

Staff Report 48

PARTY:

Gildred Solar, LLC

APPLICANT:

Ocotillo Solar, LLC

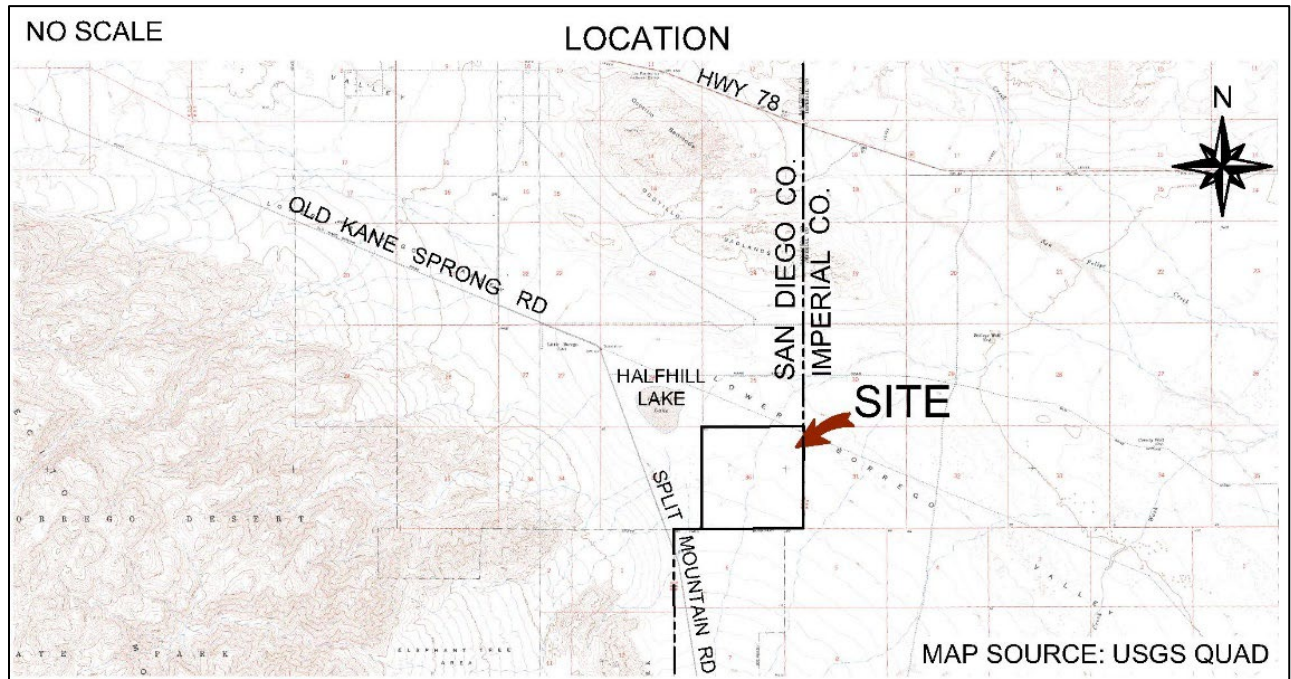
PROPOSED ACTION:

Termination of a Modification of the State's Right of Surface Entry Agreement and Approval of a new Modification of the State's Right of Surface Entry Agreement.

AREA, LAND TYPE, AND LOCATION:

Approximately 280 acres of State 100 percent reserved mineral interest school land, Assessor's Parcel Number: 253-390-57, located about 5 miles south of the community of Ocotillo Wells, Section 36, Township 12 South, Range 8 East, San Bernardino Baseline & Meridian, San Diego County (as shown in Figure 1, below).

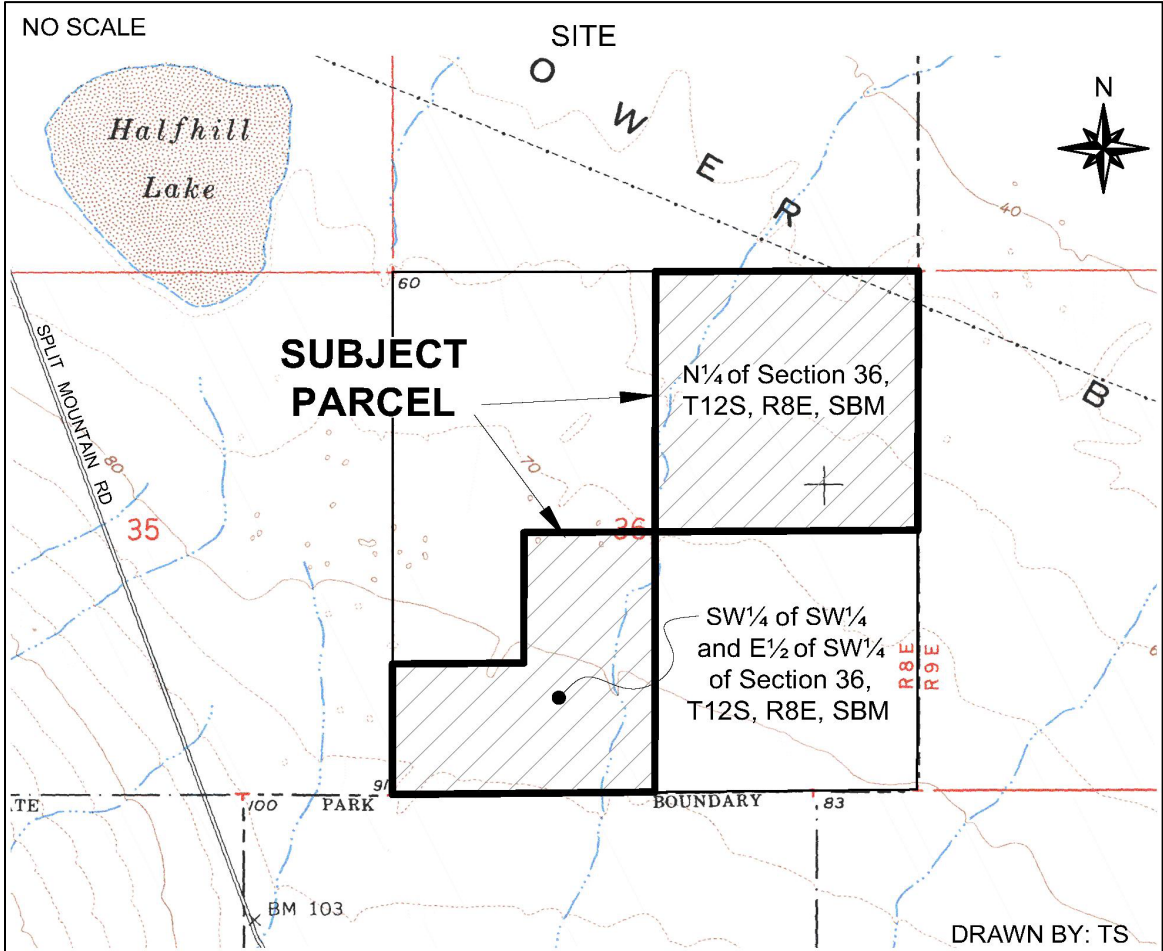
Figure 1. Location



PROPOSED AGREEMENT:

Modification of the State's right to use or cause to be used, for purposes of developing its mineral reservation, the surface, including its right to enter such lands to a depth of 500 feet below the surface of the lands (as shown in Figure 2, below).

Figure 2. Site



NOTE: This depiction of the lease premises is based on unverified information provided by the Applicant or other parties and is not a waiver or limitation of any State interest in the subject or any other property.

TERM:

40 years, beginning April 4, 2024.

CONSIDERATION:

\$840.29 per year, due on August 9, with an annual Consumer Price Index adjustment.

SPECIFIC AGREEMENT PROVISION:

The Agreement shall run with the land and shall be binding upon and inure to the Applicant, its successors, and assigns for the term of the Agreement. The Applicant

and all subsequent owners of the lands described in Exhibit A shall continue to be benefited and burdened by the covenants unless and until it expires or is otherwise terminated as provided in the Agreement.

BACKGROUND:

The State retains 280 acres of 100 percent reserved mineral interest (RMI) school lands located about 5 miles south of the community of Ocotillo Wells, in Section 36, T12S, R8E, SBM, San Diego County (Assessor Parcel Number 253-390-57). The surface estate is privately owned. The State retains ownership of any subsurface minerals. The rights to subsurface minerals include the right to enter onto the land to extract the minerals. Although the State reserves any potential mineral interest as required by state law, commercial quantities may not be present, and the surface development may not be compatible with future mining operations. In such cases, the State can contractually agree to modify the surface entry rights to enable surface development. On August 9, 2016, a Modification of the State's Right of Surface Entry Agreement was entered into with Gildred Solar, LLC (Party) ([Item 52, August 9, 2016](#)). The property was subsequently developed as part of a larger photovoltaic, solar farm. In November 2019, the Applicant acquired the solar operation on the RMI school lands from the Party. The Commission was not notified of the transfer until recently, when the Applicant applied for assignment of the original 2016 agreement, and requested to update the agreement term to 40 years. Instead of processing this item as an assignment, staff recommends that the existing agreement be terminated, and a new agreement be entered into with the Applicant, due to the Party's failure to notify the Commission of the transfer, and due to the Party's lack of response to staff's repeated requests to obtain the signatures necessary for an assignment.

Under Public Resources Code section 6401, subdivision (b), the Commission may modify, and surrender its right to enter the State's RMI, to a depth of 500 feet below the surface, to allow for the orderly use and development of lands where the State has sold the surface but retained the mineral interest. The Commission may modify its right of surface entry upon a finding that there are no known deposits of commercially valuable minerals in and above a plane located 500 feet below the surface of the lands and that such modifications are not inconsistent with federal laws pertaining to the grant of school lands (i.e., the RMI is not sold or otherwise disposed of).

STAFF ANALYSIS AND RECOMMENDATION:

AUTHORITY:

Public Resources Codes sections 6005, 6216, and 6401; California Code of Regulations, title 2, section 2003.

STATE'S BEST INTERESTS:

The proposed modification of the State's right of surface entry is in the State's best interests because it helps the State achieve its ambitious greenhouse gas emission reduction target of 40 percent below 1990 levels by 2030 (SB 32, 2016) and 85 percent by 2045 (AB 1279, 2022), and renewable energy procurement targets of 60 percent by 2030 (SB 100, 2018), 90 percent by 2035, and 100 percent by 2045 (SB 1020, 2022), through the development and expansion of the State's renewable energy portfolio. Despite the temporary loss of entry onto the parcel, the State will benefit from the new clean energy production from the solar facility. Additionally, given the low mineral potential of the parcel, it is highly unlikely that the Commission will receive any applications to develop the mineral interest on the parcel during the term of the proposed agreement. The low mineral potential of the parcel was reconfirmed using the mineral evaluation completed by a registered geologist and submitted as a part of entry into the original Agreement with the Party in 2016. Staff confirms that the 2016 geological report remains accurate, and there is no reason to believe that the mineral potential of the parcel has changed.

As consideration for the modification of the State's right of surface entry, the Applicant will pay an annual fee, \$840.29 due on August 9, the anniversary date of the prior Party, adjusted annually by the Consumer Price Index. This consideration was determined using methods authorized by the Commission under California Code of Regulations, title 2, section 2003. Finally, this subject modification is for a limited term of 40 years to preserve the ability to enter the surface if future mineral resources are discovered.

CLIMATE CHANGE:

As stated in the [Safeguarding California Plan: 2018 Update](#) (California Natural Resources Agency 2018), climate change is projected to increase the frequency and severity of natural disasters related to flooding, drought, and storms. The lease area is open lands with moderate to low vegetation fuels, and is vulnerable to the

above events, including dust storms and flash flooding from thunderstorms, and to a lesser extent, wildland fires. The lands contemplated under the agreement as well as the surrounding area may be vulnerable to these weather events; however, the right of entry agreement would remain unaffected by any projected climate change effects.

CONCLUSION:

For all the reasons above, staff believes the termination of the existing Modification of the State's Right of Surface Entry Agreement and approval of entry into a new Modification of the State's Right of Surface Entry Agreement is in the best interests of the State.

OTHER PERTINENT INFORMATION:

1. Approval or denial of the application is a discretionary action by the Commission. Each time the Commission approves or rejects a modification of the State's right of surface entry on RMI lands, it exercises legislatively delegated authority and responsibility as trustee of those lands as authorized by law. If the Commission denies the application, the Applicant would not be able to deny the State the authority to extract resources pursuant to its RMI. However, a future mineral lessee of the State would be economically responsible for any loss to surface improvements made by the Applicant if they are impacted by mineral development. Upon expiration or prior termination of the Modification of the State's Right of Surface Entry Agreement, the Commission would no longer be bound by its terms. The Applicant may submit a new application for a future modification, the approval of which would be at the Commission's sole discretion.
2. The modification of the State's right of surface entry is consistent with 43 U.S. Code section 870 because the State is not alienating its mineral interest and retains the ability to develop any minerals at the end of the modification agreement's term.
3. This action is consistent with the "Leading Climate Activism" Strategic Focus Area of the Commission's 2021-2025 Strategic Plan.
4. Authorization to terminate the existing Modification of the State's Right of Surface Entry Agreement and enter into a new Modification of the State's Right of Surface Entry Agreement is not a project as defined by the California

Environmental Quality Act because it is an administrative action 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).

EXHIBITS:

- A. Land Description
- B. Modification of Right of Surface Entry Agreement

RECOMMENDED ACTION:

It is recommended that the Commission:

FINDINGS:

1. Find that there are no known commercially valuable minerals located on the subject parcel in and above a plane of 500 feet.
2. Find that the proposed modification of the State's right of surface entry will permit the orderly use and development of the lands for renewable energy.
3. Find that the proposed modification is consistent with 43 U.S. Code section 870.

STATE'S BEST INTERESTS:

Find that terminating the existing Modification of the State's Right of Surface Entry Agreement and issuing a new Modification of the State's Right of Surface Entry Agreement is in the best interests of the State.

AUTHORIZATION:

Terminate the existing Modification of the State's Right of Surface Entry Agreement and authorize issuance of a new Modification of the State's Right of Surface Entry Agreement modifying the State's right of surface entry to use or cause to be used, for purposes of developing its mineral reserves, the surface, including its right to enter such lands to a depth of 500 feet below the surface of the lands described in Exhibit A and shown on Figure 2 (for reference purposes only), attached and by this reference made a part hereof, to Ocotillo Solar, LLC, beginning April 4, 2024, for a

term of 40 years; consideration in the amount of \$840.29 per year due August 9 with an annual Consumer Price Index adjustment.

EXHIBIT A

**A4359
Agreement 9363**

LAND DESCRIPTION

That certain parcel of State School Land in San Diego County, State of California, more particularly described as follows:

The SW $\frac{1}{4}$ of the SW $\frac{1}{4}$, the E $\frac{1}{2}$ of the SW $\frac{1}{4}$ and the NE $\frac{1}{4}$ of Section 36, Township 12 South, Range 8 East, San Bernardino Meridian, as shown on that Official U.S. Government Township Plat approved January 16, 1885.

END OF DESCRIPTION

Prepared 12/14/2023 by the California State Lands Commission Boundary Unit.



EXHIBIT B

RECORDED AT THE REQUEST OF
AND WHEN RECORDED MAIL TO:
STATE OF CALIFORNIA

California State Lands Commission
301 East Ocean Blvd. Suite 550
Long Beach, CA 90802-8833

**STATE OF CALIFORNIA
OFFICIAL BUSINESS**

Document entitled to free recordation.
pursuant to Government Code Section 27383

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Portions of A.P.N 253- 390-57
County: San Diego

Agreement 9363

MODIFICATION OF RIGHT OF SURFACE ENTRY AGREEMENT

Whereas, the State of California (State), acting by and through the California State Lands Commission (Commission), on July 14, 1955, conveyed by state patent certain lands described in Exhibit A, subject to a mineral reservation with surface entry rights (Subject Lands); and

Whereas, on August 9, 2016, the Commission approved the modification of the State's right of surface entry on the Subject Lands through a Modification of Right of Surface Entry Agreement entered into with Gilded Solar, LLC; and

Whereas, in November 2019, Ocotillo Solar, LLC acquired the solar operation on the Subject Lands from Gildred Solar, LLC; and

Whereas, the surface estate of the Subject Lands described in Exhibit A is proposed by Ocotillo Solar, LLC for the continued development and use of an approximately 280 acres photovoltaic or concentrated photovoltaic solar farm; and

Whereas, to allow for the orderly development and financing of a photovoltaic solar farm, and to protect against disturbance of operations by the potential development of the State's mineral reservation, Ocotillo Solar, LLC has applied to the Commission for a modification of the State's reserved right to enter the surface to a depth of 500 feet; and

Whereas, on August 9 2016, Gildred Solar, LLC, the previous party with which a Modification of Right of Surface Entry Agreement was entered into, submitted a geotechnical engineering report, concluding no occurrence of commercially valuable minerals upon or under the lands described in Exhibit A; and

Whereas, the Commission, determined, pursuant to California Public Resources Code Section 6401 (b), at its meetings on August 9, 2016, and again on April 4, 2024, that there are no known deposits of commercially valuable minerals in and above a plane located 500 feet below the surface of the lands described in Exhibit A; and

Whereas, on April 4, 2024, the Commission terminated the Modification of Right of Surface Entry Agreement previously entered into with Gilded Solar, LLC, due to Gildred Solar, LLC's transfer of the surface estate in the Subject Lands to Ocotillo Solar, LLC, without any notice to the Commission, and due to the inability of Commission staff to contact Gildred Solar, LLC and obtain the necessary signatures to assign the existing Agreement.

Now, therefore, effective April 4, 2024, the State, acting by and through the Commission, and Ocotillo Solar, LLC do hereby agree as follows:

1. The State, pursuant to the provisions of Public Resources Code section 6401 (b), surrenders its right to use or cause to be used, for purposes of developing its mineral reservation, the surface, including its right to enter such lands to a depth of 500 feet below the surface, of the lands described in Exhibit A attached hereto, for a period of 40 years commencing April 4, 2024, until April 3, 2064.
2. In consideration for the State modifying its rights pursuant to Public Resources Code section 6401 (b) with respect to the lands described in Exhibit A, Ocotillo Solar, LLC agrees to pay to the Commission an annual fee of \$840.29, with an annual Consumer Price Index adjustment. The annual payment of \$840.29 shall be made on August 9, 2024, and upon each subsequent anniversary thereafter.
3. The covenant created by this Agreement shall run with the land and shall be binding upon and inure to Ocotillo Solar, LLC, its successors and assigns. Ocotillo Solar, LLC and any and all subsequent owners of the lands described in Exhibit A shall continue to be benefited and burdened by the covenant unless and until it expires or is otherwise terminated as provided herein. This Agreement shall be recorded by the

Commission with the County of San Deigo Assessor-County Clerk-Recorder upon execution by all parties. Ocotillo Solar, LLC, its successors and assigns shall notify any future prospective purchasers or acquirers of the lands described in Exhibit A of this Agreement, and make any sale or transfer of the lands described in Exhibit A contingent on the acquirer's acknowledgement of its rights and duties under this Agreement. The landowner of the lands described in Exhibit A shall notify the Commission of any sale or transfer of such lands within 30 days of such sale or transfer, and shall provide the Commission with the contact information of the new owner of such lands.

4. The annual fee specified in paragraph 2 of this agreement will be adjusted annually by the Consumer Price Index as specified in California Code of Regulations, title 2, section 1900, (m) and (n). The Commission will provide a courtesy invoice 30 days prior to the date the fee is due specifying the updated fee amount at the address currently on file for the owner of the lands described in Exhibit A. If the Commission does not send a courtesy invoice, Ocotillo Solar, LLC or its successor landowner, shall submit a payment in the amount of the prior year's annual fee when due and contact the Commission within 30 days to determine the balance due.
5. Should Ocotillo Solar, LLC, or subsequent surface owner, fail to perform any covenant, condition, or agreement contained in this agreement and the Breach is not cured within 60 days after written notice of the Breach is served on the surface owner by the Commission, then this Agreement shall automatically terminate.
6. Any revision to this Agreement shall be in writing, signed by both parties, and recorded with the San Diego County Assessor-County Clerk-Recorder.

This modification of the State's right of surface entry is executed by and on behalf of the State of California by the Commission, acting pursuant to law, as approved and authorized at its regular public meeting on April 4, 2024.

[SIGNATURES ON NEXT PAGE]

CALIFORNIA STATE LANDS COMMISSION

Date: _____

By: _____

COLIN CONNOR

Assistant Executive Officer

Title

OCOTILLO SOLAR, LLC

Date: _____

By: _____

Name

Title

*In executing this document, the following are required:

Corporations:

- 1. Affix Corporate Seal.
- 2. Attach certified copy of the resolution or other document authorizing its execution on behalf of the corporation.

Individuals:

- 1. Attach acknowledgment of Signature.