



United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Southwest Region

2800 Cottage Way

Room E-1712

Sacramento, California 95825-1890

IN REPLY
REFER TO:

June 4, 2010

California Energy Commission
Attn Docket No. 10-CRD-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Subject: BLM Reply Brief in Consolidated Hearing on Issues Concerning Cultural
Resources Data, 10-CRD-1

Dear Docket Clerk:

Enclosed is the Bureau of Land Management's Reply Brief on issues concerning cultural
resources data in the above consolidated hearing.

Sincerely,

Daniel G. Shillito
Regional Solicitor

By: Erica L.B. Niebauer
Assistant Regional Solicitor

Enclosures

cc: BLM State Office
BLM CDD Office

**STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission**

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 10-CRD-1.

**BLM REPLY TO ISSUES CONCERNING US BUREAU OF LAND
MANAGEMENT CULTURAL RESOURCES DATA**

Introduction. The issue that the Bureau of Land Management (BLM) has brought to the attention of the Energy Commission with its letters of April 29, 2010 and May 18, and 19, 2010 is one of ownership and control. Contrary to the repeated assertions of CURE in its opening brief in this matter BLM does not seek and has not sought to eliminate or limit the use of sensitive cultural resource information by the Energy Commission in its analysis of the joint BLM/CEC energy projects under review. Rather, the BLM has sought to protect sensitive cultural resource information from release to third parties consistent with federal law. Also contrary to the assertions of CURE, the restriction on release of this information does not impact the ability of the CEC to review this information, rather, review of this information continues to be accommodated under other processes.

Argument. The Archaeological Resources Protection Act (ARPA), 16 U.S.C. 470hh, and National Historic Preservation Act (NHPA), 16 U.S.C. 470w-3, prohibits the release of cultural resource information until the BLM land manager determines that such a release is appropriate and to whom such a release of sensitive cultural resource information should be made. Since the information that is at issue in this proceeding is collected from public land under BLM management and jurisdiction, release of that information is to be determined by BLM in accordance with the ARPA and the NHPA. In this case, BLM made no specific determination to release this information to the CEC. However, the information was inappropriately transmitted by project applicants to the CEC who received this information from BLM permitted consultants who gathered this information on public land. Once the information was received by the CEC it was used by its staff to prepare staff testimony and/or was docketed in support of an application for certification. Once docketed, it was then subject to release, albeit under provisions of confidentiality

against further dissemination. Likewise, the BLM made no specific determination regarding this subsequent release by CEC to CURE. Neither CURE or CEC staff have presented any argument that the information that CURE requested and that CEC released is not properly covered by the ARPA and/or the NHPA

BLM sought and seeks the return of this sensitive cultural information in order that it may control its dissemination in accordance with federal requirements. It is not necessarily the case that a party with "consulting party" status under federal regulation has full access to the type of sensitive cultural information that has now been released by the CEC. Under federal regulation, the BLM retains the ability to make a determination whether CURE, a consulting party, has access to this information. The BLM has presented its position in its letters referred to above. In those letters BLM notes that it denied the release of this information to CURE under the federal Freedom of Information Act.

As a solution to this jurisdictional dilemma, the BLM has offered to provide this information to the SHPO which is under contract with the federal government and which has special status with it. The CEC staff is encouraged to work with SHPO to review the information that it needs to conduct its analysis and prepare its testimony. Any third party request for review of this information is encouraged to contact the BLM for a formal determination of release. In this manner, both the State and the federal processes may be accommodated. In addition, the BLM has offered to enter into an agreement with the Governor of California, as is afforded by federal law to ensure that the use of this type of information by the CEC retains its confidentiality. Through such an agreement, the BLM, in consultation with the CEC, may also make a determination as to whether and to what extent portions of this type of information may be redacted while the remainder may be released.

Conclusion. Under the circumstances described above, the BLM is willing to work with the CEC to reach an agreement as to the level and manner of release of sensitive cultural resource information gathered on public lands. Unless and until that agreement is reached, the BLM will continue to work through the SHPO offices to provide an adequate level of protection to dissemination of this federal information. By this submission, neither BLM nor the federal government submit to the jurisdiction of the CEC in this matter, nor is the filing of this statement to be interpreted as a waiver of federal jurisdiction over these matters. The BLM does not intend to attend the hearing on this matter.

The Bureau of Land Management agrees to the content expressed herein, and this document is filed on its behalf.

Erica L.B. Niebauer 6/4/10

Erica L.B. Niebauer
Assistant Regional Solicitor

Date

1 CERTIFICATE OF SERVICE

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3 RE: Applications for Certification for the: Docket Nos.
4 Calico Solar (SEIS Solar One) Project, 08-AFC-13,
5 Genesis Solar Energy Project, 09-AFC-8,
6 Imperial Valley (SES Solar Two) Project, 08-AFC-5,
7 Solar Millennium Blyth Project, 09-AFC-6
8 Solar Millennium Palen Project, and 09-AFC-7,
9 Solar Millennium Ridgecrest Project, 09-AFC-9, and
10 10-CRD-1.

11 I, the undersigned, declare that:

12 I am a citizen of the United States, over the age of eighteen, and not a part of this
13 litigation. On June 4, 2010, I served the

14 **"BLM REPLY TO ISSUES CONCERNING US BUREAU OF LAND
15 MANAGEMENT CULTURAL RESOURCES DATA"**

16 by transmitting a true copy via electronic mail at Sacramento, California,

17 I certify under penalty of perjury that the foregoing is true and correct. Executed on the
18 4th day of June 2010 at Sacramento, California.

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James L. Hines
Administrative Assistant