

Director's Protest Resolution Report

**Ocotillo Wind Energy
Facility Proposed Plan
Amendment and Final EIS,
Imperial County, California**

May 11, 2012



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Reader's Guide

How do I read the Report?

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

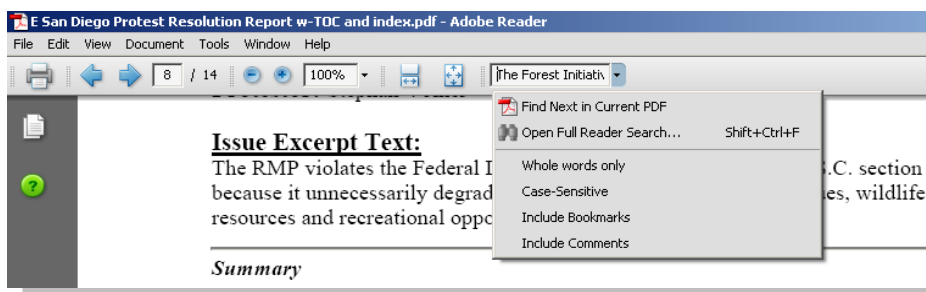
Report Snapshot

The diagram shows a report snapshot with the following fields and callouts:

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

How do I find my Protest Issues and Responses?

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



List of Commonly Used Acronyms

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

Protesting Party Index

Protester	Organization	Submission Number	Determination
Ms. Terry Weiner	Desert Protective Council	PP-CA-OWEF-12-01	Denied—Issues, Comments
Ralph Singer	Anza Borrego Foundation	PP-CA-OWEF-12-02	Dismissed—Comments only
Lisa T. Belenky	Center for Biological Diversity	PP-CA-OWEF-12-03	Denied—Issues, Comments
Frank R. Jozwiak Thane D. Somerville	On behalf of Quechan Indian Tribe	PP-CA-OWEF-12-04	Denied—Issues, Comments
Samuel B. Johnson	On behalf of Laborers International Union of North America, Local Union 1184	PP-CA-OWEF-12-05	Denied—Issues, Comments
Nicholas C. Yost	On behalf of Ocotillo Express LLC	PP-CA-OWEF-12-06	Dismissed—Comments only
Eddie Harmon	Individual	PP-CA-OWEF-12-07	Denied—Issues, Comments
Courtney Ann Coyle	On behalf of Carmen Lucas, Laguna Band of Indians	PP-CA-OWEF-12-08	Denied—Issues, Comments
Courtney Ann Coyle	On behalf of Viejas Band of Kumeyaay Indians	PP-CA-OWEF-12-09	Denied—Issues, Comments
Stanley C. Volker	On behalf of Protect Our Community Foundation, Backcountry Against Dumps, and Donna Tisdale	PP-CA-OWEF-12-10	Denied—Issues, Comments
Kevin Emmerich and Laura Cunningham	Basin and Range Watch	PP-CA-OWEF-12-11	Denied—Issues, Comments
Parke Ewing	Individual	PP-CA-OWEF-12-12	Dismissed—Comments only

Issue Topics and Responses

NEPA

Issue Number: PP-CA-OWEF-12-04-42

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

Fifth, BLM must adequately consider public comment. While BLM has taken public comment, it has clearly failed to give it meaningful consideration given that the strong majority of commenters oppose development of this project. Letters submitted by the Quechan Tribe were not included or responded to in the FEIS.

Issue Number: PP-CA-OWEF-12-05-4

Organization: Laborers International Union of North America, Local Union 1184

Protester: Samuel B. Johnston

Issue Excerpt Text:

The Response to Comments section of the FEIS/EIR purports to justify the cumulative impacts analysis with respect to the State Park. (Response to Comment letter 0-10-05, p. 79) However, the Response is conclusory and fails to serve the purpose of a response to comments, and it fails to justify the deficient cumulative impacts analysis respecting impacts on the State Park.

Issue Number: PP-CA-OWEF-12-07-20

Organization: Desert Protective Council

Protester: Edie Harmon

Issue Excerpt Text:

BLM failed to seriously consider the analysis by engineer Bill Powers related to the lack of need for the power from the proposed wind energy project which has a Power Purchase Agreement with San Diego Gas and Electric. Powers has also analyzed the adequacy of distributed generation to meet the needs of electrical users in San Diego County, including its urban centers.

Issue Number: PP-CA-OWEF-12-08-16

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Fifth, BLM must adequately consider public comment. While BLM has taken written public comment, the BLM and Imperial County did not hold a true public hearing. The fact the agencies instead held "open houses," was of significant public controversy because Ms. Lucas and members of the public were denied the opportunity for a hearing format in which views could be shared openly in a public forum and recorded by the Lead Agencies. Further, BLM has failed to engage in meaningful consultation with Ms. Lucas as required by NHPA Section 106 and by other federal laws and policies, as explained below.

Sixth, BLM must evaluate the effect of the proposed PA on BLM's desert-wide obligation to achieve and maintain a balance between resource use and resource protection. The lack of an adequate cumulative impacts analysis, as discussed elsewhere in this protest, violates this factor. 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. The 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 and that are within high conflict areas like Ocotillo"

Issue Number: PP-CA-OWEF-12-09-14

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Fifth, BLM must adequately consider public comment. While BLM has taken written public comment, the BLM and Imperial County did not hold a true public hearing. The fact the agencies instead held "open houses," was of significant public controversy because Viejas and members of the public were denied the opportunity for a hearing format in which views could be shared openly in a public forum and recorded by the Lead Agencies.

Issue Number: PP-CA-OWEF-12-10-2

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

Here, the FEIS states that BLM's purpose and need is merely to respond to a Federal Land Policy Management Act ("FLPMA") right-of-way ("ROW") application submitted by the Applicant to construct, operate, maintain, and decommission a wind energy-generating facility and associated infrastructure on public lands administered by the BLM in compliance with FLPMA, BLM ROW regulations, and other applicable Federal laws and policies. FEIS 1-3. The only other BLM purpose and need information provided is a very brief summary of three "BLM authorities" FEIS 1-3. And even for those three "authorities," the FEIS provides no explanation of which goals are preeminent, what other BLM authorities affect the Project's purpose and need, or why the Project is needed to comply with or implement any of those authorities. This is entirely inadequate for NEPA purposes.

It is not enough for BLM to reiterate its general duty to review applications submitted to it and cursorily list three applicable "BLM authorities." BLM must actually "specify the "underlying purpose and need" for the Project itself. 40 C.F.R. section 1502.13 (emphasis added); North Carolina Alliance for Transportation Reform v. Department of Transportation, 151 F.Supp.2d 661, 688 (M.D.N.C. 2001); Rankin v. Coleman, 394 F.Supp. 647, 656-7 (E.D.N.C. 1975). This entails identifying which specific goals BLM is attempting to fulfill through the Project and demonstrating why the Project is needed to meet those goals. Without a more definitive statement of purpose and need, it is impossible for BLM and the public to identify a reasonable range of alternatives that could achieve those objectives.

Responding to an application and complying with BLM's general statutory mandates cannot be considered an adequate statement of purpose and need where NEPA directs BLM to "specify the underlying purpose and need to which the agency is responding." 40 C.F.R. § 1502.13, emphasis added.

The underlying purpose of the Project is not the same as BLM's legal duty to respond to the application and comply with its general statutory mandates. The underlying purpose is the purpose behind completing the Project, not responding to the application.

Summary

The BLM in the FEIS/EIR PA violates NEPA by:

1. Having an inadequate Purpose and Need;
2. Failing to conduct a true public hearing in lieu of "open houses"; and
3. Ignoring or failing to adequately address substantive comments.

Issue Number: PP-CA-OWEF-12-10-4

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

The lone Project goal that appears repeatedly throughout the FEIS' description of BLM's and the Applicant's objectives is development of environmentally sound energy to help San Diego Gas and Electric Company (SDG&E) achieve the state's 33 percent Renewables Portfolio Standard (RPS) by 2020.' The FEIS provides no information to suggest that SDG&E will not easily meet this target without the Ocotillo Project.

Issue Number: PP-CA-OWEF-12-10-6

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

The FEIS' claim that BLM's purpose and need statement complies with NEPA's "rule of reason" fails. FEIS 5-49. BLM's articulation of this Project's purpose and need is not entitled to judicial deference unless the statement is reasonable. But BLM's statement here is not reasonable because it fails to even reference the purpose of the Project. Id.; FEIS 1-3; 40 C.F.R. § 1502.13; NPCA v. BLM, 606 F.3d at 1071. BLM's statement of purpose and need is merely a generic template that could be applied to any project the agency is considering for approval. FEIS 1-3.

Response

The EIS/EIR PA includes a detailed discussion of the purpose and need. The discussion specifies that “the purpose and need for the Proposed Action is to respond to a FLPMA ROW application submitted by the Applicant to construct, operate, maintain, and decommission a wind energy-generating facility and associated infrastructure on public lands administered by the BLM in compliance with FLPMA, BLM ROW regulations, and other applicable Federal laws and policies.” EIS/EIR PA at 1-3. While the purpose and need discussion acknowledges the applicant’s purpose in seeking authorization for the OWEF project, consistent with the National Environmental Policy Act, it does not “defer” to the applicant and, as stated in the document, “appropriately distinguishes between the need for the proposed action and the desires or preferences of the agency or applicant, and provides the parameters for defining a reasonable range of alternatives to be considered.” EIS/EIR PA at 5-49.

The BLM is not required to hold a public hearing on the DEIS/EIR for the Proposed Action. Because the EIS/EIR is a joint NEPA/CEQA document, the BLM chose to hold joint public meetings on the project. During the scoping meetings, the public was invited to speak. Based on County requirements, the comments were recorded. During the public meetings on the Draft EIS, the BLM chose to hold open house style meetings to inform the public of the review process and to afford the public the opportunity to ask detailed questions of the applicant, the technical specialists, and the agencies.

The BLM and Imperial County distributed the joint DEIS/EIR on July 8, 2011 with a corresponding *Federal Register* notice. The comment period ended on October 6, 2011 with a total of 405 comment letters received, including emails. Ten comment letters were received after the close of the comment period and included in the Final EIS/EIR with responses. In an ongoing effort to address the tribal concerns, the BLM committed to fully consider any comments submitted by February 17, 2012. Seventeen such letters and other correspondence were included in and responded to in the Final EIS/EIR. The BLM committed to consider all comments on the DEIS from tribes that were received through November 4, 2011. Based on a request for additional time, the commitment was extended until December 9, 2011 for the Viejas. It should be noted that the Quechan also submitted a letter on December 9, 2011; however, because they did not request additional time, it was not covered by the additional time provided to the Viejas. We would note, however, that many of the same issues were raised in the other comment letters received by the BLM, and therefore, those issues were addressed in responses to other comments; to the extent they were not, those issues will be responded to in the ROD.

In sum, all substantive comments were adequately addressed in Appendix N of the FEIS/EIR, following the criteria for substantive comments set forth in the BLM NEPA Handbook H 1601-1, section 6.9.2.1 and 6.9.2.2.

The geographic scope of the cumulative impacts for wildlife and vegetation is based on species range. The geographic scope and temporal scope of the cumulative impacts takes into account the timing of different projects, as they may impact the habitat and location of specific species. The migratory or movement of species is addressed insofar as the project may impact those species that cover a large area. In the response to comments on the draft and in the final EIS/EIR, the cumulative impact section fully explains the context of the analysis. The protest

characterizing the response to comment as conclusory, but the original comment on the DEIS/EIR was broadly directed as a comment on the analysis, and no specific issues were discussed. Given that the original comment lacked specific statements to which to respond, the lead agencies addressed the broader context of the comment with as much specificity as possible.

Range of Alternatives

Issue Number: PP-CA-OWEF-12-01-15

Organization: Desert Protective Council

Protester: Terry Weiner

Issue Excerpt Text:

Narrowing the purpose and need to such an extent that the BLM failed to adequately address a range of alternatives.

Failing to analyze a range of appropriate project alternatives, including distributed generation and off-site alternatives on previously degraded land such as brown fields and other contaminated lands.

Issue Number: PP-CA-OWEF-12-03-25

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

Narrowing the purpose and need to such an extent that the BLM failed to adequately address a meaningful range of alternatives.

Failing to meaningfully analyze a range of appropriate project alternatives including distributed generation and off-site alternatives on previously disturbed or degraded lands and in areas that do not support significant populations of eagles, Swainson's hawks, and other sensitive avian species or bats.

Issue Number: PP-CA-OWEF-12-07-2

Organization: Desert Protective Council

Protester: Edie Harmon

Issue Excerpt Text:

I. The Proposed CDCA Plan Amendment and FEIS Do not Comply with NEPA
The Proposed CDCA Plan Amendment and FEIS and fails to comply with numerous clear requirements of NEPA, including the following:
The purpose and need is so narrowly defined as to

make the intent of the applicant paramount and unreasonably constrains the alternatives discussed. (See also DEIS 2p-24 referring to Sec. 1.1) By limiting the alternatives discussion to projects or no projects the BLM failed to give adequate discussion to alternative locations, alternative technologies, or conservation/energy reduction efforts. BLM fails to consider whether there truly is a need to industrialize sensitive public lands located between two wilderness areas and adjacent to the Anza Borrego State Park at a site that is far from the remote coastal urban areas for which the generated electricity would be transmitted. (Para 20 of EH Letter re DEIS p. 4 of 41) BLM also failed to consider off-site alternatives on previously disturbed or degraded lands elsewhere in Imperial County or elsewhere in other Counties in Southern California.

Issue Number: PP-CA-OWEF-12-08-13

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Second, BLM must evaluate whether any alternative locations within the CDCA Plan are available which would meet the Project need without requiring a plan amendment. As pointed out in comments on the DEIR/S by three nationally-recognized NEPA authorities, "BLM failed to adequately analyze this factor. In fact, BLM failed to study a reasonable range of alternatives, including alternate locations, for the Project and failed to determine whether there are any Class M or I lands within the CDCA that would be adequate for large scale energy development to meet renewable portfolio "standards." Instead, BLM improperly limited its review simply to variations of the Project within the PA area thereby necessitating a CDCA Plan amendment. BLM is not barred from complying with the CDCA amendment criteria just because an applicant may have filed an application for a particular location; to do so, would render these six factors and the CDCA Plan itself irrelevant.

Issue Number: PP-CA-OWEF-12-09-7
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

Second, BLM must evaluate whether any alternative locations within the CDCA Plan are available which would meet the Project need without requiring a plan amendment. As pointed out in Viejas' comments on the DEIR/S by three nationally-recognized NEPA authorities, "BLM failed to adequately analyze this factor. In fact, BLM failed to study a reasonable range of alternatives, including alternate locations, for the Project and failed to determine whether there are any Class M or I lands within the CDCA that would be adequate for large scale energy development to meet renewable portfolio "standards." Instead, BLM improperly limited its review simply to variations of the Project within the PA area thereby necessitating a CDCA Plan amendment.

Issue Number: PP-CA-OWEF-12-10-12
Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale
Protester: Stephan C. Volker

Issue Excerpt Text:

Second, while it is true that distributed PV and CHP generation would not meet the project applicant's objective of constructing a wind energy project, NEPA does not allow agencies to use such a narrow objective to delimit which alternatives they must fully analyze in an EIS. *NPCA v. ELM*, 606 F.3d at 1070. Using wind energy development as a criterion for winnowing Project alternatives unduly precludes analysis of any other type of energy generation, many of which, like distributed PV solar, have fewer environmental impacts than wind energy. The FEIS's response to comments addressing alternatives ignores the fact that the purpose and need statement fails to meet NEPA's requirements. 40 C.F.R. § 1502.13. Therefore, the choice of what alternatives to consider could not have been an informed decision. Furthermore, the FEIS entirely fails to analyze the development of small-scale, distributed wind generation. The reviewing agencies should consider a distributed generation alternative that includes small-scale wind generation.

Issue Number: PP-CA-OWEF-12-10-9
Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale
Protester: Stephan C. Volker

Issue Excerpt Text:

BLM has dismissed the "Distributed Solar Generation" alternative as infeasible and unable to fulfill all the Project objectives, but as discussed below these criticisms are baseless. FEIS 2-48, 2-50. Further, the FEIS fails to even consider a distributed generation alternative that includes more than just solar generation. The FEIS must provide a robust analysis of distributed generation alternatives, including solar and other generation sources, that would obviate the need for the Project and thereby avoid its needless impacts. BLM unacceptably eliminated feasible -not to mention less environmentally damaging and more economically beneficial -alternatives from careful review in violation of NEPA.

Issue Number: PP-CA-OWEF-12-11-11
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

The BLM also states that they have no authority or influence over distributed generation systems. Once again, BLM misses the point of reviewing this alternative.

Issue Number: PP-CA-OWEF-12-11-13
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

A distributed generation alternative could prove that large, environmentally destructive projects like Ocotillo Wind Express are not a necessary burden on public and private lands.

Issue Number: PP-CA-OWEF-12-11-5
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

Private land Alternative:
The BLM rejected a private land alternative primarily because they claim there is not enough private land in Imperial Valley that contains adequate wind resources. The BLM failed to examine a private land alternative outside of Imperial Valley. The Environmental Protection Agency identified about 15 million acres of degraded and contaminated brownfields in the US that would be suitable for

renewable energy development.

Issue Number: PP-CA-OWEF-12-11-7

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

Distributed Generation: The BLM rejects a Distributed Generation Alternative because the "present electric grid was not designed to handle high

loads of distributed renewable energy systems." The present grid was also not designed to handle the intermittent power that is provided by wind energy. Furthermore, distributed generation is not dependent on a central grid to be effective. The FEIS also claims that Distributed Generation is only good as a supplement to renewable power. It also states that there is no mechanism to insure that sufficient energy will be generated to remove the need for projects such as Ocotillo Wind Express.

Summary

The range of alternatives for this FEIS/EIR PA is inadequate for the following reasons:

1. There is no analysis of alternate locations for the Project, such as private lands, brownfields, or MUC M or I lands outside Imperial County.
2. There is no analysis of alternative technologies, distributed energy, or conservation/energy reduction efforts.

Response

"Agencies enjoy 'considerable discretion' to define the purpose and need of a project." Nat'l Parks & Conservation Ass'n v. BLM, 606 F.3d 1058, 1070 (9th Cir. Cal. 2010). Generally, the identification of alternatives and the decision about which alternatives are carried forward by the technical and economic feasibility of any particular alternatives and its relationship to the purposes and need. These determinations are evaluated under a rule of reason.

The BLM considered and analyzed an adequate number and range of alternatives in the OWEF EIS. As stated on FEIS/EIR page 5-50: "A total of 18 potential alternatives to the Applicant's proposed project were initially considered for evaluation in the EIS/EIR, which included the original project, reduced size projects, alternative configurations/phasing of the project site, alternative sites, and other types of energy projects. Six alternatives were carried forward for detailed analysis in the EIS/EIR, including the No Project/Action Alternatives."

The BLM reviewed the action as proposed and considered a full range of alternatives within the context of the purpose and need. Since there are no areas within the CDCA that have been found or designated suitable for wind development, any wind project or application would require a plan amendment if located within the CDCA planning area. As stated, the BLM is responding to an application for a ROW under FLPMA, not generating its own action. As stated in the response to comments (RTC), "CEQ has indicated that the emphasis in determining the scope of alternatives should be on what is 'reasonable' and clarified that 'reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.'" While an action on other lands may have been practical based on the potential availability of other public land, it was determined infeasible based on the wind resources available on those other

potentially available parcels in Imperial County, California. As stated in the RTC at 5-50, "...CEQ provided further clarification of this question as it related to the Appellate Court decision for Roosevelt Campobello International Park Commission v. EPA, 684 F.2d 1034 (1st Cir. 1982). The Court determined that EPA's choice of alternative sites was 'focused by the primary objectives of the permit applicant . . . ' and that EPA properly had limited its consideration of sites to only those sites which were considered feasible, given the applicant's stated goals. The Court found that EPA's criterion for selection of alternative sites was sufficient to meet its NEPA responsibilities." Similarly, these principles do not require the BLM to consider alternate generations that might or might not exist with the larger CDCA or elsewhere in the United States as suggested in some of the excerpts above. The EIS/EIR affirmatively considered a reasonable range of alternative sites on both public and private lands; however, the BLM ultimately determined that none of those alternatives was feasible given the nature and distribution of suitable quality wind resources in the County. FEIS/EIR 2.8.1, p. 2-46.

The question of whether or how to address distributed generation has been covered in a number of recent documents. As stated in the RTC, "Current research by the DOE indicates that development of both distributed generation and utility-scale renewable energy development will be needed to meet future energy needs in the United States, along with other energy resources and energy efficiency technologies. Distributed solar generation was described and considered in Section 2.8. It was noted that the alternative would partially meet objectives (renewable energy)." The RTC further noted that distributed energy would not, however, meet the primary objective of wind power generation and is not likely to be implemented in a timeframe to meet the Renewables Portfolio Standard requirements. Given this context, the lead agencies chose to forgo further consideration of distributed generation and conservation measures as they were deemed infeasible and because such an alternative would not meet the purpose and need of the Proposed Action.

Preserve.

Impact Analysis

Issue Number: PP-CA-OWEF-12-01-11
Organization: Desert Protective Council
Protester: Terry Weiner

Issue Excerpt Text:

- The inadequacies in the environmental review for the project required by NEPA include, but are not limited, to the following:
- Complete lack of analysis of the impacts from this project on the Anza-Borrego Desert State Park (ABDSP), including visitors who frequent the area to explore the Mortero Palms and Dos Cabezas areas, lack of analysis of the impacts to the visual resources, impacts to the pervasive quiet and the wild qualities of the southern end of the ABDSP, impacts on dark skies and lack of consideration of impacts on the newly acquired ABDSP Piedras Grandes Cultural

Issue Number: PP-CA-OWEF-12-01-13
Organization: Desert Protective Council
Protester: Terry Weiner

Issue Excerpt Text:

- Failing to analyze impacts to visual resources of the surrounding wilderness areas, the De-Anza Historic Trail, the Yuha ACEC
- Failing to adequately identify and analyze the impacts to Peninsular bighorn sheep. The discussion seems to dismiss the use of the area by bighorn despite the dozens of photographs of sheep around the immediate fringes of the project and despite the fact that the western edges of the project area contain plant species, such as brittlebush (*Encelia farinosa*) that are a favorite browsing food for the sheep.

Issue Number: PP-CA-OWEF-12-01-16
Organization: Desert Protective Council
Protester: Terry Weiner

Issue Excerpt Text:

- Failing to address the fact that a large portion of the project site, north and west of highway S-2 and south of Interstate 98, is riddled with an intricate system of washes: broad and deep washes, narrow short washes; washes that weave in and out and drain into and crisscross each other. In walking across the site from north to south washes mostly trending from west to east throughout the area planned for the most dense turbine development. Even if the developer is able to avoid some of the major washes in erecting the 112 turbines, there would impacts to the washes from disturbance of the ground in between the washes of the drainage of this huge alluvial fan.
 - Failing to address the impacts to the surface waters from loss of natural washes and other features and from increased erosion.
-

Issue Number: PP-CA-OWEF-12-05-11
Organization: Laborers International Union of North America, Local Union 1184
Protester: Samuel B. Johnston

Issue Excerpt Text:

It would be ironic if emissions associated with a renewable energy project exceeded thresholds or caused unmitigated adverse impacts to the environment or human health. But without a proper analysis, there is no way for the public to make these evaluations or determinations. This violates NEPA.

Issue Number: PP-CA-OWEF-12-05-8
Organization: Laborers International Union of North America, Local Union 1184
Protester: Samuel B. Johnston

Issue Excerpt Text:

The FEIS/EIR admits: "Migratory raptor species observed on site include turkey vulture, osprey, Cooper's hawk, sharp-shinned hawk, merlin, ferruginous hawk, and Swainson's hawk." (FEIS/EIR, p. 4.21-14) However, cumulative impacts of the project on the condition of these species within the Anza-Borrego State Park are not identified or discussed.

Issue Number: PP-CA-OWEF-12-07-22
Organization: Desert Protective Council
Protester: Edie Harmon

Issue Excerpt Text:

(5) BLM's Final EIS/R failed to adequately address the variety of potential impacts to wildlife species, including the impacts of infrasound, vibrations and low frequency sound in addition to EMF on both species above the ground and for species that spend much of the time below the surface. Similarly the FEIS/R fails to adequately address the well documented concerns about the potential for adverse health impacts of these noise/sound/infrasound/EMF issues on the closest human receptors. Simply dismissing published accounts and videos documenting human and animal impacts is unwarranted and exhibits a lack of respect for the consequences of the project on all life in the project footprint and within the project vicinity.

Issue Number: PP-CA-OWEF-12-08-14
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

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 an adequate NHPA Section 106 process, which when properly done, is supposed to inform the Project location selection and the environmental document. Moreover, review of the FEIS/R by the Army Corps of Engineers and United States EPA is not complete; permit applications from the USFWS may also be pending. In addition, the FEIS/R prepared by BLM contains an inadequate analysis of the cumulative impacts associated with this Project, and other resources, as discussed in more detail elsewhere in this protest. Thus, BLM does not have a full picture of the environmental effects of amending the Plan, and it is premature for the BLM to adopt this PA.

Issue Number: PP-CA-OWEF-12-08-15
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

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 permanently destroying an area of unique tribal cultural significance to serve wealthier markets. 8

See, Ray Clark, Charles Eccleston and Owen Schmidt submitted comments critiquing the EIR's Purpose and Need and Alternatives sections. (FEIS/R, Comment Letters EC6j, EC6k and EC6l.)

- Unlike a project proposed on private lands where consideration of Project alternatives might be constrained by the availability of project lands not under the control of the applicant or the decision-making authority, this Project is on federal land under BLM jurisdiction, and alternative locations are not only under BLM's jurisdiction, but are areas which the CDCA Plan requires BLM to analyze and consider for Project alternatives. Imperial County, for its part, has declined to do such review, asserting it is not required under CEQA. Many of the affected tribes contain disadvantaged populations. The planned life of the project is 30 years, although the destruction of resources and the adverse social effects and impacts on Ms. Lucas and other tribes would be permanent.

Issue Number: PP-CA-OWEF-12-08-90
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:
Seismic and Public Safety: As stated elsewhere, the FEIS/R's conclusion that implementation of Mitigation Measure PSH-3 ensures that data on geological hazards is incorporated in the land use review process is false; this study should have been part of the EIS/R and the information from that study used to guide Project design and feasibility. Based on the information in the record, it cannot be concluded that "avoidable risks" are avoided.

Issue Number: PP-CA-OWEF-12-09-12
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:
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 permanently destroying an area of unique tribal cultural significance to serve wealthier markets while the County has declined to do such review asserting it is not required under CEQA. Many of the affected tribes contain disadvantaged populations. The planned life of the Project is 30 years, although the destruction of resources and the adverse social effects and impacts on Viejas and other tribes would be permanent.

Issue Number: PP-CA-OWEF-12-09-88
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:
Noise Element: Goal1 relates to providing an acceptable noise environment. However, the FEIS/R does not study the noise impact to tribal cultural and religious users, a sensitive receptor, within the PA area. Viejas disagrees that the Mitigation Measures Noise-1 through Noise-5 would lessen and avoid such impacts to its Tribal members. Viejas suggests the Project utilize a standard appropriate for outdoor religious use.

Issue Number: PP-CA-OWEF-12-10-16
Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale
Protester: Stephan C. Volker

Issue Excerpt Text:
One of the FEIS' most glaring omissions is its failure to adequately assess the impacts of infra-and low-frequency noise (ILFN). The FEIS not only fails to properly analyze the impacts of ILFN, it fails to even calculate or discuss how much ILFN the Project would produce. The Project is likely to produce enough ILFN to cause a significant adverse environmental impact as discussed below. BLM's failure to identify, let alone analyze and mitigate, this impact violates NEPA. BLM has similarly contravened NEPA by failing to accurately calculate and present the Project's audible noise impacts. On October 6, 2011 wind turbine noise expert Richard James submitted to BLM and the County an extensive wind turbine noise impact review of the Project which Conservation Groups incorporate herein by reference. The FEIS claims that its discussion of audible noise impacts meets the requirements for NEPA. FEIS 5-53, App. N 80. As shown below, however, ILFN impacts can be significant without being audible. Because ILFN has impacts when it is inaudible, the FEIS's discussion of audible impacts cannot suffice.

Issue Number: PP-CA-OWEF-12-10-18
Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale
Protester: Stephan C. Volker

Issue Excerpt Text:
The FEIR fails to address the impacts of the Project's

ILFN on PBS even though they use the Project site and adjacent areas.

Issue Number: PP-CA-OWEF-12-10-19

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

The FEIS provides only a very cursory discussion of ILFN and focuses almost entirely on "Wind Turbine Syndrome." FEIS 4, 11-13. Based on this deficient review, it concludes that there is not enough evidence to support "a dose-response relationship, and more research is needed to identify whether wind turbine noise and vibration may cause the reported symptoms." Id. The FEIS bases its conclusion on only one study (the aforementioned 2009 report by Nina Pierpont), which it dismisses as being a "small clinical case study [that] does not support a dose-response relationship" FEIS 3.12-6. This selective analysis of just one study stymies the informational goals of NEPA and in no way constitutes a "hard look" at the Project's ILFN noise pollution impacts as required by these statutes.

Issue Number: PP-CA-OWEF-12-10-20

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

The FEIS' brief discussion of the scientific literature referenced by commenters on the subject does not meet the requirements for an EIS as described above. FEIS 5-53 to 55. Indeed, the discussion is very misleading. Id. While it indicates that Leventhall found that "[ILFN] is not normally a disturbance," it ignores his other articles, one of which found that some people do experience "real and stressful" effects. 16 Furthermore, the FEIS discussion again focuses on only a single study, while ignoring the large and growing body of scientific research documenting ILFN impacts that was provided by Conservation Groups and other commenters. FEIS 5-53.

Issue Number: PP-CA-OWEF-12-10-21

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna

Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

Furthermore, the reviewing agencies' failure to analyze, quantify or qualify the Project's ILFN impacts is not excused, as they assert, by the lack of "recognized regulatory guidance or thresholds related to [Wind Turbine Syndrome]." FEIS 4.11-13. Under NEPA, BLM must use the best available science to address unique or uncertain impacts. 40 C.E.R. § 1500.1; Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998)

Issue Number: PP-CA-OWEF-12-10-23

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

ii. A-Weighted and Averaged Noise Measurements Are Insufficient to Capture ILFN

As shown in FEIS Sections 3.10 and 4.9, all the noise measurements presented and analyzed are A-weighted. Furthermore, many of them are time-averaged. FEIS 4.9-2 ("The primary indicator of noise levels for this analysis is the A-weighted average noise level measures in decibels (dBA Leq). The one-hour average noise level (dBA Leq [I-hour]) is often used to characterize ongoing operations or long-term effects."). These types of measurements are inadequate for evaluating ILFN production and exposure.

Issue Number: PP-CA-OWEF-12-10-26

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

Thus, in order to better measure ILFN and fully take into account the impacts of inaudible sound pressures, the reviewing agencies should (1) utilize non-averaged noise measurements in addition to the averaged measurements they use for other purposes, and (2) use C-, G-and/or Z-weighted measurements, which give more weight to infrasound and lower frequencies, in addition to A-weighted measurements (which are useful for measuring audible noise impacts).

Issue Number: PP-CA-OWEF-12-10-32

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

Thus, in order to better measure ILFN and fully take into account the impacts of inaudible sound pressures, the reviewing agencies should (1) utilize non-averaged noise measurements in addition to the averaged measurements they use for other purposes, and (2) use C-, G-and/or Z-weighted measurements, which give more weight to infrasound and lower frequencies, in addition to A-weighted measurements (which are useful for measuring audible noise impacts).

Issue Number: PP-CA-OWEF-12-10-35

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

Biological Impacts

There are numerous biological impacts BLM failed to adequately analyze in the FEIS, most prominently the Project's impacts to birds and bats. These impacts - and the EIS's insufficient analysis of them - are well documented by Jim Wiegand, in his October 6, 2011 comment letter to the reviewing agencies on behalf of Save the Eagles International which we incorporate herein by reference. The Project's biological impacts are insufficiently disclosed and evaluated in the FEIS, as the following discussion demonstrates.

Issue Number: PP-CA-OWEF-12-10-39

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

Hydrological Impacts

The proposed location of the Ocotillo Project is very arid and both surface and groundwater supplies are severely limited. Furthermore, the Project is located atop the Ocotillo-Coyote Wells Sole Source Aquifer. FEIS 3.20-8. Therefore it is critically important that the reviewing agencies ensure that the Project would not further exacerbate the area's severe surface and

groundwater constraints. The FEIS here fails to adequately analyze water supply and other hydrologic impacts. As San Diego County has pointed out in its comments to Imperial County, because the FEIS is deficient, "it is not possible to accurately comment on specific groundwater issues that might be associated with this proposal." San Diego County Department of Planning and Land Use comment letter submitted to Imperial County and dated March 27, 2012 (attached as Exhibit 8 hereto) at 1. 1.

Issue Number: PP-CA-OWEF-12-11-18

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

Valley fever spore are commonly stirred up in arid environments by industrial scraping. The FEIS also does not acknowledge the fact that two new cases of coccidioidomycosis occurred in the community of Ocotillo within the last years.

Issue Number: PP-CA-OWEF-12-11-20

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

The risk of *coccidioidomycosis* did not receive an adequate review in the FEIS.

Issue Number: PP-CA-OWEF-12-11-36

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

The FEIS does not discuss the potential impacts that herbicides used to control weeds would have on flat-tails. Would the spread of invasive weeds from intensive ground disturbance impact the habitat for the ants or the food source that the flat-tail horned lizard depends on?

Issue Number: PP-CA-OWEF-12-11-45

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

Burrowing owls: (*Athene cunicularia*)

The FEIS fails to discuss potential collision of burrowing owls with wind turbines during Operation and Maintenance. Burrowing owl collisions with

wind turbines are documented at Altamont
Pass. Section 6.3 - Cumulative Impacts Analysis Total
Number of Submissions: 4
Total Number of Comments: 11

Issue Number: PP-CA-OWEF-12-04-19
Organization: Quechan Indian Tribe of the Fort
Yuma Indian Reservation
Protester: Frank R. Jozwiak and Thane D.
Somerville

Issue Excerpt Text:

ISSUE #5: The Tribe Protests BLM's Proposed Plan
Amendment Because the
Plan Amendment Was Issued Without An Adequate
Evaluation of the
Cumulative Impact on Cultural Resources Associated
With the Ocotillo
Project In Conjunction With Other Past, Present, and
Reasonably
Foreseeable Developments Within the CDCA.
BLM has supported the Proposed Plan Amendment
through analysis contained in the
Final Environmental Impact Statement (FEIS)
published on March 9, 2012. That FEIS lacks any
substantive analysis of the impact to cultural
resources and values that will result from the
extensive proposed development of renewable energy
projects within the California Desert
Conservation Area. Any final decision on the
Proposed Plan Amendment and the ROD for the
Ocotillo Project must await a complete analysis of
how this project will interact with other
impacts on cultural resources in the CDCA.

Issue Number: PP-CA-OWEF-12-04-21
Organization: Quechan Indian Tribe of the Fort
Yuma Indian Reservation
Protester: Frank R. Jozwiak and Thane D.
Somerville

Issue Excerpt Text:

The FEIS for the Proposed Plan Amendment 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 Ocotillo Project,
are expected to impact the cultural resources of the
surrounding area or the broader California
Desert Conservation Area. 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 discussion of cumulative impacts
offers nothing more than the kind of
obvious, cursory analysis that has been repeatedly
rejected by the Ninth Circuit Court of
Appeals.

Issue Number: PP-CA-OWEF-12-04-23
Organization: Quechan Indian Tribe of the Fort
Yuma Indian Reservation
Protester: Frank R. Jozwiak and Thane D.
Somerville

Issue Excerpt Text:

Also, the geographic area selected for the cultural
resource cumulative impact analysis 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 Ocotillo Wind Project
interacts with other projects that impact
cultural resources within the entire planning area -
not just an arbitrarily defined sub-area.

Issue Number: PP-CA-OWEF-12-04-25
Organization: Quechan Indian Tribe of the Fort
Yuma Indian Reservation
Protester: Frank R. Jozwiak and Thane D.
Somerville

Issue Excerpt Text:

The purpose of a cumulative impacts analysis is not
just to recite a list of
projects, as BLM has done here, but to provide a
"hard look" and "quantified and detailed
information" about how the addition of this project
will add to the other impacts on lands
protected by the CDCA. The FEIS is inadequate in
this respect.

Issue Number: PP-CA-OWEF-12-08-43

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

ISSUE #5: The PA Was Issued Without an Adequate Evaluation of the Cumulative Impact on Tribal Cultural Resources Associated With the Project in Conjunction With Other Past, Present, and Reasonably Foreseeable Developments within the CDCA.

BLM supports the PA through analysis contained in the FEIS/R dated February 2012 and published in March 2012. That FEIS/R lacks any substantive analysis of the impact to tribal cultural resources that will result from the extensive proposed development of renewable energy projects within the California Desert Conservation Area." Any final action on the PA and the ROD for the Project must await a complete analysis of how this project will interact with other impacts on cultural resources in the CDCA.

Issue Number: PP-CA-OWEF-12-08-45

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

It is true that the FEIS for the PA lists several past, present, and reasonably foreseeable projects on various lands near the Project area. However, the geographic area selected for the cultural resource cumulative impact analysis (the APE plus a 10-mile radius around the Project Site) is unreasonably narrow in scope, in addition to being arbitrary and capricious. BLM offers insufficient rationale in the FEIS/R for how it defined the geographic scope of the cultural resource cumulative impact analysis or why it chose such a limited area. Second, the list is not comprehensive (does not reference past projects such as the Southwest Powerlink, Baja Norte Pipeline, lining of the All American Canal, etc., for example, some of which are within the radius described above). Third, there is no substantive quantification or detailed information or analysis of how these projects, in conjunction with the Project, are expected to impact tribal cultural resources, the PA area or the broader CDCA. See, FEIS/R, Section 4.4. 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 CDCA will be affected by the cumulative effect of all these projects.

Nonetheless, the FEIS/R reports that "Despite the correct implementation of the mitigation measures outlined here, [the Project's] incremental contribution to cumulative impacts to cultural resources would be adverse." FEIS/R, Page 4.4-34. This is the type of obvious, cursory analysis rejected by the Ninth Circuit Court of Appeals in *Te-Moak*.

Issue Number: PP-CA-OWEF-12-09-50

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

ISSUE #5: Viejas Protests BLM's PA Because the PA Was Issued Without An Adequate Evaluation of the Cumulative Impact on Tribal Cultural Resources Associated With the Project in Conjunction With Other Past. Present and Reasonably Foreseeable Developments Within the CDCA.

Issue Number: PP-CA-OWEF-12-09-53

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

It is true that the FEIS for the PA lists several past, present, and reasonably foreseeable projects on various lands near the Project area. However, the geographic area selected for the cultural resource cumulative impact analysis (the APE plus a 10-mile radius around the Project site) is unreasonably narrow in scope, in addition to being arbitrary and capricious. BLM offers insufficient rationale in the FEIS/R for how it defined the geographic scope of the cultural resource cumulative impact analysis or why it chose such a limited area. Second, the list is not comprehensive (does not reference past projects such as the Southwest Powerlink, Baja Norte Pipeline, lining of the All American Canal, etc., for example, some of which are within the radius described above).

Issue Number: PP-CA-OWEF-12-09-55

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Third, there is no substantive quantification or detailed information or analysis of how these projects, in conjunction with the Project, are expected to impact tribal cultural resources, the PA area or the

broader California Desert Conservation Area. See, FEIS/R, Section 4.4. 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.

Issue Number: PP-CA-OWEF-12-09-57

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Finally, the California Desert, and the broader Southwestern United States, is targeted for substantial renewable energy development, in addition to the usual slate of mining, farming, utility, irrigation, housing projects and OHV and Homeland Security activity. It is obvious to Viejas that the cultural landscape is being diminished at a rapid rate through projects and activities located on public lands managed by BLM. The purpose of a cumulative

impact analysis is not just to recite a list of projects, as BLM has done here, but to provide a "hard look" and "quantified and detailed information" about how the addition of this Project will add to the other impacts. The FEIS/R is inadequate in this respect and as such, cannot support the requested PA.

Issue Number: PP-CA-OWEF-12-10-36

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

First, the FEIS fails to properly analyze the Project's contribution to total cumulative golden eagle mortality in California, as it is likely that the California golden eagle population will be driven close to extinction if many more wind farms and other anthropogenic sources of eagle mortality are developed in the state.

Summary

The impact analysis in the EIS/EIR PA is inadequate for the following resources and concerns:

1. Adverse social and economic impacts on Tribes
2. Noise
3. Surface waters, natural washes and erosion
4. Failure to acknowledge presence of Peninsula Bighorn Sheep
5. Visual resource, noise, and light pollution impacts to APDSP
6. Impacts to raptors
7. Impacts to humans and animals from infrasound and low frequency noise
8. Risks associated with geologic hazards
9. Selective inclusion of some studies and failure to include others regarding wind turbine syndrome and ILFN
10. Failure to assess diseases, such as diabetes and valley fever, among others
11. Insufficient analysis of impacts to birds and bats
12. Impacts on water supplies, flat tailed horned lizard (FTHL), burrowing owls

Response

As discussed in Section 4.13 of the FEIS, impacts on social and economic issues are focused on expenditures, income, employment and tax revenue. The tribal concerns as stated in the protest revolve around the religious context of the cultural landscape. There are no impacts to tribal

economies or other socioeconomic issues as it pertains to the environmental analysis. The tribes concerns are fully discussed in Section 4.04 and in Section 5.0 with respect to government-to-government consultation. Moreover, as noted in section 3.4.1.2 of the FEIS/EIR PA (pages 3.4-14 to 3.4-17), the tribes have only provided limited information about the cultural or religious uses of the project site, that would enable the BLM to analyze those impacts under NEPA and the NHPA.

The BLM has adequately examined impacts from Noise in FEIS Section 4.9, pages 4.9-1 and 2. Since the impacts of noise and vibration are included in the existing setting and analysis sections of the FEIS/EIR, the BLM has disclosed the impact of the action fully. Section 3.10 and 4.9 explain the impacts and the studies that were performed to address the noise that would occur during construction and from operation of the wind turbines. With respect to the latest science regarding the impacts of noise related to wind power generation, the debate continues regarding the impacts of such noise on the health and safety of the public.

The impacts associated with the ephemeral washes and drainages on the project site were fully analyzed in the Draft and Final EIS. The FEIS covers the topics in specific detail following continued coordination with the U.S. Army Corps of Engineers (USACE) and the requirements of the 404-b-1 permit and the jurisdictional report that established the area of impact under the USACE rules. The analysis of the construction of the project is located in Section 4.19 of the FEIS with a full description of the measures required to Comply with the Clean Water Act (CWA) *et al.*

The FEIS reiterates the findings of the Helix/Western report that indicates no presence of Peninsula Bighorn Sheep on land currently included in the project area. As stated in Section 4.21 of the FEIS, “The 2011 HELIX/Western Tracking Institute PBS study indicates that the proposed OWEF site is not currently occupied with the exception of the area of the I-8 Island in the southwest portion of Site 1—where no OWEF project components are proposed (Figure 4.21-3). No recent PBS sign has been found in the PBS study areas except for the I-8 Island and along the portion of Devil’s Canyon that lie to the south of Site 1.” The analysis explains that the project would not impact any critical habitat, but may have a potential direct impact to Essential Habitat and lambing areas. With respect to those impacts the FWS has included a specific requirement that construction on specific turbines located in the vicinity of lambing areas be restricted to those months outside the lambing period.

As the project is located close to an outstanding resource such as ABDSP, the BLM felt it necessary to address impacts to the park in a special section within the environmental analysis. The analyses of impacts to the park were discussed in Section 4.15.8.1. That Section fully describes the impacts as described in the Parks comments made during scoping and on the draft document. The Section includes specific information on impacts to Golden Eagles, Peninsular Bighorn Sheep, FTHL, barefoot banded gecko, the CNPS listed plants, view sheds as described in Section 4.18, Paleontological Resources as described in Section 4.10, Air Quality, Cultural Resources, and cumulative impacts. The BLM’s analysis of the park specific impacts was demonstrated throughout the document with the reiteration of those considerations included in this special section.

In Section 4.21 of the FEIS, there is a breakdown of the potential cumulative impacts to other migratory birds and raptors. The discussion includes the mitigation measures to be employed to reduce impacts and to ensure the continued monitoring of the project to ensure that specific species populations are not being affected. With the measures and the adaptive management approach included in the project, the BLM is confident that impacts to raptors and other bird and bat species will be reduced, and information that is gathered will be used to modify the operations of the project in the event of increased mortality.

Responses related to impacts to the tribes and NHPA Section 106 compliance can be found in the response to Issue 33 – Tribal Concerns.

The discussion of Geologic Hazards is included in Section 4.14 of the FEIS which states “...the proposed OWEF site is not located close enough to any of the surrounding hillside mountains to be affected by either a debris flow or a landslide.” The measure required for foundation design is to include a detailed, site-specific analysis of the turbine locations so that the design of the foundations will be as accurate as possible. General Geotechnical investigations done at this stage would not provide the detailed information required to design the large intricate turbine foundations.

Impacts with regard to public health and safety were fully analyzed in Section 4.11 of the FEIS. The analysis contained detailed descriptions of the project’s “potential impacts from the Proposed Action to public health for residents of Imperial County with respect to disease vectors, pesticide use, shadow flicker, Wind Turbine Syndrome, and electromagnetic fields (see “Public Health” under “Operation and Maintenance,” Section 4.11.3). Potential impacts were discussed as they compared to changes in existing conditions. Several controls and programs are already in place within the County such as vector control activities.”

Water supplies are identified and discussed in Section 4.19 of the FEIS. Property values are covered in Section 4.13 and Section 4.21 adequately covers impacts to FTHL and burrowing owls. The impacts to burrowing owls from collision with the wind turbines are discussed at 4.21-13. There is insufficient data to accurately depict the potential for impact based on limited population data.

There are approximately 2,752.3 acres of FTHL-occupied habitat (including assumed occupied habitat, as described in Section 3.23) in the proposed OWEF site. The proposed OWEF would permanently impact approximately 23.9 acres of this habitat and would temporarily impact approximately 108.4 acres of this habitat (Figure 4.21-1). Impacts to occupied FTHL habitat would be mitigated by the implementation of Mitigation Measures Air-1 (*Implement a Fugitive Dust Control Plan*), Wild-1a (*Compliance monitoring by the Designated Biologist*), Wild-1b (*Biological monitoring by a FTHL-experienced biologist*), Wild-1c (*Worker Education Awareness Program*), Wild-1d (*Delineating work areas and confining work activities to approved work areas*), Wild-1e (*15 mile-per-hour speed limit along access roads in FTHL habitat*), Wild-1h (*Compensation for habitat loss in accordance with the FTHL Rangewide Management Strategy*), Veg-1a (*Minimizing construction-related impacts to the maximum extent practicable*), and Veg-2b (*Revegetating temporarily disturbed areas*). Mitigation Measure Wild-

1h requires compensation for this habitat loss in accordance with the FTHL Rangewide Management Strategy.

The proposed OWEF would indirectly affect FTHL if it resulted in the introduction of invasive weeds that create vegetative cover that is too dense for FTHL to navigate. As mentioned above, disturbance of soil and vegetation over a total of 132.3 acres of occupied FTHL habitat on the proposed OWEF site will take place during construction. This disturbance can encourage invasive weeds to encroach into the habitat from areas outside the site. In addition, construction vehicles and equipment can transport invasive weed seeds and vegetative parts, within their tires and other various parts under the vehicles, to the proposed OWEF site from other regions. Invasive weed species have the potential to out-compete native species and change the overall quality of the habitat. Habitat degradation could occur through the spread of existing invasive weed species within the area of the proposed OWEF site (e.g., Saharan mustard [*Brassica tournefortii*]) or through the introduction of new invasive weed species to the area of the proposed OWEF site. Impacts associated with introduction or spread of invasive weed species would be mitigated by the implementation of Mitigation Measures Wild-1a (*Compliance monitoring by the Designated Biologist*), Wild-1b (*Biological monitoring by a FTHL-experienced biologist*), Wild-1c (*Worker Education Awareness Program*), Veg-1d (*Implement an Integrated Weed Management Plan*), and Veg-2b (*Revegetate temporarily disturbed areas*).

Note: An incorrect version of the Weed Management Plan was inadvertently included in the FEIS; however, the correct version to be included in the mitigation package includes a discussion of impacts to FTHL with regard to pesticide usage.

The BLM has fully disclosed any potential impact to property values in Section 4.13.3.1 of the FEIS/EIR. In response to scoping comments, this analysis was included to discuss the results of the latest research which indicates "...that the potential for environmental concerns associated with projects to have an effect on property value is usually smaller than anticipated and essentially impossible to quantify due to the individuality of properties and their respective neighborhoods, as well as differences in the personal preferences of individual buyers and the weight of other factors that contribute to a person's decision to purchase a property." The Berkeley report is the largest study of the impacts of energy development on property value to date and as indicated, the impacts are smaller than anticipated.

Cumulative Impact Analysis

Issue Number: PP-CA-OWEF-12-05-4
Organization: Laborers International Union of North America, Local Union 1184
Protester: Samuel B. Johnston

Issue Excerpt Text:
The Response to Comments section of the FEIS/EIR

purports to justify the cumulative impacts analysis with respect to the State Park. (Response to Comment letter 0-10-05, p. 79) However, the Response is conclusory and fails to serve the purpose of a response to comments, and it fails to justify the deficient cumulative impacts analysis respecting impacts on the State Park.

Issue Number: PP-CA-OWEF-12-08-54
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

Moreover, the Final Report reveals that documented Golden Eagle flight paths and perch locations coincide with some of the recorded sacred and more culturally dense areas within the PA area, including recorded geoglyphs and cremation areas. Ms. Lucas disagrees with the conclusions in the Final Report regarding the Project not contributing to cumulative impacts to nest sites. (Appendix L9, page 34.) Ms. Lucas believes that impacts to Golden Eagles must consider the symbiotic relationship between the Eagles, these particular sacred places, and the tribes, and not just be measured on an assumed regional net loss basis, particularly where no regional data is provided. (Appendix L9, page 35.) It would not surprise her if the Golden Eagles come to these areas to be with the Old Folks and the sacred areas; this is part of the intangible essence of these kinds of tribal cultural landscapes. Finally, Ms. Lucas strongly objects to any take permit for Golden Eagles from this or any other CDCA Limited Use area and believes that should this Project be approved, that monitoring should be for the life of the Project, not merely for three years as proposed.

In sum, this revised technical Report should have been circulated for public review and comment, particularly given the known tribal sensitivities towards the Golden Eagle. That it was not circulated is a violation of CEQA, NEPA and the NHPA and is another reason why the PA is inconsistent with the applicable Class L Land Use Designation.

Issue Number: PP-CA-OWEF-12-09-75
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

Comment Excerpt Text:

Moreover, another change from the Draft to the Final EIS/R, is that the final documents state that SDG&E intends to construct and operate a switchyard independently from the Project and as such the post-construction monitoring and mitigation measures identified for the Project do not apply to the SDG&E facilities (compare DEIS/R, Section 2.1 with FEIS/R, page 2_6). This new information should have triggered the recirculation of the environmental documents or preparation of supplemental environmental review to explain the separate environmental, monitoring and mitigation processes for the SDG&E parts of the Project that are apparently being piecemealed out from the Project at the very end of the NEPA/CEQ processes and the significant Project revisions in the Water/Watershed Discussion (linking one temporary pond and up to ten 12,000 gallon temporary water tanks in the PA area)(FEIS/R, page 2-12) and the new Utility Routing discussion at FEIS/R, page 2-8.

Issue Number: PP-CA-OWEF-12-09-86
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

Goal 4 regarding minimizing the potential for land hazards cannot be substantiated as the soils, seismic and geotechnical studies have been deferred.⁴⁰ Moreover, these studies should have been completed and circulated with the DEIS/R, but were not, thereby depriving a concerned public the opportunity to review the findings prior to Project approval.

Summary

The analysis of cumulative impacts is inadequate with regard to the following:

1. Failure to take a "hard look" using quantified and detailed information
2. Narrowing the region of cumulative effects analysis for cultural resources to a ten-mile radius around the Project's APE is arbitrary and capricious;
3. Non substantive treatment of impacts and overly narrow scope for cultural resources analysis;
4. Failure to properly analyze Golden Eagle mortality; and

5. Failure to adequately consider impacts to the Anzo-Borrogo Desert State Park.

Response

The EIS/EIR PA did an adequate job of assessing the direct, indirect and cumulative effects of adopting the plan amendment to the CDCA. In response to the discussion regarding cultural resources the BLM found that since the project was designed to avoid direct physical impacts to all identified cultural resources, the context of the cumulative impact analysis was focused on viewshed/landscape-level impacts. Given this focus and as explained in the response to comments, "[b]ecause the visibility of the proposed OWEF diminishes substantially beyond ten miles (see Figure 4.18-1, Project Viewshed Map), a ten-mile radius around the OWEF site represents an appropriate geographic limit for the cumulative impact analysis for cultural resources." Moreover, effects on the identified TCP within the project's APE were analyzed to the extent information was provide about characteristics of the TCP that make it significant, including the contribution of individual resources to the TCP.

The issue regarding the preparation of the cultural resources inventory has been fully reviewed, and the final cultural resources survey report has been reviewed by the BLM and found to be sufficient. The BLM has also taken into account the likelihood of post-review discoveries and unanticipated effects. The BLM has developed a treatment and discovery plan to address such issues that will be incorporated as a requirement of any approval of the Project as part of the Project's MOA.

The BLM along with the FWS reviewed the applicant's proposal with regard to impacts to the Golden Eagle and found that their proposed measures would result in a reduced likelihood of impacts to the species. Because the review of impacts to Golden Eagles is considered in a geographical context, with respect to the breeding population, reviewing the project impacts on a statewide basis would be infeasible and not relevant to the project-specific analysis. There is not sufficient information with regard to migration patterns and nesting habits of different populations to include disparity populations in a project specific analysis, even on a wide-ranging species such as the Golden Eagle. With study results only identifying one eagle territory within a ten-mile radius, the BLM along with the FWS determined that the impact to the population would be reduced with the proposed mitigation measures and that analysis of the statewide population would be impractical based on the existing science.

As stated in the response to comments on the DEIS/EIR, "The EIS/EIR contains a comprehensive analysis of cumulative impacts in accordance with the requirements of NEPA and CEQA. Section 4.1 of the EIS/EIR contains a list of reasonably foreseeable projects within the potential area of cumulative effect, including other projects in proximity to Anza-Borrogo Desert State Park. The potential for the impacts caused by the proposed project to combine with similar effects of other projects is analyzed throughout Chapter 4 of the EIS/EIR. The comment asserts that the cumulative impact analysis is somehow inadequate, but does not explain the basis for this assertion. Please note the purpose of the impact analysis, including cumulative impact

analysis, is to describe impacts on the environment, not impacts on individual facilities or properties. The Lead Agencies believe that the cumulative impact analysis in the EIS/EIR has been prepared properly and satisfies the requirements of both NEPA and CEQA. Your concerns will be considered by the Lead Agency decision-makers.”

Need for Additional Comment Opportunity

Issue Number: PP-A-OWEF-12-09-75
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Comment Excerpt Text:

Moreover, another change from the Draft to the Final EIS/R, is that the final documents state that SDG&E intends to construct and operate a switchyard independently from the Project and as such the post-construction monitoring and mitigation measures identified for the Project do not apply to the SDG&E facilities (compare DEIS/R, Section 2.1 with FEIS/R, page 2_6). This new information should have triggered the recirculation of the environmental documents or preparation of supplemental environmental review to explain the separate environmental, monitoring and mitigation processes for the SDG&E parts of the Project that are apparently being piecemealed out from the Project at the very end of the NEPA/CEQ processes and the significant Project revisions in the Water/Watershed Discussion (linking one temporary pond and up to ten

12,000 gallon temporary water storage tanks in the PA area)(FEIS/R, page 2-12) and the new Utility Routing discussion at FEIS/R, page 2-8.

Issue Number: PP-A-OWEF-12-09-86
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Comment Excerpt Text:

Goal 4 regarding minimizing the potential for land hazards cannot be substantiated as the soils, seismic and geotechnical studies have been deferred.⁴⁰ Moreover, these studies should have been completed and circulated with the DEIS/R, but were not, thereby depriving a concerned public the opportunity to review the findings prior to Project approval.

Issue Number: PP-CA-OWEF-12-08-54
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Comment Excerpt Text:

In sum, this revised technical Report should have been circulated for public review and comment, particularly given the known tribal sensitivities towards the Golden Eagle. That it was not circulated is a violation of CEQA, NEPA and the NHPA and is another reason why the PA is inconsistent with the applicable Class L Land Use Designation.

Summary

The FEIS/EIR PA needs to be recirculated for additional comment for the following reasons:

1. The change to independently operated SDG&E switch yard facilities in the FEIS
 2. Failure to include hazards studies and Golden Eagle report that require public comment
-

Response

The changes made between the Draft and Final EIS/EIR PA do not rise to the level of requiring additional public comment in order for a decision to be made on whether or not to amend the CDCA Plan for wind energy development.

A supplemental EIS, as defined by the CEQ Regulations 40 CFR 1502.9, is not warranted. There have not been substantial changes in the proposed action that are relevant to environmental concerns, nor are there any significant new circumstances or information relevant to environmental concerns. According to the BLM NEPA Handbook, the agency may use a Determination of NEPA Adequacy 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). The analysis provided in the FEIS/EIR PA is adequate to support the Plan Amendment decision and the additional information in the FEIS does not represent a substantial change to the potential impacts informing the Plan Amendment decision here.

With respect to the proposal for SDG&E to construct and operate the substation, the project fully analyzed the substation construction, operation and maintenance, and decommissioning in the EIS. Functionally, the substation described in the Final EIS/EIR was the same as the one analyzed in the Draft EIS/EIR. What changed between draft and final was the party projected to ultimately own/operate the site. As explained in the Final EIS/EIR, the applicant will prepare the substation site for construction and then will turn over construction to SDG&E. The grant, if one is issued, would be issued to the applicant, SDG&E would construct the site as the applicant's contractor, and ultimately the site and associated portion of the ROW grant would be assigned from the Applicant to SDG&E subject to the applicable regulations and the same terms and conditions and with the same stipulations as applicable to the Applicant. No new mitigation or impact would result in the assignment of a grant from one holder to another and the assignee is required to comply with all the same terms and conditions as the original holder.

The Eagle Conservation Plan was included as Appendix L9 in the Final EIS in order to inform the public as to the prescriptions and measures that are proposed by the applicant. Subsequent studies will inform the agencies to better understand the implementation and state-of-the-art adaptive management measures included as part of the Eagle Conservation Plan that will be used to continually improve the management of the project in regard to eagles.

Specific geotechnical studies are required to design specific turbine foundations correctly. Doing project level geotechnical review without considering site specific conditions would not yield the correct information for individual turbine foundation design, even though they are sufficient to assess the overall impact of the Project on geotechnical resources. Site-specific geotechnical testing will be conducted as outlined in the plan of development to finalize foundation designs. The applicant would also be required to comply with the most stringent design standards found in the applicable building codes and plan of development. Further reports would not additionally

inform the public or the decision makers based on the level of detail. Micro siting of the turbines along with review of the final turbine geotechnical reports will allow for adaptive measures to properly place the foundations for specific turbines in areas and in ways that will support the turbine in the safest manner.

FLPMA

Issue Number: PP-CA-OWEF-12-01-7

Organization: Desert Protective Council

Protester: Terry Weiner

Issue Excerpt Text:

- The proposed plan amendment is not consistent with FLPMA, which requires BLM to prevent unnecessary and undue degradation of public lands. 43 U.S.C. 1732(b). The BLM has failed to show that it is necessary to approve the industrial-scale wind energy generating facility on this site and that there are no other suitable alternatives within or outside of the CDCA.

Issue Number: PP-CA-OWEF-12-01-8

Organization: Desert Protective Council

Protester: Terry Weiner

Issue Excerpt Text:

- The proposed Plan amendment is not consistent with FLPMA's planning provisions which require that in developing and revising land use plans, the BLM consider many factors and use a "systematic interdisciplinary approach to achieve consideration of physical, biological, economic, and other sciences....., consider the relative scarcity of values involved and the availability of alternative means and sites for realization of those values." 43 U.S.C. 1712 (c).

Issue Number: PP-CA-OWEF-12-03-14

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

Comment Excerpt Text:

- The proposed plan amendment is not consistent with FLPMA which requires BLM to prevent unnecessary or undue degradation of public lands. 43 U.S.C § 1732(b). The BLM has failed to show that it is "necessary" or even appropriate to approve the proposed large-scale industrial wind project on these

MUC class L lands in sensitive wildlife habitat adjacent to parks and wilderness or that there are no other suitable alternative sites within the CDCA or elsewhere.

Issue Number: PP-CA-OWEF-12-03-15

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

- The proposed Plan amendment is not consistent with FLPMA's planning provisions which require that in developing and revising land use plans, the BLM consider many factors and "use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences ... consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values." 43 U.S.C. § 1712(c).

Issue Number: PP-CA-OWEF-12-03-16

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

It is also inconsistent with the FLPMA provisions which contemplate that BLM will prepare and maintain adequate inventory data on the resources of an area and that information be used to inform the planning process. 43 U.S.C. § 171 I(a); 43

U.S.C. § 1701(a)(2). BLM has not prepared or maintained an adequate inventory of resources on BLM lands in the CDCA in general or this area in particular. The lack of comprehensive data undermines analysis of how the proposed plan amendment would affect both the resources on site and also undermines the BLM's ability to take the needed "systematic approach" or "integrated consideration" to planning or plan amendments on the public lands in this area overall.

Issue Number: PP-CA-OWEF-12-03-20

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

• Failing to prepare and maintain an inventory of public land resources, BLM also failed to adequately address the resources of this area in reviewing the proposed plan amendment. See *Center for Biological Diversity v. Bureau of Land Management*, 422 F.Supp.2d 1115, 1166-67 (N.D. Cal. 2006) (discussing need for BLM to take into account known resources in making management decisions); *ONDA v. Rasmussen*, 451 F.Supp.2d 1202, 1212-13 (D. Or. 2006) (finding that BLM did not take a hard look under NEPA by relying on outdated inventories and such reliance was inconsistent with BLM's statutory obligations to engage in a continuing inventory under FLPMA).

Issue Number: PP-CA-OWEF-12-04-31

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

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).

Issue Number: PP-CA-OWEF-12-07-14

Organization: Desert Protective Council

Protester: Edie Harmon

Issue Excerpt Text:

For BLM to decide to deny the proposed wind energy project seems entirely consistent with the intent of Congress when it enacted the Federal Land Management Policy Act. The text of 43 CFR 1701 (8) follows:

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use; (43 CFR 170 I)

Protest of Edie Harmon re PRMPA to CDCA Plan re OWEF 5 of DEIS Appendix B Sec. B.4.D referring to FLPMA stresses the importance of encouraging collaboration and public participation throughout the

planning process." (DEIS V. 11 at B-5 and FEIS Vol. 3 B.4.D, emphasis added.) However, this was not done when the public was not permitted to share oral scoping comments at the Scoping meeting in Ocotillo.

Issue Number: PP-CA-OWEF-12-07-19

Organization: Desert Protective Council

Protester: Edie Harmon

Issue Excerpt Text:

(2) The proposed CDCA plan amendment for the OWEF industrial wind turbine project is not consistent with FLPMA which requires BLM to prevent unnecessary and undue degradation of public lands. 43 U.S.C. § 1732(b). The BLM has failed to show that it is necessary to approve the proposed large-scale industrial wind turbine project on this site and/or that there are no other suitable alternative sites for energy production located elsewhere within the CDCA on either private or public lands.

Issue Number: PP-CA-OWEF-12-07-9

Organization: Desert Protective Council

Protester: Edie Harmon

Indeed, text of the FEIS at 1-3 in BLM's Purpose mischaracterizes the intent of FLPMA Section 103 by limiting the text to only one very small portion of Section 103 when it says: "takes into account the long term needs of future generations for renewable and non-renewable resources." (FEIS 1-3, and 1-8). EH cmts. p. 7 of 41).

Issue Number: PP-CA-OWEF-12-10-48

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

FLPMA mandates that "[i]n managing the public lands the Secretary shall ... take any action necessary to prevent unnecessary or undue degradation of the lands." Jd § 1732(b).

Contrary to these mandates, the Plan Amendment approves a massive wind energy project on pristine desert land where it will be visible for miles and degrade, impair or destroy countless resources. The CDCA Plan Amendment's allowance of widespread, intensive wind energy development on pristine desert land violates this key FLPMA protection because it

substantially degrades one of the most outstanding scenic resources within the Planning Area.

Issue Number: PP-CA-OWEF-12-10-50

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

Contrary to this direction, and in direct conflict with FLPMA's mandate that "scenic" values be preserved and protected where appropriate, the Plan Amendment would allow destruction of the area's outstanding scenic resources by the inappropriate siting of wind energy development in this visually sensitive area. The FEIS provides no defensible justification for locating this particularly scenically destructive wind energy development within the

Planning Area's outstanding viewshed.

Issue Number: PP-CA-OWEF-12-11-4

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

The BLM's Purpose and Need statement in the DEIS quotes FLPMA (section 10 (c)) and claims that "public lands are to be managed for multiple use that takes into account the long term needs of future generations for renewable and non-renewable resources." The Ocotillo Wind Express site would take up 23 square miles. Public land access would be extremely limited and other land use would be impaired. It would be impossible to manage these lands for multiple uses when so much of the land is sacrificed for just one use.

Summary

The proposed plan amendment is inconsistent with FLPMA because:

1. The BLM has not prevented "unnecessary and undue degradation" of public lands;
2. The BLM has not used a "systematic interdisciplinary approach;"
3. The BLM has not prepared and maintained adequate inventory data;
4. The BLM has not allowed the public to share oral scoping comments at the scoping meeting in Ocotillo;
5. It conflicts with FLPMA's mandate that scenic values be preserved; or
6. It conflicts with the multiple-use principle found in Section 103 of FLPMA.

Response

The BLM complied with FLPMA regarding public participation. The BLM's planning regulations direct the BLM to "provide opportunities to meaningfully participate in and comment on the preparation of plans" and require that "public involvement in the resource management planning process shall conform to the requirements of the National Environmental Policy Act and associated implementing regulations" (43 CFR 1610.2(a)). Generally, scoping is the first stage in the planning process where the BLM solicits public input on resource issues and management concerns. During this stage, the BLM issues a Notice of Intent (NOI) in the *Federal Register*, signaling the start of the formal environmental review process under NEPA. Ideas are also often solicited by BLM through mailings, newspaper articles, public and private meetings, and workshops.

The BLM relied on up-to-date and adequate inventories of the resources of the public lands when preparing the proposed PA/FEIS in compliance with FLPMA. Section 201 of FLPMA (43

U.S.C. 1711(a)) states: “The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern (ACECs). This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.” Section 202 states: “In the development and revision of land use plans, the Secretary shall...rely, to the extent it is available, on the inventory of the public lands, their resources, and other values”. 43 U.S.C 1712(c)(4).

The BLM has a baseline inventory of information for the proposed planning area site that was prepared during the development of the CDCA Plan and the Western Colorado Desert (WECO) amendment to the CDCA Plan. These data are updated on an ongoing basis. Resource-specific inventories are discussed in appropriate sections in Chapter 3 of the proposed PA/FEIS. A list of references considered in preparation of the proposed PA/FEIS is provided in Chapter 8 of the proposed PA/FEIS.

The proposed PA/FEIS did “use a systematic interdisciplinary approach” as required by FLPMA. Section 5.7 of the proposed PA/FEIS provides a list of staff involved in the preparation of the PA/FEIS. The preparers of the proposed PA/FEIS represent a wide range of professional disciplines, including but not limited to a hydrologist, outdoor recreation planner, wildlife biologist, archaeologist, realty specialist, environmental scientist, botanist, and cultural resources specialist (FEIS pgs. 5-101).

The proposed PA/FEIS is consistent with the BLM’s multiple-use mandate pursuant to FLPMA. Section 103(c) of FLPMA defines “multiple-use” as the management of the public lands and their various resource values so the public lands are used in a combination that will best meet the present and future needs of the American people. The BLM multiple-use mandate does not require that all uses be allowed on all areas of the public lands. Accordingly, the BLM is responsible for the complicated task of striking a balance among the many competing uses that can occur on public lands.

When considering whether to approve the planning area for wind energy development, the BLM considered a range of uses for the planning area, including an alternative that would have designated the planning area as unsuitable for wind energy development. The purpose and need for the plan amendment in the particular planning area is established in Section 1.1.1 of the proposed PA/FEIS, and includes the need to respond to a ROW application and comply with goals set forth in Executive Order 13212, the Energy Policy Act 2005, and Secretarial Order 3285A1. Furthermore, the ROD for the CDCA recognizes that “these facilities [renewable energy facilities] are different from conventional power plants and must be located where the energy resource conditions are available” (CDCA Plan ROD p. 15).

The proposed plan amendment will not result in “unnecessary or undue degradation of the lands” as set forth in Section 302(b) of FLPMA. The proposed plan amendment makes the planning area available for wind energy development, a use of the public lands authorized by FLPMA Section 501(a)(4), after completion of NEPA analysis (CDCA Plan p. 15). In developing the proposed plan amendment, the BLM fully complied with its planning regulations (43 CFR 1610); the requirements of NEPA; and other statutes, regulations, and Executive Orders related

to environmental quality (Appendix B, FEIS). The proposed ROW grant for wind energy development in the planning area has been analyzed through the NEPA process and if granted, will be subject to terms and conditions with appropriate mitigation measures to prevent unnecessary or undue degradation.

MUC-L

Issue Number: PP-CA-OWEF-12-01-1
Organization: Desert Protective Council
Protester: Terry Weiner

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).

Issue Number: PP-CA-OWEF-12-01-2
Organization: Desert Protective Council
Protester: Terry Weiner

Issue Excerpt Text:

DPC 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.

Issue Number: PP-CA-OWEF-12-03-1
Organization: Center for Biological Diversity
Protester: Lisa T. 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).

Issue Number: PP-CA-OWEF-12-03-6
Organization: Center for Biological Diversity
Protester: Lisa T. Belenky

Issue Excerpt Text:

The terms of the proposed plan amendment are inconsistent with the CDCA Plan because it will "significantly diminish", indeed destroy, many sensitive resources on MUC class L lands in violation of the plan.

Issue Number: PP-CA-OWEF-12-04-1
Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation
Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

The Tribe Protests BLM's Proposed Plan Amendment Because the Plan Amendment Will Result in Permanent Damage and Desecration to a Sacred Cultural Area and to Cultural Sites in Conflict with the Applicable Class L Land-Use Designation.

Issue Number: PP-CA-OWEF-12-04-10
Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation
Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

ISSUE #2: The Tribe Protests BLM's Proposed Plan Amendment Because the Plan Amendment Proposes Resource Impact and Mitigation Instead of Resource Preservation In Conflict With the Applicable Class L Land Use Designation.

Issue Number: PP-CA-OWEF-12-04-14
Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation
Protester: Frank R. Jozwiak and Thane D.

Somerville

Issue Excerpt Text:

On these Class L lands, BLM should protect and preserve the sacred cultural landscape. 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 to reduce the impacts on the cultural landscape. BLM should deny the Proposed Plan Amendment.

Issue Number: PP-CA-OWEF-12-04-28

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

ISSUE #7: The Tribe Protests BLM's Proposed Plan Amendment Because the Plan Amendment Will Result in Permanent Damage and Destruction to Sensitive Biological Resources Such as the Flat-Tailed Homed Lizard in Conflict With The Applicable Class L Land-Use Designation. The FEIS confirms that the Flat-Tailed Homed Lizard (FTHL) is known to exist in the Project area. The FEIS documents approximately 2,750 acres of FTHL-occupied habitat in the proposed project site. 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. This is another reason why the Proposed Plan Amendment is inconsistent with the applicable Class-L land use designation.

Issue Number: PP-CA-OWEF-12-04-3

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

The Ocotillo wind energy project would significantly impact and desecrate this unique cultural landscape, located on lands that have been designated for preservation in the CDCA Plan.

The proposed amendment to allow utility-scale commercial energy development on lands known to be highly sensitive in terms of cultural resources and sacred tribal values is not

consistent with the Class L designation in the CDCA Plan.

Issue Number: PP-CA-OWEF-12-04-32

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

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.

Issue Number: PP-CA-OWEF-12-04-5

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

While production of wind 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."

Issue Number: PP-CA-OWEF-12-04-8

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

Due to the permanent impairment and desecration of significant cultural resource values, this Project is clearly inconsistent with the Class L land use designation, and the Proposed Plan Amendment must be denied.

Issue Number: PP-CA-OWEF-12-07-11

Organization: Desert Protective Council

Protester: Edie Harmon

Issue Excerpt Text:

None of the cited Executive Orders includes text that suggests that the intent of FLPMA shall be so narrowly interpreted as to omit the text following the words "nonrenewable resources". Indeed, the Secretarial Order 3285AI (ES-2; 1-3) does not state that development of renewable energy is a priority which trumps all other resource values of public lands, especially public lands that without a CDCA Plan Amendment are still designated as Multiple Use Class L.

Issue Number: PP-CA-OWEF-12-07-13

Organization: Desert Protective Council

Protester: Edie Harmon

Issue Excerpt Text:

It would appear that the proposed industrial scale wind energy project at the site(s) proposed is absolutely inconsistent with the resource values which for the past 31 years left BLM and the public believing that Class L lands were to be managed with vehicular use being limited to approved routes of travel in order to protect the important cultural, ecological and biological resources of the area between the Coyote Mts. Wilderness to the north, the Jacumba Wilderness Area to the South and the Anza Borrego State Park to the West. Given the already identified sensitive resource values that BLM should/must err on the side of conservation in order not to risk today what cannot be replaced tomorrow and run the risk of starting the conversion of a resource rich area into a wasteland for a private for-profit industrial scale wind energy project. Conversion of a resources area with such rich and abundant significant biological and cultural resources, BLM has little alternative to denying the proposed ROW request if it does not want to set a dangerous precedent for other sensitive resource rich areas on other public lands within the CDCA and elsewhere on public lands with a Limited Use class designation with respect to routes of travel.

Issue Number: PP-CA-OWEF-12-07-16

Organization: Desert Protective Council

Protester: Edie Harmon

Issue Excerpt Text:

3. Concise Statement Explaining the BLM State

Director's decision is believed to be wrong

(I) Adoption of the proposed plan amendment to allow a large-scale industrial wind turbine facility on 12,436 acres of BLM's CDCA Multiple Use Class L (Limited Use) lands is inappropriate and inconsistent with the specific language of the Use class designation as stated above.

Issue Number: PP-CA-OWEF-12-07-6

Organization: Desert Protective Council

Protester: Edie Harmon

Issue Excerpt Text:

BLM Agency Preferred Alternative ignores mandate of FLPMA and is inconsistent with Multiple Use Class L current restrictions on vehicle use according to the CDCA Plan as amended and the Western Protest of Edie Harmon re PRMPA to CDCA Plan re OWEF

Colorado (WECO) routes of travel which based on observations on the ground have been respected by the public.

Issue Number: PP-CA-OWEF-12-08-19

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

The CDCA Plan divides the lands in the California Desert Conservation Area into four categories. The lands at issue here, proposed for commercial, large-scale energy development by a private applicant who are no longer alive to repeat the information, and its compliance with the record-keeping portions of the CDCA Plan itself (CDCA Plan, Addendum A, Development of the Desert Plan, page 142) are designated as "Class L." According to the CDCA Plan, the Class L designation "protects sensitive, natural, scenic, ecological, and cultural resource 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, Chapter 2, Multiple Use Classes, page 13. The industrial scale wind project proposed here is not a "low-intensity" use and has not ensured that sensitive values will not be significantly diminished as evidenced by the many significant and unavoidable impacts

Issue Number: PP-CA-OWEF-12-08-21
Organization: Carmen Lucas, Kwaaymil Laguna
Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

The cultural value of the Ocotillo Valley landscape has been well known by BLM for decades -long before the Project was conceived, as discussed elsewhere in this protest. The CDCA Plan references such cultural resources as "a national treasure." CDCA Plan, Chapter 3, Cultural Resource Element, page 22. The proposed amendment to allow large-scale commercial energy development on lands known to be highly sensitive is not consistent with the Class L designation in the CDCA Plan. BLM has no obligation to approve this conditional use, and BLM should, in this case, deny the requested amendment. While production of wind energy may not be expressly 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, Plan Elements, 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 inconsistent on its face with Class L land use.

Issue Number: PP-CA-OWEF-12-08-22
Organization: Carmen Lucas, Kwaaymil Laguna
Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

BLM concedes in the revised draft MOA attached to the FEIS/R at Appendix R, that this Project will not be able to avoid impacts to cultural resources. In fact, BLM has determined that all the build alternatives under consideration would have an adverse effect on the Spoke Wheel Geoglyph,¹² the portion of the TCP that lies within the APE as identified by tribes, and the cultural resources that the tribes have identified in that area related to the TCP to which Indian tribes attach religious and/or cultural significance (FEIS/R, Appendix R, Draft MOA, page 3)¹³ Moreover, Ms. Lucas has informed the BLM and County that the Project's impacts will be permanent and irreversible.

Due to the permanent impairment and destruction of significant cultural and religious resource values, this Project is clearly inconsistent with the Class L land use designation, and the PA must be denied.

Issue Number: PP-CA-OWEF-12-08-25
Organization: Carmen Lucas, Kwaaymil Laguna
Band of Indians
Protester: Courtney Ann Coyle

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's Cultural Resource Element 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." (Emphasis added.) The CDCA Plan goes on to state that its Management principle is, "in the face of unknowns, erring on the side of conservation in order not to risk today what we cannot replace tomorrow." (CDCA Plan, page 6 (Emphasis added). Further, Class C and L are to "provide protective resource management which complement many identified Native American values." CDCA Plan, Native American Element, page 27. On these Class L lands therefore, resource protection measures, such as rejecting the PA and the project, can and must occur to protect and preserve the cultural resources at risk. According to the CDCA Plan, BLM has the ability to say no to projects that would adversely affect tribal cultural resources.

Issue Number: PP-CA-OWEF-12-08-58
Organization: Carmen Lucas, Kwaaymil Laguna
Band of Indians
Protester: Courtney Ann Coyle

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 tribal

cultural resource area on Class L lands that is 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 land use also constitutes "unnecessary or undue degradation" of the public lands because there are either 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 Congressional intent to protect the CDCA. For these reasons, the PA must be rejected.

Issue Number: PP-CA-OWEF-12-09-20
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

The industrial scale wind project proposed here is not a "low-intensity" use and has not ensured that sensitive values will not be significantly diminished as evidenced by the many significant and unavoidable impacts described in the FEIS/R.

Issue Number: PP-CA-OWEF-12-09-22
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

The proposed amendment to allow large-scale commercial energy development on lands known to be highly sensitive is not consistent with the Class L designation in the CDCA Plan. BLM has no obligation to approve this conditional use, and BLM should, in this case, deny the requested amendment. While production of wind energy may not be expressly 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, Plan Elements, 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 inconsistent on its face with Class L land use.

Issue Number: PP-CA-OWEF-12-09-27
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

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's Cultural Resource Element 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." (Emphasis added.) The CDCA Plan goes on to state that its Management principle is, "in the face of unknowns, erring on the side of conservation in order not to risk today what we cannot replace tomorrow." (CDCA Plan, page 6)(Emphasis added). Further, Class C and L are to "provide protective resource management which complements many identified Native American values." CDCA Plan, Native American Element, page 27. On these Class L lands therefore, resource protection measures, such as rejecting the PA and the Project, can and must occur to protect and preserve the cultural resources at risk. According to the CDCA Plan, BLM has the ability to say no to projects that would adversely affect tribal cultural resources.

Issue Number: PP-CA-OWEF-12-09-58
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

ISSUE #6: Viejas Protests BLM'S PA Because the PA Will Result in Permanent Damage and Destruction to Sensitive Biological Resources, Such as the Golden Eagle, a Sacred Bird. In Conflict With the Applicable Class L Land-Use Designation.

Issue Number: PP-CA-OWEF-12-09-69
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

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 tribal cultural resource area on Class L lands that is 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 land use also constitutes "unnecessary or 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 Congressional intent to protect the CDCA. For these reasons, the PA must be rejected.

Issue Number: PP-CA-OWEF-12-10-44

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

The California Desert Conservation Area Plan as amended provides for four distinct multiple use classes (MUC) based on the sensitivity of resources in each area. The proposed Project site is in MUC Class 1. 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. Here,

Summary

The proposed plan amendment is inconsistent with the Multiple-Use Class-Limited ("MUC-L") designations of the CDCA plan because:

1. Wind energy development is not a "low-intensity use"

the Project is high, not low, intensity. Its operation would significantly diminish an extraordinary number of sensitive natural resources, as detailed above. Therefore, the Project directly conflicts with the California Desert Conservation Area Plan's overarching protections of the "sensitive, natural, scenic, ecological, and cultural resources values of the site. Id.

Issue Number: PP-CA-OWEF-12-11-49

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

Visual Resources and Limited Use Lands: The FEIS admits that the impacts to visual resources cannot be mitigated. Visual Resources are an important resource and the preservation of these resources is required under the Limited Use designation of the lands on the entire site under the Federal Land Policy Management Act for the California Desert Conservation Area.

Issue Number: PP-CA-OWEF-12-11-51

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

The Limited Use Designations under the CDCA clearly state that a development of this scale would be inconsistent with current land use management practices.

Issue Number: PP-CA-OWEF-12-11-9

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

The BLM designated the entire region as Limited Use under the California Desert Conservation Area which clearly had the goal of managing the land on the proposed site with more conservation based objectives.

2. Wind energy development will degrade sensitive cultural, visual, biological resources

Response

The proposed plan amendment is consistent with the Multiple-Use Class Limited designation. The CDCA Plan contemplates industrial uses analogous to the wind use analyzed by the proposed plan amendment, including utility rights-of-way outside of existing corridors, power plants, and wind and solar energy development and transmission (CDCA Plan, pgs. 93-95). The CDCA Plan expressly provides for wind generation facilities within areas designated as Multiple-Use Class Limited. The CDCA Plan states that wind development “may be allowed [on such lands] after NEPA requirements are met” (CDCA Plan, p. 15). The Draft and Final EIS/EIR that accompany the proposed plan amendment acts as the mechanism for complying with that CDCA Plan requirement (FEIS p. 1-10). Because wind power facilities are an allowable use of the MUC-L lands under the CDCA Plan, the proposed action does not conflict with the CDCA Plan.

The CDCA Plan provides guidance concerning the management and use of the BLM lands in the California Desert while protecting resources and balancing other public needs. The CDCA Plan specifically cites energy development and transmission as a “paramount national priority” to consider in balancing use and protection of resources (CDCA Plan, p. 6). The proposed plan amendment would allow the wind use only on the proposed project site. The proposed plan amendment identifies and analyzes sensitive resources and values. The BLM has ensured that the plan amendment will not significantly diminish sensitive values by way of appropriate design features, mitigation, and monitoring. For example, the size of the Project (as reflected in the FEIS/EIR’s Preferred Alternative) has been reduced to the maximum extent practicable in order to minimize the impact of the Project on such resources, in addition to other mitigation measures that have been identified.

In the 1980 CDCA Plan Record of Decision (ROD), the Assistant Secretary for Land and Water Resources (ASLW) discussed remaining major issues in the final CDCA Plan before he approved the Plan (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 MUC-L lands in the CDCA was approved by the ASLW and concurred with 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. As stated in the FEIS, the reason for the amendment is specifically to allow a wind-power generation project on the project site. 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, while the proposed plan

amendment identifies and analyzes sensitive resources and values, the BLM has ensured to the extent practicable that the effects to cultural, visual and biological resources associated with the project/plan amendment are mitigated/minimized through design features, mitigation, and monitoring as analyzed in the Final EIS/EIR.

CDCA Plan

Issue Number: PP-CA-OWEF-12-01-4

Organization: Desert Protective Council

Protester: Terry Weiner

Issue Excerpt Text:

• The proposed Plan amendment is not consistent with the bioregional planning approach in the CDCA Plan.

Issue Number: PP-CA-OWEF-12-03-10

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

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

Issue Number: PP-CA-OWEF-12-03-3

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

The CDCA Plan also provides that "All State and federal listed species and their critical habitat will be fully protected" CDCA Plan at 20 (emphasis added), such protections clearly need to include the migratory corridor for the State-listed threatened Swainson's hawk and protecting essential habitat for the endangered Peninsular bighorn sheep which is also a fully protected species under California law.

Issue Number: PP-CA-OWEF-12-04-11

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

The CDCA Plan recognizes that "mitigation" is often not sufficient where cultural resources and values are at issue. Page 27 of the Plan states "many impacts on resources of Native American value are not amenable to mitigation." Desecration or sacrilegious treatment of religiously significant sites cannot be mitigated as can many adverse effects on material resources. These substantial, potential, and often irreversible impacts on cultural values will be carefully considered in all actions of the Plan." In other words, prehistoric cultural resources and cultural landscapes cannot be simply replaced or restored once a project is developed and the resource is destroyed, relocated, or otherwise altered. The cultural and spiritual nature of this project area will be lost forever with the development of more than one hundred massive wind turbines across this previously undisturbed desert landscape.

Issue Number: PP-CA-OWEF-12-04-15

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

ISSUE #3: The Tribe Protests BLM's Proposed Plan Amendment Because BLM
ISSUE #3: The Tribe Protests BLM's Proposed Plan Amendment Because BLM
Has Failed to Give Full Consideration to Native American Values in the Decision-Making Process. 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." In this proceeding, despite acknowledging the vigorous tribal opposition and the desecration that would result to a significant cultural landscape, the BLM proposes to permit development of this massive wind energy facility, permanently degrading the landscape and Native American cultural values. This is a total rejection and disregard

of Native American values that is not consistent with the CDCA Plan.

Issue Number: PP-CA-OWEF-12-04-30

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

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.

Issue Number: PP-CA-OWEF-12-04-33

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

ISSUE #9: The Tribe Protests the Proposed Plan Amendment Because it Conflicts With the Decision Criteria in the Energy Production and Utility Corridors Element of the CDCA Plan. The CDCA Plan provides specific "decision criteria" for evaluation of new energy production applications. One of those criteria requires "avoidance of sensitive resources wherever possible." CDCA Plan, p. 93. As discussed above, the project area as a whole is encompassed within a traditional cultural property that is sacred to the Quechan Tribe. The development of this project will destroy and desecrate that landscape. It is possible to avoid this result, because BLM has no obligation to amend the CDCA or grant the right-of-way requested by the applicant. BLM has adequate authority, and in fact a mandate, to protect the cultural values of these lands. However, by approving the plan amendment and right-of-way application, BLM would violate its duties in a manner inconsistent with the CDCA Plan and FLPMA.

Issue Number: PP-CA-OWEF-12-04-40

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D.

Somerville

Issue Excerpt Text:

ISSUE #11: The Tribe Protests the Proposed Plan Amendment Because It Is Inconsistent With the Plan Amendment Criteria Found in the CDCA Plan; and Because the FEIS Fails to Analyze the Proposed Amendment's Consistency With the CDCA Plan Amendment Criteria.

The CDCA Plan provides six factors (plan amendment criteria) to analyze when considering an amendment. CDCA Plan, p. 121. The Proposed Plan Amendment is inconsistent with the relevant factors. The Tribe also objects that the FEIS fails to analyze the required Plan Amendment decision criteria. 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 Plan Amendment 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.

ISSUE #11: The Tribe Protests the Proposed Plan Amendment Because It Is Inconsistent With the Plan Amendment Criteria Found in the CDCA Plan; and Because the FEIS Fails to Analyze the Proposed Amendment's Consistency With the CDCA Plan Amendment Criteria.

The CDCA Plan provides six factors (plan amendment criteria) to analyze when considering an amendment. CDCA Plan, p. 121. The Proposed Plan Amendment is inconsistent with the relevant factors. The Tribe also objects that the FEIS fails to analyze the required Plan Amendment decision criteria.

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 Plan Amendment 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.

Issue Number: PP-CA-OWEF-12-08-12
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

Under the Plan Amendment factors identified in the CDCA Plan, BLM must first determine whether any law or regulation prohibits granting the requested amendment. This evidence shows the PA 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 NHPA Section 106 and failure to prepare an adequate FEIS under NEPA. Moreover, the PA (and the Project it would allow), are inconsistent with the accommodation of tribal religious values, required by the United States Constitution, Presidential Executive Order 13007, the American Indian Religious Freedom Act, and the United Nations Declaration on the Rights of Indigenous Peoples, among other authorities.

Issue Number: PP-CA-OWEF-12-08-39
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

Why is the Tribal Cultural Values Report being drafted now, outside of the legally required

environmental review framework? Each of these reports should have been made available at or before the DEIS/R stage, but were not, thereby depriving tribes an opportunity to review this information contemporaneously with the NEPA and CEQA documents. This approach is inconsistent with the CDCA Plan, Native American Element, page 26, which states that:

Prominent features of the CDCA landscape, wildlife species, prehistoric and historic site of occupation, worship, and domestic activities, and many plant and mineral resources are of traditional cultural value in the lives of the Desert's Native people. In some cases these resources have a religious value. Specific sites or regions may be important because of their role in ritual or the mythic origin of an ethnic group. These values will be considered in all CDCA land-use and management decisions.

Issue Number: PP-CA-OWEF-12-08-40
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

The CDCA Plan, Native American Element, page 27, is very clear about how tribally significant areas such as the Ocotillo Valley should be treated:

The accurate evaluation of potential impacts on cultural values can only be made within the cultural context from which those values are derived. Specific guidelines have been developed to incorporate the formal comments of tribal governments into the environmental review process of the BLM.

Priorities for implementation of the Native American Element will be directed toward the protection of the most critical and threatened resources of Native American value.

Through the guidelines provided in this element ... the consistent management and protection of Native American values will be included as an integral component of all management actions.

Clearly, the CDCA Plan does not equate archaeological value with tribal cultural value. In fact, CDCA Plan, Addendum A, Development of the Desert Plan, page 139, states that:

Within the plan elements the importance of Native American values was recognized by separating them from cultural resources and creating a separate element to address those special needs.

Moreover, the ACHP has recently published a "Native American Traditional Cultural Landscapes Action Plan," which also recognizes the concerns of

tribes relative to their cultural landscapes on federal lands." In this regard, the FEIS/R, the draft Archaeological Report and the PA are inconsistent with the CDCA Plan. For each of the reasons outlined above, it is premature for BLM to consider a PA without having adequate and full documentation available to it.

Issue Number: PP-CA-OWEF-12-08-94

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

A viewer does not need special training to see the visual contrast at the boundary of the Project with the Anza-Borrego Desert State Park (ABDSP) is prominent and adverse. (See, FEIS/R, Figures 4-18-6A through 4. 18-7c.) The Project is also inconsistent with the CDCA Plan, Recreational Element, page 69, which recognizes that, "The California Desert attracts millions of visitors annually to its wide spectrum of recreational opportunities. Its diverse landscapes create a variety of physical and physiological settings which provide a "desert experience" of natural beauty, solitude, and freedom from the structure and regulations of the urban areas of southern California ..., The PA would significantly degrade the visitor experience at ABDSP including the beauty, solitude and freedom that can presently be experienced at the southeast end of the Park. P333.)

Issue Number: PP-CA-OWEF-12-09-5

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

ISSUE #1: Viejas Protests the PA Because It Is Inconsistent With the Six Plan Amendment Factors Found in the CDCA Plan. The CDCA Plan provides six factors to analyze when considering an amendment. CDCA Plan, Chapter 7, Plan Amendment Process, page 121. The PA is inconsistent with the relevant factors, and Viejas protests the analysis contained in Section 1.4.2 of the FEIS/R 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. This evidence shows the PA would facilitate "undue impairment" of lands within the CDCA and is thus prohibited by FLPMA.

Issue Number: PP-CA-OWEF-12-09-70

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

ISSUE #8: Viejas Protests the PA Because It Conflicts With the Decision Criteria In the Energy Production and Utility Corridors Element of the CDCA Plan.

The CDCA Plan provides specific "decision criteria" for evaluation of new energy production applications. One of those criteria requires "avoidance of sensitive resources wherever possible." CDCA Plan, Energy Production and Utility Corridors Element, page 93. The CDCA Plan, also states that, "The establishment of a planning corridor is not an automatic grand [sic] of a new right of way." CDCA Plan, Energy Production and Utility Corridors Element, page 93. As discussed above, this Project will have an adverse effect or impact on, and will not avoid, hundreds of sensitive cultural sites, one or more archaeological districts, one or more TCPs, and desecrate a sacred place. Unfortunately for the applicant, it is not "possible" to avoid these resources by their very nature.

Issue Number: PP-CA-OWEF-12-10-45

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

The Project's noise levels and blade-impact mortality on birds alone preclude the Project's compliance with the CDCA Plan's protections of sensitive avian species, as discussed above. The Project's severe adverse impacts on the area's spectacular scenic resources flatly conflict with the CDCA Plan's protection of scenery. CDCA Plan at 13; FEIS 1-9. The Project also conflicts with protection of the area's Peninsular Bighorn Sheep. FEIS 1-9; CDCA Plan at 13; FEIS App. F4-41; FEIS App. 0 6; Direct Testimony of Esther Rubin (attached as Exhibit 7 hereto) at 5, 7 and 9.

Issue Number: PP-CA-OWEF-12-10-46

Organization: Backcountry Against Dumps (BAD), Protect Our Community Foundation, and Donna Tisdale

Protester: Stephan C. Volker

Issue Excerpt Text:

Furthermore, the CDCA Plan Amendment violates FLPMA because it fails to comply with its own Plan

Amendment process and therefore is not "in accordance with the land use plans." 43 U.S.C. § I 732(a). The FEIS notes that Chapter 7 of the CDCA Plan, which discusses the Plan Amendment process, requires that BLM "evaluate the effect of the proposed amendment on BLM management's desert-wide obligation to achieve and maintain a balance

between resource use and resource protection." FEIS I-II. As shown above, the Project, and hence the Plan Amendment, would destroy the delicate balance between resource use and protection, permanently destroying hundreds of acres of pristine desert land.

Summary

The proposed plan amendment is inconsistent and conflicts with the CDCA and its bioregional planning approach; decision and plan amendment criteria; and specific wildlife, recreation, and cultural resources management principles.

Response

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

The CDCA Plan itself recognized that plan amendments, such as this proposed plan amendment, may occur and outlines a process to approve or deny them (CDCA Plan, pp. 119–22). 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).

The CDCA Plan is specifically referenced and analyzed throughout the proposed plan amendment and FEIS. 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 plan amendment, the amendment is site-specific, but considers the larger context of the CDCA and its plan. The CDCA Plan originally included, has been amended several times to include, and contemplates industrial uses such as the wind power generation analyzed in connection with the proposed plan amendment, including utility rights-of-way outside of existing corridors, power plants, and solar energy development and transmission within the broader CDCA context (CDCA Plan, p. 95).

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 the maintenance of environmental quality.

The proposed plan amendment adheres to the management principles and amendment criteria in the CDCA Plan. As mentioned in Section 1.4.1 of the FEIS, the CDCA Plan recognizes the potential compatibility of wind 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 stated in the FEIS, the sole purpose of this amendment is to determine if the OWEF project site is suitable or unsuitable for wind power generation. This amendment is limited geographically to the project site only, and further, by the accompanying right-of-way grant application. This amendment will allow wind energy use on the OWEF project site only.

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, stated the following in his letter presenting the CDCA Plan, as amended, in 1999: “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.”

As discussed in CDCA Plan Chapter 7, the BLM must make certain required determinations in amendments to the CDCA Plan. The required determinations and how they were made for the CDCA Plan Amendment for the OWEF are provided below.

Required Determination: Determine if the request has been properly submitted and if any law or regulation prohibits granting the requested amendment.

Ocotillo Express LLC’s request for a ROW grant was properly submitted; the Final EIS/EIR was the mechanism for evaluating and disclosing environmental impacts associated with that application. No law or regulation prohibits granting the requested CDCA Plan Amendment.

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

The CDCA Plan does not currently identify any unencumbered sites as wind generating facilities. Therefore, there is no other location within the CDCA that could serve as an alternative location without requiring a plan amendment similar to the one required for the Refined Project. The Refined Project does not require a change in the Multiple-Use Class for any area within the CDCA as wind power generation is allowed within MUC Class L lands

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

The Final EIS/EIR evaluated the environmental effects of approving the CDCA Plan Amendment and the ROW grant application for the OWEF and fully discloses those impacts.

Required Determination: Consider the economic and social impacts of granting and/or implementing the applicant's request.

The Final EIS/EIR Section 4.13 evaluated the economic and social impacts of the Plan Amendment and the ROW grant.

Required Determination: Provide opportunities for and consideration of public comment on the proposed amendment, including input from the public and from federal, state, and local government agencies.

An NOI to amend the CDCA Plan was published in the *Federal Register* on December 10, 2010 (75 FR 77654-01). Thirty-three comment letters were received within the 30-day scoping period, which ended on February 7, 2011. Comments received during scoping are addressed in the analysis of impacts in the Draft EIS/EIR, and were also considered in the formulation of alternatives. The Draft EIS/EIR for the OWEF was distributed for public and agency review and comment on July 8, 2011. The comment period ended on October 6, 2011. A total of 405 comment letters, including e-mails, were received. Eight comment letters were received after the close of the comment period. Responses to the comments received on the Draft EIS/EIR were provided in the Final EIS/EIR.

Required Determination: Evaluate the effect of the proposed amendment on the BLM management's desert-wide obligation to achieve and maintain a balance between resource use and resource protection.

The balance between resource use and resource protection is evaluated in the Final EIS/EIR. Multiple-use includes the use of renewable energy resources, and, through Title V of FLPMA, the BLM is authorized to grant ROWs for the generation and transmission of electric energy. The acceptability of use of public lands within the CDCA for this purpose is recognized through the CDCA Plan's approval of wind generating facilities within MUC-L. The Final EIS/EIR identifies resources that may be adversely impacted by approval of the OWEF, evaluates alternative actions which may accomplish the purpose and need with a lesser degree of resource impacts, and identifies mitigation measures that, when implemented, would reduce the extent and magnitude of the impacts and provide a greater degree of resource protection.

Consistency with Other Plans

Issue Number: PP-CA-OWEF-12-04-34

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

ISSUE #10: The Tribe Protests the Proposed Plan Amendment Because the Ocotillo Project Does Not Conform to the Local Land Use Plans for Imperial County and the Ocotillo Nomirage Area. The CDCA Plan Decision Criteria for Energy Production requires that projects "conform to local plans wherever possible." CDCA Plan, p. 93.

The FEIS fails to acknowledge that the Ocotillo Project is not consistent with the Imperial County General Plan, the Ocotillo Nomirage Community Area Plan, and the zoning designations in this area.

Issue Number: PP-CA-OWEF-12-04-36

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

The CDCA Plan confirms that local land use policies and plans remain relevant where an applicant seeks approval for energy development projects on lands subject to the CDCA

Plan. See also 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]").

Issue Number: PP-CA-OWEF-12-04-38

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

Conformance with local land use plans is a required decision element pursuant to the CDCA. It was improper for the FEIS to omit discussion of the inconsistency with local land use policies.

Issue Number: PP-CA-OWEF-12-08-70

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Yet, the County recently eliminated the General Plan Amendment from the Project. (See, for example, FEIS/R, page 3.6-1.) We believe this recent Project revision, to eliminate the turbine from the County jurisdiction lands, was at least partly an attempt to evade consultation with tribes under SB 18. Moreover, the applicable local Imperial County land use designation for the PA area is primarily Open Space Designation with some Floodway and Desert Residential designations. (FEIS/R, page 3.6-2.) 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. Ms. Lucas is also concerned that a General Plan Amendment is otherwise still triggered by the Project, and that SB 18 consultation must still occur.

In addition, the Project is also inconsistent with the Goals and Objectives of Imperial County's General Plan as shown at FEIS/R, Appendix K:

Issue Number: PP-CA-OWEF-12-08-71

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Circulation and Scenic Highways Element: Goal 1 and 3 relate to a safe transportation system, including for alternate travel modes. Yet, there is no discussion

in the FEIS/R about the impact of large trucks for Project construction, maintenance and provision of water, on Imperial and San Diego County roads and how road wear caused by heavy trucks would be mitigated by the Project. Goal 3 relates to aviation hazards. There is no discussion in the FEIS/R of the FAA's December 2011 determinations regarding the Project or of the recent federal court remand of the FAA determinations for the Cape Wind project due to inadequacies. Goal 4 relates to preservation of environmental and scenic amenities of the area. There can be no dispute, given the visual simulations in the FEIS/R, Figures 4-18-2A through 4.18-5B, 4.18-8A through 4.18-9B, that the Project would adversely affect the driving experience along scenic 1-8, S-2 and SR 98, regardless of whether particular sections near the Project have been formally listed as eligible State Scenic Highways." 37 Further this is another section of the FEIS/R that is internally inconsistent about whether the County will have jurisdiction; here, related to Project connections to public roadways. (FEIS/R, Appendix K-3.)

Issue Number: PP-CA-OWEF-12-08-72

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Conservation and Open Space Element: Goal 1 relates to conserving resources for future generations by minimizing environmental impacts.⁸ Given the impacts and effects to the cultural landscape present, Objectives 1.2, 1.3, 1.5, 1.7 and 1.8 cannot be substantiated; that is why the "Explanation" section merely references the need for a Statement of Overriding Considerations. However, the statements in the consistency column, that the Project is consistent with the General Plan, do not follow this logic, and instead result-reach in a transparent attempt to whitewash the many impacts. Ms. Lucas, again, strongly disputes the assertion that the Project would "protect and preserve any encountered historical or cultural resources." This contention is not borne out by the nature of the cultural landscape or by any measure of archaeological professionalism.

Issue Number: PP-CA-OWEF-12-08-74

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Goal 3 relates to the preservation of Cultural

Resources and states that they "shall be" preserved to "maintain the traditional historic elements of the Imperial Valley landscape." Ms. Lucas strongly disputes that Mitigation Measures CUL-1 through CUL-7 are consistent with this goal given the Project's undeniable diminishment to the cultural landscape.

Issue Number: PP-CA-OWEF-12-08-75

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Goal 7 relates to the preservation of Visual Resources. Given that the desert is easily scarred and slow to heal, as evidenced by the visual scars persisting today from prior activities in the area along Sugarloaf and at the base of the recently completed Sunrise Powerlink towers in the PA area, it cannot be said the Project impacts can be minimized or that the aesthetic character of the region for residential, commercial, recreational and tourist activity would not be impaired, given the evidence on the record that recreational, OHV and tribal users may no longer come, and that home values in the area would further decrease due to the ruination of scenic mountain views, among other Project impacts.

Issue Number: PP-CA-OWEF-12-08-76

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Goal 8 relates to the County conserving and protecting Water Resources. The chart states that the applicant has "coordinated with water agencies" regarding water use. Given the documentation in the FEIS/R and elsewhere in the record, this statement is unsubstantiated; at the present time, no agency is presently able or committed to serve the Project with a certain water source. Each of the sources is speculative. (FEIS/R, page 4.19-3).

Issue Number: PP-CA-OWEF-12-08-77

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Goal 9 relates to Air Resources. Given that the Project would have significant adverse impacts

during construction to air quality and because of public concern regarding Valley Fever and the worsening of other respiratory ailments, this Project cannot be said to be consistent with the General Plan.

Issue Number: PP-CA-OWEF-12-09-100

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Industry Policy and Program: This policy acknowledges that the Community Area does not have the infrastructure or other necessary facilities to support heavy manufacturing land uses. The County supports limiting light industrial land uses to those presently existing. First, the industrial-scale Project would appear, on its face, to be inconsistent with the plain language of the Community Plan. The Community Plan states that the M-1 Zone is generally not compatible with the Plan Area. If a CUP is required, it can only be used if mitigating measures can be imposed to reduce or eliminate land use conflicts. The Project's impacts and effects cannot be mitigated, and therefore, a CUP should not issue. Moreover, growth-inducing impacts from the Project have not been properly examined in the FEIS/R, particularly if the applicant's Economic and Fiscal Impact Analysis is correct.

Issue Number: PP-CA-OWEF-12-09-78

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

ISSUE #9: Viejas Protests the PA Because the 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. However, the Project cannot demonstrate conformance with the Imperial County General Plan (ICGP) and the Ocotillo-Nomirage Community Plan (ONCP). The Project is inconsistent with these plans in many respects. These nonconformities require a General Plan Amendment to process the Project.

Yet, the County recently has eliminated its General Plan Amendment from the Project. (See, for example, FEIS/R, page 3.6-1.) We believe this recent Project revision, to eliminate the turbine from the County jurisdiction lands, was at least partially an attempt to avoid consultation with tribes under SB 18.

Moreover, the applicable local Imperial County land use designation for the PA area is primarily Open

Space Designation with some Floodway and Desert Residential designations. (FEIS/R, page 3.6-2.) 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. Viejas is also concerned that a General Plan Amendment is still required for the Project, and that SB 18 consultation must still occur.

In addition, the Project is also inconsistent with the Goals and Objectives of Imperial County's General Plan as shown at FEIS/R, Appendix K:

Circulation and Scenic Highways Element: Goal 1 and 3 relate to a safe transportation system, including for alternate travel modes. Yet, there is no discussion in the FEIS/R about the impact of large trucks for Project construction, maintenance and provision of water, on Imperial and San Diego County roads and how road wear caused by heavy trucks would be mitigated by the Project. Goal 3 relates to aviation hazards. There is no discussion in the FEIS/R of the FAA's December 2011 determinations regarding the Project or of the recent federal court remand of the FAA determinations for the Cape Wind project due to inadequacies. Goal 4 relates to preservation of environmental and scenic amenities of the area. There can be no dispute, given the visual simulations in the FEIS/R, Figures 4.18-2A through 4.18-5B, 4.18-8A through 4.18-9B, that the Project would adversely affect the driving experience along scenic 1-8, S-2 and SR 98, regardless of whether particular sections near the Project have been formally listed as eligible State Scenic Highways."

Issue Number: PP-CA-OWEF-12-09-80

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Conservation and Open Space Element: Goal 1 relates to conserving resources for future generations by minimizing environmental impacts.⁹ Given the impacts and effects to the cultural landscape present, Objectives 1.2, 1.3, 1.5, 1.7 and 1.8 cannot be substantiated; that is why the "Explanation" section merely references the need for a Statement of Overriding Considerations. However, the statements in the consistency column, that the Project is consistent with the General Plan, do not follow this logic, and instead result-reach in a transparent attempt to whitewash the many impacts. Viejas, again, strongly disputes the assertion that the Project would "protect and preserve any encountered

historical or cultural resources." This contention is not borne out by the nature of the cultural landscape or by any measure of archaeological professionalism.

Issue Number: PP-CA-OWEF-12-09-82

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Goal 3 relates to the preservation of Cultural Resources and states that they "shall be" preserved to "maintain the traditional historic elements of the Imperial Valley landscape." Viejas strongly disputes that Mitigation Measures CUL-1 through CUL-7 are consistent with this goal given the Project's undeniable diminishment to the cultural landscape.

Goal 7 relates to the preservation of Visual Resources. Given that the desert is easily scarred and slow to heal, as evidenced by the visual scars persisting today from prior activities in the area along Sugarloaf and at the base of the recently completed Sunrise Powerlink towers in the PA area, it cannot be said the Project impacts can be minimized or that the aesthetic character of the region for residential, commercial, recreational and tourist activity would not be impaired, given the evidence on the record that recreational, OHV and tribal users may no longer come, and that home values in the area would further decrease due to the ruination of scenic mountain views, among other Project impacts.

Goal 8 relates to the County conserving and protecting Water Resources. The chart states that the applicant has "coordinated with water agencies" regarding water use. Given the documentation in the FEIS/R and elsewhere in the record, this statement is unsubstantiated. At the present time, no agency is able or committed to serve the Project with a certain water source. Each of the sources is speculative. (FEIS/R, page 4.19-3.)

Goal 9 relates to Air Resources. Given that the Project would have significant adverse impacts during construction to air quality and because of public concern regarding Valley Fever and the worsening of other respiratory ailments, this Project cannot be said to be consistent with the General Plan.

Goal 10 relates to preservation of Open Space Resources and states that they "shall be maintained" to protect various public conservation values. It cannot be said that the Project will not affect

recreational activities as there is no condition that the Project will not be fenced at some future time during the life of the Project. Moreover, Viejas is concerned because important plans, such as restoration and decommissioning plans, are not being drafted prior to Project approval and may be subject to relaxed laws several decades from now.

Issue Number: PP-CA-OWEF-12-09-89

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Land Use Planning and Public Safety: Goal 1 relates to ensuring geological hazards data be incorporated into the land use review process; however, as noted above, it was omitted from the FEIS/R. Goal 2 relates to preventing loss of life and property damage. Based on the lack of information and lack of qualified EIR preparer personnel in this technical subject matter, the conclusion that Mitigation Measure PSH-3, a deferred full geotechnical study, "ensures" the Project would not result in geotechnical impacts, is unsubstantiated.

Issue Number: PP-CA-OWEF-12-09-95

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

In addition, the Project is also inconsistent with the Goals and Objectives of Imperial County's Ocotillo/Nomirage Community Area Plan, as shown at FEIS/R, Appendix K:

Issue Number: PP-CA-OWEF-12-09-97

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Protection of Environmental Resources: Goal S directs the preservation of significant natural, cultural and community character resources. There is abundant information on the record from tribes, the community and others, that the Project cannot meet this goal due to its site as well as landscape level impacts to the enumerated resources. Because the full geotechnical study has not been completed, the explanation for plan consistency offered by the FEIS/R is unsubstantiated, including for floodways, flood level and seismic resources.

Summary

The proposed plan amendment is inconsistent with the:

Imperial County General Plan and Imperial County's Ocotillo-Nomirage Community Area Plan; and the General Plan for Anza-Borrego Desert State Park

Response

Under FLPMA, the BLM land use plans are required to be consistent with State and local plans to "the maximum extent possible" (43 U.S.C.1712 (c) (9)). Conformance with local plans "whenever possible" is one of the required decision criteria that the CDCA Plan establishes for evaluating applications such as the OWEF (FEIS pg. 1-12). Even though the BLM is not required to comply fully with all requirements of applicable local plans, the BLM did adhere to the conformance criteria laid out in the CDCA.

The BLM considered any inconsistencies with the Imperial County General Plan and the Ocotillo-Nomirage Community Area Plan through a consistency analysis (FEIS, Appendix K). The consistency analysis provides the BLM's determination of consistency with the relevant elements, goals, and objectives from the Imperial County General Plan and the Ocotillo-

Nomirage Community Area. The consistency analysis also provides the BLM’s rationale for each determination.

For example, from FEIS Appendix K-5, the Imperial County General Plan Goal 3 regarding Important Prehistoric and Historic Resources – Preservation of Cultural Resources lists the following objective, and the BLM’s response with regard to consistency:

“Objective 3.1: Protect and preserve sites of archaeological, ecological, historical, and scientific value, and/or cultural significance.”

[Response]: “As discussed in Sections 4.4, Cultural Resources, and 4.10, Paleontological Resources, the incorporation of Mitigation Measures CUL-1 through CUL- 7 would ensure the OWEF protects and preserves any encountered historical or cultural resources.

Special Designations

Issue Number: PP-CA-OWEF-12-03-7

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

Adoption of a plan amendment to allow a large-scale industrial facility in such a remote area on public lands directly bordering Anza-Borrego Desert State Park with towers over 400 feet tall in close proximity to State Park boundary and nearby State Wilderness Areas is inappropriate. BLM is certainly aware that such areas are likely to be high conflict and inappropriate for development as noted in the Instruction Memorandum No. 2011-061, February 7, 2011, which explains that for "lands near or adjacent to lands designated by Congress, the President, or the Secretary for the protection of sensitive viewsheds, resources, and values (e.g., units of the National Park System, Fish and Wildlife Service Refuge System, National Forest System, and the BLM National Landscape Conservation System), which may be adversely affected by development" there is a "High Potential for Conflict" and that it "may not be feasible to authorize" renewable energy projects in these areas.

Summary

The proposed plan amendment is inconsistent with BLM Instruction Memorandum No. 2011-061 protecting lands with sensitive resources.

Response

The proposed plan amendment complies with Instruction Memorandum No. 2011-061: “Solar and Wind Energy Applications—Pre-Application and Screening.” The FEIS summarizes pertinent policy and guidance considered, and specifically acknowledges Instruction Memorandum No. 2011-061 (FEIS Section 1.3.1). The Instruction Memorandum directs the BLM Field Officials to consider “lands near or adjacent to lands designated by Congress, the President, or the Secretary for the protection of sensitive viewsheds, resource, and values...which may be adversely affected by development” as a screening criteria when prioritizing the processing of solar and wind energy development right-of-way applications. The

IM does not conclude that such lands are not available or appropriate for renewable energy development, but rather as noted above “may not be feasible” sites for such development. Moreover, State Parks and State Wilderness Areas are not designated by Congress, the President, or the Secretary, and therefore do not pertain to the high potential for conflict screening criteria, rather such a location suggests that the Project site has a medium potential for resource conflict. The BLM’s approach here is not inconsistent with this guidance.

Furthermore, the impacts of the project to the viewshed in and around the project have been fully analyzed in FEIS Section 4.18 and in related technical studies. (See Appendix E Visual Resources report and KOP-5 at 4.18-6 of the FEIS/EIR.) Those studies demonstrate that this project is in conformance to the BLM’s interim-Visual Resource Management (VRM) Class objective. The interim-VRM Class, which dictates visual management objectives, is determined through evaluation of the existing land use plan’s resource allocations and visual values. Interim-VRM Class objectives must be compatible with the existing land use plan’s allocation decisions while providing protection to the visual values. Consistent with the BLM’s policy on Visual Resources, and in accordance with IM 2009-043, those areas with high wind resources should be managed accordingly. Therefore, the visual resource inventory describing the existing conditions resulted in an inventory Class of II or III. In consideration of the proposed land use plan resource allocation decisions; the BLM determined that the appropriate Interim-VRM designation is Class IV, which allows for major visual change. As explained in the FEIS/EIR, the project is in conformance with the Interim-VRM Class IV objectives.

Wildlife and Special Status Species

Issue Number: PP-CA-OWEF-12-03-18
Organization: Center for Biological Diversity
Protester: Lisa T. Belenky

Issue Excerpt Text:

In addition, the golden eagle analyses must be updated to analyze impacts based on the final version of the land-based wind energy guidelines issued by USFWS, which provides additional guidance for land-based wind energy project that help to avoid and minimize impacts to avian species.

Issue Number: PP-CA-OWEF-12-08-49
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

ISSUE #6: The PA Will Result in Permanent Damage and Destruction to Sensitive Biological Resources, Such as the Golden Eagle, a Sacred Bird,

In Conflict With The Applicable Class L Land-Use Designation. The FEIS/R confirms that Golden Eagles are known to exist in the Project area, with eleven Golden Eagles observed during the Spring migration in 2011. (FEIS/R, Appendix L9, page 10.) The Golden Eagle is a sacred bird to the Kwaaymii and Kumeyaay. This is well documented in the historic literature and by tribes. The effect of the local and regional decline of the Golden Eagle and the potential abandonment of the PA area by the Eagle, is not analyzed in the FEIS/R, even though it has been raised on the record at many meetings between tribes and the BLM and in correspondence from tribes to BLM, including letters from Manzanita and Viejas related to the Tule Wind Project.

Issue Number: PP-CA-OWEF-12-08-52
Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:

It is troubling that the Golden Eagle reports and the confidential nest maps are publicly available on the internet. Much like cultural resource site locations,

Eagle nest and locational information is treated by resource professionals in a confidential manner to protect those vulnerable resources from harm, harassment and takes. It is difficult to believe that the local Eagle professionals whose data is used in the Report would agree with this information being placed on the internet and, in fact, the Draft Report withheld such figures. However, they are present in the Final Report which is online. Ms. Lucas asks that the nest locations and other confidential figures and information be immediately removed from the public Report and BLM and County websites.

Issue Number: PP-CA-OWEF-12-08-54

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Moreover, the Final Report reveals that documented Golden Eagle flight paths and perch locations coincide with some of the recorded sacred and more culturally dense areas within the PA area, including recorded geoglyphs and cremation areas. Ms. Lucas disagrees with the conclusions in the Final Report regarding the Project not contributing to cumulative impacts to nest sites. (Appendix L9, page 34.) Ms. Lucas believes that impacts to Golden Eagles must consider the symbiotic relationship between the Eagles, these particular sacred places, and the tribes, and not just be measured on an assumed regional net loss basis, particularly where no regional data is provided. (Appendix L9, page 3S.) It would not surprise her if the Golden Eagles come to these areas to be with the Old Folks and the sacred areas; this is part of the intangible essence of these kinds of tribal cultural landscapes. Finally, Ms. Lucas strongly objects to any take permit for Golden Eagles from this or any other CDCA Limited Use area and believes that should this Project be approved, that monitoring should be for the life of the Project, not merely for three years as proposed.

Issue Number: PP-CA-OWEF-12-09-59

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

The FEIS/R confirms that Golden Eagles are known to exist in the Project area, with eleven Golden Eagles observed during the spring migration in 2011. (FEIS/R, Appendix L9, page 10.) The Golden Eagle is a sacred bird to the Kumeyaay. This is well documented in the historic literature and by tribes.

The effect of the local and regional decline of the Golden Eagle and the potential abandonment of the PA area by the Golden Eagle, is not analyzed in the FEIS/R, even though it has been raised on the record at many meetings between tribes and the BLM and in correspondence from tribes to BLM, including letters from Manzanita and Viejas related to the Tule Wind Project.

Issue Number: PP-CA-OWEF-12-09-63

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

The Draft and Final Report's section on additional Advanced Conservation Practices (ACPs) also materially differs, with a number of potential measures having been eliminated without explanation, such as omitting seasonal or daily curtailment and committed funding for regional eagle population studies. (Compare, FEIS/R, Appendix L9, page 45 with DEIS/R Supplemental Document, "Golden Eagle Conservation Plan for the Ocotillo Wind Energy Facility", March 3, 2011, page 25.) These revisions are of particular concern given the impacts that tribes, environmental groups, community planning groups and the public have noted regarding ongoing projects such as Sunrise Powerlink on a variety of Golden Eagle populations during the study period. The Final Report also references the Tule Wind LLC 2011 Avian and Bat Protection Plan for data related to nest activity in the area in 2011. However, this referenced report was not part of the FEIS/R.³²

Issue Number: PP-CA-OWEF-12-09-64

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Moreover, the Final Report reveals that documented Golden Eagle flight paths and perch locations coincide with some of the recorded sacred and more culturally dense areas within the PA area, including recorded geoglyphs and cremation areas. Viejas also disagrees with the conclusions in the Final Report regarding the Project not contributing to cumulative impacts to nest sites. (Appendix L9, page 34.) Viejas believes that impacts to Golden Eagles must consider the symbiotic relationship between the Eagles, these particular sacred places, and the tribes, and not just be measured on an assumed regional net loss basis, particularly where no regional data is provided. (Appendix L9, page 35.)

Issue Number: PP-CA-OWEF-12-11-26
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

Barefoot Banded Gecko (*Coleonyx switaki*)
The FEIS "assumes" that the barefoot banded gecko is absent for the survey areas because the species was not detected in the 2010 and 2011 surveys. Although the DEIS describes the surveys as "exhaustive" the amount of time allocated for the survey could be inadequate. The natural history of this gecko is not well-known. Secretive, nocturnal, hides by day in deep crevices. Active in fairly cool ambient temperatures during periods of increased humidity, typically spring through fall.

The International Union for Conservation Nature Red List of Threatened Species states: "It is a secretive species that is not often encountered. Approximately 25 occurrences were known as of the late 1980s (see Grismer and Ottley 1988, Grismer 1990); undoubtedly there are many others not yet documented. The total adult population size is unknown but is probably at least a few thousand. The extent of occurrence, area of occupancy, and abundance are probably stable; sightings per year actually have been increasing (L. Grismer pers. comm. 1995)." (<http://www.iucnredlist.org/lappsredlist/detailsI64038/0>).

In personal communication with herpetologists, negative evidence does not prove absence of a species. The following publication describes the difficulty of determining absence of a species based on limited surveys:

Kery, Marc. 2002. Inferring the absence of a species—a case study of snakes. *The Journal of Wildlife Management* 66(2): 330-338. *The Journal of Wildlife Management*.

Issue Number: PP-CA-OWEF-12-11-30
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

The FEIS states that none of the land being considered for the components of the Ocotillo Wind Site is currently occupied by Peninsular bighorn sheep, but later states that the project has the potential to disrupt foraging, movement, reproduction and lambing. It seems pointless to suggest that occupation of the site is not current because no sign was found in the short window of the survey period. P264-24 -For Peninsular bighorn sheep, on p. 253

BLM states that "field studies are ongoing as a means to continue developing an understanding of PBS movement routes in the vicinity of the project...." This contradicts earlier statements that PBS do not use the area for movement. Little seems to be known about PBS use of the flatlands of the project area, and thus concerns remain unaddressed.

Issue Number: PP-CA-OWEF-12-11-31
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

BLM says on p. 254 that the flat project area is not an important habitat and used only occasionally, but this determination neglects to consider that even occasional use of certain habitats may be important for nutrition and health of a population; for example, the spring use of flat areas by ewes to forage for wildflowers that helps in gaining nutrition for nursing lambs.

Issue Number: PP-CA-OWEF-12-11-32
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

Also not addressed is the brief number of surveys to measure forage and plant quality on the project site; one out of every several years may be an above-average rainfall year or El Niño event that makes vegetation attractive to PBS on the flat areas. Year-to-year variability of rainfall and green-up, as well as variation in geographic location of rain cells needs to be analyzed.

Issue Number: PP-CA-OWEF-12-11-38
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

Bats: The FEIS and the Avian and Bat Protection Plan state that based on the surveys by Helix, bat populations on the site are very low. The FEIS suggests that only five species of bats use the site and most of them are low flying. This information is only based on surveys that took place in the year 2010. Climatic conditions in arid environments can vary, but it usually takes longer than one year to conclude presence/absence of a species.

Issue Number: PP-CA-OWEF-12-11-40
Organization: Basin and Range Watch
Protester: Kevin Emmerich

Issue Excerpt Text:

Furthermore, not all available survey techniques were used. The following high altitude survey techniques could have been utilized

Issue Number: PP-CA-OWEF-12-11-42

Organization: Basin and Range Watch

Protester: Kevin Emmerich

Issue Excerpt Text:

Some literature suggests that bats occur more frequently near wind turbines and may even be attracted to the ultra-sonic sound the spinning blades produce.

Summary

Golden Eagles

Impacts from the local and regional decline of Golden Eagle populations and the potential abandonment of the PA area by the Golden Eagles are not analyzed in the FEIS.

The Golden Eagle Conservation Plan (Appendix L9):

1. Omits seasonal or daily curtailment descriptions, committed funding for regional eagle population studies, and a reference to the Tule Wind LLC's 2011 Avian and Bat Protection Plan, which were included in the Draft EIS version.
2. Fails to reference the final version of the of the land-based wind energy guidelines issued by USFWS, which provides additional guidance for land-based wind energy project that help to avoid and minimize impacts to avian species.
3. Inadequately claims that the project will not contribute to cumulative impacts, specifically those associated with symbolic relationships between eagles and the local tribes.
4. Wrongfully published Golden Eagle nest locations, which places these valuable resources at risk.

Barefoot Banded Gecko and Peninsular Bighorn Sheep

The FEIS makes an inaccurate determination that the Barefoot Banded Gecko and Peninsular Bighorn Sheep are absent in the PA area, due to the small survey duration and the fact that negative evidence does not prove an absence of a species.

Bats

The information in the FEIS and Avian and Bat Protection Plan is faulty because:

1. High altitude survey techniques were not used;
2. The survey was only taken over the course of a single year; and
3. The information does not take into account that bats may be attracted to the ultra-sonic sound that the spinning blades from the wind turbines create.

Response

Golden Eagles

The Golden Eagle Conservation Plan (Appendix L9) was written to provide guidance for all required golden eagle mitigation and monitoring prior to, during, and after construction of the OWEF. This report included an in depth discussion regarding the risks that this proposed project would present to Golden Eagle populations. This document adequately supported the impacts discussed in Section 4.21 of the FEIS.

The daily and seasonal curtailment mitigation measures, as well as the funding of regional eagle populations studies, were termed “possible Advanced Conservation Practices.” They are contingency or adaptive management measures that could be implemented depending on the results of the three-year post-construction monitoring. Without the monitoring results, there is no established need for these possible mitigation measures.

The March 23, 2012 Land-Based Wind Energy Guidelines are voluntary. They represent a good-faith effort to minimize risk to eagles between the wind energy developer and the Fish and Wildlife Service. The Eagle Conservation Plan for the Ocotillo Express project utilized the tiered approach recommended in the draft guidelines. The Fish and Wildlife Service has reviewed and concurred with the Eagle Conservation Plan for its ability to comply with the regulations issued pursuant to the Bald and Golden Eagle Act

The BLM utilized the best available data to assess cumulative impacts to the regional golden eagle population. The importance of golden eagles to the tribes was recognized and disclosed in the draft and final EIS/EIR. As noted on FEIS Page 3.4-10: “Regarding other resources, Spier (1923:307) observed that some Kumeyaay ‘gens’ (i.e., clans) owned patches of certain trees and ‘each gens owned one or more eyries from which eaglets were taken for use in the mourning ceremony.’ Apparently, however, resource ownership did not extend to the oak groves in the mountains, which probably reflects the extreme importance placed upon this resource for the adaptation and survival of the entire society. Gifford (1931: 50-51) reported that the Kamia had no clan chiefs, but had a tribal chief like the Quechan; however, this form of leadership may have been introduced after European contact.”

Barefoot Banded Gecko and Peninsular Bighorn Sheep

The BLM used the most recent and best information available to determine the presence of the Barefoot Banded Gecko (see Section 4.21-3) and Peninsular Bighorn Sheep (see Section 4.21-7) in the proposed amendment area. The FEIS acknowledges that Peninsular Bighorn Sheep occupy habitat within the I-8 Island. The FEIS also identifies impacts to Bighorn Sheep and avoidance and mitigation measures to reduce those effects (see Section 4.21).

The barefoot banded gecko was not detected in the proposed amendment area, despite exhaustive searches in 2011. The CDFG survey protocol (CDFG, 2010) was prepared to maximize detection and states that, “if no lizards are detected within four surveys according to this protocol, it will

be assumed the species is not present in the surveyed area.” While the survey only took place over the course of one year, preconstruction surveys will provide additional opportunity to detect barefoot banded gecko to better avoid direct impacts to individuals. If the species is found during construction, a 2081 Incidental Take Permit from the California Department of Fish and Game will be required. As explained in the FEIS/EIR, the proponents are compensating for all applicable unavoidable habitat loss.

Bats

The Fish and Wildlife Service has reviewed and concurred with the Avian and Bat Protection Plan (FEIS/EIR Appendix L6). The project proponents followed the California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development (California Energy Commission), at the agency’s recommendation. These recommendations were developed with the assistance of bat conservationists. High altitude survey methodology was not recommended in these guidelines. Although collection of additional survey data is encouraged by the BLM, it is not required. Completion of one year of surveys is also consistent with California Energy Commission guidelines. Nothing in the submitted studies or literature indicates the propensity of bats to be attached to moving wind turbines; therefore, this impact was not analyzed in the FEIS/EIR.

Tribal Interests and Cultural Resources

Issue Number: PP-CA-OWEF-12-04-16

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

ISSUE #4 The Tribe Protests BLM's Proposed Plan Amendment Because BLM Failed to Engage in Meaningful Government-to-Government Consultation Under Section 106 of the NHPA.

Issue Number: PP-CA-OWEF-12-04-18

Organization: Quechan Indian Tribe of the Fort Yuma Indian Reservation

Protester: Frank R. Jozwiak and Thane D. Somerville

Issue Excerpt Text:

As in the Imperial Valley Solar proceeding, BLM has failed to comply with its duties to consult with the Quechan Tribe at each stage of the Section 106 process, including determinations of eligibility, and resolution of adverse effects. The Tribe has also been deprived

of access to the actual decision-maker in this proceeding - thus precluding true government-to-government consultation. These procedural flaws render any substantive decision to approve the plan amendment and right-of-way invalid.

Issue Number: PP-CA-OWEF-12-08-23

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

ISSUE #3: The PA Proposes Resource Impacts and Effects and Inadequate Mitigation Measures Instead of Resource Preservation In Conflict With the Applicable Class L Land-Use Designation. The CDCA Plan, Native American Element, recognizes that "mitigation" is often not sufficient where cultural resources are at issue. Page 27 of the Plan states, "[M]any impacts on resources of Native American value are not amenable to mitigation. Desecration or sacrilegious treatment of religiously significant sites cannot be mitigated as can many adverse effects on material resources. These substantial, potential, and often irreversible impacts on cultural values will be carefully considered in all actions of the Plan." In other words, prehistoric cultural resources cannot be simply replaced or put back together once a project is developed and the resource destroyed, relocated, or otherwise altered."

The special and unique cultural and spiritual nature of this area will be lost forever once 112 440-foot turbines, 42 miles of roads and other infrastructure and activities are placed on this largely undisturbed desert land.

Issue Number: PP-CA-OWEF-12-08-26

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Further, items in the current draft of the MOA proposed as treatment measures are evaluations more properly completed prior to project approval and prior to action on the PA. These items should also be done by qualified contractors and in consultation with Ms. Lucas, and not be imposed upon the tribes. For example, the studies referenced in the MOA include: 1) an independent ethnographic study to further document the tribal values and traditional use of the resources within the Project area and explore how these resources fit into a larger TCP identified by Ms. Lucas and other tribes, its potential eligibility for the National Register and formal nomination to it; 2) a synthesis study of existing data to explore the potential for one or more archaeological districts using a regional approach, and the preparation of National Register forms; and 3) a prehistoric trails continuation study. (See, Revised Ocotillo Express MOA packet from BLM to consulting parties, dated April 3, 2012.)

Issue Number: PP-CA-OWEF-12-08-28

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Other proffered mitigation or treatment measures, are culturally inappropriate or are of no benefit to tribes, but instead benefit archaeologists (i.e., more studies for which they are well compensated) and BLM (i.e., funding for the Imperial Valley Desert Museum where BLM houses collections)." Still other treatment measures, such as proposals for offsite mitigation, should have been evaluated through the NEPA process, which has not occurred here. 17 See, DOI Instructional Memorandum No. 2008-204, "Offsite Mitigation." The Memo also states that under the provisions of Section 302 of FLMPA, discussed below, offsite mitigation cannot be substituted where the onsite use, if authorized would cause unnecessary or undue degradation.

Issue Number: PP-CA-OWEF-12-08-32

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

T The CDCA Plan also incorporates the consultation requirements of other federal laws, such as NHPA Section 106 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. 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 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); and 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), among others. The BLM has also not complied with these authorities. The meaningful government-to-government consultation required by law has not occurred here and importantly, there has been no resolution of adverse effects.

Issue Number: PP-CA-OWEF-12-08-33

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

The required consultation has not occurred in this proceeding, to the detriment of the planning and decision-making process, Ms. Lucas and other tribes.

As made clear by FEIS/R Table 5-2, "Tribal Consultation between February 2010 and August 2011," BLM appears to believe that transmission of general project status updates, general notices and provision of draft documents to which the tribes were not involved in creating satisfies its obligation to engage in meaningful government-to-government consultation with affected tribes. Just because a letter refers to "continuing consultation" does not make it so. Notification letters and brief project updates to the general public are not adequate to comply with BLM's Section 106 consultation obligations to Ms. Lucas. 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 and seeking agreement with tribes. 20 The EI Centro BLM appears to have a pattern and practice of failing to implement adequate consultation. See, *Quechon Tribe of the Fort Yuma Indian Reservation v. United States Department of Interior*, 755 F.Supp.2d 1104 (S.D. Cal. 2010). Ms. Lucas understands that many of the same shortcomings experienced by her relative to the Imperial Valley Solar (IVS) Project are being repeated relative to the Project, indicating that BLM has not undertaken the necessary steps to change how it consults with tribal nations. Ms. Lucas submitted many letters of concern on the IVS project; my office also sent in a protest to BLM on that project, raising many of the same issues at stake with the instant Project. (See, Exhibit 2, Lucas letter to BLM, dated May 31, 2010; Email protest from Attorney Coyle to BLM, dated August 26, 2010; and Attorney Coyle letter to Secretary Salazar, dated September 2, 2010.) To Ms. Lucas, meaningful consultation includes written responses to her written concerns and direct meetings with the decision makers. Neither of these has occurred with respect to the proposed Project.

Issue Number: PP-CA-OWEF-12-08-36

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Second, the fast tracking has caused the required process steps to be taken out of sequence, which in a "domino effect," has contributed to the current inadequacies and shortcomings in the Project's environmental compliance and PA documents. This includes the fundamental flaw that the Archaeological Survey Report (by Tierra

Environmental Services) is still in draft form (even though the FEIS/R has been released, over tribal objection) and is currently still out for consulting parties review until April 20, 2012. Also, the California and National Register eligibility determination recommendations (also by Tierra) are not final and are the subject of ongoing discussions among consulting parties, including the SHPO, Advisory Council on Historic Preservation (ACHP) and BLM. Moreover, important documents, such as the Tribal Values Report, are still in the drafting stage by BLM, awaiting review by Ms. Lucas and other tribes.

Issue Number: PP-CA-OWEF-12-08-37

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Third, the approach to assessing Cultural Resources, has pivoted solely around the draft Archaeological Report, which looked only at archaeological sites and aspects of interest to archaeologists." Ms. Lucas and others repeatedly asked for tribal interpretations and views to be incorporated into that Report." Even though the Report has undergone multiple revisions, it remains insufficient. If tribal cultural values are not to be included in the Archaeological Report, they must occur somewhere in the EIS/R. Very little analysis was contained in the DEIS/R, and what is in the FEIS/R remains insufficient, only a restatement of views from tribal leaders.

Issue Number: PP-CA-OWEF-12-08-74

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Other Sections: 7.4

Issue Excerpt Text:

Goal 3 relates to the preservation of Cultural Resources and states that they "shall be" preserved to "maintain the traditional historic elements of the Imperial Valley landscape." Ms. Lucas strongly disputes that Mitigation Measures CUL-1 through CUL-7 are consistent with this goal given the Project's undeniable diminishment to the cultural landscape.

Issue Number: PP-CA-OWEF-12-09-15

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

15 Further, BLM has failed to engage in meaningful government-to-government consultation with Viejas as required by NHPA Section 106 and by other federal laws, and the County has declined to consult at all with Viejas, as discussed elsewhere in more detail.

Issue Number: PP-CA-OWEF-12-09-23

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

BLM concedes in the draft MOA attached to the FEIS/R at Appendix R, that the development of this Project will not be able to avoid impacts to cultural resources. In fact, BLM has determined that all the build alternatives under consideration would have an adverse effect on the Spoke Wheel Geoglyph,¹⁷ the portion of the TCP that lies within the APE as identified by tribes, and the cultural resources that the tribes have identified in that area related to the TCP to which Indian tribes attach religious and/or cultural significance (FEIS/R, Appendix R, Draft MOA, page 3).

Issue Number: PP-CA-OWEF-12-09-25

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

The Project's impacts will be permanent and irreversible. Due to the permanent impairment and destruction of significant cultural and religious resource values, this Project is clearly inconsistent with the Class L land use designation, and the PA must be denied.

Issue Number: PP-CA-OWEF-12-09-29

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Further, items in the current draft of the MOA proposed as treatment measures are evaluations more properly completed prior to project approval and prior to action on the PA. These items should also be done by qualified contractors and in consultation with Viejas and other tribes, and not be imposed upon the tribes. For example, the studies referenced in the MOA include: 1) an independent ethnographic study to further document the tribal values and traditional use of the resources within the Project area and explore how these resources fit into a larger TCP identified by Viejas and other tribes, its potential

eligibility for the National Register and formal nomination to it; 2) a synthesis study of existing data to explore the potential for one or more archaeological districts using a regional approach, and the preparation of National Register forms; and 3) a prehistoric trails continuation study. (See, Exhibit 4, Revised Ocotillo Express MOA packet from BLM to consulting parties, dated April 3, 2012, and Exhibit 5, Viejas Comments on Revised MOA, dated March 29, 2012). Moreover, other proffered mitigation or treatment measures, are culturally inappropriate or are of no benefit to tribes, but instead benefit archaeologists (i.e., more studies for which they are well compensated) and BLM (i.e., funding for the Imperial Valley Desert Museum where BLM houses collections)."

Issue Number: PP-CA-OWEF-12-09-33

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

The required consultation has not occurred in this proceeding, to the detriment of the planning and decision-making process, Ms. Lucas and other tribes. As made clear by FEIS/R Table 5-2, "Tribal Consultation between February 2010 and August 2011," BLM appears to believe that transmission of general project status updates, general notices and provision of draft documents to which the tribes were not involved in creating satisfies its obligation to engage in meaningful government-to-government consultation with affected tribes. Just because a letter refers to "continuing consultation" does not make it so. Notification letters and brief project updates to the general public are not adequate to comply with BLM's Section 106 consultation obligations to Ms. Lucas. 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 and seeking agreement with tribes. ²⁰ The EI Centro BLM appears to have a pattern and practice of failing to implement adequate consultation. See, *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of Interior*, 755 F.Supp.2d 1104 (S.D. Cal. 2010). Ms. Lucas understands that many of the same shortcomings experienced by her relative to the Imperial Valley Solar (IVS) Project are being repeated relative to the Project, indicating that BLM has not undertaken the necessary steps to change how it consults with tribal nations. Ms. Lucas submitted many letters of concern on the IVS project; my office

also sent in a protest to BLM on that project, raising many of the same issues at stake with the instant Project. (See, Exhibit 2, Lucas letter to BLM, dated May 31, 2010; Email protest from Attorney Coyle to BLM, dated August 26, 2010; and Attorney Coyle letter to Secretary Salazar, dated September 2, 2010.) To Ms. Lucas, meaningful consultation includes written responses to her written concerns and direct meetings with the decision makers. Neither of these has occurred with respect to the proposed Project.

Issue Number: PP-CA-OWEF-12-09-35

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

importantly, there has been no resolution of adverse effects. It was for these reasons that Viejas requested that the BLM and Imperial County hold the FEIS/R and not release it until the resolution of adverse effects had occurred. Viejas' request was rejected. This is not consistent with Section 106 of the NHPA or its implementing regulations."

The required consultation has not occurred in this proceeding, to the detriment of the planning and decision-making process, Viejas and other tribes. As made clear by FEIS/R Table 5-2, "Tribal Consultation between February 2010 and August 2011," BLM appears to believe that transmission of general project status updates, general notices and provision of draft documents to which the tribes were not involved in creating satisfies its obligation to engage in meaningful government-to-government consultation with affected tribes. Just because a letter refers to "continuing consultation" does not make it so. Notification letters and brief Project updates to the general public are not adequate to comply with BLM's Section 106 consultation obligation to Viejas. 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 and seeking agreement with tribes." To Viejas, meaningful consultation includes written responses to its written concerns and direct meetings with the decision makers. Neither of these occurred with respect to the proposed Project.

Issue Number: PP-CA-OWEF-12-09-40

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Second, the fast tracking has caused the required process steps to be taken out of sequence, which in a "domino effect," has contributed to the current inadequacies and shortcomings in the Project's environmental compliance and PA documents. This includes the fundamental flaw that the Archaeological Survey Report (by Tierra Environmental Services) is still in draft form (even though the FEIS/R has been released, over Viejas' objection) and is currently still out for consulting parties review until April 20, 2012. Also, the California and National Register eligibility determination recommendations (also by Tierra) are not final and are the subject of ongoing discussions among consulting parties, including the State Historic Preservation Office (SHPO), Advisory Council on Historic Preservation (ACHP) and BLM. Moreover, important documents, such as the Tribal Values Report, are still in the drafting stage by BLM, awaiting review by Viejas and other tribes.

Issue Number: PP-CA-OWEF-12-09-42

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Third, the approach to assessing Cultural Resources, has pivoted solely around the draft Archaeological Report, which looked only at archaeological sites and aspects of interest to archaeologists." The tribes repeatedly asked for tribal interpretations and views to be incorporated into that Report. Even though the Report has undergone multiple revisions, it remains insufficient. If tribal cultural values are not to be included in the Archaeological Report, they must occur somewhere in the FEIS/R. Very little analysis was contained in the DEIS/R, and what is in the FEIS/R remains insufficient, mostly a restatement of views from tribal leaders but no analysis. Why is the Tribal Cultural Values Report being drafted now, outside of the legally required environmental review framework? Each of these reports should have been made available at the DEIS/R stage, but were not, thereby depriving tribes an opportunity to comment.

Issue Number: PP-CA-OWEF-12-09-44

Organization: Viejas Band of Kumeyaay Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Each of these reports should have been made available at the DEIS/R stage, but were not, thereby depriving tribes an opportunity to review this information contemporaneously with the NEPA and

CEQA documents. This approach is inconsistent with the CDCA Plan, Native American Element, page 26, which states that, Prominent features of the CDCA landscape, wildlife species, prehistoric and historic site of occupation, worship, and domestic activities, and many plant and mineral resources are of traditional cultural value in the lives of the Desert's Native people. In some cases these resources have a religious value. Specific sites or regions may be important because of their role in ritual or the mythic origin of an ethnic group. These values will be considered in all CDCA land-use and management decisions.

Issue Number: PP-CA-OWEF-12-09-46
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:
Clearly, the CDCA Plan does not equate archaeological value with tribal cultural value. In

fact, CDCA Plan, Addendum A, Development of the Desert Plan, page 139, states that:
Within the plan elements the importance of Native American values was recognized by separating them from cultural resources and creating a separate element to address those special needs. needs.

Issue Number: PP-CA-OWEF-12-09-67
Organization: Viejas Band of Kumeyaay Indians
Protester: Courtney Ann Coyle

Issue Excerpt Text:
In sum, this revised technical report ("Golden Eagle Conservation Plan for the Ocotillo Wind Energy Facility", March 3, 2011) should have been circulated for public review and comment, particularly given the known tribal sensitivities towards the Golden Eagle. That it was not circulated is a violation of both CEQA, NEPA and the NHPA and is another reason why the PA is inconsistent with the applicable Class L Land Use Designation.

Summary

The BLM in the FEIS/EIR PA violates NEPA, FLPMA, and Section 106 of the NHPA by:

1. Failing to engage in meaningful government-to-government consultation with various tribes;
 2. Not circulating preferred mitigation or treatment measures related to cultural resources to the tribes with adequate time for review and comment;
 3. Proposing offsite mitigation, which cannot be substituted where the onsite use would cause unnecessary or undue degradation;
 4. Making decisions before the Archaeological Survey Report, Tribal Values Report, and the California and National Register eligibility determination recommendations are finalized and reviewed by SHPO, the ACHP, and the BLM;
 5. Assessing cultural resources solely based upon the draft Archaeological Report, which looked only at archaeological sites and aspects of interest to archaeologists and did not take into account tribal values; and
 6. Not resolving adverse impacts, which is the final step of the Section 106 consultation process.
-

Response

The BLM invited the tribes to consult on the OWEF on a government-to-government basis at the earliest stages of project planning. It sent letters to the affected Tribes and the one Tribal Organization, dated February 4, 2010, informing them about the application submitted by the Applicant for a ROW to conduct wind testing at the Project site and to develop a wind energy generation facility near Ocotillo, California. The letters also requested assistance from the tribes identifying any issues or concerns, including the identification of sacred sites and places of traditional religious and cultural significance that might be affected by the OWEF. Since then, as explained below, the BLM has made a good faith effort to consult with tribes, respond to their concerns, and carefully consider the information and comments they shared. The BLM has incorporated this information into the decision-making process concerning historic properties and adverse effects to them, as well as the analysis of cultural resources for NEPA purposes.

Following the initial invitation to consult, the BLM continued to send correspondence, added additional tribes to the consultation list, held Section 106 group meetings, and offered to meet with individual tribes on a government-to-government basis, all in an effort to obtain their input, and that of other consulting parties on all phases of the Project's environmental review. Notably, in a letter dated July 28, 2010, wherein it reiterated its invitation to enter into government-to-government consultation, the BLM also: (i) provided an update on the environmental review process and cultural resources inventory; (ii) included a copy of the Class II & III Inventory Research Design and Work Plan; (iii) reiterated the BLM's request for assistance identifying tribal issues or concerns, including the identification of sacred sites and places of traditional religious and cultural significance, so that the cultural resources inventory could be adapted accordingly; and (iv) notified the tribes that the archaeological contractor would be contacting them to determine if they had tribal representatives who would participate in the inventory process. Many tribes responded to the BLM and the outreach conducted by the archaeological contractor by indicating that they wanted to participate in the archaeological inventory of the Project area. Throughout all phases of the inventory, tribal participants were included.

The BLM continued its consultation with the tribes in parallel with the NEPA process. Following the publication of the DEIS, some tribes identified the project area as a Traditional Cultural Property (TCP); one tribe stated so in a letter dated September 29, 2011. On November 23, 2011, another one of the consulted tribes informed the BLM that, in their view, a TCP encompassed the Project site and a much larger surrounding area. The tribes also reiterated their strong concern about the Project and potential effects to the newly recorded archaeological sites, including but not limited to: trails, geoglyphs, rock features, habitation areas, previously documented ethnographic resources, the view shed from the Spoke Wheel Geoglyph and other geoglyphs and sacred sites within the Project area, and both known and unknown cremation sites. These concerns were expressed to the BLM during Section 106 consultation meetings, individual government-to-government meetings, and in correspondence. In response to these concerns, the BLM requested in writing (and in subsequent meetings) additional information about the identified TCP; specifically, information about the characteristics that make the TCP eligible for inclusion in the NRHP so that the BLM could make the applicable determinations under Section 106 and to understand its significance to the Tribes. Chapter 5.0 and Tables 5-1 and 5-2 in the Final EIS/EIR provide a detailed summary of the activities and good faith efforts that the BLM has undertaken since February 2010 as part of its tribal consultation obligations,

including: written correspondence, meetings for the purposes of information and idea exchange, cultural resource site visits, and responses to information requests to consult with the affected tribes on this project.

With respect to planning for public involvement in the Section 106 process, the December 22, 2010 NOI published in the Federal Register for the OWEF project stated that the BLM would use and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the NHPA as provided for in 36 CFR 800.2(d)(3). Chapter 4.4 and Chapter 5.2 of the Draft EIS/EIR discussed the Section 106 process and the information in that Chapter was updated for the Final EIS/EIR. A copy of the draft Section 106 Memorandum of Agreement (MOA) which outlines the agency's effects determinations and proposed treatment measures to resolve the adverse effects was also included as Appendix R to the Final EIS/EIR.

Moreover, the Section 106 and government-to-government consultation for this project and amendment included more than just correspondence through formal mailings. It also included individual government-to-government meetings between agency officials and the tribes as well as Section 106 consultation group meetings and conference calls between consulting parties and tribes.

With respect to BLM's government-to-government consultations, Section 5.2 of the Final EIS/EIR identifies the numerous meetings that have been held with individual Tribes regarding the project, its potential effects, and the measures that might be taken to mitigate those effects.

With respect to Section 106, the BLM held the following group consultation meetings (six total), field trips (two total), and conference calls (three total):

- May 12, 2011: Group meeting to present and discuss preliminary archaeological survey results and to present avoidance options for sites identified to date. The meeting included a field trip to the OWEF project area and the following archaeological sites: Spoke Wheel Geoglyph (CA-IMP-6988), a large lithic scatter (temp designation SAC-003) and a ceramic scatter (temp designation AMC-004).
- December 22, 2011: Group meeting to discuss and obtain input on the BLM's determinations of eligibility, findings of effect, and the content of the Section 106 draft MOA.
- January 5, 2012: Group meeting to discuss and obtain input on the BLM's determinations of eligibility, findings of effect, and the content of the draft MOA.
- February 9, 2012: Group meeting to obtain input on avoidance ideas, treatment and mitigation to be included in the draft MOA. Project applicant presentation of 112 turbine reduced project footprint that sought to address concerns raised during Section 106 consultation.
- March 7, 2012: Group meeting to obtain input on the revised draft MOA, avoidance ideas, treatment and mitigation included in the MOA.

- March 12, 2012: Group meeting to obtain input on the revised draft MOA, avoidance ideas, treatment and mitigation included in the MOA.
- April 10, 2012: Group conference call to obtain input on the revised draft MOA, treatment and mitigation included in the MOA.
- April 11-13, 2012: Group field trips to visit requested archaeological sites within the OWEF project area as well as proposed project facilities.
- April 17, 2012: Group conference call to obtain input on the revised draft MOA, treatment and mitigation included in the MOA.
- April 19, 2012: Group conference call to obtain input on the revised draft MOA, treatment and mitigation included in the MOA.

In addition to the activities noted above, the BLM also made the following consultation efforts since publication of the Final EIS/EIR:

- On March 6, 2012, the BLM sent a letter to tribes requesting continued government-to-government consultation, provided the revised draft of the archaeological inventory report for an additional 45 day review period, and invited tribes and their representatives to participate in field trips to the project area to look at archaeological sites and proposed facilities. The letter notified tribes that the BLM's third party contractor would be following up by phone call with them to determine their participation and answer any questions. The letter concluded with an offer to again meet individually with Tribes on a government-to-government basis at any time.
- On March 31, 2012 and April 18, 2012, the BLM had government-to-government meetings with the Quechan Indian Tribe to discuss the Project.
- On April 2, 2012, the BLM and Secretary of the Interior officials had a government-to-government meeting to discuss the Project with the Quechan Indian Tribe, the Manzanita Band of Kumeyaay Indians and the Viejas Band of Kumeyaay Indians. A field trip to the Project area was also conducted.
- On April 3, 2012, the BLM sent a letter to tribes providing a third revised version of the draft MOA for a final 17 day consultation period. The letter requested their comments and review by April 20, 2012 and included a detailed summary of the changes that had been made in response to the comments that had been provided on the previous draft. The letter also re-invited tribes to participate in the field trips on April 11-13, 2012.

Based on these consultations, the Project was repeatedly redesigned to avoid any direct physical impacts to cultural resources identified during the archeological surveys conducted

in connection with the Project. These redesigns included the relocation of individual turbines, as well as the wholesale elimination of turbine sites. Most notably, as reflected in the Final EIS/EIR Preferred Alternative, 43 turbine sites were eliminated altogether from the Proposed Action configuration to reduce the impact of the Project on cultural resources in the northwest corner of the Project site and the landscape where the Project is located. These consultations also resulted in the development of the Project's MOA. In total, these measures meaningfully reduce the impact of the Project to identified archeological resources. With respect to currently unknown resources, the MOA contains robust measures that respond to the potential for the post-review discovery of cultural resources during the construction, operation, or decommissioning of the Project. Specifically, the MOA includes a Historic Properties Treatment Plan, Plan for Archaeological Monitoring, Post-Review Discovery and Unanticipated Effects, and Native American Graves Protection and Repatriation Act Plan of Action. The MOA also includes stipulations for the creation of Environmentally Sensitive Areas to protect archaeological sites during construction and a provision that requires the development of a Long Term Management Plan to ensure the continued protection of cultural resources within the ROW for the life of the Project.

Despite these measures, as explained in the Final EIS/EIR, consultation with the Tribes, Tribal Organizations and members of the public has revealed very strong concern about the Project and the impacts it would cause under all of the build alternatives. The BLM understands and appreciates the importance and sensitivity of cultural resources within and near the Project site, and even after the implementation of the measures contained in the MOA, the BLM recognizes that the Refined Project will still have an adverse effect on religious and cultural resources that are significant to many of the tribes that consulted with the BLM about the Project. However, the BLM has endeavored to address, to the maximum extent practicable, all of the issues identified by the tribes.

Most notably, despite its relatively late identification in the Section 106 process, the BLM has worked extensively with the tribes over the last seven months to understand the TCP identified by the tribes. The BLM held additional meetings to discuss the eligibility determinations; the BLM's findings of effect; and ways to minimize, avoid, and resolve the adverse effects as discussed in the revised draft MOA, including effects on the TCP. The BLM also repeatedly requested at these meetings (and in writing) information about the identified TCP, including the information necessary for it to make the necessary determinations under Section 106. As a result of these efforts and consultations with Tribes and other parties, including the SHPO and the ACHP, the BLM revised its original proposed determinations and findings with respect to the cultural resources on the Project and expressly assumed that the portion of the TCP within the Project area is eligible for the NRHP for purposes of its analysis of adverse effects. It also documented its understanding of the identified resource in the Final EIS/EIR and in a Draft Tribal Values Supplemental Report for the Ocotillo Wind Energy Facility that it prepared.

The relevant guidance explains that the identification and evaluation of a traditional cultural landscape, or a TCP, generally depends upon when the group to which the property may have traditional cultural significance provides sufficient information to identify the landscape. As explained in the Final EIS/EIR, the BLM did not receive sufficient information for it to fully analyze the entire TCP, or all of the characteristics that might make it eligible for the NRHP. However, based on the information it was able to obtain and consistent with the relevant guidance, the BLM has assumed that the period of significance for the TCP ranges between the creation of humans and the current era and that, for the purposes of this plan amendment, makes an assumption of NRHP eligibility for that portion of the TCP within the Project APE. More importantly, the BLM has acknowledged that the Project, or any of its action alternatives, would result in adverse effects to the TCP that cannot be completely mitigated.

Based on the foregoing, the BLM has satisfied its government-to-government and Section 106 consultation obligations with respect to the Project. It has identified potential effects to resources, and to the extent practicable, has developed measures to avoid, minimize, or mitigate those effects.

Visual Resource Management

Issue Number: PP-CA-OWEF-12-08-75

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Goal 7 relates to the preservation of Visual Resources. Given that the desert is easily scarred and slow to heal, as evidenced by the visual scars persisting today from prior activities in the area along Sugarloaf and at the base of the recently completed Sunrise Powerlink towers in the PA area, it cannot be said the Project impacts can be minimized or that the aesthetic character of the region for residential, commercial, recreational and tourist activity would not be impaired, given the evidence on the record that recreational, OHV and tribal users may no longer come, and that home values in the area would further decrease due to the ruination of scenic mountain views, among other Project impacts.

Summary

The FEIS wrongly claims that the project's impacts can be minimized or that the aesthetic character of the region for residential, commercial, recreational and tourist activity would not be impaired, given the evidence on the record that recreational, OHV and tribal users may no longer visit the area and that home values in close proximity to the PA area would decrease due to the ruination of scenic mountain views.

Response

The FEIS does not conclude that the project would not impact the aesthetic character of the region. In fact, section 4.18 of the FEIS explicitly states that “the project would result in the long-term visual alteration of landscapes, including both BLM-administered lands, other public lands, and private lands.” As explained in sections 3.18 and 4.18, impacts to the inventoried visual resource values are evaluated through a contrast rating process. The degree to which the Proposed Action and alternatives affect the visual quality of a landscape is directly related to the amount of visual contrast between the alternative and the existing landscape character. As indicated above, the project site is located on BLM-administered lands managed under an Interim VRM Class IV designation, which permits a high level of visual change to the landscape, including activities that may dominate views. The visual values within the Field Office planning area were inventoried and found that the project area was within Visual Resource Inventory (VRI) Class II and III. VRI Classes describe the visual values only and do not dictate management objectives.

The CDCA does not designate visual management directives normally defined by Visual Resource Management (VRM) Classes I – IV. With the omission of VRM Class designations within the CDCA plan, proposed actions require a designation of an interim-VRM Class, which is determined through evaluation of inventoried visual values and existing allocation decisions within the CDCA Plan. Interim-VRM Class designations must be compatible with the land use plan’s existing allocation decisions. Once the project was analyzed, the developed condition determined, and an evaluation made of the CDCA land use plan’s allocations, the BLM decided that the area should be designated as Interim VRM Class IV. The project is consistent with that Interim VRM designation. Section 4.18.11 also points out that under the proposed action it “is expected that even with effective implementation of Mitigation Measure VR-1, the residual impacts associated with land scarring and vegetation clearance would remain for several years given the difficulty of successful revegetation in an arid environment. This would result in an unavoidable, long-term, adverse impact to visual resources.”

Water

Issue Number: PP-CA-OWEF-12-08-76

Organization: Carmen Lucas, Kwaaymil Laguna Band of Indians

Protester: Courtney Ann Coyle

Issue Excerpt Text:

Goal 8 relates to the County conserving and protecting Water Resources. The chart states that the applicant has "coordinated with water agencies" regarding water use. Given the documentation in the FEIS/R and elsewhere in the record, this statement is unsubstantiated; at the present time, no agency is presently able or committed to serve the Project with a certain water source. Each of the sources is speculative. (FEIS/R, page 4.19-3).

Summary

According to the FEIS, the BLM has coordinated with water agencies regarding the use of water associated with the proposed action. However, this statement is unsubstantiated, as there is no record of any agency committed to serve the project with a certain water source.

Response

The BLM notes several times throughout the FEIS (including in Appendix P: Water Supply Assessment) that there is currently no committed water source for the proposed project. While there is currently no committed water source, coordination with water agencies and companies (including the City of Brawley, SCWD, Vulcan Materials, and IID) has taken place and these discussions are documented in Section 4.19. While these discussions do not translate into a specific commitment to purchase water from a particular agency, they do constitute coordination regarding water supply to meet the Project's water use need.
