

Director's Protest Resolution Report

**Genesis Solar Energy Project
Plan Amendment**

California Desert Conservation Area Plan

November 4, 2010



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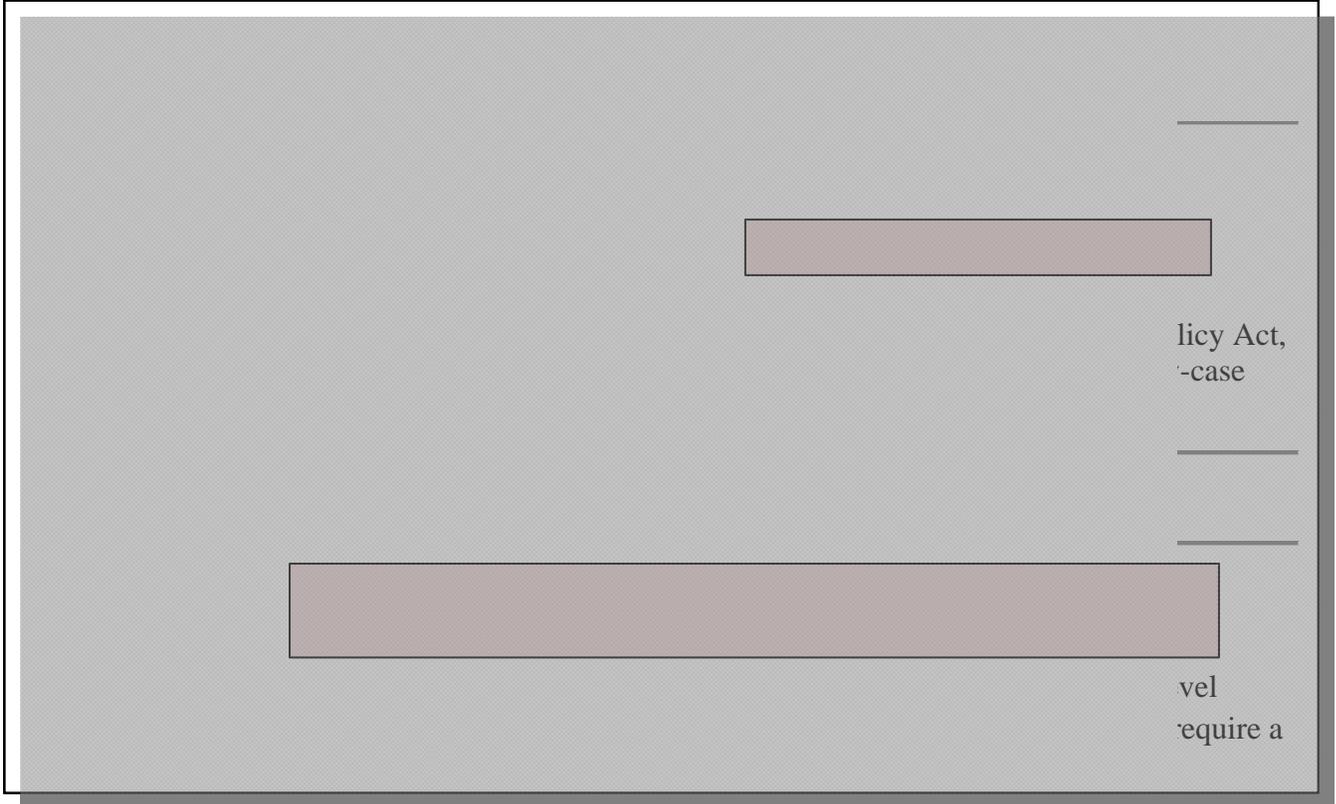
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Reader's Guide

How do I read the Report?

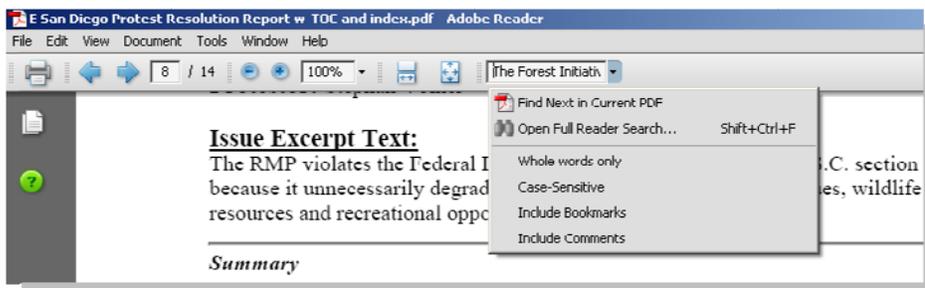
The Director's Protest Resolution Report is divided up into sections, each with a topic heading, excerpts from individual protest letters, a summary statement (as necessary), and the Bureau of Land Management's response to the summary statement.

Report Snapshot



How do I find my Protest Issues and Responses?

1. Find your submission number on the protesting party index which is organized alphabetically by the protester's last name.
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 used.



List of Commonly Used Acronyms

APE	Areas of Potential Effect	FEIS	Final Environmental Impact Statement
BLM	Bureau of Land Management	MUC	Multiple Use Class
CDCA	California Desert Conservation Area	NEPA	National Environmental Policy Act of 1969
CFR	Code of Federal Regulations	NRHP	National Register of Historic Places
DEIS	Draft Environmental Impact Statement	ROD	Record of Decision
EIS	Environmental Impact Statement	ROW	Right-of-Way

Protesting Party Index

Protester	Organization	Submission Number	Determination
Lisa Belenky	Center for Biological Diversity	PP-CA-Genesis-10-01	Denied-Issues, Comments
Kim Delfino	Defenders of Wildlife, Natural Resources Defense Council, Sierra Club, The Wilderness Society (Defenders of Wildlife et al.)	PP-CA-Genesis-10-02	Protest Withdrawn
Rachael E. Koss	Californian Unions for Reliable Energy, Richard Reed, G. Ron Ellis, Tom R. Martinez (Cure et al.)	PP-CA-Genesis-10-03	Denied-Issues, Comments

Issue Topics & Responses

NEPA

Comment Number: PP-CA-GENESIS-10-03-28

Organization: CURE et al

Protester: Rachael Koss

Issue Excerpt Text:

As explained in CURE's attached comments on the FEIS, the proposed Project cannot proceed without transmission system upgrades identified in the Transition Cluster Phase II Interconnection Study Report ("Phase II Study"), and the transmission system upgrades would not be necessary but for the Project. In other words, the Project and the system upgrades are connected actions. Thus, NEPA requires BLM to analyze adverse effects from the transmission system upgrades identified in the Phase II Study in a supplemental EIS. BLM's compliance with NEPA is a condition precedent to its approval of the proposed Plan Amendment. As such, BLM may not proceed with approval until it has prepared a supplemental EIS, recirculated the EIS for review and comment, and issued a revised FEIS, in accordance with NEPA.

Response

The Bureau of Land Management (BLM) response to concerns raised by the protesting party on this issue in comments submitted on the BLM Draft Environmental Impact Statement (DEIS) was inaccurate. On page 5-20 of the Final Environmental Impact Statement (FEIS), in response to comment #6-061, the BLM stated that the Transition Cluster Phase II Interconnection Study Report (Phase II study) was "forthcoming" when, in fact, the study was completed in July 2010, which is prior to release of the FEIS. The BLM also states in its response that "any actions as a result of the studies are not considered connected actions." This too is not accurate.

As stated on page 2-11 of the FEIS, "Transmission reliability impacts and appropriate mitigation have now been fully identified through the Phase II Interconnection study of projects in the Transition Cluster, including the Genesis project." The analysis in the Phase II study identifies a number of actions necessary to address downstream transmission impacts, and on pages 2-10 and 2-11 of the FEIS, the BLM identifies these actions as "connected actions," as required by the National Environmental Policy Act (NEPA). Specifically, upgrades or replacements of circuit breakers or other equipment in 22 existing transmission substations downstream were identified.

As noted on page 2-11 of the FEIS, the upgrades and replacement of circuit breakers and other equipment at existing substations will mitigate any impacts to the transmission system that would arise from the addition of a 250 megawatt energy generation facility at the site and "[i]f the upgrades and mitigations are completed in a timely manner, full deliverability of the project is possible without overloading the system."

The BLM will clarify in the Record of Decision that the BLM's response to comment #6-061 on page 5-20 of the FEIS is incorrect.

Issue Number: PP-CA-GENESIS-10-0001-9
Organization: Center for Biological Diversity
Protester: Lisa Belenky

Issue Excerpt Text:

The Center protests that the proposed Plan amendment was expanded to allow not only this project (which has been evaluated in the EIS) but also “all other types of solar energy development” at this site without any environmental review of the impacts of “all other types of solar energy development.” As the BLM is aware, different solar energy development projects have different types and intensity of impacts on the environment—some more than this proposed project and some less. It is inappropriate to adopt a Plan amendment that is broader than the FEIS that was prepared to support the Plan amendment.

Response

The California Desert Conservation Area (CDCA) Plan will be specifically amended by the Genesis Solar Energy Project Record of Decision to allow a solar energy generation facility on this site as described in the FEIS. The BLM did provide an analysis of impacts associated with solar energy development (including that proposed by the applicants) by considering the land use plan amendment “No Action Alternative C,” which would amend the plan to identify the Genesis Solar Energy Project application area as “suitable for any type of solar energy development” (FEIS p. 2-2).

As described in FEIS Sections 1.4, and 2.2.1 and later analyzed in Chapter 4 of the FEIS, the CDCA Plan recognizes the potential compatibility of solar generation facilities on public lands and requires that all sites associated with power generation or transmission not specifically identified in the CDCA Plan for a project site be considered through the plan amendment process. Genesis Solar, LLC, (Applicant) proposes to construct, operate, maintain and decommission the Genesis Solar Energy Project which includes solar generating facility, transmission line and ancillary facilities (access road and natural gas pipeline) on BLM-administered land (FEIS p. A-4, Figure 2-1). The applicant is seeking a Right-of-Way (ROW) grant for approximately 4,640 acres of land and a land use plan amendment as described in Section 2.1 of the FEIS. Construction and operation of the project would disturb a total of almost 1,750 acres within a ROW grant of approximately 1,950. The difference between the total acreage listed in the right-of-way application (approximately 4,640) and the total acreage required for construction and operation (approximately 1,950) would not be part of the ROW grant or plan amendment. The plan amendment applies only to that area specific to the project. No other type of solar energy development is being proposed by Genesis Solar, LLC, for the area.

Range of Alternatives

Comment Number: PP-CA-GENESIS-10-0001-16

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.

Failing to analyze a range of appropriate project alternatives including distributed generation and off-site alternatives on previously disturbed or degraded lands.

Response

In accordance with NEPA, the BLM has discretion to specify the underlying purpose and need for action (40 CFR 1502.13). The BLM guidance requires the BLM to construct its purpose and need for the proposed action to conform to existing decisions, policies, regulation, or law (BLM NEPA Handbook H-1790-1 at 6.2). The BLM guidance further explains that for externally generated actions (such as a right-of-way application), the purpose and need must describe the purpose and need of the BLM, and not that of the applicant. In the case of a right-of-way application, then, the BLM action is to respond to the application by granting the right-of-way, granting the right-of-way with modifications (including alternative location), or denying the right-of-way.

The purpose and need for the proposed action defines the range of alternatives to be considered. These action alternatives are developed to respond to the problem or opportunity that is presented (in this case, the application), and to provide a basis for eventual selection of an alternative in a decision. Tying the purpose and need to the decision to be made establishes the scope of the NEPA review, clearly explains the decision to be made to the public, sets expectations, and focuses the NEPA analysis. The BLM must analyze a range of reasonable alternatives, but is not required to analyze every possible alternative or variation in detail. According to Council on Environmental Quality regulations for implementing the NEPA, an alternative may be eliminated from detailed study if: it is determined not to meet the proposed action's purpose and need; it is determined to be unreasonable given BLM mandates, policies, and programs; its implementation is speculative or remote; or, it is technically or economically infeasible (BLM NEPA Handbook H-1790-1 at 6.6.3).

The FEIS considered a range of reasonable alternatives to the proposed action designed to meet legal responsibilities of the BLM, and its purpose and need for action. The purpose and need for the proposed action was described as a response to Genesis Solar, LLC's application under Title V of Federal Land Policy and Management Act for a ROW grant for a solar energy facility on public land (FEIS p.1-2). In order to respond to the ROW application, the BLM must consider whether to amend the CDCA Plan. This consideration is necessary because the CDCA Plan requires the BLM to undertake a plan amendment process when a proposed renewable energy project is to be located on a site not already identified in the plan as available for such a development. As such, the BLM's land use plan decision is limited to whether to identify the project site as available for a solar energy facility. With respect to the BLM's land use plan

decision, a non-public land alternative would not be within the range of reasonable alternatives to the proposed planning action because the BLM has no authority with regard to non-BLM administered lands.

The BLM also adequately addressed consideration of previously disturbed or degraded lands on pages 5-68 and 5-69 of the FEIS. A thorough rationale for why the BLM eliminated from detailed analysis other alternatives, including an alternative considering distributed solar technology, is provided in Table 2-6 of the FEIS.

Impact Analysis

Issue Number: PP-CA-GENESIS-10-0001-8
Organization: Center for Biological Diversity
Protester: Lisa Belenky

Issue Excerpt Text:

In particular, approval of this remote siting may encourage other projects to propose similar sites in remote areas (near this project or in other areas). Before considering approval of an industrial scale project in such a remote area, BLM should have fully analyzed how such a decision may exacerbate the worst impacts of sprawl-fragmentation and expansion of infrastructure into areas of the CDCA that should remained intact in as large blocks as possible in order to protect habitat for imperiled species and other resources.

Issue Number: PP-CA-GENESIS-10-03-21
Organization: CURE et al
Protester: Rachael Koss

Issue Excerpt Text:

The Applicant has not yet submitted results from a late-summer/early-fall floristic survey, and thus the EIS' affected area, impact analysis and mitigation for Project impacts to rare plants still does not (and cannot) satisfy NEPA. Without the fall survey results, BLM cannot evaluate the Project's impacts on rare plants, and more importantly, BLM cannot avoid and minimize the impacts. Therefore, BLM failed to take a "hard look" at the Project's effects on rare plants.

Issue Number: PP-CA-GENESIS-10-03-23
Organization: CURE et al
Protester: Rachael Koss

Issue Excerpt Text:

BLM failed to adequately describe the area affected by the proposed actions for Couch's spadefoot toad because the Applicant's survey for Couch's spadefoot toads was not conducted after summer rains. The Applicant's Couch's spadefoot toad survey does not provide an adequate basis for determining significant impacts because it was conducted during the wrong time of year.

Issue Number: PP-CA-GENESIS-10-03-25
Organization: CURE et al
Protester: Rachael Koss

Issue Excerpt Text:

Furthermore, BLM's requirement that the Applicant conduct an assessment of the Project's impacts to Couch's spadefoot toad after Project approval, as mitigation, violates NEPA. NEPA requires that the BLM include an analysis of the Project's effects on Couch's spadefoot toad in the EIS, not in a mitigation plan that will be provided by the Applicant after Project approval.

Summary

The FEIS does not adequately analyze impacts to rare plants or the Couch's spadefoot toad and had not fully analyzed how approval of the proposed plan amendment could lead to similar proposals elsewhere in the CDCA.

Response

The BLM gathered the necessary data essential to make a reasoned choice among the alternatives analyzed in detail in the FEIS. The BLM analyzed the available data that led to an adequate disclosure of the potential environmental consequences of the preferred alternative and other alternatives. As a result, the BLM has taken the hard look required by the NEPA of the environmental consequences of the alternatives which enables the decisionmaker to make an informed decision.

The BLM has adequately addressed cumulative effects from existing and proposed future projects in a broad, regional scope. Cumulative impacts to wildlife species from reasonably foreseeable future actions can be found in section 4.21.3 and Appendix E of the FEIS. Table 4.21-2 summarizes these impacts to wildlife resources. The forthcoming BLM Solar Energy Development Programmatic EIS will analyze effects from speculative future actions on a broader scale.

Regarding the analysis of rare plants, the FEIS analyzed the impacts of the proposed plan amendment on rare plants in Section 4.17 and Appendix E, and includes measures to mitigate those impacts. Concerns regarding surveys of rare plants were raised by the protesting party in comments submitted on the BLMs DEIS and were adequately responded to in Chapter 5 of the FEIS. Specifically, the protester's comments 6-008, 6-022, and 6-025 were responded to on pages 5-13, 5-15 and 5-16. Section 4.17 of the FEIS addresses special status plants that may be detected during the summer-fall 2010 surveys and provides "an analysis of impacts to 'potentially occurring' late-season special-status plants and the triggers for mitigation and specific mitigation measures. These triggers were designed to ensure that any anticipated or unanticipated species detected during the summer-fall 2010 surveys would be mitigated to levels less than substantial. This mitigation would be achieved through a variety of avoidance and minimization measures, restoration (enhancement projects), and compensatory mitigation through the acquisition and protection of other occurrences and their habitat" (FEIS p. 4.17-16). One of the project "Conditions of Certification" requires that further surveys take place before project construction implementation in order to address project impacts to detected plant species: the BIO-19 condition requires that "late-summer/fall botanical surveys for late-season special-status plants prior to start of construction or by the end of 2010" (FEIS pp. G-43-45) and outlines avoidance requirements to those plants that are detected (FEIS pp. G-45-47).

Analysis of potential impacts to Couch's spadefoot toad is found in FEIS Section 4.21 (FEIS pp. 4.21-7-8) and Appendix E (p. E-27) and describes the known and potential habitat within the amendment area, as well as the types of impacts resulting from the solar development therein. The level of analysis adequately supports the BLM planning decision. Concerns regarding the BLM's data on the species habitat were raised by the protester in comments submitted on the BLM DEIS and were responded to in Chapter 5 of the FEIS. As explained in the BLM response

to the protester's comment 6-020, "Surveyors found suitable breeding habitat for Couch's spadefoot toad (*Scaphiopus couchi*). All artificial or temporary water catchments that could serve as breeding pools for Couch's spadefoot toad were also mapped. Surveyors did detect suitable breeding habitat for this species in the borrow pit south of Interstate-10 that crosses the Project's transmission line route near the Colorado River Substation. Habitat for this species consists of extremely xeric areas with sandy, well-drained soils, often associated with creosote bush and mesquite trees (Arizona-Sonora Desert Museum 2010). Temporary ponds created during seasonal rainstorms are important habitat for breeding" (FEIS p. 5-15). These habitat assessments form the basis of the BLM impact analysis and inform the hard look taken in considering the CDCA plan amendment. A protection and mitigation plan will be developed prior to construction and operations to further survey potential habitat and to identify specific mitigation measures of the project-related impacts on the Couch's spadefoot toad (FEIS p. G-63, BIO-27).

California Desert Conservation Area Plan

Comment Number: PP-CA-GENESIS-10-0001-3
Organization: Center for Biological Diversity
Protester: Lisa Belenky

Issue Excerpt Text:

Adoption of a plan amendment to allow a large-scale industrial facility on MUC class M lands is inappropriate. Under the CDCA Plan, Multiple-use Class M (Moderate Use) "protects sensitive, natural, scenic, ecological, and cultural resources values. For public lands designated as Class M the CDCA Plan intends a "controlled balance between higher intensity use and protection of public lands. This class provides for a wide variety of [f] present and future uses such as mining, livestock grazing, recreation, energy, and utility development. Class M management is also designed to conserve desert resources and to mitigate damage to those resources which permitted uses may cause." CDCA Plan at 13 (emphasis added). The proposed project is a high-intensity, single use of resources that will displace all other uses and that will significantly diminish (indeed, completely destroy) approximately 1,800 acres of habitat including impacting aeolian transport in the dunes ecosystem, directly impacting habitat for desert tortoise, Mojave fringe-toed lizard and other impacts to species and habitats.

Issue Number: PP-CA-GENESIS-10-03-13
Organization: CURE et al
Protester: Rachael Koss

Issue Excerpt Text:

The BLM provided no evidence that the Project's impacts on the Colorado River strike a controlled balance between higher intensity use and protection of public lands, conserve desert resources, or mitigate damage to those resources on Class M lands, all specific purposes of the CDCA Plan. The Project's conversion of the Planning Area into a single-use industrial site is inconsistent with FLPMA's multiple use mandate and CDCA's balancing mandate for Class M lands.

Issue Number: PP-CA-GENESIS-10-03-15
Organization: CURE et al
Protester: Rachael Koss

Issue Excerpt Text:

According to FEIS, the CDCA Plan allows the use of the Planning Area for solar generation through the Plan's approval of solar generating facilities within the Multiple -Use Class M. BLM is in error. Renewable generation is only conditionally allowed for Class M lands under the CDCA Plan. According to the CDCA Plan, renewable energy generation is an allowed use within Class M where BLM strikes a balance between the use and the protection of the public lands. The FEIS identifies significant

unavoidable impacts to biological and cultural resources. The industrialization of the Planning Area will significantly diminish the natural, scenic, and cultural values of these lands and fails to strike the balance between usage of the land and preservation of the resources. The Plan Amendment cannot be approved because solar generation that doesn't balance resource protection with usage of the land is not consistent with Class M lands under the CDCA Plan.

Issue Number: PP-CA-GENESIS-10-03-4

Organization: CURE et al

Protester: Rachael Koss

Issue Excerpt Text:

The Planning Area is designated Class M under the CDCA Plan. In evaluating whether the Plan should be amended, BLM failed to assess whether the proposed Plan Amendment ensures a controlled balance on Class M lands, as required by FLPMA and the CDCA Plan.

Issue Number: PP-CA-GENESIS-10-03-6

Organization: CURE et al

Protester: Rachael Koss

Issue Excerpt Text:

The BLM and California Energy Commission Staff concluded that the Project “would have significant impacts to biological resources, eliminating all of the Sonoran creosote bush scrub and other native plant and wildlife communities within the approximately 1,880-acre site.” Further, BLM concluded that the Project would “permanently diminish the extent and value of native animal communities in the region.” In light of the findings of the California Energy Commission and BLM, BLM may not approve the Plan Amendment to allow the wholesale destruction of the biological resources within the Planning Area: Such approval would be inconsistent with the CDCA Plan’s moderate and limited use designations for the Planning Area.

Issue Number: PP-CA-GENESIS-10-03-9

Organization: CURE et al

Protester: Rachael Koss

Issue Excerpt Text:

The BLM provided no evidence that the proposed destruction of cultural resources ensures a controlled balance between higher intensity use and protection of public lands, conserves desert resources, or mitigates damage to those resources on Class M lands, all specific purposes of the CDCA Plan. The Project’s conversion of the Planning Area into a single-use industrial site is inconsistent with FLPMA’s multiple use mandate and CDCA’s balancing mandate for Class M lands.

Summary

The proposed plan amendment is inconsistent with the Multiple-Use Class M lands designation of the California Desert Conservation Area (CDCA) Plan.

Response

As the proposed plan amendment states, the location of the proposed Genesis Solar Energy Project includes land that is classified as Multiple-Use Class (MUC) - M (Moderate Use) in the CDCA Plan. The MUC - M lands are specifically identified as being compatible with energy development and transmission “Multiple-Use Class M ... is based on a controlled balance between high intensity use and protection of public lands. This class provides for a wide variety of present and future uses such as mining, livestock grazing, recreation, energy, and utility development” (CDCA Plan, p. 13).

The CDCA Plan provides guidance concerning the management and use of BLM-administered lands in the California Desert while balancing other public needs and protecting resources. The CDCA Plan contemplates industrial uses, including utility rights of way outside of existing corridors, power plants, and solar energy development and transmission (CDCA Plan, p. 95). The CDCA Plan expressly provides that solar generation facilities within areas designated as MUC – M “may be allowed after NEPA requirements are met” (CDCA Plan, p. 15). The CDCA Plan specifically cites energy development and transmission as a “paramount national priority” to consider in balancing use and protection of resources (CDCA Plan, p. 6). The proposed plan amendment would allow the solar use only on the proposed project site and will not result in any changes in land use designations or authorized land uses anywhere else in the California Desert Conservation Area.

The California Desert Conservation Area Plan states that solar power facilities may be allowed within MUC - M areas after NEPA analysis is complete and requires that newly proposed power generation facilities that are not already identified in the CDCA Plan be considered through a plan amendment process (CDCA Plan, pp.15 and 95). For MUC - M lands, the authorized officer is directed to manage for a controlled balance of higher intensity uses and protection of public lands values (FEIS p. 4.8-2). The Environmental Impact Statement that accompanies the proposed plan amendment acts as the mechanism for complying with NEPA requirements. Because solar power facilities are an allowable use of the land as it is classified in the CDCA Plan, the proposed action does not conflict with the CDCA Plan. However, the CDCA Plan also requires that newly proposed power sites that are not already included within the Plan be added through the plan amendment process. The Genesis Solar Energy Project is not currently included within the CDCA Plan, so a plan amendment is required to include the site as a recognized element with the CDCA Plan.

The CDCA NEPA requirements have been met in the analysis contained in the DEIS and FEIS. The proposed plan amendment, and the corresponding analysis of the proposed plan amendment with respect to the requirements contained within Chapter 7 of the CDCA Plan, is provided within the FEIS. As the FEIS states in Section 4.8 “The Proposed Action would be developed entirely within MUC-M. ...No changes in the MUC classification would be required prior to approving the ROW grant” (FEIS p. 4.8-1). FEIS Section 4.8 goes on to describe in detail why

the proposed site location for the project meets the Multiple Use Class guidelines consistent with the CDCA Plan.

Therefore, the proposed plan amendment is consistent with the Multiple-Use Class designations in the CDCA Plan.

Cultural Resources

Issue Number: PP-CA-GENESIS-10-03-19

Organization: CURE et al

Protester: Rachael Koss

Issue Excerpt Text:

Test excavations that provide information concerning the size, integrity and nature of each cultural resource must be conducted to properly determine site significance and appropriate mitigation. BLM's "analysis" in the FEIS is insufficient under NEPA because it is devoid of evidence that would ensure that BLM has been informed of the environmental consequences of the Project. In other words, BLM failed to take a "hard look" at cultural resources within the Project site and its area of impact, as required by NEPA.

Response

The FEIS did take a hard look at impacts to cultural resources. A description of the inventories that were conducted can be found in Section 3.4 of the FEIS (FEIS pp. 3.4-29–3.4-35). These inventories resulted in the identification of "a total of 538 cultural resources within the [Areas of Potential Effect] APEs and in the near vicinity" (FEIS p. 3.4-37). Preliminary evaluations of the archaeological resources determined that 27 National Register of Historic Places (NRHP) eligible sites would be directly affected by a solar energy generation facility at the proposed plan amendment site.

The preliminary NRHP eligibilities were determined on the basis of the surface exposures of the sites. These determinations have yet to be confirmed by test excavation. The Programmatic Agreement prepared for the project will guide the excavation, identification and mitigation procedures of cultural resources within the APE. As noted in the FEIS, "In accordance with 36 CFR § 800.14(b), Programmatic Agreements are used for the resolution of adverse effects for complex project situations and when effects on historic properties, resources eligible for or listed in the National Register of Historic Places, cannot be fully determined prior to approval of an undertaking" (FEIS p. 4.4-10). Although a Programmatic Agreement must be signed before the Record of Decision, as allowed for in 36 CFR 800.4(b)(2), the agency may defer final identification and evaluation of historic properties if it specifically provided for in the Programmatic Agreement. The Programmatic Agreement was signed on October 7, 2010, and does address the contingencies for exposing buried significant cultural resources after approval of the project.
