, Page 344 of Official Records, in the Office of the County Recorder, San Bernardino County.

[28] Bureau of Land Management California Desert Conservation Area (CDCA) Plan 1980 as Amended West Mojave Plan, West Mojave Route Designation Program, Map 48 - Manix, Hidden Valley West; Map 54 - Newberry Springs, Troy Lake; Map 55 - Hector, Sleeping Beauty; Map; Map 62 - Sunshine Peak, Lavic Lake; Map 63 - Ludlow, Ash Hill.

private lands without trespassing.

8. Exhibit 82-B is vague and inconclusive as some of the Proposed Public Access Routes depicted on the figures are within the Pisgah Solar Energy Study Area and the Applicant did not present evidence the Proposed Public Access Routes will comply with the Department of the Interior Bureau of Land Management Notice of Proposed Withdrawal and Opportunity for Public Meeting; Arizona, California, Colorado, Nevada, New Mexico, and Utah which is "subject to valid existing rights."[29]

9. Exhibit 82-B is vague and inconclusive as the Applicant did not present evidence the Proposed Public Access Routes will comply with *Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp.2d 1115, 1166-67 (N.D. Cal. 2006).

10. Exhibit 82-B is vague and inconclusive as the Applicant did not present evidence the public can traverse the Southern California Edison right-of-way/easement east of the Project.

11. Exhibit 82-B is vague and inconclusive as the Applicant did not present evidence the Proposed Public Access Route can be used during construction of the Project and access routes.

IX. RECORDS REQUESTED UNDER THE FREEDOM OF INFORMATION ACT

On December 13, 2009, I requested records the BLM has on Hector Road under the Freedom of Information Act (FOIA). The request for information was made in accordance with 5 U.S.C. § 552 *et seq.* and Title 20 California Code of Regulations § 1716(c).

To date, I have not received all the records I requested and I filed a FOIA appeal with the United States Department of the Interior (DOI) Office of the Solicitor on May 8, 2010. This appeal is ongoing.[30]

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29 Federal Register, Vol. 74, No.124, June 30, 2009.

30 Patrick C. Jackson Status Report No. 5.

As a matter of record: On December 13, 2009, I also requested records the BLM has on water well quantity testing and water well sites under FOIA. I have not received all the records I requested and I filed a FOIA appeal with the DOI Office of the Solicitor on May 8, 2010. This appeal is also ongoing.[31]

The National Environmental Policy Act (NEPA) requires the BLM to provide information requested under FOIA.[32]

To date, the BLM has not provided relevant and material information requested under FOIA. In not providing the requested information, the BLM actions do not meet the legal requirements of Title 20 California Code of Regulations § 1716(f).

Although, once again, I reserve the right to a more formal comment/rebuttal to the Applicant's Brief, the Applicant's attempt to simply dismiss the FOIA issue would appear to disrespect the intention of this Committee to issue a "fully informed", fair and reasonable ruling.

The Applicant's Brief concludes:

> *Finally, Mr. Jackson complaints that BLM has not complied with FOIA. Mr. Jackson's FOIA contentions are beyond the Commission's jurisdiction, and in any case are entirely irrelevant to any issue before the Commission. Accordingly, Mr. Jackson's argument that the project does not comply with LORS due to the closing of the non-public railroad crossing should be rejected as meritless.*

AGAIN CONTRARY TO THE APPLICANT'S CONTENTION:

1. The record shows my FOIA requests do not pertain to the gated Crossing but to Hector Road, water well quantity tests and water well test sites.

2. In this case, the Applicant appears to want to limit the Commission's understanding of all the relevant facts... and to state that my claim is "meritless", without any level of support is insulting to private property owners and the "fairness" requirement of

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31 *Id.*

32 Federal Register, Vol. 75, No. 35, February 23, 2010, p. 8046.

this proceeding.

The BLM's withholding of relevant and material records prevents me and other interested parties from presenting evidence and participating fully in the Applicant's Application for Certification as permitted under Title 20 California Code of Regulations §§ 1711, 1723(b).

The Memorandum of Understanding Between the U.S. Department of Interior, Bureau of Land Management California Desert District and the California Energy Commission Staff Concerning Joint Environmental Review For Solar Thermal Power Plant Projects states, in pertinent part:

> The assessments provided by the Parties must be sufficient to meet all federal and state requirements for NEPA and CEQA and shall be included as part of the joint Preliminary Staff Assessment/Draft Environmental Impact Statement and the joint Final Staff Assessment/Final Environmental Impact Statement. [Emphasis added]

While the Committee does not have jurisdiction over the BLM, **the Committee is bound by California Code of Regulations to rule the BLM did not comply with Title 20 California Code of Regulations § 1716(f).**

X. REQUESTS

1. I request the Committee rule the Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA do not comply with FLPMA on the grounds the Project will close a valid FLPMA right of way.

2. I request the Committee rule the Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA do not comply with CDCA on the grounds the Project will deprive Private Property Owners use of CDCA designated open routes.

3. I request the Committee rule the Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA do not comply with CEQA on the grounds the Applicant did not conduct environmental studies on the Applicant's

Proposed Public Access Routes depicted on Exhibit 82-B.

4. I request the Committee rule the Transportation and Traffic and the Land Use, Recreation and Wilderness sections of the SSA do not comply with all applicable laws, ordinances, regulations and standards (LORS) as required by the CEQA on the grounds these sections lack significant and material information to enable the Committee "to make a decision which intelligently takes account of environmental consequences."

5. I request the Committee strike the Applicant's Exhibit 82-B on the grounds the exhibit is vague and inconclusive; false and misleading; arbitrary and capricious; and does not meet the legal requirements of CEQA Guidelines.

August 15, 2010

Date

Patrick C. Jackson
Private Property Owner & Intervenor

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 **August 15, 2010**, I served and filed copies of the attached ***Reply Brief on the Private Property Access Issue and Objection and Motion to Strike Applicant's Exhibit 82-B.*** 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.

August 15, 2010
Date

Patrick C. Jackson

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 CALICO SOLAR *(Formerly SES Solar One)*

Docket No. 08-AFC-13

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(Revised 8/9/10)

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