Director's Protest Resolution Report

McCoy Solar Energy Project Plan Amendment

California Desert Conservation Area

Supplement

May 29, 2013

BLM

Contents

Reason for Supplement

The McCoy Solar Energy Project (MSEP) Protest Report was posted to the BLM website on March 13, 2013. Following the release of the report, the BLM discovered that an additional protest letter had been received, but had been misdirected to the wrong location within the BLM. Consequently, this letter and any issues raised in the letter were not included in the original protest report. Because this letter met all of the requirements for filing a valid protest (43 CFR 1610.5-2), the BLM has treated it as a valid protest letter, and responded to all protest issues raised in the letter in this supplemental protest resolution report.

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

Issue Topics and Responses
NEPA

Topic heading

Submission number

Issue Number: PP-CA-ESD-08-0020-10

Protest issue number

Organization: The Forest Initiative

Protesting organization

Protester: John Smith

Protester's name

Issue Excerpt Text:

Direct quote taken from the submission

Rather than analyze these potential impacts, as required by NEPA, BLM postpones analysis of renewable energy development projects to a future case-by-case analysis.

Summary

General statement summarizing the issue excerpts (optional).

There is inadequate NEPA analysis in the PRMP/FEIS for renewable energy projects.

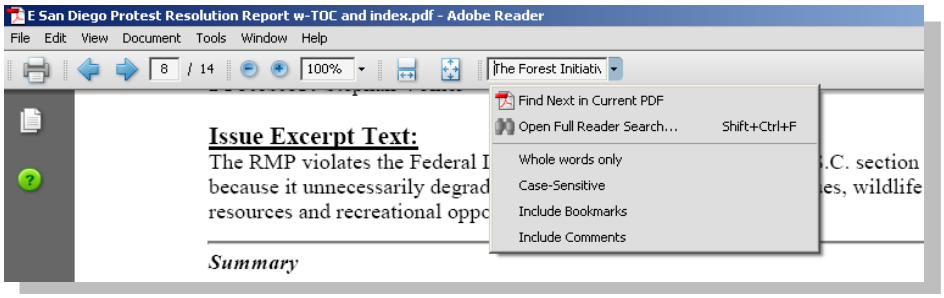
Response

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

How do I find my Protest Issues and Responses?

1. Find your submission number on the protesting party index which is organized alphabetically by 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 useful.



List of Commonly Used Acronyms

ACEC	Area of Critical Environmental Concern
APD	Application for Permit to Drill
BA	Biological Assessment
BLM	Bureau of Land Management
BMP	Best Management Practice
BO	Biological Opinion
BSPP	Blythe Solar Power Project
CAA	Clean Air Act
CDCA	California Desert Conservation Area
CDFW	California Department of Fish and Wildlife (formerly CDFG)
CDFG	California Department of Fish and Game (now CDFW)
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
COA	Condition of Approval
CSU	Controlled Surface Use
CWA	Clean Water Act
DM	Departmental Manual (Department of the Interior)
DOI	Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
EO	Executive Order
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act of 1976
FO	Field Office (BLM)
FWS	U.S. Fish and Wildlife Service
GIS	Geographic Information Systems
IB	Information Bulletin
IM	Instruction Memorandum
MOU	Memorandum of Understanding
MSEP	McCoy Solar Energy Project
NEPA	National Environmental Policy Act of 1969
NHPA	National Historic Preservation Act of 1966, as amended
NOA	Notice of Availability
NOI	Notice of Intent
NRHP	National Register of Historic Places
NSO	No Surface Occupancy
OHV	Off-Highway Vehicle (has also been referred to as ORV, Off Road Vehicles)
PA	Plan Amendment
PPA	Power Purchase Agreement
RFDS	Reasonably Foreseeable Development Scenario
RMP	Resource Management Plan
ROD	Record of Decision
ROW	Right-of-Way
SHPO	State Historic Preservation Officer
SO	State Office
T&E	Threatened and Endangered
USC	United States Code
USGS	U.S. Geological Survey
VRM	Visual Resource Management
WA	Wilderness Area
WSA	Wilderness Study Area
WSR	Wild and Scenic River(s)

Protesting Party Index

Protester	Organization	Submission Number	Determination
Koss, Rachael	California Unions for Reliable Energy (CURE), G. Ron Ellis, and James Brook	PP-CA-McCoy-13-03	Denied – Issues, Comments

Issue Topics and Responses

California Desert Conservation Area

Issue Number: PP-CA-McCoy-13-03-2
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The Planning Area is designated Class L under the CDCA Plan. In evaluating whether the Plan should be amended, BLM failed to assess whether the proposed Plan Amendment ensures low-intensity, carefully controlled use of Class L lands, as required by FLPMA and the CDCA Plan. For many of the resources that BLM did assess, BLM failed to ensure the proposed Plan Amendment would strike the proper balance to protect desert resources in the face of the multiple use mandate.

Issue Number: PP-CA-McCoy-13-03-4
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
According to BLM, the Project would destroy more than 4,500 acres of wildlife habitat, affecting almost 30 special status plant and wildlife species. According to biologist Scott Cashen, "ecological consequences of eliminating a broad expanse of relatively undisturbed Colorado Desert habitat cannot be mitigated to the point of no adverse effect." The Project would have "major impacts to vegetation resources, eliminating all of the Sonoran creosote bush scrub and other native plant and wildlife communities within the disturbance area..." In addition, the Project would significantly affect "an extensive network of desert washes..." In light of these findings, 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 limited use designations for the Planning Area.

Summary

The McCoy project plan does not ensure the low-intensity and controlled use of Multiple-Use Class Limited (MUC-L) lands under the CDCA plan.

The BLM does not ensure that biological desert resources are adequately protected, as the CDCA's MUC-L designation calls for.

Response

The siting of solar development within lands designated Multiple-Use Class Limited (MUC-L) is consistent with the CDCA Plan. The CDCA Plan expressly provides for solar generation facilities within areas designated as Multiple-Use Class Limited, stating that wind and solar development "may be allowed [on such lands] after National Environmental Policy Act (NEPA) requirements are met." CDCA Plan, page 15. The CDCA Plan provides guidance concerning the management and use of the BLM lands in the California Desert while protecting resources and balancing other public needs. 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, page 6.

Applicable guidelines from the CDCA Plan for MUC-L lands are included in Table 3.10-2 of the McCoy PA/FEIS (page 3.10-5). Rows 10 and 17 of Table 3.10-2 specifically address vegetation, and wildlife species and habitat. The BLM has complied with all guidelines for management, use, development, and protection of the resources and public lands within the CDCA, as articulated in the McCoy PA/FEIS. The extent to which the proposed Project has been located and designed to avoid sensitive resources is addressed throughout the PA/FEIS, and the consideration of the Project's consistency with the CDCA Plan MUC-L requirements is provided in section 4.10, Lands and Realty. In short, the CDCA Plan MUC-L permits the BLM to amend the CDCA Plan for specific proposals, including solar energy development facilities as contemplated here. The BLM has met all of the procedural requirements in considering a CDCA Plan Amendment.

Vegetation

Issue Number: PP-CA-McCoy-13-03-21
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
For Desert Lavender Scrub Alliance, the FEIS states that "[d]espite the presence of desert lavender in the Project area, Desert Lavender Scrub habitat does not occur in the Project area." As Cashen explains, this statement conflicts with information that the Applicant's consultant provided to BLM's consultant. In addition, the FEIS completely fails to quantify or map the abundance and distribution of the Desert Lavender Scrub Alliance in the Planning Area. As a result, it is impossible to assess impacts on this sensitive natural community. BLM failed to take a "hard look" at impacts to Desert Lavender Scrub Alliance.

Issue Number: PP-CA-McCoy-13-03-22
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
BLM failed to take a "hard look" at impacts to Creosote Bush-Big Galleta Grass Association. The Creosote Bush-Big Galleta Grass and Creosote Bush-White Bursage -Big Galleta associations are considered sensitive natural communities. The FEIS, without any support, states neither association occurs on the Project site. The FEIS conflicts with the DEIS, which states the solar plant site contains "ephemeral swales (supporting a desert wash scrub of creosote bush and big galleta grass)." The FEIS also conflicts with information provided in the Biological Resources Technical Report and information that the Applicant's consultant provided to BLM's consultant, which shows that this sensitive natural community exists on the Project site.

Issue Number: PP-CA-McCoy-13-03-23
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
BLM failed to take a "hard look" at the Plan Amendment's adverse impacts to Desert Dry Wash Woodland (Blue Palo Verde - Ironwood Woodland). In his comments on the DEIS, Cashen provided five different types of evidence that demonstrate that the Applicant and BLM greatly underestimated the amount of Desert Dry Wash Woodland on the Project site. The FEIS provides no evidence to the contrary, but claims that vegetation communities were properly characterized.

Issue Number: PP-CA-McCoy-13-03-24
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The FEIS provides that "[v]egetation communities were characterized by the classification system used by Holland (1986) and the NECO Plan (Evens and Hartman, 2007), and cross-referenced with A Manual of California Vegetation (Sawyer and Keeler-Wolf, 1995), where appropriate." Cashen explains in that the FEIS' statement is incorrect. In fact, the vegetation mapping conducted for the Project violates the classification scheme used by all three of these sources. For example, an area should be classified as having the Blue Palo Verde – Ironwood Woodland Alliance if the absolute cover of blue palo verde and/or ironwood exceeds two percent, according to Evens and Hartman, or three percent according to Sawyer and Keeler-Wolf. According to Cashen, many of the washes on the Project site undeniably meet this criterion. Mr. Cashen's comment provides the Manual of California Vegetation's membership rules for the Blue Palo Verde - Ironwood Woodland Alliance and the vegetation map that was prepared for the Blythe Solar Power Project. This information shows that there is more Dry Desert Wash Woodland on the Project site than disclosed in the FEIS. BLM has failed to adequately disclose and analyze the adverse effects to these sensitive natural communities.

Issue Number: PP-CA-McCoy-13-03-26
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
BLM could not take a hard look at the Project's impacts to botanical resources because protocol surveys for sensitive botanical resources in the Planning Area buffer were not conducted. BLM attempts to resolve this significant issue by stating "[t]he results of BSPP surveys of the Alternative 3 routes were inadvertently omitted from PAIEIS Figure 3.3-1 [sic Figure 3.3-3]. As a result, this figure is revised to reflect plant communities on the Alternative 3 routes." However, Figure 3.3-3 was not revised, nor does it accurately reflect the results of the Blythe Solar Power Project surveys. Moreover, there are considerable discrepancies between Figure 3.3-3, Chapter 3 of the FEIS and the Biological Resources Technical Report. Specifically, Figure 3.3-3 does not depict the location of Abram's spurge or California ditaxis. Figure 3.3-3 maps both Harwood's eriastrum and Harwood's phlox, but Chapter 3 indicates these are the same species. Chapter 3 states seven special-status plant species were detected during the spring 2011 surveys but the technical report indicates only six species were detected. These inconsistencies make it impossible to determine the extent of impacts to botanical resources.

Issue Number: PP-CA-McCoy-13-03-27
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
Also, according to the FEIS, botanical surveys that were conducted for the Blythe Solar Power Project "confirm that there are fewer populations of Harwood's milk-vetch and Utah milkvine on the Alternative 3 linear Project route compared to the Alternative 1 gen-tie line, which can be confirmed by reviewing plant distribution in Figure 3.3-3." However, according to Cashen, this comparison is not valid because of multiple sources of scientific bias, including differences in years, surveyors, and techniques (among other differences). Further, as the FEIS acknowledges, only partial survey data is available for the Alternative 3 routes due to low rainfall during Blythe Solar Power Project surveys. The BLM cannot conduct an informed assessment of impacts associated with the various linear routes until appropriately timed botanical surveys have been completed for all of the potential alternatives.

The FEIS indicates [b]otanical surveys were initiated in September 2012 to complete special status plant surveys on Alternative 3 routes... Survey results will inform the effects analysis and mitigation approach if the western or central gen-tie routes are elected... The botanical survey data collected to date and anticipated fall 2012 survey findings of the alternative 3 routes (e.g., additional Abram's spurge populations) adequately describe baseline conditions in the Project area and the FEIS provides adequate mitigation for anticipated Project effects. Cashen points out some significant flaws with these statements. First, surveys that have not been completed cannot "adequately describe baseline conditions." Second, as the FEIS acknowledges, the surveys "will inform" the effects analysis and mitigation approach. Thus, the FEIS cannot already have provided "adequate mitigation for anticipated effects." The BLM's approach to impact analysis and

mitigation is based on speculation. Even the Applicant's own consultant acknowledged that it is inappropriate to use speculation for impact analysis and mitigation. As Cashen explains, "the flora of the Desert Floristic Province is poorly understood and it is difficult to predict the outcomes of botanical surveys.

Consequently, any future surveys may yield completely unexpected results that cannot be mitigated by the pre-formulated conditions identified in the FEIS."

Issue Number: PP-CA-McCoy-13-03-60
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The FEIS proposes compensatory mitigation for these impacts, including the acquisition of "unoccupied but adjacent" habitat. However, there is no evidence that purchasing "unoccupied but adjacent" habitat would actually compensate for the Project's substantial effects on special-status plants.

Summary

The BLM did not adequately assess the impacts to these sensitive communities:

- Desert Lavender Scrub Alliance;
- Creosote Bush-Big Galleta Grass Association; and
- Desert Dry Wash Woodland.

The vegetation communities were not mapped properly in the McCoy PA/FEIS, due to inconsistent and/or incorrect assessment criteria.

The FEIS shows no evidence that mitigation measures would compensate for project impacts on special status species.

Response

In identifying the affected environment, the BLM NEPA Handbook notes that "data and analysis in a statement must be commensurate with the importance of the impact" and "less important material" may be summarized, consolidated, or referenced. BLM NEPA Handbook H-1790-1 at 6.7. In regards to impacts to the Creosote Bush-Big Galleta Grass Association and the Desert Dry Wash Woodland, the creosote bush and big galleta grass characteristics were described in detail in the Affected Environment Section. McCoy PA/FEIS, pages 3-3.2 to 3-3.7. Further, Table 4.3-3 of the Environmental Effects Section assessed that the impact to the creosote bush-big galleta grass community on the project site would range from 0.9 acres in Alternative 2 to 10.9 acres in Alternative 3 (Western Route). McCoy PA/FEIS, page 4.3-10. Impacts to desert dry wash woodland habitat were highlighted in Section 4.3 of the FEIS for Alternatives 1 through 3. The largest disturbance was noted in the Western Route for Alternative 3. In regards to impacts to Desert Lavender Scrub Alliance, the Biological Resources Technical Report from August 2011 noted the presence of desert lavender in the Project area (McCoy PA/FEIS, Appendix C), and the FEIS also noted that desert lavender is a common understory species of

Desert Dry Wash Woodland. (McCoy PA/FEIS, page 3.3-5). However, as stated in Appendix K of the McCoy PA/FEIS, Desert Lavender Scrub habitat does not occur in the Project area, thus there are no impacts to this plant community.

As discussed in Appendix C-1, the field surveys followed a protocol that was agreed upon and approved by the BLM, the CDFW and the FWS. McCoy PA/FEIS pages C-27 to C-29. These protocols are consistent with the BLM's Survey Protocols Required for NEPA and ESA Compliance for BLM Special Status Plant Species (BLM 2009) and CDFW's protocol for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities (CDFW 2009). The botanical survey data collected to date adequately describe baseline conditions in the Project area and the McCoy PA/FEIS provides adequate mitigation for anticipated effects to rare plants in the planning area.

The mitigation measures for the McCoy PA/FEIS are within the scope of existing regulations and policies. Specifically, the mitigation measures for BLM allow for "rectifying the impact by repairing, rehabilitation, or restoring the affected environment" and "compensating for the impact by replacing or providing substitute resources or environments." BLM NEPA Handbook H-1790-1 at 6.8.4. While the option to select "unoccupied but adjacent" habitat is correct, the FEIS notes that it is part of a larger evaluation process. The compensatory mitigation by acquisition process would still have to be reviewed and approved with a management plan prepared to ensure the long-term viability of special status plants. McCoy PA/FEIS pages 4.3-32 to 4.3-33.

Cultural Resources

Issue Number: PP-CA-McCoy-13-03-14
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The cultural resources sections of the DEIS and FEIS fail to take a hard look at the cultural resources within the Planning Area and the environmental consequences of the proposed Plan Amendment. BLM's failure to adequately analyze impacts on cultural resources begins with BLM's narrowly defined "cultural resource," which excludes traditional cultural properties and other resources that are not "recognized, identified and valued by archaeologists through archaeological surveys." The DEIS and FEIS fail to include "those aspects of the environment to which humans attach cultural significance, including sites, artifacts, landscapes, plants, animals and traditional associations and beliefs" in the impact analyses. The DEIS' and FEIS' narrow definition of "cultural resources" preclude a full evaluation of impacts on cultural resources.

Issue Number: PP-CA-McCoy-13-03-15
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The DEIS and FEIS fail to analyze the Project's impacts on buried cultural resources. CURE provided expert evidence of the likelihood of buried resources on the Project site. BLM's own data also indicates the likely presence of buried archaeological sites, Native American graves and cultural items. Yet, BLM has not conducted adequate testing to determine whether buried cultural sites or materials are actually present. BLM has failed to take a "hard

look" at adverse effects on buried resources.

Issue Number: PP-CA-McCoy-13-03-16
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
Finally, the DEIS and FEIS fail to adequately analyze the Project's impacts on cultural landscapes. In fact, in the FEIS, BLM eliminated any discussion of draft cultural landscapes. BLM justifies its decision by stating that landscape-level studies are being conducted, but are not yet complete, and therefore "it would be premature to speculate about NRHP eligibility criteria for the sites that may be included within such a network..." However, as Dr. King explains, "cultural landscapes exist on the land, and in the minds and hearts of those who value them. BLM seems, at best, to be confusing some procedure it thinks to be involved in drafting a landscape description with the landscape itself." In other words, "[n]o one is out in the desert 'drafting' cultural landscapes." Rather, the landscapes already exist, and BLM must analyze and disclose impacts on them.

Issue Number: PP-CA-McCoy-13-03-57
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The FEIS' assurance, without any evidence or analysis, that CUL-1 satisfies NEPA's requirement to include a reasonably complete discussion of mitigation measures, is no better than the DEIS. First, the FEIS admits that it does not contain a compete discussion - rather, a potential, future MOA will contain the complete discussion. Second, a MOA executed under section 106 of the National Historic Preservation Act does not necessarily establish measures to mitigate impacts on cultural resources pursuant to NEPA. Section 106 deals with impacts on districts, sites, buildings, structures and objects included in or eligible for the National Register of Historic Places. However, as BLM acknowledges, "cultural resources" include both places eligible for the Register and places that may not be eligible. Finally, there is no guarantee that a MOA will be executed. A MOA is a negotiated document which may or may not be executed.

NEPA requires the FEIS to include all relevant, reasonable mitigation measures that could alleviate the Project's effects on cultural resources. The FEIS falls short - it provides only a "perfunctory description" of a potential, future document that may mitigate some of the Project's effects to some cultural resources. The FEIS failed to include a reasonably complete discussion of possible mitigation measures, and is therefore inadequate.

Issue Number: PP-CA-McCoy-13-03-6
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
According to BLM, the Project would permanently affect 94 known cultural resource sites. The Project may also affect countless additional resources yet to be discovered. The CDCA Plan Amendment would allow the destruction of cultural resources in the Planning Area for conversion into a single industrial site. However, the BLM set forth no justification for this action, as required by FLPMA and the CDCA Plan. BLM failed to set forth any evidence that its decision accounts for "the principles of multiple use and sustained yield" such as, for example, how the destruction of the resources on the site would be balanced by other management decisions in the CDCA Plan, as required by FLPMA. The BLM failed to explain how its decision responds to national priority needs for energy development and transmission, "without compromising...public values such as...cultural resources..." BLM provided no evidence that the proposed destruction of cultural resources is consistent with only allowing "lower-intensity, carefully controlled multiple use of resources" and that the action ensures "that sensitive values are not significantly diminished" on Class L lands, as required by the CDCA Plan.

Summary

The cultural resources sections failed to take a hard look at the impacts on cultural resources within the Planning Area.

- The narrow definition of "cultural resources" precludes a full evaluation of impacts on cultural resources.
- The BLM has not conducted adequate testing to determine whether buried cultural sites or materials are present.
- The DEIS and FEIS fail to adequately analyze the Project's impacts on cultural landscapes.
- The NEPA regulations require the FEIS to include all relevant, reasonable mitigation measures that could alleviate the Project's effects on cultural resources. The FEIS failed to include a reasonably complete discussion of possible mitigation measures, and is therefore inadequate.
- The BLM provided no evidence that the proposed destruction of cultural resources is consistent with only allowing "lower-intensity, carefully controlled multiple use of resources" and that the action ensures "that sensitive values are not significantly diminished" on Class L lands, as required by the CDCA Plan.

Response

The BLM ensures inventory and recording of a full range of cultural resources in this and all project proposals in compliance with the NEPA and the National Historic Preservation Act (NHPA). The FEIS identified the range of cultural resources stating, "A cultural resource is a location of human activity, occupation, or use identifiable through field inventory, historical documentation, or oral evidence. Cultural resources include both archaeological, historic, or architectural sites, structures, or places with important public and scientific uses, and may include definite locations (sites or places) of traditional cultural or religious importance to specified social and/or cultural groups." The FEIS clearly indicates that the "cultural resources … evaluated … fall under one of the following resource types: prehistoric archaeological resource, ethnographic resource, and historic-period archaeological and built environment resources." McCoy PA/FEIS, page 3.5-1. These resources were identified and evaluated in preparation of the DEIS through professionally conducted Class III cultural resources inventory and ongoing consultation with Native American tribes and the California State Historic Preservation Office (SHPO). Through these efforts, a number of cultural resources were identified and evaluated. Several identified resources are determined and/or recommended for inclusion in the National Register of Historic Places (see McCoy PA/FEIS Table 3.5-1). Cultural landscapes, traditional cultural properties, and other ethnographically important places are identified through tribal consultation which was ongoing throughout all the BLM planning efforts (see FEIS, pages 5-5 through 5-12). As of the signing of the ROD for the MSEP, none of these resources were identified by the Native American community.

"Evaluation of potential impacts of the Proposed Action and alternatives on cultural resources is based in part on review of legal responsibilities established under NEPA, the NHPA (42 USC §§4321, 4331-4335), and other relevant authorities." McCoy PA/FEIS, page 4.5-1. The determinations of significance of those located cultural resources under the NHPA and NEPA (see 40 CFR 1508.27 (b)(8)), and the potential for proposed project implementation to inflict adverse effects to some of those resources, required the BLM to develop and sign a Memorandum of Agreement (MOA) among the BLM, the California SHPO, and the Advisory Council on Historic Preservation. The MOA contains "measures to avoid, minimize, and mitigate adverse effects to historic properties and detail[s] the process for activities to proceed in areas where historic properties are not now known to exist; procedures for treatment of unanticipated effects and post-review discoveries; recognition that the BLM will comply with the Native American Graves Protection and Repatriation Act (NAGPRA); compliance monitoring; dispute resolution; and tribal participation" (see Parts III – VI of the McCoy ROD, Appendix 3). As it is not possible to identify all potential subsurface cultural deposits through proactive archaeological testing, stipulations included in the MOA provide for professional archaeological monitoring of construction activities and treatment of subsequently discovered, but as yet unknown subsurface cultural resources and/or human remains and funerary objects (see Parts V and VI of the McCoy ROD, Appendix 3). As stated in the McCoy PA/FEIS (page 4.5-2), the BLM did expect to execute the cultural resources MOA prior to issuing a ROD on the proposed project. Subsequent execution of that MOA and the implementation of the stipulations decreed therein concluded the section 106 compliance process regarding the currently-proposed project. Conclusion of the section 106 process indicates that the BLM has both adequately analyzed potential effects to cultural resources, and provided sufficient mitigation measures to account for any adverse effects to known and unknown cultural resources. The MOA was attached as Appendix 3 to the ROD for the MSEP.

Finally, contrary to the protest point, the BLM does not propose to destroy significant cultural resources. Instead, through implementation of the MOA, the BLM requires protection of the "sensitive values" for significant cultural resources within the project area.

Water Resources

Issue Number: PP-CA-McCoy-13-03-10
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The CDCA Plan Amendment would compromise scarce Colorado River water for a single industrial use. However, BLM set forth no justification for this action, as required by FLPMA or the CDCA Plan. BLM failed to set forth any evidence that its decision accounts for "the principles of multiple use and sustained yield" such as, for example, how the use of scarce resources for the Project would be balanced by other management decisions in the CDCA Plan, as required by FLPMA.35 BLM failed to explain how its decision responds to national priority needs for energy development and transmission, "without compromising the basic desert resources of...water..."36 BLM provided no evidence that the Project's impacts on the Colorado River are consistent with only allowing "lower-intensity, carefully controlled multiple use of resources" and that the action ensures "that sensitive values are not significantly diminished" on Class L lands, as

required by 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 protection mandate for Class L lands.

Issue Number: PP-CA-McCoy-13-03-49
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The Project proposes to pump groundwater for construction and operation. The Project site overlies the PVMGB. The DEIS acknowledged that "subsurface inflow into the PVMGB occurs from the Colorado River via the PVVGB..." According to the DElS, the PVMGB "is hydrologically continuous with the PVVGB" and "[g]roundwater migrating from the Colorado River through the PVMGB represents most of the subsurface inflow to the basin..." The DEIS also states that the "PVMGB is tributary to the lower Colorado River, and is part of the Colorado River aquifer." Finally, the DEIS states that the PVMGB is "likely subject to" the Law of the River. Yet, without any evidence, the DEIS concludes that the "groundwater connection between the Colorado River and the PVMGB is not anticipated."

Issue Number: PP-CA-McCoy-13-03-51
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
the FEIS mischaracterizes existing studies as "hypotheses" and mischaracterizes the issue which triggers analysis and an entitlement in this case. The FEIS states that "available data do not substantiate the hypothesis from 2009 that groundwater from the Colorado River could potentially flow through the PVVGB to the PVMGB" and "PVID's drains prevent water flow between the Colorado River and the mesa groundwater." Therefore, according to the FEIS, "there is no connectivity between the Colorado River and mesa groundwater. Project-related groundwater pumping would have no impact on the Colorado River." Once again, BLM failed to take a "hard look" at the Project's effect on the Colorado River, as required by NEPA.

Issue Number: PP-CA-McCoy-13-03-55
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The California Water Code requires any person discharging waste, or proposing to discharge waste, within any region that could affect waters of the State to file an application for waste discharge requirements. According to the Colorado River Basin Regional Water Quality Control Board, the Project requires a waste discharge permit for the disturbance of 165.2 acres of State jurisdictional waters. According to Water Board staff, "a permit definitely needed to be issued' and "a project that size cannot be ignored." Yet, the DEIS and FEIS completely failed to disclose or analyze this permit requirement and the associated environmental effects of discharging waste on State waters. Therefore, BLM failed to take a "hard look" at the Project's impacts on waters of the State.

Summary

The BLM failed to take a "hard look" at the Project's effect on the Colorado River, as required by NEPA. The DEIS incorrectly concluded that "groundwater connection between the Colorado River and the PVMGB is not anticipated." Further, the BLM did not provide evidence that the Project's impacts on the Colorado River are consistent with only allowing "lower-intensity, carefully controlled multiple use of resources" and that the action ensures "that sensitive values are not significantly diminished" on Class L lands, as required by the CDCA Plan.

According to the Colorado River Basin Regional Water Quality Control Board, the Project requires a waste discharge permit for the disturbance of 165.2 acres of State jurisdictional waters.

Yet, the DEIS and FEIS completely failed to disclose or analyze this permit requirement and the associated environmental effects of discharging waste on State waters.

Response

In the analyses of the environmental consequences of permitting the proposed MSEP, the BLM established the potential effects of the project on water resources, both locally and regionally. Consistent with professional water resources science, the McCoy PA/FEIS described groundwater modeling to determine the effects of the proposed use of water resources for MSEP construction, operation, and decommissioning. The results of the groundwater modeling indicate that "regardless of the well configuration or associated pumping schedule, the influence from MSEP pumping would be minimal" and "drawdown outside of the solar plant boundary would be less than 0.1 foot, both at the end of construction and at the end of operational pumping," in "no scenario did the model predict that the drawdown would extend beyond the PVMGB [Palo Verde Mesa Groundwater Basin] boundary into the PVVGB [Palo Verde Valley Groundwater Basin]" (FEIS, pages 4.20-5/6). Given that the PVVGB lies between the PVMGB and the Colorado River, the conclusion that the MSEP will have no significant impact on the Colorado River is substantiated.

In further analyses of potential impacts to water resources, the McCoy PA/FEIS described the cumulative effects of solar projects in the area overlying the PVMGB. The "Project-specific groundwater model included consideration of a cumulative scenario, which included seven solar power projects in the vicinity of the MSEP that would be located on the Palo Verde Mesa: the Blythe Energy Project II, Blythe PV Project, Blythe Solar Power Project, Desert Quartzite Solar Farm, Gypsum Solar, the MSEP, and the enXco McCoy Project" McCoy PA/FEIS, page 4.20-17. Cumulative model analysis results show a "drawdown contour of 0.01 foot is predicted at the end of 33 years of pumping to remain within the PVMGB" and that "the MSEP would result in…about 1.3 percent of the total cumulative scenario water use" but "would not result in a cone of depression under the cumulative scenario" (McCoy PA/FEIS, page. 4.20-17).

In regards to water discharge permit, the McCoy PA/FEIS stated that implementation of the MSEP "would require a Title 27 discharge permit issued by the Colorado River RWQCB, which would require adherence to WDRs and minimum standards" and "the WDRs would require the preparation of a Water Quality Monitoring and Response Plan that would include monitoring of the [evaporation] pond liner to detect leaks, as well as groundwater monitoring" and that "adherence to the conditions of the WDRs would ensure that groundwater quality would be protected from degradation, consistent with the Basin Plan" (McCoy PA/FEIS, page 4.20-12).

Further, the McCoy PA/FEIS presents a suite of mitigation measures to address potential impacts of the proposed MSEP on water resources. McCoy PA/FEIS, pages 4.20-20 to 4.20-22. These included:

- the Applicant shall comply with the National Pollutant Discharge Elimination System;

- proposed evaporation ponds shall be sized to accommodate operational discharges plus a 25-year storm event, with no less than 1 foot of freeboard;
- additional stormwater retention measures and facilities…shall be implemented within the MSEP site;
- all on-site buildings and fill areas shall be placed outside of frequent flood flow areas…and associated facilities shall be constructed at a finished floor elevation of at least 2 feet above the highest anticipated flood flows during a 100-year event;
- the Applicant shall complete a Flood Safety Plan for the site;
- the Applicant shall ensure that during construction, temporary construction related structures would be constructed so as to avoid interference with 100-year flood flows;
- The groundwater Monitoring and Mitigation Plan shall be prepared by a qualified hydrogeologist.

Finally, the FEIS (at 4.20.9) describes anticipated residual impacts associated with implementation of the proposed MSEP, indicating that the BLM did take the NEPA-requisite "hard look" at potential impacts to water resources of approving/permitting implementation of the proposed MSEP.

Biological Resources

Issue Number: PP-CA-McCoy-13-03-19
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
Although the FEIS "level of site analysis" may exceed "the landscape-level 'hot spot' GIS analysis," BLM has still failed to put the ecological values of the Planning Area into context, such that their potential loss is properly disclosed to the public and decision makers. The NECO Plan mapping demonstrates that the Planning Area is within one of the largest unfragmented areas in the NECO Plan area, and that it has some of the highest ecological values among all other sites in NECO Plan area. According to Mr. Cashen, the impact caused by the loss of these values cannot be mitigated to the point of no adverse effect without any evidence. Here, BLM provides no evidence that the loss of these ecological values is not significant.

Summary

The FEIS does not adequately disclose the loss of ecological values to the public and decision makers.

Response

While Appendix K of the McCoy PA/FEIS noted that Northern and Eastern Colorado Desert Coordinated Management (NECO) Plan resulted in three management areas, it clearly stated that

the "solar plant site is not located within one of these special management areas." McCoy PA/FEIS, pages K-75 to K-76. The boundaries for the Bighorn Sheep Wildlife Habitat Management Area (WHMA) and the ROW Grant application boundary illustrate a slight overlap on the western end (as shown in McCoy PA/FEIS Figure 3.4-7). However, the MSEP Units 1 and 2 do not overlap with the WHMA, and thus, the MSEP does not conflict with ecological values that were noted in the NECO Plan. McCoy PA/FEIS, Figure 3.4-7, page A-24. As detailed in the FEIS, "The intermountain valley floor within the solar plant site is unlikely to serve as a potential movement corridor for Nelson's bighorn sheep based on their documented absence from the McCoy Mountains. Presently, the McCoy Mountains are considered an unoccupied portion of the bighorn's range." McCoy PA/FEIS, page K-60. Further, in describing the NECO Plan's background, the FEIS states that "All practicable means to avoid or minimize environmental harm by the plan have been adopted." McCoy PA/FEIS, page 3.4-28.

Wildlife

Mojave Fringe-toed Lizard

Issue Number: PP-CA-McCoy-13-03-28
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The BLM erred in its original calculation of Mojave fringe-toed lizard habitat. According to the FEIS, the total amount of potentially occupied sand dune and sand sheet habitat in the Palo Verde Valley was revised upward from 1,098 acres to 12,911 acres, which is considered a small portion of the available habitat based on the large amount of similar habitat available locally. Additionally, the total cumulative impact from future projects, including the Proposed Action, was revised downward from 655 acres to 76 acres. The anticipated contribution of the Proposed Action to cumulative effects, 38 acres, includes both temporary and permanent effects.

Evidence shows the acreage values presented in the FElS are unsupported. Evidence from the NECO Plan, BLM's DEIS for the Blythe Solar Power Project and the habitat model that was prepared for the Desert Renewable Energy Conservation Plan ("DRECP") show that the acreage reported in the FEIS is underestimated.

Further, Cashen explains that BLM's failure to take a hard look by misstating the acreage of habitat is compounded by other errors. First, the FEIS does not define the geographic scope of analysis (i.e., the boundaries of the Palo Verde Valley), nor does it explain why the revised analysis was limited to the Palo Verde Valley when, according to the FEIS, the Planning Area is located on the Palo Verde Mesa.

Second, the geographic scope of the cumulative effects analysis in the FEIS is not the same as the one used in the DEIS, or as the one that the BLM used for the Blythe Solar Power Project (both of which included the Chuckwalla Valley). According to Cashen, a cumulative effects analysis that is limited to the Palo Verde Valley is biologically irrelevant (arguably, the species does not even occur in the Palo Verde Valley).

Third, the FEIS provides inconsistent information on the habitat subject to the BLM's analysis. Specifically, it first indicates the analysis pertains to potentially occupied sand dune and sand sheet habitat, whereas it subsequently indicates the analysis pertains to occupied habitat. Cashen explains that research indicates Mojave fringe-toed lizards select specific micro-habitats and that at the macro-level there is a considerable amount of apparently "suitable" habitat that is not occupied by the species. As a result, there is no scientific basis for BLM assessing impacts to occupied habitat in relation to the total amount of potentially occupied habitat.

Finally, BLM has not discussed the distribution and status of Mojave fringe toed lizard populations in the Planning Area region. Based on Cashen's independent research, he determined that the Mojave fringe-toed lizards in the Project area are in the southeastern-most portion of the species' range and Mojave fringe-toed lizard populations are believed to be decreasing. Cashen explains that the proposed gen-tie line would fragment a relatively large population (or metapopulation) of Mojave fringe-toed lizards in the corner of the species' range. Cashen concludes that this would greatly increase the risks of range contraction and local extirpation, neither of which would be mitigated by the measures prescribed in the FEIS.

Summary

The BLM violated NEPA because it failed to adequately analyze impacts to the Mojave fringe toed lizard. Specifically, the FEIS:

- underestimated the acreage of occupied habitat,
- modified the geographic scope of the analysis between the draft and final EIS, and
- provided inconsistent information on the habitat subject to the BLM's analysis.

Response

The protester is correct that the BLM did err in its original calculations of the Mojave fringe-toed lizard occupied habitat in the DEIS. The FEIS corrected the error and stated:

"…the total amount of occupied Mojave fringe-toed lizard habitat was revisited and an error was detected in the original calculation that greatly overestimated the total cumulative impact and cumulative contribution of the Proposed Action. Following the updated analysis, the total amount of potentially occupied sand dune and sand sheet habitat in the Palo Verde Valley was revised upward from 1,098 acres to 12,911 acres, which is considered a small portion of the available habitat based on the large amount of similar habitat available locally. Additionally, the total cumulative impact from future projects, including the Proposed Action, was revised downward from 655 acres to 76 acres. The anticipated contribution of the Proposed Action to cumulative effects, 38 acres, includes both temporary and permanent effects. Thus, the permanent impact of the Project, 19 acres, constitutes a permanent effect to less than 0.2 percent of sand dune and sand sheet habitat in the Palo Verde Valley study area that may support this species." McCoy PA/FEIS, page K-24.

The new acreage numbers in the FEIS were derived by studying cumulative effects on the Mojave fringe-toed lizard population in using the NECO planning area as an initial starting point. Building upon the cumulative impact assessment methods used for the BSPP, the approach used for the MSEP focused on known Mojave fringe-toed lizard populations and the distribution of suitable habitat (sand sheets and sand dunes).

It was determined that impacts this species in the NECO planning area were limited to the

Chuckwalla and Palo Verde valleys. As such, the DEIS analysis characterized impacts to 35 acres occupied and potential Mojave fringe-toed lizard habitat (DEIS, Table 4.4-3). For the FEIS analysis, difficulties were encountered in calculating the total acreage of potential Mojave fringe-toed lizard in this larger study area. Because the only identified cumulative projects that impacted Mojave fringe-toed were to the local population that occurred within a 12,911-acre area traversed by the McCoy Project (shown in Figure 4.4-3 of the FEIS), the cumulative analysis area was reduced to reflect this area.

The area of occupied Mojave fringe toed lizard habitat in the cumulative study area, which was identified as within "Palo Verde Valley" to differentiate this area from the Chuckwalla Valley, includes 12,911 acres of undifferentiated sand dune and sand sheet habitat, as presented in Table 4.4-3 of the FEIS. Including the McCoy Solar Power Project, the analysis calculated that cumulative projects would impact 76 acres (0.6 percent) of potential habitat.

The comment is correct that the total area of potential and occupied habitat for Mojave fringe-toed lizard within the NECO planning area is vastly greater than the 12,911 acres presented in the FEIS. However, as presented previously, the precise amount of sand dune and sand sheet habitat is not known. When the project's 38-acre impact area and the total 76-acre cumulative impact are viewed against a potentially occupied area of 50,000 acres or more, it is clear that the individual and cumulative contributions to habitat loss for this species are negligible.

Bats

Issue Number: PP-CA-McCoy-13-03-31
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The FEIS states "biological surveys considered the potential presence of potential roosting habitat to 0.37 mile from the Project site." Evidence shows this statement is vague and misleading. The Applicant's consultant conducted a 30foot-wide line-transect survey for desert tortoises at a distance of 0.37-miles (600 m) from the solar plant site boundary (as well as transects at 200 and 400 m). However, those surveys do not provide information on all potential bat roosts within 0.37-miles of the Planning Area.

The FEIS states "it is reasonable to conclude based on field observations no significant bat roosts occur in areas located within 1.0 mile north and east of the [planning Area] site." However, the field observations do not support BLM's conclusion because a bat roost was detected in one of the washes in the Planning Area. Cashen notes that additional roosts may be located in other washes and in the McCoy Mountains. Therefore, impacts to bats cannot be adequately analyzed until focused surveys for bat roosts within one mile of the Planning Area have been completed in compliance with requirements of the NECO Plan.

The FEIS indicates the Applicant's consultants did not find bats at the roost, and that "no mitigation is required for potential impacts to special-status bats or their habitat." However, as Cashen states in his comments, the consultants did not conduct surveys to determine if the roost was occupied (or active). Instead, it appears they simply concluded the roost was inactive and biologically insignificant due to the "small amount of guano." As Cashen explained in his comment letter on the DEIS, a "small amount" of guano cannot be used to conclude a roost is inactive or biologically insignificant. Consequently, the BLM has not acquired the data needed to make conclusions pertaining to the occupancy status of the roost, and thus, the need for mitigation. In other words, BLM

failed to take a "hard look" at the Project's effects on special-status bats.

Summary

The BLM inadequately surveyed bat roosting habitats that are needed to make conclusions pertaining to the occupancy status of the roost.

Response

The protester is correct that the BLM did not acquire extensive data regarding bat roosts. However, the BLM clearly provides a rationale as to why extensive surveys were not conducted. According to Appendix C-1 Biological Resources Technical Report, "the MSEP is proposed for flat areas of the desert with few trees, minimal relief, and no nearby reliable water sources … Although the amount of area to be dedicated to the Project may permanently reduce bat foraging opportunities, no surveys are required to come to this conclusion, and bat surveys in nearby mountains and McCoy Wash woodland would not contribute to an understanding of the impact of the Project on sensitive bat species. Therefore, no focused bat surveys were conducted." McCoy PA/FEIS, page C-35. During a desert tortoise biological survey, a natural cavity with a small amount of bat guano was identified, but the survey indicated that the cavity was not in current use by any bats (McCoy PA/FEIS, page C-49). Prior to initiating surveys, the protocols were reviewed and approved by the BLM, FWS, and CDFW based on the general absence of bat roosting habitat and the related low likelihood that bats would be encountered.

Burro Deer

Issue Number: PP-CA-McCoy-13-03-33
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:

The FEIS acknowledges that the microphyll woodlands on the Project site provide habitat for burro deer but dismisses impacts to burro dear because the woodlands would largely be avoided though Project design. However, Cashen explains that the extent to which woodlands have been avoided though Project design is irrelevant because the Project's security fence would prevent deer from accessing the woodlands.

The Project, in conjunction with other reasonably foreseeable projects in the Project area, would exclude deer from a substantial amount of habitat in the "Upper McCoy" and "McCoy Valley" regions, which the California Department of Fish and Wildlife ("CDFW') has identified as being part of a linkage corridor that is critical for burro deer connectivity in eastern Riverside County. Consequently, Cashen concludes that the Project would adversely affect burro deer. BLM must prepare a supplemental EIS that adequately analyzes and mitigates impacts to burro deer.

Summary

The FEIS fails to adequately analyze impacts to burro deer.

Response

The BLM adequately analyzed impacts to burro deer. The protestor is correct that the MSEP would exclude burro deer from foraging habitat, mainly due to the fact the area would be fenced off for security. A similar issue was raised during the 90-day Draft EIS comment period and the BLM revised its direct and indirect impact analysis in the FEIS to reflect this concern: "Direct and indirect construction impacts to burro deer would include the loss of foraging habitat in desert dry wash woodlands, vegetated swales, and Sonoran creosote bush scrub habitat, and potential barriers to local and regional deer movement. The Project would not present a barrier to regional movement because deer still could disperse around the site to the west, north, and east." McCoy PA/FEIS, page 4.4-16. Thus, the BLM acknowledges that foraging habitat would be impacted, but the overall regional movement of this species would not be drastically hindered.

Burrowing Owl

Issue Number: PP-CA-McCoy-13-03-35
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
BLM continues to provide inconsistent information pertaining to the number of active burrowing owl burrows in the Project area. The DEIS indicated there were 10 active burrows on the solar facility site and 1 active burrow along the gen-tie route. The FEIS now indicates that "a thorough review identified 14 active burrows." This information, too, appears to be incorrect. Cashen reviewed maps produced by the Applicant's consultant, which depict at least 21 distinct locations with active burrowing owl burrows.

Cashen explains that BLM also continues to misconstrue the Applicant's adherence to the CDFW survey protocol, which BLM acknowledges was the protocol issued by the California Burrowing Owl Consortium ("CBOC"). Cashen illustrates in his comments that the surveys that were conducted for the Project did not adhere to this protocol.

Without reliable data, it is impossible to evaluate the extent of Project's impacts on burrowing owls. Surveys that adhere to CDFW guidelines must be conducted prior to Project approval. The surveys must include the Project site, the buffer zone, and the transmission corridor. Without these surveys, BLM cannot take a "hard look" at the Project's adverse effects on burrowing owls.

Issue Number: PP-CA-McCoy-13-03-70
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
In short, the Project would result in direct impacts to at least 15, and likely 20, active burrows and approximately 4,543 acres of occupied breeding and foraging habitat. The Project would also result in additional indirect and cumulative impacts to the species. The BLM proposes to mitigate these impacts by requiring the Applicant to acquire 45 acres of mitigation lands that do not need to be occupied by burrowing owls. Cashen states that the proposed mitigation is inconsistent with the CBOC's mitigation guidelines, CDFW's 2008 Guidance for Burrowing Owl Conservation, and CDFW's 2012 Staff Report on Burrowing Owl Mitigation.

Summary

The BLM failed to take a "hard look" at the Project's adverse impact to the burrowing owl because the BLM:

- is inconsistent in conveying the number of active burrowing owl burrows;
- failed to adhere to the CDFW survey protocols; and
- is inconsistent with the CBOC's mitigation guidelines, CDFW's 2008 Guidance for Burrowing Owl Conservation, and CDFW's 2012 Staff Report on Burrowing Owl Mitigation.

Response

The FEIS is internally consistent regarding the number of owls and active owl burrows in the study area. Section 3.4 (page 3.4-11) and 4.4 (page 4.4-14) report 14 active burrows, 2 owl pairs and 4 individual owls. Additionally, cited in both sections: 4 owls are noted in the buffer area for the solar plant site and the gen-tie has 1 owl pair and 1 active burrow.

The BRTR (Appendix C – Biology, Table 9 on page C-50) identifies 5 active or recently used burrows, 8 with unknown activity status, and 1 with white wash resulting in 14 burrows as well

The text inconsistency comes in Response 9-18, which was not carried into chapters 3 and 4 of the FEIS. Revisions to the west side of the project reduced impacts to burrowing owl, and an additional owl pair is cited in the gen-tie ROW, as reflected in the response.

Section 4.2.3.4 of Appendix C: Biological Resources Technical Report of the FEIS thoroughly discusses the guidelines and consecutive surveys that were conducted consistent with CDFW protocols, which reflect the California Burrowing Owl Consortium's guidelines. Surveys included a Phase I: Habitat Assessment, Phase II: Burrow Survey, and a Phase III Owl Presence survey. A field reconnaissance survey was also conducted in December 2007. Appendix I and J disclose the number and locations of the burrows that were identified on the Project site.

The claim that the BLM failed to adhere to the CDFW survey and mitigation protocols is incorrect. According to the Appendix C: Biological Resources Technical Report, "survey methods were reviewed and approved by BLM, FWS, and CDFG [now CDFW] prior to commencing field work (Tetra Tech and Karl 2011) and were conducted in accordance with standardized protocols for all relevant species for which there are protocols, and used biologically sound approaches for the remaining species." McCoy PA/FEIS, page C-29. As for adherence to California Burrowing Owl Consortium (CBOC) and CDFW mitigation, the CDFW reviewed and approved Mitigation Measure WIL-9, consistent with CBOC guidelines. FEIS at 4.4-44 (California Burrowing Owl Consortium (CBOC), 1993. Burrowing owl survey protocols

and mitigation guidelines. Unpub. document. 13 pp).

Gila Woodpecker

Issue Number: PP-CA-McCoy-13-03-37
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
Cashen's comments on the DEIS described BLM's failure to accurately disclose the current range of the Gila woodpecker, as well as habitats used for nesting. The FEIS does not rectify these issues and therefore fails to take a "hard look" at the Project's adverse effects to Gila woodpeckers.

Issue Number: PP-CA-McCoy-13-03-74
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The Biological Resources Technical Report acknowledges "potential habitat [for the Gila woodpecker] may occur in the larger trees of the arboreal washes that cross the Liner Corridor at the southern McCoy Mountains." Nevertheless, focused surveys were not conducted at those locations. Instead, surveys were limited to two days in McCoy Wash. In addition, the FEIS provides no basis for categorizing the Gila woodpeckers on the Blythe Solar Power Project site as "vagrants." On the contrary, Cashen explains that the presence of more than one individual during the breeding season strongly suggests breeding activity on (or in close proximity to) the site.

Summary

The BLM failed to accurately disclose the current range of the Gila woodpecker, as well as habitats used for nesting.

Response

The BLM accurately disclosed the current range of the Gila woodpecker. According to Table 3.4-3 of the FEIS, "The Gila woodpecker's range is limited to a small area of southwestern United States and northwestern Mexico. In California, this species is found only along the Colorado River and in small numbers in Imperial County. In southeastern California, Gila woodpeckers were formerly associated with desert washes extending up to one mile from the Colorado River. Currently, they are found only in riparian areas along the Colorado River…

The site does not contain suitable nesting habitat for this species. The nearest CNDDB (2011) records for this species are a 1986 record 9.4 miles east of the site at the Colorado River and a 2002 record from Sand Wash (Imperial County), 10.2 miles south of the CRS." McCoy PA/FEIS, page 3.4-22.

Appendix C of the FEIS included a focused Gila woodpecker survey. Based on that survey, the BLM determined that no Gila woodpecker nesting habitat occurs on the MSEP site or along most of the project linears (McCoy PA/FEIS, page. C-47). Tree inspections performed during the

focused Gila woodpecker survey showed that potential habitat may occur in the larger trees of the arboreal washes that cross the Liner Corridor at the southern McCoy Mountains. McCoy PA/FEIS, page C-47. As a result, the BLM concluded that this species is an "unlikely nester/possible transient" in the project area. McCoy PA/FEIS, page C-24. Appendix K of the FEIS explained in response to comment 11-47 that "[a]n occasional vagrant can be expected to the area…." The word "vagrant" was used in this instance as a synonym of "transient." Nowhere else in the McCoy PA/FEIS has the BLM described the Gila woodpecker as a "vagrant" species.

Couch's Spadefoot Toads

Issue Number: PP-CA-McCoy-13-03-39

Issue Excerpt Text:
First, it is unclear whether appropriately timed surveys to determine the presence of activity at breeding pools were completed. The FEIS makes several references to surveys that will be performed in fall of 2012 to determine whether spadefoot are present. However, it also indicates that the fall 2012 surveys were completed, and it references a technical memorandum that summarizes the results of the surveys. The technical memorandum was not included in the FEIS. In his attached comments, Cashen explains that Couch's spadefoots are very difficult to detect because they spend most of the year below ground and the timing of breeding activities is unpredictable. As the FEIS correctly reports, surveys for the Couch's spadefoot take multiple years to complete. As a result, the BLM must disclose the spadefoot survey reports (or memorandums) so that they can be vetted by the public and resource agencies.

Second, several potential breeding pools are located in the Project area. This is significant in a desert environment. Yet, the BLM has failed to describe the pools by providing their size, substrate, water holding capacity, and proximity to potentially suitable aestivation habitat. This precludes the ability to evaluate the habitat value of the pools to the Couch's spadefoot.

Finally, according to the FEIS, [t]he absence of demonstrated species presence shall not be used to assume species absence from suitable habitat. Thus, mitigation shall be required as described in WIL-14 for all potential Couch's spadefoot habitat losses, unless appropriately-timed focused surveys can demonstrate species absence.

This statement is internally inconsistent. As a result, it is unclear whether the BLM intends to require mitigation for Project impacts to suitable habitat (i.e., despite survey results). Moreover, the BLM attempts to justify the merits ofWIL14 (i.e., the mitigation for Couch's spadefoot), while simultaneously omitting WIL14 from the FEIS.

Summary

The FEIS is unclear on whether surveys were appropriately timed to determine the presence of activity at Couch's Spadefoot toad breeding pools and whether mitigation will be required for any project impacts to suitable habitat.

Response

Surveys were appropriately timed in order to determine the presence of activity at spadefoot toad breeding pools. The results of the Spadefoot toad surveys from fall 2012 are summarized in the document titled: Tetra Tech EC, Inc., 2012cb. Couch's Spadefoot Breeding Season Surveys near Blythe, California for the McCoy Solar Energy Project. Technical Memorandum, December 3, 2012. This technical memorandum was received within the two weeks preceding issuance of the FEIS and its results were relied upon in the FEIS. Both the FEIS Affected Environment (section 3.4) and Environmental Consequences (section 4.4) sections included and referenced the final negative survey findings. The technical memorandum is part of the project file and available upon request from the BLM.

Mitigation Measure WIL-14 was deleted from the FEIS as no longer required because the fall 2012 breeding season surveys for Couch's spadefoot toads did not result in any findings of Couch's spadefoot toads. Without specimens of the species being present, the Project would not cause impacts that could be avoided or reduced by mitigation. This has been clarified in the ROD (see McCoy ROD Appendix 7, page 7-14).

Golden Eagles

Issue Number: PP-CA-McCoy-13-03-43
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
BLM failed to rigorously examine the consequences of eliminating thousands of acres of Golden Eagle foraging habitat in the Project area. The FEIS concludes, without support, that "[b]ased on analysis provided in the PA/FEIS, implementation of the Project is not expected to result in take of golden eagles." As several commenters pointed out, BLM's analysis was, and continues to be, fatally flawed. First, it is mathematically impossible for there to be 398,823 acres of land within 10 miles of the Project site, as suggested by the BLM. Second, BLM's statements purporting to justify its conclusion that the Project would not result in take (i.e., the lack of active nests near the Project site and the low observed prey densities on the Project site) are unjustified. As the USFWS articulated in its comments on the DEIS, BLM's conclusions pertaining to impacts to foraging habitat are unreliable because they are based on limited survey data and incidental observations of prey during surveys for other species. Also, BLM did not apply an appropriate geographic scope of analysis. Further, information provided in the DRECP contradicts BLM's statement that there is a lack of active nests near the Project site.

Summary

The FEIS did not adequately support the conclusion that implementation of the project is not expected to result in take of golden eagles.

Response

The BLM relied upon extensive survey data when it concluded that the MSEP would not result in take of golden eagles. In spring 2010, helicopter surveys to detect golden eagle nesting activity were conducted by the Wildlife Research Institute (WRI) following the USFWS Interim Golden Eagle Inventory and Monitoring Protocols (Pagel et al., 2010). Additional helicopter surveys were conducted in spring 2011 at the request of the FWS to provide a second consecutive year of golden eagle nest data within 10 miles of the Project. The 10-mile radius is consistent with FWS guidance for inventorying golden eagles that occur near a specific project (Pagel et al., 2010). Surveys were conducted during the most appropriate time to observe nesting activity and productivity, and focused on areas containing suitable nesting habitat within the search area. The spring 2010 helicopter surveys detected two golden eagle nests (one active, two inactive) within 10 miles of the MSEP. The 2011 nest survey located five golden eagle nests within the 10-mile-radius search area. Four of these nests were inactive, and the fifth (Nest 4 – an active golden eagle nest in 2010), was occupied by red-tailed hawks in 2011. McCoy PA/FEIS, Appendix C, pages C-254 to C-255.

Avian point count surveys were also conducted on the Solar Plant Site and Linear Corridor pursuant to a protocol approved by the FWS, BLM and CDFW, and described in detail on pages C-34 to C-35, and C-256 of Appendix C. No golden eagles were observed during the avian point counts or the modified counts for raptors. On March 28, 2011, two golden eagles were incidentally observed south of the MSEP soaring northward, toward the project site.

The BLM's conclusion that "development and operation of the Project is not expected to disturb the foraging of any eagle pairs within 10 miles of the project site" is supported by the data provided in the biological surveys of the project area. McCoy PA/FEIS, page 4.4-17. As described in Appendix C, desert cottontails and two species of ground squirrel were detected on the MSEP site during biological surveys, but no concentration areas were noted. Avian point counts on the Project site suggest that golden eagles do not use the area for foraging. Additionally, the habitat that will be disturbed or removed is not unique or limiting on the landscape, and represents only a small percentage of the area within a 10-mile radius of known eagle nest centers. McCoy PA/FEIS, pages C-258 to C-259.

The BLM determined that there are 398,823 acres of potentially suitable golden eagle foraging habitat within 10 miles of the Project site. McCoy PA/FEIS, page 4.4-25. A follow-up GIS analysis performed in response to the comment verified that the acreage value presented in the FEIS is correct. The BLM analyzed all habitats within 10 miles from the boundary of the solar plant site and project linears.

Bighorn Sheep

Issue Number: PP-CA-McCoy-13-03-46
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
Bighorn sheep (except Nelson bighorn sheep (ssp. avis canadensis nelson)) are a fully protected species. Bighorn sheep occurring in eastern Riverside County are not among those excepted from the status of "fully protected" by the Fish and Game Code. The FEIS, without any support, reports a "documented absence" of bighorn sheep from the McCoy Mountains and therefore concludes that the Project would not impact bighorn sheep. BLM's conclusions in the FEIS lack support.

Substantial evidence shows that bighorn sheep exist in the Project area and would be adversely affected by the Project. Bighorn sheep have been observed in the McCoy Mountains. The FEIS ignores this evidence. The FEIS also ignores evidence of bighorn sheep movement between the nearby Riverside and Big Maria Mountains. This evidence is consistent with classification of those ranges, along with the McCoy Mountains, as transient range (i.e., occupied on a seasonal basis or by animals moving between mountain ranges). Also, the Little Maria Mountains now support a small population of bighorn sheep, and three individuals were observed in that range during golden eagle surveys associated with the Project.

BLM provides no evidence that such movements do not currently occur, or that the McCoy Mountains are not occupied on at least a seasonal basis. On the contrary, evidence shows that the McCoy Mountains played, and continue to play, an important role in the annual life-history strategies of bighorn sheep inhabiting, eastern Riverside County.

Summary

The FEIS did not adequately support the conclusion that the project would not impact bighorn sheep.

Response

The McCoy PA/FEIS provided strong evidence to support the conclusion that the Project would not impact Nelson's bighorn sheep. The NECO Plan addresses the conservation of bighorn sheep through the designation of bighorn sheep WHMAs, which overlay the entire range of bighorn sheep occurrence and movement corridors. The Project is not located within a bighorn sheep WHMA, and consequently, would not result in the loss of habitat for this species within a WHMA. At its nearest point, the solar plant site is located approximately 0.5 mile from the boundary of a bighorn sheep WHMA. As detailed in the FEIS, "The intermountain valley floor within the solar plant site is unlikely to serve as a potential movement corridor for Nelson's bighorn sheep based on their documented absence from the McCoy Mountains. Presently, the McCoy Mountains are considered an unoccupied portion of the bighorn's range." McCoy PA/FEIS, page K-60. Additionally, no sign or evidence of Nelson's bighorn sheep was found within the study area during field surveys. Potential sign of Nelson's bighorn sheep was, however, observed in the adjacent BSPP site in 2009. McCoy PA/FEIS, pages 3.4-17 to 3.4-18.

The NECO Plan also shows the McCoy Mountains and the Little Maria Mountains as unoccupied ranges. No bighorn sheep were observed in the McCoy Mountains during helicopter surveys. Three ewes were observed; however, more than 10 miles north of the solar plant site in the Little Maria Mountains during golden eagle helicopter surveys. Sheep also occur in the ranges adjacent to the McCoy Mountains and have the ability to naturally recolonize that range in the future. As disclosed in the FEIS, sheep are difficult to detect in ranges with a very low number of individuals such as the McCoy Mountains. The McCoy mountain range has been determined to be an important area for sheep recovery and is designated as a desert bighorn sheep WHMA within BLM. McCoy PA/FEIS, pages 3.4-17 to 3.4-18.

Due to the absence of bighorn sheep from the Project area, the construction phase of the Project would not adversely affect habitat for this species or cause effects to individual sheep or sheep populations. Permanent fencing that is proposed around the MSEP and BSPP projects would create a five-mile-long wildlife movement barrier that would alter but not likely impede the movement of large wildlife species such as Nelson's bighorn sheep. For these wide-ranging species, the Project would not present a barrier to regional movement because animals would still disperse around the site to the west, north, and east. Further, the Project site, due to the width of the valley in which the solar facility would be located, has limited value as a movement corridor. McCoy PA/FEIS, pages 4.4-15 and 4.4-27.

Connectivity

Issue Number: PP-CA-McCoy-13-03-41
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
The Project site is located within an area that is critical to maintaining connectivity between the two major desert tortoise populations identified in the Colorado Desert (e.g., the Chuckwalla and Chemehuevi populations). BLM acknowledged that site fencing could present a movement barrier to off-site tortoises, that it would alter their home range, and that it could separate individuals from the regional tortoise population. Specifically, it considers "effects to desert tortoise habitat that occurs within one mile of the base of the McCoy Mountains may have affect habitat connectivity or linkages for this species." According to Cashen, "this impact is indisputable given the substantial edge effects that would be caused by the Project." Yet, BLM failed to adequately analyze the Project's impacts to connectivity (i.e., gene flow) among desert tortoise populations. Instead, BLM simply assumed the "remaining 1-mile-wide movement corridor [west of the Project site] is of sufficient size that remaining tortoise populations may be sustained and would not be isolated from the regional population." The BLM provided no evidence to support this conclusion. The USFWS estimated that a landscape linkage needs to be at least 1.4 miles wide to maintain connectivity between desert tortoise populations. BLM has not identified the precise location of even the one-mile wide movement corridor that it claims will remain after Project development. Based on measurements that Cashen made using GIS, he determined that the corridor between the base of the McCoy Mountains and the currently proposed fence line is as narrow as one-half mile. The corridor would be much less than the necessary 1.4 miles. Further, BLM also indicated it cannot guarantee the corridor (or the proposed translocation area) will be protected.

Summary

The FEIS did not adequately analyze the project's impacts to connectivity among desert tortoise populations.

Response

Impacts to desert tortoise connectivity were fully disclosed in the McCoy PA/FEIS. The FEIS clearly states, "It is anticipated that fencing would pose an impediment to east-west desert tortoise movement near the two project sites; however, such fencing would not impede north-south movement" McCoy PA/FEIS, page 4.4-27. Further, the FEIS described, "The effects of proposed and future actions on movement of … desert tortoise are likely to remain even after the application of mitigation measures; however, such impacts would abate for the MSEP and BSPP following Project decommissioning. This cumulative impact is due to the residual effects of habitat fragmentation and impaired east-west movement of the species." McCoy PA/FEIS, page 4.4-27. The expectation that east-west connectivity may still be maintained is based on the fact that a one-mile undeveloped corridor will remain during project development, and habitat on the site would be reconnected to adjacent lands following project decommissioning. McCoy PA/FEIS, pages 4.4 through 28. The one-mile area located to the west of the project boundary was developed in consultation with the FWS. This area is bisected by numerous large washes and provides for an area for the desert tortoise to exist. The 1.4 mile area as recommended by FWS was addressed in the consultation and in working with FWS staff. During consultation FWS confirmed that one mile would be adequate for this area.

Mitigation

Issue Number: PP-CA-McCoy-13-03-63
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
Mitigation Measure WIL-6 requires the Applicant to prepare an Avian and Bat Protection Plan "to monitor the death and injury of birds and bats from collisions with facility features such as transmission lines and tower structures (e.g., meteorological towers)." According to the FEIS, the monitoring data shall be used to inform an adaptive management program that would avoid and minimize Project-related avian and bat impacts. BLM failed to provide the details needed to evaluate the value of the proposed mitigation measure and the likelihood that it would be effective.

Issue Number: PP-CA-McCoy-13-03-66
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
Cumulatively, the reasonably foreseeable projects in eastern Riverside County would require the acquisition of approximately 100,000 acres of compensation lands. The DEIS and FEIS provide no evidence that 100,000 acres of suitable habitat is available for acquisition within the specified region(s). BLM has provided no information on the quality, quantity, and configuration of potential compensation lands. Based on independent GIS analysis, Cashen concluded that there is a limited amount of private land available for potential acquisition in eastern Riverside County. BLM must

show that the compensatory mitigation requirements are feasible prior to Project approval. Otherwise, the FEIS' mitigation is unsupported, as required by NEPA.

Issue Number: PP-CA-McCoy-13-03-68
Organization: CURE et al.
Protestor: Rachael Koss

Issue Excerpt Text:
In his comments on the DEIS, Cashen identified flaws with the triggers the BLM established for the Golden Eagle Monitoring and Management Plan. Specifically, Cashen commented that the triggers ("any evidence of Project-related disturbance to nesting golden eagles, including but not limited to agitation behavior, increased vigilance behavior to nest sites, changes in foraging and feeding behavior, or nest site abandonment") would constitute "take" under State and federal law. Further, Cashen noted that "there is no utility in adaptive management if an eagle abandons its nest." The FEIS completely fails to resolve these issues and, therefore, mitigation proposed for impacts to golden eagles remains inadequate.

Moreover, Mitigation Measure WIL-12, which requires eagle surveys within one mile of the Project boundaries during each year of construction, contains several flaws. First, if an occupied nest is detected within one mile of the Project boundaries, the measure requires the Applicant to prepare a Golden Eagle Monitoring and Management Plan in consultation with the USFWS. As Cashen explains in his attached comments, golden eagles may forage several miles from the nest site. Also, the loss of foraging habitat may lead to the take of eagles. Thus, the geographic scope of the proposed mitigation (one mile) is inconsistent with eagle foraging distance and the take that may occur to eagle nests located greater than one mile from the Project boundaries (but within the foraging territory).

Second, the intent of the Golden Eagle Monitoring and Management Plan is "to avoid or minimize Project-related construction impacts to golden eagles during initial Project construction and again prior to Project decommissioning." However, preparation of the Plan would not be triggered until construction is imminent. Presumably, it would take some time to prepare the Plan and conduct consultations with the USFWS, as required by BLM. This scenario provides no security that an appropriate and thoroughly vetted Plan would be in place prior to construction.

Third, although the mitigation measure requires the Applicant to prepare the Plan "in consultation with the USFWS," it does not establish an enforcement mechanism that ensures the final plan meets USFWS approva1. Finally, BLM fails to establish the monitoring methods associated with the Plan. Cashen explains that this is problematic because it is very difficult to prove cause and effect relationships in wildlife science. Therefore, the need for adaptive management would be at the subjective discretion of the Applicant's biologist. This issue is magnified by the BLM's failure to establish an enforcement mechanism and a reporting schedule.

Summary

The Avian and Bat Protection Plan (ABPP) is not included in the FEIS, and thus cannot be evaluated for merit. The FEIS does not provide evidence that suitable desert tortoise habitat is available for acquisition within the region.

The mitigation proposed for golden eagles is inadequate because of the following issues:

- The triggers established for the Golden Eagle Monitoring and Management Plan themselves constitute take;
- there is no utility in adaptive management if an eagle abandons its nest;
- the geographic scope of MM WIL-12 is inconsistent with eagle foraging distance;

- preparation of the Golden Eagle Monitoring and Management Plan would not be triggered until construction is imminent, thus a final plan may not be in place prior to construction;
- there is no enforcement mechanism that ensures the final plan meets FWS approva1; and
- the FEIS does not establish the monitoring methods associated with the Plan.

Response

The ABPP is required by MM WIL-6. This plan must be submitted to the BLM AO in consultation with CDFW and the FWS for review and approval prior to construction. There is no requirement to include the ABPP in the FEIS. Once approved, the ABPP will be part of the project administrative record.

In regards to desert tortoise mitigation, MM WIL-4 requires compensatory mitigation at a 1:1 ratio for impacts to 4,500 acres. This requirement can be fulfilled through land acquisition or payment of in-lieu fees to the National Fish and Wildlife Foundation (NFWF) Renewable Energy Action Team (REAT) account, or to a third party other than NFWF, such as a non-governmental organization supportive of desert habitat conservation, by written agreement of the BLM AO and CDFW. McCoy PA/FEIS, pages 4.4-34 to 4.4-35. In-lieu fees can be used for either land acquisition or habitat improvement; both are considered acceptable by the FWS.

In regards to golden eagles, the Golden Eagle Monitoring and Management Plan is required only if an occupied nest is found within one mile of the Project boundary. In the case of such circumstance, the plan must be prepared in consultation with the FWS and must follow current guidance from the FWS. It is not appropriate for monitoring methods to be established in the FEIS because guidance from the FWS could change.

As discussed by the protestor, MM WIL-12 requires inclusion of adaptive management actions in the Golden Eagle Monitoring and Management Plan. The adaptive management requirement is not a replacement for a robust monitoring and management plan that has been vetted and approved by the FWS. Rather, the requirement for adaptive management provides an additional safeguard to ensure that Project construction activities do not result in unforeseeable disturbance to golden eagles. The requirement for adaptive management would immediately be triggered if any evidence was found of disturbance to golden eagle, and would result in cessation or modification of any construction activities causing the disturbance. The protestor is incorrect that all of the example triggers listed in the FEIS constitute take (agitation behavior, increased vigilance behavior at nest sites, changes in foraging and feeding behavior, or nest site abandonment). As stated in the Interim Golden Eagle Inventory and Monitoring Protocols: "of the preceding behaviors, nest-site abandonment constitutes take under the Eagle Act, as it is specifically cited in the definition of 'disturb'. The other behaviors, when considered cumulatively, may be evidence that activities are interfering with normal breeding behavior and are likely to lead to take" (Pagel 2010, page 9). The adaptive management requirement thus provides a safeguard mechanism to modify construction activities before they might result in take.

In regards to the geographic scope of MM WIL-12, the Interim Golden Eagle Inventory and Monitoring Protocols states that "inventories for Golden Eagles should occur if nesting, roosting, and foraging habitat are contained within the project boundary and exist within 10 miles of the project boundary. Local and regional Golden Eagle habitat variability will dictate the distance from the project boundary where surveys will occur" (Pagel 2010, page 11). The MM WIL-12 is consistent with this guidance and requires an annual inventory during construction within one mile of the project boundary. This distance was developed in consultation with the FWS and is appropriate for this Project area.