

*Director's Protest Resolution Report*

**Desert Harvest Solar Project  
Plan Amendment  
California Desert Conservation Area Plan**

March 11, 2013



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## Reader's Guide

### How do I read the Report?

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

### Report Snapshot

**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**

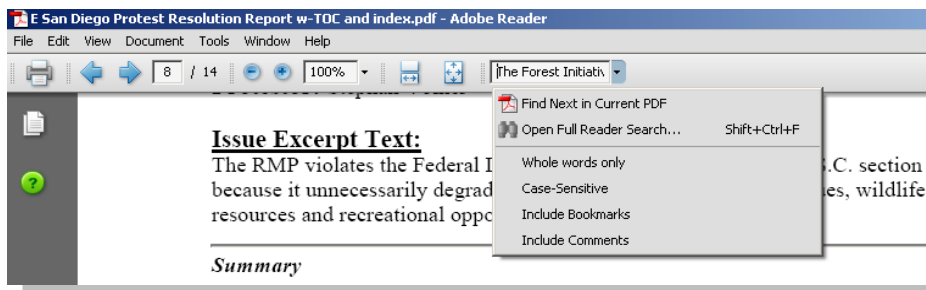
**Issue Excerpt Text:**  
Rather than analyze these potential impacts, as required by NEPA, the BLM postpones analysis of renewable energy development projects to a future case-by-case analysis.  
**Direct quote taken from the submission**

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

## Protesting Party Index

<b>Protester</b>	<b>Organization</b>	<b>Submission Number</b>	<b>Determination</b>
Lisa Belenky	Center for Biological Diversity	PP-CA-DesertHarvest-13-01	Denied—Issues, Comments
Richard Drury	LIUNA, et al	PP-CA-DesertHarvest-13-02	Denied—Issues, Comments
Donna and Larry Charpied	Basin and Range Watch	PP-CA-DesertHarvest-13-03	Denied—Issues, Comments
Sarah K. Friedman Kim Delfino Johanna Wald	Sierra Club Defenders of Wildlife* Natural Resources Defense Council*	PP-CA-DesertHarvest-13-04	Denied—Issues, Comments
Mekaela M. Gladden	CARE and La Cuna	PP-CA-DesertHarvest-13-05	Denied—Issues, Comments
Eldred Enas	Colorado River Indian Tribes	PP-CA-DesertHarvest-13-06	Denied—Issues, Comments
*Protesting party indicated an interest in withdrawing their protest.			

## Issue Topics and Responses

### Section 6 - NEPA

Total Number of Submissions: 3

Total Number of Comments: 4

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**Comment Number:** PP-CA-DesertHarvest-13-02-10

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

The FEIS fails to establish an adequate baseline, which misleads the public and prevents environmental impacts from being properly measured and evaluated in violation of NEPA and CEQA. The FEIS should be revised to include an adequate baseline. The FEIS should include a Phase I ESA to document the current conditions at the Project site.

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**Comment Number:** PP-CA-DesertHarvest-13-02-4

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

The FEIS fails to establish a baseline in violation of NEPA and CEQA. In particular, the FEIS fails to adequately disclose hazards related to military debris and baseline soil conditions. According to Mr. Hagemann, “[t]he FEIS does not adequately disclose hazards, including unexploded ordnance and munitions of concern, from former military operations on the Project site” and baseline

soil and current conditions are not described. Therefore, “[t]he FEIS should be revised and recirculated to identify all hazards and potential sources of contamination and any necessary mitigation.”

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**Comment Number:** PP-CA-DesertHarvest-13-05-22

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

10. A Programmatic EIS Should Have Been Prepared. A programmatic environmental impact statement ("PEIS") should have been prepared. The Bureau of Land Management's NEPA compliance handbook requires a PEIS under circumstances like those present here. "Connected actions are those actions that are 'closely related' and 'should be discussed' in the same NEPA document." See Ex. P1. The Department of Interior has implicitly acknowledged that the large numbers of solar energy projects being proposed in the Southwest are intimately connected and a programmatic EIS is necessary by preparing a PEIS for "Solar Energy Development in Six Southwestern States." See Ex. P2. The problem is that the PEIS has not yet been approved and site-specific projects should tier off this

document. See Ex. P3. Unfortunately, this project is moving in reverse order, with a site-specific project coming before the programmatic impacts are understood. The argument that failing to address this

deficiency is justified because doing so fulfills the purpose and need for this and other solar projects is simply unacceptable. See Final EIS N-96.

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### *Summary*

Protesters allege that the FEIS fails to establish an adequate baseline, including a description of current conditions, which misleads the public and prevents environmental impacts from being properly measured and evaluated in violation of the National Environmental Policy Act of 1969 (NEPA) and Council on Environmental Quality Act (CEQA). They also allege that the Final Environmental Impact Statement (FEIS) fails to adequately disclose hazards related to military debris and baseline soil conditions, does not adequately disclose hazards, including unexploded ordnance and munitions of concern, from former military operations on the Project site. The FEIS should be revised and recirculated to identify all hazards and potential sources of contamination and any necessary mitigation. The BLM also needs to prepare a Programmatic EIS to address the large numbers of solar energy projects being proposed in the Southwest. Finally, protesters contend that the Final EIS is so long and convoluted that it essentially makes the information inaccessible to most people and, consequently, fails to properly inform the public of the nature and consequences of the project. Depriving the public of full disclosure runs counter to NEPA's policy in favor of public participation.

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### *Response*

The FEIS establishes a comprehensive baseline of all environmental factors anticipated to be affected by the proposed project. As stated in chapter 1 of the FEIS “[t]he analysis of the environmental consequences of the solar facility and gen-tie line alternatives compares the conditions of project construction, operation, and decommissioning to the existing physical conditions in the environment at the time of the commencement of analysis, or September 2011. Therefore, the baseline is the existing physical environment as it was in September, 2011 including the Desert Sunlight (DS) Solar Farm Project’s solar field partially under construction and the DS Solar Farm Project’s approved gen-tie line not yet constructed. The evaluation of cumulative effects considers the combined potential effects of the Desert Harvest Solar Protest (DHSP) and other reasonably foreseeable projects” (FEIS page 1-6). The Affected Environment chapter 3 describes current environmental conditions with respect to resources within the planning area that include air, biological, cultural, paleontological, fire and fuels, soils and geology, energy and mineral, visual, water, and solid and hazardous wastes. The soils and geology of the proposed project area (section 3-09), for example, are described both regionally and locally, including erosion and seismic hazard potentials. Several cultural resources investigations are cited in the FEIS (section 3.6), including a Class III survey of the proposed project area. Table 4.6-1 shows the cultural resources and historic properties identified by those

efforts, including WWII military artifacts. These surveys, although locating both spent ordnance and C-ration refuse, failed to locate any hazardous military materials. Section 4.21 fully describes the potential for impacts associated hazardous waste under all alternatives.

The length of the FEIS results from the depth of analyses required to fully inform the various stakeholders with interests in the proposed project. As stated in chapter 1 of the FEIS “[t]his document follows regulations promulgated by the Council on Environmental Quality (CEQ) for Implementing the Procedural Provisions of NEPA (40 CFR 1500-1508); the Department of the Interior’s NEPA regulations, 43 C.F.R. Part 46; the BLM NEPA Handbook, H-1790-1; Sections 201, 202, and 206 of FLPMA (43 C.F.R. Part 1600); and the BLM Land Use Planning Handbook, H1601-1. This EIS describes the components of and reasonable alternatives to the Proposed Action and environmental consequences of the Proposed Action and the alternatives. In addition, the document incorporates compliance with provisions of CEQA to allow Riverside County to use this EIS to satisfy its environmental review and approval processes” (FEIS page 1-9). Although the draft RMP Amendment/EIS is lengthy in its own right, the proposed FEIS is significantly longer as it includes the summary texts and responses to the multitude of comments submitted on the draft. The BLM has little leeway in determining the length of comprehensive NEPA documents, particularly those dealing with issues as complex as those involved with large-scale renewable energy proposals in potentially sensitive environments. The FEIS is, nonetheless, organized in a standard NEPA format, and includes both a comprehensive table of contents, in the printed version, and is fully bookmarked in the electronic version. Based on the foregoing, the BLM developed a comprehensive baseline supporting its NEPA analysis, which was made available to the public consistent with the applicable legal requirements.

With regard to protesters’ contentions regarding programmatic analysis, it should be noted that in October 2012, Secretary of the Department of the Interior, Ken Salazar, signed the Approved Resource Management Plan Amendments/Record of Decision for Solar Energy Development in Six Southwestern States (Solar PEIS) (see <http://solareis.anl.gov/documents/fpeis/index.cfm>). Through the Solar PEIS, the BLM replaced certain elements of its existing solar energy policies with a comprehensive Solar Energy Program, and amended land use plans, including the CDCA Plan, to establish the foundation for that program. Specifically, the Solar PEIS designated Solar Energy Zones (SEZs), where the BLM will prioritize and facilitate utility-scale production of solar energy and associated transmission infrastructure developments. It also designated exclusion areas where utility-scale solar development would not be permitted, and variance areas, which may be available for utility-scale solar energy right-of-ways (ROWs) with special stipulations or considerations.

The DHSP is not subject to the Solar PEIS Record of Decision (ROD), or the CDCA Plan Amendments made as a result of that decision. Appendix B of the Solar PEIS ROD defines “pending” application as “any applications...filed within SEZs before June 30, 2009.” The DHSP Applicant’s initial application was filed on October 13, 2007, in an area that was later included in the Riverside East SEZ. Section 3.2 of the Solar PEIS ROD states that “Pending applications will not be subject to any decisions adopted by this ROD. The BLM will process pending solar applications consistent with land use plan decisions in place prior to amendment by this ROD and policies and procedures currently in place...or as may be modified in the future.” Consequently, the DHSP is not subject to the Solar PEIS ROD or to the CDCA Plan



amendments made in that decision; instead it remains subject to the pre-Solar PEIS ROD requirements of the CDCA Plan. Additionally, the timing of these NEPA documents precluded tiering of the Desert Harvest FEIS to the Solar PEIS.

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### **Section 6.1 - Purpose and Need and Range of Alternatives**

Total Number of Submissions: 4  
Total Number of Comments: 18

**Comment Number:** PP-CA-DesertHarvest-13-03-10

**Organization:** Basin and Range Watch  
**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The FEIS is incomplete by omitting the following alternatives: Brownfields and Degraded Lands Alternative:

The FEIS fails to consider an alternative that designates a conservation status to the site and proposed Right of Way. A conservation alternative would recognize the importance of the site to wildlife, wildlife connectivity, rare plants, microphyll woodlands and preserving the integrity/view-scape of the adjacent Joshua Tree National Park.

The FEIS also fails to consider a distributed generation and EPA Brownfields Alternative.

Under the National Environmental Policy Act, the BLM is required to consider alternatives located outside of the jurisdiction of the lead agency.

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**Comment Number:** PP-CA-DesertHarvest-13-03-6

**Organization:** Basin and Range Watch  
**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The only alternative is variations of the same project, far from the requisite “hard look” approach mandated by NEPA. A real alternative analysis would include something other than your proposal that will accomplish the same goals.

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**Comment Number:** PP-CA-DesertHarvest-13-04-2

**Organization:** Sierra Club  
**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

1. The purpose and need statement is too narrow. According to the BLM, the purpose and need for the proposed project is as follows: “Taking into account the BLM’s multiple use mandate, the purpose and need for the Proposed Action is to respond to a FLPMA ROW application submitted by the Applicant to construct, operate, maintain, and decommission a solar energy–generating facility and associated infrastructure on public lands administered by the BLM in compliance with FLPMA, BLM ROW regulations, and other applicable federal laws and policies.” (FEIS, Chapter 1-4)

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**Comment Number:** PP-CA-DesertHarvest-13-03-8

**Organization:** Basin and Range Watch  
**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

Here, BLM, like it has on all other proposed solar energy projects proposed on public lands, is focused on meeting the objectives of the applicant and on amending the CDCA Plan for this project only. Indeed, the FEIS states that BLM only analyzed alternatives “that responded to the purpose and need for the proposed project and are otherwise reasonable.” (FEIS, Chapter 2-1). This narrow approach resulted in BLM giving serious consideration to only one project at one location, driven entirely by the applicant’s right of way application.

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**Comment Number:** PP-CA-DesertHarvest-13-04-4

**Organization:** Sierra Club

**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

1 The Parties would like clarification that the BLM’s Preferred Alternative not only requires that Desert Harvest and Desert Sunlight share a Gen-tie route, but that these two projects also share Gen-tie infrastructure such as utility poles in order to minimize impacts.

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**Comment Number:** PP-CA-DesertHarvest-13-04-5

**Organization:** Sierra Club

**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

BLM clearly only analyzed alternatives that met the purpose and need for the action, namely public lands under BLM jurisdiction and only those associated with a right of

way application filed by the applicant. As a result, the BLM essentially foreclosed serious consideration of meaningful alternatives during the formulation of the final project and decision, in violation of NEPA, and focused its attention on only one site.

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**Comment Number:** PP-CA-DesertHarvest-13-04-7

**Organization:** Sierra Club

**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

BLM dismissed potentially viable private land alternatives because it assumed consolidation of numerous parcels would be technically and economically infeasible, but without any supporting analysis. (FEIS, Chapter 2.17.2) Even more troubling is BLM’s narrow consideration of alternative locations for the proposed project, namely those within eastern Riverside County and associated with the Devers-Palo Verde Transmission Line. (FEIS, Chapter 2-67). Absent from its consideration were disturbed private lands, or a combination of private and adjacent public lands, throughout the California Desert in areas such as Imperial County, near Blythe, and the Antelope Valley. Lands in these areas are generally more disturbed, have lower biological or conservation value and are considered by our organizations as suitable alternatives to public lands having intact biological communities and higher biological resource values.

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**Comment Number:** PP-CA-DesertHarvest-13-04-8

**Organization:** Sierra Club

**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

BLM also failed to consider and analyze a conjunctive use alternative involving a combination of private and public lands, especially those with lower biological resources values. BLM's failure to consider such an alternative was because of its too-narrow statement of purpose and need, i.e., it was not entirely on public land, which conflicts with the Interior Department's NEPA handbook which says the "purpose and need statement for an externally generated action must describe the BLM purpose and need, not an applicant's or external proponent's purpose and need."

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**Comment Number:** PP-CA-DesertHarvest-13-04-9

**Organization:** Sierra Club

**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

3. Rejection of the Alternative to Facilitate Wildlife Movement (FEIS, 2.17.1). BLM's rejection of this alternative, stemming from a recommendation from the FWS and supported by our organizations in our comments on the DEIS, is unreasonable. Its justification was based on improper reliance on a desert-wide habitat linkage study which BLM didn't cite or identify in the FEIS, and additional on-site examination of the habitat quality along an area at the far eastern end of the proposed project.

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**Comment Number:** PP-CA-DesertHarvest-13-05-11

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

Alternatives were rejected as "too difficult and expensive." Final EIS 2-67. However, there IS no evidence justifying this conclusion. *See Columbia Basin Land Protection Ass'n .v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981). More information should be provided so as to adequately justify why alternative siting, or the use of private lands, is not presented as an option for this project.

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**Comment Number:** PP-CA-DesertHarvest-13-05-19

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

this project proposes no alternative, other than its no action alternative, that steers completely clear of the Desert Dry Wash Woodland communities. Considering the importance of the Desert Dry Wash Woodland to the long term conservation on public lands in this planning area, alternatives to the proposed project that completely avoid this habitat type should be favored.

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**Comment Number:** PP-CA-DesertHarvest-13-05-2

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

The approval of the Desert Harvest Solar Project violates the above mandate, not only because of the violations set forth in this letter, but also because the BLM failed to consider alternatives that avoid the disruption of sensitive cultural resources, including the disturbance of Native American remains, which has already

occurred in past similar projects. See Ex. 810.

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**Comment Number:** PP-CA-DesertHarvest-13-05-6

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

BLM states that the purpose and need for the Proposed Action "is to respond to a FLPMA ROW application submitted by the Applicant to construct, operate, maintain, and decommission a solar-energy generating facility and associated infrastructure on BLM lands ... in compliance with The Energy Policy Act...set[ting] forth the 'sense of Congress' that the Secretary of the Interior should seek to have approved non-hydropower renewable energy projects on the public lands with a generation capacity of at least 10,000 MW by 2015." Final EIS 1-4. The purpose and need is intended to focus on the agency's purpose and need and not the applicant's; focusing on the November 30, 2012 Page 6 applicant's needs unduly restricts the alternatives analysis. Furthermore, none of the referenced policies are as narrowly tailored as requiring the siting of a utility-scale solar energy development on public lands. Executive Order 13212 calls for energy-related projects to be expedited, while maintaining safety, public health, and environmental protections. See Ex. PN I. The Energy Policy Act of 2005 encourages the Secretary of Interior to approve non-hydropower renewable energy projects on public lands with a generation capacity of at least 10,000 megawatts of electricity. See Ex. PN 2. Secretarial Order 3285A calls for the identification and prioritization of specific locations in the United States best suited for large-scale production of solar, wind,

geothermal, incremental or small hydroelectric power on existing structures, and biomass energy (e.g., renewable energy zones). See Ex. PN 3.

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**Comment Number:** PP-CA-DesertHarvest-13-05-8

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

Altogether, an analysis of a Distributed Generation (DG) alternative or an alternative that includes at least some DG component would allow for a meaningful review of the appropriate balance to strike between environmental impacts caused by land-intensive utility-scale generation and the electricity-generation capacity. Without an analysis of this alternative, the decision-makers cannot make an informed decision about what impacts are an acceptable cost for the benefit attained.

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**Comment Number:** PP-CA-DesertHarvest-13-05-9

**Organization:** CARE, *et al*

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

Conservation and Demand-Side Management Conservation, demand response, and other demand-side measures can reduce congestion on the grid and meet our energy demands. See Exs. A47 & A48. Conservation and other demand-side alternatives are needed to provide the basis for informed decision-making about the environmental impacts of increased transmission. Therefore, this alternative should have been fully considered in the Final EIS.

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**Comment Number:** PP-CA-DesertHarvest-13-06-2

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

Instead of addressing a valid public purpose-the development of renewable energy-this statement of purpose and need responds only to EDF's proposal at this particular site. Such a narrow scope impermissibly constrains the analysis in the FEIS.

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**Comment Number:** PP-CA-DesertHarvest-13-06-4

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

In particular, the FEIS eliminated any distributed solar technology alternative from detailed consideration, based in part on the alternative's failure to "meet BLM's purpose and need./I FEIS at 2-69. While the FEIS contains no discussion of this alternative's environmental impacts (see id.), it is clear that distributed generation generally has less environmental impacts than utility-scale solar facilities, as such technology can be readily incorporated in the existing built environment. If BLM were to redefine the purpose of the Project to express more directly the public goals, including reducing dependence on greenhouse gas emissions, providing energy, creating jobs, and reducing dependence on foreign energy

sources, it is clear that a distributed generation alternative should be given a detailed review.

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**Comment Number:** PP-CA-DesertHarvest-13-06-5

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

In addition, BLM relies on a legal artifice to justify the rejection of a distributed generation alternative. In particular, the FEIS states that it must reject any distributed generation alternative because the Energy Policy Act of 2005 established that the Secretary of the Interior must approve 10,000 MW of non-hydropower renewable energy by 2015. FEIS at 2-69. The FEIS states that this objective "cannot be achieved on that timetable through distributed generation systems." This claim ignores the facts on the ground. On October 9, 2012, the Secretary of the Interior reached his goal of 10,000 MW over three years early. See "Salazar Authorizes Landmark Wyoming Wind Project Site, Reaches Presidential Goal of Authorizing 10,000 Megawatts of Renewable Energy" (<http://www.blm.gov/wo/st/en/info/newsroom/2012/october/NR10092012.html>). This project is not necessary to meet this goal.

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**Summary**

The FEIS purpose and need statement is too narrow, limiting alternatives analyzed and

essentially foreclosing serious consideration of meaningful alternatives in violation of NEPA. By focusing attention on only one site, the BLM dismissed potentially-viable private land alternatives without any supporting analysis, and also failed to consider and analyze a conjunctive use alternative involving a combination of private and public lands, especially those with lower biological resources values than the project site. Other examples include:

- Failure to analyze a Distributed Generation alternative or conservation and other demand-side alternatives to provide the basis for informed decision-making about the environmental impacts of increased transmission.
- The FEIS proposes/analyzes no alternative, other than its no action alternative, that steers completely clear of the Desert Dry Wash Woodland communities.
- The FEIS omits Brownfields and Degraded Lands Alternative, rejects the Alternative to Facilitate Wildlife Movement, fails to consider an alternative that designates a conservation status to the site and proposed Right of Way, and fails to consider alternatives that avoid the disruption of sensitive cultural resources, including the disturbance of Native American remains, which has already occurred in past similar projects.

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### ***Response***

“The BLM’s purpose and need for agency action in this EIS is focused on the siting and management of utility-scale solar energy development on public lands” (FEIS, page 2-69). “The BLM’s multiple use mandate requires the agency to balance productive, recreation, and conservation uses on its lands, and the agency seeks to do this while minimizing impacts. Furthermore, as part of the Agency’s responsibilities under Title V of the Federal Land Policy and Management Act (FLPMA; 43 U.S.C. 1761), the BLM must respond to the application for a ROW grant to construct, operate, maintain, and decommission a solar energy facility on public lands in compliance with FLPMA, BLM ROW regulations, and other applicable Federal laws” (FEIA, page N-82).

The FEIS includes one action alternative, two no-project alternatives with plan amendment, four alternatives addressing the solar electrical generation facility, and five alternatives addressing the transmission of generated solar energy via various gen-tie options (see page 2-1 and Tables 2-11 and Table 2-12 in particular). Several measures eliminated from analysis included consideration of private and contaminated sites such as the Brownfield and Degraded Lands Alternatives (see section 2.17.2). These sites were eliminated from consideration because of technological, logistical, or economic infeasibility, and because those options failed to meet the BLM’s purpose and need in responding to the ROW application for the construction and operation of a specific Project in a particular area. A distributed generation alternative was also considered, but the BLM has no authority or influence of the installation of distributed generation systems, other than on lands that it administers and because this option also fails to meet the BLM’s purpose and need in responding to the ROW application. See Section 2.17.4. Based on the foregoing, these alternatives were not carried forward for further analysis as explained in section 2.17 of the FEIS.

The BLM agrees that a renewable energy future includes striking a balance between renewable energy development and the needs of threatened and endangered species. Working under the multiple-use mandate, the BLM strives to balance innumerable resources protection issues and respond to the Nation's demands for energy and various mineral needs. The majority of land use allocations have some impacts to cultural and natural resources, including archaeological and historical resources, native vegetation, and (often) wildlife; management plans are designed to minimize and mitigate potential negative impacts. As described in chapter 4, the FEIS details protective measures associated with each of the proposed alternatives, examples of which are provided below.

The FEIS provides for the protection of historical resources by considering a range of alternatives for facility location, designs, and operations, in combination with various mitigation measures. Cultural resource protection includes a combination of inventory and avoidance measures. The inventory efforts are described in Section 3.6 and Table 4.6-1 presents the results. The Desert Harvest Project Applicant Measures include a cultural resources monitoring and mitigation plan as a DHSP design feature; this plan is included as a stipulation of the cultural resources Memorandum of Agreement, which was executed by the applicant, the State Historical Preservation Office (SHPO), and the BLM on Feb. 22, 2013.

The FEIS provides for the protection of biological resources by considering a range of alternatives for facility location, designs, and operations, in combination with various mitigation measures. The FEIS carefully and quantitatively evaluates the project's effects on desert dry wash woodland. Alternatives 6 and 7 avoid substantial portions of desert dry wash woodland that would be affected by Alternatives 4 and 5, and mitigation to this plant community is required per the provisions of the NECO plan. The FEIS includes numerous mitigation measures, a number of which work directly to minimize, avoid, or compensate for effects to special status species and vegetation communities, including Desert Dry Wash Woodland.

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## **Section 6.2 - Impact Analysis**

Total Number of Submissions: 2

Total Number of Comments: 2

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**Comment Number:** PP-CA-DesertHarvest-13-01-25

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The FEIS fails specifically fails to adequately assess impacts to surface

hydrology (and thereby also fails to address many impacts to soils). Recent experiences with flooding and erosion at the nearby Genesis project show that this issue has been inadequately addressed by BLM in the past.

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**Comment Number:** PP-CA-DesertHarvest-13-03-15

**Organization:** Basin and Range Watch  
**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

In addition, the adoption of a plan

amendment to allow sharing of a gen-tie powerline without clear support from the

current gen-tie owner is speculative.

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### *Summary*

The BLM's NEPA analysis is flawed because:

The FEIS fails to adequately assess impacts to surface hydrology and soils; recently approved BLM projects in the California Desert have been shown to have been inadequately analyzed.

This FEIS fails to improve on the earlier level of analysis of risks of soil loss and erosion associated with surface disturbance such as sudden high volume rain events.

The FEIS can only speculate that there will be sharing of a gen-tie powerline with the current gen-tie owner.

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### *Response*

The FEIS addresses potential environmental impacts that would result from implementation of the proposed project at the level of specificity appropriate for this plan-level analysis. Sections 4.3 and 4.20 of the FEIS present results of analyses of effects to state jurisdictional resources (FEIS at pages 4.3-64 and -65 and pages 4.20-11 and -12). Analyses of effects on soils and ephemeral streams are reported in FEIS section 4.20 (FEIS at pages 4.20-9 through -11). As shown, impacts to soils and surface hydrology should an alternative to approve the proposed project be adopted are fully taken into account. At section 4.20.1, the FEIS informs readers that “[w]ater resources effects were considered for the project’s potential to: violate water quality standards or waste discharge requirements; substantially deplete groundwater supplies or interfere with groundwater recharge; substantially alter existing drainage patterns such that erosion or flooding occur on- or off-site; place structures within Flood Hazard Areas such that flood flows would be impeded or redirected, or result in substantial risk associated with flooding; substantially degrade surface water or groundwater quality” (FEIS, page 4.20-1).

With regards to surface water and drainage patterns, the FEIS clearly describes findings relative to effects and remedies to wit:

"Implementation of the proposed project or an alternative (Alternatives 5 through 7 and C, D, and E) would include both temporary and permanent areas of disturbance that would result in site-specific alterations to surface waters and drainage patterns. With implementation of the Best Management Practices and mitigation measures presented in section 4.20.6, construction, operation, and maintenance would not result in substantial effects to surface water and drainage patterns such that erosion, siltation, or flooding would occur on or off site. Other projects that are also identified in the cumulative scenario (see Table 4.1-1) would result in alterations to surface water and drain-age patterns in similar ways as the proposed project or an alternative; however, such effects are anticipated to be site-specific and would not occur on the same site as



the proposed project or an alternative (FEIS, page 4.20-51)."

As stated in the FEIS, the BLM's preferred alternative combines the high-profile/reduced footprint facility option with the shared gen-tie line option. This combination would provide for the least impacts to the environment (in the event that the project is ultimately implemented) and reduce implementation costs to the proponents of both DHSP and DSSF. The proposal to implement the proposed project using a shared transmission line is not speculative, as the BLM has engaged in numerous discussions with the proponents of both the DHSP and DSSF regarding the prospects for collocation of their respective projects' gen-tie transmission lines.

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### Section 6.2.1 - Groundwater

Total Number of Submissions: 1

Total Number of Comments: 5

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**Comment Number:** PP-CA-DesertHarvest-13-03-21

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The FEIS fails to define how a Desert Dry Wash Woodland Monitoring and Reporting Plan would actually protect the phreatophytes that would be threatened by groundwater pumping. It is one thing to monitor water levels, it is another to implement mitigation measures that would

prove effective in preserving microphyll. We have the following concerns:

How much would the groundwater level have to drop before the BLM would halt construction?

Since this is a threat to important microphyll woodlands and groundwater is already being used for the adjacent DS Project, decline of local groundwater could cumulatively impact phreatophytes depending on the aquifer.

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**Comment Number:** PP-CA-DesertHarvest-13-03-35

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

There is no data presented at all that accounts for the loss of rainfall recharge due to the solar industrialization of the desert.

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**Comment Number:** PP-CA-DesertHarvest-13-03-37

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

Failure to conduct any groundwater testing (tritium for example) results in your conclusion, "it is not anticipated that operational groundwater pumping would result in substantial overdraft or drawdown

conditions” is merely speculative at best.

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**Comment Number:** PP-CA-DesertHarvest-13-03-39

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

USGS conducted a study in the Chuckwalla Valley, Groundwater Ambient Monitoring Analyzing or “GAMA”, which provided age dating for the area. In a personal conversation with Mr. Michael Wright, USGS, we learned that they examined wells in Desert Center and determined the water is “very, very old”, thousands of years old. He explained if tritium is not detected there has been no recharge for the past 50 years, which is a commonly accepted hydrological

fact. Why didn’t the EIS do tritium analysis? Also, C14 will tell exactly how old the water is, but the EIS did no such analysis.

<http://pubs.usgs.gov/ds/659/> - this is the link to the GAMA study.

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**Comment Number:** PP-CA-DesertHarvest-13-03-41

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The Final EIS fails to supply details on how much water will be used during the entire construction (including use by employees), as well as where the water will be coming from.

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**Summary**

The FEIS’s analysis for groundwater impacts is inadequate because:

No data on where water for the site will come from and how much water will be used was provided.

No groundwater testing (tritium for example) was conducted for the analysis.

There is no information regarding how the Desert Dry Wash Woodland Monitoring and Reporting Plan would protect the phreatophytes that would be threatened by groundwater pumping.

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**Response**

Section 4-20 of the FEIS does in fact disclose how much water will be used and where the water for the project will come from. Within the direct effects description of the groundwater supply and recharge, the FEIS states that “total construction water demand would be 801.02 to 1,001.02 acre-feet over a period of 24 months, or 400.51 to 500.51 afy. The Applicant’s Plan of Development (POD) indicates that pending the permitting and physical feasibility of using on-site groundwater wells, construction water will either be obtained from on-site wells and/or it would be pumped from off-site wells in the project area and trucked to the project site. The project and surrounding area is underlain by the Chuckwalla Valley Groundwater Basin (CVGB), and it is reasonably assumed that the source of construction water is the CVGB,

regardless of whether the water is pumped on-site or off-site.” (FEIS at page 4.20-4). Water replacement can be achieved through re-charge from Metropolitan Water District (MWD). Future adaptive management will allow the BLM to review water levels as necessary; no significant drop in water is anticipated. Alternative water source and groundwater offsets as required by Mitigation Measure (MM) WAT-2 will be further clarified in the ROD.

Groundwater testing will take place when the applicant applies for a permit from the State of California’s Department of Conservation before constructing any wells. Aside from the groundwater testing that will take place at the time the applicant applies for a permit to construct any wells, the applicant will also be required to comply with MM WAT-3 which obliges the applicant to complete a Groundwater Drawdown Monitoring and Reporting Plan. This plan will enable the BLM to identify how the groundwater resources will be used in response to the project and will allow the BLM to make management decisions accordingly to protect water resources. Mitigation Measure WAT-7 would also require the applicant to ensure that groundwater pumped for the project would be replaced by Colorado River water, with added conservation actions that would be implemented to “replace” the groundwater on an acre-foot by acre-foot basis, equating to a ratio of 1:1.

The Desert Dry Wash Woodlands Monitoring and Reporting Plan would protect the phreatophytes that would be threatened by groundwater pumping by requiring the project owner “to monitor groundwater levels and plant health and vigor in adjacent desert dry wash woodland areas and to implement remedial measures if monitoring identifies impacts.” (FEIS 4.3-11). “If plant stress or mortality is determined to be related to project activities, then the project owner will either refrain from pumping, reduce groundwater pumping to allow for recovery of the groundwater table, or provide additional habitat compensation as described in MM VEG-10.” FEIS 4.3-36 Mitigation Measure VEG-10, in combination, with other measures, is expected to effectively mitigate the majority of the project’s adverse impacts to off-site Desert Dry Wash Woodland that could result from groundwater pumping, though some residual impacts would remain (FEIS, 4.3-9).

Determining the impact of project construction on groundwater level is a circumstance-specific inquiry and will be assessed by a qualified or plant physiologist who will develop or adapt a sampling protocol to be carried out in desert dry wash woodland for various sampling zones throughout the Project site. Mitigation Measure VEG-10 will require a protocol that will include a measure of pre-dawn water potential or other appropriate indicator or water stress, as measured by standard plant physiology techniques. If results of the groundwater monitoring program under MM WAT-3 indicate that the project pumping has resulted in water level decline of five feet or more below the baseline trend, and vegetation monitoring for plant stress, mortality, and water potential have documented one or more of the sampling sites for the two groundwater dependent plant species as reaching the threshold, the project owner will reduce groundwater pumping until water levels stabilize or recover, provide for temporary supplemental watering, or compensate for additional impacts to desert dry wash woodland (Blue Palo Verde–Ironwood Woodland) at the ratio of 3:1, consistent with mitigation VEG-6. Estimated acreage of additional dry wash woodland impacts will be submitted to BLM, Riverside County, and the Resource Agencies for approval. Upon approval, the project owner will initiate compensation according to the requirements and conditions for habitat compensation as described in MM

VEG-6.

Although the mitigation measures listed above will adequately address groundwater resources, it is important to note that since publication of the FEIS, the California State Water Resources Board Response to the FERC Draft EIS on the Eagle Mountain Pump Storage Project dated Jan. 25, 2013 indicates that that project and the cumulative known and identified projects in the Chuckwalla Valley will not have an adverse effect on the water table or the recharge rate of the groundwater beyond the 1981 – 1982 drawdown.

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### **Section 6.2.2 - Wildlife**

Total Number of Submissions: 2

Total Number of Comments: 4

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**Comment Number:** PP-CA-DesertHarvest-13-03-4

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The preferred alternative proposed project includes “sharing” of 12.1 mile long power lines with the Desert Sunlight (“DS”) project (more on this below), which are located partially within ACEC/DWMA and desert tortoise critical habitat. However, it is unclear if, in fact, this preferred alternative is actually feasible. The solar project site is occupied habitat for the federally threatened desert tortoise and the gen-tie line is partially located within the ACEC/WHMA identified in the Northern and Eastern Colorado Plan for conservation of multiple species. Fourteen other rare species also occur on the proposed project sites and another 16 have high likelihood of presence on site (FEIS at 3.3-19 through 22 and 3.4-11 through 16). In sum, the preferred project alternative directly impacts many areas that are designated for conservation and are clearly inappropriate for industrial development --DWMA, WHMA and critical habitat—and lands adjacent to these

protected areas where development will cause indirect and cumulative impacts to the conservation areas.

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**Comment Number:** PP-CA-DesertHarvest-13-04-11

**Organization:** Sierra Club

**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

4. Absence of a Biological Opinion from the FWS in the FEIS. The FEIS does not include a biological opinion for the project which, according to the FEIS, is in preparation by the Fish and Wildlife Service (FWS) and will be included in the Record of Decision (ROD) for the proposed project and CDCA Plan amendment. We consider a biological opinion an essential component of an FEIS because it provides the public with an independent assessment of the effects of a federal action on listed species and their habitat. We rely on biological opinions in our review and assessment of the adequacy of the analysis in the FEIS. This is especially relevant for this project because of impact of this and other projects on the threatened desert tortoise.

Furthermore, our organizations believe that BLM cannot comply with NEPA without receiving a biological opinion from the FWS under ESA Section 7(a)(2). To address this issue we request that BLM publish the biological opinion and make it available for a 30 day review and comment before finalizing the ROD.

lead agency for administering the ESA and identifying ways in which federal agencies can contribute to the conservation of threatened and endangered species, specifically asked BLM to include the Alternative to Facilitate Wildlife Movement for the benefit of the desert tortoise in the western Chuckwalla Valley.

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**Comment Number:** PP-CA-DesertHarvest-13-04-13

**Organization:** Sierra Club

**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

1. Endangered Species Act (ESA). Section 7(a)(1) of the ESA requires federal agencies, including BLM, to use their authorities to conserve threatened and endangered species. BLM's rejection of the Alternative to Facilitate Wildlife Movement (described above) is contrary to its responsibilities under this section of the ESA. The FWS, as

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**Comment Number:** PP-CA-DesertHarvest-13-04-15

**Organization:** Sierra Club

**Commenter:** Sarah K. Friedman

**Issue Excerpt Text:**

BLM's failure to analyze and adopt the Alternative to Facilitate Wildlife Movement violates its national policy for wildlife habitat in general and special status species in particular.

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**Summary**

The preferred alternative proposes "sharing" of 12.1 mile long power lines with the DSSF project which are located partially within ACEC/DWMA and desert tortoise critical habitat. However, it is unclear if this preferred alternative is actually feasible.

The FEIS does not include a biological opinion (BO) for the project, stating that the BO will be included in the ROD. The public relies on the BO in reviewing and assessing the adequacy of the analysis in the FEIS. Furthermore, the BLM cannot comply with NEPA without receiving a BO from the U.S. Fish and Wildlife Service (FWS) under Endangered Species Act (ESA) Section 7(a)(2).

The BLM's failure to analyze and adopt the Alternative to Facilitate Wildlife Movement violates its national policy for wildlife habitat in general and special status species in particular.

## *Response*

The proposed gen-tie line runs along the border of the Chuckwalla DWMA, and within proximity of Alligator Rock ACEC (Figure ES-1, Appendix A). The only location where the gen-tie line enters the Chuckwalla DWMA, however, is at the approved Red Bluff Substation. The impacts of the plan amendment, which would allow the 12.1 mile gen-tie line, were analyzed in the FEIS (see sections 4.3 and 4.4). In addition, mitigation measures requiring pre-construction surveys and transplantation for special-status plant species and cacti will be implemented (see AM BIO-3, FEIS, page 4.3-3; and MM VEG-7, FEIS, page 4.3-30).

In regards to the Biological Opinion (BO), the BLM submitted a Biological Assessment (BA) and a request for formal ESA Section 7 consultation on the proposed project to FWS on May 8, 2012. Consultation was initiated on June 13, 2012 with a letter from FWS to the BLM (see Appendix C.19 of the Final EIS). In this letter, FWS requested clarifying information on the project description prior to August 10, 2012. The supplemental clarifying information was submitted to FWS in the form of a Supplement to the BA on July 27, 2012. As of the date of publication of the Final EIS, a BO had not been completed by FWS (FEIS, p. 5-10). The BLM is not required to hold release of the FEIS until after release of the BO. The BLM does, however, require a final BO covering the project prior to its making a final decision on the project. The BO for the DHSP was signed on January 15, 2013.

As stated in the FEIS, the BO will be included in BLM's ROD and the project owner will be required to implement all measures adopted in the ROD as well as all additional conditions included in the BO. Measures to reduce or avoid impacts to biological resources are identified in the Final EIS to mitigate impacts in satisfaction of NEPA (FEIS, p. N-40). Section 7(a)(2) of the ESA requires that "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary." The BLM has fully complied with this requirement, and as stated, will require the project owner to comply with all additional conditions included in the BO.

In regards to the Alternative to Facilitate Wildlife Movement, the purpose and need for the proposed action defines the range of alternatives to be considered. The BLM must analyze a range of reasonable alternatives, but is not required to analyze in detail every possible alternative or variation. According to the Council of Environmental Quality (CEQ) regulations for implementing NEPA, an agency may eliminate alternatives from detailed study with a brief discussion of the reasons for having been eliminated (40 CFR 1502.14(a)). The BLM considered the Alternative to Facilitate Wildlife Movement, but eliminated this alternative from detailed study because the critical wildlife connectivity area lies west of the project and not east of the project, and because the proposed project site provides only minimal support for regional connectivity. Thus, the proposed alternative would not serve the purpose of improving connectivity. For a more detailed explanation on the BLM's consideration of this alternative, please see page 2-65 in the FEIS.

## Section 6.3 - Cumulative Impacts Analysis

Total Number of Submissions:4

Total Number of Comments: 8

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**Comment Number:** PP-CA-DesertHarvest-13-01-22

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The mitigation ratio of 1:1 desert tortoise habitat is too low and does not provide any mitigation for loss of WHMA designated lands, impacts to the connectivity corridor, indirect impacts, or fragmentation impacts due to the proposed industrial-scale solar project in this remote location nearby wildlands and adjacent to Joshua Tree National Park and wilderness areas.

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**Comment Number:** PP-CA-DesertHarvest-13-02-30

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

According to the FEIS (page 4.4-57), “Existing and foreseeable future projects in the NECO planning area (not including the DHSP) would result in the total projected loss of 4.5 percent of the Sonoran Creosote Bush Scrub (Sonoran Desert Scrub) and 6.5 percent of the Desert Dry Wash Woodland habitat in the NECO planning area...” These percentages are not correct, however, unless they include the effects of habitat fragmentation. A cumulative effects

analysis should also consider the impacts of habitat fragmentation, which results in a larger net loss of habitat due to loss of dispersal and other types of movement between increasingly isolated habitat patches. The FEIS does not provide an explanation of how these percentages were obtained.

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**Comment Number:** PP-CA-DesertHarvest-13-02-31

**Organization:** LIUNA, *et al*

**Commenter:** Richard Drury

**Issue Excerpt Text:**

The FEIS focused on the project-specific contributions to cumulative impacts, repeatedly concluding that the project-specific impacts would be small compared to the cumulative impacts contributed by the sum of the other projects considered. This approach is unsound in a cumulative impacts analysis, and misses the point of such an analysis. The FEIS should not point to other projects as the greater contributors so that the impacts of the proposed project can be trivialized. The point of a cumulative effects analysis is to consider the project-specific impacts in the context of regional, long-term, incremental impacts. A sound cumulative impacts analysis would conclude that the project-specific impacts, although significant when considered alone, should be considered as devastating, given that so much of the Mojave Desert is either being converted to human uses or is

undergoing planning and permitting for conversions.

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**Comment Number:** PP-CA-DesertHarvest-13-03-46

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The FEIS failed to analyze the cumulative impacts on air quality that will result from the removal of so much stabilized soil and biological soil crust. The short term construction would not only create a visual contrast from soil disturbance, but erosion from the removal of soils would compromise the visual quality of the area by allowing dust to be stirred up whenever there are wind events. The short term construction would most likely result in long term visual disturbance due to the permanent removal of desert soils. This of course would impact adjacent JoTr, Wilderness, and private property.

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**Comment Number:** PP-CA-DesertHarvest-13-03-50

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The FEIS states that the visual resources that would be impacted in Joshua Tree National Park would not be as significant because these would be in areas to the park that receive little visitation. This is a presumptuous statement that is based on limited visitor information. It may not even be true. The statement also ignores potential future visitation trends. This is an irrelevant statement and should not be considered in

the approval process.

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**Comment Number:** PP-CA-DesertHarvest-13-03-52

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The FEIS fails to provide the full scope of visual impacts that the DH project would have on Joshua Tree National Park. The industrialization of the region will impair wilderness values relating to solitude, long sweeping views and unimpaired night skies.

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**Comment Number:** PP-CA-DesertHarvest-13-03-54

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

If Desert Harvest and Kaiser decide to do business together, then a full analysis of restarting mining operations, on the doorstep of Joshua Tree National Park must be conducted. The analysis must include but not limited to analysis of the cumulative impacts on traffic, road deterioration (remember there is only ONE road to the proposed project and the defunct mine). Kaiser will need to obtain all necessary permits, and withdraw its applications for the world's largest garbage dump. Additionally, analysis of the material taken from the defunct mine must be analyzed for toxins, prior to Desert Harvest using it for construction of their project. The FEIR/S must discuss activities at the defunct mine. To satisfy NEPA/CEQA requirements analysis of all past, current and foreseeable future activities must be conducted.



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**Comment Number:** PP-CA-DesertHarvest-13-06-34

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

Second, the list of cumulative projects considered in the FEIS's analysis

erroneously omits or describes a number of projects. In particular, the list should include Mule Mountain, Mule Mountain III and the Sonoran West Projects, located southwest of Blythe in the 1-10 corridor. The list also must be revised to indicate that BLM approved the Riverside East Solar Energy Zone in October 2012.

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**Summary**

The FEIS focused on the project-specific contributions to cumulative impacts, repeatedly concluding that the project-specific impacts would be small compared to the cumulative impacts contributed by the sum of the other projects considered. This approach is unsound in a cumulative impacts analysis, and misses the point of such an analysis.

The list of cumulative projects considered in the FEIS's analysis erroneously omits or describes a number of projects, and the FEIS also must be revised to indicate that the BLM approved the Riverside East Solar Energy Zone in October 2012.

Cumulative effects for air included known projects and technologies. Cumulative effects for water by the California State Water Resources Board letter dated January 25, 2013 include all known and planned projects.

If the Desert Harvest project relies on materials from the Kaiser mine, a full analysis of restarting mining operations must be conducted to satisfy NEPA/CEQA requirements analysis of all past, current and foreseeable future activities.

The FEIS failed to analyze the cumulative impacts on air quality, long term visual disturbance due to the permanent removal of desert soils, and impacts to Joshua Tree National Park.

The mitigation ratio of 1:1 desert tortoise habitat is far too low and does not provide any mitigation for loss of WHMA designated lands, impacts to the connectivity corridor, indirect impacts, or fragmentation impacts. A cumulative effects analysis should also consider the impacts of habitat fragmentation, which results in a larger net loss of habitat due to loss of dispersal and other types of movement between increasingly isolated habitat patches.

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## ***Response***

The FEIS presents results of cumulative analyses to all major resource issues in spatial and temporal contexts appropriate to each resource (see chapter 4 generally). These analyses focus on the combined impacts of all the identified cumulative projects relevant to a particular resource and not just the DHSP's contribution to those impacts. Environmental impacts analyses, including those related to cumulative effects, require significant staff effort and address known and reasonably foreseeable projects and project proposals within contexts that relate to each resource type, which may or may not pertain to any particular planning area, such as the recently-approved Riverside East Solar Energy Zone. Inclusion of environmental impacts (direct, indirect, and cumulative) resulting from potential resumption of operations at the Kaiser Mine, for instance, are not appropriate in this planning effort because this mine is not part of the DHSP or supply chain, as known by the BLM. The mine would be included in project-level planning should the Kaiser Mine be reopened. There is no indication that this project will use materials from the Kaiser Mine. At this time, the Kaiser Mine remains in transition of ownership and is involved in multiple options for future use that are currently under Federal Court jurisdiction. No foreseeable use of the property as a mine or provider of materials for solar projects is anticipated.

As an example, FEIS section 4.2.15 describes cumulative effects to air quality of the proposed DHSP and other projects under concurrent construction and/or operation within a 6-mile radius of the proposed project. The analyses indicate “[i]t is expected that cumulative PM10 and PM2.5 emissions would result in a temporary unavoidable adverse impacts during construction, consequently impacts on visibility due to airborne dust would likely be adverse” (FEIS, page 4.2-25). However, findings related to air quality show that potential for “adverse effects of cumulative projects would not substantially overlap at sensitive receptors” (FEIS, page 4.2-25), including Joshua Tree National Park, the nearest Federal Class I area (located 1.8 miles away from the project site). Furthermore, “[d]ue to the limited emission sources associated with these facilities, the cumulative impacts on visibility would be negligible and operation of the project[s] would not result in an unavoidable cumulative adverse effect” (FEIS, page 4.2-25).

The analysis of cumulative impacts to biological resources for the proposed project makes a broad, regional evaluation of the impacts of existing and reasonably foreseeable future projects that threaten plant communities within the context or geographic scope of the NECO Plan. The NECO planning area is located in the southeastern CDCA and comprises 5.5 million acres of private, federal, and State land. Although the FEIS states “[t]he large renewable projects proposed on BLM-administered and private land used in the cumulative analysis for Biological Resources...represent the projects that had applications to the BLM or the California Energy Commission as of October, 2011” (FEIS, page 4.3-59), it also notes that “[i]t is likely that new projects will be proposed in the near future that are not reflected in this analysis” (FEIS, page 4.3-59).

Page 4.4-58 of the FEIS discloses that cumulative impacts include fragmentation of wildlife habitat: “The incremental contribution of the proposed project or its alternatives to cumulative impacts to common wildlife, including most resident and migratory birds would be habitat loss and fragmentation. Existing and foreseeable future projects in the NECO planning area (not

including the DHSP) would result in the total projected loss of 4.5 percent of the Sonoran Creosote Bush Scrub (Sonoran Desert Scrub) and 6.45 percent of the Desert Dry Wash Woodland habitat in the NECO planning area (see section 4.3.16). This would constitute a substantial cumulative impact on habitat for common wildlife species.”

With regard to compensation lands, the FEIS discloses that a “Habitat Compensation Plan will compensate for acreages and habitat types” and that “[t]he Plan will be submitted for approval to the BLM, Riverside County, and Resource Agencies prior to the commencement of construction” (FEIS, pages 4.3-20/21). Furthermore, compensation land ratios shown, e.g., 1:1 for desert tortoise, are minimums, and will be the greatest of all shared habitat types (see Table 4.3-3). Moreover, “Criteria for the acquisition, initial protection and habitat improvement, and long-term maintenance and management of compensation lands for impacts to biological resources will include all of the following:

- a. Compensation lands selected for acquisition to meet the BLM, FWS, CDFG (now known as CDFW), and Riverside County requirements will provide habitat value that is equal to or better than the quality and function of the habitat impacted, to be determined by the BLM, CDFG, and FWS biologist, taking into consideration soils, vegetation, topography, human-related disturbance, wild-life movement opportunity, proximity to other protected lands, management feasibility, and other habitat values;
- b. To the extent that proposed compensation habitat may have been degraded by previous uses or activities, the site quality and nature of degradation must support the expectation that it will regenerate naturally when disturbances are removed;
- c. Be near larger blocks of lands that are either already protected or planned for protection, or which could feasibly be protected long-term by a public resource agency or a non-governmental organization dedicated to habitat preservation;
- d. Not have a history of intensive recreational use or other disturbance that might cause future erosion or other habitat damage, and make habitat recovery and restoration infeasible;
- e. Not be characterized by high densities of invasive species, either on or immediately adjacent to the parcels under consideration, that might jeopardize habitat recovery and restoration;
- f. Not contain hazardous wastes that cannot be removed to the extent that the site could not provide suitable habitat;
- g. Must provide wildlife movement value equal to that on the project site, to be determined by the BLM, CDFG, and FWS, based on topography, presence and nature of movement barriers or crossing points, location in relationship to other habitat areas, management feasibility, and other habitat values; and

- h. Have water and mineral rights included as part of the acquisition, unless the BLM and Riverside County, in consultation with CDFG and FWS, agree in writing to the acceptability of land without these rights.
- i. Additional selection criteria for desert tortoise compensation lands:
  - i. Compensation lands for impacts to desert tortoise will be within the Colorado Desert Tortoise Recovery Unit;
  - ii. Will be contiguous and biologically connected to lands currently occupied by desert tortoise, ideally with populations that are stable, recovering, or likely to recover (for lands proposed as desert tortoise habitat compensation; and
  - iii. Will contribute to wildlife movement and desert tortoise population connectivity value at least equal to that on the project site, by contributing to linkages between desert tortoise-designated critical habitat, known populations of desert tortoise, and other lands allocated for conservation. The primary focus area for acquiring parcels to maintain/improve connectivity will be along the I-10 corridor between Desert Center and Cactus City with a priority on parcels that connect con-served lands on either side of the I-10 through large culverts or bridges; the habitat compensation ratio for mitigation lands along the I-10 corridor will be 1:1 for each acre of total long-term and permanent disturbance. If acquisition of sufficient acreage within the I-10 corridor is not feasible, then the project owner will coordinate with Resource Agencies to identify other suitable lands to compensate for the project's impacts to desert tortoise habitat connectivity" (FEIS, pages 4.3-23 and 24).

In addition, as a part of protest negotiations, the applicant has agreed that the applicant shall use best efforts to acquire and restore lands within the Chuckwalla Valley, help maintain a connectivity corridor that is accessible to wildlife, and will support Desert Tortoise movement and occupancy. This will be documented in the DHSP ROD.

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## **Section 6.4 - Mitigation**

Total Number of Submissions: 2

Total Number of Comments: 4

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**Comment Number:** PP-CA-DesertHarvest-13-02-33

**Organization:** LIUNA, *et al*

**Commenter:** Richard Drury

**Issue Excerpt Text:**

Other mitigation measures are inadequate because they only require payment of a fee. A fee does not necessarily mitigate a project's impacts. Under CEQA, mitigation fees are not adequate mitigation unless the lead agency can show that the fees will fund a specific mitigation plan that will actually be implemented in its entirety. *Napa Citizens for Honest Gov. v. Bd. Of Supervisors* (2001) 91 CallApp.4th 342 (no evidence that impacts will be mitigated simply by paying a fee); *Anderson First Coal. v. City of Anderson* (2005) 130 Ca.App.4th 1173 (traffic mitigation fee is inadequate because it does not ensure that mitigation measure will actually be implemented). See NEPA cases, *High Sierra Hikers v. Weingardt*, 521 F.Supp.2d 1065 (N.D.Cal. 2007); *Oregon Nat. Res. Coun. v. Harrell*, 52 F.3d 1499 (9th Cir. 1995).

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**Comment Number:** PP-CA-DesertHarvest-13-02-39

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

AM-BIO 3 Pre-construction surveys will be performed to locate and transplant special-status plant species. This measure was referred to in the wildlife section of Chapter 4 of the FEIS, so I assume the same practice will be applied to wildlife. However, the FEIS neglected to identify the destinations of the plants and animals to be translocated.

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**Comment Number:** PP-CA-DesertHarvest-13-03-12

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

Proposed Alternative: The FEIS is basing mitigation conditions and management of this project based on the applicant's desire to use one of two photovoltaic technologies. Depending on which technology is chosen, there could be different requirements and impacts from each scenario.

Crystalline silicon panels and Copper indium gallium selenide panels may have different efficiency output. Copper indium gallium selenide are a type of thin-film. Silicon and thin-film panels can require different amounts of water to wash the panels.

These two technologies can also have different impacts to the area should they break.

The copper indium gallium selenide panels contain rare earth minerals and could be more hazardous if released from the panels. The FEIS's evaluation is based on a plan to use one or the other, yet the impacts, efficiency and mitigation could be potentially different for each technology.

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**Comment Number:** PP-CA-DesertHarvest-13-03-19

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

Microphyll Habitat: The loss of microphyll habitat would be compensated by 3 to one mitigation, yet this mitigation is deferred. The BLM has no idea where this land would be available or even if this land would be available.

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## ***Summary***

The BLM did not develop adequate mitigation in failing to:

1. Require actual mitigation rather than imposing a fee;
2. Identify locations for transplantation of plants and animals;
3. Account for the varying mitigation requirements for differing solar technology impacts; and
4. Identify the compensation lands to replace lost microphyll habitat.

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## ***Response***

The FEIS does not discuss any mitigation measure where a fee would be collected as mitigation. For some mitigation measures, the applicant may satisfy its obligations in one of several ways. Ultimately though, the required mitigation measure must be completed. For example, MM VEG-6 contemplates off- site vegetation and habitat mitigation. There is no plan for payment as mitigation in lieu of actual mitigation to satisfy MM VEG-6's requirements. That said, sub-contractors- who would be paid - may be involved in doing the work.

The project Owner would be required to provide the compensation lands, or to provide financial assurance sufficient to carry out the habitat acquisition and management, no later than 30 days prior to initiation of ground disturbance.

As described in Applicant Measure (AM) BIO-1, "a Habitat Compensation Plan is being prepared and will be implemented by the Applicant to compensate for the loss of creosote desert scrub, desert dry wash woodland, and jurisdictional resources." FIES page 4.3.3. Further, "The precise details of the mitigation, including mitigation ratios, will be established in the BLM Right-of-Way (ROW) grant, FWS Biological Opinion, and any CDFG 2081 Incidental Take Permit or CDFG 2080.1 Consistency Determination." Therefore, the details of plant transplantation will not be known until that time.

Mitigation measure (MM) VEG-6 governs compensation for lost vegetation and wildlife habitat. With regard to compensation for lost wildlife species habitat, FEIS 4.4-10 describes mitigation for Desert Tortoise Habitat loss. "According to MM VEG-6, the project owner would be required to provide the compensation lands, or to provide financial assurance sufficient to carry out the habitat acquisition and management, no later than 30 days prior to initiation of ground disturbance. The Applicant is currently working with Wildlands Inc. to develop a suitable compensation strategy addressing the resources and ratios described in MM VEG-6 (see Appendix C.12). Specific compensation land availability cannot be identified or quantified at this time. Wildlands Inc. provided a review of private land availability in the area during a meeting with resource agencies on March 2, 2012, indicating that acquisition of the requisite acreage of suitable compensation lands to mitigate desert tortoise habitat loss is feasible."

The FEIS addresses the risk of toxic material releases in Appendix N. The Draft EIS discussed

the risk of toxic material release due to fire on page 4.13-4. The final PV technology and the potential for toxic chemical release have not yet been determined. The EIS analyzed crystalline silicon and copper indium gallium selenide panels. The panel size has not changed nor has the number of panels on site increased. Only the structure that supports the panels increased in height. The risk has therefore been adequately analyzed. The analysis in the document concludes that with mitigation incorporated this impact would not be significant, regardless of the chosen technology: “The DHSP may use a variety of PV technologies, including copper indium gallium cyanide panels, which are manufactured using the toxic elemental metal cadmium. Chemicals within PV modules are highly stable; even if the modules become broken or damaged during construction, these substances would not mobilize into the environment except under extremely rare conditions. A fire at the Alternative 4 site during construction could release chemicals from installed PV panels; however, fires are unlikely to occur because of the lack of fuel to support a sustained wildfire. Grass fires are the most likely fire exposure for ground-mounted PV systems, and these fires tend to be short-lived. As a result, these fires are unlikely to expose PV modules to prolonged fire conditions or to temperatures high enough to volatilize panel constituents. Mitigation Measure (MM) FIRE-1 would also reduce potential effects from related fire risks. Therefore, the use of PV panels and other project components would not have any adverse, unavoidable effects on public health and safety.” (FEIS page N-99). Since the panel heights have not changed since the inception of the project but rather the stacking arrangement on the tracker has resulted in the height increase, there is no additional risk of the components having any adverse, unavoidable effects on public health and safety.

The FEIS address the compensation lands to replace lost microphyll habitat on page N-21, stating "Please see Mitigation Measure VEG-6 for a discussion of the compensation strategy for the proposed project. As described therein, compensation lands acquired to provide mitigation for impacts to vegetation communities must support the same vegetation communities present on the affected lands in the required ratios (1:1, 3:1, or 5:1, depending on vegetation community and impacts within wildlife habitat management areas). As described in item 1 of that measure, nesting refers to habitat compensation requirements for species. There, a compensation land parcel that supports creosote bush scrub would satisfy requirements for mitigation of creosote bush scrub, but may also satisfy requirements for impacted species that occur in creosote bush scrub if additional species-specific requirements are also met. It would not “count” for any other vegetation community, however. No changes have been made to the Final EIS. As described in sections 3.3 and 4.3 of the EIS, microphyll woodlands on site were classified specifically as Blue Palo Verde-Ironwood Woodland, which corresponds to Desert Dry Wash Woodland as mapped in the NECO Plan. Impacts to microphyll woodlands from the proposed project are addressed in section 4.3.7 and 4.3.12. Cumulative impacts to microphyll woodlands are addressed in section 4.3.16. Regarding the comment that the EIS should identify an alternative that provides protection for crucifixion thorn occurrences through designation of an ACEC, both Alternatives 6 and 7 would avoid these occurrences; however, the designation of lands as an ACEC is beyond the scope of this project-specific EIS. Regarding the comment that the Draft EIS fails to adequately evaluate rare plants, surveys were conducted and the potential for several annuals that could occur, but were not detected, is disclosed and analyzed. Mitigation Measure VEG-7 (Mitigate Direct Impacts to Special-Status Plants) provides a comprehensive strategy to mitigate impacts to known populations of rare plants as well as any additional occurrences that could be discovered during the required pre-construction surveys. No changes have been made to the

Final EIS." As further noted on FEIS 4.3.7 (MM Veg-6): "The project owner will salvage individual plants from the site prior to construction or introduce greenhouse raised plants, or provide compensation lands with crucifixion plants existing. Applicant will protect existing crucifixion plants with 100' MM Veg-7 buffer as identified in draft ROD."

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### **Section 6.4.1 - Deferral of Mitigation Plans**

Total Number of Submissions: 5

Total Number of Comments: 14

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**Comment Number:** PP-CA-DesertHarvest-13-01-32

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Other Sections:** 2

**Issue Excerpt Text:**

Deferring development of detailed final plans to protect resources until after public participation is completed, including, but not limited to, the following: final Desert Tortoise Translocation Plan, Final Bird and Bat Conservation Strategy, Final Integrated Weed Management Plan, Final Worker Environmental Awareness Program, Final Vegetation Resource Management Plan, and Final Vegetation Resource Management Plan.

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**Comment Number:** PP-CA-DesertHarvest-13-02-36

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

The Desert Harvest Solar Project EIS defers the formulation of its central compensatory mitigation measure (participation with an HCP) to an unspecified, later date.

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**Comment Number:** PP-CA-DesertHarvest-13-02-38

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

This measure defers the formulation of the weed management plan and effectively prevents me and other members of the public from participating with it.

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**Comment Number:** PP-CA-DesertHarvest-13-02-41

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

the applicant will prepare a vegetation resources management plan that will detail the salvage and restoration plans. However, this deferral of the plans' formulation will effectively prevent me and other members of the public from participating with them.

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**Comment Number:** PP-CA-DesertHarvest-13-02-42

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

AM-BIO 6 A desert tortoise translocation plan will be prepared at an undisclosed, later date. Again, deferring the formulation of mitigation measures, especially a measure as important as this one, effectively excludes my participation with the environmental review.

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**Comment Number:** PP-CA-DesertHarvest-13-02-44

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

AM-BIO 7 An avian and bat management plan will be prepared at an unspecified, later date. Again, deferring the formulation of mitigation measures, such as this one, effectively excludes my participation with the environmental review. The FEIS neglected to provide any details of this plan.

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**Comment Number:** PP-CA-DesertHarvest-13-02-45

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

AM-BIO 8 According to the FEIS, the water storage pond will be constructed and operated in compliance with all regulatory standards to protect migratory waterfowl. However, no details of the construction and operation were provided in the FEIS. Again, deferring the formulation of mitigation measures, such as this one, effectively

excludes my participation with the environmental review.

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**Comment Number:** PP-CA-DesertHarvest-13-02-47

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

MM WIL-3 A management plan will be developed for minimizing project impacts to nesting birds, as was described in AM-BIO 7. My comments on AM-BIO 7 also apply to this measure.

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**Comment Number:** PP-CA-DesertHarvest-13-02-48

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

MM WIL-4 A plan will be formulated to mitigate impacts to burrowing owl. Again, this measure defers the formulation of the mitigation to an unspecified, later date, effectively excluding me and other members of the public from participating with the environmental review in a meaningful manner.

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**Comment Number:** PP-CA-DesertHarvest-13-03-23

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The FEIS seems to be moving along before the BLM can identify feasible mitigation for the desert tortoise. The entire review process should be delayed until further solutions can be identified.

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**Comment Number:** PP-CA-DesertHarvest-13-03-43

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpiel

**Issue Excerpt Text:**

Deferring development of detailed final plans to protect resources until after public participation is completed, including, but not limited to, the following: final Desert Tortoise Translocation Plan, Final Bird and Bat Conservation Strategy, Final Integrated Weed Management Plan, Final Worker Environmental Awareness Program, Final Vegetation Resource Management Plan, and Final Vegetation Resource Management Plan. Additional plans that are not mentioned in the FEIS but need to be include Compensatory Mitigation Plan for State Waters; Burrowing Owl Mitigation and Monitoring Plan; Management Plan for Compensatory Mitigation Lands for tortoise , drainages etc.; Special-status Plant Impact Avoidance and Mitigation Plan; American Badger and Desert Kit Fox Protection and Management Plans;

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**Comment Number:** PP-CA-DesertHarvest-13-05-24

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

The Final EIS makes vague reference to a cultural resources monitoring plan without describing how the plan will actually mitigate impacts on cultural resources while also failing to identify the responsible party for carrying out these so called mitigation measures. See Final EIS 4.6-5

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**Comment Number:** PP-CA-DesertHarvest-13-06-17

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

BLM also defers the development of a Monitoring and Mitigation Plan until after the Project has been approved, again in violation of NEPA's core requirements. FEIS at 4.6-8. The Monitoring and Mitigation Plan will address the steps that will be taken with respect to any unanticipated discoveries, and thus will address some of CRIT's most significant concerns. 3 Yet the FEIS allows the Applicant to prepare the plan, without any requirement for consultation with affected tribes, and then merely submit it to BLM for approval. Id. This deferral and lack of public involvement raises serious questions about the ability of the plan to address cultural resource impacts.

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**Comment Number:** PP-CA-DesertHarvest-13-06-18

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

While the FEIS states that a draft MOA is available at Appendix 0 (FEIS at ES-5), Appendix 0 is not available on the Project website, and CRIT has not been provided with a copy of a draft document.

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## ***Summary***

The FEIS defers the development of detailed final plans to protect resources until after public participation is completed, including, but not limited to:

- Desert Tortoise Translocation Plan,
- Bird and Bat Conservation Strategy,
- Integrated Weed Management Plan,
- Worker Environmental Awareness Program,
- Vegetation Resource Management Plan,
- A plan to mitigate impacts to burrowing owl,
- A management plan for minimizing project impacts to nesting birds,
- Avian and bat management plan, and
- Cultural resources management plan.

Details are also lacking or deferred to an unspecified date on the construction of a water storage pond to protect migratory waterfowl, a central compensatory mitigation measure (participation with an HCP), and a draft MOA (which is not available on the Project website nor has it been provided to CRIT).

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## ***Response***

NEPA does not require identified mitigation plans to be finalized prior to the conclusion of the NEPA process. Rather NEPA requires sufficient detail about the potential content of such plan that the effects of the measures can be disclosed and analyzed in the NEPA document. Similarly, while NEPA requires an agency to discuss possible mitigation measures, 42 U.S.C. § 4332(C)(ii), it does not require specific types of mitigation to be analyzed or adopted; those decisions are left to the discretion of the Agency. The analysis of the identified mitigation plans in the FEIS satisfies these obligations. Various mitigations plans were included in the FEIS, including a Draft Bird and Bat Conservation Strategy (Appendix C.9), an Integrated Weed Management Plan (Appendix C.10), an Applicant Memo on Mitigation Land (Appendix C.12), a Raven Management Plan (Appendix C.14), a Worker Environmental Awareness Plan (Appendix C.15), a Vegetation Management Plan (Appendix C.17), a Closure and Reclamation Plan (Appendix C.18). During the NEPA process mitigation measures have been added, clarified, and/augmented. Thus, the EIS contains sufficient detail about the potential content of the Project's various mitigation plan, such that the EIS' analysis of mitigation measures was not inappropriately deferred." (FEIS, page N-64, see also response to comment C002-2 on page N-62).

Similarly, the BLM has met its responsibilities under Section 106 of the National Historic Preservation Act with the execution of the MOA among the SHPO, applicant and BLM on February 26, 2013, which includes a binding commitment to assure that the mitigation measures proposed in the Final EIS is incorporated into the ROD (36 CFR 800.8 (4)). The provisions of the MOA were developed based on consultations between BLM, SHPO, and interested tribes. A

draft of the MOA was made available to all interested parties, including the CRIT, prior to its execution.

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### **Section 6.5 – Public Participation**

Total Number of Submissions: 1

Total Number of Comments: 1

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**Comment Number:** PP-CA-DesertHarvest-13-05-4

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

The Final EIS is so long and convoluted that it essentially makes the information inaccessible to most people and, consequently, fails to properly inform the public of the nature and consequences of the project. Depriving the public of full disclosure runs counter to NEPA's policy in favor of public participation.

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### ***Summary***

The FEIS is improperly long so as to discourage meaningful public participation.

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### ***Response***

As stated in FEIS Appendix N-96: “The length of the document is considered necessary to evaluate this especially complex project, which has numerous resource protection challenges and no fewer than 12 alternatives evaluated at an equal level of detail.”

As noted in response to Issue 6.0, the length of the FEIS results from the depth of analyses required and reported on to fully inform the BLM’s constituents with interests in the proposed project. This EIS describes the components of and reasonable alternatives to the Proposed Action and environmental consequences of the Proposed Action and further incorporates compliance with provisions of CEQA to allow Riverside County to use this EIS to satisfy its environmental review and approval processes (see CEQA Readers’ Guide, FEIS Section 1.8, page 1-10). The FEIS/Proposed Plan Amendment is significantly longer than the Draft EIS because it includes the summary texts and responses to the multitude of comments submitted on the DEIS. The BLM has little leeway in determining the length of comprehensive NEPA documents, particularly those dealing with issues as complex as those involved with large-scale renewable energy proposals in potentially sensitive environments regarding the proposed project and were not notified when the EPA published their Notice in the Federal Register. A series of emails between the Charpieds, Kevin Emmerich, and the BLM further confused the issue. A

missive from Frank McMenimen states the protest period ends December 2, 2012 (which is a Sunday). The Federal Register (77 Fed. Reg. 213) states the period ends December 3rd, and the BLM website states December 5th. A project's protest period begins.

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## **Section 7 - FLPMA**

Total Number of Submissions: 1

Total Number of Comments: 1

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**Comment Number:** PP-CA-DesertHarvest-13-03-2

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

### **Issue Excerpt Text:**

To wit, we are Known Interested Parties when the BLM files it's Notice in the Federal Register, and provides a means for the Public to access the FEIS/Plan Amendment. It took a week before the situation had been clarified, (and over 14 days before we received Appendix D [a week after we requested it]) leaving about 23 days to read, digest, and prepare a protest. In reality, the protest period should be December 12, 2012 – 30 days after the publication of the BLM Notice in the Federal Register.

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### ***Summary***

The BLM should extend the protest period to compensate for poor communication in making the document available.

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### ***Response***

The protest regulations at 43CFR 1610.5-2 specify that protests “shall be filed with the Director... within 30 days of the date the Environmental Protection Agency [EPA] published the notice of receipt of the final environmental impact statement containing the plan or amendment in the Federal Register.” The EPA published the NOA for the Desert Harvest PRMP/FEIS on Friday, November 2, 2012. While the BLM distributed hard copies and CDs of the document to the public in time to be received by November 2, the BLM was unable to post the document on its website until Monday, November 5 for technical reasons. Therefore, the BLM announced in a November 9, 2012 news release that protests would be accepted so long as they were postmarked by December 5, 2012, or 30 days from November 5 due to the technical difficulties in making the EIS available electronically during the protest period.

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### **Section 7.1 - MUC-L**

Total Number of Submissions: 1

Total Number of Comments: 1

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**Comment Number:** PP-CA-DesertHarvest-13-01-2

**Organization:**

Commenter:

**Issue Excerpt Text:**

If, in fact, an additional gen-tie powerline is required from the project site to the Red Bluff substation it will occur on MUC class L lands, which is inappropriate. Under the CDCA Plan, Multiple-use Class L (Limited Use) “protects sensitive, natural, scenic, ecological, and cultural resources values. Public lands designated as Class L are

managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished.” CDCA Plan at 13 (emphasis added). In particular, building multiple gen-tie lines to the Red Bluff substation on Class L lands is inconsistent with the goals of the Desert Plan (as well as being inconsistent with the designation of much of these lands as DWMA and WHMA), and inconsistent with the Solar PEIS amendments which contemplates that appropriate environmental safeguards will be put in place for projects including coordination of infrastructure to lessen impacts to sensitive lands and resources.

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### ***Summary***

An additional gen-tie powerline required from the project site to the Red Bluff substation will occur on MUC class L lands, which is inappropriate.

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### ***Response***

The CDCA Plan does not prohibit the development of transmission facilities on Class L lands. In fact the Plan provides that Electrical transmission and distribution facilities may be allowed on Class M and Class L outside designated utility corridors after NEPA requirements are met and a plan amendment is approved. The FEIS and Proposed Plan Amendment for the Project satisfy that requirement.

While the FEIS Alternatives C-E analyze a separate gen-tie, some form of shared ROW with the DSSF project remains the BLM's preferred configuration of the DHSP's gen-tie line as analyzed in the FEIS under Alternatives B and C. With respect to the non-co-located gen-tie alternatives in the FEIS, Alternative C is described in section 2.11 (page 2-32) and would be a line parallel to the Desert Sunlight approved gen-tie on separate towers in an adjacent right-of-way; Alternative D is described in section 2.12 (pages 2-33 and 2.-34) and would cross diagonally southeast through the Chuckwalla Valley from the project site to the Red Bluff Substation; and Alternative E is described in section 2.13 (pages 2-34 through 2-36) and would cross the eastern edge of the

Valley just south of the Desert Lily ACEC. Each alternative is analyzed in turn with respect to each environmental resource in chapters 3 and 4 of the FEIS. All gen-tie alternatives would cross a very small area of land designated as Class L upon entry into the Red Bluff Substation; however, only Alternative E would cross a sizable area designated as Class L prior to reaching the Red Bluff Substation. All of these alternatives are consistent with the applicable CDCA Plan requirements, which allow electrical transmission and distribution facilities on Class M and Class L lands outside designated utility corridors after NEPA requirements are met and a plan amendment is approved.

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## **Section 7.2 - CDCA**

Total Number of Submissions: 3

Total Number of Comments: 4

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**Comment Number:** PP-CA-DesertHarvest-13-02-2

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

### **Issue Excerpt Text:**

The FEIS concludes that the Project is in conformance with the nine decision criteria, including criterion #4, #5, and #6. (FEIS, p. 3.22-7). However, this conclusion is unfounded. The proposed Project would violate the CDCA because it fails to avoid sensitive resources, fails to conform to local plans, and it is inconsistent with wilderness values and is inconsistent with wilderness recommendations.

The Project is not consistent with criterion #4 (i.e., “[a]void sensitive resources wherever possible), because the Project could be located to avoid sensitive resources and in particular the Palen-Ford Wildlife Management Area. For example, alternative 5, completely avoids the Palen-Ford Wildlife Management Area.

The FEIS concludes that the Project is in conformity with criterion #5 (i.e., “[c]onform to local plans whenever possible”). In pertinent part, the FEIS states “[t]he Proposed Action is in conformance with the Riverside County General Plan.” (FEIS, p.

3.22-7). This statement is inconsistent with various other statements in the FEIS. For example,

“The project would have strong visual contrast with the surrounding landscape and would be visible from proximate wilderness areas and scenic vistas. The project, if approved, would conflict with several Riverside County General Plan policies designed to protect visual resources.” (FEIS, p. ES-8 - ES-9) (emphasis added).

- “The moderate to high degree of visual change that would be caused by the proposed solar farm would not be consistent with the following Riverside County General Plan policies: LU 4.1, LU 13.1, LU 13.3, LU 13.5, LU 13.8, LU 20.1, LI 20.2, LU 20.4, DCAP 2.3, DCAP 9.1, and DCAP 10.1.” (FEIS, p. ES-10).

- “[T]he County recognizes that its current General Plan does not address siting utility-scale solar facilities and that policy conflicts may exist. The County plans to address siting of solar projects and will clarify these issues in a General Plan update and in future County Code revisions (CEC and BLM 2010).” (FEIS, p. 3.11-1 – 3.11-2). Based on these statements, the FEIR erroneously concludes that the Project is in conformance with the Riverside County General Plan.

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**Comment Number:** PP-CA-DesertHarvest-13-03-13

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**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 o[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).

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**Comment Number:** PP-CA-DesertHarvest-13-03-29

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The proposed Plan amendment is not consistent with the bioregional planning approach in the CDCA Plan. The overarching principles expressed in the Decision Criteria in the CDCA are applicable to the proposed project including minimizing the number of separate rights-of-way, providing alternatives for consideration during the processing of applications, and “avoid[ing] sensitive resources wherever possible.” CDCA Plan at 93. The BLM should have taken a more comprehensive look at the plan amendment

to determine: 1) whether industrial scale projects are appropriate for any of the public lands in this area; 2) if so, how much of the public lands in this area are suitable for such industrial uses given the need to balance other management goals including desert tortoise, burrowing owl and other rare species and protection of wilderness values especially in light of other developments being constructed and proposed in this area; and 3) the location of the public lands suitable for such uses, if any.

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**Comment Number:** PP-CA-DesertHarvest-13-05-21

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

The EIS should have considered all solar energy projects within the CDCA. Congress has recognized that “the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed.” 43 U.S.C. § 178 I(a)(2). As a special area, Congress required that a “comprehensive, long-range plan for the management, use, development and protection of the public lands within the California Desert Conservation Area” be prepared. *Id.* at § 178I(d). Failing to look at similar projects, all requiring amendments to the CDCA Plan defies the Congressional mandate for a cohesive plan. See November 30, 2012 Page 10 Exs. C 1-7, C9-C 12, *cn.* Yet that is precisely what happened here. Section C of the attached index provides a thorough overview of the projects that should have been considered in the final EIS.



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## *Summary*

The FEIS/CDCA Plan Amendment concludes incorrectly that the Project is in conformance with the nine CDCA decision criteria. The Proposed Plan amendment would violate the CDCA because it:

Fails to avoid sensitive resources and is inconsistent with wilderness values and wilderness recommendations.

Sites a large-scale industrial facility on MUC class M (moderate use) lands.

Fails to avoid sensitive resources

Is not consistent with the bioregional planning approach in the CDCA Plan. The EIS should have considered all solar energy projects under consideration in the Planning area.

Fails to conform to Riverside County General Plan to protect visual resources.

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## *Response*

As stated on N-89, “The required determinations for a land use plan amendment are disclosed in the EIS in Table 3.22-1 on pages 3.22-5 and 3.22-6.” Table 3.22-2 elaborates on conformity with the CDCA Plan's energy production and utility corridors element. Table 3.22-2 summarizes the BLM's compliance with the applicable CDCA Plan decision criterion, including "Avoid[ance of] sensitive resources wherever possible". The Applicant's original siting process, discussed in pre-application meetings with the BLM focused on the avoidance of Desert Wildlife Management Areas. Wilderness values and visual resources (see FEIS sections 4.17 and 4.19) were taken into consideration. In sum, "The proposed project location and configurations of the boundaries were modified in consideration of sensitive resources." (FEIS 3.22-7) See FEIS Table 4.1.3 “Cumulative projects within the Geographic Scope of Cumulative Analysis for each resources area”. For some resources all were included (e.g., climate change). This conforms to the BLM NEPA Handbook 6.8.3. See also Tables 4.1.1 and 4.1.2. Thus, the FEIS is consistent with the CDCA bioregional planning approach. In addition, BLM-CA is using the analysis in the FEIS to make conclusions about plan conformance which determinations will be presented in the ROD in support of the project alternative ultimately selected.

With respect to the bioregional planning approach in the CDCA Plan, see FEIS Table 4.1.3. Additionally, the project area is within the Northern and Eastern Colorado Desert Coordinated Management Plan/ EIS Area (NECO). “The NECO Plan/EIS provides integrated ecosystem management for special-status species and natural communities for all federal lands, and regional standards for public land health for BLM lands.” (FEIS page 3-3.7). For example, the FEIS used the NECO planning area as the geographic area of consideration for cumulative effects for biological resources – vegetation, and biological resources – wildlife (for most species). (FEIS Table 4.1-3).

With respect to compliance with the requirements of the Riverside County Plan, as the FEIS explains the majority of the Project is located on Federal lands managed by the BLM and only portions of the Project's proposed gen-tie line are within Riverside County's Desert Center Planning Area. (FEIS 1-17). Moreover, FLMPA and its implementing regulations simply require ROW grant authorizing projects to contain terms regarding compliance with the state law "to the extent practicable." 43 CFR § 2805.15(a).

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### **Section 7.3 - Consistency with Other Plans**

Total Number of Submissions: 1

Total Number of Comments: 1

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**Comment Number:** PP-CA-DesertHarvest-13-06-44

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

The FEIS violates CEQA in numerous, significant ways, particularly regarding the deferral of analysis and mitigation and the specific mitigation measures that must be analyzed and adopted for archaeological resources under CEQA.

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### ***Summary***

The FEIS violates CEQA by 1) deferring of analysis and mitigation; and 2) not using the specific mitigation measures that must be analyzed and adopted for archaeological resources under CEQA.

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### ***Response***

At the outset it should be noted that alleged violations of state statutes, like CEQA, do not provided a valid basis for protesting a BLM planning decision under FLPMA. As the FEIS explains (page 1-2): " In compliance with Section 15221 of the CEQA Guidelines, this document has been prepared to a CEQA-equivalent standard, as the County and CDFG may use this document to meet their CEQA obligations related to any permits or approval they might issue for the project. Further detail on this process is provided in section 1.5.2." Please also see also section 1.8 ("CEQA Readers' Guide"), starting on page 1-10, that cross-references CEQA-relevant information with corresponding sections in the PRMP/FEIS. It should be emphasized, however, that the inclusion of CEQA information in the FEIS does not imply that the BLM can be held responsible for CEQA compliance. That is within the purview of California state and local governments. Consistent with FLPMA, the BLM's obligations is simply to ensure that the Applicant "secure all necessary local, state, and Federal permits, authorizations, and approvals as required for each phase of the project before the BLM will issue a Notice to Proceed (NTP). "

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## **Section 9 - Fish, Wildlife, Plants, And Special Status Species**

Total Number of Submissions: 1

Total Number of Comments: 6

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**Comment Number:** PP-CA-DesertHarvest-13-02-12

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

### **Issue Excerpt Text:**

Dr. Smallwood concludes that the EIS should have included Crissal thrasher (*Toxostoma crissale*), which is a California Bird Species of Special Concern, Priority 3 (Shuford and Gardali 2008).

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**Comment Number:** PP-CA-DesertHarvest-13-02-15

**Organization:** LIUNA, *et al*

**Commenter:** Richard Drury

### **Issue Excerpt Text:**

3. Swainson's hawk Dr. Smallwood concludes that contrary to statements in the EIS, the site may be habitat for Swainson's hawk. Dr. Smallwood states:

According to the EIS (page 3.4-23), "One Swainson's hawk was observed flying over the proposed solar facility site in April 2011. The project study area may serve as incidental foraging habitat during migratory seasons, but otherwise would not support Swainson's hawks, due to the distance from its breeding range." The observation of a Swainson's hawk in April is interesting because the migratory return of Swainson's hawks occurred one to two months earlier. This hawk was observed during the nesting season. Claiming that the project site must

be incidental foraging habitat conflicts with the observation of a Swainson's hawk occurring on site in April. It is possible that Swainson's hawk breeds on site, or nearby.

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**Comment Number:** PP-CA-DesertHarvest-13-02-17

**Organization:** LIUNA, *et al*

**Commenter:** Richard Drury

### **Issue Excerpt Text:**

Dr. Smallwood concludes that dispersal and stop-over habitat impacts of the Project are not properly analyzed in the EIS. He states: "Another type of impact that appeared to have been neglected in the EIS is the project's impacts on animal dispersal. Whereas the EIS was correct to point out that Mojave fringe-toed lizard is unlikely to occur on site due to the lack of sand dunes, it was also misleading to neglect any discussion of the likelihood that Mojave fringe-toed lizards likely disperse across landscapes lacking sand dunes in order to disperse from one sand dune complex to another.

Migratory stop-over habitat was also given little if any consideration in the EIS. The EIS was correct to point out that ferruginous hawks likely visit the project site only during winter, but these winter stopovers also comprise a significant aspect of the species' natural history – its ecology. The proposed project will likely reduce stopover habitat for osprey, ferruginous hawk, Cooper's hawk, sharp-shinned hawk,

northern harrier, prairie falcon, merlin, short-eared owl, long-eared owl, Vaux's swift, burrow deer, and Nelson's bighorn sheep, and these losses should be considered adverse and significant.

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**Comment Number:** PP-CA-DesertHarvest-13-02-19

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

the scope and scale of Spencer et al.'s analysis, with a minimum habitat block of 10,000 acres, was inappropriate for use in an EIS for this project.

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**Comment Number:** PP-CA-DesertHarvest-13-02-21

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

The EIS conclusion -- that the project site "would be of minimal value to support regional connectivity" (page 3.4-31) -- was purely speculative, and not based on any data or reasonable analysis. Citing preliminary results in a personal communication of where the regions "connectivity area" is located is scientifically indefensible and contrary to erring on the side of caution when making a risk analysis with substantial environmental consequences (National Research Council 1986, O'Brien 2000).

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**Comment Number:** PP-CA-DesertHarvest-13-02-27

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

The EIS dramatically underestimates the Project's impacts related to avian collisions (bird strikes).

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**Summary**

The BLM's analysis for wildlife was flawed for the following reasons:

- The FEIS should have included Crissal thrasher (*Toxostoma crissale*), a priority 3 California Bird Species of Special Concern.
- The FEIS fails to indicate that the site might provide nesting habitat for Swainson's hawk.
- The FEIS failed to adequately analyze impacts on animal dispersal for Mojave fringe-toed lizards and of migratory stop-over habitat for osprey, ferruginous hawk, Cooper's hawk, sharp-shinned hawk, northern harrier, prairie falcon, merlin, short-eared owl, long-eared owl, Vaux's swift, burrow deer, and Nelson's bighorn sheep.
- The assessment of wildlife movement corridors relied on a source that was inappropriate for use in this FEIS.

- The conclusion that the project site “would be of minimal value to support regional connectivity” was purely speculative, and not based on any data or reasonable analysis.
- The FEIS dramatically underestimates the Project’s impacts related to avian collisions (bird strikes).

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### ***Response***

All of the identified species were considered in the FEIS, and impacts to these species and their habitat were adequately analyzed.

Crissal thrasher and other species of concern are considered in FEIS Table 3.4-2, page 3.4-14 to 3.4-16.). The BLM has determined that the Crissal thrasher has a low potential to occur onsite, and that habitat is marginally suitable for nesting and foraging. As described on page 3.4-11, a species was determined to have a low potential to occur if there are no records of the taxon within the project study area (five miles), the environmental conditions are marginal, and/or the taxon is conspicuous and was not detected during biological surveys.

The closest known recent breeding populations of Swainson’s hawk occur in the agricultural region south of the Salton Sea, approximately 50 miles south of the DHSP site, and in the Antelope Valley of Los Angeles and Kern Counties, over 150 miles to the northwest. Two historical nest territories occur in the Lanfair Valley within the Mojave National Preserve, over 90 miles northeast of the site; these territories have not been recorded to be active since the early 1980s (DRECP Draft Swainson’s Hawk species account, March 2, 2012: [http://www.drecp.org/meetings/linkdocs/2012-02-4\\_meeting/species\\_profiles/Swainson\\_Hawk.pdf](http://www.drecp.org/meetings/linkdocs/2012-02-4_meeting/species_profiles/Swainson_Hawk.pdf)).

The project site does not support suitable nesting habitat for Swainson’s hawk and is well outside of the current known breeding distribution; however, this species commonly migrates through the desert regions of California. As described on FEIS pages 3.4-3, 3.4-13, and 3.4-23, this species was observed migrating through the project area. As stated on FEIS page 3.4-23, one Swainson’s hawk was observed flying over the proposed solar facility site in April 2011. The project study area may serve as incidental foraging habitat during migratory seasons, but otherwise would not support Swainson’s hawks, due to the distance from its breeding range. Bird strikes (avian collisions) are addressed under Biological Resources, Wildlife Movement section 4.12, page 4.4-44, 45 of the FEIS.

The Mojave fringe-toed lizard, a BLM Sensitive Species known from the area, is not expected to occur on the solar project site due to absence of suitable aeolian sand habitat (see pages 4.4-10 to 4.4-11). However, portions of gen-tie Alternative E would cross occupied Mojave fringe-toed lizard habitat along the western margin of the dune system at the base of the Coxcomb Mountains. The animals were observed during field surveys for the Desert Sunlight Solar Farm project and for the DHSP (see FEIS page 3.4-20). As described in the FEIS (page 4.4-54), construction of Alternative E would affect some occupied habitat for Mojave fringe-toed lizard along the gen-tie line alignment, and could cause direct mortality of these species by crushing or

other effects, as described for reptiles and small mammals under the analyses for Alternative B (FEIS section 4.4.12). Implementation of Mitigation Measures VEG-6 and MM WIL-1 (Wildlife Impact Avoidance and Minimization) would reduce or offset these impacts. For Alternative E, MM VEG-6 (Provide Off-Site Compensation for Impacts to Vegetation and Habitat) includes a requirement to compensate for impacts to occupied and suitable Mojave fringe-toed lizard habitat at a 5:1 ratio. Construction and operation of a gen-tie line in this area is not expected to substantially affect Mojave fringe-toed lizard dispersal because the alternative gen-tie alignment occurs at the edge of the dune system, with more intact and extensive habitat occurring to the east. Additionally, disturbance associated with the gen-tie line would be minor (totaling 7 acres), consisting of the footings of the transmission structures and an unpaved access road. Once construction is complete, the gen-tie line would not pose an obstacle to movement for wildlife, including Mojave fringe-toed lizards.

The FEIS's analysis of the Project's impacts on connectivity generally is not speculative. As the FEIS explains (4.4-17 to 18), the proposed DHSP solar facility site's "contribution to [wildlife] movement habitat is limited, however, by existing land use patterns south and east of the proposed solar facility site, and by the DSSF project to the north (see Cumulative Impacts analysis, below). Much of the open space to the south and east of the DHSP solar facility site includes large tracts of land used for agriculture (jojoba, date palms, etc.). Some of these fields are actively farmed, while others are not. However, degraded habitat, fences, and other alterations limit their function for wildlife movement through the areas within 3 miles of the southern boundary of the solar facility site. ... [And while] Project construction would further limit connectivity by eliminating movement opportunities across the site for most wildlife species, the actual consequence to wildlife movement would be minor due to the land uses and movement barriers described above."

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## **Section 9.1 - Desert Tortoises**

### **Generally**

Total Number of Submissions: 3

Total Number of Comments: 12

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**Comment Number:** PP-CA-DesertHarvest-13-01-12

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

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

The Proposed Plan Amendment and FEIS fails to acknowledge the poor track record of desert tortoise translocation in general, nor does it require measures to improve the success of relocation efforts including

complete temporary fencing of the translocation areas for example. We are also concerned that the translocation plan does not minimize impacts to those tortoises that are identified to be moved by requiring that the tortoises be moved only once.

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**Comment Number:** PP-CA-DesertHarvest-13-01-14

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The Draft Translocation Plan relies upon an unavailable Biological Opinion (BO) issued by the U.S. Fish and Wildlife Service, so it is impossible to evaluate if the requirements of that BO are addressed in the Translocation Plan. On this basis as well, BLM has failed to fulfill its duties under NEPA to fully analyze the impacts of the proposed project and under FLPMA to prevent unnecessary and undue degradation of public lands and resources.

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**Comment Number:** PP-CA-DesertHarvest-13-01-16

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

This issue is particularly concerning here because of the reliance in the FEIS on translocation into the Sunlight Recipient Site, which is located northwest of the proposed project site, and was originally within the Desert Sunlight Solar Farm project area, but was abandoned due to desert tortoise conflicts. It is unclear from the FEIS whether sufficient protections are in place for this area and its tortoise population that would make it off-limits to all future development.

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**Comment Number:** PP-CA-DesertHarvest-13-01-18

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The Center protests the proposed plan amendment because the FEIS fails to

identify a mechanism to minimize conflicts with higher density desert tortoise areas (both “unaugmented” sites and translocation recipient sites) for this proposed development or future proposed development and fails to clearly address this critical conservation issue.

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**Comment Number:** PP-CA-DesertHarvest-13-01-20

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

Deferring identification and analysis of impacts to resources including “host” desert tortoise populations from the translocation.

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**Comment Number:** PP-CA-DesertHarvest-13-01-7

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The FEIS fails to follow the Revised Desert Tortoise Recovery Plan2 (2011), which recommends that translocations occur in conserved areas with depleted or extirpated populations (at pg. 36). The primary translocation site is the Sunlight Recipient Site (FEIS at Appendix 8 pg. 4), which is not a conserved site and conceivably could be developed in the future, requiring desert tortoise to be moved a second time. Additionally neither the FEIS nor the Draft Translocation Plan actually evaluates if the areas are in fact depleted.

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**Comment Number:** PP-CA-DesertHarvest-13-01-9

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The Draft Translocation Plan fails to follow the more recent Independent Science Advisor’s recommendations<sup>3</sup> for the Desert Renewable Energy Conservation Plan, which opposes translocation into DWMAs<sup>4</sup>, which is proposed as the second option (Chuckwalla Recipient Site) in the Draft Translocation plan.

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**Comment Number:** PP-CA-DesertHarvest-13-03-26

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The FEIS fails to follow the Revised Desert Tortoise Recovery Plan (2011), which recommends that translocations occur in conserved areas with depleted or extirpated populations (at pg. 36). The primary translocation site is the Sunlight Recipient Site (FEIS at Appendix 8 pg. 4), which is not a conserved site and conceivably could be developed in the future, requiring desert tortoise to be moved a second time. Additionally neither the FEIS nor the Draft Translocation Plan actually evaluates if the areas are in fact depleted. Because DS is using the site as its translocation site, a case can be made that it is already exceeding its carrying capacity with the introduction of Sunlight’s trans-located tortoise.

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**Comment Number:** PP-CA-DesertHarvest-13-03-27

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The Draft Translocation Plan fails to follow the more recent Independent Science Advisor’s recommendations for the Desert Renewable Energy Conservation Plan, which opposes translocation into DWMAs, which is proposed as the second option (Chuckwalla Recipient Site) in the Draft Translocation plan. Therefore the FEIS fails to utilize the recommendations of expert agencies and scientists regarding translocation locations. Moving ahead with the proposed translocation plan could set into motion a catastrophic impact scenario, not only to the trans-located population, but also the “host” population.

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**Comment Number:** PP-CA-DesertHarvest-13-03-30

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

No impacts to tortoises are analyzed regarding home range impact. While a Desert Tortoise Removal and Translocation Plan is proposed to be implemented (FEIS AM-BIO-6), that document is not available for public review and therefore the public and decision makers cannot evaluate the strategy of the plan, if it complies with the Independent Science Advisors’ report or even its general adequacy. It is unclear if desert tortoise exclusion fencing will be utilized, where it will be utilized, how much etc. and if it were to go up how home ranges and connectivity would be affected.

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**Comment Number:** PP-CA-DesertHarvest-13-03-32

**Organization:** Basin and Range Watch



**Commenter:** Donna and Larry Charpied

**Issue Excerpt Text:**

The FEIS fails to identify a mechanism to minimize conflicts with higher density desert tortoise areas (both “unaugmented” sites and translocation recipient sites) and development and fails to address this critical conservation issue.

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**Comment Number:** PP-CA-DesertHarvest-13-05-14

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

6. The EIS Fails to Adequately Analyze and Mitigate Impacts to Desert Tortoises  
BLM acknowledges that desert tortoises are generally found throughout the region where the solar facility would be located and that it is assumed the entire solar facility site and all gen-tie line alternative alignments might be occupied by desert tortoises at any time. It cannot be denied that this project will directly, indirectly, and cumulatively impact desert tortoises. The mitigation measures listed to address these impacts are grossly inadequate. Among the impacts are: habitat

loss, fragmented habitat, loss of connectivity, and potential increases in susceptibility to predators such as ravens. In addressing these impacts, the mitigation measures proposed are tortoise translocation and other vague measures such as "permanent protection and management of compensation lands" and "enhancement actions, as needed, such as habitat restoration ... " See Final EIS 4.4-1 O. However, these measures, in and of themselves, result in negative impacts to tortoises such as elevated stress hormones, changes in behavior and social interaction, spread of disease, and increased predation. See Exs. B3-B8. The risks and uncertainties of translocation of desert tortoises are well recognized in the scientific community. See Final EIS 4.4-9. Yet, no mitigation measures are provided for these translocation impacts except a vague statement about an alternate strategy in which desert tortoises would be removed from the wild at the project site and placed permanently into conservation facilities. However, the Final EIS makes no mention of where these conservation facilities exist.

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**Summary**

The BLM has failed to fulfill its duties under NEPA to fully analyze the impacts of the proposed project and under FLPMA to prevent unnecessary and undue degradation of public lands and resources with respect to Desert Tortoises. The FEIS fails to follow the Revised Desert Tortoise Recovery Plan (2011), which recommends that translocations occur in conserved areas with depleted or extirpated populations. The Proposed Plan Amendment and FEIS fails to acknowledge the poor track record of desert tortoise translocation in general, nor does it require measures to improve the success of relocation efforts nor minimize impacts to those tortoises that are identified to be moved by requiring that the tortoises be moved only once.

The Draft Translocation Plan fails to follow the more recent Independent Science Advisor’s recommendations for the Desert Renewable Energy Conservation Plan, which opposes

translocation into DWMAAs. Therefore the FEIS fails to utilize the recommendations of expert agencies and scientists regarding translocation locations. Moving ahead with the proposed translocation plan could set into motion a catastrophic impact scenario, not only to the translocated population, but also the "host" population.

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### ***Response***

The BLM has fulfilled all responsibilities under NEPA and FLPMA in regards to impacts of the proposed plan amendment on Desert Tortoises. The FEIS adheres to the most recent protocols and guidelines provided by the FWS for desert tortoise surveys (see section 10.3), and the final translocation plan will conform to the 2010 FWS desert tortoise relocation guidelines entitled Translocation of Desert Tortoise (Mojave Population) From Project Sites: Plan Development Guidance and the guidelines set forth in the 2011 Revised Recovery Plan for the Mojave Population of the Desert Tortoise. These documents reflect the most current understanding of desert tortoise biology and incorporate through the BO issued January 15, 2013 mortality and relocation takes developed from modeling of multiple techniques for numbering and monitoring of the desert tortoise.

As described in the FEIS (page 4.4-7), the proposed solar facility site and surrounding area is modeled as relatively low value habitat for desert tortoise. Desert tortoises have not been documented within the solar facility site, but are expected to be present in low numbers based on nearby known occurrences and desert tortoise signs discovered on the site during field surveys. The draft translocation plan anticipates that five or fewer tortoises occur on the DHSP site, and would necessitate translocation prior to construction. However, this Plan also includes provisions for expanded monitoring to be implemented if more than five tortoises must be translocated, consistent with FWS guidance.

The three potential recipient sites were assessed in terms of the FWS selection criteria provided in the 2011 Revised Recovery Plan on pages 4 to 9 of Appendix C.8 of the FEIS. According to the Revised Desert Tortoise Recovery Plan, recipient sites should occur on lands where desert tortoise populations have been depleted or extirpated, yet still support suitable habitat. Tortoise densities within the Sunlight Recipient Site and the Chuckwalla Recipient Site are estimated to be lower than the average density for the Colorado Desert Recovery Unit, but slightly above the threshold to be considered "depleted." Desert tortoise densities at the DuPont Recipient Site are currently unknown. If the identified sites cannot be used for translocation purposes due to density thresholds, alternate recipient sites will be identified in consultation with CDFG, FWS, and the BLM.

The Recovery Plan also states that the recipient site will be managed for conservation so that potential threats from future impacts are precluded. The Sunlight Recipient Site is located on BLM-managed lands within the Colorado Desert Recovery Unit for the desert tortoise that the BLM has committed to managing as a solar exclusion area. Any development in that area would be governed by the MUC Class as specified in the land use plan. There are no specific restrictions on that site. Nothing is anticipated on that site at this time. The Chuckwalla Recipient Site is located on BLM-managed lands within the Colorado Desert Recovery Unit and

within the Chuckwalla DWMA and CHU. The DuPont Recipient Site is located primarily on BLM-managed lands within the Colorado Desert Recovery Unit and the Chuckwalla DWMA and CHU for desert tortoise.

Desert tortoise clearance surveys and translocation have inherent risks and could themselves result in direct adverse effects to desert tortoises, such as mortality, injury, or harassment of desert tortoises due to equipment operation, fence installation, removal of tortoise burrows, and tortoise translocation. These risks, including estimates of mortality, were discussed in section 4.4 of the FEIS. Because handling and translocation cause risk to tortoise survival, all translocated tortoises must be radio-tagged and monitored to evaluate translocation success. If five or more tortoises are translocated, the FWS also requires radio-tagging and follow-up monitoring of an equal number of host population tortoises at each translocation site on a long-term basis for a period of at least 30 years after the initial translocation date. In addition, FWS requires radio-tagging and follow-up monitoring of an equal number of tortoises at a selected control site, where no translocated animals have been introduced (FEIS 4.4-8 to 4.4-10). As stated by the protestor, tortoise can be relocated more than once; however, each relocation counts as a “take” for the purposes of consultation.

In regards to the mitigation measures, the FEIS provides several mitigation measures to reduce impacts to desert tortoise. Mitigation Measures (MM) VEG-1 through MM VEG-6 require monitoring and reporting, worker environmental training, minimization of construction impacts, and off-site compensation for habitat impacts at a minimum 1:1 ratio. In addition, MM WIL-1 (Wildlife Impact Avoidance and Minimization) includes numerous requirements to prevent wildlife road strikes, entrapment in pitfalls, interactions with workers’ pets, and other threats. MM WIL-2 (Desert Tortoise Clearance Surveys, Exclusion Fencing, and Translocation) requires that the project owner exclude desert tortoises from the project site, survey the entire site for tortoises prior to initial clearing and grading, and relocate any tortoises in accordance with a project-specific Desert Tortoise Translocation Plan to be prepared by the project owner and implemented only upon approval by the FWS and CDFG. As stated by the protestor, MM WIL-2 also requires that the Translocation Plan include an alternate strategy, in which desert tortoises would be removed from the wild at the project site and placed permanently into conservation facilities approved by FWS and CDFG. The decision on which strategy to implement will be made following completion of a final Desert Tortoise Translocation Plan, and the recently issued BO from FWS (January 15, 2013) and Incidental Take Permit or Consistency Determination from CDFG, (FEIS, page 4.4-8 to 4.4-10). The project owner will be required to implement all additional conditions included in the biological opinion from the FWS. For more information regarding availability of the BO, please see section 6.2.2 in this Protest Resolution Report. The BO included a modification to the number of mortality and re-location takes for the DHSP.

In regards to impacts on host populations, desert tortoise translocation would also require several measures to minimize impacts to host populations, including: (1) determination of existing tortoise density and health assessment at the translocation site; (2) an assessment of the site’s ability to accommodate additional tortoises above baseline conditions; and (3) health assessments and equipment or facilities for in situ or ex situ tortoises quarantine prior to their release into host populations.

## Section 9.2 - Desert Tortoise Surveys

Total Number of Submissions: 3

Total Number of Comments: 4

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**Comment Number:** PP-CA-DesertHarvest-13-01-4

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The FWS methodologies in the Desert Tortoise (Mojave Population) Field Manual (2009) for estimating the number of desert tortoise on the proposed project site does not seem to be used and is not referenced in the appendices. Failure to use these methodologies is likely to significantly underestimate the number of desert tortoises on site.

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**Comment Number:** PP-CA-DesertHarvest-13-01-6

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The estimation methodologies used on this project may have significantly underestimated the number of desert tortoise on this project site. Therefore, we also protest the plan amendment because the environmental impact analysis in the FEIS relies on surveys and methodologies that

have been shown to be inaccurate in estimating of the number of desert tortoises on the project sites as well as the number of tortoise at the potential translocation sites.

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**Comment Number:** PP-CA-DesertHarvest-13-03-24

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpiel

**Issue Excerpt Text:**

The FWS methodologies in the Desert Tortoise (Mojave Population) Field Manual (2009) for estimating the number of desert tortoise on the proposed project site does not seem to be used and is not referenced in the appendices. Failure to use these methodologies is likely to significantly underestimate the number of desert tortoises on site.

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**Comment Number:** PP-CA-DesertHarvest-13-05-15

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

**Issue Excerpt Text:**

The Final EIS also does not estimate the number of tortoises on the project site, or the site where the tortoises will supposedly be translocated.

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## *Summary*

The FWS methodology in the Desert Tortoise (Mojave Population) Field Manual (2009) for estimating the number of desert tortoise on the proposed project site does not seem to be used and is not referenced in the appendices. Failure to use these methodologies is likely to significantly underestimate the number of desert tortoises on site. Therefore, the environmental impact analysis in the FEIS that relies on surveys and methodologies that have been shown to be inaccurate in estimating of the number of desert tortoises on the project sites as well as the number of tortoise at the potential translocation sites is also flawed.

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## *Response*

Focused desert tortoise surveys were conducted during spring 2011 within the proposed solar facility site (both parcels) and spring 2012 on gen-tie line alignment Alternative E. The surveys were conducted in accordance with the current FWS survey protocol “Preparing for Any Action That May Occur within the Range of the Mojave Desert Tortoise” (2010). The full reference can be found in section 3.4 of chapter 7 of the FEIS. The FWS reviewed all available population, migration and habitat models for the area, and verified in the final BO for the project that the BLM’s estimation of the number of desert tortoises on the proposed project site was a conservative projection.

Estimates of desert tortoise populations on the proposed project site and recipient sites can be found on pages 2 through 9 of Appendix C.8 of the FEIS.

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## **Section 9.3 - Kit Fox**

Total Number of Submissions: 2

Total Number of Comments: 3

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**Comment Number:** PP-CA-DesertHarvest-13-01-28

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

### **Issue Excerpt Text:**

The desert kit fox and American badger occur on site (FEIS 4.4-16) but the FEIS fails to provide any meaningful analysis of likely impacts to these species instead leaving the details necessary to a mitigation plan that has not yet been developed. For

example, no quantification the density of desert kit fox that will be displaced and “taken” by the proposed project is provided although this species is protected under California law. As the FEIS notes there was a recent distemper outbreak in the local kit fox populations but the BLM fails to address the significant concerns raised by any additional impacts to this species in this area.

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**Comment Number:** PP-CA-DesertHarvest-13-01-30

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

The FEIS fails to quantify how many kit fox territories overlap the proposed project site, analyze the impacts from the proposed project on kit fox individuals or populations, or provide specific avoidance, minimization or mitigation measures regarding this increasingly rare and declining species.

**Issue Excerpt Text:**

The mitigation measures listed to address the possible impact on kit foxes, more specifically, canine distemper, are grossly inadequate. There is a strong possibility this outbreak may lead to an epidemic, as is evidenced by the previous outbreak during the Genesis Solar Energy Project. See Ex. B9 & BIO. The Final EIS makes no commitment to stopping the spread of this disease by using vague, permissive language which would allow the applicant to completely forego mitigation measures. For example, the Final EIS states "The Plan will provide CDFG the opportunity to test animals for canine distemper virus," and the opportunity for other measures "as appropriate," but does not actually commit to take any such actions to do so. See Final EIS 4.4-39.

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**Comment Number:** PP-CA-DesertHarvest-13-05-17

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

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**Summary**

The FEIS failed to:

- quantify the density of desert kit fox that will be displaced and “taken” by the proposed project
- analyze the impacts from the proposed project on kit fox individuals or populations
- provide specific avoidance, minimization or mitigation measures for kit fox
- provide adequate mitigation measures to address impacts of canine distemper on kit foxes
- quantify how many kit fox territories overlap the proposed project site

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**Response**

Desert kit fox is not listed as a special-status species by the State of California or the FWS, but it is protected under Title 14, Section 460, California Code of Regulations, which prohibits take. The BLM has complied with this requirement by identifying potential impacts to desert kit fox (discussed on page 4.4-16 of the FEIS) and requiring specific mitigation measures designed to minimize impacts and avoid take. Mitigation Measures VEG-1 through MM VEG-6 and MM WIL-1 (Wildlife Impact Avoidance and Minimization) would require biological monitoring during construction activities, moving special-status wildlife out of harm’s way, worker environmental awareness training, restoration of temporarily impacted areas, compensation for permanently impacted habitat at a minimum 1:1 ratio, minimization of impact areas, vehicle

speed limits of 15 miles per hour, and control of fugitive dust. In addition, MM WIL-7 (Desert Kit Fox and American Badger Impact Avoidance) would require the project owner to passively relocate desert kit fox or American badgers found within the project area and provide CDFG the opportunity to test animals for canine distemper virus, vaccinate them against it, fit the animals with radio collars for follow-up tracking, or take other management actions as appropriate (page 4.4-38). The FEIS does not use vague language in regards to implementation of mitigation measures; as stated on page 4.4-38: “The passive Relocation Plan shall include measures as listed below, to be implemented if potential burrows of either species are located within the project area.” The requirement that the project owner provide CDFG “the opportunity” to test and vaccinate animals for canine distemper virus, reflects the fact that is CDFG responsibility to test and vaccinate animals, not the project owners. As a result of protest resolution and additionally coordination with CDFG, Mitigation Measure MM WIL-7, regarding desert kit fox and American badger, will be modified in the ROD to require the project owner to implement a long-term monitoring program. The measure requires the project owner to contract a qualified biologist to conduct a baseline kit fox census and population health survey and prepare and implement a Desert Kit Fox Management Plan. The measure specifies the requirements for baseline Desert Kit Fox and American Badger surveys, preparation and implementation of a management plan, and alternatives to badger relocation. The BLM also added language to address distemper concerns.

In regards to quantifying the number of individuals and territories in the project area, desert kit fox and American badger burrows and sign were noted during desert tortoise surveys and subsequent vegetation mapping and streambed delineation field work, but there were no additional field surveys dedicated to locating these species. The BLM determined that this level of field data collection for desert kit fox and American badger is appropriate to inform the NEPA analysis for this FEIS.

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### **Section 9.4 - Burrowing Owl**

Total Number of Submissions: 2

Total Number of Comments: 2

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**Comment Number:** PP-CA-DesertHarvest-13-01-23

**Organization:** Center for Biological Diversity

**Commenter:** Lisa Belenky

**Issue Excerpt Text:**

Failing to provide adequate mitigation and monitoring for burrowing owls. Based on the best available science provided in our comments on the DEIS, the mitigation should be much greater than 13 acres of occupied mitigation for each burrowing owl

bird or pair that will be impacted. The best available science does not support the requirement of 19.5 acres of unoccupied land as mitigation for impacts to burrowing owls.

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**Comment Number:** PP-CA-DesertHarvest-13-02-14

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

the survey method used to detect burrowing owls likely underestimated the number of burrowing owls, and failed to comply with California Department of Fish and Game Guidelines. Dr. Smallwood states:

“The breeding season burrowing owl surveys were conducted concurrently with the desert tortoise surveys. This approach effectively limited burrowing owl detection to discoveries of burrows used by owls, based on presence of sign such as pellets, whitewash, and feathers. While surveying for desert tortoise, the searchers are focused down at the ground in front of them, which is a necessary tactic for detecting desert tortoise, but ill-suited for detecting burrowing owls. I am familiar with this problem, because I spent several weeks performing biological surveys at a proposed solar project while my colleagues performed

desert tortoise surveys.

“Burrowing owls do not always leave readily detectable sign of their use of burrows, especially early in the breeding season. This is why the burrowing owl survey protocol requires more than simply searching for evidence of burrow use. The primary surveys for burrowing owls are supposed to be for the owls themselves, and surveys for burrows are secondary in the protocol. Visual scans are supposed to precede walking transects. The methodology implemented by Aspen Environmental likely contributed to missed detections of burrowing owls, and an abundance estimate that was biased low. The methodology was inconsistent with the CDFG Staff Guidelines of both 1995 and 2012.”

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### *Summary*

The FEIS failed to provide adequate mitigation and monitoring for burrowing owls, likely underestimated their number, and failed to comply with California Department of Fish and Game Guidelines.

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### *Response*

Burrowing owl surveys for the FEIS followed the “Burrowing owl survey protocol and mitigation guidelines” (California Burrowing Owl Consortium 1993). The BLM believes that this protocol is appropriate for use in the FEIS. Based on these results, the project area was determined to provide suitable habitat for burrowing owl, and the FEIS requires several mitigation measures to minimize impacts to burrowing owl (see page 4.4-12 of the FEIS). Additionally, pre-construction surveys will be implemented no more than 30 days prior to the start of ground-disturbing activities in any part of the project area, and will be conducted in accordance with the most current CDFG guidelines (FEIS, page 4.4-34). Mitigation measures (including habitat compensation) will be implemented based on the results of pre-construction surveys.

In regards to mitigation ratios, as stated in the 2012 CDFG Staff Report on Burrowing Owl Mitigation and the response to comments provided in the FEIS (page N-42), current scientific literature supports the conclusion that mitigation for permanent habitat loss necessitates



replacement with an equivalent or greater habitat area for breeding, foraging, wintering, dispersal, presence of burrows, burrow surrogates, presence of fossorial mammal dens, well drained soils, and abundant and available prey within close proximity to the burrow. Mitigation Measure WIL-4 requires 19.5 acres of habitat compensation land for each single burrowing owl or breeding pair of burrowing owls that is displaced by construction of the project. The requirements for habitat compensation for all biological resources outlined in Mitigation Measure VEG-6 would require the project owner to acquire and preserve in perpetuity lands at a ratio of 1:1, 3:1, or 5:1 depending on vegetation community and whether impacts are within a wildlife management area. Therefore, total acreages acquired for this project would greatly exceed that required by WIL-4 specifically for burrowing owls. Because of the location and habitat requirements set forth in Mitigation Measure VEG-6, compensation lands would also benefit burrowing owls. Therefore, the overall compensation strategy for the DHSP would adequately mitigate for impacts to burrowing owl habitat, and would be consistent with CDFG's current recommendations and the current scientific literature.

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## **Section 10 - Hazardous Materials, Public Safety**

Total Number of Submissions: 1

Total Number of Comments: 2

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**Comment Number:** PP-CA-DesertHarvest-13-02-6

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

### **Issue Excerpt Text:**

the Project site should be surveyed for MEC and UXO before certification of the FEIR to safeguard construction personnel from what are very real explosive hazards.

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**Comment Number:** PP-CA-DesertHarvest-13-02-8

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

### **Issue Excerpt Text:**

Because of the history of the site, it is almost certain that UXO and MEC-related material will be present on the site which is contrary to the FEIS's characterization that the potential presence of explosive hazards will be "unanticipated" (FEIS, p. 4.13-12). Given this likelihood, Mitigation Measure PH-8 is unacceptable and insufficient. Instead, UXO survey and removal should be performed prior to beginning any construction by certified UXO technicians and in accordance with BLM14 and U.S. Army Corps of Engineers' guidance.15 Findings of UXO or MEC should be reported to local law enforcement, the nearest military Explosive Ordnance Disposal unit, and the BLM ranger or the hazardous materials coordinator at the BLM office, according to BLM guidance 16.

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### ***Summary***

The FEIS's analysis regarding hazardous materials and public safety is inadequate because there is an incorrect characterization of the potential presence of explosive hazards, mainly due to the fact the FEIS failed to conduct surveys for MEC and UXOs on the site. As a result, mitigation measures for explosive hazards within the plan amendment are insufficient.

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### ***Response***

The protestor is correct that portions of the plan amendment and project area may have unexploded munitions and/or explosives (specifically within the Chuckwalla Valley area, which was historically used as a military training facility). BLM recognizes the public health and safety concerns associated with the existence of MECs and UXOs on the project site, which is why mitigation measure PHS-8 was developed. As the protestor recommends and in accordance with PHS-8, the project owner will be responsible for coordinating with the Department of Defense on the likely occurrence of, and safe treatment of, MECs in the project area. PHS-8 would also require project construction personnel to undergo MEC health and safety awareness training to ensure that they know what actions to take if unanticipated MEC or other suspicious articles are encountered during construction. In response to this protest, the BLM will amend Mitigation Measure PHS-8, regarding munitions and explosives, to include the requirement that "[t]he site shall be surveyed and cleared of all munitions and explosives of concern by a qualified expert prior to the issuance of a notice to proceed."

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## **Section 12 - Social, Economic Interests**

Total Number of Submissions: 1

Total Number of Comments: 1

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**Comment Number:** PP-CA-DesertHarvest-13-05-13

**Organization:** CARE, et al

**Commenter:** Mekaela Gladden

### **Issue Excerpt Text:**

5. The EIS Fails to Adequately Analyze Socioeconomic Impacts . The Final EIS fails to address how the gas and electric bill of local ratepayers in the region would be affected. There is growing evidence that the cost of mandating renewable energy sources and providing the transmission lines to deliver it may outweigh the environmental benefits, increase electricity prices, and, in the long run, reduce jobs instead of creating them. See Ex. PN4 & PN5. The implementation of

mandates is proceeding so rapidly that energy consumers are being locked into higher rates for many years to come. *Id.* A recent study conducted by the Manhattan Institute reveals a pattern of higher rates in states with renewable portfolio standards mandates compared with those states without such mandates. *Id.* At the very least, the Final EIS should have addressed the impact this project would have on rates charged to energy consumers. Despite, the BLM Director's statement that "the purpose of the EIS is ...to evaluate the environmental effects of the proposed project," courts have held that such an evaluation includes a socioeconomic analysis, including the one proposed by CARE and La CUNA. See Final EIS N-I05. In fact, COU11s have gone as far as saying that NEPA "must be construed to include protection of the quality of life for city residents," including assessing whether a project might increase crime in an area. Hanly v. Kleindienst (1972) 471 F.2d 823, 827.

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### *Summary*

The FEIS analysis regarding socioeconomic impacts is insufficient because it failed to address how this plan amendment would impact rates charged to energy consumers.

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### *Response*

The protestor is correct in emphasizing the importance of using the NEPA review processes to promote environmental justice. Executive Order 12898 directs Federal agencies to analyze the environmental effects, including human health, economic, and social effects, of their proposed actions on minority and low-income communities when required by NEPA. However, as discussed in the response to comments on the Draft EIS, the purpose of this EIS is not to evaluate the economic merits of the state and Federal renewable energy policies and objectives, but rather to evaluate the environmental effects of the proposed project and viable alternatives to the project, including the effects on minority or low-income population. Section 4.16 of the FEIS has in fact done this.

In regards to increasing consumer energy rates, it is not possible to ascribe a particular economic effect to individual ratepayers in the region as a result of this project. Electric utility rates are regulated by the CPUC, and power purchase agreements are approved by the CPUC — these agreements are confidential. The project does not yet have a power purchase agreement. Furthermore, the project is proposed to use existing and approved transmission facilities, thereby minimizing effects related to new transmission infrastructure.

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## Section 12.1 - Environmental Justice

Total Number of Submissions: 1

Total Number of Comments: 2

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**Comment Number:** PP-CA-DesertHarvest-13-06-41

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

The FEIS itself also acknowledges that a significant adverse effect must be found if "both of the following are true: (1) there is an unavoidable adverse impact to humans, and (2) the affected area contains a minority

or low-income population." FEIS at 4.16-1. Here, the FEIS admits the Project will result in an unavoidable adverse impact on cultural resources, and correspondingly, the populations that value such resources. FEIS at 4.6-12. Moreover, it is clear that the "affected area" for cultural resources should include the populations that particularly value those resources; in this instance, that community is meets the definition of both minority and low-income. Under the FEIS's own formulation, an environmental justice impact must be found.

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**Comment Number:** PP-CA-DesertHarvest-13-06-43

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

Because the Guidance recognizes that a

"disproportionate and adverse effect" may be a cultural impact (Guidance at 26), the FEIS must be revised to acknowledge and mitigate for this environmental justice harm.

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### *Summary*

The FEIS admits the Project will result in an unavoidable adverse impact on cultural resources, and correspondingly, the populations that value such resources. FEIS at 4.6-12. Under the FEIS's own formulation, an environmental justice impact must be prepared and the FEIS revised to acknowledge and mitigate for this environmental justice harm.

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## ***Response***

As stated in section 4.16.1 of the FEIS, "unavoidable adverse impacts are identified where mitigation measures, which are presented in each section, are not adequate to ensure that effects associated with construction and operation of the proposed project or its alternatives are sufficiently minimized or avoided." While not outlined in the Environmental Justice section of chapter 4 of the FEIS, mitigation measures CUL-1 through CUL-9, and measures developed in the Memorandum of Agreement between the State Historic Preservation Officer (SHPO), the BLM, and the Project proponent, are required to reduce adverse project effects related to cultural resources. As noted earlier, the MOA has been executed, and while it resolves some of the adverse effects associated with the project, the BLM recognizes that some effects cannot be resolved through mitigation, which is why the FEIS acknowledges that some impacts from the construction, operation, maintenances and decommissioning of the Project on cultural resources are considered unavoidable adverse effects.

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### **Section 13 - Soil**

Total Number of Submissions: 1

Total Number of Comments: 2

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**Comment Number:** PP-CA-DesertHarvest-13-02-23

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

the EIS underestimates the Project's impact on burrowing species that will result from soil compaction.

**Comment Number:** PP-CA-DesertHarvest-13-02-25

**Organization:** LIUNA, et al

**Commenter:** Richard Drury

**Issue Excerpt Text:**

Given that the primary habitat element of desert wildlife is soil, the project's impacts will be devastating on the endemic wildlife because the project will destroy the soils' integrity for such long periods that the effects will essentially be permanent.

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### ***Summary***

The FEIS fails to adequately address the devastating impacts from soil compaction, particularly on burrowing species.

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## ***Response***

Section 4.4.7 of the FEIS discusses the direct and indirect effects that the proposed project and associated plan amendment would have on biological resources related to wildlife. Wildlife habitat is defined on page 4.4-4 of the document as "the environment and ecological conditions where a species is found. Wildlife habitat is generally described in terms of vegetation, though a more thorough explanation often must encompass further detail, such as availability or proximity to water... and soils that are suitable for burrowing or hiding and many other factors that are unique to each species." Therefore, the impacts discussed in section 4.4.7 are not simply constrained to impacts from vegetation, but also impacts to soil habitats. In depth impact analysis to species that depend on the integrity of desert soils in the planning area discussed in the EIS (Table 3.4-2) include desert tortoise, burrowing owls, Couch's spadefoot, Agassiz's Desert tortoise, Rosy boa, Burrowing owl, Palm Springs round-tailed ground squirrel, Colorado Valley wood rat, Ring-tailed cat), American badger, and Desert kit fox.

The FEIS addresses the impacts of soil compaction on desert tortoise on page FEIS 4.4-8; "Other direct effects could include individual tortoises or eggs being crushed or entombed in their burrows, disruption of tortoise behavior during construction or operation of facilities, disturbance by noise or vibrations from the heavy equipment, and injury or mortality from encounters with workers' or visitors' pets." Similar effects were disclosed for burrowing owls (FEIS page 4.4-12) and for American badger and desert kit foxes (FEIS page 4.4-16).

Effects on soils and ephemeral streams are analyzed on pages 4.20-9 through -11. In an effort to protect soil integrity outside of the project site, Mitigation Measure MM WIL-1 of the FEIS was included to make sure that "any project activities during construction, O&M, or decommissioning that take place outside of the permanently fenced site within desert tortoise habitat, and have the potential to disturb native soils or vegetation, shall be subject to fencing and preconstruction clearing survey requirements, or shall take place only while a Biological Monitor is on-site."

As a result of protest resolution discussions, the DHSP Project ROD incorporates additional measures regarding soil treatment which require the applicant to minimize grading and vegetation removal for the Project. Site grading within the project site shall be localized in nature and limited to major access roads, inverter pad locations, lay down areas, tracker locations and ancillary facilities (including parking area, material storage, operations and maintenance building and switchyard).

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## **Section 14 - Tribal Interests and Cultural Resources**

Total Number of Submissions: 1

Total Number of Comments: 15

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**Comment Number:** PP-CA-DesertHarvest-13-06-10

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

The FEIS is unclear whether all resources have been formally evaluated by BLM, rather than by the Applicant. For example, the FEIS states that Site P-33-18292, a prehistoric habitation area, is "recommended not eligible." FEIS at 3.6-33. To the extent this is a recommendation made by the Applicant, rather than BLM, it is insufficient as a final determination regarding eligibility.

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**Comment Number:** PP-CA-DesertHarvest-13-06-13

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

With the problems at the Genesis Solar Energy Project a recent memory-where the project applicant refused to do additional analysis to determine the potential for sensitive buried resources-CRIT is understandably concerned about the deferral in this instance. Once the Project is approved, the practical reality is that it will be extremely difficult to modify or reduce the impacts of the Project should sensitive

cultural material be uncovered.

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**Comment Number:** PP-CA-DesertHarvest-13-06-15

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

The FEIS also defers the formulation of the Memorandum of Agreement to some point in the future. FEIS at 4.6-8.2. This deferral violates NEPA's requirement to identify measures that lessen or avoid Project impacts as part of the environmental review process. BLM relies on the Memorandum of Agreement to claim that the impacts to cultural resources have been minimized. E.g., FEIS at 4.6-6. Yet without knowing the mechanisms that will be relied on to resolve adverse effects, it is impossible to conclude that they will be minimized. The FEIS's statements amount to mere conclusions without any tangible support.

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**Comment Number:** PP-CA-DesertHarvest-13-06-16

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

The FEIS also states that BLM's obligations under Section 106 of the NHPA will be satisfied upon execution of the MOA. FEIS at 3.6-4, 5-9. Not so. The MOA is simply a plan for carrying out the agency's obligations under federal law; failure to

comply with the plan is a violation of the NHPA. 36 C.F.R. § 800.6 ("A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts./I) (emphasis added); see *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, 1110 (S.D. Cal. 2010). The FEIS must be revised to clarify this point.

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**Comment Number:** PP-CA-DesertHarvest-13-06-19

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

CRIT is particularly concerned that the Monitoring and Mitigation Plan will not contain adequate requirements for avoiding any significant, unanticipated discoveries, for using Native American Monitors whenever ground-disturbing activities are occurring, and regarding the ability of BLM and the public to enforce the requirements of any plan.

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**Comment Number:** PP-CA-DesertHarvest-13-06-24

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

For instance, the FEIS reports that 28 resources-including 4 prehistoric, 16 historic, 2 multicomponent and 6 unknown-will be directly impacted by gen-tie alternative B and that 20 resources will be indirectly impacted. FEIS at 4.6-4. The FEIS then indicates that of the 28 resources, 8 will

be resolved through the MOA and 7 will be avoided through the MOA. The FEIS, however, provides no information on which of the 28 resources will be resolved or avoided, and which will be directly impacted by the project. Moreover, the FEIS provides no information on how the MOA proposes to resolve the impacts to the 8 archaeological sites. The FEIS must be revised to provide additional information on how each impacted cultural resources will be treated under the proposed mitigation measures.

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**Comment Number:** PP-CA-DesertHarvest-13-06-25

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

D. The Project's Impacts on Eligible Districts and Cultural Landscapes Are Not Adequately Discussed. The FEIS acknowledges that three listed or eligible cultural resources are located in the vicinity of the proposed Project, including the Coco-Maricopa Trail, the North Chuckwalla Mountains Petroglyph District, and the North Chuckwalla Mountains Quarry District. FEIS at 3.6-35. The FEIS, however, never actually describes these resources or their contributing features. No locations are given, making it difficult to assess the likelihood and severity of indirect impacts from the Project. And no information is given about the importance of these resources to CRIT, its members, or other affected tribes in the area. The FEIS also acknowledges the presence of a fourth potential resource: the Prehistoric Trails Network Cultural landscape, but does not discuss any possible impact.

Moreover, the FEIS glosses over the impacts



of the Project on these resources. It appears that the BLM has not considered whether any of the prehistoric archaeological resources found on site are connected to any of these districts or trails, or the Prehistoric Trails Network Cultural landscape currently being evaluated by the California Energy Commission, and therefore contribute to their eligibility. And while the FEIS reveals that the Project will impact one prehistoric districts, it never states which of the two eligible districts will be impacted or how the impacts to the other eligible district will be resolved. FEIS at 4.6-4. These omissions are glaring, significant, and in violation of federal law.

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**Comment Number:** PP-CA-DesertHarvest-13-06-27

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

Meaningful government-to-government consultation with CRIT requires that BLM meet with CRIT's Tribal Council and acknowledge and address the Tribes' concerns and input. To date, this has not occurred.

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**Comment Number:** PP-CA-DesertHarvest-13-06-28

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

the FEIS concludes that a number of prehistoric archaeological resources will be impacted by the Project, but are ineligible for listing on the National Register. FEIS at 3.6-33 to 34. Yet consultation with

connected tribes or development of an ethnographic study is critical for understanding if archaeological resources are eligible under Criterion A (artifacts relevant to the understanding our collective history) rather than simply under Criterion D (artifacts relevant for informational purposes only).

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**Comment Number:** PP-CA-DesertHarvest-13-06-30

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

Similarly, the FEIS notes that "it is unknown if impacts on cultural resources can be satisfactorily mitigated, primarily because the MOA and Native American consultations are still in progress" and that "[c]onsultations may raise issues that cannot be resolved through mitigation measures." FEIS at 4.6-12; see also id. at 4.6-28. NEPA and the NHPA require more than reliance on the results of potential consultation to come at a later date. Once the Project is approved, it will be too late for the results of consultation to be implemented at the site.

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**Comment Number:** PP-CA-DesertHarvest-13-06-32

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

The FEIS bases its cumulative effects analysis on the assumption that any given project in the area will unearth on average 0.019 cultural resources per acre and 0.002 potentially eligible resources per acre ("Average Density Calculation"). FEIS at 4.6-24 (averages were derived from projects along the 1-10 Corridor). This calculation

ignores the recent discoveries at the Genesis Solar Energy Project, fails to include all proposed utility scale solar projects in the vicinity, and omits any discussion of the very real cultural harms that will result from the destruction of 39 percent of the surrounding landscape.

During construction of the Genesis Project, hundreds of eligible cultural resources were uncovered in a 100-acre area, far exceeding the number of resources initially analyzed in the project's EIS. It does not appear that the FEIS for the Desert Harvest Project takes into account this significant change in density at the Genesis Project Site. Consequently, to the extent the Averaged Density Calculation can accurately predict the number of resources that will be impacted, it likely underestimates the number of resources that will be affected by the cumulative projects.

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**Comment Number:** PP-CA-DesertHarvest-13-06-36

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

While it may be mathematically true that the Desert Harvest Project will contribute "only a small amount to the possible permanent cumulative impacts related to cultural resources," the statement is only accurate due to the immensity of the total impacts to this area. If BLM ignores the impacts of each individual project for this reason, however, CRIT is bound to see its ancestral landscape transformed. It is precisely because of the scale of the transformation that each project must be scrutinized more carefully-after all, cultural resources are finite in number. The FEIS must be revised to indicate this reality.

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**Comment Number:** PP-CA-DesertHarvest-13-06-38

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

The Visual Resources section of the FEIS does not address the cultural implications of the Project's disruption of the visual landscape. While the FEIS considers impacts to motorists on Interstate Highway 10 and the people that live in a nearby residential community (FEIS at 3.19-10), it fails to consider the Project's visual impact on tribal members and their spiritual and religious practice. The surrounding mountains and trails are more than a recreational resource for the Tribes; they have longstanding cultural and spiritual significance as ancestral lands. Any large-scale visual alteration to this space disturbs the sanctity of the outdoor environment and constitutes a significant impact. Despite this special significance, the FEIS does not mention the visual impact on CRIT members in the Visual Resources section, and the FEIS does not indicate that CRIT was consulted for this section. None of the Key Observation Points were selected based on cultural resource concerns, even though the purpose of selecting such observation points is to identify areas with increased sensitivity.

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**Comment Number:** PP-CA-DesertHarvest-13-06-7

**Organization:** Colorado River Indian Tribes

**Commenter:** Eldred Enas

**Issue Excerpt Text:**

A. By Using the NHPA to Dictate Its NEPA Analysis, the FEIS Significantly Downplays Cultural Resource Impacts.

As a preliminary matter, the FEIS suffers from a critically flawed definition of "cultural resources," which undermines the accuracy and quality of its subsequent analysis. The FEIS states at the outset that cultural resources can include prehistoric, ethnographic, and historic resources. FEIS at 3.6-1. The FEIS notes that ethnographic resources can include "traditional resource-collecting areas, ceremonial sites, value-imbued landscape features, cemeteries [and] shrines," among other resources. *Id.* This broad definition is supported by the NEPA guidelines. 40 C.F.R. § 1502.16(g) (specifying that EIRs must address impacts to "historic and cultural resources") (emphasis added).

However, in evaluating the types of resources found on the Project site, BLM severely narrows the definition, finding only "archaeological sites, built environment resources, and historic districts" to be cultural resources for the purposes of its analysis. FEIS at 3.6-31. No reason is given for the elimination of other types of resources, though the lack of ethnographic study or true consultation, as described

below, may provide some explanation. The NEPA analysis therefore relies exclusively on the guidelines for historic resources as set forth in the NHPA. 16 U.S.C. § 470w(S) ('Historic property' or 'historic resource' means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource").

BLM offers no justification for substituting the definition of "historic resources" in one statute for the definition of "cultural resources" in another statute. By paring its analysis of cultural resources under NEPA down to only those tangible phenomena listed in the NHPA definition of "historical resources," BLM excludes from consideration a host of important tangible and intangible cultural resources that are potentially affected by the project, such as viewsheds and landscapes, plants and animals used in and/or central to cultural and religious practices and creation stories, and religious and customary practices (e.g., hunting and gathering, religious ceremonies, and trail-walking).

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### *Summary*

The FEIS violates NEPA and the NHPA and is insufficient in regards to tribal concerns for the following reasons:

- It is not clear if the BLM or the applicant formally evaluated all eligible cultural sites in the planning area;
- Defers the analysis of sensitive buried resources;
- Incorrectly states that obligations under Section 106 of the NHPA will be satisfied upon execution of the MOA, when in reality, the MOA is simply a plan for carrying out the agency's obligations under Federal law;
- The Monitoring and Mitigation Plan will not contain adequate requirements for avoiding any significant, unanticipated discoveries and fails to allow for Native American

Monitors whenever ground-disturbing activities are occurring, and does not allow the BLM or the public to enforce the requirements of the plan;

- Provides no information on which cultural resources will be directly impacted by the project or how the MOA proposes to resolve the impacts to the impacted archaeological sites;
- Does not describe the contributing features or locations of the three eligible cultural resources located in the vicinity of the proposed project contain;
- Did not consider whether any of the prehistoric archaeological resources found on site are connected to any historic district or the Prehistoric Trails Network Cultural landscape currently being evaluated by the California Energy Commission;
- The BLM did not hold meaningful government-to-government consultation with the CRIT's Tribal Council and acknowledge and address their concerns and input;
- Development of an ethnographic study to fully understand if archeological resources are eligible for listing never took place;
- The cumulative effects analysis ignores the recent discoveries from the Genesis Solar Energy Project, fails to consider all proposed utility scale solar projects in the vicinity, and omits any discussion of the very real cultural harms that will result from the destruction of 39 percent of the surrounding landscape;
- VRM section does not address cultural implications of the project's disruption of the visual landscape, specifically because none of the key observation points used in the analysis were selected based on cultural resource concerns;
- Uses a narrow definition of cultural resources (and in some cases substitutes the definition of historic resources for cultural resources) and as a result, the FEIS only analyzes impacts to archeological sites, built environment resources, and historic districts, not viewsheds and landscapes, plants, and animals used in and/or central to cultural and religious practices and creation stories, and religious and customary practices; and
- Ignores any potential harm created by unearthing, damaging, or destroying artifacts determined to be ineligible for listing.

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### ***Response***

The protester expressed some uncertainty regarding who formally evaluated the eligible cultural sites in the planning area. The applicant did conduct an inventory for their proposed solar facility, gen-tie alternative E, and portions of gen-tie alternative D. Despite the applicant's involvement, however, all final determinations of eligibility were made by the BLM. The BLM accepted the surveys and determined them to be adequate. Using this survey information, the BLM in consultation with the SHPO and other interested parties ultimately made the determinations about the eligibility of cultural resources for the National Register.

The protester also presented some concern regarding the deferral of analyzing sensitive buried resources after a project is approved. As mentioned in Appendix N – Responses to Public Comment Letters, the BLM established mitigation measure MM CUL-9 (Pre-construction Geoarchaeological Subsurface Excavation) to require a geoarchaeological study prior to any construction. The results of this study will be used to develop/refine the Monitoring and

Treatment Plan, in consultation with the tribes and SHPO, so as to better avoid inadvertent damage of cultural resources during construction. This mitigation measure was developed to mitigate risk of damage to previously unknown buried resources.

The protester claims that the BLM incorrectly stated in the FEIS that it's "obligations under Section 106 of the NHPA will be satisfied upon execution of the MOA." The protester's claims with respect to the execution of the MOA are legally incorrect. The regulations are clear that the execution of an MOA "evidences the agency official's compliance with Section 106." 36 CFR § 800.6(c). While the agency has an obligation to ensure that undertakings that are the subject of an MOA are carried out in accordance with those agreement, it does mean the agency retains any 106 obligations with respect to such undertakings. Under Section 106 of the NHPA, an MOA, unlike a programmatic agreement (PA), documents what the adverse effects to identified historic properties would be should the project be approved, and provides the means for resolving those adverse effects. The Project's MOA was executed by the SHPO on February 20, 2013. Implementation of the Project consistent with the MOA will be a requirement of the Project's ROD.

Due to the fact the Archaeological Monitoring, Post-Review Discovery, and Unanticipated Effects Plan (which will be finalized and incorporated in the MOA) have not been finalized; it would be speculative to assume that applicant measure CULT-1 is insufficient. CULT-1 states that "a cultural resources monitoring and mitigation plan will be prepared for the project. The plan will include a description of areas to be monitored during construction, a discovery plan that will address unanticipated cultural resources, and provisions for the education of construction workers. Responsible parties for mitigation measures will be identified." Consistent with NEPA, the FEIS contained sufficient detail about the potential contents of the plans such that it could be analyzed in the EIS. Consistent with the MOA, the BLM will provide oversight and coordination during this plan development and in consultation with the appropriate parties. Section 7 of the executed MOA describes how consulting parties are involved during plan development and Project implementation.

The protestor notes that the BLM failed to provide information in the FEIS regarding which of the 28 resources will be resolved or avoided by the gen-tie alternative or how the MOA propose to resolve the impacts to the archeological sites referenced in section 4.6-4. As mentioned in Appendix N – Responses to Public Comment Letters, the MOA was still in the process of being completed at the time the FEIS was prepared, and therefore it would have been speculative to include this information in the FEIS, in the event that this information would change. Although indirect impacts to cultural resources have been identified, Mitigation Measures MM CUL-1 through CUL-9 and the additional measures developed in the MOA will reduce project-related impacts to cultural resources. While it is subject to change, a draft MOA was included in Appendix O of the FIES. On February, 20, 2013 a final MOA was executed by the SHPO and the BLM. It was subsequently signed by the Project proponent. As explained in the document, the MOA resolves the identified adverse effect to historic properties to the extent practicable. Other sites identified in the FEIS and associated effects are address by the mitigation specified in chapter 4.

Tribes were notified of the agency's determinations and findings for this project and all cultural resource reports were made available in a formal letter. The protester is correct that the locations and contributing features of the three listed or eligible cultural resources located in the vicinity of the proposed project were not outlined in the FEIS. In accordance with Section 304 of the NHPA, Section 9 of the Archeological Resource Protection Act of 1979 (as amended), and BLM Manual 8120 (Tribal Consultation Under Cultural Resources), Field Office Managers and staffs shall protect from disclosure to the public sensitive and confidential information about traditional tribal practices and beliefs, and the locations with which they are associated, to the greatest degree possible under law and regulation. Where appropriate, Field Offices shall maintain the confidentiality of sacred sites. It is also important to note that the Prehistoric Trails Network Cultural Landscape is an ongoing study, not a BLM-managed project. Moreover, as explained in the Chapter 3.6, the study was included as background research for the EIS.

With respect to the adequacy of tribal consultation under Section 106 of the NHPA, section 5.2 of the FEIS outlines the extensive efforts the agency has taken regarding Native American government-to-government consultation. The BLM initiated formal, government-to-government tribal consultation at the earliest stages of project planning. On October 4, 2011, the BLM sent a letter to 15 tribes, including those identified by the Native American Heritage Commission (the NAHC maintains a database that has the names and contact information for individuals, representing a group or themselves, who have expressed an interest in being contacted about development projects in specified areas). The letter requested assistance in identifying any issues or concerns that a tribe might have about the project, including identifying places of religious and cultural significance that might be affected by the proposed project. The letter further requested that each Tribal Government identify those tribal representatives who have been designated to consult with the BLM on this project. Since that time, the BLM has conducted field trips and has worked with NAHC to distribute and obtain information from tribes on known cultural resources and traditional cultural properties and to learn of any concerns they might have about the DHSP. On October 10, 2012, the BLM held a meeting of Section 106 consulting parties. The BLM feels that these outreach efforts constitute meaningful government-to-government, which culminated in the development of a robust MOA that addresses identified adverse effects associated with the Project to the extent practicable.

All resources were evaluated based on the information available. The BLM has requested information from the Tribes regarding areas to which they attach cultural or religious significance beginning with our initial letter on October 4, 2011, and in every subsequent letter. As explained in the FEIS in chapter 5, an ethnographic literature review was conducted for this project to identify any previous Tribal concerns. This literature review was circulated to Tribes for review and additional information sought. No specific information has been brought forward by Tribes as a response to our requests, and no comments were received on the Ethnographic Literature Review prepared by Applied Earth Works for the BLM in 2012 and distributed to the Tribes.

The Final EIS addresses the cumulative impacts of projects in the Desert Center area using the best data available given the scope of the project. The emphasis on quantitative data (average cultural resources per acre) is based on the NEPA requirement to use quantitative data when available. Cumulative analyses are useful tools for describing regional trends, but are not the

appropriate methods for predicting the presence of buried resources in specific locations such as those identified during construction of Devers to Palo Verde 2 and the Genesis Solar Energy Project. Those potential unknown impacts are addressed through specific measures included in the Project's MOA.

With respect to the protesters concerns about the analysis of visual resource impacts, the BLM would note that the CRIT stated in their DEIS comment letter that the DEIS did not mention the visual impairment of the project on resources significant to Tribal members as described in chapter 4. That same letter also described the McCoy Mountains as an important cultural landscape for tribal members. However, for purposes of analysis, the tribes did not request any specific KOPs beyond those already included in the visual resource evaluation. Moreover, as explained below, the BLM analyzed the visual impacts of the project on the identified cultural resources as reflected in the MOA.

The Indirect Effects Analysis in the EIS (methodology on FEIS 4.6-1) considers the visual, auditory, and atmospheric effects from the project. In the FEIS, all solar facility alternatives would result in indirect adverse effects associated with a visual intrusion into the historic setting of the proposed DTC/C-AMA historic district (NRHP-eligible). Also, all gen-tie alternatives may result in indirect visual, auditory, and atmospheric effects to the North Chuckwalla Petroglyph District (CA-Riv- 1383, NRHP listed), segments of a prehistoric trail (CA-Riv-053T, NRHP eligible), and the proposed DTC/C-AMA historic district (NRHP eligible). Also, Alternative D would additionally result in adverse indirect effects to one World War II-era refuse scatter (P-33-18352, NRHP eligible).

Finally, while not expressly tied to the cultural resources sections of the FEIS (sections 3.6 and 4.6), impacts to viewsheds and landscapes, plants, and animals have been discussed throughout the FEIS. The beginning of section 3.6.1 of the FEIS fully describes the environment in a cultural, geologic, prehistoric, and ethno-historic context, which includes the description of many of the intangible resources the protestor refers to. While not documented within the Class I and III inventories that were completed for the planning area, these resources were considered in the analysis in section 4-6 of the FEIS. After the DEIS was published, additional studies and surveys were conducted, including an indirect effects study that considered the effects of the project to NRHP eligible resources within a five-mile vicinity. Indirect effects to two prehistoric NRHP eligible properties were identified in and reported to the tribes and will be resolved as described in stipulation 3 of the signed MOA. Thus, the protestor is incorrect in stating that the BLM ignored tangible ineligible cultural sites. Ineligible cultural sites were in fact recorded in Table 3.6-2 of the FEIS, along with those that were eligible, and impacts to those sites were taken into account in section 4.6 of the FEIS.

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## **Section 15 - Visual Resource Management**

Total Number of Submissions: 1

Total Number of Comments: 1

**Comment Number:** PP-CA-DesertHarvest-13-03-48

**Organization:** Basin and Range Watch

**Commenter:** Donna and Larry Charpiel

**Issue Excerpt Text:** The FEIS undermines the complete visual resource impacts by only providing KOP's that show non-reflective simulations of this 1,000 plus acre disturbance. Polarized glare has been recognized to have impacts on wildlife, but should also be included in all visual resource evaluations.

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### *Summary*

The PRMP/FEIS does not adequately analyze impacts to visual resources due to the fact that the analysis only references KOPs that show non-reflective simulations.

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### *Response*

Section 3.19 of the FEIS discusses in detail each of the KOPs that were developed for the analysis. Several of the KOPs did in fact take into account the reflectivity of panels. For example, KOP 2 and 9 were established because they were locations "from which to prepare a time-lapse visual simulation of any glare or glint associated with the DHSP tracking panels while in motion from east to west" (FEIS, 3.19-11 and 3.19-15). Visual impacts from these KOPs (specifically glare and sky glow) are included in the Final EIS in section 4.19. In response to comments that were received for the Draft EIS, a time-lapse visual simulation at a newly recommended KOP was included in the Final EIS. This time-lapse visual simulation and two others are presented in Appendix G-5 of the Final EIS. As shown in the simulation, the Desert Harvest panels track the sun throughout the day and there is no noticeable glare or glint off the panels that is visible from KOP 9. During the morning hours, the brighter band of color that creates a "lake effect" and the relatively brief episode of reflected sun that does occur (approximately 26 seconds into the video) is actually from the adjacent Desert Sunlight fixed tilt solar panels. Up until just before midday, the view from KOP 9 is capturing the backside of the Desert Harvest tracking panels, which is why they appear darker relative to the Desert Sunlight solar field. At approximately mid-day, the Desert Harvest panels are in an approximate horizontal position and the sun has already reached its position due south (to the right out of the field of view). In the afternoon and evening when the front of the Desert Harvest solar panels would be visible from KOP 9, the panels are essentially reflecting the color hues of the background mountains and sky. What the time-lapse simulation shows is that the Desert Harvest tracking panels would exhibit minimal to no perceptible glare or glint as viewed from KOP 9. Direct and cumulative effects from the reflectivity of the solar project on wildlife (specifically birds) were discussed in section 4.4 of the Final EIS (FEIS page 4.4-21).