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 U.S. Bureau of Land	)	
Management Cultural Resources Data	)	
_____	)	

(REVISED) PROPOSED DECISION OF THE SITING COMMITTEE, AND NOTICE OF HEARING

NOTICE OF HEARING

The Energy Commission will hold a hearing to receive comments on, and to consider adopting, the Proposed Decision of the Siting Committee that is set forth below. The hearing will be held during the Commission's regular Business Meeting:

Wednesday, July 14, 2010
Beginning at 10:00 a.m.
California Energy Commission
Hearing Room A
1516 Ninth Street
Sacramento, California
Wheelchair Accessible

The Business Meeting Agenda, containing information about how to attend the meeting via telephone or WebEx, may be found at:

HTTP://WWW.ENERGY.CA.GOV/BUSINESS_MEETINGS/2010_AGENDAS/AGENDA_2010-07-14.HTML

Written comments (a) must be filed in the CEC Docket Office and served on all parties in each of the proceedings captioned above no later than 5:00 p.m. on Monday, July 12, 2010; (b) must be limited to the matters in the Proposed Decision (and matters that arguably should have been included therein), be based on the existing record in Docket 10-CRD-1, and contain no new evidence; and (c) may be filed and served by any interested person.

Persons wishing to make oral comments at the July 14 hearing are asked to limit their comments to less than 5 minutes if possible, although up to 10 minutes per person may be allowed if time permits. Time for comments may be further limited if necessary in order to keep the total comment period to one hour. Persons wishing to make public comments are encouraged to contact Jennifer Jennings, the Energy Commission's public advisor, in advance of the hearing, at (916) 654-4489 or (800) 822-6228 or e-mail: [publicadviser@energy.state.ca.us].

Please note that the Proposed Decision would make this a precedent decision under section 11425.60 of the Government Code.

PROPOSED DECISION OF THE SITING COMMITTEE:
COMMISSION ORDER ON DATA CONCERNING
CULTURAL RESOURCES ON BLM LAND

[For consideration and adoption by Commission on July 14, 2010]

I. Introduction and Summary.

Cultural resources, such as historical artifacts, ancient art, and ancestral burial grounds, are often found on the sites of power facilities proposed for licensing by the California Energy Commission ("CEC" or "Commission"). In order to protect those sensitive resources, federal and state laws require confidential treatment of data on their locations and other key characteristics. However, in the Commission's licensing (formally, "certification") proceedings, we must assess potential impacts to cultural resources, along with mitigation measures and alternatives that would avoid or minimize the impacts (we must also assess projects' compliance with the cultural resources laws), and doing so requires reasonable access to such data. In turn, formal parties in our proceedings (usually referred to as "intervenors") may also seek access to this data to facilitate their participation. Balancing the competing legal, factual, and policy considerations that may be present in any given proceeding is difficult.

In several of the Commission's current proceedings on applications for certification ("AFC") for solar power plants located on U.S. Bureau of Land Management ("BLM") land, intervenor California Unions for Reliable Energy ("CURE") has asked us for access to confidential information about cultural resources. (In the Imperial Valley

AFC proceeding, CURE has received some data.) Applicants and BLM oppose those requests.

In this order, the Commission:

1. Agrees with BLM that the federal agency has ultimate control over the data; therefore, the Commission orders CURE to return the Imperial Valley data to BLM.

2. Concludes that CURE, like all other intervenors, has no legal right to the most detailed data on the location of cultural resources, even though the Commission may need such data for decision making purposes and even though BLM and AFC applicants may, as a result of that need, provide data to the Commission Staff.

3. Recognizes, nevertheless, that having access to such data could enhance participation in Commission power facility proceedings by appropriate intervenors, and therefore encourages BLM to provide access under conditions that BLM finds to be sufficient to protect the resource.

4. Provides direction on how requests for confidential data in our certification proceedings should be handled in the future.

II. Procedural History.

On September 29, 2008, the Imperial Valley Solar applicant filed an application for confidentiality to protect draft reports prepared by its consultant, URS Corporation ("URS"). The reports contained confidential information concerning cultural resources located on the project's proposed site. The application was filed under the Commission's regulations that govern access to, and confidentiality of, all of the CEC's public records (i.e., not only the documents that are filed in licensing proceedings), and that implement the provisions of California's Public Records Act ("PRA"). (See Cal. Code Regs., tit. 20, § 2501 et seq.) Our Executive Director granted the Imperial Valley applicant's request for confidentiality approximately one month after receiving it, and she subsequently granted several additional, similar requests by the applicant. (See *id.*, § 2505, subd. (a)(1) & (3).) The same basic process occurred in all of the solar AFCs.

On March 10, 2010, CURE petitioned the Commission for access to the confidential cultural resources data in the Imperial Valley proceeding. Although CURE filed its petition under the Commission's PRA regulations (as the regulations allow), CURE did so in its status as an intervenor in the proceeding. "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." (CEC Staff Brief, p. 4.) CURE's petition stated that both the organization itself and the cultural resources expert it retained would sign nondisclosure agreements protecting the sensitive data.

On April 15, 2010, the Commission's Chief Counsel, who acts as our delegatee in such matters, granted CURE's petition. (See Cal. Code Regs., tit. 20, § 2506.) "The [Chief Counsel's] determination concluded that CURE satisfied requirements of Section 2506 of the Commission's regulations, noted that Commission proceedings are open for public participation, and further noted that . . . any person granted intervention has the rights of a party." (CEC Staff Brief, p. 4.) The Chief Counsel's determination also concluded that there was no risk of damage to the cultural resources or the site upon which they were located. He reached this conclusion because CURE had hired a qualified archaeologist to review the requested documents, only he and other similar individuals would be able to review the documents, and the reviewer(s) would be given access only if they signed a stringent
non-disclosure agreement.

Our regulations provide a fourteen-day period in which any party may request the full Commission to reconsider the determination of the Chief Counsel. (Cal. Code Regs., tit. 20, § 2506, subd. (b)(6).) BLM attempted to file a request for reconsideration, but it was untimely. Since then, BLM has filed additional documents strongly asserting that it has legal control over the data and objecting to the CEC's release of the data to CURE. BLM insists that CURE return the data to BLM, and demands that the Commission remove from its Docket and return all confidential information regarding cultural resources on BLM lands. (In this decision, we are treating BLM's request as if it were timely filed.) (See Cal. Code Regs., tit. 20, § 1203, subds. (c), (d), (f).))

Although the Commission had released information concerning only the Imperial Valley project, we had received an additional request from CURE for access to confidential cultural resources data in connection with the Genesis Solar Energy Project (which we are here treating as if it were granted and then appealed by BLM), and it appeared likely that similar issues would arise in other current proceedings. Taking those considerations into account, the Commission's Siting Committee (Chairman Karen Douglas, Presiding Member, and Commissioner Robert B. Weisenmiller, Associate Member, collectively "the Committee") consolidated all of the solar AFC proceedings "for the limited purpose of considering and resolving issues related to BLM-related cultural resources data." (Notice and Orders (May 21, 2010), p. 3; see Cal. Code Regs., tit. 20, §§ 1203, subds. (c), (d), 1208, 1719, subd. (a).) Since then we have received from CURE requests for confidential data in all of the consolidated proceedings except Ridgecrest (and a request still could be submitted there).

The Committee "[invited] [a]ll parties who have an interest in cultural resources in any of the cases . . . [to] submit briefs and testimony" and held an evidentiary hearing on June 9, 2010. Applicants in the cases, CURE, the CEC Staff, other parties, and BLM participated. The Committee issued a Proposed Decision on July 7, and the full Commission will hold a hearing on July 14 to take final comments.

III. **Analysis.**

A. Confidentiality of the Data and the Documents.

CURE requested access to the data at issue, subject to a non-disclosure agreement, pursuant to Section 2506 of Title 20 of the California Code of Regulations. As noted above, this regulation is designed to implement the Energy Commission's obligations under the PRA. Consequently CURE's request would seem to have been made pursuant to the PRA, although CURE's request did not explicitly cite the PRA or any other underlying statute.

No one disputes that the data at issue, and the documents in which the data is embodied, are properly confidential under both federal and state laws pertaining to cultural resources and to government documents: the federal Archaeological Resources Protection Act ("ARPA"), the federal National Historic Preservation Act ("NHPA"), the federal Freedom of Information Act ("FOIA") and the California PRA. (5 U.S.C. § 552(b)(3); 16 U.S.C. §§ 470hh, 470w-3; Gov. Code, §§ 6253.9, subd. (g), 6254, subd. (k).); see also *Hornbostel v. U.S. Dept. of Interior* (D.D.C. 2003) 305 F. Supp. 2d 21, 30.) Furthermore, the PRA does not anticipate selective disclosure of confidential information to one member of the public, such as an intervenor in a siting case, while keeping the records otherwise confidential. (See, e.g., *Coastal Delivery Corp. v. U.S. Customs Service* (C.D.Cal. 2003) 272 F.Supp.2d 958, 964 [interpreting the FOIA] ["There is no room for confidentiality agreements, non-disclosure agreements, or other selective revelation in FOIA jurisprudence."]; see also Gov. Code, § 6257.5 [prohibiting denial of a PRA request because of its purpose].)

We must deny CURE's request for selective access to confidential information to the extent it was made pursuant to the PRA. However, CURE sought the data in question in its capacity as a party to a siting case. We believe CURE should have sought access to the data in question pursuant to the provisions of Section 1716 of Title 20 of the California Code of Regulations, which governs data requests in siting cases. (See Palo Verde Solar I, LLC & Palen Solar I, LLC Reply Brief p. 2.) For the sake of expediency, the remainder of this Order treats CURE's request as if it had filed a petition to compel production of documents pursuant to Section 1716(g). As is more fully explained below, we find such a petition could not be granted over BLM's objection.

B. BLM's Control of the Data and the Documents.

Federal laws assigning BLM responsibility for cultural resources on the lands within its jurisdiction lead us to accept BLM's argument that it "owns" or otherwise controls the disputed data.[1] Therefore BLM has the authority to determine the

[1] When interpreting and applying statutes and regulations, we must give appropriate deference to the agencies responsible for implementing those laws. (See, e.g., *Udall v. Tallman* (1965) 380 U.S. 1, 16 [explaining that the U.S. Supreme Court "shows great deference to the interpretation given [a] statute by the officers or agency charged with its administration"].).

conditions (if any) under which any particular person or entity may have access to the data in question.

1. BLM's responsibility for cultural resources under Federal law.

As we explain more fully in the next paragraph, BLM has the legal duty to maintain the integrity of cultural resources on the land for which it is responsible. (See 16 U.S.C. §§ 433, 470aa *et seq.*; 43 U.S.C. § 1701; 36 Fed. Register 8921; see generally BLM Manuals 8100, 8140.) As a result, BLM has the legal authority to control access to those resources (and to the locations where other resources potentially may be found). (See 16 U.S.C. §§ 432, 470cc-dd, 470ee; see generally BLM Manual 8150.) We believe that in order to implement its authority and to carry out its responsibilities, BLM must be able to control the dissemination of properly-confidential data concerning cultural resources which are created in the course of reviewing the environmental impacts of a prospective project located on BLM land.

Two federal statutes govern, respectively, archaeological and historical cultural resources that are or may be found on the sites of the solar AFCs: the Archaeological Resources Protection Act ("ARPA") and the National Historic Preservation Act ("NHPA"). Under ARPA, "information concerning the nature and location of any archaeological resource . . . may not be made available to the public" unless the Federal land manager determines that such disclosure would further the purposes of ARPA and would not create a risk of harm to the resources or to the site on which they are located. (16 U.S.C. § 470hh(a)(1)-(2).) As BLM correctly notes in its brief, "the Federal land manager in this instance is the California Office of the BLM"; as such, only that Office can make the determination as to whether the cultural resources data should be disclosed to the public under ARPA. (April 29, 2010, letter of BLM Acting State Director James Abbott, p. 2; see also 16 U.S.C. § 470bb(2) [defining "Federal land manager" as "the Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over [public] lands"].) "ARPA provide[s] the 'federal land manager' with substantial discretion to disclose or withhold 'information concerning the nature and location' of cultural resources, based on an assessment of the risks and benefits of disclosure." (*Southern Utah Wilderness Alliance v. U.S. Bureau of Land Management* (D.D.C. 2005) 402 F. Supp. 2d 82, 90; see also *U.S. v. Quarrell* (10th Cir. 2002) 310 F.3d 664, 671 [noting that archaeological sites are kept confidential to protect resources from vandalism and looting].) The provisions of NHPA are similar. (See 16 U.S.C. § 470w-3.)

2. BLM's ownership of the documents within which the data is contained.

The U.S. Federal Records Act "ma[kes] it clear that Congress regard[s] the ownership of agency records to be in the United States." (*Nixon v. United States* (D.C. Cir. 1992) 978 F.2d 1269, 1283.) It is equally clear that BLM documents containing cultural resources data are "agency records" and that therefore BLM owns those documents.

The FRA defines "agency records" as:

> All books, papers, maps, photographs . . . or other documentary materials [that are] made or received by any agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the information value of data in them.

(FRA, Pub. L. No. 81-754, 64 Stat. 583 [codified as amended in scattered sections of 44 U.S.C.].) BLM's cultural resources records were "made or received" by BLM "under Federal law": applicants' contractors generated the records and provided them to BLM in accordance with BLM national standards. (See BLM Manual 8150, Permitting Uses of Cultural Resources; April 29, 2010, letter of BLM Acting State Director James Abbott, p. 2). The cultural resources records were also "made . . . in connection with the transaction of public business": the data was gathered for the purpose of conducting cultural resources investigations of proposed solar facility sites on government-owned land. (See *id.*, p. 2.) Furthermore, the records are "evidence of [BLM's] functions . . . procedures, [and] operations": because the data was gathered subject to a BLM State Permit for Archaeological Investigations, it provides an inside look into BLM's Field Authorization and permit processes. (*Ibid*.) In addition, it is obvious that the records are "preserved [and] appropriate for preservation . . . because of the information value of [the cultural resources] data in them" as specified in the FRA. And finally, BLM requires qualified archaeologists to "safeguard and preserve [cultural resources] materials as property of the United States." (43 C.F.R. § 7.6(b)(5).) For all of these reasons, the documents containing the disputed cultural resources data are agency records owned by BLM as the applicable representative of the United States government.

In sum, BLM has the authority to determine the conditions (if any) under which any particular person may have access to the data in dispute here. BLM has exercised its authority by saying that CURE cannot have access (at least at this time). We now examine what impact CURE's inability to access the information it seeks might have on the Energy Commission's siting process.

C. <u>Intervenors' Rights to Data</u>.

There is nothing in constitutional, statutory, or regulatory law giving CURE (or any other party) a right to the data that is in dispute here.

1. <u>The California Administrative Procedure Act.</u>

The adjudicative portion of the California Administrative Procedure Act (APA) embodies and implements all of the due process protections that must constitutionally

be provided to any participant in an agency adjudicative proceeding. (See Cal. Law Revision Com. com., foll. Gov. Code, § 11425.10 ["minimum due process and public interest requirements"].) There is nothing in the APA that provides a right to intervene, let alone any specific type of intervention or participation such as discovery. (See generally Gov. Code, § 11340 *et seq.*) Therefore, nothing in the APA compels release of the disputed cultural resources data to CURE.

This conclusion is reinforced by the intervention provision that is found in the APA. Government Code section 11440.50 provides an optional intervention process that agencies may adopt. Subdivision (c)(2) of that section expressly gives the agency the substantial discretion to "impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a subsequent time . . . so as to promote the orderly and prompt conduct of the proceeding." (Gov. Code, § 11440.50, subd. (c)(2).) Thus the agency may impose any condition – such as no discovery, or limited discovery – that it believes is appropriate "to promote the orderly and prompt conduct of the proceeding." (See *id.*)

Indeed, there is no due process right to discovery even for defendants in agency disciplinary proceedings such as license revocation hearings. Yet such persons are entitled to more due process protections than are those who do not have but only seek a license (e.g., applicants in our AFC proceedings), who in turn are generally entitled to more protection than persons intervening in license application proceedings. As the leading practice guide on administrative hearings explains, "[d]ue process of law does not guarantee a prehearing right to discovery." (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 2008) Overview, § 1.70, p. 50 [quoting *Mohilef v. Janovici* (1996) 51 Cal. App. 4th 267].) Instead, "[t]he scope of discovery in administrative hearings is governed by statute and the agency's discretion. " (*Id.* [quoting *Cimarusti v. Superior Court* (2000) 79 Cal. App. 4th 799].)

The federal APA is to the same effect. (See 5 U.S.C. § 555(b); cf. F.R. Civ. P. § 24(a) [intervention as of right in civil judicial litigation].) "[T]he agency 'may' permit intervention if it chooses" (7 West's Fed. Admin. Prac. § 7721 (3d ed. 2009)), and "inherent in the provision for intervention is the power to limit the form and extent of participation by the intervener" (2 Admin. L. & Prac. § 5:20 (2d ed. 2010)).

2. <u>Warren-Alquist Act.</u>

The Warren-Alquist Act is the Energy Commission's enabling legislation, which is part of the California Public Resources Code (PRC). PRC section 25114 defines "Interested party" as **"**any person whom the commission finds and acknowledges as having a real and direct interest in any proceeding or action carried on, under, or as a result of the operation of, this division." Regarding access to data for intervenors in AFC proceedings, PRC section 25519(b) provides: "The commission, upon its own motion or in response to the request of any party, may require the applicant to submit any information, document, or data, in addition to the [application for certification], that it determines is reasonably necessary to make any decision on the application." Notably,

Section 25519(b) speaks only to access to information by the Energy Commission and its staff for the purpose of completing its environmental analysis, but not to access to information by intervenors (or "interested parties") such as CURE.

a. Section 1716 of Title 20 of the California Code of Regulations.

To implement the Warren-Alquist Act, the Energy Commission has adopted regulations governing both intervention and discovery. Section 1716 governs the processes by which both Energy Commission staff and intervenors in AFC proceedings may obtain information. (Cal. Code Regs., tit. 20, § 1716.) Section 1716(a) grants Energy Commission staff "authority to request or otherwise obtain from the applicant such information as is necessary for a complete staff analysis of the notice or application." In contrast, section 1716(b) provides that intervenors "may request from the applicant any [relevant] information *reasonably available* to the applicant"; 1716(d) further limits intervenor's access to information from other parties to relevant information which is "reasonably available to the responding party *and cannot otherwise be readily obtained*." (Cal. Code Regs., tit. 20, § 1716 (b) & (d) (emphasis added).) Section 1716 draws a marked distinction between staff and intervenors. While staff may request "any information necessary for a complete analysis," intervenors are limited to data which is "reasonably available" to the requesting party. (See Cal. Code Regs., tit. 20, § 1716(a) (b) & (d).) This is an acknowledgement of different roles; unlike intervenors, staff is responsible for undertaking the environmental analysis.

When discovery disputes arise, Section 1716(g) provides that any party may bring what amounts to a petition to the relevant siting committee to compel production of data. This subsection gives the committee broad discretion adjudicating such petitions, providing that the committee "may grant or deny the petition, in whole or in part," or may "direct the commission staff to supply such of the information request as is available to staff. (Cal. Code Regs., tit. 20, § 1716(g).)

Here, CURE has submitted what amounts to a request pursuant to Section 1716(g) for cultural resources data.[2] As discussed extensively above, BLM has asserted ownership and control of the data requested by CURE in this proceeding, and has demanded the return of all such data by both CURE and Staff. Whether the data is in Staff's possession or not, it cannot be transferred to CURE without BLM's approval. Consequently, the data is not "reasonably available," as required to Section 1716 (b) & (d). For this simple reason, we find CURE's request must be denied.

b. Section 1207 of Title 20 of the California Code of Regulations.

Section 1207 of Title 20 sets forth the general process for intervening in Energy Commission proceedings, including AFC proceedings. (Cal. Code Regs., tit. 20, §§

[2] See *supra* Section III. A.

1207.) Section 1207(c) provides that any party granted intervenor status has "all the rights and duties" afforded to other parties. CURE contends that because the CEC Staff, which is a party, has access to the BLM cultural resources data that has been docketed here, it too must have the same access. Relatedly, Californian's for Renewable Energy asserted that Section 1207 prevents the Energy Commission from pursuing an AFC proceeding until CURE has been afforded access to all information available to the Staff. We disagree with both contentions.

Section 1207 must be read in conjunction with, and harmonized with, the other applicable provisions of our regulations, including but not limited to Section 1716. True, the Staff is a party in AFC proceedings. (See Cal. Code Regs., tit. 20, § 1201, subd. (e); see also Gov. Code § 11405.60). However, as noted above, the Staff has access to, and uses, cultural resources data not primarily in an advocacy role as a party, but in carrying out its unique responsibility to ensure that the Commission's record contains a legally-adequate assessment of all environmental matters under the California Environmental Quality Act (CEQA) and of compliance with all applicable laws. (See Pub. Resources Code, § 21082.1, subd. (c); Cal. Code Regs., tit. 20, § 1742, subd. (c); see also Cal. Code Regs., tit. 20, § 1716 (discussed *supra*).) To the extent that the Commission needs access to any particular information to carry out its duties under CEQA and the Warren-Alquist Act, we must rely on the Staff to analyze that information on our behalf. Section 1207 does not change that fact, nor the fact that neither CURE nor any other intervenor has a similar duty. (The applicant also has a unique responsibility under the law to present adequate evidence to meet its burden of proof, but that is not at issue here.)

In sum, we find that nothing in the Warren-Alquist Act or the Commission's regulations, or any other law, requires that CURE must be permitted access over BLM's objection to sensitive cultural resources data controlled by BLM pursuant to federal law. Furthermore, there is nothing which suggests that our process cannot proceed if is denied access to the information it seeks. Rather, our regulations suggest that CURE's request should be denied because the information it seeks is not reasonably available for release to CURE.

D. <u>CURE Access to Data Pursuant to BLM Processes</u>.

While intervenors do not have an absolute right to discovery, to facilitate vigorous public participation and transparency the Commission has consistently exercised its discretion to grant intervenors access to data to the extent feasible. In this instance, we lack the authority to give CURE access to the information it seeks.

In our view it would be consistent with the purposes of ARPA and NHPA for BLM to grant access to cultural resources data to intervenors with appropriate qualifications and pursuant to the requisite confidentiality requirements. Expert witnesses are frequently given access to confidential data that is unavailable to the general public; they have access to confidential information such as autopsy reports, ballistic reports, psychiatric records, and medical records. (See, e.g., *Stewart v. U.S.* (1961) 366 U.S. 1,

12; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233.) They are provided access to this information so that they can draw on their expertise and guide the parties through complex and technical scientific issues. (See Federal Rules of Evidence Rule 702.)

The record indicates that CURE has already initiated discussions with BLM to obtain from it the data it seeks from us, and that BLM is considering these requests. Under different circumstances, we might consider delaying a siting case to afford an intervenor access to relevant information. We do not have that luxury in this instance. Each of the above-captioned projects must meet extraordinarily tight time-lines with respect to state and federal agency permitting decisions to qualify for funding from the U.S. Department of Energy under the American Recovery and Reinvestment Act. (Public Law 111-5 (2009).) Even a slight delay could cause projects to miss critical deadlines in the permitting process, and therefore lose access to recovery act funding. These projects also provide options for California's electric utilities' in meeting their statutory obligation per the Renewable Portfolio Standard, and they have the potential to help reduce greenhouse gas emissions. We therefore encourage BLM to accommodate CURE to the extent it can without violating its obligation to protect the cultural resources in question, as expeditiously as possible. We further direct Staff to do what it can to facilitate such resolution.

IV. <u>Orders and Other Concluding Matters</u>.

1. BLM controls the dissemination of confidential data on cultural resources that are or may be located on land within its jurisdiction. We will not disclose records that (a) are in our possession or control, (b) concern cultural resources on BLM land, and (c) are confidential under ARPA or NHPA, without permission from BLM.

2. The confidential data sought by CURE is not reasonably available to staff for disclosure to CURE.

3. CURE shall return all disputed confidential data received to date to BLM.

4. Energy Commission staff shall comply with BLM's direction with respect to the confidential data on cultural resources in question, while working with BLM staff to ensure that it has access to the information it needs for its environmental analysis under CEQA.

5. In proposed generation facility proceedings, the Staff has unique duties that are not within the scope of section 1207, subdivision (c) of the Commission's regulations.

6. The constitutional and statutory provisions that we implement do not create or provide an absolute right to intervention, or to any particular form or activity of intervention.

7. The Commission's regulations provide two potential courses of action for persons who are seeking information from the Commission in AFC proceedings: discovery under our siting case regulations and Public Records Act requests under our PRA regulations. To implement both sets of regulations in an efficient manner, parties in power facility proceedings should use the discovery process wherever possible (including but not limited to submitting data requests to the CEC Staff for documents that are within the Commission's possession or control). Of course, members of the public may seek access under the PRA to non-confidential documents related to siting cases.

8. This is a precedent decision under section 11425.60 of the Government Code.

Dated July 12, 2010,

Original signed by:	*Original signed by:*
KAREN DOUGLAS	ROBERT B. WEISENMILLER
Chairman and Presiding Member	Commissioner and Associate Member
Siting Committee	Siting Committee

DECLARATION OF SERVICE

I, Maggie Read, declare that on May 25, 2010, I sent hard copies of the attached *Notice and Order for Consolidated Hearing on Issues Concerning US Bureau of Land Management Cultural Data Resources and .* 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 pages for the following projects at :
[www.energy.ca.gov/sitingcases/solar_millennium_blythe]
[www.energy.ca.gov/sitingcases/calicosolar]
[www.energy.ca.gov/sitingcases/genesis_solar]
[www.energy.ca.gov/sitingcases/solartwo/index.html]
[www.energy.ca.gov/sitingcases/solar_millennium_palen]
[www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest].

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:

(*Check all that Apply*)

FOR SERVICE TO ALL OTHER PARTIES:

__x__ sent electronically to all email addresses on Proof of Service lists for the following projects;

09-AFC-6 *Blythe Solar Power Plant Project*, 08-AFC-13 *Calico Solar*, 09-AFC-8 *Genesis Solar Energy Project*, 08-AFC-5 *Imperial Valley Solar Project*, 09-AFC-7 *Palen Solar Power Plant Project* and 09-AFC-7 *Ridgecrest Solar Power Project;*

____ by personal delivery;

__x__ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses NOT marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

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

OR

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

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 09-AFC-6
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.

*Original signed by:*_____
Maggie Read
Hearing Adviser's Office