

**STAFF REPORT
C83**

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10/18/18
SB50-18-015

S 28

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**CONSIDER EXERCISING THE RIGHT OF FIRST REFUSAL FOR THE
ACQUISITION OF FEDERAL PUBLIC LANDS, OR RIGHT TO ARRANGE FOR
THEIR TRANSFER TO ANOTHER ENTITY, IN THE COUNTY OF RIVERSIDE**

AREA, LAND TYPE, AND LOCATION:

3,478 acres, more or less, of federal public lands in Riverside county.

INTRODUCTION TO SB 50:

In October 2017, the Governor of California signed SB 50 (Allen, Chapter 535, Statutes of 2017) into law, which added sections 6223 and 27338 to the Government Code and section 8560 to the Public Resources Code. Section 8560 makes certain federal land conveyances void unless the Commission is provided with a right of first refusal or the right to arrange for the transfer of the land to another entity. The Commission must exercise its right of first refusal at a public meeting. If the Commission was provided with its right of first refusal and right to transfer to another entity but elects not to purchase or arrange for transfer, it must issue a certificate affirming compliance with the law. Section 6223 prohibits the recordation of a conveyance of federal public lands unless it is accompanied by a certificate of compliance. The right of first refusal does not apply to certain conveyances, including but not limited to, those associated with a habitat conservation plan, lands conveyed into or out of trust for a federally recognized Native American tribe, and certain land exchanges.

On June 27, 2018, the Governor of California signed SB 854 (Stats. 2018, Ch. 51), which amended SB 50. Significantly, the amendments added a requirement that the Commission's Executive Officer waive the Commission's rights for:

The conveyance of any federal public lands not managed by the federal National Forest Service, the federal Bureau of Reclamation, the federal Bureau of Land Management, the United States Fish and Wildlife Service, or the federal National Park Service unless the land conveyed satisfies any of the following:

(A) Is part of a national monument or national marine sanctuary.

(B) Contains national conservation lands.

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(C) Is land placed in the National Register of Historic Places.

(D) Is designated for preservation or conservation uses.

(Pub. Resources Code, § 8560, subd. (f)(4).)

BACKGROUND:

Palen Solar Holdings, LLC, has requested that the Commission exercise its rights under SB 50 and issue a certificate of compliance for a proposed conveyance of a right-of-way on lands managed by the U.S. Bureau of Land Management (BLM). The right-of-way would apply to approximately 3,478 acres of land (described in Exhibit A and referred to as the Subject Federal Parcel) for a solar energy facility, associated transmission lines, and an access road.

PROPERTY DESCRIPTION:

Appraised Value:

No appraisal was prepared for the Subject Federal Parcel.

Existing Improvements:

Improvements on the Subject Federal Parcel include roads and utility infrastructure.

Natural and Cultural Resources:

The following discussion is derived from the May 2018 Supplemental Environmental Impact Statement/Environmental Impact Report/Land Use Plan Amendment (SEIS/SEIR) prepared for the Palen Solar Project (Index No. BLM/CA/PL-2018/008+1793+2050; State Clearinghouse No. 2011054002).

Vegetation on the Subject Federal Parcel comprises a mixture of desert Sonoran creosote bush scrub, desert dry wash woodland, stabilized and partially stabilized desert dunes, and unvegetated ephemeral dry wash. The SEIS/SEIR identifies several special status plant species on the Subject Federal Parcel: Harwood's eriastrum (*Eriastrum harwoodii*), Harwood's milkvetch (*Astragalus insularis* var. *harwoodii*), ribbed crypantha (*Crypantha costata*), spiny abrojo (*Condalia globosa* var. *pubescens*), California ditaxis (*Ditaxis serrata* var. *californica*), Utah milkvine (*Funastrum utahense*), and Salton saltbush (*Atriplex* sp. Nov. J. Andre or *Atriplex canescens* var. *macilenta*). The project has been redesigned to avoid the majority of sensitive dry wash woodland and active sand transport zones with compensatory mitigation ratios greater than 1:1 required of impacts to the remainder. Graduated compensatory mitigation ratios are required for impacts to sensitive plant species, based

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on the level of sensitivity of each impacted species. The SEIS/SEIR determined that all potentially significant impacts of the project to vegetation resources would be mitigated to a less than significant level.

The Subject Federal Parcel was surveyed for desert tortoise, a threatened species under both the state and the federal Endangered Species Acts, in 2009 and 2016 pursuant to U.S. Fish and Wildlife Service (USFWS) protocols. No live tortoises or active tortoise sign were detected on the proposed solar fields. Active tortoise sign was found along the project's proposed transmission line route. The USFWS has issued a biological opinion and incidental take statement authorizing any "take" of desert tortoise caused by the project. Mojave fringe-toed lizards inhabit the site, a BLM and California Department of Fish and Wildlife (CDFW) sensitive species. The parcel also supports suitable habitat for other sensitive species such as burrowing owl, American badger, and desert kit fox. The SEIS/SEIR determined that all potentially significant impacts of the project to wildlife resources would be mitigated to a less than significant level, except for the potential for sensitive avian species to collide with the project as a result of the hypothesized solar panel "lake effect." The SEIS/SEIR deemed this potential effect, which is common to all solar PV facilities, to be potentially significant and unavoidable because the scale of the potential impact remains uncertain until further study of solar projects is performed. The project is subject to monitoring and adaptive management measures to address this potential effect.

Archaeological archival record searches and BLM Class III cultural resources surveys conducted on the Subject Federal Parcel revealed 77 cultural resources. These include three built environment resources (two roads and one transmission line), seven prehistoric archaeological sites (lithics, groundstone and fire-affected rock), and 66 historic-era archaeological sites mostly associated with the World War II Desert Training Center. The SEIS/SEIR concluded that only one of these resources, a campsite associated with the Desert Training Center located along the project's proposed transmission line route, would be eligible for listing in the National Register of Historic Places or the California Register of Historic Places. Mitigation requires the project to flag, protect, and avoid the resource during construction of its transmission line. No prehistoric or Native American trails were found during intensive field inventories, although the SEIS/SEIR identified the project as contributing in a "small but measurable way" to significant unavoidable visual impacts to landscape-scale Native American cultural values caused by the development of multiple large-scale solar facilities within eastern Riverside county. Through consultation with BLM under Section 106 of the National

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Historic Preservation Act, the State Historic Preservation Officer concluded on April 4, 2018, that the project would not adversely affect historic resources.

Encumbrances:

The Subject Federal Parcel is subject to easements for utility infrastructure, road use, public recreation, and conservation.

Contamination:

There is no known contamination on the Subject Federal Parcel.

APPLICANT'S INTENDED USE:

Construction, operation, and maintenance of a solar energy facility, associated transmission lines, and an access road.

STAFF ANALYSIS AND RECOMMENDATION:

Authority:

Public Resources Code sections 6005 and 8560 and Government Code section 6223.

State's Best Interests Analysis:

Section 8560 defines "federal public land" broadly as "any land owned by the United States, including the surface estate, the subsurface estate, or any improvements on those estates." While the statute mandates that the Commission consider its right of first refusal for conveyances of federal public lands within the state of California, it does not provide guidance as to when the Commission should exercise its right to acquire federal public lands or to arrange for their transfer to another entity. However, the legislative history suggests that the Legislature intended for SB 50 to address conveyances of federal public lands with high value for environmental conservation or preservation, tourism, scientific study, or recreation. (See Assem. Com. on Natural Resources, report on SB 50 (2017-2018 Reg. Sess.), as amended May 26, 2017, pp. 3-4.; Sen. Com. on Natural Resources and Water, report on SB 50 (2017-2018 Reg. Sess.), Feb. 22, 2017 version, pp. 1-2.; Sen. Jud. Comm., report on SB 50 (2017-2018 Reg. Sess.), as amended March 20, 2017, pp. 3-4.)

The proposed conveyance is not the sale of a federal fee interest to a private entity; it is a 30-year right-of-way grant issued by BLM to Palen Solar Holdings, LLC, that operates similarly to a lease. The United States remains the land owner and reserves substantial rights to the land. For example, in issuing the right-of-way grant, BLM reserves the right (i) to access the lands covered by the grant at any time and enter any facility

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constructed on the right-of-way; (ii) to require common use of the right-of-way, including facilities, subsurface, and air space and authorize use of the right-of-way for compatible uses; (iii) to retain ownership of the resources of the land, including timber and vegetative or mineral materials and any other living or non-living resources; and (iv) change the terms and conditions of the right-of-way grant as a result of changes in legislation, regulation, or as otherwise necessary to protect public health or safety or the environment. (43 C.F.R. § 2805.15.) Finally, BLM may terminate a right-of-way grant and require removal of all installations if the grant holder does not comply with applicable laws and regulations or any terms, conditions, or stipulations of the grant. (43 C.F.R. §§ 2807.17, 2807.19.)

The Subject Federal Parcel proposed for conveyance lies within a Solar Energy Zone (SEZ) and Development Focus Area (DFA) designated by BLM's 2012 Western Solar Plan and the 2016 Desert Renewable Energy Conservation Plan (DRECP) as one of the most suitable areas in the State for the generation of utility-scale solar energy on BLM-administered public lands. The Commission participated in the development of the DRECP. In addition to designating 400,000 acres of federal public lands in California as SEZs and DFAs ideal for solar development, the DRECP also set aside approximately 5 million acres of federal public lands in California as new conservation lands off-limits to renewable energy development. These new conservation lands are in addition to 3 million acres of previously existing BLM conservation lands within the borders of the DRECP.

SB 100, signed by Governor Brown on September 10, 2018, requires California to achieve 60 percent renewable energy by 2030 and 100 percent carbon-free energy by 2045. The same day, Governor Brown also signed Executive Order EO B-55-18, which establishes a new statewide goal "to achieve carbon neutrality as soon as possible, and no later than 2045, and achieve and maintain net negative emissions thereafter." A 30-year right-of-way grant for the operation of a 500 MW solar energy power plant will help achieve the State's goals embodied in SB 100 and Executive Order EO B-55-18.

For these reasons, staff recommends that the Commission find it is not in the State's best interests to acquire the Subject Federal Parcel or to arrange for its transfer to another entity.

OTHER PERTINENT INFORMATION:

1. This action is consistent with Strategy 1.1 of the Commission's Strategic Plan to deliver the highest levels of public health and safety in the

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protection, preservation, and responsible economic use of the lands and resources under the Commission's jurisdiction.

2. The Commission's finding that it is not in the State's best interests to acquire the Subject Federal Parcel or to arrange for its transfer, and authorization to issue a certificate of compliance are not projects as defined by the California Environmental Quality Act (CEQA) because they are administrative actions that will not result in direct or indirect physical changes in the environment.

Authority: Public Resources Code section 21065 and California Code of Regulations, title 14, section 15378, subdivision (b)(5).

3. **Finding that the acquisition or transfer to another entity is not in the State's best interests:** Staff recommends that the Commission also find that this activity is exempt from the requirements of CEQA as a statutorily exempt project. The activity is exempt because CEQA does not apply to projects that a public agency rejects or disapproves.

Authority: Public Resources Code section 21080, subdivision (b)(5) and California Code of Regulations, title 14, section 15270, subdivision (a).

4. **Issuance of a certificate of compliance:** Staff recommends that the Commission also find that this activity is exempt from the requirements of CEQA as a statutorily exempt project. The activity is exempt because CEQA does not apply to ministerial projects. After being provided with the right of first refusal and the right to transfer to another entity, the Commission has no discretion whether to issue the certificate of compliance—it "shall issue a certificate of compliance."

Authority: Public Resources Code sections 21080, subdivision (b)(1) and California Code of Regulations, title 14, section 15268, subdivision (a).

EXHIBIT:

- A. Land Description

RECOMMENDED ACTION:

It is recommended that the Commission:

CEQA FINDING:

1. **Finding that the acquisition or transfer to another entity is not in the State's best interests:** Find that the activity is exempt from the requirements of CEQA pursuant to California Code of

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Regulations, title 14, section 15061 as a statutorily exempt project pursuant to Public Resources Code section 21080, subdivision (b)(5) and California Code of Regulations, title 14, section 15270, subdivision (a), projects that a public agency rejects or disapproves.

2. **Issuance of a certificate of compliance:** Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a statutorily exempt project pursuant to Public Resources Code section 21080, subdivision (b)(1) and California Code of Regulations, title 14, section 15268, subdivision (a), ministerial projects.

STATE'S BEST INTERESTS FINDING:

Find that it is not in the best interests of the State for the Commission to acquire the Subject Federal Parcel proposed for conveyance from the United States to Palen Solar Holdings, LLC, or to arrange for its transfer to another entity.

AUTHORIZATION:

Authorize the Executive Officer, or her designee, to issue a certificate of compliance with Public Resources Code section 8560 for the conveyance of the Subject Federal Parcel to Palen Solar Holdings, LLC.

1.0 Riverside County, South Coast Palm Springs Field Office, BLM

1.1 Project Solar Site

San Bernardino Meridian, California

T. 5 S., R. 17 E.

- Sec. 27, NW1/4 SW1/4, SE1/4 SW1/4, SW1/4 NW1/4;
- Sec. 28, NW1/4 NW1/4, SW1/4 NW1/4, SE1/4 NW1/4, SW1/4 NE1/4, SE1/4 NE1/4, S1/2;
- Sec. 29, NE1/4, S1/2;
- Sec. 31, E1/2 SE1/4;
- Sec. 32;
- Sec. 33;
- Sec. 34, NW1/4, NW1/4 NE1/4, SW1/4 NE1/4, SE1/4 NE1/4, S1/2;

T. 6 S., R. 17 E.

- Sec. 2, N1/2 SW1/4, NW1/4 SE1/4, LOT 1 & 2 NW1/4, W1/2 LOT 1 NE1/4, W1/2 LOT 2 NE1/4;
- Sec. 3, W1/2 SW1/4, W1/2 LOT 1 NW1/4, LOT 2 NW1/4, LOT 2 NE1/4, E1/2 LOT 1 NE1/4;
- Sec. 4, N1/2 SW1/4, SE1/4 SW1/4, SE1/4, LOT 1 & 2 NW1/4, LOT 1 & 2 NE1/4;
- Sec. 5, LOT 1 & 2 NW1/4, LOT 1 & 2 NE1/4;

1.2 Generation Tie-Line*

San Bernardino Meridian, California

T. 5 S., R. 17 E.

- Sec. 21, SW1/4 SW1/4;
- Sec. 20, SW1/4 NW1/4, N1/2 SW1/4, NW1/4 SE1/4, S1/2 SE1/4;
- Sec. 19, S1/2 NE1/4, LOT 1 & 2 SW1/4, S1/2 LOT 1 NW1/4;

T. 5 S., R. 16 R.

- Sec. 24, S1/2 SE1/4;
- Sec. 25, N1/2 NW1/4, NW1/4 NE1/4;
- Sec. 26, N1/2 N1/2;
- Sec. 27, N1/2 N1/2;
- Sec. 28, NE1/4 NE1/4, W1/2 NE1/4, W1/2 SE1/4;

*Generation Tie-Line Access Road inclusive in this description.

1.3 Access Road

San Bernardino Meridian, California

T. 6 S., R. 17 E.

Sec. 6, LOT 2 NE1/4;

T. 5 S., R. 17 E.

Sec. 31, SE1/4 SE1/4;

Sec. 32, SW1/4 SW1/4;