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

Applications for Certification for the	)	**Docket Nos.**
	)	
Calico Solar (SES Solar One) Project,	)	**08-AFC-13,**
Genesis Solar Energy Project,	)	**09-AFC-8,**
Imperial Valley (SES Solar Two) Project,	)	**08-AFC-5,**
Solar Millennium Blythe Project,	)	**09-AFC-6,**
Solar Millennium Palen Project, and	)	**09-AFC-7,**
Solar Millennium Ridgecrest Project.	)	**09-AFC-9, and**
	)	
Consolidated Hearing on Issues	)	**10-CRD-1**
Concerning US Bureau of Land	)	
Management Cultural Resources Data	)	
	)	

ENERGY COMMISSION STAFF BRIEF ON CULTURAL RESOURCE DATA ON BLM LANDS

I. INTRODUCTION

This brief addresses a controversy concerning how two cooperating agencies, one state and one federal, can best attain the common goal of preserving sensitive archaeological resource information while allowing the public and interested parties to effectively participate in an open power plant siting process. This controversy does not arise under the Public Records Act, as all parties and agencies agree that the information in question can be confidential pursuant to that statute. It does not involve a due process right pursuant to the state Administrative Procedure Act, as that statute is intent on providing due process to those accused by the State or who have applied to the State for a license that requires a determination of facts regarding a right, privilege, duty, or other legal interest. (Gov. Code, §§ 11400 *et seq.*)[1]

[1] For instance, the "Administrative Bill of Rights" is applicable to "the person to which the agency action is directed," which means the person accused in a disciplinary proceeding, or the applicant who has a legal right or interest being adjudicated. (See Gov. Code, § 11425.10.) Intervenor participation can be significantly curtailed pursuant to APA provisions. (See Gov. Code, § 11440.50.)

The issue arises because the Energy Commission's statute provides for open proceedings and encourages public participation. It was the first agency with a statute requiring a Public Adviser, a gubernatorial appointee whose very purpose is to encourage and accommodate public participation, particularly in adjudicatory siting proceedings. (Pub. Resources Code, § 25222 [the Public adviser "shall insure that full and adequate participation by all interested groups and the public at large is secured" for power plant proceedings].) The Energy Commission (Commission) has always been liberal in granting intervention to parties expressing interest in siting proceedings, and has rarely restricted such participation beyond conformance with the duties of other parties.

In accord with its statute and regulations, the Energy Commission has provided (pursuant to a strict nondisclosure agreement) confidential information regarding the location of archaeological resources to an intervening party that sought that information to better participate on cultural resource issues in a power plant siting proceeding. The confidential information pertains to resources on federal lands managed by the U.S. Bureau of Land Management (BLM). BLM objects to the release of any information regarding such resources without its consent, as it has a duty under federal law to control such information to protect such resources. BLM believes that the Energy Commission's unilateral release of un-redacted confidential archaeological resource information compromises its ability to satisfy these federal statutory requirements.

For this reason, BLM has strongly objected to the earlier release of information to California Unions for Reliable Energy (CURE), and has demanded that all records of such information be returned to BLM. It has further requested that all confidential cultural resource information regarding resources on its lands be removed from dockets and returned to BLM. Alternatively, it has informally suggested that it might agree to the release of such information pursuant to nondisclosure agreements if facts regarding the location of sensitive resources are fully redacted.

Staff, and the agency itself, are presented with a problem that requires immediate resolution. BLM has a compelling interest in controlling data regarding information on archaeological resources collected with its perrnission on its lands, and which it has a duty to protect. At the same time, Staff believes that parties such as CURE should be able to participate effectively on important issues in the proceeding

However, balancing these considerations, Staff recommends that the Commission find a solution that allows BLM to control information regarding sensitive archaeological resources on federal lands. Staff believes that this is a significant federal interest that BLM and the Solicitor for the U.S. Department of Interior (Solicitor) have a duty to insist on. And they do insist. Unless BLM and the Solicitor feel that BLM has control over release of the data in question to any person, they will allow no further information on such matters to be shared with the Commission or its staff. This will considerably impede or make impossible this agency's ability to timely complete its CEQA analyses for the solar projects.

The Commission has released information only for one project thus far: the Imperial Valley Project (08-AFC-5). The procedural background describing how the confidential information was handled in that project is instructive for the other consolidated solar cases, and is provided below.

II. PROCEDURAL BACKGROUND FOR THE IMPERIAL VALLEY PROJECT

On September 29, 2008, Imperial Valley Solar, LLC (Applicant), filed an application for confidentiality in Docket No. 08-AFC-5. The reports in question were draft reports that were prepared by URS, Applicant's consultant, for data acquired pursuant to a BLM permit for cultural resource survey work.

The Commission determined that the records were confidential under the California Public Records Act (Gov. Code, §6254(k)) and the federal Archaeological Resources

Protection Act. (16 U.S.C. § 470hh.) The determination of confidentiality was based on the conclusion that non-disclosure of archaeological and cultural resources is expressly in the public interest, and the Commission designated the records confidential for an indefinite period.

On March 10, 2010, CURE, an intervening party to the proceeding, filed a petition for inspection and copying of certain confidential records filed in the Imperial Valley Solar Project. CURE's petition stated that the requested information is necessary for CURE to fully participate in the proceeding with regard to cultural resource issues, that CURE is a formal consulting party in the federal National Historic Preservation Act Section 106 consultation process for the project, and that CURE would be participating in developing a programmatic agreement for protection of the cultural resources on the project site. CURE's petition also stated that CURE was willing to enter into a nondisclosure agreement with Applicant, that CURE had retained a cultural resources preservation expert to assist in the review of the materials, and that it was willing to sign a nondisclosure agreement. The Commission received the nondisclosure agreements signed by counsel for CURE and its expert.

Counsel for Applicant agreed to the terms of the nondisclosure agreement, and Applicant joined CURE in signing the document.

On April 15, 2010, the Chief Counsel issued a determination that CURE could receive the confidential information. The determination concluded that CURE satisfied the requirements of Section 2506 of the Commission's regulations, noted that Commission proceedings are open for public participation, and further noted that pursuant to Section 1207 of its regulations any person granted intervention has the rights of a party, including the ability to cross-examine witnesses and present evidence in the proceeding. In addition, the determination concluded that CURE's retention of a

qualified expert and signing of a nondisclosure agreement would adequately protect the cultural resources in question.[2]

BLM concurrence in the release of this information was not a part of this process.

III. BLM DUTIES AND THE SECTION 106 PROCESS.

The Archaeological Resources Protection Act (ARPA) provides:

> Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this chapter or under any other provision of Federal law may not be made available to the public under [federal law disclosure requirements] unless the Federal land manager concerned [BLM] determines that such disclosure would ... (2) not create a risk of harm to such resources or to the site at which such resources are located. (16 U.S.C.A. § 470hh.)

The Federal Land Manager in this case is the California office of BLM. BLM has "issued a Field Authorization, subject to a BLM State Permit for Archaeological Investigations," for Applicant's consultants to survey archaeological resources at the proposed Imperial Valley Solar power plant site. (April 29, 2010, letter of BLM Acting State Director James Abbott, p. 2.) Permit recipients are directed not to publish or otherwise make available site location information collected. *(Ibid.)* All reports, notes, photographs, and other materials acquired pursuant to the permit are, according to BLM, property of the U.S. government and can be recalled at any time. *(Ibid.)*

BLM has stated that it allowed Applicant to provide draft survey documents (containing resource location information) directly to the Commission and Staff because of the accelerated schedule for ARRA-funded projects. It took this shortcut to allow Staff to more quickly analyze cultural resource impacts for its CEQA analyses. Normally, BLM

[2] The Chief Counsel's determination is subject to appeal to the full Commission for 14 days, and confidential material is not disclosed until any appeal is concluded. BLM subsequently appealed, but the appeal was not received until after the 14 day period had run, and after the information had been released subject to the conditions of the nondisclosure agreement.

would never release such draft documents to anyone, but would release finalized documents (possibly redacted to remove resource location information) to persons who sought such information through the federal agency "Section 106" process. BLM has never consented to the sharing of such information with siting case intervenors. BLM now requests the return of all such data that has been submitted to dockets.

As mentioned above, the federal agencies have their own process for determining who may see such information. This process is pursuant to the National Historic Preservation Act. (16 U.S.C.A. 470 *et seq.)* Under this process, BLM itself decides who will have access to sensitive cultural resource information regarding artifacts on BLM lands. (BLM letter, *supra.)* Federal regulations describe this as the "Section 106 process," which provides an elaborate system for such determinations, and is generally described in the introduction to such regulations as follows:

> *Purposes* of *the Section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings [projects] on historic properties .... The procedures in the part define how Federal agencies meet these statutory responsibilities. The Section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency officials and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stage of project planning. (36 C.F.R. § 800.1 (a).)

The Section 106 process is established to provide consultation with the Secretary of the Department of Interior, with oversight from the federal Advisory Council on Historic Preservation. It includes as participants the lead agency official(s) (here BLM) and "consulting parties," which include state historic preservation officers, Indian tribes, and "additional consulting parties" ("individuals and organizations with a demonstrated interest in the undertaking ... due to the relation of their legal or economic relation to the undertaking or affected parties, or their concern with the undertaking's effects on historic properties"). (36 C.F.R. § 800.2.) Both CURE and the Commission are consulting parties in the Section 106 process for the Imperial Valley proceeding.

"The views of the public are essential to informed Federal decision-making in the Section 106 process." (36 C.F.R. § 800.2(d).) The federal agency is supposed to seek public input and consider such public reviews regarding project impacts. *(Ibid.)* Resources and impacts are to be documented, and such documentation may be restricted from public access for reasons of privacy, harm to historic resources, or to avoid impeding the use of a traditional religious site. (36 C.F.R. § 800.11 (c).) The Secretary of the Interior, in consultation with the federal agency, "shall determine who shall have access to the [confidential] information for the purpose of carrying out the Act." *(Ibid.)* Determinations to withhold information are subject to review.

It is Staff's understanding that the Section 106 process is well underway for the Imperial Valley project. Moreover, CURE has stated in its filings seeking confidential archeological data that it is a formal consulting party within that Section 106 process.

CURE's status as a formal consulting party in BLM's Section 106 process suggests the potential resolution of the current impasse: let BLM address any request for archaeological information through this established process. This would not necessarily require the return of docketed information that is confidential. Rather, the Commission would be required to make it clear that such information will not be released by the Commission, and that all requests for information collected on BLM lands pursuant to a BLM permit must be obtained directly from BLM itself, through the Section 106 process, presumably by seeking "consulting party" status, and perhaps agreeing to a BLM-imposed nondisclosure agreement. This agency could provide assurance to BLM by an express agreement, or possibly by terms of a "consulting party" agreement in the Section 106 process.

Alternatively, the Commission could agree to return to BLM all draft cultural resource information that was improvidently docketed by applicants or their consultants after having been collected pursuant to a BLM permit. This creates a potentially important logistical problem for Staff, which needs access to such information to provide CEQA analysis for the various projects, and must do so on accelerated time schedules. This is

an issue that needs further exploration with BLM, so the ultimate efforts of both agencies are not derailed by the issue of how to protect confidential information. Staff has discussed with BLM possible ways to address the dislocating effects of not having physical custody of the confidential information, but this is an issue that must be quickly addressed.

Finally, Staff believes that it is essential for the Commission to find a resolution of this issue that preserves the critical working relationship between the staffs of the two agencies, and that maximizes the ability of the agencies to share information necessary for the environmental analysis that they are jointly responsible for.

Date: June 1, 2010

Respectfully submitted,

RICHARD C. RATLIFF
Staff Counsel IV