

*Director's Protest Resolution Report*

**Imperial Valley Solar Project  
Plan Amendment**

**California Desert Conservation Area Plan**

October 5, 2010



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## Reader's Guide

### How do I read the Report?

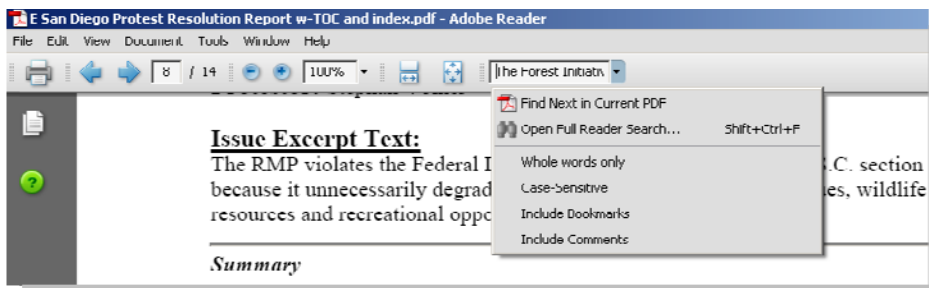
The Director's Protest Resolution Report is divided up into sections, each with a topic heading, excerpts from individual protest letters, a summary statement (as necessary), and the Bureau of Land Management's response to the summary statement.

### Report Snapshot

<b>Issue Topics and Responses</b>			
<b>NEPA</b>	Topic heading	Submission number	
<b>Issue Number:</b>	PP-CA-ESD-08-0020	10	Protest issue number
<b>Organization:</b>	The Forest Initiative		Protesting organization
<b>Protester:</b>	John Smith		Protester's name
<b>Issue Excerpt Text:</b>	Quotation taken from the submission		
	Rather than analyze these potential impacts, as required by the National Environmental Policy Act, the BLM postpones analysis of renewable energy development projects to a future case-by-case analysis.		
	General statement summarizing the issue excerpts (optional)		
<b>Summary</b>	There is inadequate NEPA analysis in the PRMP/FEIS for renewable energy projects.		
<b>Response</b>	The BLM's response to the summary statement or issue excerpt if there is no summary		
	Specific renewable energy projects are implementation-level decisions rather than RMP-level decisions. Upon receipt of an application for a renewable energy project, the BLM would require a site-specific NEPA analysis of the proposal before actions could be approved....		

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

1. Find your submission number on the protesting party index which is organized alphabetically by the protester's last name.
2. In Adobe Reader, search the report for your name, organization, or submission number (do not include the protest issue number). Key word or topic searches may also be used.



### *List of Commonly Used Acronyms*

ACEC	Area of Critical Environmental Concern	FTHL	Flat-Tailed Horned Lizard
ACHP	Advisory Council for Historic Preservation	ICC	Interagency Coordinating Committee
APE	Area of Potential Effect	IVS	Imperial Valley Solar
ASLW	Assistant Secretary of Lands and Water	MA	Management Area
BLM	Bureau of Land Management	MUC	Multiple Use Class
BMP	Best Management Practice	MW	Megawatt
CDCA	California Desert Conservation Area	NEPA	National Environmental Policy Act of 1969
CEC	California Energy Commission	NHPA	National Historic Preservation Act of 1966, as amended
CEQ	Council on Environmental Quality	NRHP	National Register of Historic Places
CFR	Code of Federal Regulations	PA	Programmatic Agreement
CTCRA	Carrizo Mountains/Tierra Blanca Mountains/Coyote Mountains Recovery Area	PBS	Peninsular Bighorn Sheep
DEIS	Draft Environmental Impact Statement	RMP	Resource Management Plan
DNA	Determination of NEPA Adequacy	ROD	Record of Decision
EIS	Environmental Impact Statement	ROW	Right-of-Way
ESA	Endangered Species Act	SHPO	State Historic Preservation Officer
FEIS	Final Environmental Impact Statement	SO	State Office
FLPMA	Federal Land Policy and Management Act of 1976	T&E	Threatened and Endangered
		USFWS	U.S. Fish and Wildlife Service

*Protesting Party Index*

<b>Protester</b>	<b>Organization</b>	<b>Submission Number</b>	<b>Determination</b>
Barbara Boyle	Sierra Club	PP-CA-IMPERIAL-10-0001	Denied-Issues Comments
Johanna Wald, Kim Delfino, and Alice Bond	Natural Resources Defense Council, Defenders of Wildlife and The Wilderness Society	PP-CA-IMPERIAL-10-0001	Protest Withdrawn
Lisa Belenky	Center for Biological Diversity	PP-CA-IMPERIAL-10-0002	Denied-Issues Comments
Frank Jozwiak	Quechan Indian Tribe	PP-CA-IMPERIAL-10-0003	Denied-Issues Comments
Elizabeth Klebaner	California Unions for Reliable Energy, Neil Zinn and Sterling E. Mayes (California Unions for Reliable Energy et al.)	PP-CA-IMPERIAL-10-0004	Denied-Issues Comments
Stephan Volker	Backcountry Against Dumps, Desert Protective Council, The Protect Our Communities Foundation, East County Community Action Coalition, and Donna Tisdale (Backcountry Against Dumps et al.)	PP-CA-IMPERIAL-10-0005	Denied-Issues Comments
Courtney Ann Cole	Carmen Lucas, Kwaaymii Band of Indians	PP-CA-IMPERIAL-10-0006	Denied-Issues Comments
Eddie Harmon	Individual	PP-CA-IMPERIAL-10-0007	Denied-Issues Comments

## *Issue Topics & Responses*

### NEPA

#### *Range of Alternatives*

**Issue Number:** PP-CA-IMPERIAL-10-0001-3

**Organization:** Sierra Club

**Protester:** Barbara Boyle

**Issue Excerpt Text:**

The purpose and need statement is too narrow. It is focused on the proposed project and on amending the CDCA for this project only, thus foreclosing consideration of meaningful alternatives at the draft stage in violation of NEPA. See *National Parks Conservation Assn v. BLM*, 586 F.3d 735 (9th Cir. 2009). Because of the crabbed purpose and need statement, the alternatives considered do not include a reasonable range of alternatives. In particular, the alternatives considered do not include an off-site alternative or a phased alternative that would allow the proponent to demonstrate that its technology is scalable as well as that the environmental impacts of the project can be adequately mitigated.

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**Issue Number:** PP-CA-IMPERIAL-10-0002-15

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

The inadequacies in the environmental review for the project required by NEPA include, but are not limited, to the following:

- Narrowing the purpose and need to such an extent that the BLM failed to adequately address a meaningful range of alternatives.
- Failing to analyze a range of appropriate project alternatives including distributed generation, a phased alternative, and off-site alternatives on previously disturbed or degraded lands.

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#### ***Summary***

The CDCA Plan Amendment FEIS does not include an evaluation or evaluate a reasonable range of alternatives because there is no consideration of offsite alternatives.

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#### ***Response***

The FEIS considered a range of alternatives designed to meet the BLM's legal duties and purpose and need for action. In accordance with NEPA, the BLM has discretion to establish the purpose and need for action (40 CFR 1502.13). The BLM's guidance requires the BLM to construct its purpose and need to conform to existing decisions, policies, regulation, or law (BLM NEPA Handbook, H-1790-1, 6.2). The BLM's purpose and need for the proposed action is described on

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**Issue Number:** PP-CA-IMPERIAL-10-0002-23

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

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 are suitable for such industrial uses given the need to balance other management goals including flat-tailed horned lizard and Peninsular bighorn sheep conservation and recreational uses; and 3) the location of the public lands suitable for such uses, if any.

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**Issue Number:** PP-CA-IMPERIAL-10-0007-16

**Protester:** Edie Harmon

**Issue Excerpt Text:**

By failing to include a comprehensive analysis of alternatives and any need other than processing an application submitted, BLM has failed to demonstrate any real need to approve such a massive industrial scale solar project of unproven technology on such sensitive lands. BLM has failed to demonstrate that there are no other alternative sites. Alternatives analysis should not be guided by the desires of a project applicant, but in the guidance set forth in the Introduction to the CDCA Plan.

page 1-2 of the FEIS.

The purpose and need for the proposed action defines the range of alternatives to be considered. The BLM must analyze a reasonable range of alternatives but is not required to analyze in detail every possible alternative or variation. According to Council of Environmental Quality regulations for implementing NEPA, an agency may eliminate alternatives from detailed study with a brief discussion of the reasons for their having been eliminated (40 CFR 1502.14(a)). For example, an alternative may be eliminated from detailed study if it is determined not to meet the proposed action's purpose and need; determined to be unreasonable given BLM mandates, policies, and programs; its implementation is speculative or remote; or it is technically or economically infeasible (BLM NEPA Handbook, H-1790-1, 6.6.3).

The FEIS considered a range of reasonable alternatives to the proposed action designed to meet the BLM's legal responsibilities and its purpose and need for action. The purpose and need for the proposed action was described as a response to the Imperial Valley Solar FLPMA ROW application for a solar energy facility on public land (FEIS p.1-2). With respect to the BLM's land use plan decision, a non-public land alternative would not be within the range of reasonable alternatives to the proposed planning action because the BLM has no decision authority with regard to non-BLM administered lands. Nevertheless, to help inform the BLM's land use plan decision, the BLM considered offsite locations for utility scale solar development on non-BLM administered lands. As explained in the FEIS, these alternative locations were eliminated from detailed study:

- The Mesquite Lake Alternative was not analyzed in detail because the site consists of 70 individual parcels owned by 52 different parties. The BLM does not manage any of those private parcels. The BLM determined that the implementation of this alternative is speculative and remote because of the difficulty in obtaining control over sufficient land at the site (FEIS p. 2-43).
- The Agricultural Lands Alternative was not analyzed in detail because the site consists of seven separate, unconnected parcels owned by different parties. The BLM does not manage any of those private parcels. The BLM determined that the implementation of this alternative is speculative and remote because of the difficulty of obtaining control over sufficient land at this site as well as the difficulty associated with site security over noncontiguous parcels (FEIS p. 2-44).
- The South of Highway 98 Alternative was not analyzed in detail because the site would require an approximately 38-mile water transmission pipeline and a 30-mile transmission line to the San Diego Gas and Electric Imperial Valley Substation. Additionally, this site has been withdrawn for Bureau of Reclamation purposes. The Bureau of Reclamation lands are appropriated for their withdrawal purposes (Boulder Canyon Act, 1928) and not subject to ROW under FLPMA.

In addition, the BLM considered many other alternative sites. The rationale for eliminating these alternatives from detailed analysis is described in Table 2-6 (FEIS pp 2-47 to 2-56). The BLM considered a range of reasonable alternatives for amending the CDCA Plan to identify a site for the preferred alternative (709 Megawatt [MW] Alternative), the four project alternatives (750 MW Alternative, 300 MW Alternative, Drainage Avoidance #1 Alternative, and Drainage Avoidance #2 Alternative), a site alternative that would amend the CDCA Plan to make the site available for solar generation without approving the IVS project, an alternative that would not

amend the CDCA Plan, and an alternative to amend the CDCA Plan to make the site unavailable for solar development. The FEIS summarizes these alternatives at pages 2-1 to 2-3 and describes them in detail at pages 2-8 to 2-41.

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### *Impact Analysis*

**Issue Number:** PP-CA-IMPERIAL-10-0001-9

**Organization:** Sierra Club

**Protester:** Barbara Boyle

**Issue Excerpt Text:**

The impacts to Multiple Use Class L Lands and the loss of multiple use lands that will result if this project is permitted to go ahead have not been addressed.

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**Issue Number:** PP-CA-IMPERIAL-10-0002-11

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

Failing to adequately identify and analyze the likely impacts to flat-tailed horned lizard. While the Center appreciates that the BLM has dropped the ill-conceived translocation plan in the Final EIS, the FEIS still fails to adequately address the impacts on this species and its habitat. Further, the FEIS does not provide sufficient monitoring and reporting requirements for direct and indirect impacts to the species during construction and operations so that the agencies will be able to know whether additional protective measures are needed as construction proceeds or during the operational life of the project. The mitigation ratio of 1:1 for [Flat Tailed Horned Lizard] FTHL habitat outside of the Management Areas is inappropriate for such an extensive amount of land. This extremely large project will not only destroy occupied habitat within its boundaries but will also have edge effects that have not been accounted for and significantly fragment occupied habitat for the flat-tailed horned lizard by blocking connectivity between existing populations and management areas.

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**Issue Number:** PP-CA-IMPERIAL-10-0002-12

**Organization:** Center for Biological Diversity

**Protester:** Lisa Belenky

**Issue Excerpt Text:**

Failing to adequately identify and analyze the impacts to Peninsular bighorn sheep. While the Center appreciates that the FEIS does now admit that impacts may occur to bighorn, the discussion of habitat use by bighorn appears to be little more than an attempt to discount the use of habitat in this area

(for example by providing unsupported conjecture regarding the stress bighorn might be under when in this area). Even if the siting was "unusual" that does not necessarily mean that the foraging habitat is unimportant. Further, the mitigation measures to compensate for impacts of the proposed project to waters of the U.S. by removing tamarisk from nearby Carrizo Creek may not provide adequate mitigation for loss of forage habitat for the Peninsular bighorn.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-20

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

The Quechan are not alone in their concerns. "[T]he Cocopah Indian Tribe and Kwaaymii Band of Laguna Indians have indicated that certain geological features hold significant value to the Tribe. Several Tribes have indicated that they attach sacred, religious, and cultural significance to the cremations/burial that have been identified within the APE [Area of Potential Effects]." These cultural resources include biological resources on the Project site that are sacred to local tribes and sacred areas on or near the Coyote Mountains that may be impacted by the Project. The Project may result in visual, audible, and atmospheric impacts to these sites, none of which have been evaluated in the EIS. The impacts analysis provided in the FEIS is also vastly inadequate. BLM was able to provide only a summary table of the totality of the impact, by alternative. This sort of "analysis" is insufficient under NEPA because it is devoid of evidence that would ensure that BLM has been informed of the environmental consequences of the proposed action, and because it precludes meaningful public comment. Certainly, the discussion provided in the FEIS falls far short of the "full and fair discussion of every significant impact" that is required under NEPA. This scant record clearly demonstrates that BLM failed to take a "hard look" at cultural resources within the Planning Area as required by NEPA.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-31

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner



**Issue Excerpt Text:**

BLM Failed to Include in the FEIS Reasonable Measures to Reduce Adverse Impacts to the Federally Endangered Peninsular Bighorn Sheep. Although BLM now admits that mitigation is necessary to minimize adverse effects on PBS, BLM fails to propose mitigation that will reduce the significance of those adverse effects. The FEIS states that BIO-8 and BID-17 will mitigate for impacts to PBS, However, BLM presents no rational basis for this conclusion. Indeed, neither BIO-8 nor BID-17 even mentions PBS. BIO-8 was originally included in the DEIS to minimize the construction and operation

impacts of the proposed Imperial Valley Solar Project; this measure was devised prior to BLM's identification of potentially significant impacts to the PBS, BLM fails to provide any justification for its conclusion that BIO-8 may mitigate impacts to PBS. Similarly, BIO 17 was originally included in the DEIS to mitigate for impacts to state and federal jurisdictional waters, BLM fails to identify any evidence to support its conclusion that BIO-17 may also mitigate impacts to PBS. For these reasons, BLM's conclusion that significant adverse impacts to PBS will be substantially reduced is arbitrary and capricious and violates NEPA.

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***Summary***

The FEIS does not adequately analyze the impacts of the proposed plan amendment, including impacts to Multiple-Use Class - L (Limited) lands, Flat-Tailed Horned Lizard, Peninsular Bighorn Sheep, and cultural resources.

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***Response***

Before beginning the CDCA Plan Amendment process and throughout the planning effort, the BLM considered the availability of data from all sources, adequacy of existing data, data gaps, and the type of data necessary to support informed management decisions for the proposed plan amendment. During preparation of the proposed CDCA Plan Amendment/EIS, the BLM consulted with and used data from other agencies and sources, including but not limited to the Department of Energy, the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, the National Park Service, Tribes, and the California Department of Fish and Game (FEIS pp. 5-2–5-7). The BLM consulted on the analysis and the incorporation of available data into the proposed CDCA Plan Amendment/FEIS with its cooperating and other agencies. The BLM considered and used public input to refine its analytical approaches to planning. The Interdisciplinary Team that developed the IVS project documents used a systematic process to evaluate public input and comment during the planning process. As a result of these actions, the BLM gathered the necessary data essential to make a reasoned choice among the alternatives analyzed in detail in the proposed plan amendment/EIS. The BLM analyzed the available data that led to an adequate disclosure of the potential environmental consequences of the preferred alternative and other alternatives. As a result, the BLM has taken a “hard look,” as required by NEPA, at the environmental consequence of the alternatives to inform the public and to enable the decisionmaker to make an informed decision.

With regard to the analysis of impacts to individual resources raised by protesters:

The CDCA Plan allows solar power plants to be located on MUC - L lands if in conformance with MUC guidelines expressed in the Plan. The FEIS adequately analyzed the impacts of the plan amendment on MUC - L lands. The FEIS analyzes impacts to MUC - L lands by resource category, for example, air quality (Section 4.2); biological resources (Section 4.3); cultural and paleontological resources (Section 4.5); soils and mineral resources (Section 4.7); grazing and wild horses and burros (Section 4.8); and recreation (Section 4.12). The FEIS also analyzed the impacts of the plan amendment on other land uses in Section 4.9. In addition, the BLM will

clarify the analysis of the land use plan amendment in the Record of Decision, Section 3.3.1.2, Need for a CDCA Plan Amendment.

In conformance with the CDCA Plan, the BLM analyzed the impacts of the plan amendment on the FTHL throughout FEIS Section 4.3 but primarily at pages 4.3-23 to 4.3-28, including the potential for habitat fragmentation and loss of connectivity. The FEIS at D-158 additionally states: “Although the IVS project site is somewhat isolated by existing barriers to FTHL movement, specifically Interstate 8 (I-8) adjacent to the south boundary of the project site and Evan Hewes Highway and the railroad to the north, the IVS project site could provide some connectivity between FTHL populations and the two [Management Areas] MAs. The applicant has proposed alternatives to eliminate SunCatcher placements in the primary washes of the site, which would generally support potential FTHL movement north or south through the IVS project site.” In addition, the BLM consulted the Flat-Tailed Horned Lizard Rangelwide Management Strategy (to which it is a signatory) in analyzing potential impacts to FTHL and in determining appropriate mitigation ratios.

In conformance with the CDCA Plan, the BLM analyzed the impacts of the plan amendment on peninsular bighorn sheep, primarily at FEIS 4.3-22. In the response to comments, the BLM provided additional discussion of the foraging habitat at the site, specifically: “There are vast expanses of desert floor Sonoran desert creosote bush habitat adjacent to the existing PBS MAs. The IVS project site is over six miles from federally designated PBS critical habitat and would not be considered a migratory corridor because the IVS project site is not surrounded by typical PBS habitat. There are PBS MAs north and south of the Coyote Mountains Area, but the IVS project site is east of there and it is highly unlikely that PBS would circumvent much more efficient routes to other areas occupied by or suitable for occupation by PBS. The IVS project site is in proximity to developed agricultural lands to the east and is bounded to the north by Evan Hewes Highway and the railroad tracks, and to the south by I-8. The IVS project site could provide some temporary forage habitat to displaced PBS, but does not function as primary forage habitat or a migration corridor for PBS” (FEIS pp. D-211–212). The FEIS states “Mitigation for this foraging habitat would be consistent and overlapping with the Corps proposed mitigation approach at Carrizo Creek and Carrizo Marsh” (FEIS p. 4.3-22). Because the Carrizo Creek and Carrizo Marsh are located within PBS Critical Habitat, the restoration and enhancement of this habitat through mitigation for the IVS project would have a beneficial effect on the species.

In conformance with the CDCA Plan, the FEIS adequately analyzed the impacts of the plan amendment on cultural resources. These impacts are described in FEIS Section 4.5. The FEIS also identifies mitigation measures that would reduce impacts through avoidance, evaluation, and treatment (FEIS Section 4.5.6.2). In support of the plan amendment, the BLM has developed a Programmatic Agreement (PA). The purpose the PA is to resolve adverse effects in situations when such effects cannot be fully determined prior to approval of an undertaking. Please refer to the BLM Response regarding cultural resources below for additional information.

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## *Cumulative Impact Analysis*

**Issue Number:** PP-CA-IMPERIAL-10-0003-11

**Organization:** Quechan Indian Tribe

**Protester:** Frank Jozwiak

### **Issue Excerpt Text:**

The FEIS for the PRMP-A lists many past, present, and reasonably foreseeable projects on various lands near the project area. However, there is no substantive quantification or detailed analysis of how these projects, in conjunction with the Imperial Valley Solar Project, are expected to impact the cultural resources of the surrounding area or the broader California Desert Conservation Area. See FEIS, Section 4.5.5. For example, there is no discussion of whether the other projects are located in areas of cultural sensitivity or what percentage of known cultural resources in the California Desert Conservation Area will be affected by the cumulative effect of all these projects. The FEIS reports that "the construction of the IVS project and other foreseeable cumulative projects will contribute to permanent long-term adverse impacts as a result of the removal and/or destruction of resources on those sites and an overall net reduction in cultural and paleontological resources in the area." FEIS, Page 4.5-19. This is the type of obvious, cursory analysis rejected by the Ninth Circuit Court of Appeals in *Te-Moak*. Also, the geographic area selected for the cultural resource cumulative impact analysis (the "Plaster City area") is unreasonably narrow in scope, in addition to being arbitrary and capricious. BLM offers no rationale in the FEIS for how it defined the geographic scope of the cultural resource cumulative impact analysis or why it chose such a limited area. The relevant area, in the context of a CDCA-Plan amendment, is the entire California Desert Conservation Area. Congress expressly set aside that entire area for careful management of its unique desert resources, and specifically cultural resources. 43 U.S.C. § 1781(a) (finding that archaeological and historic sites in the California desert are "seriously threatened by...pressures of increased use...which are certain to intensify because of the rapidly growing population of southern California"). BLM needs to consider how the proposed Imperial Valley Solar Project interacts with other projects that impact cultural resources within the entire planning area - not just an arbitrarily defined sub-area.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-27

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

### **Issue Excerpt Text:**

The FEIS fails to consider the proposed Plan Amendment's contribution to adverse cumulative impacts to wildlife connectivity and other cumulative impacts that will be caused by the influx of immense solar facilities in the CDCA Plan area. Specifically, the FEIS fails entirely to evaluate the cumulative effect of the proposed industrialization of the Planning Area on PBS movement within the [Carrizo Mountains/Tierra Blanca Mountains/Coyote Mountains Recovery Area] CTCRA.

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**Issue Number:** PP-CA-IMPERIAL-10-0006-7

**Organization:** Carmen Lucas, Kwaaymii Band of Indians

**Protester:** Courtney Ann Cole

### **Issue Excerpt Text:**

The FEIS does not adequately analyze cumulative impacts to cultural resources, instead laying out standard treatment measures at FEIS 4.5-23 through 4.5-31 and providing bare charts listing projects by BLM field office area at FEIS Table 2-7. There is no analysis of the cumulative loss of specific cultural values across the traditional homeland of the Yuman Tribes (Hoover Dam area to the Mexican Border and 20 miles east of the Colorado River to the Pacific Ocean) of the resources, traditional practices, belief systems that could be destroyed piecemeal and the affect that would have on the sustainability for these indigenous cultural life ways and beliefs. Such analysis must include, but not be limited to, specific discussion of the impacts associated with proposed utility projects at: Ivanpah, Topock, Blythe, West Imperial County, East Imperial County and approved projects such as the Sunrise Powerlink and past projects including the North Baja Pipeline and lining the All American Canal. Without this level of analysis in narrative form looking at the impacts across the desert, it cannot be said that BLM has truly taken these impacts and effects into account.

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**Issue Number:** PP-CA-IMPERIAL-10-0007-18

**Protester:** Edie Harmon

### **Issue Excerpt Text:**

PRMP-A would allow industrial solar energy development and construction of IVS project which will cause increased off-site particulate pollution as washes and cryptobiotic crusts are destroyed by grading, with no hope of protecting these sensitive resources. BLM also failed to adequately address the very serious concerns that disturbing the soil crusts and washes, in addition to the creation of 234 miles

of unpaved roads would have on PM 10 pollution in an already severely impacted air basin with exceptionally high childhood asthma rates. Wind blown dust also accumulates on vegetation in arid areas with little rainfall and thereby reduces forage quality for all animal life in the project vicinity when dust blows off-site, There is a significant cumulative

impact of development of the proposed project at a site so close to an existing ORV open area which is often a major contributor for downwind dust storms as BLM El Centro Field Office staff should well know.

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### ***Summary***

The FEIS does not adequately analyze the cumulative impacts of the proposed plan amendment, specifically with regard to other renewable energy projects, cultural resources, wildlife connectivity, and offsite particulate pollution.

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### ***Response***

The BLM thoroughly explained its consideration and analysis of cumulative effects of the plan amendment in the FEIS. The cumulative impact analysis in the FEIS considered the present effects of past actions, to the extent that they are relevant, and the effects of present and reasonably foreseeable (not highly speculative) Federal and non-Federal actions. The analysis took into account the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. Section 2.10 provides an overview of the cumulative impacts analysis. While the area of cumulative effect varies by resource, the BLM provides a cumulative projects scenario to provide a basis for the cumulative impacts analysis for each discipline. This baseline scenario is comprised of other renewable energy projects in the California Desert District and on state and private lands. It also includes existing projects in the Plaster City area. The BLM has identified this geographic area as large enough to provide a reasonable basis for evaluating cumulative impacts for all resource elements or environmental parameters. This scenario is refined and supplemented by environmental parameter throughout Chapter 4. For example, the BLM chose the Plaster City area as the geographic area for cultural resource cumulative impact analysis because it is located on the high water line of the Ancient Lake Cahuilla Shoreline.

Cumulative impacts of the plan amendment on biological resources, including habitat loss, are discussed in Section 4.3, particularly Section 4.3.5. Likewise, cumulative impacts of the plan amendment on air resources are discussed in Section 4.2, particularly Section 4.2.5. Cumulative impacts of the plan amendment on cultural resources are described in Section 4.4, particularly Section 4.4.5.

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### ***Supplemental Environmental Impact Statement***

**Issue Number:** PP-CA-IMPERIAL-10-0004-24

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

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

BLM first disclosed that [U. S. Fish and Wildlife Service] "USFWS is in the process of preparing a Biological Opinion for the potential adverse project effects on the [Peninsular Bighorn sheep] PBS" when

it issued the [Final Environmental Impact Statement] FEIS. Contrary to the information provided in the [Draft Environmental Impact Statement] DEIS, the FEIS indicates that "USFWS has determined that the project area provides some forage function for Peninsular bighorn sheep." In a complete reversal of its prior position, BLM now indicates that mitigation measures will be required to reduce the newly identified adverse impacts of industrial development on the future recovery of the PBS. This new

information qualifies as significant new information and circumstances under NEPA, triggering BLM's duty to supplement the FEIS. By failing to adequately analyze impacts to PBS at the outset of environmental review, BLM failed to take the requisite "hard look" at the environmental consequences of the proposed Plan Amendment and to adequately inform the public of those consequences.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-33  
**Organization:** California Unions for Reliable Energy et al.  
**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

**Protester:** Elizabeth Klebaner  
In violation of NEPA, BLM also failed to include any mention of the Project's need for an incidental take permit under the Federal Endangered Species Act for the potential take of PBS. This haphazard and segmented environmental review record has greatly comprised BLM's ability to fully evaluate the environmental consequences of the Project and the

public's ability to meaningfully participate in the environmental review process. BLM is required to prepare a supplemental EIS that adequately evaluates the Project's potentially significant impacts to cultural, historic and biological resources.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-35  
**Organization:** California Unions for Reliable Energy et al.  
**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

In the FEIS, BLM concludes that a supplemental EIS is not necessary because "the modifications to the IVS project that lead to the development of the Agency Preferred Alternative are not the types of changes in circumstances that would require analysis through supplementation." This conclusion is in error. Not only does this conclusion not address the Plan Amendment, but BLM's rationale fails to account for the significant new information provided in the FEIS regarding the newly identified, potentially significant impacts to PBS.

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***Summary***

The BLM failed to analyze significant new information regarding the Peninsular Bighorn Sheep and as a result must prepare a supplemental EIS.

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***Response***

A supplemental EIS, as defined by the CEQ regulations 40 CFR 1502.9, is not warranted. According to the BLM NEPA Handbook, the bureau may use a DNA to evaluate new circumstances or information prior to issuance of a decision to determine whether the preparation of supplemental analysis is necessary (BLM NEPA Handbook, H-1790-1, p. 22). As discussed in Appendix B (Determination of NEPA Adequacy) of the FEIS, the BLM concluded after analyzing the new information, that the modifications to the agency preferred alternative are not the types of changes requiring analysis through supplementation (FEIS p. B-7). The DEIS included discussion of PBS. The DEIS disclosed that the project site provides marginal foraging habitat for PBS (DEIS C.2-18). The DEIS discussed the potential impacts to PBS and mitigation measures on pages C.2-39 and C.2-40. The DEIS further stated that "the USFWS is expected to issue a Biological Opinion for the peninsular bighorn sheep ... which will specify mitigation measures which must be implemented for the protection of the species" (DEIS, A-19). "Take" is discussed at page C.2-57 of the DEIS and at page 5-3 of the FEIS. The BLM made no substantial changes to the Proposed Plan Amendment/DEIS, and no significant new circumstances or information were identified that would substantially affect the BLM decision. The Biological Opinion was transmitted on September 23, 2010, from the Field Supervisor, Carlsbad Fish and Wildlife Office, Carlsbad, California to the El Centro California BLM Field Manager on September 23, 2010, and is appended to the IVS Record of Decision.

## *Clarifications*

**Issue Number:** PP-CA-IMPERIAL-10-0007-20  
**Protester:** Edie Harmon

**Issue Excerpt Text:**

The proposed IVS site is in the Yuha desert, north of the Yuha Desert Area of Critical Environmental Concern (ACEC) east of the Coyote Mountains, 14 miles west of El Centro, and approximately 4 miles east of Ocotillo, California. However, the FEIS repeatedly incorrectly states that the project is located 4 miles east of Ocotillo Wells, which is located in San Diego County on Hwy 78 east of Anza Borrego State Park in spite of repeated public attempts to get BLM to make corrections. The same inaccurate project location is once again repeated (B-3) and in the Vol 1 Executive Summary (p. iii) and (Vol. I at 1-1). If the BLM FEIS and PRMP-A couldn't get the project location correct, how much other public input was ignored. Erin Dreyfuss, the BLM NEPA Coordinator used to work at the BLM El Centro Field office and should surely know the difference.

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**Issue Number:** PP-CA-IMPERIAL-10-0007-5  
**Protester:** Edie Harmon

**Issue Excerpt Text:**

6. To allow such a proposed project in a Multiple Use Class (MUC) L, even if only on this site, negates the clear meaning and intended uses of the Multiple Use

Class L (Limited Use) here and throughout the California Desert District Conservation Area and especially on adjacent 15,000 acres of BLM MUC L lands where there is a wind energy proposal under review at this time. (FEIS Vol2 Figs 2-9 and 2-10 in Appendix A) Why would the PRMP-A chose to permit wind energy development at the IVS site when no such energy development has been proposed?

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**Issue Number:** PP-CA-IMPERIAL-10-0007-6  
**Protester:** Edie Harmon

**Issue Excerpt Text:**

8. The entire PRMP-A to change the uses allowed in MUC L to allow wind/solar energy at purportedly only the IVS site, however, the FEIS includes Figures 2-9 (Vol 2 App A, A-19) Fig 2.10 (A-21) depicting wind energy development for the Ocotillo Express Wind on more than 15,000 acres BLM MUC L lands immediately west of the IVS site (FEIS Vol. 1 at 2-66) even though the FEIS incorrectly located the project as being east of the IVS site. Lands to the east of the project site are predominantly agricultural lands that are or have been farmed and are no longer under BLM management. Again, an incorrect site location in FEIS Table 2-10 at p. 2-66, sloppy inattention to matching text and Figures.

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## *Summary*

The FEIS contains factual statements that need to be corrected or clarified in the ROD, specifically concerning the description of the location of the project site and wind energy development at the site.

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## *Response*

A complete description of the proposed project location is discussed in Section 1.1 and Section 2.3 of the FEIS and is also depicted in Figures 2-1 and 2-2. Currently there are no applications for wind energy projects at the IVS project site. The plan amendment serves to allow solar energy development at the project site. The BLM will clarify this information in the ROD.

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## **Federal Land Policy and Management Act**

### *Multiple Use Class*

**Issue Number:** PP-CA-IMPERIAL-10-0002-2  
**Organization:** Center for Biological Diversity  
**Protester:** Lisa Belenky

**Issue Excerpt Text:**

Adoption of a plan amendment to allow a large-scale industrial facility on MUC class L lands 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). The proposed project is a high-intensity, single use of resources that will displace all other uses and that will significantly diminish of over 6,000 acres of good-quality occupied flat-tailed horned lizard habitat among other impacts. The Center protests that the proposed project is inappropriate for a Limited Use area such as this one and the terms of the proposed plan amendment are inconsistent with the CDCA Plan.

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**Issue Number:** PP-CA-IMPERIAL-10-0003-13  
**Organization:** Quechan Indian Tribe  
**Protester:** Frank Jozwiak

**Issue Excerpt Text:**

The Tribe Protests BLM'S PRMP-A Because the PRMP-A Will Result in Permanent Damage and Destruction to Sensitive Biological Resources. Such as the Flat-Tailed Horned Lizard In Conflict With The Applicable Class L Land-Use Designation. The FEIS confirms that the Flat-Tailed Horned Lizard (FTHL) is known to exist in the project area. See also July 27, 2010 [California Energy Commission] CEC Hearing Transcript, p. 189 (noting USFWS estimate that there "are between 1300 and 2000 lizards on site that would be impacted from construction of the Imperial Valley Solar plant"); p. 286 (discussing direct and indirect impacts to lizards likely to result from project). The FEIS also acknowledges that the FTHL is proposed for listing on the Endangered Species Act and that final action on the proposed listing is likely to occur this year. The lizard is culturally significant to the Quechan Tribe, as it is part of the Tribe's creation story. BLM acknowledges that this Project could result in direct mortality, injury, and harassment of lizards, which are currently being considered for listing on the Endangered Species Act. This is another reason why the PRMP-A is inconsistent with the applicable Class L Land-Use Designation.

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**Issue Number:** PP-CA-IMPERIAL-10-0003-16  
**Organization:** Quechan Indian Tribe  
**Protester:** Frank Jozwiak

**Issue Excerpt Text:**

By creating a separate management structure and a heightened standard of protection for California Desert lands, Congress clearly expressed its desire for preservation of resources and strict adherence to

the planning requirements and preservation goals of the CDCA Plan. In this case, BLM is proposing to allow permanent impairment of a sensitive cultural resource area on Class L lands that are specifically designated for resource preservation and less intensive uses. Allowing an intensive large-scale energy development on these specific lands will result in undue impairment of the sensitive resources in violation of the CDCA Plan and Congressional intent expressed in FLPMA. The proposed use also constitutes "unnecessary and undue degradation" of the public lands because there are other areas within the CDCA Plan specifically "zoned" for more intensive uses like the project proposed here (Class M and Class I lands). There may also be other Class L lands that are less sensitive and accordingly more appropriate for the proposed project. Amending the CDCA Plan to facilitate large-scale energy development on these specific lands is inconsistent with FLPMA and Congress' intent to protect the CDCA.

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**Issue Number:** PP-CA-IMPERIAL-10-0003-6  
**Organization:** Quechan Indian Tribe  
**Protester:** Frank Jozwiak

**Issue Excerpt Text:**

The proposed amendment to allow large-scale commercial energy development on lands known to be highly sensitive in terms of cultural resources is not consistent with the Class L designation in the CDCA Plan. BLM has no obligation to approve the conditional use and BLM should, in this case, deny the requested amendment. While production of solar energy is not per se prohibited on Class L lands, the CDCA Plan only allows "low-intensity" uses on Class L lands. The CDCA Plan requires a more delicate balancing of resource values on Class L lands than on lands in the Class M (higher intensity use) and Class I (intensive use) designations. The CDCA Plan, page 21, confirms that consumptive uses should be allowed on Class L lands "only up to the point that sensitive natural and cultural values might be degraded." This specific large-scale, high-intensity, project proposal, which will degrade sensitive natural and cultural values is clearly not consistent with Class L land use. BLM concedes in the FEIS that the development of this Project will not be able to avoid impacts to cultural resources. Moreover, the impacts will be permanent and irreversible. Previously, on page C.2-106 of the DEIS, BLM acknowledged that the project "may wholly or partially destroy all archaeological sites on the surface of the project area." Due to the permanent impairment and destruction of significant cultural resource values, this Project is clearly inconsistent

with the Class L land use designation, and the PRMP-A must be denied.

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**Issue Number:** PP-CA-IMPERIAL-10-0003-8

**Organization:** Quechan Indian Tribe

**Protester:** Frank Jozwiak

**Issue Excerpt Text:**

The CDCA Plan contains other statements confirming that this Project would not be consistent with the Class L designation. The Plan confirms that on Class L lands, protection and preservation of resources takes precedence over the more typical patterns of impact and mitigation. The Plan states, on page 24, that "mitigation will be used primarily in Classes M [a land-use class that specifically authorizes higher intensity uses like energy and utility development] and I [a land-use class designated for 'concentrated use of lands and resources to meet human needs'] where resource protection measures cannot override the multiple use class guidelines." On these Class L lands, BLM should protect and preserve the cultural resources. BLM should reject the PRMP-A, in a manner consistent with the Class L designation. If this Project must be developed in the CDCA, it should be re-directed to appropriate Class M or Class I lands that have already been set apart for this kind of intensive development, or less sensitive Class L lands. Standard "mitigation" is not adequate here. The PRMP-A should be denied.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-15

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

The Draft Programmatic Agreement in the FEIS still does not specify mitigation measures for the Anza Trail; it sets forth only the intention of the consulting parties to devise such measures prior to ground disturbance. In short, BLM failed to ensure that historic resources within the Planning Area will not be significantly diminished before the Plan Amendment is approved. BLM may not approve the Plan Amendment until it has ensured that the Anza Trail will not be significantly diminished by the proposed industrial use within the Planning Area, as required by FLPMA and the CDCA.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-17

**Organization:** California Unions for Reliable Energy et.al.

**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

The Sate Director's interpretation of the CDCA Plan is severely flawed. According to BLM, the CDCA Plan allows the use of the Planning Area for [solar generation] through the Plan's approval of solar generating facilities within the Multiple -Use Class L. BLM is in error. Renewable generation is only conditionally allowed for Class L lands under the CDCA Plan. According to the CDCA Plan, renewable energy generation is an allowed use within Class L lands where BLM has first ensured, based on environmental review, that the proposed amendment will not significantly diminish the natural, scenic, ecological and cultural values of those. The EIS identifies significant unavoidable impacts to visual resources, and fails to mitigate for identified significant adverse impacts to cultural and historic resources. As detailed in the DEIS, the FEIS, and in the numerous comments submitted by federal expert agencies, Native American tribes, environmental organizations, and concerned members of the public, the industrialization of the Planning Area will significantly diminish the natural, scenic, and cultural values of these lands. By failing to include mitigation measures capable of avoiding the significant diminishment of these resources, BLM has failed to ensure their protection and to balance the use of the Planning Area with its protection. BLM's finding of consistency cannot be sustained on this record. The Plan Amendment cannot be approved because renewable energy generation is an inconsistent use under the CDCA Plan.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-5

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

Although renewable energy generation is a conditionally allowed use within Class L lands, BLM may not dedicate such lands for renewable energy generation if the proposed use will significantly diminish the natural, scenic, ecological and cultural values of those lands. The Planning Area is a designated Class L area under the CDCA Plan. As noted by numerous comments from the public and state and federal agencies, BLM failed to assess the proposed Plan Amendment's impact on sensitive resource values and to ensure that such values are not significantly diminished, as required by FLPMA and the CDCA Plan. For those resources that BLM did assess, BLM determined that the proposed Plan Amendment would significantly impact sensitive resources. Therefore, the proposed Plan Amendment is inconsistent with the CDCA Plan.



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**Issue Number:** PP-CA-IMPERIAL-10-0004-6  
**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

BLM May Not Approve the Plan Amendment Because it Would Significantly Diminish Visual Resources Within the Planning Area FLPMA requires BLM to manage public lands "in a manner that will protect the quality of the...values..." of those lands, and to integrate visual resource management into the multiple use, sustained yield method of management mandated by the Act. The DEIS finds that, "under the proposed project an area of roughly 10 square miles, including 5.6 miles of frontage of Highway 1-8, would experience a dramatic visual transformation from a predominantly natural desert landscape to one of a highly industrial character." The visual impact of industrial development within the Planning Area is deemed in the DEIS to be significant and unavoidable. The proposed project would substantially degrade the existing visual character and quality of the site and its surroundings, including motorists on Interstate 8, recreational destinations within the Yuha Desert Area of Critical Environmental Concern and portions of the Juan Bautista Anza National Historic Trail, resulting in significant impacts. Because effective, feasible mitigation measures could not be identified by staff, these impacts are considered to be unavoidable. The FEIS does not alter this initial finding of unavoidable significant impacts. In light of this finding, BLM may not approve the Plan Amendment to allow the significant diminishment of visual resources within the Planning Area. Such approval would be inconsistent with the CDCA Plan.

**Issue Number:** PP-CA-IMPERIAL-10-0005-7  
**Organization:** Backcountry Against Dumps et. al.  
**Protester:** Stephan Volker

**Issue Excerpt Text:**

BLM proposes to "amend the CDCA Plan to allow wind/solar energy generating activities in the Multiple Use Class L (Limited Use) on the IVS project site." FEIS at B-9. This environmentally destructive project simply does not belong on a Limited Use site intended 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. This Project might be appropriately located in a Multiple Use Class M site, which "is based upon a controlled balance between higher intensity use and protection of public lands...Class M management is designed...to mitigate damage to those resources which permitted uses may cause," or a Class I site, whose "purpose is to provide for concentrated use of lands and resources to meet human needs." Id. But this sensitive site with its priceless archeological resources, essential PBHS habitat, outstanding scenery and invaluable but already overtapped aquifer is not an appropriate place in which to conduct industrial uses.

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**Issue Number:** PP-CA-IMPERIAL-10-0007-11  
**Protester:** Edie Harmon

**Issue Excerpt Text:**

15. Accordingly, it is inappropriate to consider approving any Proposed CDCA Plan Amendment for such activities in MUC L public lands which appears to be inconsistent with the above cited text and intent of the 1999 CDCA Plan as Amended. I protest this PRMP-A to permit solar energy development in MUC L at the IVS site.

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***Summary***

The PRMP-A is inconsistent with the designation, Multiple Use Class - Limited, which requires that sensitive values are not significantly diminished.

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***Response***

The proposed plan amendment is consistent with the Multiple Use Class - Limited (MUC-L) designation.

As stated in the FEIS, "The acceptability of use of public lands within the CDCA for this purpose is recognized through the Plan's approval of solar generating facilities within (MUC-L) lands. The purpose of the FEIS is to identify resources which may be adversely impacted by approval of the IVS project, evaluate alternative actions which may accomplish the purpose and need with a lesser degree of resource impacts, and identify mitigation measures and Best

Management Practices (BMPs) which, when implemented, would reduce the extent and magnitude of the impacts and provide a greater degree of resource protection” (FEIS p. 4.9-10).

The CDCA Plan provides guidance concerning the management and use of BLM lands in the California Desert while balancing other public needs and protecting resources. The CDCA Plan contemplates industrial uses analogous to the solar use analyzed by the proposed plan amendment, including utility ROWs outside of existing corridors, power plants, and solar energy development and transmission (CDCA Plan, p. 95). The CDCA Plan allows for solar development in MUC - L areas and expressly provides that solar generation facilities within areas designated as MUC - L “may be allowed after NEPA requirements are met” (CDCA Plan, p. 15).

In the CDCA Plan Record of Decision, the Assistant Secretary for Land and Water Resources discussed remaining major issues in the final CDCA Plan before he approved the same (CDCA ROD, p. 10 *et seq.*). One of the remaining major issues was the allowance of wind, solar, and geothermal power plants within designated Class L lands (CDCA ROD, p. 15). The ROD recognized that “These facilities are different from conventional power plants and must be located where the energy resource conditions are available. An EIS will be prepared for individual projects.”

The recommended decision, which was ultimately approved, noted, “Keep guidelines as they are to allow these power plants if environmentally acceptable. Appropriate environmental safeguards can be applied to individual project proposals which clearly must be situated where the particular energy resources are favorable.”

The allowance of wind, solar, and geothermal power plants on designated Class L lands in the CDCA was approved by the ASLW, and concurred by the Secretary of the Interior on December 19, 1980.

The BLM has met the NEPA requirements for the plan amendment through the analysis contained in the DEIS and FEIS. The amendment will allow the solar use only on the IVS project site and will not result in any changes in land use designations or authorized land uses anywhere else in the CDCA. As stated in the FEIS, the reason for the amendment is specifically to allow a solar power generation project on that 6,500-acre project area, which was not previously designated in the CDCA Plan. This amendment and the overall amendment process are consistent with the implementation of the CDCA Plan. The CDCA Plan amendment will not result in sweeping changes to the Limited Use designation within the overall boundary of the CDCA. Furthermore, the proposed plan amendment identifies and analyzes sensitive resources and values. In addition, the BLM has ensured that the plan amendment will not significantly diminish sensitive values through design features, mitigation, and monitoring.

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### ***Conformance with the California Desert Conservation Area Plan***

**Issue Number:** PP-CA-IMPERIAL-10-0001-8

**Organization:** Sierra Club

**Protester:** Barbara Boyle

**Issue Excerpt Text:**

The Plan Amendment and proposed project are not analyzed in the context of the CDCA Plan. Although specific management principles are contained in the

Plan, they have not been applied to either the proposed amendment or project. Nor have landscape level issues and management objectives been considered in evaluating these proposals or in selecting meaningful alternatives to them.

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**Issue Number:** PP-CA-IMPERIAL-10-0003-21

**Organization:** Quechen Indian Tribe

**Protester:** Frank Jozwiak

**Issue Excerpt Text:**

ISSUE #9: The Tribe Protests the PRMP-A Because It Is Inconsistent With the Plan Amendment Criteria Found in the CDCA Plan. The CDCA Plan provides six factors to analyze when considering an amendment. CDCA Plan, p. 121. The PRMP-A is inconsistent with the relevant factors and the Tribe protests the analysis contained in Section 4.9.4 of the FEIS regarding the CDCA Plan Amendment. Under the plan amendment factors identified in the CDCA Plan, BLM must first determine whether "any law or regulation prohibits granting the requested amendment." As discussed above, the PRMP-A would facilitate "undue impairment" of lands within the CDCA and is thus prohibited by FLPMA. The amendment is also prohibited due to the BLM's failure to comply with Section 106 of the NHPA and failure to prepare an adequate FEIS under NEPA. Second, BLM must evaluate whether any alternative locations within the CDCA are available which would meet the applicant's needs without requiring a plan amendment. BLM failed to adequately analyze this factor. BLM failed to determine whether there are any Class M or I lands within the CDCA that would be adequate for large scale energy development of this kind. Third, BLM must determine the environmental effects of granting and/or implementing the applicant's request. BLM has failed to satisfy this requirement since it is proposing to render a decision on this project prior to completion of the Section 106 process. In addition, the FEIS prepared by BLM contains an inadequate analysis of the cumulative impacts associated with this project, as discussed in more detail above. Fourth, BLM must consider the economic and social impacts of granting the applicant's request. BLM has failed to adequately consider the social and environmental justice impacts associated with destroying an area of cultural significance, located within the traditional territory of the Quechan Indian Tribe, for the purpose of potentially short-term energy production. The planned life of the is only 40 years, although the destruction of resources will be permanent. See FEIS, at p. 2-31 (noting anticipated 40 year life of project). Fifth, BLM must adequately consider public comment. While BLM has taken

public comment, it has failed to engage in meaningful government-to-government consultation with the Quechan Tribe as required by Section 106 of the NHP A and by other federal laws, as discussed in more detail above. Sixth, BLM must evaluate the effect of the proposed amendment on BLM's obligation to achieve and maintain a balance between resource use and resource protection. The lack of an adequate cumulative impacts analysis, as discussed above, violates this decision criteria. BLM must thoroughly consider the cumulative impact on desert resources associated with past, present, and reasonably foreseeable projects within the entire CDCA - the planning area designated by Congress. BLM should select lands within the Class M or Class I designations for this project, instead of Class L lands known to contain sensitive resources. In summary, BLM's PRMP-A is inconsistent with the CDCA Plan and should be rejected.

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**Issue Number:** PP-CA-IMPERIAL-10-0007-24

**Protester:** Edie Harmon

**Issue Excerpt Text:**

PRMP-A for the IVS project also is inconsistent with the management principles for resolving conflicts in the California Desert Plan as related to the significant adverse impacts, especially to biological and cultural resources and their identified values at the proposed MUC L site. CDCA Plan Management Principles include the following: a. Development of decision-making processes using appropriate guidelines and criteria which provide for public review and understanding. These processes are designed to help in allowing for the use of desert lands and resources while preventing their undue degradation or impairment. b. -Responding to national priority needs for resource use and development, both today and in the future, including such paramount priorities as energy development and transmission, without compromising the basic desert resources of soil, air, water, and vegetation, or public values such as wildlife, cultural resources, or magnificent desert scenery. This means, in the face of unknowns; erring on the side of conservation in order not to risk today what we cannot replace tomorrow. (CDCA Plan p 6, emphasis added.). With the PRMP-A, BLM has chosen to ignore the mandate to err on the side of conservation in the face of so many unknowns raised during the CEQ/NEPA for this project. When viable alternatives exist for solving the problem of reducing energy use. By failing to consider alternative technologies, conservation and weatherization in concert with distributed rooftop PV, and alternative sites not managed by BLM, the PRMP-A ignores the need to err on the side of conservation by choosing to

risk the loss of important habitat for sensitive species and loss of irreplaceable cultural resources on site and the cultural resource landscape, degraded air quality, and the requirement to comply with FLPMA in this California Conservation Area. BLM failed to consider whether other lands in less sensitive areas or disturbed lands within Imperial County could have

met the objective of renewable energy, rather than having NEPA review driven by the Applicant's determination to gain approval for industrial scale solar on more than 6,000 acres of public lands in MUC L where there are sensitive biological resources and irreplaceable cultural resources.

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### ***Summary***

The CDCA Plan Amendment is inconsistent with the specific management principles in the CDCA plan as amended.

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### ***Response***

The proposed plan amendment is consistent with the specific management principles and plan amendment criteria listed in the CDCA Plan.

The CDCA Plan itself recognizes that Plan Amendments may be proposed, and outlines a process to approve or deny them (CDCA Plan, pp. 119-122). The management principles listed are “multiple use, sustained yield, and maintenance of environmental quality contained in law” (CDCA Plan, p. 6). These principles were the basis for the BLM's development of the proposed plan amendment. The CDCA Plan also lists management approaches to be used to resolve conflicts. These approaches are designed to help achieve the goals of allowing for the use of desert lands and resources while preventing their undue degradation or impairment, and responding to national priority needs for resource use and development, “both today and in the future, including such paramount priorities as energy development and transmission, without compromising basic desert resources...[and] erring on the side of conservation in order not to risk today what we cannot replace tomorrow” (CDCA Plan, p. 6). The CDCA Plan conceives of balancing use and protection in the overall context of the entire CDCA, but recognizes that certain sites will strike the balance in favor of protection or use depending on relevant factors. The CDCA Plan management principles section specifically cites energy development and transmission as a paramount national priority to consider in striking that balance (CDCA Plan, p. 6).

Also, the plan amendment criteria, which the BLM Desert District Manager applies for proposals that could amend the CDCA Plan, were considered during development of this proposed CDCA Plan Amendment. It is therefore not correct to state that the BLM failed to analyze the proposed plan amendment in the context of the CDCA Plan. The CDCA Plan is specifically referenced and analyzed throughout Sections 3 and 4 of the CDCA Plan Amendment/FEIS. The CDCA Plan originally included, has been amended several times to include, and contemplates industrial uses analogous to the solar use analyzed by the proposed CDCA Plan Amendment, including utility ROWs outside of existing corridors, power plants, and solar energy development and transmission (CDCA Plan, p. 95). The CDCA Plan was initially prepared and continues to provide guidance concerning the use of the California Desert public land holdings while balancing other public needs and protecting resources. Amendments to the CDCA Plan can be site-specific or global depending on the nature of the amendment. In the case of the proposed CDCA Plan Amendment, the amendment is site-specific, but considers the larger context of the CDCA and the BLM's Plan for the CDCA. The BLM has the discretion, based on its expertise,

to determine whether a plan amendment adheres to the principles of multiple use, sustained yield, and maintenance of environmental quality.

The proposed plan amendment adheres to the management principles and amendment criteria in the CDCA Plan. As described in FEIS Sections 1.2.1, and 2.2.1.2 and later analyzed in Section 4.9, the CDCA Plan recognizes the potential compatibility of solar generation facilities on public lands and requires that all sites associated with power generation or transmission not specifically identified in the CDCA Plan for a project site be considered through the plan amendment process. As the FEIS states, the sole purpose of this amendment is to allow power generation and transmission on the 6,500-acre IVS project site, which was not previously identified in the CDCA plan. This amendment is limited geographically to only the 6,500-acre project site, and further, by the accompanying ROW grant application. This amendment will allow solar energy use on the IVS project site only, and will not result in any changes in land use designations or authorized land uses anywhere else in the CDCA.

As noted in the FEIS response to comments on the DEIS, the CDCA Plan was adopted in 1980 and has since been amended many times. Frequently, long-range plans that cover large geographic areas such as the California Desert are living documents intended to provide overall land use planning guidance and general regulation, with more detailed land use information provided through amendments, special area plans, or other more focused planning documents. Former BLM California State Land Director James B. Ruch, in his 1999 letter presenting the CDCA Plan, as amended, stated, "The California Desert Plan encompasses a tremendous area and many different resources and uses. The decisions in the Plan are major and important, but they are only general guides to site-specific actions."

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### *Consistency with Other Plans*

**Issue Number:** PP-CA-IMPERIAL-10-0003-20

**Organization:** Quechen Indian Tribe

**Protester 1:** Frank Jozwiak

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

ISSUE #8: The Tribe Protests the PRMP-A Because the Imperial Valley Project Does Not Conform to the Local Land Use Plan for Imperial County. The CDCA Plan Decision Criteria for Energy Production requires "conformance to local plans wherever possible." CDCA Plan, p. 93. Here, the applicable local Imperial County land use designation for the project area is "Open Space Preservation Zone." DEIS, p. A-5. This designation does not allow use for electric power generation projects. DEIS, p. A-5. The DEIS and FEIS fail to acknowledge the lack of compliance with applicable zoning. Amendment of the CDCA to permit a large-scale power development in an area zoned by the local government for open space preservation is not appropriate. DEIS, p. C.8-18 ("the proposed project would not be consistent with the intent of the S-2 zone within the county's Land Use Ordinance"). In addition, the Project is also inconsistent with the Goals and Objectives of Imperial County's General Plan; specifically, Goal 7 regarding Preservation of Visual Resources and Goal 10 regarding Preservation of Open Space. 43 U.S.C. § 1712(c) ("land use plans of the Secretary...shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of [FLPMA]").

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## ***Summary***

The proposed CDCA Plan Amendment fails to conform to the Imperial County Land Use plan, which designates the project area as an “Open Space Preservation Zone.”

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## ***Response***

Sec. 202 (c)(9) of FLPMA states, “...the Secretary shall, to the extent he finds practical, assure that consideration is given to State, local and tribal plans that are germane in the development of land use plans for the public lands....” The BLM has given due consideration to the Imperial County General Plan, to the extent practical, in preparing the CDCA Plan amendment, particularly in regard to those aspects of the Imperial County General Plan that are germane to the CDCA amendment, in compliance with FLPMA.

As stated on FEIS page 1-21, “... The General Plan provides guidance on future growth in Imperial County. Any development in Imperial County must be consistent with the General Plan and the Imperial County Land Use Ordinance” (Title 9, Division 10). Although the BLM-managed lands within the boundary of the IVS project site are not subject to the requirements of the General Plan because the BLM is a Federal agency, the BLM has determined that the IVS project is in conformance with the Imperial County General Plan. The Conservation and Open Space and Land Use Elements of the General Plan direct the county to evaluate the compatibility of proposed development projects with the preservation of biological resources and open space. Part of the proposed action would involve county lands that are currently highly disturbed by human activity, and would coincide with the county’s goal of developing alternative energy resources and meeting the State’s Renewable Portfolio Standard goals. The purpose of the EIS is to help evaluate the compatibility of proposed development project with the preservation of biological resources and open space. Therefore, the IVS project would achieve this county goal.

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## ***Cultural Resources***

### ***Impacts and Mitigations to Cultural Resources***

**Issue Number:** PP-CA-IMPERIAL-10-0004-11

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

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

Clearly, BLM has not even begun to consider the cultural resources within the Planning Area or how these may be impacted by the proposed Plan Amendment. The FEIS finds, under NEPA, that the Plan Amendment will significantly impact cultural resources within the Planning Area. [FEIS, p 4.5-21] However, the FEIS does not include a means to reduce those impacts to a level of insignificance. Instead, the FEIS states that “[a] draft PA is currently in development...implementation of Measures CUP-1 through CUP-11, subject to the consultation process for the development of the Programmatic Agreement, would reduce or resolve adverse affects.” [FEIS p.

4.5-23] In improperly deferring preparation of a final Programmatic Agreement until after the issuance of Project approval, BLM has ignored the urgings of the Quechan, CURE, and others to devise enforceable measures to prevent the significant diminishment 'of these resources as a result of the proposed Plan Amendment. As such, BLM has unequivocally failed to evaluate and ensure no significant diminishment to cultural resources, as required by FLPMA and the CDCA Plan. BLM may not approve the Plan Amendment until it has ensured that cultural resource values are not significantly diminished.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-30

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

BLM failed to include in the FEIS a reasonably complete discussion of possible mitigation measures for adverse effects on cultural resources. A final Programmatic Agreement has not yet been prepared, and the Draft Programmatic Agreement attached to FEIS is merely a shell document that lacks any substantive discussion of mitigation. Moreover, consultation under section 106 of the National Historic Preservation Act has just begun. As the FEIS clearly states, A Draft PA is currently in development and has been sent out to the Consulting Parties...[i]mplementation of measures CUP-I through CUP-II, subject to the consultation process for the development of the Programmatic Agreement, would reduce or resolve adverse effects ...[b]ecause specific treatments are being developed and consultation with all interested parties is ongoing, there is no absolute commitment to specific treatment measures until they are finalized. [FEIS, p.4.5-23]The above perfunctory description of a plan for mitigation development, and the mere listing of mitigation measures of unknown efficacy in the FEIS do not substitute for an adequate mitigation analysis under NEPA. BLM has clearly failed to "thoroughly evaluate all feasible mitigation measures," as required by NEPA.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-41

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

ii. BLM Failed to Determine Whether Historic Properties Within the Planning Area Are Eligible for Listing in the National Register and Which Eligible Properties Would be Adversely Affected BLM has, to date, failed to determine site eligibility and whether Project effects on eligible resources would be adverse. [See FEIS, p.4.5-1.] In February 2010, the DEIS disclosed that, [S]taff is presently unable to identify precisely which of the different cultural [archeological] resources are historically significant and is therefore presently unable-to articulate the exact character of the effects of the Project; [DEIS, p.C.2-130]No...eligible ethnographic resources are presently known to be in the project area of analysis. Further refinements to determinations of the historical significance and to the extant assessments of the potential for visual effects to occur to other

ethnographic resources known to be in the vicinity...would help evaluate [the presence of effects on historically significant ethnographic resources]; [DEIS p. C.2-133] and[W]hereas determinations regarding...eligibility of built-environment resources within the project area of analysis have not been completed, identification and assessment of impacts cannot be assessed at this time. [DEIS, p. C.2-133] The DEIS explains that "determinations on the historical significance of the resources would be made under provisions in the proposed PA." [DEIS, p. C.2-116] The DEIS further explains that these determinations could not be completed prior to Project approval because "the time required for formal evaluations of historical significance for the complete cultural resources inventory exceeds the one-year licensing process." [DEIS, p. C.2-106] Such deferral does not amount to a reasonable good faith effort at Section 106 compliance. Neither NEPA nor any other federal (or state) statute applicable to BLM's review of the proposed Plan Amendment exempts BLM from complying with the requirements of the NHPA or NEPA.

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**Issue Number:** PP-CA-IMPERIAL-10-0004-42

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

**Issue Excerpt Text:**

iii.BLM Failed to Identify Measures to Avoid and Minimize Adverse Effects on Eligible Resources. To date, BLM has failed to identify measures to avoid and minimize adverse effects on eligible resources. The Draft Programmatic Agreement indicates that all of the mitigation options are, as of yet, to be developed by the Applicant and approved by BLM. Similarly, the proposed Historic Properties Treatment Plans contain "neither an outline to develop treatment plans nor [does it contain] a treatment plan for historic properties." By way of illustration, in comments on the Draft Programmatic Agreement, the ACHP provides as follows: "Under Appendix B...clarify what is meant by 'individually specify how the Applicant will avoid, minimize or resolve[sic] the adverse the adverse effects'." Again, BLM has failed to make a reasonable good faith effort to comply with Section 106 prior to Project approval. In sum, BLM has deferred the entire Section 106 consultation, in violation of the NHPA.

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**Summary**

The BLM's deferral of cultural resource eligibility determinations, identification of mitigation measures, and preparation of a final Programmatic Agreement until after the publication of the

FEIS does not constitute a good faith effort at compliance with Section 106 of the NHPA.

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### ***Response***

The BLM has complied with Section 106 of the NHPA in preparing the proposed plan amendment. The Imperial Valley Solar Programmatic Agreement was finalized and signed on September 15, 2010 and will be included as an appendix to the Record of Decision. Pursuant to the 36 CFR 800.14(b), regulations implementing Section 106 of the NHPA one purpose of a PA is to resolve “adverse effects for complex project situations and when effects on historic properties (resources eligible for or listed in the National Register) cannot be fully determined prior to approval of an undertaking” (FEIS Section 4.5.6.2). In addition, per 36 CFR part 800.4(2), the BLM is entitled to implement phased identification of historic properties and defer final identification and evaluation for large land areas if it is specifically provided for in the PA.

For planning purposes, the California protocol implementing the national Programmatic Agreement, establishes procedures and standards for involving SHPO in the development of land use plans (BLM Manual 8130, *Planning for Uses of Cultural Resources*, .15B1). In addition, page 8 of Appendix C of BLM Handbook H-1601-1, *Land Use Planning Handbook*, states, “The scope and scale of cultural resource identification are much more general and less intensive for land use planning than for processing site-specific use proposals. Instead of new, on-the-ground inventory (i.e. Class III Inventory), the appropriate level of identification level for land use planning is a regional overview...If land use decisions, however, are more specific in terms of impacts, they may require a more detailed level of identification of the scope and nature of cultural resources during land use planning.”

The purpose of the Plan Amendment is to allow for solar energy development and the IVS project site. The BLM identified cultural resources through a Class III Inventory, and Historic Property identification is ongoing. Although “it is BLM’s intent to render preliminary determinations of eligibility on resources prior to the Record of Decision (ROD)” (FEIS Section 4.5.4.1), it is not necessary that the identification of historic properties are made for the plan amendment. Section 4.5.6.2 provides general mitigations that could be applied to any solar project approved at the amendment site, and as stated in the FEIS (Appendix D.4.9.6; first paragraph in the response), “Preliminary mitigation measures are included in the FEIS and will be adopted into the ROD.” These or similar measures are adequate for NHPA compliance at the land use plan level.

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### ***Class III Inventory***

**Issue Number:** PP-CA-IMPERIAL-10-0004-40

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

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

In the FEIS, published in July 2010, BLM provides that the Applicant has submitted a draft Class III Cultural Resources Technical Report, which the BLM is currently review adequacy. [FEIS, p. 3.5-21]. It should be noted, that the APE has been determined by BLM to encompass a 15 mile radius around the 10-mile Project, [FEIS, p. 3.5-17] whereas the Applicant’s Class III survey covers only a one mile radius around the Project. [FEIS p. 3.5-21] As such, the Class III survey cannot reasonably be expected to adequately identify the cultural resources within the



APE. Consequently, BLM deferred resource identification until after Project approval. The DEIS provides that "the proposed PA will stipulate the completion of the documentation for the 75% of the surface archaeological sites in the project area of analysis...the execution of a program to evaluate the historical significant of archaeological landscapes and districts, archaeological site types, and individual archaeological sites...and refinements to and the execution of multiple treatment plans to resolve those potential effects that are found to be significant." [DEIS p. C.2-60] This complete deferral of Section 106 consultation does not amount to a good faith effort at compliance with the NHPA.

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### ***Response***

“[R]esource identification” was not deferred. The BLM used Class III Inventory, Class I Inventory (including literature and records reviews), and tribal consultation to identify cultural resources within the area of the plan amendment. Appendix I of the FEIS lists the resources identified during the various information gathering efforts.

As explained in FEIS Section 3.5.3, the BLM has outlined an overall Area of Potential Effect for the project. This overall APE is the total geographic area or areas within which the undertaking may directly or indirectly cause alterations in the character or use of historic properties (cultural resources eligible for or listed in the National Register of Historic Places). The overall APE for the project was defined as a 15-mile radius around the perimeter of the project site. Within the overall APE, there is a potential for visual, auditory, and atmospheric effects to historic properties, but not direct physical effects (FEIS Sections 3.5.3.1(3) and 3.5.3.3).

Within the overall APE, the BLM also has outlined more specific APEs where historic properties could sustain direct physical effects as a result of the undertaking. The BLM defined these APEs to include the project site plus a 50- to 300-foot-wide buffer area, and Section 3.5.3.1 of the FEIS describes the specific methodology used to identify any historic properties within each of these more specific APEs. The BLM authorized the applicant to conduct specific identification efforts for this undertaking, including a Class III Inventory (intensive, pedestrian survey) of the project site (including construction footprint). The Class III Inventory process is described in detail in Section 3.5.3.2 of the FEIS.

In addition to this Class III Inventory process, the BLM conducted a Class I Inventory to identify historic properties within the overall APE. The Class I Inventory process included literature searches, discussions with local historical and archaeological experts, and consultation with affected and interested groups and individuals. Additionally, the BLM has been performing government-to-government consultation with interested Tribes for purposes of gathering information to assist in the identification of properties which may be of religious and cultural significance, and may be eligible for the National Register in accordance with 36 CFR 800.4(a)(4).

The BLM is not required to conduct a Class III Inventory of the entire APE. Rather, the BLM must determine the scope of identification efforts in consultation with the SHPO and the consulting parties per 36 CFR 800.4(a) and then make a reasonable and good faith effort to carry out the appropriate identification efforts. These efforts may include background research, consultation, oral history interviews, sample field investigation, and field survey (per 36 CFR 800.4(b)).

## *Fish, Wildlife, Plants, Special Status Species*

**Issue Number:** PP-CA-IMPERIAL-10-0001-11

**Organization:** Sierra Club

**Protester:** Barbara Boyle

### **Issue Excerpt Text:**

The PRMP-A fails to comply with BLM Policy for management of Special Status Species in the following respects: Because the proposed action would result in the destruction of several thousand acres of suitable habitat for the Flat-tailed Horned Lizard, a species proposed for listing under the Endangered Species Act (ESA), the proposed action is inconsistent with the BLM's obligation to conserve and/or recover listed species and the ecosystems on which they depend so that ESA protections are no longer needed. Because the proposed action would contribute to the significant loss of suitable habitat for the Flat-tailed Horned Lizard and contribute to the need to list this species, it is inconsistent with the BLM's obligation to initiate proactive conservation measures that reduce or eliminate threats to sensitive species to minimize the likelihood of and need for listing of these species under the ESA.

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### ***Response***

The BLM has complied with applicable policy for management of Special Status Species. As noted on FEIS page D-177, "The applicant has proposed to offset project related impacts to and loss of FTHL by implementing measures pursuant to the Flat-Tailed Horned Lizard Rangeland Management Strategy. The Strategy was published by the FTHL Interagency Coordinating Committee (ICC) to ensure FTHL and its habitats are managed appropriately. The ICC consists of the USFWS, California Department of Fish and Game, BLM, United States Marine Corps, United States Navy, and Arizona Game and Fish. Pursuant to the Strategy, the applicant will provide the BLM with funds to acquire 6,619.9 acres of land for preservation of FTHL habitat" as part of the required mitigation and compensation for the IVS project.

The FEIS page D-177 continues, "In addition to habitat acquisition, as part of the FWS conferencing, additional conservation measures will be required. The Strategy has been the guiding document for mitigation for FTHL take within the known range of FTHL in the United States. The Strategy has been accepted as suitable for guiding FTHL mitigation within FTHL range. The species is currently proposed for listing pursuant to the Federal Endangered Species Act. The BLM requested conferencing and received a conference opinion for this project from the FWS for the species. If listed, it is unknown at this time if the FWS would adopt the current Strategy as appropriate mitigation guidelines for unavoidable adverse impacts to FTHL." These implementation measures comprise an acceptable mitigation strategy to protect the FTHL from adverse effects of the plan amendment.

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## *National Trails*

**Issue Number:** PP-CA-IMPERIAL-10-0004-13

**Organization:** California Unions for Reliable Energy et al.

**Protester:** Elizabeth Klebaner

### **Issue Excerpt Text:**

Even if BLM were to disagree with NPS's finding of unavoidable significant impacts on the Anza Trail, BLM has failed to mitigate for the significant impacts identified in the DEIS. The FEIS is devoid of measures to reduce impacts to the historic Anza Trail. The FEIS provides that "measures to address project impacts to the Anza Trail are provided in Section 4.5 Cultural Resources, in the FEIS, and the draft Programmatic Agreement." However, Section 4.5 contains no analysis of impacts to the Anza Trail, and the "Draft PA is currently in development."

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## ***Summary***

The FEIS contains no analysis of impacts to the Anza Trail.

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## ***Response***

On-the-ground surveys conducted to date have not identified any physical evidence or cultural properties related to the Juan Bautista de Anza National Historic Trail within the trail corridor. Indirect effects are discussed in FEIS Sections 4.12 and 4.16. Chapter 4 provides measures to mitigate the address indirect effects of the plan amendment to the corridor in CUP-11 (FEIS Section 4.5.6.2) and REC-1 (FEIS Section 4.12.6). These measures incorporate some of the National Park Service mitigations proposed in its comment letter on the DEIS (FEIS Appendix D.4.9.5). The Record of Decision will include these, or similar, measures to resolve adverse effects to the trail corridor (FEIS Appendix D.4.9.6; first paragraph in the response). Although these are preliminary measures, they adequately address general impacts associated with the CDCA Plan Amendment decision.

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## ***Tribal Interests***

**Issue Number:** PP-CA-IMPERIAL-10-0003-9

**Organization:** Quechen Indian Tribe

**Protester:** Frank Jozwiak

### **Issue Excerpt Text:**

ISSUE #3: The Tribe Protests BLM's PRMP-A Because BLM Has Failed to Give Full Consideration to Native American Values in the Decision-Making Process And Has Failed to Comply With Section 106 of the NHPA. Page 26 of the CDCA Plan states that BLM will "give full consideration to Native American values in land use planning and management decisions, consistent with statute, regulation, and policy." Throughout this process, BLM has treated the Native American consultation process as a burden to endure rather than a meaningful opportunity to engage in government-to-government discussions about the preservation and protection of resources. In the Tribe's view, BLM's primary consideration throughout this process has been "fast track" project approval, rather than compliance with fiduciary and legal obligations to affected tribes. Despite repeated requests over a period of years, the Tribe did not receive a cultural report related to this Project until early July 2010. Lack of access to a final cultural resources report for the project significantly impaired the ability of the Tribe (and other stakeholders) to comment on the impacts to cultural resources. See, e.g., CEC Hearing Transcript, August 16, 2010, p. 111 (Nash testimony) (describing how lack of access to cultural resource report impaired consultation). To date, BLM has not met with the Quechan Tribal Council in government-to-government consultation on this Project, nor

discussed the effects of the PRMP-A with the Tribal Council. This is not consistent with the CDCA Plan or applicable federal laws. The CDCA Plan incorporates the consultation requirements of other federal laws, such as Section 106 of the NHPA and its implementing regulations. The NHPA requires ongoing consultation with interested Indian tribes throughout the identification and evaluation of cultural resources and the resolution of adverse effects. 36 C.F.R. § 800.3(f)(2); 800.4(a)(4); 800.5(c)(2)(iii); 800.6(a); 800.6(b)(2), etc. The meaningful government-to-government consultation required by law has not occurred here. Instead, BLM is proposing, through its Draft Programmatic Agreement, to postpone consultation until the decision-making process is over. This is not consistent with Section 106 of the NHPA or its implementing regulations. See also CEC Hearing Transcript, August 16, 2010, p. 92 (CEC Staff Testimony) (describing BLM's conditions relating to cultural resource protection as a "subversion of the 106 process"). Other federal laws and policies also mandate meaningful government-to-government consultation with interested tribes when federally-approved actions will affect tribal interests. See Executive Order 12875, Tribal Governance (Oct. 26, 1993) (the federal government must consult with Indian tribal governments on matters that significantly or uniquely affect tribal governments); Executive Order 12898, Environmental Justice (Feb. 11, 1994) (federal government must consult with tribal leaders on steps to ensure environmental justice requirements); Executive Order No. 13007, Sacred Sites (May 24, 1996) (federal government is

obligated to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, avoid adversely impacting the physical integrity of sites, and facilitate the identification of sacred sites by tribes); Executive Order No. 13084, Consultation and Coordination with Indian Tribal Governments (May 14, 1998) (places burden on federal government to obtain timely and meaningful input from tribes on matters that significantly or uniquely affect tribal communities); Executive Order 13175, Consultation with Indian Tribal Governments (Nov. 6, 2000) (the federal government shall seek to establish regular and meaningful consultation with tribes in the development of federal policies affecting tribes). The required consultation has not occurred in this proceeding, to the detriment of the planning and decision-making process. As made clear by Appendix F to the FEIS, BLM appears to believe that transmission of general project status updates and notices satisfy its obligation to engage in meaningful government-to-government consultation with affected tribes. Notification letters and brief project updates to the general public are not adequate to comply with BLM's Section 106 consultation obligation to the Quechan Tribe. See, e.g., CEC Hearing Transcript, August 16, 2010, p. 118 (Nash testimony). Meaningful consultation includes a timely exchange of information and requires BLM to seek out, discuss, and carefully consider the views of

affected tribes regarding identification, evaluation, and mitigation of affected cultural resources prior to reaching any final decision on the project. In this case, BLM's sole focus has been on rushing towards the finish line and getting this project approved on a "fast track," regardless of tribal views or impacts on cultural resources. This is not acceptable and not consistent with BLM's obligations under Section 106 of the NHPA, or the CDCA Plan.

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**Issue Number:** PP-CA-IMPERIAL-10-0006-4

**Organization:** Carmen Lucas, Kwaaymii Band of Indians

**Protester:** Courtney Ann Cole

**Issue Excerpt Text:**

Government-to-Government Consultation Inadequately Described in FEIS. The so-called Government-to-Government Consultation section, FEIS Appendix F, is merely a recitation in chart of form listing the contacts made between BLM and tribes. There is no substantive summary of what the concerns of affected Tribal Governments are or how they were considered in the FEIS. This is inadequate, and does not provide sufficient information for decision makers to understand, even partially, the nature and depth of the cultural and other tribal concerns about the proposed action..

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***Summary***

The required government-to-government consultation with the Tribes has not occurred during the consideration of the proposed plan amendment. Further, the FEIS does not adequately describe the concerns of affected tribal governments.

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***Response***

FEIS Sections 4.5.6.2 and 7.2 explain that tribal consultation will be ongoing as the cultural resources inventory report is finalized and Section 106 consultation continues.

Government-to-government consultation with the Tribes has been ongoing since 2008. Appendix F of the FEIS indicates that, as of the date the FEIS went to print, the last contact by the BLM with the Tribes occurred on June 25, 2010. Since then, the BLM has contacted the Tribes by email on July 9, 2010, conducted a field visit with the Tribes on July 29-31, 2010, and sent a letter to the Quechen Tribe on August 18, 2010 (see below). Section 7.2 of the FEIS discloses that in a December 4, 2009, meeting, the Tribes had expressed concerns over impacts to cremated human remains in the project area. Section 3.5.3.2 of the FEIS states that 1,200 acres were excluded from the originally proposed project area to avoid direct effects to the cremation sites. The concerns of the Tribes regarding protection of human remains location were addressed by amending the project proposal and by creating a protective buffer around these locations.

Regarding consultation with the Quechan Indian Tribe, in January 2008, the BLM notified the Quechan Indian Tribe about the project and extended an invitation to consult on a government-to-government basis. In addition to that initial invitation, the BLM sent numerous follow-up letters to the Quechan Indian Tribe, with each letter extending the invitation to consult on this project; these follow-up letters were dated November 11, 2008, November 6, 2009, January 15, 2010, March 11, 2010, March 29, 2010, June 2, 2010, and June 24, 2010. These letters also provided updates regarding the environmental and Section 106 review processes and extended invitations to participate in various field visits and consultation meetings. The BLM also met with the Quechan Culture Committee in August 2008 and July 2009 and have hosted Tribal members at site visits, project coordination meetings, and meetings pertaining to the Section 106 process. As a result of the Tribal consultation efforts for this project, the BLM is aware of the issues and concerns of the Quechan Indian Tribe and have considered these during the planning process.