State of California
Energy Resources Conservation
and Development Commission

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In the Matter of:	)	Docket 08-AFC-05
	)	
Application for Certification of the Imperial Valley Solar Project,	)	**Staff's Opening Brief on Cultural Resources**
	)	
	)	

INTRODUCTION

At the conclusion of the August 16, 2010 evidentiary hearing for the Imperial Valley Solar Project ("IVP"), the Committee gave parties the option to file opening briefs due by August 20, 2010. Staff submits the following opening brief:

I.
THE PROGRAMMATIC AGREEMENT PROCESS COUPLED WITH ISSUANCE OF THE STAFF ASSESSMENT IS THE MOST EFFECTIVE MEANS TO COMPLY WITH CEQA, NEPA AND SECTION 106

A. The Programmatic Agreement Allows for Efficient Regulatory Process

The cultural resources analysis for the IVP accommodates both the primary need of the Energy Commission to demonstrate, under CEQA, a consideration of the potential for the project to affect cultural resources and the primary needs of the BLM to conduct similar analyses under NEPA and Section 106 of the National Historic Preservation Act, (16 USC 470(f)) . (Staff Assessment C.3-2) The Staff Assessment is intended to fulfill the largely parallel goals of the Energy Commission, Bureau of Land Management (BLM) and the State Historic Preservation Officer, (SHIPO) through the execution of five basic analytic phases. (Staff Assessment C.3-2 to C.3-3)

1) Determination of the appropriate geographic extent of the analysis for the proposed project.
2) Production of an inventory of the cultural resources in the geographic area.
3) Determination of whether particular cultural resources in an inventory are historically significant.

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4) Assessment of the character and the severity of the impacts on the historically significant cultural resources.
5) Proposal of measures that would resolve significant impacts.

The question is which of these five phases have been completed and which can be performed after project certification? As discussed below the first phase has been completed, the second phase is sufficiently complete, but is subject to additional post certification work, the third phase will occur after certification, phase four is done in that the general level of impacts to resources is known, now and phase five is also done because the types of mitigation used is well known.

1) Phase One, determination of the appropriate geographic extent of the analysis for the proposed project has been done.

Section C.3.3.1 on page C.3-3 of the Staff Assessment, titled *THE PROJECT AREA OF ANALYSIS AND THE AREA OF POTENTIAL IMPACTS* contains a discussion of the geographic extent of the analysis for the project. Contrary to the testimony of CURE's witnesses, the project area of analysis extends beyond the foot print. The area reflects the minimum standards set out in the Energy Commission Power Plant Site Certification Regulations (Cal. Code Regs., tit. 20, § 1701 et seq., appen. B, subd. (g)(2)) and is sufficiently large and comprehensive geographically to encompass the project's potential impacts to archaeological, ethnographic, and built-environment resources. (Staff Assessment C.3-3)

As part of the effort to coordinate with BLM, staff noted that BLM concurred that the project area of analysis adequately covers the area of the project's impacts to cultural resources under NEPA and is consistent with the definition of the area of potential effects (APE) in the Section 106 process (36 CFR § 800.16(d)). The project area of analysis was found to be equivalent to the APE for the purpose of Staff Analysis. Therefore, in both the Staff Assessment and the Programmatic Agreement, the area evaluated was greater than the project footprint. Any statement to the contrary by CURE is not supported by the record.

2) Phase Two, an inventory of the cultural resources in the geographic area is substantially done, but must await full construction to be complete.

Based on background literature research, a geoarchaeology study of the project area, pedestrian archaeological surveys of the project area of analysis, a 25% re-recordation effort, and built-environment and ethnographic resource surveys, staff developed an

inventory of the cultural resources in the geographic area. (Staff Assessment C.3-60) The results of the work include the identification of 330 prehistoric and historical surface archaeological resources. (Staff Assessment C.3-1 and C.3-131. See also Appendix A, C.3-167 for a description of all identified sites.) Because there is always a chance of uncovering an unknown buried resource, the inventory process is not complete until all construction is done. But the Programmatic Agreement contains a detailed protocol on how to deal with these discoveries. (Staff Assessment, Programmatic Agreement, *Discovery Plan*, p. 84)

3) Phase Three, determination of whether particular cultural resources in an inventory are historically significant, is best left to post-certification.

Determination of the historical significance of a resource will occur after certification but before construction begins. (Staff Assessment Prograrnmatic Agreement, pp. 20, 28) While the preferred practice on smaller sites is to make determinations of significance before certification, for larger more complex sites, post certification determinations are consistent with both section 106 of the National Historic Preservation Act, (16 USC 470(f)) and CEQA. Generally, a resource is significant if it is eligible for listing on the California Register of Historical Resources, (CRHR) or the National Register of Historic Places, (NRHP). (Staff Assessment p. C.3-4 to C.3-7) Unevaluated cultural resources that cannot be avoided are treated as eligible when determining impacts. (Staff Assessment p. C.3-4)

To acquire the data necessary to complete the third step, the Programmatic Agreement would require that the project owner conduct fieldwork to collect the balance of the requisite primary data on the cultural resources in the project area of analysis with which to evaluate their historical significance. Criteria set out in the Historic Properties Treatment Plans (HPTP), required by the Programmatic Agreement, would guide decisions on the number and extent of the phases needed to investigate the archaeological resource types as set out in subpart II of appendix A to the Programmatic Agreement. (Staff Assessment p. C.3-131) It is important to acknowledge, determination of historical significance would occur before ground disturbance near the resource. (Staff Assessment, Programmatic Agreement, pp. 20, 28))

Staff has provided a preliminary assessment of many of the over 300 sites with recommendations as to whether a site should be eligible for listing. (Staff Assessment pp. C.3-167 to C.3-409.)

4) **Phase Four, assessment of the character and the severity of the impacts on the historically significant cultural resources, is complete.**

The core of a cultural resources analysis under CEQA, NEPA, or Section 106 is to assess the character of the impacts that the project may have on historically significant cultural resources. (Staff Assessment p. C.3-7). The potential impacts to the known resources are well understood and staff provides a description of these impacts in the Staff Assessment. (See Staff Assessment C.3.3.4 *Assessing Action Impacts* p. C.3-7) While the characterization of all 330 sites is yet to be determined, staff recognizes that the construction of the proposed solar thermal power facility may wholly or partially destroy the majority of the surface archaeological resources in the proposed project area. (Staff Assessment p. C.3-130) Therefore, the potential direct impacts are known, allowing for a menu of mitigation to be developed prior to certification. The Programmatic Agreement is a means to define the 330 sites and refine the mitigation. (Staff Assessment p. C.3-60)

5) **Phase Five, Proposal of measures that would resolve significant impacts, is done.**

The fifth and final step, implementing mitigation measures that meet standards for the resolution of significant impacts on significant historical resources and historic properties under CEQA, NEPA, and Section 106, would occur through the joint efforts of the consulting parties to the Programmatic Agreement. But common mitigation measures for significant impacts on significant archaeological resources are well known, effective and may include, among others, resource avoidance, monitoring by cultural resource professionals and Native American monitors, information recovery, curation of material remains and resource documentation, and public outreach. (Staff Assessment p. C.3-132 and C.3-133)

The Programmatic Agreement goes beyond general listing of mitigation and includes specific performance measures available for impacts to each resource type. For example, for built environment resources, the Programmatic Agreement recommends two types of mitigation, "Documenting built-environment resources in accordance with the standards and guidelines provided by the Historic American Building Survey (HABS), Historic American Engineering Record (HAER), Historic American Landscape Survey (HALS)" and "Relocating or moving historic buildings, objects or structures out of the area of potential effects." (Staff Assessment, Appendix B of the Programmatic Agreement, pp, 31-32.)

Under CEQA, it is permissible to utilize performance standards and defer some amount of environmental problem solving until after project approval. (Cal. Code Regs., tit. 14, § 15126.4(a)(1)(B), See *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal. App. 3d 1011. (Project approved without first determining precisely the means of mitigating the project's impacts.) See also *Riverwatch v. County of San Diego* (1999) 76 Cal.App. 4th 1428. (The specific mitigation required was largely dependent on a study to be conducted by Caltrans as part of an encroachment permit. The court held the fact the entire extent and precise detail of the mitigation that may be required is not known does not undermine the EIR's conclusion that the impact can in fact be successfully mitigated.) In *Endangered Habitats League v. County of Orange* (2005) 131 Cal. App.4th 777, 793-794, the court found deferral is permissible where the agency commits itself to mitigation and either adopts a performance standard and makes further approvals contingent on finding a way to meet the standard or lists alternative means of mitigating the impacts which must be considered, analyzed, and possibly adopted in the future.

In this case, staff has identified over 300 known cultural sites on the project area. While staff has not been able to assess whether every one of these sites is historically significant, the Staff Assessment has identified potential impacts and listed available mitigation and performance standards through the Programmatic Agreement.

Based on the existing information, staff believes the types of mitigation measures and the performance standards identified in the Staff Assessment and Programmatic Agreement would ensure that all significant impacts to the information values of archaeological resources can be mitigated to a level that is less than significant, and that all other significant impacts to the associative values of archaeological and ethnographic resources can be reduced. (Staff Assessment p. C.3-135 For a discussion of associative values see the testimony of Michael McGuirt, August 16, 2010)

B. The Staff Assessment and Programmatic Agreement Meet the Requirements of CEQA.

While a Programmatic Agreement is not appropriate in all cases, it is specifically recognized by SHPO and BLM for use when effects on historic properties cannot be fully determined prior to approval of an undertaking or when developing programmatic agreements for complex or multiple undertakings. (36 CFR § 800.14(b)(1) and (3)) In the case of Imperial Valley, both conditions are met. The Programmatic Approach developed for this case allows for the development of a single document meeting both federal and state requirements applicable to the project through a consultation process with federal and state agencies.

1) The development of a single document governing the project.

The Programmatic Agreement offers a mechanism to ensure the project meets the requirements of CEQA, NEPA and Section 106 while reducing the chances the project owner will be subject to conflicting or duplicative requirements. It also allows for project mitigation and informational requirements to be located in a single document facilitating easier public participation and project owner compliance. (Testimony of Michael McGirt See also Staff Assessment, C.3-11) The Programmatic Agreement also provides a way for the Energy Commission and BLM to coordinate efforts and achieve regulatory efficiencies.

2) The consultation process.

The Programmatic Agreement is the product of a joint effort among the BLM, Advisory Council on Historic Preservation, SHPO, US Army Corp of Engineers, National Parks Service, Energy Commission staff, applicant, and various Native American tribes. (Staff Assessment p. C.3-11 and C.3-12) Despite testimony by CURE that Native Americans have not been included in the process, the evidence indicates that considerable efforts have been made to date to engage Native Americans in the process and under the Programmatic Agreement consultation will continue. While there is no explicit requirement under CEQA to consult with Native Americans, the Section 106 process requires such action by the BLM. The Programmatic Agreement meets this requirement by requiring consultation with Native Americans tribes in the area of the project. (Staff Assessment C.3-12) In addition the Commission's process is also available as a means for participation. CURE's expert acknowledged in testimony that the Native Americans she had been working with were aware of the ability to become formal interveners in the Energy Commission process, but chose not to. (Testimony of Bridget Nash, August 17, 2010)

The process to develop the Programmatic Agreement began with a kick-off meeting in El Centro, California on December 4, 2009. Participants in the meeting included the BLM, the U.S. Army Corps of Engineers, Advisory Council on Historic Preservation, National Parks Service, SHPO, the Energy Commission staff, the National Trust for Historic Preservation, the Cocopah Indian Tribe, Quechan elder Preston Arroweed and other Quechan, Kwaaymii Laguna Band of Mission Indians elder Carmen Lucas, Tessera Solar (applicant), members of the public, and consultants to the BLM and the applicant. (Staff Assessment p. C.3-12) Native American tribes were engaged from the beginning.

II.
THE 11 CONDITIONS IN THE FINAL ENVIRONMENTAL IMPACT STATEMENT NEED NOT BE INCLUDED IN THE PRESIDING MEMBERS PROPOSED DECISION

The Committee expressed an interest in including the 11 conditions found in BLM's Final Environmental Impact Statement (FEIS). As staff noted at the hearing, the 11 conditions are simply recommendations of general cultural resource practices that may or may not be incorporated into the Programmatic Agreement. While most of the 11 conditions will become part of the Programmatic Agreement in one form or another, they should not included as Conditions of Certification in the PMPD. Because they are subject to change for the Programmatic Agreement, their inclusion in the PMPD may result in inconsistent requirements between the Commission's Conditions of Certification and the Programmatic Agreement. Staff recommends that the PMPD include the 11 conditions as additional evidence of what kinds of requirements are expected in the final Programmatic Agreement and range of expected mitigation. (Testimony of Michael McGuirt August 16, 2010)

III.
CURRENTLY NO NRHP OR CRHR ELIGIBLE ETHNOGRPHIC RESOURCES HAVE BEEN IDENTIFIED BUT THE PROGRAMMATIC AGREEMENT ALLOWS FOR CONTINUED INVESTIGATION AND CONSULATION

Ethnographic resources represent the heritage of a particular ethnic or cultural group, such as Native Americans or African, European, or Asian immigrants. They may include traditional resource collecting areas, ceremonial sites, topographic features, cemeteries, shrines, or ethnic neighborhoods and structures. (Staff Assessment p. C.3-1) These resources are often identified in consultation with Native Americans and other ethnic groups, and issues that are raised by these groups may define the area of analysis. (Staff Assessment p. C.3-3)

Potential ethnographic resources have been identified north, northeast, and south of the proposed project area. The project area is surrounded to the west by Fish Creek and the Coyote Mountains, to the northeast by the Superstition Mountain Range, to the east by the Chocolate Mountains and Indian Pass, and to the south by Mount Signal. (Staff Assessment p. C.3-3)

No NRHP- or CRHR-eligible ethnographic resources are presently ascribed to the project area of analysis. Further refinements under the Programmatic Agreement regarding the historical significance of and the potential for visual impacts to other

ethnographic resources in the vicinity of the project area would further inform conclusion of the project's construction impacts on significant ethnographic resources. (Staff Assessment p. C.3-135)

Historic Properties Treatment Plans (HPTP) under the Programmatic Agreement, are to prescribe the exact measures to mitigate the projects adverse impacts on any significant historical ethnographic resources in the project area of analysis. (Staff Assessment p. C.3-135)

Appendix B of the Programmatic Agreement provides explicit mitigation measures for three types of ethnographic resources in the project area of analysis and includes performance standards for each measure. The three resource types are cremations or burial sites, trails, and physiographic landforms and other geographic or constructed places to which Native American groups ascribe religious or cultural significance. (Staff Assessment p. C.3-135)

Staff acknowledges that there is a potential for the project to impact ethnographic resources through visual intrusion and that such intrusion may not be mitigable. Adherence to the consultation processes described in the Programmatic Agreement may help narrow apparent differences in cross-cultural perspectives on the character, the significance, and the ultimate treatment of some ethnographic resources. (Staff Assessment p. C.3-152) The Programmatic Agreement offers additional opportunity to engage the Native American community on the issues of ethnographic resources even after project approval. This opportunity enhances the analysis done in accordance with CEQA because CEQA requires mitigation based on impacts identified during the time of preparation of the environmental document. (Cal. Code Regs., tit. 14 §15004(b))

IV.
CONCLUSION

The Programmatic Agreement coupled with the Staff Assessment provides the most effective way to assess the impacts of the project on cultural resources and to provide appropriate mitigation. The adoption and implementation of Condition of Certification **CUL-1** which requires the applicant to abide by the Programmatic Agreement would reduce the potential impacts of the proposed action on the information values of the archaeological resources in the project area of analysis to less than significant under CEQA, would resolve analogous impacts under Section 106 of the National Historic Preservation Act, and would further ensure that the proposed action would, in this regard, be in conformity with all applicable laws, ordinances, regulations, and standards. The adoption and implementation of **CUL-1** would provide additional opportunity to

engage Native Americans regarding the project's effects on ethnographic resources. (Staff Assessment p. C.3-159) At this time, no NRHP- or CRHR-eligible ethnographic resources are presently ascribed to the project area of analysis, but the proposed mitigation plan would identify any should they be discovered in the vicinity of the project after commission certification. (Staff Assessment p. C.3-135)

Dated: August 19, 2010

Respectfully submitted,

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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
PROOF OF SERVICE
(Revised 6/8/10)

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DECLARATION OF SERVICE

I, Lynn Tien-Tran, declare that on **August 19, 2010**, I served and filed copies of the attached **Staff's Opening Brief on Cultural Resources**, dated **August 19, 2010**. 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/solartwo].

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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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.

Lynn Tien-Tran

*indicates change