BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

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	)	
	)	

BRIEF OF TESSERA SOLAR NORTH AMERICA, INC. ON ISSUES CONCERNING US BUREAU OF LAND MANAGEMENT CULTURAL RESOURCES DATA

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I. Introduction

On May 21, 2010, the Siting Committee issued a Notice and Order for Consolidated Hearing on Issues Concerning U.S. Bureau of Land Management Cultural Resources Data (Order), inviting parties interested in cultural resource issues in six solar Application for Certification (AFC) cases to submit briefs and testimony regarding how Bureau of Land Management (BLM)-related cultural resource data should be handled in the referenced AFC proceedings. Tessera Solar North America, Inc. (TSNA) is the applicant in two of the referenced proceedings, the Calico Solar (SES Solar One) Project and the Imperial Valley Solar (SES Solar Two) Project, and therefore has an interest in how these issues are resolved.

In Appendix C to the Order, the Siting Committee listed eighteen issues related to how BLM cultural resource data can and should be utilized in Energy Commission proceedings. TSNA generally agrees with the position stated by the BLM in its April 29, 2010 and May 18, 2010 letters to the Energy Commission (provided as Appendix A and B to the Order) that BLM is the sole owner of reports that describe cultural resources located on federal lands and it retains the sole authority regarding how, when and if this information should be released to other parties or members of the public.[1] There are three questions included in Appendix C which pertain to how the Commission should analyze potential cultural resources impacts in an AFC proceeding. In this brief, TSNA presents its view on the following three questions from Appendix C:

9. What are the cultural resource issues in the proceedings?

10. What data does the Commission need, under the Warren-Alquist Act, the CEC regulations, CEQA, NEPA, the cultural resources laws, and under the APA to resolve those issues?

11. For projects proposed on BLM land, can the CEC defer, partially or entirely, to BLM's decision on cultural resource issues, under the Warren-Alquist Act, the CEC regulations, CEQA, NEPA, the cultural resources laws, and the APA?

Overall, TSNA believes that the CEC has an obligation to evaluate potentially significant impacts to cultural resources and to consider feasible mitigation measures. Given that cultural resources located on federal lands are under the exclusive jurisdiction of the federal government, however, the mitigation measures which the CEC can feasibly require applicants to implement are limited. Nevertheless, the Commission can satisfy the requirements of CEQA and the Warren-Alquist Act by taking advantage of BLM's extensive cultural resources process, as described below.

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[1] With respect to Appendix C Questions 2 and 3, TSNA notes that its primary consultant, URS, provided confidential cultural resources data for both the Calico Solar Project and the Imperial Valley Solar Project to the Commission. This material was submitted to the CEC in response to CEC requirements. For example, to achieve data adequacy, "A technical report of the results of the new surveys, conforming to the Archeological Resources Management Report format (CA Office of Historic Preservation Feb 1990), which is incorporated by reference, shall be separately provided and submitted (under confidential cover if archeological site locations are included) Data Adequacy Worksheet, July 30, 2008." The provision of this information to the Commission complied with the terms of BLM's Special Permit conditions and with accepted BLM protocol at the time the information was provided.

II. Cultural Resource Issues Involved In Solar AFCs Located on BLM Lands

The cultural resource issues involved in solar AFCs for projects proposed on BLM lands are whether the proposed projects would cause significant adverse changes in the significance of historic resources. *See* Imperial Valley Solar Project SA/DEIS § C.3.3, Methodology and Thresholds for Determining Environmental Consequences (Feb. 2010). If significant adverse changes are identified, a second issue arises, which is to identify mitigation measures that would eliminate or reduce the significant effects. *Id.*

III. Commission Data Needs To Address Cultural Resources Issues

To address cultural resources issues, the Commission needs a report that assesses proposed project activities against an inventory of the cultural resources in the area to be affected. Such a report need not be prepared by Commission staff; it may be prepared by anyone with the requisite data and expertise. The only requirement is that the Commission base its decision on "substantial evidence," *i.e.,* "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." 14 Cal. Code Regs. § 15384(a). The impact analysis may be based on informed judgments by experts. *National Parks & Conserv. Ass'n v. Regents of Univ. of Cal.,* 71 Cal. App. 4th 1341, 1362 (1999); Pub. Res. Code § 21080(e).

The Commission's certified regulatory program under CEQA encourages Commission staff to use the work of other agencies in the assessment of environmental issues. Commission staff's assessment of environmental effects and mitigation measures "shall focus on those environmental matters *not* expected to be considered by other agencies, in order to ensure a complete assessment of significant environmental issues in the proceeding." 20 C.C.R. § 1742(c) (emphasis added). Where another agency's work is used, the role of staff is to monitor the other agency's assessment of environmental factors and, if needed to ensure a complete consideration of environmental issues, to assist and supplement the other agency's assessment. 20 C.C.R. § 1742.5(d).

Where the project at hand is a solar AFC on BLM land, the case for Commission use of BLM's work on cultural resources is particularly strong. Cultural resources analysis is not an environmental topic on which the Commission's certified regulatory program places special emphasis, particularly in comparison to air quality and water quality impact analysis. *See, e.g.,* 20 C.C.R. §§ 1744.5, 1752(a)(2); Pub. Res. Code § 25523(d)(1).

In contrast, BLM is required to, and in fact does, emphasize the analysis of impacts to cultural resources from activities on the federal lands it manages. To approve a right-of-way grant or plan amendment, BLM must obtain intensive cultural resources surveys and comply with a plethora of federal statutes and executive orders governing such resources. *See* BLM Manual 8100 - The Foundations for Managing Cultural Resources (2004). In the case of solar AFCs, the relevant statutes will generally include the National Historic Preservation Act of 1966, the Federal Land Policy and Management Act of 1976, the American Indian Religious Freedom Act of 1978, the Archaeological Resources Protection Act of 1979, and the Native American Graves Protection and Repatriation Act of 1990. *Id.* Most of these statutes, as well as NEPA, require the federal agency to protect cultural resources that are not eligible for the National Register of

Historic Places, as well as those that are. *Id.* To comply with these laws, BLM issues extensive guidance regarding cultural resources. *See* BLM Manual 8100 Series.

Thus for solar AFCs on BLM lands, the analysis of impacts to cultural resources is not only "expected," but required, to be analyzed in depth by agencies other than the Commission. In this scenario, the Commission's certified regulatory program calls for staff to "monitor" the federal agency's work. 20 C.C.R. §§ 1742(c), 1742.5(d). Thus the answer to the question of what data the Commission needs to address cultural resources issues is "enough data to monitor BLM's reports," *i.e.,* enough data to conclude that those reports constitute substantial evidence.

IV. Commission Deference to BLM Decisions on Cultural Resources Issues.

As described above, with respect to the analysis of cultural resources impacts, the Commission may "defer" to BLM in the sense of relying on reports generated through the BLM process, so long as monitoring by Commission staff establishes that those reports constitute substantial evidence. With respect to the other key element of cultural resources analysis – the imposition of mitigation measures if a significant impact to cultural resources is identified – the Commission must defer to BLM in the sense that only BLM can decide what mitigation activities will occur on the lands it administers. The Commission can always reject an AFC application, and may, as the example discussed below demonstrates, actively participate in BLM processes for cultural resources evaluation and mitigation, but the ultimate decision regarding activities on BLM-administered lands is BLM's.

The analyses of the two TSNA projects currently under review reflect this principle. For both projects, BLM, in coordination with the Commission, has identified the requirements and issued the permits for the professionals' surveys of the project sites, and the surveys were conducted pursuant to BLM's "Class III" standards. With respect to mitigation, for TSNA's Calico Solar Project, BLM has preliminarily identified a defined area of significant cultural resources and the applicant has proposed to avoid those resources. Given this, TSNA anticipates that there will be no remaining significant impacts to cultural resources and that therefore no additional mitigation measures will be required. If total avoidance is not possible, mitigation measures similar to those involved in the Imperial Valley Solar Project and described below can be implemented.

TSNA's Imperial Valley Solar Project would affect a greater number of cultural resource sites. The complexity inherent in mitigating the cultural resources impacts of this project led BLM to initiate the Programmatic Agreement process under the National Historic Preservation Act. This process brings together BLM, the Corps of Engineers, the State Historic Preservation Officer, and the Advisory Council on Historic Preservation as Signatory Parties, and the Commission and the TSNA as Invited Signatory Parties, to establish the process for final determinations of significance, avoidance, and treatment and management with respect to cultural resources that may be affected by the Imperial Valley Solar Project. Although the Programmatic Agreement effort has included, and is anticipated to continue to include, extensive participation by the Commission, the BLM retains the final authority, as it must, to determine what activities will occur on BLM-managed lands.

This "deference" to BLM is consistent with CEQA because the statute recognizes that a lead agency—here the CEC—does not always have jurisdiction to implement, or require

implementation of, every mitigation measure the lead agency identifies. CEQA does not provide agencies with new mitigation powers; in mitigating or avoiding significant impacts, the agency "may exercise only those express or implied powers provided by law other than" CEQA. Pub. Res. Code § 21004. Accordingly, one of the three findings a lead agency may make regarding significant impacts is that the identified mitigation measures are "within the responsibility and jurisdiction of another public agency and have been, or can and should be adopted by the other public agency." Pub. Res. Code § 21081(a)(2). CEQA requires the CEC to provide an analysis of cultural resources impacts based on substantial evidence and to identify mitigation measures for any significant impacts identified. Through the processes described above, the CEC has met these requirements for the Calico Solar and Imperial Valley Solar Projects. CEQA does not allow, much less require, the CEC to require project applicants to conduct mitigation on BLM lands that differs from BLM's approved mitigation measures on those lands. In this sense, the CEC properly "defers" to BLM under CEQA.

V. Conclusion

TSNA submits that the CEC may comply with its obligations under the Warren-Alquist Act and CEQA by providing an analysis of cultural resources impacts that takes advantage of BLM's independent obligation to analyze the same resources. TSNA further submits that the Commission's legal inability to require mitigation on BLM-administered lands that differs from the mitigation required by BLM creates no inconsistency with the Commission's obligations under the Warren-Alquist Act and CEQA.

Dated: June 1, 2010

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

Docket No. 09-AFC-6

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

Docket No. 08-AFC-13

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APPLICATION FOR CERTIFICATION FOR THE
GENESIS SOLAR ENERGY PROJECT

Docket No. 09-AFC-8

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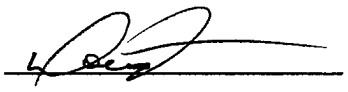

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APPLICATION FOR CERTIFICATION FOR THE
IMPERIAL VALLEY SOLAR PROJECT
(formerly known as SES Solar Two Project)
IMPERIAL VALLEY SOLAR, LLC

Docket No. 08-AFC-5
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DECLARATION OF SERVICE

I, Doug Carson, declare that on 06/01/10, I served and filed copies of the attached, Brief of TSNA. The original documents, filed with the Docket Unit, are 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/solartwo/index.html]

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

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CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 10-CRO-1
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, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

*indicates change

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

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

Docket No. 09-AFC-7

PROOF OF SERVICE
(Revised 4/19/10)

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DECLARATION OF SERVICE

I, Doug Larson declare that on 06/01/10, I mailed hard copies of the attached Brief of TSNA. The original document, filed with the Docket Unit, 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_palen]

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APPLICATION FOR CERTIFICATION
For the *RIDGECREST SOLAR POWER PROJECT*

Docket No. 09-AFC-9

PROOF OF SERVICE
(Revised 5/12/2010)

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DECLARATION OF SERVICE

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