

*Director's Protest Resolution Report*

**Eagle Crest Gen-Tie and  
Water Pipeline  
Environmental Assessment  
and  
Proposed California Desert  
Conservation Area Plan  
Amendment (EA/PA)**

August 1, 2018



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## Reader's Guide

### How do I read the Report?

The Director's Protest Resolution Report is divided into sections, each with a topic heading, excerpts from individual protest letters, a summary statement (as necessary), and the Bureau of Land Management's (BLM) response to the summary statement.

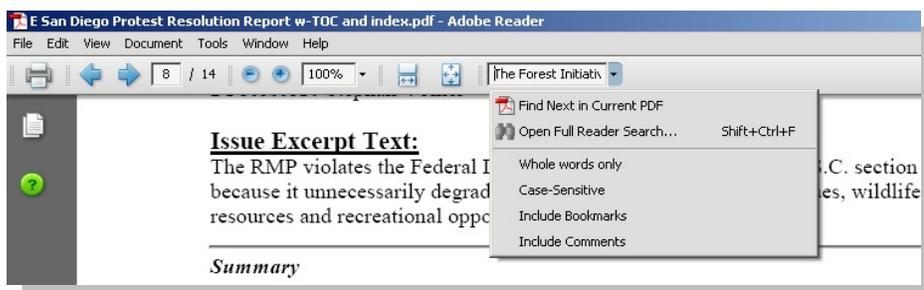
### Report Snapshot

The diagram shows a report snapshot with the following sections and components:

- Topic heading:** *Issue Topics and Responses*
- Submission number:** NEPA
- Protest issue number:** PP-CA-EAGLECREST-17-02-10
- Protesting organization:** The Forest Initiative
- Protester's name:** John Smith
- Issue Excerpt Text:** Rather than analyze these potential impacts, as required by NEPA, the BLM postpones analysis of renewable energy development projects to a future case-by-case analysis. (This is a direct quote taken from the submission.)
- Summary:** The BLM inadequately analyzes NEPA for renewable energy projects in the PRMP/FEIS. (This is a general statement summarizing the issue excerpts, optional.)
- Response:** BLM's response to the summary statement or issue excerpt if there is no summary. (Specific renewable energy projects are implementation-level decisions rather than RMP-level decisions. Upon receipt of an application for a renewable energy project, the BLM would require a site-specific NEPA analysis of the proposal before actions could be approved (FEIS Section 2.5.2, p. 2-137). Project specific impacts would be analyzed at that time (including impacts to surrounding properties), along with the identification of possible alternatives and mitigation measures.)

### How do I find my Protest Issues and Responses?

1. Find your submission number on the protesting party index which is organized in the order protest letters were received by the BLM.
2. In Adobe Reader search the report for your name, organization or submission number (do not include the protest issue number). Key word or topic searches may also be useful.



## List of Most Commonly Used Acronyms

<b>BA</b>	Biological Assessment	<b>IB</b>	Information Bulletin
<b>BLM</b>	Bureau of Land Management	<b>IM</b>	Instruction Memorandum
<b>BO</b>	Biological Opinion	<b>KOP</b>	Key Observation Points
<b>CDFW</b>	California Desert Fish and Wildlife	<b>MOU</b>	Memorandum of Understanding
<b>CEQ</b>	Council on Environmental Quality	<b>NEPA</b>	National Environmental Policy Act of 1969
<b>CFR</b>	Code of Federal Regulations	<b>NHPA</b>	National Historic Preservation Act
<b>COA</b>	Condition of Approval	<b>NOA</b>	Notice of Availability
<b>CWA</b>	Clean Water Act	<b>NOI</b>	Notice of Intent
<b>DEIS</b>	Draft Environmental Impact Statement	<b>NPS</b>	National Park Service
<b>DM</b>	Departmental Manual (Department of the Interior)	<b>NRHP</b>	National Register of Historic Places
<b>DO</b>	District Office (BLM)	<b>PA</b>	Plan Amendment or Programmatic Agreement
<b>DOI</b>	Department of the Interior	<b>RFDS</b>	Reasonably Foreseeable Development Scenario
<b>EA</b>	Environmental Assessment	<b>RMP</b>	Resource Management Plan
<b>EIS</b>	Environmental Impact Statement	<b>ROD</b>	Record of Decision
<b>EO</b>	Executive Order	<b>ROW</b>	Right-of-Way
<b>EPA</b>	Environmental Protection Agency	<b>SHPO</b>	State Historic Preservation Office
<b>ESA</b>	Endangered Species Act	<b>THPO</b>	Tribal Historic Preservation Officer
<b>FEIS</b>	Final Environmental Impact Statement		
<b>FLPMA</b>	Federal Land Policy and Management Act of 1976		
<b>FO</b>	Field Office (BLM)		
<b>FWS</b>	U.S. Fish and Wildlife Service		
<b>HPMP</b>	Historic Properties Management Plan		

## Protesting Party Index

<b>Protester</b>	<b>Organization</b>	<b>Submission Number</b>	<b>Determination</b>
Lisa T. Belenky / Ileene Anderson	Center for Biological Diversity 1212 Broadway, Suite 800 Oakland CA 94612 (Belenky)  8033 Sunset Blvd. #447 Los Angeles CA 90046 (Anderson)	PP-CA-Eaglecrest-17-01	Denied – Issues & Comments
Sarah K. Friedman	Sierra Club 714 W. Olympic Blvd, Suite 1000 Los Angeles CA 90015	PP-CA-Eaglecrest-17-02	Denied – Issues & Comments
Deborah Sivas obo <b>NPCA</b> (Neal Desai) / <b>Coalition</b> (Mark Butler) / <b>Defenders</b> (Jeff Aardhl)	Mills Legal Clinic Stanford Law School, Environmental Law Clinic, 559 Nathan Abbott Way, Stanford CA 94305	PP-CA-Eaglecrest-17-03	Denied – Issues & Comments
Stephan Volker obo <b>Desert Protection Society</b> (Donna and Larry Charpied)	Law Offices of Stephan Volker 1633 University Avenue Berkeley CA 94703	PP-CA-Eaglecrest-17-04	Denied – Issues & Comments
Tom O’Key	Individual	PP-CA-Eaglecrest-17-05	Denied – Issues & Comments
Chairman Dennis Patch	Colorado River Indian Tribes 26600 Mohave Road Parker AZ 85344	PP-CA-Eaglecrest-17-06	Denied – Issues & Comments

## **Issue Topics and Responses**

### ***NEPA – General***

**Issue Number:** PP-CA-EAGLECREST-17-01-21

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ilene Anderson

#### **Issue Excerpt Text:**

BLM’s FEA (at 65-66) also states that it is relying on the State Water Resources Control Board (“SWRCB”) 2013 documentation for the CWA § 401 process related the FERC license to show that the state has fully examined the water issues here, but it has not.

First, FERC ultimately concluded that there was no impact to water quality and that a CWA § 401 certification was not needed. On that basis the SWRCB itself noted that its decision was moot and dismissed any reconsideration. Because the process was mooted, the BLM cannot rely on the decision or the analysis, including the EIR prepared by the SWRCB. Further, BLM cannot “tier to a document that has not itself been subject to NEPA review” because “it circumvents the purpose of NEPA.” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002). In particular, an agency cannot rely on analysis from a document, which violates NEPA, without conducting an independent analysis in its own EIS.

**Issue Number:** PP-CA-EAGLECREST-17-02-12

**Organization:** Sierra Club

**Protester:** Sarah Friedman

#### **Issue Excerpt Text:**

Significant controversy exists around the Projects. The FEA/FONSI impermissibly tiers to the FERC EIS which relies on stale and inaccurate data. For these reasons BLM is obligated to prepare a full EIS under NEPA.

**Issue Number:** PP-CA-EAGLECREST-17-02-8

**Organization:** Sierra Club

**Protester:** Sarah Friedman

#### **Issue Excerpt Text:**

As discussed above, the serious flaws in the FERC EIS make it invalid to tier off to, making BLM’s reliance on the State Water Resources Board (the “Board”)’s findings misplaced and improper. The Board’s Environmental Impact Report (EIR) acknowledged that cumulative pumping, including the Pumped Storage Project, would throw the basin into long term overdraft, requiring a determination of overriding circumstances. Moreover, the Board withdrew its EIR as moot before it completed the public appeal process. Courts have consistently refused to allow agencies to “tier to a document that has not itself been subject to NEPA review” because “it circumvents the purpose of NEPA.” *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1073 (9th Cir. 2002).

**Issue Number:** PP-CA-EAGLECREST-17-03-17

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

While the Eagle Crest application was pending before BLM, the proposed ROWs grew significantly in size compared to the project boundary that FERC analyzed. The Proposed Action now occupies nearly twice the amount of BLM public land. Such “substantial changes in the proposed action” trigger a requirement that BLM “[s]hall prepare supplements to either draft or final environmental impact statements.”

**Issue Number:** PP-CA-EAGLECREST-17-03-5

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

The FEA expressly “tiers” to the 2012 FERC EIS, which itself “tiers” to and relies on data and analysis in the unrelated 1997 Eagle Mountain Landfill project Final EIS – an analysis that was held to be inadequate in several respects by the Ninth Circuit Court of Appeals – because the Eagle Crest project proponent could not gain access to the proposed project site during the FERC NEPA process.

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**Summary:**

The BLM violated NEPA by tiering to the FERC Final EIS for the Eagle Mountain Pumped Storage Hydroelectric Project (FEIS) because the FEIS (1) relies on inaccurate data, and (2) did not fully examine impacts to water resources. Additionally, the project’s footprint grew considerably after the FERC conducted its analysis, but the BLM did not prepare a supplement to the FERC’s EIS, violating NEPA.

**Response:**

Tiering is using the coverage of general matters in broader NEPA documents, such as an EIS, in subsequent, narrower NEPA documents. This allows agencies to “eliminate repetitive discussions” and to focus its analysis on site-specific actions (40 CFR 1502.2, 40 CFR 1508.28). Should the broader NEPA document be insufficient to support site-specific decisions, the BLM must provide the necessary relevant analysis in the tiered NEPA document (43 CFR 46.140(b)). Agencies may not tier to documents that are not NEPA documents.

The BLM must supplement an EIS when: it makes substantial changes to the proposed action that are relevant to environmental concerns; it adds a new alternative that is outside the spectrum of alternatives already analyzed; or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its effects. Supplementation of an EIS is only necessary when there remains a major Federal action to occur; in the BLM’s case, this is when a Record of Decision has not yet been signed. The supplementation process, when necessary, occurs after circulation of a draft or final EIS, and does not apply to EAs (BLM

Handbook H-1790-1, Section 5.3).

The BLM tiered the site-specific Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA) to the broader FEIS. As noted in Section 1.6 of the EA/PA, BLM management and technical staff critically evaluated all of the FERC FEIS information it used, and added new or updated information as necessary. These updates included a revised water budget and additional discussion of impacts to groundwater quantity (EA/PA, Section 4.1.5.2).

FERC licensed the Eagle Mountain Pumped Storage Project in 2014, at which point there was no major Federal action left to occur. Further, the BLM would not prepare a supplement to another agency's FEIS. The footprint of the project did not change between the FEIS and the BLM's EA. Rather, 460 acres of private land identified for the project reverted to federal ownership in late 2014, increasing the number of acres under federal ownership affected by the FERC license but not the analysis area itself (EA/PA, p. 44). Though FERC's ability to access these private lands during EIS preparation was limited (FEIS, p. 115), as mentioned above, the BLM conducted additional analysis where necessary.

The BLM properly tiered the EA/PA to the FERC FEIS in full compliance with NEPA.

## ***NEPA – Public Involvement***

**Issue Number:** PP-CA-EAGLECREST-17-01-11

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ileene Anderson

### **Issue Excerpt Text:**

When we went to review the Revised Predator Monitoring and Control Plan, via the link provided in Table 1-1 of the FEA, it leads to a page that states “This address is restricted”. In fact, all of the links provided in Table 1-1 are “restricted”. We searched the FERC website but were unable to find the plans for the project. This eliminates public review of these eighteen important plans and makes it impossible to evaluate the strategies to be implemented and therefore any evaluation of the mitigation’s appropriateness or effectiveness.

**Issue Number:** PP-CA-EAGLECREST-17-01-30

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ileene Anderson

### **Issue Excerpt Text:**

It is unclear if impacts to avian species have been fully addressed because the Avian Protection Plan of May 17, 2016 is not available for public review due to the faulty web link in the FEA.

**Issue Number:** PP-CA-EAGLECREST-17-01-31

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ileene Anderson

### **Issue Excerpt Text:**

[R]eliance on plans that are not provided to the public for review does not meet the NEPA requirements for an open public information process.

**Issue Number:** PP-CA-EAGLECREST-17-01-36

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ileene Anderson

### **Issue Excerpt Text:**

The Center also protests the inadequate mitigation requirements. The FEA fails to address many of the mitigation related issues we raised in our comments on the DEA including...the reliance on the most recent Avian Protection Plan (approved on May 17, 2016 [at FEA pdf 31]) but is not available to the public (see above, the link in Table 1-1 goes to a “restricted address” (the DEA provided a February 2015 Avian Protection Plan but it is unclear if changes were made to the plan between February 2015 and May 17, 2016).

**Issue Number:** PP-CA-EAGLECREST-17-01-37

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ilene Anderson

**Issue Excerpt Text:**

The additional inadequacies in the environmental review for the project required by NEPA include failing to provide the public with the Desert Tortoise Clearance and Relocation/Translocation Plan.

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**Summary:**

The BLM violated NEPA by failing to provide sufficient public information in the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA) in the following ways:

- Including several links in Table 1.1 of the EA, which are broken and inaccessible, specifically the Avian Protection Plan. This prevents the public's ability to review these supporting documents, making it impossible to evaluate the appropriateness or effectiveness of mitigation measures; and
- Not providing the public with the Desert Tortoise Clearance and Relocation/Translocation Plan.

**Response:**

Public involvement is a requirement of the NEPA regulations (40 CFR 1501.7). The purpose of public involvement is to allow the public ample opportunity to participate in the planning process, resulting in the identification of issues to be addressed during this process. Planning issues are disputes or controversies about existing and potential land and resource allocations, levels of resource use, production, and related management practices (BLM Handbook H-1601-1, p. 19).

The BLM provided sufficient information to the public in both the Eagle Crest Draft and Proposed EAs/PAs, including access to all associated plans used by FERC in the development of the Eagle Crest project.

NEPA's public involvement requirements include more than providing links to plans within NEPA documents. Several opportunities to get involved in the NEPA process exist, which include the following:

- When the agency prepares its NEPA procedures;
- Prior to and during preparation of NEPA analysis;
- When a NEPA document is published for public review and comment; and
- When monitoring the implementation of the proposed action and the effectiveness of any associated mitigation.

The BLM does provide active links to relevant Natural Resource Protection Plans required by FERC License for the Eagle Mountain Pumped Storage FERC Project (Table 1.1) in the EA/PA. These include, but are not limited to the Avian Protection Plan and the Desert Tortoise Clearance and Relocation/Transportation Plan. Although Google Chrome does not allow the links to work, the links are completely accessible via Internet Explorer, as is stated in the EA on page 3, as well as on the bottom of each page in Table 1.1. The links connect to FERC's online eLibrary, which allows the public full access to each plan.

The BLM adhered to NEPA by providing sufficient information and access to plans in the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment.

## ***NEPA – Best Available Science***

**Issue Number:** PP-CA-EAGLECREST-17-01-22

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ilene Anderson

### **Issue Excerpt Text:**

[W]e are informed that additional groundwater modeling of the Chuckwalla Basin done for BLM by Penn State experts and the Lawrence Berkeley Laboratory in collaboration with the USGS and the Department of Agriculture's NRCS, which shows that long term overdraft would persist beyond the 4 year fill period and that recharge would be significantly lower. In further violation of NEPA and FLPMA, BLM has failed to provide the public with this modeling or consider it in the environmental analysis although it is based on much more complete hydrological data and updated information.

**Issue Number:** PP-CA-EAGLECREST-17-01-26

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ilene Anderson

### **Issue Excerpt Text:**

The state of the environment here, including the status of protected species such as the desert tortoise and water resources in California has changed since 2014 when the FERC EIS was prepared based on even older data.

**Issue Number:** PP-CA-EAGLECREST-17-02-1

**Organization:** Sierra Club

**Protester:** Sarah Friedman

### **Issue Excerpt Text:**

The Eagle Crest pumped storage project remains highly controversial due to a serious dispute regarding the groundwater impacts analysis in the EA. The FEA/ FONSI asserts that '[T]here is no evidence of a "substantial dispute" within the scientific community concerning the groundwater withdrawals' FONSI, Page 9. In fact, there is a major scientific dispute regarding the effects of the proposed pumping by the Eagle Crest project, the quality and applicability of various groundwater models, and the rate of groundwater recharge. This dispute was raised by numerous commenters to the DEA, and BLM continues to ignore this dispute by neglecting to use the model they themselves developed, in the FEA. Indeed, the best available scientific information points solidly against BLM's position on project groundwater impacts in the EA. Although the FEA asserts it performed an independent analysis of groundwater impacts to the Chuckwalla aquifer, the BLM's analysis is superficial at best, relying on the prior FERC analysis and conclusions instead of performing the required critical examination of new information available to BLM since the completion of the FERC EIS.

**Issue Number:** PP-CA-EAGLECREST-17-02-3

**Organization:** Sierra Club

**Protester:** Sarah Friedman

**Issue Excerpt Text:**

*Reliance on Stale and Inaccurate Data Requires BLM to Prepare an EIS.*

Ignoring new information which would avoid harm violates the Federal Land Policy and Management Act of 1976 (FLPMA), and using stale, outdated and incorrect information violates BLM's requirements under NEPA to provide accurate information on which to base 'informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.' As discussed in greater detail below, the purpose and need for the project relies on information more than eight years old, and the site specific information is in many cases based on the original landfill analysis--so over twenty years old! Notably, despite comments on the DEA raised by the Sierra Club and other commenters, the BLM omitted and ignored recent information (mostly within their own control) regarding: (i) groundwater analysis, (ii) purpose and need, and (iii) wildlife impacts.

**Issue Number:** PP-CA-EAGLECREST-17-02-4

**Organization:** Sierra Club

**Protester:** Sarah Friedman

**Issue Excerpt Text:**

Numerous commenters to the draft EA, including the Sierra Club, identified the existence of the Penn State/LBL Model of the Chuckwalla Basin, a model that BLM still failed to discuss in either the final EA [or] FONSI. As Sierra Club noted in its DEA comments, the Penn State/LBL Model is based on much more complete hydrological data and updated information. Scenario runs of that model concluded that Eagle Crest pumping in combination with realistic (reduced) estimates of other basin pumping, will cause the Chuckwalla Basin to go into serious long term overdraft conditions—well beyond the 4 year fill period—and that the recharge rate is significantly lower than assumed in the draft or Final EA. The Penn State/LBL model includes significantly more water level and other hydrological data, and current data on pumping by other sources. BLM's reliance on outdated data and simplistic groundwater modeling is incompatible with BLM's duties under NEPA. BLM, as a sponsor of that study, clearly had access to all of the data and conclusions reached by the model, and BLM has long been aware that the Penn State/LBL model results and the results of a prior model, a study by the Argonne National Laboratory sponsored by BLM, countered the conclusions in the draft and final EA.

**Issue Number:** PP-CA-EAGLECREST-17-02-9

**Organization:** Sierra Club

**Protester:** Sarah Friedman

**Issue Excerpt Text:**

BLM's reliance on the state water board's EIR analysis of groundwater pumping effects is thus misplaced, and does not comport with BLM's obligation to fully and independently assess groundwater impacts in the Chuckwalla Basin using the best available information—luckily BLM

has access to this information which it has funded and possesses, but has not released to the public.

**Issue Number:** PP-CA-EAGLECREST-17-03-10

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

BLM conducted an updated water balance for this EA. Notably, the “updated water balance” in the FEA does not incorporate the new modeling analysis, but only eliminates potential future projects from consideration, thereby lowering the projected rate of future water use in the Chuckwalla Basin. In other words, BLM refuses to evaluate updated modeling results that show that prior modeling assumptions most likely grossly overestimate recharge rates, while at the same time purporting to update (i.e., downgrade) projected future water use in the Basin.

**Issue Number:** PP-CA-EAGLECREST-17-03-15

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

[T]he FEA simply fails to satisfy the agency’s legal duty to consider currently available information concerning the likely impacts of the Proposed Action. As BLM’s own NEPA guidance provides, the environmental analysis “must include a description of any limitations inherent in the method if there is substantial dispute over models, methodology, or data, you must recognize the opposing viewpoint(s) and explain the rationale for your choice of analysis.” BLM NEPA Handbook at 72 (noting that “[t]o the extent possible,” the impacts analysis should be quantified). BLM quite simply ignores this legal directive, derived directly from controlling judicial precedent, and claims, instead, that it need not engage the new, better groundwater data and modeling because it may defer to the conclusions of the State Water Board on groundwater recharge rates and impacts.

**Issue Number:** PP-CA-EAGLECREST-17-03-19

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

In addition to the new groundwater modeling information discussed above, California’s unprecedented drought and the effects of climate change have rendered further the groundwater analysis in FERC EIS obsolete. Relying on a previous EIS through tiering becomes especially problematic where a significant event intervenes between the finalizing of the EIS and the drafting of the EA.

**Issue Number:** PP-CA-EAGLECREST-17-03-20

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

FERC's 2012 EIS relies on pre-drought data, but the recent drought and climate change have undermined that data's reliability. In particular, historical average data, like the data FERC cites, does not capture the effects of the intervening years of drought, which formed "the driest [four-year period] since record keeping began in the late 1800s." Ellen Hanak, et al., What If California's Drought Continues? PPIC 1 (Aug. 2015) available at [http://www.ppic.org/content/pubs/report/R\\_815EHR.pdf](http://www.ppic.org/content/pubs/report/R_815EHR.pdf). EPA urged BLM to consider these effects in its November 2016 letter to BLM, noting that "the strain on groundwater in the basin has likely increased due to...intensified drought conditions that persist throughout the Riverside area and California." Letter from Connell Dunning, Acting Manager Environmental Review Section, EPA, to Greg Miller, BLM (Nov. 8, 2016).

**Issue Number:** PP-CA-EAGLECREST-17-03-6

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

Of greatest concern, the FEA's superficial analysis of groundwater impacts is seriously outdated and inexplicably fails to evaluate important new, scientifically credible information of which BLM has been aware for several years. In particular, preliminary modeling results from two more sophisticated water balance modeling efforts demonstrate that the Eagle Crest project will have significant adverse impacts of the groundwater aquifer. BLM is well aware of these modeling results – indeed, BLM previously argued that such results must be incorporated into the project review – but has failed to adequately address them in the FEA.

**Issue Number:** PP-CA-EAGLECREST-17-03-7

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

As this chronology demonstrates, the groundwater impacts modeling contained in the 2012 FERC EIS has been superseded by new and substantially more sophisticated and accurate groundwater recharge modeling results that significantly undermine the conclusions in the decades-old Eagle Mountain landfill EIS. BLM itself argued that the State Water Board must consider this new evidence before taking action on the application for a section 401 certification. The State Water Board, however, did not update its Draft EIR to consider this information; instead, it merely relied on the outdated conclusions of the Eagle Mountain EIS.

**Issue Number:** PP-CA-EAGLECREST-17-03-8

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

BLM initiated a study to collect additional monitoring data and to use a more sophisticated groundwater impacts model developed by Penn State experts and Lawrence Berkeley Laboratory in collaboration with the U.S. Geological Service and the Department of Agriculture's Natural Resources Conservation Services.

**Issue Number:** PP-CA-EAGLECREST-17-03-9

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

Even under these reduced/updated water balance assumptions, recent runs of the model using these assumptions demonstrate that pumping in connection with the Eagle Crest project will cause the Chuckwalla Basin to go into serious long-term overdraft conditions (well beyond the four-year fill period) and that recharge rates are significantly lower than assumed in the FEA.5

These results confirm the prior findings of a second model developed by the Argonne National Laboratory. Like the Lawrence Berkeley Laboratory model, the Argonne National Laboratory model found significantly lower recharge rates in the Chuckwalla Basin than assume in the FEA – 3,200 acre-feet/year as compared to 12,700 acre-feet/year. The Argonne model predicted that overdraft conditions would worsen with reasonable levels of pumping from renewable energy projects in the Riverside East Solar Energy Zone. See Argonne National Laboratory, “A Groundwater Model to Assess Water Resource Impacts at the Riverside East Solar Energy Zone” at 12 (Dec. 2013), available at <http://blmsolar.anl.gov/sez/ca/riverside-east/groundwater/downloads/Riverside-East-Groundwater-Report.pdf>

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**Summary:**

The Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment (EA/PA) failed to use the best available science concerning groundwater data and modeling, climate change, and desert tortoise.

**Response:**

The Council on Environmental Quality's (CEQ) regulations implementing NEPA require that agencies use “high quality information” (40 CFR 1500.1(b)). NEPA regulations require the BLM to “insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements” (40 CFR 1502.24). In addition, the BLM NEPA Handbook directs the BLM to “use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed” (BLM Handbook H-1790-1, p. 55). Under the BLM's guidelines for implementing the Information Quality Act, the BLM applies the principle of using the “best available” data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

In addition to the data available in the FERC FEIS, the BLM considered several other sources of data in the Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment, which can be found in the References section of the EA (see Chapter 9). For example, regarding the best available science for

groundwater data and modeling and for climate change, the BLM considered the following:

- Relevant information developed by the California State Water Resources Control Board in its formulation of water quality protection measures.
- Updated cumulative assessment of potential groundwater effects from the FERC Project in the Chuckwalla Valley Groundwater Basin. When the FERC FEIS was prepared, an estimated 14 solar projects were planned with total cumulative water use estimates of about 17,742 acre-feet for construction plus 2,506 acre-feet per year during operation. Since that time, many of these proposed solar projects have been withdrawn. In addition, water usage estimates were lowered to reflect the cancellation of the Eagle Mountain landfill project and a revised schedule for the timing of the FERC Project. A revised water balance calculation was developed based on these changes in water use and was incorporated in the EA (see Tables 6-1 to 6-3).
- The BLM's Desert Renewable Energy Conservation Plan FEIS (2015) LUPA (2016) (DRECP FEIS/LUPA) and conducted a comparative analysis of the DRECP FEIS/LUPA land designations and CMA and FERC License requirements directed at groundwater (see Section 1.7.1, App. A, Table 4-6 and Table 1-3).
- The NPS Joshua Tree National Park "Finding of No Significant Impact, Eagle Mountain Boundary Study Including Possible Land Withdrawal Environmental Assessment" (Dec. 12, 2016) (NPS FONSI, 2016) for its discussion of groundwater. The data and discussion contained in these separate and thorough groundwater models and impacts analyses are consistent with and support FERC's assessment of potential groundwater impacts associated with the Project, and, BLM has concluded that the groundwater findings and conclusions in the FERC FEIS groundwater assessment remains accurate.
- California Environmental Protection EA, "Indicators of Climate Change in California," (2013) to assess the impact of climate change on water quantity. The report notes that annual precipitation in California has been variable year to year and that no clear precipitation trend is evident in the climate records reviewed by the California Environmental Protection Agency. The EA in an update to Section 3.1.1 has been modified to further address climate change impacts and recognizes that the climate in the FERC Project area is anticipated to become warmer in future decades, but precipitation is not anticipated to change: "Therefore, groundwater recharge is not anticipated to change, and so water supply for the project will be stable."

Protesters reference groundwater modeling completed by scientists from Pennsylvania State University, Lawrence Berkeley Labs, and the BLM. This study<sup>1</sup> was published on June 1, 2017, after the BLM released its final Environmental Assessment and Proposed Plan Amendment. It projects that the Eagle Mountain pumped storage project will withdraw more water than the assumed recharge. However, the study makes assumptions regarding levels of groundwater use for projects that have not been and may not be built (Desert Harvest) or that have updated plans and will now use much less water (Palen). The BLM continues to rely on the State Water Resources Control Board (SWRCB) as the experts on groundwater in the Chuckwalla Basin. The SWRCB issued a Clean Water Act Water Quality Certification and License that requires the Licensee to

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<sup>1</sup> Shen, C.; Fang, K.; Ludwig, N.; Godfrey, P.; and Doughty, C. A. 2017. Impact of Water Use by Utility-Scale Solar on Groundwater Resources of the Chuckwalla Basin, CA: Final Modeling Report. Lawrence Berkeley National Laboratory.

monitor groundwater for several conditions, including whether the Project operations will have a permanent impact on the Chuckwalla Valley Groundwater Basin (SWRCB Water Quality Certification for Federal Permit or License, p. 31). FERC and BLM have also conditioned their authorizations on the impact to the groundwater basin. Monitoring wells will be in place and monitored to determine the impacts that the reservoir filling and facility operation will have on groundwater recharge (EA/PA, Table 1-1 and pp. 108-109; see also Groundwater Level Monitoring Plan and Aquifer Testing Plan).

Regarding the best available science for desert tortoise, the BLM's EA/PA tiers to the FERC EIS (2012) for analysis of the potential impacts of the Project to the desert tortoise (direct, indirect, and cumulative). Potential impacts to desert tortoise are discussed in the FERC EIS (pp. 172-189); in the EA (Sections 4.1.2 and 6.3.1 and Appendix B); and in the 2012 biological opinion prepared by the US Fish and Wildlife Service (USFWS, 2012 BO). The EA refers to the USFWS 2012 biological conclusion that the Project "is not likely to jeopardize the continued existence of the desert tortoise or destroy or adversely modify designated critical habitat" but could result in incidental take (EA/PA, p. 87). The BLM has updated the FERC FEIS and USFWS 2012 biological opinion information on the desert tortoise (see Section 1.6.2.). Further, the BLM consulted with USFWS in an ESA Section 7 informal consultation process and conducted a 2016 survey for desert tortoise (see Appendix B). Finally, the BLM has also reviewed and incorporated new information on the desert tortoise from the DRECP FEIS/LUPA (2016) and the NPS, Joshua Tree National Park, "Finding of No Significant Impact, Eagle Mountain Boundary Study Including Possible Land Withdrawal Environmental Assessment" (December 12, 2016).

The BLM relied on high quality information and the best available data in preparation of the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment.

## *NEPA – Cumulative Effects*

**Issue Number:** PP-CA-EAGLECREST-17-01-34

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky / Ilene Anderson

**Issue Excerpt Text:**

BLM improperly revised the assessment of cumulative groundwater effects in the Chuckwalla Basin based on “many of these proposed solar projects have been withdrawn” (FEA at pdf 5). While it is true that at the time of the FERC ROD, approximately 14 solar projects were proposed (FEA at pdf 5), the Riverside East Solar Energy Zone and Development Focus Area for renewable energy is approximately 148,000 acres and includes the much of the area where the proposed pipeline and transmission line are proposed to transverse. While not all of the approximate 14 projects may be moving forward currently, the FEA fails to evaluate the cumulative impacts of water withdrawal to support 148,000 acres of potential renewable energy development when it is ultimately built out.

**Issue Number:** PP-CA-EAGLECREST-17-03-13

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

The FEA, however, should have considered at least six other reasonably foreseeable solar projects that have applied for approval within the Chuckwalla Valley/Palo Verde Mesa area of the DRECP’s Riverside East Solar Energy Zone because the valley and mesa are hydrologically connected, including the Desert Quartzite, Crimson Solar, Palen/Maverick, Jupiter, Io Solar, and SunPower projects.

**Issue Number:** PP-CA-EAGLECREST-17-03-14

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

BLM’s manipulation of the information to exclude from consideration the cumulative groundwater impacts from reasonably foreseeable projects while, at the same time, including a dubious assumption that that land within the Boundary Study will not be involve any new water demand, is the textbook definition of arbitrary and capricious decision-making intended to reach an preordained outcome.

**Issue Number:** PP-CA-EAGLECREST-17-03-21

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

BLM misidentified its Cumulative Effects Study Area (“CESA”) for both groundwater impacts and terrestrial impacts. This misidentification improperly reduces the analysis of the project’s effects to resources in the Riverside East Solar Energy Zone, to Corn Springs, to cultural resources within and outside the Chuckwalla Valley, and to groundwater dependent resources, including the Colorado River.

**Issue Number:** PP-CA-EAGLECREST-17-03-22

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

BLM does not account for reasonably foreseeable renewable energy projects which should be accounted for as related to both terrestrial cumulative impacts to wildlife, air quality, cultural resources, and to groundwater accounting and budgeting, including the groundwater budget developed in the FEA. Those solar projects are Jupiter, Arica, Crimson, and Io. The omission of these projects and their cumulative impacts is a flaw, a violation of NEPA, and demonstrates that the CESA was not properly developed. The Groundwater CESA should include both the Palo Verde aquifer, the Orocopia Aquifer, and the Chuckwalla Aquifer, as they all communicate and ultimately flow into the Colorado River.

**Issue Number:** PP-CA-EAGLECREST-17-06-1

**Organization:** Colorado River Indian Tribes

**Protester:** Dennis Patch

**Issue Excerpt Text:**

Not only could this project directly impact cultural resources, including artifacts, trails and landscapes, it will also facilitate the development of additional utility scale renewable projects in the area. This is because the Storage Project is designed to store renewable energy generated by other nearby projects for use during times when wind and solar are not generating power. The EA fails to adequately address this cumulative impact.

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**Summary:**

The BLM violated NEPA by failing to consider the cumulative impacts of reasonably foreseeable future renewable energy projects, which will pump groundwater from the Chuckwalla Basin and from other aquifers connected to the Colorado River. Additionally, the BLM’s cumulative effects study area is too small.

**Response:**

The BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EA (BLM Handbook H-1790-1, Section 6.8.3). The CEQ regulations define cumulative effects as “...the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions” (40 CFR 1508.7).

The BLM has complied fully with the requirements of 40 CFR 1508.7 and prepared a cumulative impact analysis based on the nature and scope of the proposed options under consideration. The cumulative impact analysis considered the effects of the planning effort when added to other past present and reasonably foreseeable (not highly speculative) Federal and non-Federal actions. The cumulative impacts section (Chapter 6 of the EA/PA) identifies all actions that were considered in the cumulative impacts analysis, and provides a basis for the cumulative impacts analysis for each affected resource.

The cumulative effects study area for water resources includes other aquifers connected to the Chuckwalla Basin, namely the Orocopia Basin and Pinto Basin Aquifers (Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA), p. 128; see also EA/PA Response to Comments, p. 362). Tables 6-1 of the EA/PA lists the currently operating and reasonably foreseeable future solar projects whose impacts would be additive to the impacts of the Eagle Crest project. Table 6-2 provides total, cumulative water use estimates for ongoing and reasonably foreseeable solar projects as well as for the Eagle Crest project.

Protesters asserted that specific solar projects should have been included in the cumulative effects analysis: Desert Quartzite, Crimson Solar, Palen/Maverick, Jupiter, Io Solar, SunPower, and Arica. Palen/Maverick was indeed included in the cumulative effects analysis (EA/PA, Table 6-1). Jupiter, Io Solar, SunPower, Arica, and Desert Quartzite are in the very early stages, with no perfected applications or Plans of Development. The BLM has not yet released a Notice of Intent for Crimson Solar. The water sources and usage of these projects are therefore unknown and the BLM is not required to speculate about these future actions (BLM Handbook H-1790-1, Section 6.8.3.4). Aside from these solar projects, protesters provided no concise statement of or rationale regarding the perceived flaws in the cumulative effects study area.

The analysis took into account the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the EA/PA enables the decision-maker to make a reasoned choice among alternatives. The BLM adequately analyzed cumulative effects in the EA/PA.

## ***NEPA – Purpose and Need***

**Issue Number:** PP-CA-EAGLECREST-17-01-33

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

Narrowing the purpose and need to such an extent that the BLM failed to adequately address a meaningful range of alternatives. The FEA only fully considers the action and no action alternative—this is insufficient.

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### **Summary:**

The BLM failed to follow the purpose and need requirements under the National Environmental Policy Act (NEPA) resulting in the purpose and need for the Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment (EA/PA) being too narrow.

### **Response:**

The BLM's purpose and need for federal action was adequate. In accordance with NEPA, the BLM shall identify the purpose and need for a proposed action (40 CFR 1502.13). The BLM has flexibility in defining the purpose and need, but should construct the purpose and need to conform to existing decisions, policies, regulation, or law (BLM Handbook H-1790-1, Section 6.2). However, the purpose and need may not be so narrow that only one alternative becomes a foreordained outcome, and may not be so broad that an infinite number of possibilities could accomplish the goals of the project.

The BLM established the purpose and need for the EA/PA, which is described in Chapter 1.2.1, to meet its land use planning mandate under the Federal Land Policy and Management Act (FLPMA). The BLM's purpose and need is to respond to the proponent's application under Title V of FLPMA (43 U.S.C., Section 1761(a)(4)) for a right-of-way grant to construct, operate, maintain, and decommission a 500-kilovolt (kV) transmission line, a water supply pipeline, and components of a pumped storage project on public lands in compliance with FLPMA, BLM right-of-way regulations (43 CFR 2800), and other applicable federal laws. The proponent's purpose for the FERC project is to provide energy, capacity, and ancillary services to the California-South sub-region of the statewide electrical grid system in both the short and long term. Consideration of alternatives that include a different project or means of energy storage do not meet the purpose and need of the environmental assessment. For example, other types of energy storage technologies would not meet either BLM's or the applicant's purpose and need. While batteries are a useful form of energy storage, they are a complement to bulk energy storage like pumped storage, not an alternative.

Finally, per the BLM NEPA Handbook (H-1790-1, Section 6.2), the purpose and need statement for an externally generated action must describe the BLM purpose and need and not an applicant's purpose and need (40 CFR 1502.13). The applicant's purpose and need may provide useful background information, but this description must not be confused with the BLM purpose and need for action.

The purpose and need provided the appropriate scope to allow the BLM to analyze a reasonable number of alternatives that represent a range of alternative approaches for managing the public lands in the planning area. Also, because the BLM's purpose and need does not include determining whether the proponents are correct in believing that the project is needed and/or to meet the needs of its customers, related alternatives were not analyzed.

## ***NEPA – Range of Alternatives***

**Issue Number:** PP-CA-EAGLECREST-17-02-5

**Organization:** Sierra Club

**Protester:** Sarah Friedman

**Issue Excerpt Text:**

Relying on inaccurate information additionally violates NEPA by precluding the range of alternatives truly considered in the EA. NEPA requires that a reasonable range of alternatives to the proposed project be considered in the environmental review process, including a ‘no project alternative.’

**Issue Number:** PP-CA-EAGLECREST-17-02-6

**Organization:** Sierra Club

**Protester:** Sarah Friedman

**Issue Excerpt Text:**

...although a ‘no project alternative’ was included, it was dropped from consideration, and alternatives which would have avoided or vastly decreased groundwater impacts, such as a water imports from the Colorado River, were dismissed without full consideration.

**Issue Number:** PP-CA-EAGLECREST-17-02-7

**Organization:** Sierra Club

**Protester:** Sarah Friedman

**Issue Excerpt Text:**

Additional alternatives which were rejected with no real analysis include co-locating the Gen-Tie.

**Issue Number:** PP-CA-EAGLECREST-17-03-3

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

The inadequate “purpose and need” discussion in the FEA directly undermines other critical parts of the NEPA review, particularly the alternatives analysis. Consistent with its NEPA obligations, BLM must “[r]igorously explore and objectively evaluate all reasonable alternatives” to the proposed project by “sharply defining the issue and providing a clear basis for choice among options by the decision-maker and the public.” 40 C.F.R. § 1502.14.

**Issue Number:** PP-CA-EAGLECREST-17-03-4

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

By failing to engage the issue of whether there is any “need” for the proposed pumped storage project, BLM also neglected its obligation to evaluate a reasonable range of alternatives that could mitigate project impacts. Indeed, the FEA, like the FERC EIS before it, considered only variations on the proposed project and the required “no action” alternative.

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**Summary:**

The Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment (EA/PA) violates NEPA by failing to consider a complete range of alternatives. Specifically, the EA/PA:

- fails to give full consideration to a no-project or no-action alternative; and
- fails to fully analyze an alternative in which the gen-tie was co-located.

**Response:**

The BLM must analyze a reasonable range of alternatives, but not every possible alternative to a proposed action: “In determining the alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. ‘Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.’” BLM NEPA Handbook, H-1790-1, at 50 (citing Question 2a, CEQ, Forty Most Asked Questions Concerning CEQ's NEPA Regulations, March 23, 1981); *see also* 40 C.F.R. § 1502.14.

Agencies are allowed to dismiss an alternative from detailed analysis. The agency must briefly discuss the reasons for having dismissed the alternative from detailed analysis (40 C.F.R. 1502.14). An alternative may be eliminated from detailed study if it is determined not to meet the proposed action’s purpose and need; determined to be unreasonable given the BLM mandates, policies, and programs; it is substantially similar in design to an alternative that is analyzed; its implementation is speculative or remote; or it is technically or economically infeasible (BLM Handbook, H-1790-1, Section 6.6.3).

In the EA/PA, the BLM discusses alternatives in Section 2. The no-action alternative is addressed in Section 2.3. In response to comments, the BLM expanded its description of the No Action Alternative in the EA. The EA/PA describes the environmental consequences of the no-action alternative in Section 4.2.

Section 2.4.1 of the EA/PA addresses alternatives that the BLM considered but eliminated from further analysis. This latter section describes alternatives to approve the right-of-way with modifications, including two alternatives that would co-locate the gen-tie line in existing utility corridors. The BLM appropriately rejected both as infeasible: one would use a utility corridor that is already full and cannot support additional gen-tie lines, and the other would cross more environmentally sensitive lands than the project as proposed.

The BLM also discussed alternatives considered but dismissed by FERC and the State Water Board, Section 2.4.2 of the EA/PA (40 C.F.R. 1508.9(b); EAs shall include “brief discussions” of alternatives). The BLM is tiering to the FERC EIS (2012) for analysis related to environmental impacts from the Project and the EIS considered a full and reasonable range of alternatives to the

Project as a whole.

The BLM Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and California Desert Conservation Area Plan Amendment dismisses alternatives from further consideration consistent with 40 C.F.R. 1502.14 and is fully compliant with NEPA.

## ***NEPA – Hard Look***

**Issue Number:** PP-CA-EAGLECREST-17-05-1

**Organization:** Individual

**Protester:** Tom O'Key

### **Issue Excerpt Text:**

It is unfair to assess the stability of the land mass in the Eagle Mountain area for fifty years of reliable integrity and should an event like the one that happened to the North boundary of the Joshua Tree National Park, it is predicable that similar potential hazards are anticipated in the Southern geologic areas, as well. Should such a seismic event create a similar outcome, the level of severity would be magnified manifold simply by multiplying the volume of water associated with such an event. All of the relevant concerns then become potential health and safety issues that need serious consideration and I join in saying that the duty of the BLM and the prudent planners of this land use is to establish sure science in this regard, which is lacking as there has not been a “hard look” into the real facts of this potential mode of failure.

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### **Summary:**

The BLM violated NEPA in not taking a hard look at the effects that seismic activity might have on a pumping project and the corresponding impacts to health and safety.

### **Response:**

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the Eagle Crest Gen-Tie Pipeline Project.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

As required under NEPA and the regulations implementing NEPA, BLM must identify and analyze the direct, indirect, and cumulative environmental effects of the proposed action and of each of the alternatives. The BLM must make a good faith effort to explain the effects that are not known but are "reasonably foreseeable" (NEPA Section 1508.8(b)).

The EA tiers to the FERC FEIS, including FERC’s analysis and disclosure of potential impacts to public health or safety. The FERC FEIS describes potential geologic hazards in the Proposed Action vicinity, including active faulting, landslides, liquefaction, and seismic settlement (FERC FEIS, pp. 52-55). It also describes the potential effects of the project’s construction and operation on seismic issues and liquefaction (FERC FEIS p. 55-59) and affirms Eagle Crest’s plans to

investigate and monitor seismic activity (FERC FEIS p. 57). The EA/PA summarizes the relevant information, including the low risk of catastrophic seismic activity, in section 3.4. It summarizes the potential impacts of seismic activity, tiering to the FERC FEIS, in section 4.1.4.

BLM's specific right-of-way (ROW) permitting authority concerns surface and subsurface resources along the gen-tie line, water supply pipeline, and components of the pumped storage project (Eagle Crest Energy Gen-Tie and Water Pipeline Finding of No Significant Impact (FONSI), p. 1-3). The BLM concluded that there would be no new public health and safety effects in the ROW for the FERC Project, beyond those effects previously identified and analyzed in the FERC FEIS (FONSI, p. 7).

The BLM took a "hard look" regarding seismic activity and considered all reasonably foreseeable potential impacts to health and safety.

## ***NEPA – Impacts Analysis – Wildlife***

**Issue Number:** PP-CA-EAGLECREST-17-01-9

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

...the BLM's inadequate NEPA review of impacts to these sensitive species including bighorn sheep (from potential loss of surface waters in surrounding wilderness areas and JTNP) also violates the terms of the CDCA Plan.

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### **Summary:**

The Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA) fails to comply with NEPA in its review of the impacts of loss of surface waters in the project's vicinity on bighorn sheep.

### **Response:**

NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a "hard look" at potential environmental impacts of adopting the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA).

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

Sections 4.1.2.3 and 6.3.2 of the EA/PA describe the impacts of the proposed project on Nelson's bighorn sheep. Fencing, increased artificial lighting, and new roads may disrupt sheep moving between water sources (EA/PA, Section 4.1.2.3). The EA/PA also discusses reservoirs in open mine pits that bighorn sheep currently use after rains. Though the project would include fences around these pits and prevent bighorn sheep access to them, the "reservoirs are small relative to distances bighorn sheep travel between watering sources" (EA/PA, p. 95). The reservoirs, when fenced, are still small enough for the sheep to migrate around should they want to go to the other side. The EA/PA also describes the cumulative impacts to Nelson's bighorn sheep, explaining that while the proposed action will indeed impact the sheep, there are no reasonably foreseeable future actions that will compound those negative effects (EA/PA, p. 137). If the transfer of about 20,000 BLM-managed acres to the National Park Service is completed, Nelson's bighorn sheep and its habitat will be further protected (EA/PA, p. 136).

Further, the BLM's analysis, consistent with FERC's, found that though the project may cause a small drawdown of the local water table, surface water quantity will not be affected because the water table is approximately 200 feet below ground level and not physically connected to surface resources (EA/PA, Section 4.1.5.1).

The information presented in the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA) enables the decision-maker to make a reasoned choice among alternatives and is therefore adequate.

The BLM complied with NEPA's requirement to analyze the environmental consequences to bighorn sheep in the EA/PA.

## ***NEPA – Impacts Analysis – Water Resources***

**Issue Number:** PP-CA-EAGLECREST-17-01-17

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

BLM repeatedly denies that there are any issues at all remaining as to impacts to water resources although it has failed to fully address federal reserved water rights which include groundwater rights. As the BLM should be aware, the Ninth Circuit recently clarified that the federal reserved water rights extend to groundwater rights as well.

**Issue Number:** PP-CA-EAGLECREST-17-01-18

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

In light of this new decision clarifying the law, BLM must reconsider whether the proposed project could impair any federal reserved water rights, including groundwater rights in the area.

**Issue Number:** PP-CA-EAGLECREST-17-01-19

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

As relevant to this matter, the reservation of groundwater at minimum applies to the groundwater underlying wilderness areas and JTNP—not only to the surface water resources. BLM must address these reserved rights in groundwater but has not.

**Issue Number:** PP-CA-EAGLECREST-17-01-20

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

Even where there is no express reservation of rights on other public lands in the CDCA, the BLM must also address the federal reserved water rights afforded to the public to protect surface water sources on all public lands affected by the proposed project.

**Issue Number:** PP-CA-EAGLECREST-17-01-23

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

While BLM is correct that the groundwater pumping is subject to state law, BLM's reliance on the earlier EIR from the state to conclude that water rights have been secured is wrong because the earlier 401 certification process did not directly address the water rights issues nor provide an adjudication of the basin.

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**Summary:**

The BLM failed to fully consider impacts to water resources because it did not analyze impacts to federal reserved water rights, including both surface and groundwater, in the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA).

**Response:**

NEPA directs that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a "hard look" at potential environmental impacts of adopting the EA/PA.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The water policy of the BLM is to acquire and perfect Federal reserved water rights necessary to carry out public land management purposes. If a Federal reserved water right is not available, then the BLM will acquire and perfect water rights through state law (BLM Manual Section 7250.1.2.A). Moreover, the BLM has no specific regulatory authority related to use of water or enforcement of water quality laws.

No water will be pumped from BLM-managed lands for use by the FERC Project. The BLM defers to the state with regard to regulation of the use of state water resources, as the legally authorized water agency for the state with the authority to control the amount of water consumed in the basin. The BLM's analysis of FERC Project groundwater impacts relies on the analysis conducted by the State Water Board (letter from T. Raml, BLM to O. Biondi, State Water Board, April 19, 2013; Hogan, 2013) (EA/PA, Section 3.5, pp. 65-66).

In the EA/PA, the BLM evaluates the potential effects of the Project's groundwater pumping on BLM resources, and includes review of the comprehensive analyses performed by FERC and the State Water Board (EA Sections 3.5; 4.1.5). Based on the FERC FEIS cumulative effects assessment, the BLM prepared an updated assessment of the cumulative effects of Project pumping in relation to other projects in the Chuckwalla Basin and connected groundwater basins (EA, p. 19). As a result, in the Response to Comments on the Draft EA/PA, the BLM explains that the project would not deplete water resources in any way that could impair *any* federal reserved water rights

(EA/PA Response to Comments, p. 407).

Additionally, the BLM has examined its groundwater analyses in EISs and Records of Decision published for three solar projects located proximate to the Project in the Chuckwalla Valley. The BLM also reviewed the NPS Joshua Tree National Park “Finding of No Significant Impact, Eagle Mountain Boundary Study Including Possible Land Withdrawal Environmental Assessment” (Dec. 12, 2016) (NPS FONSI, 2016) for its discussion of groundwater. The data and discussion contained in these separate and thorough groundwater models and impacts analyses are consistent with and support FERC’s assessment of potential groundwater impacts associated with the Project, and as a result, the BLM has concluded that the groundwater findings and conclusions in the FERC FEIS groundwater assessment are accurate.

As discussed in the Response to Comments, p. 408-409, the results of the hydro-geologic investigations performed for the Project concluded that Project pumping effects both locally and regionally would not have significant or permanent effects on the Chuckwalla Basin nor the surrounding groundwater and surface water systems. The BLM’s review of the groundwater analyses also confirms that the use of groundwater for the Project has no potential to deplete the groundwater basin in any way that could impair any federal reserved water rights for either NPS or BLM purposes, or that would interfere with any riparian area, creek, springs or other surface waters. Additionally, even though the project will not interfere with any federally reserved water rights, the BLM’s Water Rights Manual has always recognized that “[g]roundwater as well as surface water is reserved, if needed, to fulfill or protect the purposes of the reservation.” (BLM Manual Section 7250.1.3.B.4.

The BLM complied with NEPA’s requirement to analyze the environmental consequences and impacts to all applicable federal water rights in the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment.

## ***Baseline Data***

**Issue Number:** PP-CA-EAGLECREST-17-01-24

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

The EA is also deficient in failing to provide adequate baseline information. Baseline data is critical for ensuring adequate environmental review. BLM is required to “describe the environment of the areas to be affected or created by the alternatives under consideration.” 40 C.F.R. § 1502.15.

**Issue Number:** PP-CA-EAGLECREST-17-01-25

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

[T]he BLM’s lack of adequate baseline information on water resources, including groundwater conditions and likely future availability undermines the analysis in the EA.

**Issue Number:** PP-CA-EAGLECREST-17-01-3

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

The FEA fails to adequately address our and others concerns, including the NPS’ which stated “the current EA lacks strong sources of baseline site specific data and resources analysis and that the environmental documents it tiers to – the DRECP and 2014 FERC EIS – are also lacking current, site-specific, high quality information and analysis.”

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### **Summary:**

The Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment (EA/PA) fails to establish adequate baseline data.

### **Response:**

The BLM provides adequate baseline data for water resources and other resources that may be impacted in the affected environment section (Chapter 3) of the Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment (EA/PA). This section succinctly describes the existing condition and trend of issue-related elements of the human environment that may be affected by implementing the proposed action or an alternative. As recommended in BLM’s NEPA Handbook (H-1790-1), the descriptions

of the specific elements should be quantitative wherever possible, and of sufficient detail to serve as a baseline against which to measure the potential effects of implementing the action. The affected environment section of the environmental analysis is defined and limited by the identified issues (BLM Handbook H-1790-1, Section 6.7.1).

For this environmental assessment, the BLM tiered to the FERC EIS, but also developed updated and supplemented baseline data. As a result of an October 15, 2015 order in response to National Park Service (NPS) concerns regarding the adequacy of data and information used in the FERC EIS, FERC reviewed the available sources of information that staff used to prepare the EIS and found that they provided substantial information about environmental resources in the project area. FERC concluded that the information sources its staff used were the best commercially or scientifically available, and were adequate to support the NEPA process. That order was not appealed. For the EA/PA, the BLM also used literature reviews, information provided by experts in the BLM as well as outside organizations, and the professional judgement of study team members. These sources are listed in the references section (Chapter 9) of the EA/PA. In addition, the EA tiers to the FERC EIS, but includes updated and supplemented baseline data, including an updated assessment of cumulative groundwater effects in the Chuckwalla Basin in the introduction section (Chapter 1). Additional site-specific data collections and consultations have been conducted on the Project site, as described in the Dear Reader letter of the environmental assessment.

The EA/PA, therefore, contains the most current, site-specific baseline and other data available, including information cited by the NPS in the Boundary Study EA and the Final environmental impact statement on the Desert Renewable Energy Conservation Plan (DRECP).

## *Controversy*

**Issue Number:** PP-CA-EAGLECREST-17-01-35

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

In addition to this ignoring the groundwater itself, the impacts to surface resources are an issue about which there is considerable disagreement and controversy (as explained in the comments including those submitted by The Nature Conservancy on the DEA with the 25-page analysis from Andy Zdon & Associates) which we incorporate by reference here. This controversy and scientific uncertainty requires additional investigation by BLM in an EIS.

**Issue Number:** PP-CA-EAGLECREST-17-03-25

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

Relatedly, an agency's previous statements highlighting the controversy render that agency's "failure to acknowledge the 'highly controversial' nature of [its] decision" arbitrary and capricious.

**Issue Number:** PP-CA-EAGLECREST-17-03-26

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

Several federal agencies, including BLM, the National Park Service, and the Department of the Interior have repeatedly commented on the insufficiency of FERC's 2012 EIS, contending that it violates NEPA. Despite describing several impacts as "poorly characterized or unknown," BLM now attempts to argue that it need not conduct additional environmental review and no controversy exists. Indeed, BLM's current position directly contradicts its previous position that "[a]s the record demonstrates . . . there has been and continues to be considerable debate between agency staff, the proponent and various stakeholder groups regarding the 'correct number' to assign to groundwater recharge for the basin."

**Issue Number:** PP-CA-EAGLECREST-17-03-27

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

The controversy surrounding FERC's 2012 EIS has followed the project and resulted in continued significant controversy during BLM's NEPA review process. Both experts and agencies have questioned the accuracy and sufficiency of BLM's environmental review, making BLM's decision

not to prepare an EIS “arbitrary and capricious.” Wild Sheep, 681 F.2d at 1182. First, comments by Andy Zdon & Associates, Inc.<sup>8</sup> undermine the legitimacy of BLM’s groundwater recharge estimates, use of stale data, groundwater monitoring, and failure to consider impacts to the Pinto Valley Groundwater Basin within Joshua Tree. Andy Zdon, Comment Letter on Eagle Crest Project FERC EIS 2 (Oct. 29, 2016). Second, BLM also fails to acknowledge Godfrey, Ludwig and Salve’s (2012) overview of Chuckwalla Valley Basin’s estimated recharge and their critical review of the previous Eagle Crest studies. Third, the EPA has rated the FERC Eagle Crest EIS, the document to which the FEA is tiered, with an abysmal rating of EO 2, meaning there are grave deficiencies with the document. Fourth, the National Park Service has raised and reiterated resource concerns about impact to Joshua Tree National Park and stated they believe the correct compliance document should be an EIS.

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**Summary:**

The BLM violated NEPA because it did not prepare an Environmental Impact Statement (EIS), despite the high degree of controversy among experts over the nature of the project’s effects on groundwater resources.

**Response:**

When determining whether to prepare an EIS instead of an EA, the BLM must determine the significance of the effects of the proposed action. To determine whether the effects are significant enough to warrant preparation of an EIS, the BLM must consider both the context and intensity of the action and the effects (BLM Handbook H-1790-1, p. 70). One of the CEQ’s considerations for evaluating intensity of effects is the degree to which the effects are likely to be highly controversial (40 CFR 1408.27(b)(4)). In this context, “controversy” means that there is disagreement about the nature of the effects, not merely public opposition to a project or preference for a different alternative. In particular, substantial disagreement among the scientific community regarding the nature of effects indicates controversy. The BLM decision-maker uses his or her discretion to determine the degree of controversy (BLM Handbook H-1790-1, p. 71).

The EA/PA tiers to the FERC Environmental Impact Statement (2012) (FERC FEIS), which analyzes the effects of the entire Eagle Mountain Pumped Storage Hydroelectric Project/FERC Project, including the ROW and FERC Project components on federal lands. The tiered information is incorporated by reference throughout the EA/PA.

As discussed in the Response to Comments, p. 305, an EA is appropriate for an action with “significant effects” if the EIS to which the EA is tiered fully analyzed those significant effects (also see BLM Handbook H-1790-1, p. 27). Based on the analysis of potential environmental impacts in the EA/PA, the BLM believes that the Proposed Action is consistent with the level of impacts previously identified and analyzed in the FERC FEIS. No new and significant impacts were disclosed during completion of environmental analysis for the Proposed Action at issue.

Comments by the Environmental Protection Agency (EPA), and a request for rehearing by the National Park Service (NPS) do not make the Eagle Crest Gen-Tie Project “one of the most controversial projects in the entire California Desert.” Likewise, NPS’s comment on the draft EA requesting that the BLM complete an EIS does not indicate a high level of controversy. As BLM’s guidance notes, “there will always be some disagreement about the nature of the effects for land

management actions...” (BLM Handbook H-1790-1, Section 7.3).

In its preparation of its EA/PA, the BLM has taken a hard look at the FERC FEIS analyses of groundwater, including FERC’s responses to comments on the FEIS. The BLM has also examined groundwater analyses in EISs and Records of Decision published for three solar projects located proximate to the Project in the Chuckwalla Valley. The data and discussion contained in these separate and thorough groundwater models and impacts analyses are consistent with and support FERC’s assessment of potential groundwater impacts associated with the Project, and BLM has concluded that the groundwater findings and conclusions in the FERC FEIS groundwater assessment remains accurate (Response to Comments, p. 406).

Additionally, the use of groundwater to generate electricity in connection with a pumped storage project is a lawful beneficial use of water under State law. Under California Code of Regulations Title 23, Section 662, water for power use is included as a beneficial use of state water. The water will be pumped entirely from wells on private land, pursuant to a water right under State law, and there will be no pumping from wells on federal lands administered by BLM.

Further, on May 8, 2013, the BLM met with representatives from FERC at a public meeting to resolve the BLM’s comments on FERC’s FEIS. At that meeting, the two agencies were able to resolve the BLM’s concerns with FERC’s groundwater analysis and other BLM comments. While the Department of the Interior, on behalf of the NPS, later sought rehearing of FERC’s License Order, FERC responded to the Department’s request for rehearing. The Department did not further challenge FERC’s findings, found in its Order on Rehearing, in Federal court. Thus, there is no longer any controversy over FERC’s License Order between the Department and FERC.

Finally, BLM has reviewed the study, published on June 1, 2017 (after the publication of the final Environmental Assessment and Proposed Plan Amendment), that modeled impacts to groundwater quantity by utility-scale solar projects in the Chuckwalla Basin.<sup>2</sup> It projects that the Eagle Mountain pumped storage project will withdraw more water than the assumed recharge. However, the study makes assumptions regarding levels of groundwater use for projects that have not been and may not be built (Desert Harvest) or that have updated plans and will now use much less water (Palen). The BLM continues to rely on the State Water Resources Control Board (SWRCB) as the experts on groundwater in the Chuckwalla Basin. The SWRCB issued a Clean Water Act Water Quality Certification and License that requires the Licensee to monitor groundwater for several conditions, including whether the Project operations will have a permanent impact on the Chuckwalla Valley Groundwater Basin (SWRCB Water Quality Certification for Federal Permit or License, p. 31). FERC and BLM have also conditioned their authorizations on the impact to the groundwater basin. Monitoring wells will be in place and monitored to determine the impacts that the reservoir filling and facility operation will have on groundwater recharge (EA/PA, Table 1-1 and pp. 108-109; see also Groundwater Level Monitoring Plan and Aquifer Testing Plan).

While there is some disagreement about the nature of the effects of the Eagle Crest Gen-Tie project on groundwater resources, this disagreement does not constitute a high level of controversy and the

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<sup>2</sup> Shen, C.; Fang, K.; Ludwig, N.; Godfrey, P.; and Doughty, C. A. 2017. Impact of Water Use by Utility-Scale Solar on Groundwater Resources of the Chuckwalla Basin, CA: Final Modeling Report. Lawrence Berkeley National Laboratory.

BLM appropriately tiers its EA to the FERC FEIS.

## ***FLPMA***

**Issue Number:** PP-CA-EAGLECREST-17-01-32

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

While BLM has data and a recent inventory of many public land resources from the DRECP process, the DRECP process explicitly excluded any inventory of BLM or other Department of the Interior (DOI) groundwater resources. Because the BLM ignored impacts to these critical public lands resources, both reserved groundwater rights for wilderness and park lands, and unreserved BLM groundwater rights, the BLM is violating FLPMA's inventory provision.

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### **Summary:**

The BLM violated FLPMA by not conducting an inventory for groundwater resources that would inform the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA).

### **Response:**

Section 201(a) of FLPMA requires that the BLM "prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values" and that "this inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." Section 202(c)(4) of FLPMA requires that "in the development and revision of land use plans, the Secretary shall...rely, to the extent it is available, on the inventory of the public lands, their resources, and other values[.]"

There will be no pumping on BLM-managed lands for use by the Eagle Crest Gen-Tie Pipeline project. An inventory of groundwater resources on BLM-managed lands would thus not inform the EA/PA. The BLM defers to the state of California with regard to regulation of state water resources, as it is the legally authorized water agency with authority to control the amount of water consumed in the basin (EA/PA, p. 65-66).

The Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment is consistent with FLPMA.

## ***FLPMA – Unnecessary and Undue Degradation***

**Issue Number:** PP-CA-EAGLECREST-17-01-2

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

The Proposed Plan Amendment would violate FLPMA for several reasons because it will contribute to the degradation of resources and their values within the Joshua Tree National Park and may impair reserved water rights for the park and wilderness areas...

**Issue Number:** PP-CA-EAGLECREST-17-01-15

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

The Center protests that the proposed plan amendment is not consistent with FLPMA which requires BLM to prevent unnecessary or undue degradation of public lands.

**Issue Number:** PP-CA-EAGLECREST-17-01-16

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

Just as for a mining project, BLM regulations provide that in approving a right of way BLM must prevent unnecessary and undue degradation to public lands. 43 C.F.R § 2801.2 (b). BLM cannot approve a plan amendment for any project, even if previously approved by FERC, that would cause UUD including the proposed Plan Amendment and ROW for this pump storage project which will significantly deplete groundwater resources including federal reserved groundwater rights for wilderness areas and JTNP and will harm surface resources, wildlife, and plants that must be protected on public lands.

**Issue Number:** PP-CA-EAGLECREST-17-02-10

**Organization:** Sierra Club

**Protester:** Sarah Friedman

### **Issue Excerpt Text:**

FLPMA requires that “[i]n managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b).

**Issue Number:** PP-CA-EAGLECREST-17-02-11

**Organization:** Sierra Club

**Protester:** Sarah Friedman

**Issue Excerpt Text:**

BLM has an independent obligation under FLPMA and the DRECP to ensure that any project or ROW that it approves that will pump groundwater from basins in which it owns lands (BLM manages approximately 80% of the lands in the Chuckwalla Basin) does not cause or contribute to overdraft, exceeding perennial or safe yield, irrespective of whether the pumping itself will occur on public or private lands. In the Chuckwalla Basin, BLM's role with respect to groundwater is especially critical as BLM has identified important groundwater dependent ecological resources in the Palen Lake area (sensitive plant assemblages in the Palen-Ford Playa Dunes ACEC)<sup>27</sup> that are likely to be affected by pumping from the basin.

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**Summary:**

The BLM violates FLPMA by failing to prevent unnecessary and undue degradation of public lands, particularly with respect to groundwater. Specifically, the Eagle Crest Gen-Tie Pipeline Project and California Desert Conservation Desert Plan Amendment (EA/PA) may cause or contribute to overdraft, which, in turn, will negatively impact sensitive species and the Federal reserve water rights of wilderness areas and the Joshua Tree National Park.

**Response:**

Section 302(b) of FLPMA requires that "in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." Additionally, the BLM's water policy is to acquire and perfect Federal reserved water rights necessary to carry out public land management purposes. If a Federal reserved water right is not available, then the BLM will acquire and perfect water rights through state law (BLM Manual Section 7250.1.2.A). The BLM has no specific regulatory authority related to use of water or enforcement of water quality laws.

Congress recognized that through the BLM's multiple-use mandate, there would be conflicting uses and impacts on the public land. The BLM does not consider activities that comply with applicable statutes, regulations, and BLM policy—and include appropriate mitigation measures—to cause unnecessary or undue degradation.

Here, the Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA) provides for the balanced management of the public lands in the planning area. In developing the EA/PA, which tiers to FERC's FEIS, the BLM fully complied with its planning regulations at 43 CFR 1610, the requirements of NEPA, and other statutes, regulations and Executive Orders related to environmental quality.

With respect to federal reserved water rights, the BLM's EA/PA discusses groundwater issues and effects. FERC and the State Water Board (State Water Board FEIR p. 3.3-33) found that in the first 3 to 4 years of FERC Project operation, the water table is expected to drop due to the large amount

of pumping required for the initial fill of the lower reservoir. However, in the longer term, the effect of the groundwater withdrawal by the FERC Project is not expected to cause the aquifer to be overdrafted nor cause the groundwater table to decline below maximum historical drawdown levels. As detailed in the BLM's Response to Comments, the BLM's review of the groundwater analyses also confirm that the Project's use of groundwater for the Project has no potential to deplete the groundwater basin in any way that could impair any federal reserved water rights for either NPS or BLM purposes, or that would interfere with any riparian area, creek, springs or other waters (EA/PA Response to Comments, p. 407).

Based on the FERC FEIS cumulative effects assessment, the BLM prepared an updated assessment of the cumulative effects of the Project's pumping in relation to other projects in the Chuckwalla Basin and connected groundwater basins (EA/PA, p. 19). Consistent with the FERC FEIS's findings, the BLM assessment concludes that although the Project's water use may cause a relatively small drawdown of the local water table, this reduction has no potential to affect overlying vegetation or habitat, nor any surface waters or springs. The drawdown of the water table will not affect these surface resources because the water table is approximately 200 feet below ground level, and is not physically connected to any of these resources (EA, Section 4.1.5). For those reasons, BLM also concludes that the Project's use of groundwater has no potential to deplete the groundwater basin in any way that could impair any federal reserved water rights for either NPS or BLM purposes, or that would interfere with any riparian area, creek, springs or other waters (Response to Comments p. 407). Further, even though the project will not interfere with any federally reserved water rights, the BLM's Water Rights Manual has always recognized that "[g]roundwater as well as surface water is reserved, if needed, to fulfill or protect the purposes of the reservation." (BLM Manual Section 7250.1.3.B.4. Additionally, the BLM is requiring mitigation for potential well interference measures as part of ROW and EA/PA approval as discussed in the Response to Comments, pp. 413-416.

Additionally, Article 403 of the FERC License requires Eagle Crest to develop a groundwater monitoring plan, with monthly monitoring during the first 4 years of pumping (i.e., the initial fill period); quarterly monitoring for the next 7 years, which should capture the maximum water table decline; and semi-annual monitoring thereafter, for the term of the License when changes to groundwater levels are expected to be small. Article 404 of the license requires groundwater quality monitoring in the vicinity of the FERC Project's reservoirs, desalination ponds, seepage recovery wells, and water supply wells over the term of the License (FERC License Section 76). Please see the BLM EA/PA, Section 4.1.5.4, pp. 112-114 for more details regarding the Groundwater Quality Monitoring Plan.

The BLM has met its obligation under FLPMA to prevent unnecessary and undue degradation of BLM-managed lands. The EA/PA will not result in unnecessary or undue degradation of the lands as set forth in Section 302(b) of FLPMA.

## ***Mitigation***

**Issue Number:** PP-CA-EAGLECREST-17-01-14

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

In general, in order to show that mitigation will reduce environmental impacts to an insignificant level, BLM must discuss the mitigation measures “in sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Communities, Inc. v. Busey*, 956 F.2d 619, 626 (6th Cir. 1992). Simply identifying mitigation measures, without analyzing the effectiveness of the measures, violates NEPA. Agencies must “analyze the mitigation measures in detail [and] explain how effective the measures would be...A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev’d on other grounds*, 485 U.S. 439 (1988).

**Issue Number:** PP-CA-EAGLECREST-17-04-2

**Organization:** Desert Protection Society

**Protester:** Stephan Volker

### **Issue Excerpt Text:**

Just as BLM failed to analyze “the effectiveness of the mitigation measures” in South Fork, it violated NEPA here by failing to provide – in the FEIS or its EA – a discussion of the proposed mitigation measures in “sufficient detail to ensure that environmental consequences have been fairly evaluated.”

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### **Summary:**

The BLM violated NEPA by failing to provide a detailed analysis of the effectiveness of mitigation measures regarding the evaluation of environmental consequences.

### **Response:**

NEPA requires that the BLM include a discussion of measures that may mitigate adverse environmental impacts (40 CFR 1502.14(f), 40 CFR 1502.16(h)). Potential forms of mitigation include: (1) avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20).

The Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California

Desert Conservation Area Plan Amendment (EA/PA) analyzes and adopts mitigation measures that avoid some potential future impacts altogether, and minimizes other potential future impacts by restricting certain uses on the public lands. The BLM did not simply list mitigation measures; rather, it provides specific plans including analysis that the project must adhere to in order to mitigate any negative effects over time (EA/PA, pp. 14-17).

#### *Air Quality*

Mitigation measures for air quality are discussed in the EA/PA (p. 83). FERC License 423 for the project requires that an Air Quality Monitoring and Protection Plan be prepared, which will be filed with the Commission for approval within 18 months of the issuance of the license. The plan was prepared in consultation with the South Coast Air Quality Management District and the National Park Service (NPS). Please refer to the BLM EA/PA, pp. 83-85 for detailed information.

#### *Geology and Soil Resources*

As noted in the EA/PA, the FERC EIS (pp. 46-63) discusses potential environmental impacts to geology and soil resources. The BLM's EA/PA discusses 10 specific mitigation measures regarding these resources in accordance with FERC License Article 302 (pp. 101-2). The EA/PA also outlines residual impacts after mitigation implementation, in the form of FERC's Project Erosion and Sediment Control Plan as well as a Storm Water Pollution and Prevention Plan and a Monitoring Plan contained in the FERC FEIS, p. 61.

#### *Hydrology and Water Quality*

The BLM's EA/PA summarizes the potential environmental impacts to surface and ground water quality discussed by FERC in the FEIS on pp. 83-88 (surface water) and pp. 96-109 (groundwater), including mitigation measures for these resources.

Regarding surface water mitigation measures, FERC License 309 requires Eagle Crest to perform an Inflow Design Flood and Hazard Classification study for surface water to include a number of evaluations. As stated in the BLM EA/PA, "To ensure that any design changes would not increase the environmental effects of releasing excess water from the reservoirs, the design flood determination would be included in a Supporting Design Report, which will be reviewed and commented on by the Commission prior to start of construction. A likely dam break analysis and analysis design of flood conditions will be included in the Emergency Action Plan, which is required to be submitted at least 60 days prior to initial filling of the reservoir in accordance with Part 12, Subpart C of the Commission's regulations" (EA/PA, p. 104). Residual impacts after the implementation of mitigation measures to surface water are discussed in the EA/PA on p. 104. The EA/PA (p. 110) also discusses FERC's requirement of Eagle Crest to conduct site investigations to determine any potential water quality impacts associated with ore-body contact (FERC License 401). Additionally, FERC License 402 requires Eagle Crest to test for acid producing potential and if necessary dispose of it outside the reservoir, and FERC License 406 was issued to address water quality as outlined in the BLM EA/PA, pp. 110-112. Also refer to the EA's Response to Comments, pp. 335-337, which specifies FERC's requirement to implement a full range of mitigation measures to protect water quality from acid mine drainage, some of which are mandated to be completed as part of the final design and construction of the project (EA/PA, Table 1.1).

Regarding groundwater mitigation measures, FERC concluded that the construction, monitoring and mitigation measures proposed for the Eagle Crest project are "likely to be sufficient to control

potential reservoir seepage effects on groundwater levels in the Proposed Action Area” (FERC FEIS, p. 102). FERC License 405 requires FERC to use liners in project reservoirs to control seepage and to conduct testing on aquifers to confirm the expectation of characteristics such as seepage are expected. As such, Eagle Crest consulted with the State Water Board, BLM, NPS, the Metropolitan Water District and Kaiser to develop the Aquifer Testing Plan. Additionally FERC requires development of a Groundwater Quality Monitoring Plan (Article 404) and protection of groundwater at the desalination pond locations (Article 406). New monitoring wells will be established to ensure pumping levels remain in the historical range of pumping in the Chuckwalla Aquifer, and that water tables remain above minimum historical levels. Continuous monitoring will take place as discussed in the BLM EA/PA, p. 108.

The BLM complied with NEPA by including a discussion and analysis of a number of measures that may mitigate adverse environmental impacts to the extent appropriate in the EA.

## *Special Status Species*

**Issue Number:** PP-CA-EAGLECREST-17-01-10

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

### **Issue Excerpt Text:**

The preferred alternative would violate BLM's wildlife habitat and special status species management policies with regard to conservation of the threatened desert tortoise through direct impacts to habitat and increased predation—a major threat to survival of young animals. It would also violate BLM's wildlife habitat and special status species management policies with regard to conservation desert bighorn sheep, a BLM-designated sensitive species, through loss of surface water resources in springs throughout the area and potentially disrupt movement corridors of bighorn and other terrestrial species through fencing and fragmentation of habitat.

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### **Summary:**

The Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment (EA/PA) violates the BLM's Special Status Species policy because it would allow increased predation of desert tortoise and loss of surface water resources in the project area that are critical to desert bighorn sheep.

### **Response:**

A primary objective of the BLM Special Status Species policy is to initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of the species under the Endangered Species Act (ESA) (BLM Manual Section 6840.02.B). However, the BLM does not have the authority to determine if listing under the ESA is warranted for a particular species, or if the management outlined in a project avoids the need for listing of Bureau sensitive species under the ESA.

### *Desert Tortoise:*

FERC conducted formal consultations with the USFWS regarding the effects of the project on the desert tortoise. In its 2012 Biological Opinion (BO), the USFWS determined that the Project is not likely to jeopardize the continued existence of the desert tortoise or destroy or adversely modify designated critical habitat, but that it could result in incidental take of desert tortoise (USFWS, 2012 BO, p. 48). In 2016, contractors conducted desert tortoise surveys in the Central Project Area and the affected BLM lands, implementing a detailed work plan developed in consultation with BLM biologists and USFWS. The results confirmed earlier projections that no tortoise habitat was expected in the Central Project Area. The survey further identified very low tortoise densities on the affected BLM lands, and low numbers of tortoises at the brine ponds outside the Central Project Area (Appendix B, p. 21).

To minimize the impact of incidental take of desert tortoises, the USFWS BO included an

incidental take statement with “reasonable and prudent measures” to minimize incidental take and “terms and conditions” to implement those measures. These measures require Eagle Crest to: (1) conduct surveys for desert tortoises in the Central Project Area prior to any land-disturbing activities; (2) employ an authorized biologist to capture, handle, or relocate tortoises; and (3) design and construct exclusion fencing in construction areas and around Project facilities to minimize risks of injury and mortality to tortoises and other wildlife. The FERC License requires these measures in Article 415 of the FERC License. The FERC License Article 416 also requires a Desert Tortoise Habitat Mitigation Plan to be prepared in consultation with BLM, NPS, FWS, and the California Department of Fish and Wildlife (CDFW) (EA Response to Comments, p. 377). After the 2016 survey identified tortoise habitat at the location of the project’s planned brine ponds, the BLM reinitiated Section 7 ESA consultation with the USFWS and FERC and determined that the brine ponds would be relocated to a highly disturbed area of negligible desert tortoise habitat value (EA/PA Dear Reader Letter, p. 5). The BLM will complete that Section 7 ESA consultation and expects the USFWS to issue a Biological Opinion before the BLM makes a final decision on whether to amend the CDCA Plan and issue the ROW.

The applicant’s Predator Monitoring and Control Plan, required by FERC License Article 417, includes regular surveys of predators and for depredated tortoises and provides that the applicant will notify relevant agencies of any depredated tortoises (Revised Predator Monitoring and Control Plan, Section 3). If this monitoring indicates that the predator control measures (outlined in Section 4 of the Predator Monitoring and Control Plan) are not fully effective, the advisory team consisting of the applicant’s and agency staff will use an adaptive management approach to change the control measures (Revised Predator Monitoring and Control Plan, p. 10).

*Bighorn Sheep:*

The FERC FEIS and information collected by the BLM for the Eagle Mountain Landfill EIS scoping in 2014 shows occasional use of the existing mine pits in the project area by bighorn sheep: “[a]fter rain events, water collects in the bottom of the pits which allows them to serve as a temporary watering site” (NPS FONSI 2016, p. 29). The fences the applicant proposes to install around these reservoirs would exclude bighorn sheep, but sheep traveling through the Central Project Area are most likely to use nearby undisturbed habitat (EA/PA, p. 95). The pits are not part of the primary migration corridor for bighorn sheep moving between the Eagle and Coxcomb mountains (NPS FONSI 2016, p. 29).

FERC concluded that Project construction activities would not create a migratory barrier, and effects of Project construction on Nelson’s bighorn sheep populations would be minor and temporary (EA/PA, p. 95, citing FERC FEIS, p. 160; see also NPS Final 2016 EA, p. 191). To reduce the effects of Project construction on bighorn sheep movement, Eagle Crest’s desert tortoise exclusion fencing along Project roads would be limited to 3 feet in height to allow bighorn sheep to pass through the site and thereby avoid interfering with bighorn sheep movement (EA/PA, p. 95). These fences would be removed following construction. The Wildlife Protection Plan, required by FERC License Article 414 and developed by Eagle Crest in consultation with the NPS, BLM, USFWS, and CDFW, describes the fencing plan. FERC approved the Wildlife Protection Plan on June 6, 2016. See EA/PA, Table 1-1.

The Biological Technical Advisory Team, which is required by the FERC License, consisting of representatives of the USFWS, NPS, CDFW, and BLM, will be consulted throughout the Project

License period regarding implementation of mitigation for bighorn sheep and other sensitive species.

Based on the science considered and impacts analysis presented in the Eagle Crest Gen-Tie Pipeline Project, the mitigation proposed satisfies the BLM's intent to manage the public lands in a manner that avoids the need for listing of Bureau sensitive species under the ESA. The management proposed complies with BLM's Special Status Species policy by not allowing increased predation of the desert tortoise nor jeopardizing water resources critical to bighorn sheep.

## *Climate Change*

**Issue Number:** PP-CA-EAGLECREST-17-01-27

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

The need to address persistent drought, increased temperatures, and other changed circumstances due to climate change that were not addressed in the FERC EIS requires a supplemental EIS not just an EA.

**Issue Number:** PP-CA-EAGLECREST-17-04-1

**Organization:** Desert Protection Society

**Protester:** Stephan Volker

**Issue Excerpt Text:**

While the EA acknowledges the high evaporation rate when discussing surface water quality, it fails to consider how increases in temperature will increase evaporation as it relates to groundwater recharge. EA 66; see also EA Response to Comments 354 (stating that “[e]vaporation rates may increase as a result of warmer air temperature” when discussing the Project’s reservoirs, but no such discussion for groundwater recharge). Instead, the EA concludes that even with climate change “groundwater recharge is not anticipated to change; and so water supply for the project will be stable.” EA Response to Comments 310, 354; FONSI at 5-6. This conclusion does not follow from the facts and therefore BLM must prepare an EIS that analyzes this potentially significant impact.

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**Summary:**

The Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment fails to address climate change particularly with respect to drought, higher temperatures and air quality, a consequent increase in evaporation rates, and the resulting effects on groundwater recharge.

**Response:**

NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment (EA/PA).

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and

alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM considers and analyzes the potential impacts from greenhouse gas emissions and climate change in accordance with measures taken by FERC, as discussed in Section 4.1.1 of the Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment (EA/PA).

Additionally, the Response to Comments address drought, higher temperatures, increased evaporation rates and short-term effects on groundwater. Here, the BLM addressed each substantive comment raised and complied with climate change analysis requirements in developing the EA/PA. As discussed in the Response to Comments pp. 351-352, because mitigation for construction emissions is required by FERC License Article 423, which required Eagle Crest to prepare an Air Quality Monitoring and Protection Plan, construction activities are not expected to exceed the South Coast Air Quality District (SCAQMD) CEQA threshold for emissions of nitrogen oxides. The Plan was prepared in consultation with the SCAQMD and the National Park Service (NPS). Following the rules and procedures outlined in License Article 423 will meet air quality standards.

The BLM EA/PA discusses how the FERC Project operation would have minimal direct effects on air quality. “The indirect effects could be beneficial if power from the pumped energy storage project replaces or supplements fossil-fueled peaking generation facilities (FERC FEIS p. 265). During operations, air pollutant emissions associated with Proposed Action maintenance activities would be minimal, and would not exceed SCAQMD CEQA thresholds for operation. Table 4-3 provides the estimated operation-related annual emissions associated with maintenance of the Proposed Action (FERC EIS p. 265)” (EA/PA, Section 4.1.1, p. 82).

In regards to groundwater estimations and evaporation rates, the BLM EA/PA, in Section 3.1.1, discusses how the climate in the Project area is anticipated to become warmer in future decades, but that precipitation is not anticipated to change. Because of this, groundwater recharge is not anticipated to change, resulting in the water supply for the project remaining stable. Evaporation rates could increase as a result of warmer air temperature, which could potentially increase the need for make-up water supplies.

The BLM complied with climate change analysis requirements in developing the Eagle Crest Energy Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Plan Amendment.

## ***Tribal Consultation***

**Issue Number:** PP-CA-EAGLECREST-17-06-2

**Organization:** Colorado River Indian Tribes

**Protester:** Dennis Patch

### **Issue Excerpt Text:**

CRIT also protests BLM's approval of the Eagle Crest Project because BLM failed to consult with CRIT as required under Section 106 of the National Historic Preservation Act. The Response to Comments document claims that BLM completed Section 106 consultation for this project in 2015, two years ago. But BLM had not even issued the EA for this project at that time, and thus could not have completed consultation. Moreover, on September 1, 2015, CRIT wrote to Teresa A. Raml, requesting certain information and documentation related to the project. Our records do not reflect that BLM provided any of the requested information. Nor did BLM consult with CRIT's Tribal Council regarding this project, as required by Section 106.

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### **Summary:**

The BLM violated Section 106 of the National Historic Preservation Act (NHPA) by:

- asserting that it had completed tribal consultation before the EA draft was released;
- failing to consult with the Colorado River Indian Tribes; and
- not responding to an information and document request from a tribe.

### **Response:**

The National Historic Preservation Act (NHPA) requires federal agencies, as part of the NHPA Section 106 process, to consult with Indian tribes that attach religious and cultural significance to historic properties potentially affected by an undertaking (54 U.S.C. 302706). The regulations implementing NHPA Section 106 requires federal agencies to make a "reasonable and good faith effort" to identify historic properties within the area of potential effect in part through consultation with Indian tribes (36 CFR 800.4(b)). The BLM's tribal consultation efforts are broader than the identification of historic properties. "The NHPA Section 106 standard only applies to the agency's effort to consult with Indian tribes regarding historic properties of religious and cultural significance in the context of NHPA Section 106 *and not the other specific and general authorities that require tribal consultation on a government-to-government basis*" (emphasis added; BLM Manual 1780 Tribal Relations, H-1780-1, A2-1).

Tribal governments may reach agreement with a federal agency through the Section 106 process by establishing a Memorandum of Agreement (MOA) or Programmatic Agreement (PA). Execution of the agreement by a designated tribal representative and the agency (along with filing the agreement with the Advisory Council on Historic Preservation, and agency compliance with the terms of the agreement, would complete the Section 106 process.

In August 2015, BLM completed the NHPA Section 106 consultation process for the right-of-way (ROW) and PA with interested Tribes, including the Colorado River Indian Tribe (CRIT) and the State Historic Preservation Office (SHPO). This included an invitation to consult on the proposed action by letter dated August 22, 2013, as well as a review of the existing Historic Properties Management Plan and Programmatic Agreement with SHPO for the FERC-licensed Project. The

invitation included information about the application submitted by Eagle Crest Energy for a ROW grant, explained the FERC role in the overall FERC Project, further explained the BLM's role in the environmental review process for the ROW grant application, and invited Tribes to consult in a Government-to-Government manner pursuant to Executive Order (EO) 13175, the Executive Memorandum of April 29, 1994, and other relevant authorities laws and regulations including Section 106 of the NHPA. The letters requested assistance in identifying any issues or concerns about the Proposed Action, including the identification of places of cultural or religious significance that might be affected by the Proposed Action.

The BLM held a Section 106 consulting parties meeting for all consulting parties, including the 15 invited Tribes, on September 26, 2013. The purpose of the meeting was to further discuss the Proposed Action and the BLM's role in the process. Representatives from the Colorado River Indian Tribes and the Fort Yuma Quechan Tribe attended the meeting (EA/PA, Section 7.2.2, pp. 146-148).

On July 30, 2015, BLM issued the Agency Determinations and Findings under NHPA Section 106. These findings were sent to all consulting parties for consultation, including tribes and SHPO. The SHPO concurred with BLM's Agency Determinations and Findings on August 21, 2015.

The BLM acknowledges the traditional importance and value of traditional cultural properties (TCPs) and other resources of cultural or religious significance to the Tribes as an integral part of Tribes' history and cultural continuity. To date, the BLM has not received information regarding the presence of TCPs or other resources of cultural or religious significance in the Proposed Action vicinity from the Tribes.

As discussed in the EA/PA, as part of its consultation under Section 106 of the NHPA, the American Indian Religious Freedom Act, and Executive Order (EO) 13175, the BLM will continue to consult with all involved and interested Tribes, including the CRIT, in a Government-to-Government manner throughout the life of the project. The Historic Properties Management Plan will also provide for continuing tribal participation and proper treatment of prehistoric human remains, should any be found during construction. The BLM may also require the development and implementation of a Long Term Management Plan for cultural resources. To encourage consistency in implementation, these conditions may be incorporated into any Historic Properties Management Plan or other cultural resources compliance plans developed by FERC in accordance with the Programmatic Agreement for their undertaking. The BLM will review any cultural resources compliance plans, and approve them for use on the BLM undertaking.

The BLM received the Colorado River Indian Tribes' September 1, 2015 letter requesting information on the Eagle Crest project and plan amendment. The BLM responded via email on September 15, 2015 to the request for cultural resources field inventories. It further responded to the CRIT's request for the EA, a description of the project, and the cultural compliance plans when it completed and released the EA in 2016.

The BLM complied with all requirements under the Section 106 review process. In addition, the BLM has consistently consulted with the tribes through the Government-to-Government consultation process, including the CRIT for the FERC / Eagle Mountain Project. Tribal consultation is not considered complete until the Decision Record is issued.

## *Consistency*

**Issue Number:** PP-CA-EAGLECREST-17-01-4

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

The BLM was required to ensure that the proposed plan amendment would be consistent with the CDCA Plan as a whole but did not. *ONRCF v. Brong*, 492 F.3d 1120, 1025 (9th Cir. 2007) (“Once a land use plan is developed, ‘[a]ll future resource management authorizations and actions...shall conform to the approved plan.’ 43 CFR § 1610.5-3(a).”). The proposed Plan Amendment is not consistent with the CDCA Plan as adopted and amended by the DRECP or the CDCA Plan before the DRECP amendments. If as BLM asserts (but the Center does not concede), the project is not subject to the DRECP, then it must be analyzed under the CDCA Plan – BLM has failed to show consistency with the CDCA Plan and BLM’s duties thereunder.

**Issue Number:** PP-CA-EAGLECREST-17-01-5

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

The Plan Amendment process requires [the following]:

Determine if alternative locations within the CDCA are available which would meet the applicant’s needs without requiring a change in the Plan’s classification, or an amendment to any Plan element.

Determine the environmental effects of granting and/or implementing the applicant’s request.

Evaluate the effect of the proposed amendment on BLM management’s desert- wide obligation to achieve and maintain a balance between resource use and resource protection. CDCA Plan as amended at 121 (emphasis added). Here nothing in the documents shows that BLM has evaluated the amendment in the context of its desert-wide obligation to achieve and maintain a balance between resource use and resource protection or determined if alternative locations are available which would meet the applicant’s needs without requiring a change in the Plan’s classification, or an amendment to any Plan element. Indeed, BLM did not consider any alternative locations for the pipelines and gen-tie lines and other project components on BLM lands that would reduce impacts by using existing corridors and roadways

**Issue Number:** PP-CA-EAGLECREST-17-02-2

**Organization:** Sierra Club

**Protester:** Sarah Friedman

**Issue Excerpt Text:**

There are significant conflicts between the Plan Amendment and the DRECP. The ROW proposed

by BLM is significantly larger than the size of the project boundary that was analyzed by FERC, including nearly twice the amount of BLM public land.

**Issue Number:** PP-CA-EAGLECREST-17-03-1

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

As discussed below, however, the land area affected by the proposed ROWs and Plan Amendment is considerably larger than the area covered by the FERC license and that expanded area is fully subject to the DRECP standards and limitations.

**Issue Number:** PP-CA-EAGLECREST-17-03-18

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

Here, significant changes to the footprint of the Proposed Action and the encumbrance of public lands above the amount specified in the FERC EIS to which the FEA tiers constitute changed circumstances requiring additional environmental review. This expansion is inconsistent with the new DRECP and conservation designations within that plan, including Areas of Critical Environmental Concerns and National Landscape Conservation System lands. Contrary to the suggestion in the FEA, these expanded lands are not part of any “valid existing rights” created by the FERC license and must be fully addressed for compatibility with the DRECP. The appropriate way to address such a significant change in a project is through the issuance of a Supplemental EIS; mere “tiering” to the FERC EIS without supplemental analysis of these changes is improper.

**Issue Number:** PP-CA-EAGLECREST-17-03-23

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

The proposed Plan Amendment is necessary here because the grant of ROWs would otherwise be inconsistent with the newly-adopted DRECP. BLM claims that the Plan Amendment is permissible because the DRECP expressly accommodates “valid existing rights,” including the FERC license for the Eagle Crest pumped storage project. BLM’s statements on this issue are misleading for two reasons.

First, BLM’s statements in the FEA documents suggest that Eagle Crest has a “right” to obtain the ROWs it has requested, which is not correct. The DRECP merely recognizes that its newly-adopted planning requirements and prohibitions will not trample on ongoing or previously approved activities. The “valid existing rights” language in the DRECP cannot and does not override the statutory requirements of FLPMA Title V, which sets forth the conditions under which BLM has the discretionary authority to grant ROWs.

Second, as discussed above, the requested ROWs covered by the FEA are significantly larger than the project footprint covered by the FERC license. Thus, even under the express terms of the DRECP, the proposed expanded ROWs do not, in fact, satisfy the “valid existing rights” criteria. For those portions of the requested ROWs, therefore, BLM must conduct a thorough DRECP compatibility analysis and cannot grant ROWs that are incompatible with CMAs or other DRECP restrictions.

**Issue Number:** PP-CA-EAGLECREST-17-03-24

**Organization:** NPCA / Coalition / Defenders of Wildlife

**Protester:** Deborah Sivas

**Issue Excerpt Text:**

Indeed, as Table 3-3 on page 71 of the FEA demonstrates that the requested acreage of the ROWs is now almost double the acreage covered by the FERC EIS and license. Accordingly, at the very least, the “valid existing rights” concept does not apply to 220+ acres not covered by the FERC license.

**Issue Number:** PP-CA-EAGLECREST-17-06-3

**Organization:** Colorado River Indian Tribes

**Protester:** Dennis Patch

**Issue Excerpt Text:**

Finally, the EA and Response to Comments document argue at length that the FERC Storage Project is a valid existing right to which the DRECP is subject. However, these documents fail to support the conclusion that requiring compliance with DRECP mitigation measures for the gen-tie and water-pipeline right-of-way project currently under consideration by BLM would interfere with that valid existing right.

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**Summary:**

The Eagle Crest Gen-Tie project violates the BLM’s planning regulations because the project does not conform to the decisions in the California Desert Conservation Area Plan Amendment (CDCA).

Additionally, the CDCA describes the process for amending that plan, but the BLM did not follow the process when preparing the amendment for the Eagle Crest project because it did not: (1) determine if alternative locations within the CDCA were available to meet the applicant’s needs without requiring an amendment; (2) determine the environmental effects of granting and/or implementing the applicant’s request; or (3) evaluate the effect of the proposed amendment on BLM’s desert-wide obligation to achieve and maintain a balance between resource use and resource protection.

Further, the BLM’s assertion that the project has valid existing rights and is therefore not required to be consistent with the DRECP is incorrect in a number of ways. First, the project area that the BLM analyzed is larger than the area covered by the FERC license, so the valid existing rights that allow the project to continue without its being necessarily consistent with the DRECP do not apply

to this expanded area. Second, the project's mitigation measures do not comply with the DRECP, and the BLM failed to explain how those measures would interfere with the valid existing right. Finally, the "valid existing rights" language of the DRECP does not override the BLM's discretionary authority, granted in FLPMA, to issue ROWs.

**Response:**

The BLM's planning regulations direct that "all future resource management authorizations and actions" must conform to the approved resource management plan (43 CFR 1610.5-3(a)). When an authorization or action does not conform to the approved plan, the BLM is to consider the authorization or action through a plan amendment (43 CFR 161.5-3(c)). The Eagle Crest Gen-Tie and Water Pipeline Environmental Assessment and Proposed California Desert Conservation Area Plan Amendment (EA/PA) amends the CDCA to ensure that the Eagle Crest project conforms to that plan, in compliance with the BLM's planning regulations.

BLM followed the process identified in the CDCA for amending that plan. It considered granting the right-of-way (ROW) for the gen-tie line in existing and CDCA-designated utility corridors, which would not require an amendment, but eliminated these alternatives from further analysis as infeasible (EA/PA, Section 2.4.1). All of Chapters 4, 5, and 6 of the EA/PA is a determination of the environmental effects of granting the applicant's request for a ROW and an evaluation of the effect of the proposed amendment on BLM's desert-wide obligation to achieve and maintain a balance between resource use and resource protection.

The DRECP is a major amendment to the CDCA that was adopted in 2016, after the FERC license for the Eagle Crest project was granted. The Approved DRECP Land Use Plan Amendment (p. xxiv) defines a "valid existing right" as "[a] documented, legal right or interest in the land that allows a person or entity to use said land for a specific purpose. Such rights include fee title ownership, mineral rights, rights-of-way, easements, permits, licenses, etc. Such rights may have been reserved, acquired, leased, granted, permitted, or otherwise authorized over time". Eagle Crest's FERC license is a Federally-issued license to operate a hydroelectric power project under the Federal Power Act. The FERC license is thus a valid existing right to which the DRECP is subject (EA/PA, Section 1.7.1). While the BLM may reasonably regulate valid existing rights, the agency cannot unreasonably regulate or diminish a valid existing right.

After the FERC granted the license, a court order moved 460 privately owned acres covered by the license to federal ownership (EA/PA, p. 44). Though the number of acres under federal ownership thus changed, the area subject to the license's valid existing right did not. These 460 acres are therefore not required to be consistent with the DRECP.

The BLM required some Conservation Management Actions (CMA) from DRECP, but did not require certain others. The BLM made the EA/PA consistent with the DRECP where it was possible to do so without violating the valid existing right, including with respect to mitigation. The DRECP's mitigation measures are included in its Conservation Management Actions, which were designed to meet certain goals and objectives for each land use allocation (DRECP ROD, p. 63). Appendix A of the EA/PA compares the project proponent's requirements under the FERC license to the DRECP CMAs. Most, though not all, of the FERC license requirements are consistent with the goals and objectives of the DRECP CMAs. Additionally, the EA/PA adopts several DRECP CMAs and makes them conditions of the BLM's approval of the ROW (EA/PA, Table 4-7). Table

1-3 of the EA/PA thoroughly describes the remainder of the specific CMAs with which the proposed project, the valid existing right, would be in conflict, as well as the nature of that conflict.

The EA/PA recognizes the BLM's discretion to grant ROWs under Title V of FLPMA. The EA/PA describes that the BLM's purpose and need is to respond to the applicant's request for a ROW (EA/PA, Section 1.2.1), and it notes that the BLM has the discretion to decide whether to deny the ROW, grant the ROW, or grant the ROW with modifications (EA/PA Section 1.2.2). Further, the BLM fully considered a no action alternative, in which it would not approve a ROW for the project or an amendment to the CDCA (EA/PA Sections 2.3, 4.2).

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