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Brendan Hughes
<jesusthedude@hotmail.com>
08/21/2010 12:09 PM
To
<jim_stobaugh@blm.gov>, <cmeyer@energy.state.ca.us>
cc
Subject
Comments on Imperial Valley Solar
FEIS/SSA

To whom it may concern:

I implore BLM and CEC to deny the Imperial Valley Solar project. This project will have unmitigable impacts on the rich cultural resources of the Colorado Desert and the flat-tail horned lizard and the peninsular bighorn sheep. It will cause the flat-tail horn lizard to be listed under the Endangered Species Act. Overriding these considerations will put BLM at odds with its multiple-use mandate to sustainably manage its resources for the benefit of the American people, and will cause the CEC to disregard the protections of CEQA. Alternatives to this project are clearly available, just not in the model that brings the highest profit to the energy companies. I urge you to bring some sanity to this energy debate and deny this destructive and unnecessary project.

Thank you for your consideration.

Brendan Hughes
61093 Prescott Trail
Joshua Tree, CA 92252

From: CourtCoyle@aol.com
To: caivspp@blm.gov
Sent: 8/26/2010 5:39:47 P.M. Pacific Daylight Time
Subj: FEIS Imperial Valley Solar Project Comments and Protest

Jim Stobaugh, BLM, National Project Manager caivspp@blm.gov
Brenda Hudgens-Williams, Director and Protest Expeditor By Mail and Fax
202-912-7129

Dear Sirs and Madams:

This comment letter and protest is sent on behalf of my client, Carmen Lucas, Kwaaymii Laguna Band of Indians. Ms. Lucas has been involved in project planning through attending meetings, site visits and hearings. She is specifically referred to within the FEIS including at pages 7-1, 7-2, D-5 and throughout Appendix F. This letter supplements correspondence and comments that have already been provided by Ms. Lucas.

Improper Deferral of Cultural Inventories, Evaluations and Tribal Consultation

The FEIS states that further field visits and tours are expected in the upcoming months as the cultural resources inventory report is finalized and Section 106 consultation continues. (FEIS, 7-2). While we appreciate the value of field visits and tours, we strongly believe that to comply with Section 106, NEPA and CEQA, that tours and visits, cultural resource inventory reports, National Register evaluations, TCP identifications and landscape and visual effects analysis must be concluded prior to project approval. Otherwise, it cannot be said that the agencies have truly taken into account all the adverse effects of the project and considered all feasible mitigation measures. Improperly delaying the completion of 106 until after project approval is something we are seeing with more frequency on projects in our area, especially those related to industrial utility projects - like the Sunrise Powerlink - and is a practice that we believe is not supported in the law.

Improper Deferral of Mitigation Measures for Impacts to Tribal Cultural Resources

The FEIS states that "preliminary mitigation measures" are described in the FEIS and in the draft Programmatic Agreement ("PA"). (FEIS D-259, D-286). We strongly believe that mitigation measures must be known and implementable at the time of project approval - not deferred until sometime after public review closes or after project approval. A failure to timely present mitigation will result in the inability of the tribes and others to have an opportunity to publicly review the measures. Moreover, there is an obligation for the applicant and approving agency not to rush to override significant adverse impacts without adopting feasible mitigation measures to help lessen those impacts.

Further, we have reviewed the draft PA and FEIS and find it to contain few tangible mitigation measures that would offset the project's impacts to tribes. Mitigation measures that should be investigated, in consultation with tribes, only if the project must move forward (which we hope it will not), include, but are not limited to funding/resources to:

establish/enhance cultural centers, museums, language programs, or establish THPO offices. Such measures should be agreed upon prior to project approval.

The Draft Programmatic Agreement is Insufficient, Harmful to Tribal Interests and Consultation on it Should be Terminated

The draft PA for this project is insufficient in several regards and should not be used here or elsewhere in our desert as a template or model. Most of the actions described in this document, are actions that should take place prior to project approval to ensure the full and adequate consideration of cultural resources and values. There is little actual mitigation of the admitted adverse effects in the PA or the FEIS. This is very alarming.

The PA also is internally inconsistent by stating on the one hand that the applicant has "completed" all the necessary cultural investigations - and on the other hand admitting that the report is still in "draft" form. (Compare PA lines 150-151 to lines 157-158 and 463-469). Also, it is unclear that the project APE, while larger than the area surveyed for archaeological impacts, addresses the full geographic extent of adverse indirect effects (including effects to cultural landscapes, trail systems, visual impacts, and sacred mountains) which are beyond that boundary, contrary to PA line 152. A graphic map of the APE and sub-APEs would be helpful in understanding the differing areas.

National Register evaluation and nominations must include a focus on nomination under Criterion A - tribal values and not just Criterion D - scientific values (PA line 539). Tribes should also be consulted by BLM when it is determining whether to assume a discovered property to be eligible for inclusion in the NRHP (PA line 641).

The PA references many appendices, but does not provide a table of appendices nor are any appendices included for review. (See, for example, Appendix A to the PA is alluded to at PA line 566, but not provided for public review; Attachment B, mentioned at PA line 579, is also omitted, etc.). This renders the review period invalid. An additional 30 days of public review for the FEIS and PA must occur.

Government-to-Government Consultation Inadequately Described in FEIS

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

Avoidance of Tribal Burials not Guaranteed

The FEIS and PA do not state that burial or cremation grounds will be avoided by the project. (FEIS D-501). Avoidance should include all related cultural features, such as gathering or food preparation areas as well as include a buffer and protective measures. Specific mitigation measures to avoid adverse effects must be spelled out clearly in the mitigation and conditions of project approval. Moreover, what guarantee is there that additional burials will not be located within the project area? If they are subsequently found, how will the project avoid those resources? What specific steps will BLM and the applicant take? The FEIS and PA also must demonstrate compliance with California Public Resources Code section 5097.9.

Visual Impacts Unacceptable

Visual impacts are not adequately or consistently shown in the FEIS,

likely in an effort to downplay their effects. Compare the binder spine images (vegetation up to the units) with FEIS Figures 2-3 and 4-5 which show the more accurate denuded base of the dish units and the vast number of units. These visual impacts to the tribal cultural landscape are unmitigable and unacceptable.

Cumulative Impacts Inadequately Considered

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

No Plan Amendment Should Issue

Moreover, no amendment to the CDCA Plan should occur to accommodate a project that causes so many environmental harms to our special places and local peoples, as enumerated above, especially on Class L (Limited Use) lands which were designated to protect sensitive, natural, scenic, ecological and cultural resource values. Renewable energy may be an appropriate use for areas of the California desert, but not in this area. Please do not begin to turn our open desert into a sacrifice area for industrial renewable energy and forever change the hallowed landscape that the tribal ancestors entrusted to us.

In sum, based on the effects and impacts described above, my client is in favor of the No Action Alternative and to amend the CDCA Plan for No Solar in this, and similarly situated locations, within her ancestors' territory.

Very Truly Yours,
Courtney Coyle
cc: Interested Parties

Courtney Ann Coyle
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"Protecting and Preserving Tribal, Cultural, Biological and Park Resource Landscapes"

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Memorandum

To: Bureau of Land Management
2800 Cottage Way
Sacramento, CA 95825
Attn: Erin Dreyfuss

Date: August 20, 2010

Website: www.fire.ca.gov

Re: Imperial Valley Solar Project Final EIS
SCH2010074006
Environmental Impact Statement (EIS-Federal)

After review of the above referenced document, I recommend the following considerations:

One; create a fuel break around project area. This action would reduce the risk of fire escaping from or into project area. The fuel break should be maintained through out the life of the project.

Two; construct an all weather access road into and around project area. This will allow emergency vehicle access when a fire occurs. The road should be maintained through out the project life.

Three; that all wires and other service lines be placed under ground. This action would greatly enhance public and firefighter safety in the event of a wild land fire and also allow access which typically is compromised because of burnt poles and down lines, which are indicative of overhead applications. This will also greatly increase aerial firefighting operational safety. I would recommend and strongly encourage that these considerations be utilized as part of the project plan.

Thank you for this opportunity to participate in this process.



Mark Ostrander
CAL FIRE
San Diego Unit
Environmental Coordinator
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Mandated Due Date:	08/23/10
Date Document Received in Mail:	08/10/10
Comment Letter Date:	08/20/10
Date Mailed:	08/21/10

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August 25, 2010

VIA E-MAIL [ORIGINAL WITH ATTACHMENTS TO FOLLOW BY OVERNIGHT MAIL]

Jim Stobaugh
BLM Project Manager
U.S. Bureau of Land Management
1340 Financial Boulevard
Reno, Nevada 89520
Jim_Stobaugh@blm.gov

Re: Joint Comments on the Final Environmental Impact Statement for the Imperial Valley Solar, LLC Project, California and the Proposed California Desert Conservation Area Plan Amendment

Dear Mr. Stobaugh:

We submit these Joint Comments on the Final Environmental Impact Statement ("FEIS"), prepared for the Imperial Valley Solar, LLC Project and the Proposed California Desert Conservation Area Plan Amendment (collectively "Project"), on behalf of California Unions for Reliable Energy ("CURE"), Neil Zinn, and Sterling E. Mayes. As explained more fully below, the FEIS does not comply with the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and approval of the Project would violate the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, and the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.* BLM may not approve the Project until it has complied with all relevant law, and evaluated the Project impacts in a supplemental EIS, as required by NEPA.

CURE is a coalition of labor unions whose members construct, operate, and maintain power plants throughout California. CURE encourages sustainable development of California's energy and natural resources. Environmental degradation jeopardizes future growth and jobs by causing construction moratoriums, destroying cultural or wildlife areas, consuming limited fresh water

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resources, causing water pollution, and imposing other stresses on the environmental carrying capacity of the state. This in turn reduces future employment opportunities for CURE's members. Additionally, union members live, recreate and work in the communities and regions that suffer the impacts of projects that are detrimental to human health and the environment. CURE therefore has a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment. Finally, CURE members are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. The NEPA process allows for a balanced consideration of a project's socioeconomic and environmental impacts, and it is in this spirit that CURE offers these comments.

Neil Zinn is a member of International Brotherhood of Electrical Workers Local 569. Mr. Zinn lives in El Centro, California and owns land near the proposed Project site. Mr. Zinn has a personal interest in protecting the Project site from unnecessary adverse impacts in order to protect the area for future study and recreation. Mr. Zinn is on the Board of the Imperial Valley College Desert Museum Society, dedicated to collecting and preserving Native American artifacts and prehistoric cultural sites that still exist in the surrounding area. His goal is to help students and the public learn about the early inhabitants around the lake that filled Imperial Valley. These ancient and sacred treasures include remains of Native American fishtraps, sleeping circles, and geoglyphs, among other cultural resources. Mr. Zinn has used the Project area and its vicinity for motorcycling and recreation since the 1960s. He now enjoys hiking the Project area and using the area for observation of desert wildlife and wildflowers.

Sterling E. Mayes is the Secretary and Treasurer of the Imperial County Building Trades Council. Mr. Mayes lives in El Centro, California. Mr. Mayes frequents the Project area for wildlife observation and to enjoy the scenic beauty of the Yuha Desert. Mr. Mayes also frequently visits the Salton Sea, where he takes drives and walks to observe native and migrating birds. Mr. Mayes has a personal interest in protecting the Project area of impact from unnecessary adverse environmental effects to preserve the area for future recreation.

The Bureau of Land Management ("BLM") and the California Energy Commission ("CEC") prepared a joint Staff Assessment/Draft Environmental Impact Statement ("SA/DEIS") for the Project to satisfy the requirements of NEPA and California Environmental Quality Act ("CEQA"), California Public Resources Code § 21000 *et seq.* Following publication of the SA/DEIS, BLM and the CEC

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informed the public that environmental review of the Project would be bifurcated, and that BLM would publish a final EIS that would evaluate the Project in accordance with NEPA. These comments are directed toward BLM's FEIS and the technical appendices attached to the FEIS.

We have reviewed the FEIS and its technical appendices in conjunction with other studies and materials developed as part of the concurrent review of the Project by BLM and CEC. These comments were prepared with the technical assistance of Chris Bowles, Ph.D., P.E., Chris Campbell, M.S., and Claudia Nissley. The comments and qualifications of Dr. Bowles and Mr. Campbell are attached here to as Attachment A. The comments and qualifications of Ms. Nissley, a cultural resource specialist and former State Historic Preservation Officer of Wyoming, are attached hereto as Attachment B. We request that you consider and respond to these consultants' comments separately and individually.

I. NEPA VIOLATIONS

NEPA supplements and augments the authority of each federal agency, vesting each federal agency with the "responsibility and power to protect the environment and integrate environmental, social, and economic objectives when carrying out other federal agency functions."¹ Each federal agency is directed to "interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives."² Consistent with NEPA's mandate, the CDCA Plan requires BLM to analyze the environmental effects and the economic and social impacts of granting and/or implementing an applicant's request to amend the CDCA to accommodate a specific proposed use.³ BLM's rationale shall be based on "the principles of multiple use, sustained yield, and maintenance of environmental quality."⁴

¹ Ronald E. Bass et al., *The NEPA Book: A Step by Step Guide to How to Comply with the National Environmental Policy Act* (2d. Ed. 2001), p. 2.

² 40 C.F.R. § 1500.6

³ *See id.* ("Analysis of Proposed Amendments").

⁴ *See id.* ("Decision Criteria for Approval or Disapproval") and 40 C.F.R. § 1500.6.
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A. BLM Must Prepare a Supplemental Environmental Impact Statement

“An agency’s NEPA responsibilities do not end with the initial assessment; supplemental documentation “is at times necessary to satisfy the Act’s action-forcing purposes.”⁵ As stated by the Supreme Court in *Marsh v. Oregon Natural Resources Defense Council*,

It would be incongruous . . . with the Act’s manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.⁶

A supplemental EIS must be prepared if the agency makes “substantial changes” in the proposed action that are relevant to environmental concerns or if there are “significant new circumstances or information” relevant to environmental concerns and bearing on the proposed action or its impacts.⁷ “This is a low standard.”⁸ A plaintiff need only raise “substantial question regarding whether a project may have a significant effect.”⁹ If a change to an agency’s planned action affects environmental concerns in a different manner than previous analyses, the change is surely “relevant” to those same concerns.”¹⁰

⁵ *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 562 (9th 2006).

⁶ 490 U.S. 360, 371 (1989).

⁷ 40 C.F.R. § 1502.9(c)(1)(i)-(ii); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

⁸ *Klamath Siskiyou Wildlands Center*, 468 F.3d at 562.

⁹ *Id.*; see also *Price Road Neighborhood Association, v. United States Department of Transportation*, 113 F.3d 1505, 1509 (9th Cir. 1997) (“supplemental documentation is only required when the environmental impacts reach a certain threshold-i.e. significant (defined at 40 C.F.R. § 1508.27) or uncertain”)

¹⁰ *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 707 (10th Cir. 2009) (“*New Mexico*”).

i. BLM Must Supplement the EIS Because It Has Proposed a New Project Alternative Which Will Result in Different Potentially Significant Adverse Environmental Effects

A reduction in impact acreage due to the development of a new project alternative does not necessarily remove the agency's duty to supplement an EIS.¹¹ For example, a supplement is required where the adopted alternative entails a different configuration of activities and locations, not merely a reduced version of a previously considered alternative, and where a change in the location of development gives rise to different, potentially significant impacts on the environment.¹² "If . . . the Proposed Action ultimately differs so dramatically from the alternatives canvassed in the draft EIS as to preclude "meaningful consideration" by the public, [CEQ regulations] still require[] the submission of the Proposed Action for public comment prior to the issuance of the final EIS."¹³ In this case, "the circulation of a supplemental draft EIS describing the Proposed Action is the only means of satisfying" NEPA's requirement for meaningful public participation.¹⁴

Here, BLM failed to disclose the proposed Project until the publication of the FEIS. After the DEIS was released, the developer of the proposed Project, Imperial Valley Solar, LLC ("Applicant") and the Army Corps of Engineers ("Corps") proposed to modify the originally proposed Project to:

- (1) relocate the main service complex out of several primary washes;
- (2) remove some SunCatchers from drainages that transverse the Project site;
and
- (3) remove 30,000 stabilized spur access roads to allow all travel to Project SunCatcher units, whether for maintenance or mirror washing, to occur off road.

¹¹ See *New Mexico*, 565 F.3d 683 at 706.

¹² *New Mexico*, 565 F.3d 683 at 706-707 and *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1291-92 (1st Cir. 1996).

¹³ *State of Cal. v. Block*, 690 F.2d 753, 770 (9th Cir. 1982).

¹⁴ *Id.*

Thus, fundamental assumptions about the Project have changed since the publication of the DEIS; most notably, unlimited off road travel will now be permitted throughout the Project site.

The new Project proposal – referenced herein as the “Preferred Project” because BLM adopts it as the agency preferred project in the FEIS – changes the location of impacts by dispersing impacts throughout the Project site through unrestricted off-road travel. The Preferred Project also changes the configuration of the main Project elements. None of the alternatives considered in the DEIS evaluated a Project that proposes unrestricted off-road travel on ten square miles of fragile desert lands. Ironically, BLM currently also *forbids* this sort of activity in the Project area in order to protect the Yuha Desert as required by the CDCA Plan.¹⁵ The Preferred Project will result in new, potentially significant effects to desert hydrology, biological resources, and air quality that were not analyzed in the DEIS and have never before been considered for this area of the Yuha Desert under the CDCA. Because core elements of the Preferred Project could not be ascertained in the DEIS, the public has also been deprived of a meaningful opportunity to review and comment on this ill-advised Project proposal.

1. New Potentially Significant Impacts to Soil and Water

The Preferred Project is new and different, and in some respects *worse*, than the originally proposed Project. The Preferred Project “has new and persistent significant impacts” due to the reduction in number of access roads and the proposed removal of spur roads from the Project design.¹⁶ Based on the information provided in the FEIS, it is not clear how maintenance activities will be conducted as a result of a reduction in the number of access roads and the removal of spur roads. Presumably, where these roads do not exist, maintenance vehicles will simply travel “off road” to access the Project facilities. At least three potentially significant impacts can be identified based on BLM’s newly announced Project change:

- i. Excessive damage to the desert pavement and cryptobiotic crusts as a result of unrestricted access to areas not demarcated by a formal road;

¹⁵ See U.S. Bureau of Land Management, U.S. Department of Interior, Exploring the Yuha Desert (“Vehicles can travel in the Yuha only on marked BLM *designated routes*.”) (emphasis in original).

¹⁶ Comments of Chris Bowles and Chris Campbell on the FEIS, August 23, 2010, p.1. (“Campbell & Bowles Comments”) (Attachment A).

- ii. Unmitigated erosion due to the travel of maintenance vehicles along ad hoc access routes; and
- iii. Increased, and unmitigated, transport of soils and sediment to the washes and streams in and around the Project site as a result of off-road travel.¹⁷

These impacts must be analyzed in a supplemental EIS, and the public must be given an opportunity to comment on the Preferred Project, as required by NEPA.

2. New Potentially Significant Impacts to Biological Resources

The Preferred Project redesign would *increase* the temporary disturbance on the Project site with the construction of 50-foot wide roads for the installation of the underground utility line and hydrogen pipelines.¹⁸ These Project changes result in new and different impacts to biological resources by, for example, obstructing wildlife movement throughout the ten square mile Project site.¹⁹ BLM has not studied these impacts because they result from a newly proposed configuration of the Project. A supplemental EIS must be prepared to evaluate the impacts of the changed location of development within the Project site, and the public must be given an opportunity to comment on the Preferred Project in accordance with NEPA.²⁰

3. New Potentially Significant Impacts to Air Quality and Water Resources

The Preferred Project may potentially result in significant, unanalyzed impacts to air quality. Increases in the amount of “over land” unmaintained access throughout the site will generate additional dust resulting in significant public health impacts. Activities that result in soil disturbance and which generate dust present a unique health hazard in Imperial Valley because of the extremely high

¹⁷ Attachment A, p. 3 (Campbell & Bowles Comments).

¹⁸ See FEIS, Appendix H.

¹⁹ See e.g., California Energy Commission Hearing Transcript, July 27, 2010, p. 198:25-199:7 (“Attachment C”).

²⁰ See e.g., *New Mexico*, 565 F.3d 683 at 706-707 and *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1291-92 (1st Cir. 1996).

incidence of Valley Fever infection in this area.²¹ Valley Fever is caused by the microscopic fungus *coccidioides immitis*.²² Infection can occur through spores that become airborne when contaminated soil is disturbed by human activities, such as agricultural activities or construction, and are inhaled.²³ Infection is often accompanied by flu like symptoms. In less than 1% of cases, however, the illness can spread to the lungs, brain, bone and skin. If left untreated, Valley Fever can lead to severe pneumonia, meningitis, and death.²⁴

Greater dust generation also translates into greater water use as more frequent watering events would be needed to adequately mitigate adverse air quality impacts.²⁵ These impacts have not been studied or addressed. Indeed, the Applicant acknowledged at an evidentiary hearing held at the CEC regarding the proposed Project, that an analysis of air quality impacts from the Preferred Project has not been prepared.²⁶

Substantial questions exist regarding the potentially significant effects of the Preferred Project. A supplemental environmental impact statement must be prepared to adequately analyze these effects and to afford the public a meaningful opportunity to comment on the Preferred Project.

In the FEIS, BLM asserts that the Preferred Project includes changes which are “not the types of changes in circumstance that would require analysis through supplementation of the DEIS because the minimizing effect of the drainage avoidance features . . . are within the scope of the original DEIS.”²⁷ Notably, in making its determination of NEPA adequacy, BLM fails to identify the fact that the Preferred Project proposes to remove *all* spur roads from the Project design.²⁸ BLM’s determination is not supported by substantial evidence. The Preferred Project will result in unanalyzed, potentially significant effects, and is exactly the

²¹ Los Angeles Department of Public Health, Acute Communicable Disease Control, 2008 Annual Morbidity Report, p. 39, available at <http://www.lapublichealth.org/acd/diseases/Cocci.pdf>.

²² Office of Health and Safety, U.S. Department of Energy, Safety Advisory: Valley Fever.

²³ *Id.*

²⁴ County of Los Angeles Department of Regional Planning Impact Analysis Section, Draft Environmental Impact Report AV Solar Ranch One Project, June 2010, at p. 5.6-11.

²⁵ See California Energy Commission Hearing Transcript, July 26, 2010, p. 240:9-14; 241:10-25 (“Attachment D”).

²⁶ Attachment C, pp. 375:17-376:2.

²⁷ FEIS, Appendix B, pp. B-8-9.

²⁸ See generally, *id.*

type of Project change that warrants supplementation.²⁹ BLM must prepare a supplemental EIS and circulate the supplemental EIS for public review and comment in accordance with NEPA.

i. BLM Must Supplement the EIS Because the Project Now Proposes to Rely on Groundwater Which Results in Different, Potentially Significant Adverse Environmental Effects

The DEIS assumed that the Seeley Waste Water Treatment Facility (“SWWTF”) would serve the Project’s water needs with recycled water. After publication of the DEIS, however, the Applicant proposed to rely on groundwater to meet Project construction and, potentially, operation needs. Specifically, the Applicant proposes to rely on groundwater from the Dan Boyer Well for the Project’s primary water supply for up to the first three years of construction and operation.³⁰ This is a *significant* Project change. The Applicant’s proposed reliance on groundwater will cause potentially significant adverse effects, none of which were analyzed in the DEIS.

1. New Potentially Significant Impacts to Groundwater Supply

The Dan Boyer Well was “registered” by the County some time after May 2010.³¹ However, there is no license or permit that authorizes pumping from Dan Boyer Well for the Preferred Project.³² The registration certificate, recently issued by the County, also does not take into consideration the affects of pumping on overall basin balance.³³ As understood by the Applicant, the total “registered” capacity of the Dan Boyer well is 40 AFY.³⁴

²⁹ *New Mexico*, 565 F.3d 683 at 706-707 and *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1291-92 (1st Cir. 1996).

³⁰ FEIS, Appendix B, p. B-16.

³¹ See Attachment D, pp. 108:18-109:6.

³² See Attachment D, pp. 168:9-169:3.

³³ See *id.* at pp. 160:15-161:1; See also Imperial County Code, tit. 9, § 92103.00 (“Any person who uses a new or existing well shall first register said well with the Imperial county planning and development services department. If a well is under an active conditional use permit, the well shall be deemed to be registered. **Any well that is not under an Imperial County CUP shall be registered** with the planning and development services department and the state pursuant to California Water Code, Section 13750. An application to register any well shall be filed with the planning and development services department and said application shall contain all information required upon the form.”).

³⁴ Attachment D at pp. 96:19-97:12.

No records of prior groundwater extraction from the Dan Boyer Well have been provided by the Applicant.³⁵ Currently, residential water use supplied by the well is estimated to amount to 6 AFY.³⁶ The Applicant, however, assumes that pumping from the Dan Boyer Well may *increase* as a result of the Project.³⁷ The Applicant proposes to extract 39.5 AF of water from the well on an annual basis.³⁸ Based on this record evidence, total water demand will *increase* by an unknown quantity to approximately 45.5 AFY. BLM has not attempted to ascertain the proposed level of increase of Project pumping.

Because total demand will exceed the “registered” capacity of the Dan Boyer well, existing users will have to obtain their water from elsewhere, effectively shifting the demand to other wells in the basin. There is substantial question regarding the potentially significant effects of this change because the basin is characterized by *overdraft* conditions. According to the Applicant, the overall historic trends regarding groundwater levels in the Coyote-Ocotillo basin suggests that groundwater levels have been on the decline.³⁹ *Any* additional groundwater would exacerbate basin overdraft conditions in the Coyote-Ocotillo Wells basin, and such effect would be significant. Specifically,

[CEC] staff concluded that unmitigable impacts would occur to groundwater storage in the Ocotillo/Coyote Wells basin. This basin is in a state of ongoing overdraft and the approximate use of this groundwater would exacerbate this condition.⁴⁰

CEC technical Staff further concluded that effects on groundwater from Project pumping would be significant because,

of the fact that this is a drinking water supply and it’s been designated as a sole source aquifer, so basically people rely on this groundwater system for their water supply.⁴¹

³⁵ *Id.* at pp. 111:11-113:24.

³⁶ *Id.* at p. 197:7-20.

³⁷ *Id.* at p. 218:7-21.

³⁸ *Id.* at pp. 96:19-97:12.

³⁹ *Id.* at p. 164:2-5.

⁴⁰ *Id.* at p. 196:2-196:11.

⁴¹ *Id.* at p. 211:14-17.

The effect would also be significant because of the non renewable nature of groundwater resources in the Ocotillo/Coyote Wells groundwater basin,

[the Project would be located] in a desert basin, and the consumption of water, it's not a temporary thing, it's consumed and it's gone.⁴²

Record evidence also strongly suggests that the Applicant's proposed reliance on groundwater from the Dan Boyer well violates Imperial County's prohibition on out of basin transfers.⁴³ Ordinarily, such prohibitions are in place where out of basin transfers will have significant effects on groundwater resources in the basin at issue.⁴⁴

BLM has not analyzed the Project's significant effects on groundwater resources, and any adverse effects on groundwater supply as a result of Project pumping.

2. New Potentially Significant Impacts to Groundwater Quality

The Dan Boyer Well is in a sole source aquifer that is relied upon by a number of surrounding communities as their only source of water.⁴⁵ Substantial question exists regarding potential impacts to water quality as a result of Project pumping. The CEC technical Staff found a negligible impact due to "upflux of relatively poor groundwater from underlying water-bearing zone into overlying water-bearing zones that are pumped by most wells."⁴⁶ However, CEC technical staff failed to analyze cumulative effects on water quality in the Ocotillo/Coyote Wells aquifer as a result of the Project.⁴⁷ There has also been no analysis of Project effects of groundwater pumping over an extended period of time. Potentially significant effects on groundwater quality could result from continued extractions because, "at some point there could be a threshold reached whereby additional groundwater upflux could be enhanced" due to pumping.⁴⁸

⁴² *Id.* at p. 211:18-20.

⁴³ *See id.* at p. 198: 13-25.

⁴⁴ *Id.* at p. 256:6-29.

⁴⁵ 61 Fed. Reg. 47752-02 (Sept. 10, 1996).

⁴⁶ Attachment D, p. 197:3-9.

⁴⁷ *Id.* at pp. 228:17-229:7; 247:17-248:11.

⁴⁸ *Id.* at p. 247:1-13.

In the FEIS, BLM claims that supplementation is not necessary because “the alternative water supply modification is essentially similar to that analyzed in the DEIS . . . the geographic and resource conditions are sufficiently similar to those analyzed in the DEIS, and the differences between the alternative water supply analysis in the DEIS are not substantial.”⁴⁹ This rationale has no basis in fact.

Instead of relying on *recycled water* as originally proposed, the Project now proposes to use *groundwater* in a desert environment where water resources are scarce. Moreover, the Applicant proposes to rely on groundwater pumping from a basin that is currently in overdraft and which represents the sole source of drinking water for neighboring communities. As briefly summarized in these Joint Comments, substantial evidence suggests that the newly proposed reliance on groundwater pumping from the Ocotillo/Coyote Wells groundwater basin will have new, unanalyzed significant effects on groundwater resources. BLM must prepare a supplemental EIS that analyzes these effects, and provide the public with an opportunity to review and comment on its analyses, as required by NEPA.

ii. Impacts to Peninsular Bighorn Sheep and Newly Identified Need for an Incidental Take Permit Under the Federal Endangered Species Act

“The draft [environmental impact] statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act.”⁵⁰ “If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion.”⁵¹ A supplemental EIS must be prepared to a final EIS if the agency makes “substantial changes” in the proposed action that are relevant to environmental concerns or if there are “significant new circumstances or information” relevant to environmental concerns and bearing on the proposed action or its impacts.⁵² “If a change to an agency’s planned action affects environmental concerns in a different manner than previous analyses, the change is surely “relevant” to those same concerns.”⁵³

⁴⁹ FEIS, Appendix B, p. B-15.

⁵⁰ 40 C.F.R. § 1502.9(a).

⁵¹ *Id.*

⁵² 40 C.F.R. § 1502.9(c)(1)(i)-(ii); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

⁵³ *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 707 (10th Cir. 2009). 2218-158a

The Project is located within a recovery area for federally endangered peninsular bighorn sheep (“PBS”). PBS are known to occupy a number of areas surrounding the Planning Area, including the Coyote Mountains which lie immediately west of the Planning Area, the Fish Creek Mountains immediately north of the Planning Area, and the Jacumba Mountain range.⁵⁴ These mountain areas comprise the designated Carrizo Mountains/Tierra Blanca Mountains/Coyote Mountains Recovery Area (“CTRCA”) for PBS.⁵⁵

As pointed out by CURE in its comments on the DEIS, industrial development within the Project site would adversely affect the PBS through the interference and obstruction of movement corridors crucial for species recovery and the elimination of seasonal foraging and dispersal habitat.⁵⁶ BLM did not to disclose or evaluate these potentially significant impacts in the DEIS, finding that the proposed action would not cause adverse impacts to this protected species.⁵⁷

BLM first disclosed that “USFWS is in the process of preparing a Biological Opinion for the potential adverse project effects on the PBS” when it issued the FEIS.⁵⁸ Contrary to the information provided in the DEIS, the FEIS indicates that “USFWS has determined that the project area provides some forage function for Peninsular bighorn sheep.” ***In a complete reversal of its prior position, BLM now indicates that mitigation measures will be required to reduce the newly identified adverse impacts of industrial development on the future recovery of the PBS.***⁵⁹ This new information qualifies as significant new information and circumstances under NEPA, triggering BLM’s duty to supplement the FEIS.⁶⁰

By failing to adequately analyze impacts to PBS at the outset of environmental review, BLM failed to take the requisite “hard look” at the environmental consequences of the proposed Plan Amendment and to adequately inform the public of those consequences. “NEPA does not permit an agency to

⁵⁴ See Comments of California Unions for Reliable Energy on Draft Environmental Impact Statement for the Imperial Valley Solar Project. May 27, 2010, pp. 16-22 (“CURE Comments”).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ FEIS, p. 4.3-22.

⁵⁹ *Id.*

⁶⁰ See *New Mexico ex rel. Richardson*, 565 F.3d at 707; see also *Laguna Greenbelt Inc. v. U.S. Department of Transportation*, 42 F.3d 517, 529 (9th Cir. 1994) (finding that an agency may rely on the “substantial technical expertise” of other federal agency in determining whether a new impact is significant for the purpose of a supplemental EIS.).

remain oblivious to differing environmental impacts, or hide these from the public Such a state of affairs would be anathema to NEPA's 'twin aims' of informed agency decisionmaking and public access to information."⁶¹ BLM is required to supplement the DEIS or FEIS, and recirculate the supplemental environmental review document for public review and comment in accordance with NEPA to adequately evaluate the proposed Project impacts on the recovery of PBS.

B. Failure to Respond to Comments

NEPA's procedural requirements "are to be strictly interpreted to the "fullest extent possible" in accordance with the policies embodied in the Act . . . grudging, pro forma compliance will not do."⁶² "NEPA's public comment procedures are at the heart of the NEPA review process."⁶³ Responsible opposing viewpoints must be included in the final EIS; "this reflects the paramount Congressional desire to internalize opposing viewpoints into the decision-making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision."⁶⁴ In responding to public comments on a DEIS, agencies are "obliged to provide "meaningful reference" to all responsible opposing viewpoints concerning the agency's proposed decision Moreover there must be a good faith, reasoned analysis in response."⁶⁵

Agencies are held to a more stringent standard with regard to responses to comments submitted by expert federal agencies. Specifically, courts have *required* the agency to respond to such comments and "to discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."⁶⁶ "This disclosure requirement obligates the agency to make available to the public *high quality* information, including accurate scientific analysis, expert

⁶¹ *New Mexico ex rel.*, 565 F.3d at 707 (citing *Marsh*, 490 U.S. at 371; *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Citizens' Committee to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1177-78 (2008).

⁶² *State of Cal. v. Block*, 690 F.2d 753, 769 (9th Cir. 1982) (citing 42 U.S.C. § 4332(1) and *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974).

⁶³ *State of Cal.*, 690 F.2d at 770.

⁶⁴ *Id.* at 770-71.

⁶⁵ *Id.* at 773 (internal citations omitted).

⁶⁶ See *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1167 (citing 40 C.F.R. § 1502.9(b)).

agency comments and public scrutiny, before decisions are made and actions are taken.”⁶⁷

Here, BLM failed to provide a good faith, reasoned analysis in response to public comments, and also failed to respond to comments submitted by the U.S. Environmental Protection Agency (“EPA”). These omissions violate NEPA.

i. BLM Failed to Provide a Good Faith Reasoned Response to CURE’s Comments Regarding Climate Change

The evaluation of global climate change under NEPA must include an analysis of the Project in the *context of* global climate change; the agency’s analysis should not be limited to the greenhouse gas (GHG) emissions associated with the proposed project.⁶⁸

The environmental analysis and documents produced in the NEPA process should provide the decision maker with relevant and timely information about the environmental effects of his or her decision [i]n this context, climate change issues arise in relation to the consideration of (1) the GHG emissions effects of a proposed action . . . and (2) *the relationship of climate change effects to a proposed action or alternatives, including the relationship to proposal design, environmental impacts, mitigation and adaptation measures.*⁶⁹

“With regards to the effects of climate change on the design of a proposed action and alternatives, Federal agencies must ensure the scientific and professional integrity of their assessment of the ways in which climate change . . . could effect” the proposed action.⁷⁰ As recognized by the Council on Environmental Quality, “climate change can affect the environment of a proposed action in a variety of ways . . . [for example] climate change can affect the integrity of a development or structure by exposing it to a greater risk of floods, storm surges, or high temperatures.”⁷¹

⁶⁷ *Id.* (citing 40 C.F.R. § 1500.1(b)) (emphasis added).

⁶⁸ See *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 711 (9th Cir. 2009) (holding that the U.S. Fish and Wildlife Service adequately analyzed a major federal action’s impacts to polar bears in the context of a warming climate”).

⁶⁹ Council on Environmental Quality, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions, Feb. 18, 2010.

⁷⁰ *Id.* at p. 6.

⁷¹ *Id.*

In comments submitted on the DEIS, CURE stated that, “the DEIS failed to consider the role that climate change may have in shaping the significance of the Project impacts on the hydrologic conditions on the Project site.”⁷² Specifically, CURE noted that,

provided that intense summer storms are responsible for a majority of the runoff that occurs on the project site, the Nature Conservancy would suggest that summer rainfall in southeastern California may increase by as much as 50% by 2080 in the summer, which could be accompanied by significant increases in rainfall intensity and erosivity . . .

These significant increases in rainfall quantity, intensity, and erosivity would have a profound impact on the landscape . . . [which would] in turn, significantly impact the structural stability and flood preparedness of the solar dishes placed in the washes . . .⁷³

CURE’s concerns are echoed by comments submitted on the DEIS by the EPA, which recommended that BLM include a discussion in the FEIS regarding,

[H]ow climate change could affect the proposed Project, specifically within sensitive areas, and assess how the impacts of the proposed Project could be exacerbated by climate change.⁷⁴

In response to CURE’s comments, the FEIS provides, “there is no requirement for an environmental document to attempt to speculate on weather patterns 70 years in the future or to speculate or attempt to analyze the secondary effects of weather changes.”⁷⁵ This statement does not rise to the level of a “reasoned” response. On the contrary, BLM’s rationale contradicts federal agency guidance regarding the elements of an adequate analysis of climate change under NEPA.

The response in the FEIS further provides that “Sections 3.4. and 4.4 in the FEIS discuss climate change.”⁷⁶ However, the discussion included at Sections 3.4.

⁷² See FEIS, Appendix D, p. D-465.

⁷³ *Id.*

⁷⁴ FEIS, Appendix D, p. D-231.

⁷⁵ *Id.*

⁷⁶ *Id.*

and 4.4. addresses the Project's contribution of GHG emissions. As such, the information provided in those sections of the FEIS does not respond to CURE's or the EPA's comments regarding *the effect of climate change on the proposed Project*. BLM's response violates NEPA, because BLM's response hardly equates to a good faith effort to respond to public comment.

ii. BLM Failed to Provide a Good Faith Reasoned Response to CURE's Comments Regarding Project Impacts to Soil Resources

NEPA requires agencies to take a "hard look" at the environmental consequences of a proposed action.⁷⁷ A hard look is defined as a "reasoned analysis containing quantitative or detailed qualitative information."⁷⁸ The level of detail must be sufficient to support reasoned conclusions by comparing the amount and the degree of the impact caused by the proposed action and the alternatives.⁷⁹ An EIS must provide a "full and fair discussion of significant environmental impacts and shall inform the decision-makers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment."⁸⁰

In comments submitted on the DEIS, CURE raised the following concerns regarding the Project's impacts on soil and water resources:

The DEIS fails to include any analysis of surface soils, including identification of the presence of cryptobiotic crusts on the Project site . . . [d]isruption of the crust will result in decreased organism diversity, soil nutrients, stability, and organic matter.⁸¹

The DEIS failed to analyze or account for the physical properties of the desert pavement on the Project site . . . the BLM must evaluate the

⁷⁷ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1284 (1st. Cir. 1996); see also *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

⁷⁸ BLM, NEPA HANDBOOK, P. 55 (Jan. 2008) ("NEPA Handbook"), available at: http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_hanndbook.Par.24487.File.dat/h1790-1-2008-1.pdf.

⁷⁹ NEPA Handbook, p. 55; see also 40 C.F.R. § 1502.1 (2009).

⁸⁰ 40 C.F.R. § 1502.1.

⁸¹ CURE Comments, pp. 11-12.

extent and type of desert pavement on the Project site in order to analyze the effects of [its] destruction.⁸²

The DEIS provides no consideration of the content of the soil on the project [*sic*] site and the extent of soluble salts that could be released into the environment from development activities.⁸³

The DEIS indicates that the Project will employ widespread use of soil binders . . . the DEIS fails to adequately address the potentially significant impacts posed by widespread use of soil binders.⁸⁴

The CEC technical Staff and BLM agree that desert pavement and cryptobiotic crusts occur on the Project site.⁸⁵ Throughout the region, large expanses of nearly vegetation-free desert pavement are a characteristic element.

In response to CURE's comments, however, the FEIS provides as follows:

*There are very limited areas on the project site that currently support biotic crusts. Much of the site was used for gravel mining in the past and the site is currently used for some recreation uses which may have disturbed or continue to disturb biotic crusts on the site. There are also limited areas on the site that support physical crusts.*⁸⁶

BLM provides no citations to support these claims because it cannot. Gravel mining occurred on the site approximately 100 years ago.⁸⁷ With regard to current recreational uses, BLM provided in the FEIS that the Project site has minimal evidence of surface disturbance.⁸⁸ Indeed, BLM provides *no evidence* to support its claim that past and current uses on the Project site have substantially diminished cryptobiotic crusts and desert pavement from the

⁸² CURE Comments, p. 12.

⁸³ CURE Comments, p. 13.

⁸⁴ CURE Comments, p. 28.

⁸⁵ See DEIS, pp. C.7-26, C.7-31, C.7-32; FEIS, Appendix D, p. D-510-512.

⁸⁶ FEIS, Appendix D, p. D-498 (emphasis added).

⁸⁷ DEIS, p. C.2-114.

⁸⁸ FEIS, p. 3.16-2.

Project site. On the contrary, the facts in the record point to the exact opposite conclusion.⁸⁹

BLM's response to CURE's comments is based on assumptions that are contrary to information provided in the DEIS and the FEIS. BLM's response also entirely fails to address CURE's comments regarding the effects of the proposed use of soil binders on the Project site. As such, BLM failed to provide a good faith reasoned response to CURE's comments in violation of NEPA.

iii. BLM Failed to Respond to Comments Submitted by the EPA Regarding Project Impacts to Groundwater Resources

It bears repeating that with regard to responses to comments submitted by expert federal agencies, the agency must "make available to the public *high quality* information, including accurate scientific analysis, expert agency comments and public scrutiny, before decisions are made and actions are taken."⁹⁰ The EPA submitted extensive comments on the DEIS, indicating that the DEIS failed to meet the informational purposes of NEPA.⁹¹ EPA also noted that the Applicant had changed the Project to rely on groundwater resources after the publication of the DEIS.⁹² Specifically, the EPA commented that,

The [Applicant's Application] Supplement indicates the Project will rely on up to 50 acre –feet per year (afy) of withdrawals from an Alternative Water Supply (AWS) within the Ocotillo-Coyote Wells Groundwater Basin (OCWGB), a federally designated sole source aquifer . . . it is our understanding from the Applicant that the AWS will result in no net increase in pumping. If this is so, this should be disclosed and adequately supported in the FEIS.⁹³

⁸⁹ See FEIS, Appendix D, p. D-510-512.

⁹⁰ *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1167 (9th Cir. 2003) (citing 40 C.F.R. § 1500.1(b)) (emphasis added).

⁹¹ U.S. Environmental Protection Agency, Detailed Comments on the Joint Draft Environmental Statement (DEIS) and Staff Assessment for the Imperial Valley Solar Project, Imperial County, California, May 27, 2010, p. 3 ("U.S. EPA Comments").

⁹² *Id.* at pp. 8-9; CURE Comments, p. 43.

⁹³ *Id.* at p. 9.

EPA's comments on the DEIS specifically requested BLM to discuss the level of impact of proposed pumping on the overdraft conditions in the Ocotillo-Coyote Wells Groundwater Basin, among other issues raised by Applicant's proposed reliance on groundwater use.⁹⁴ As stated previously, BLM cannot respond to EPA's concern because it has not investigated this aspect of the Project.

BLM responds, however, that "the alternative water source is not expected to adversely affect the Ocotillo-Coyote Wells sole source aquifer because it is a currently permitted well."⁹⁵ BLM's response does not satisfy its obligation under NEPA because it is utterly unsubstantiated. BLM's assertions are also factually incorrect.

First, no analysis has been undertaken with regard to the effects of proposed Project pumping on the Ocotillo-Coyote Wells basin balance.⁹⁶ Second, the Dan Boyer well is not permitted.⁹⁷ To date, the only impact analysis that has been undertaken with regard to the Dan Boyer well was at the CEC. CEC technical Staff found that the effect of Project pumping would be significant, adverse, and unmitigable.⁹⁸

BLM is required to include *high quality* information in the FEIS, such as *accurate scientific* analysis and expert agency comments, to meet the public disclosure requirements of NEPA.⁹⁹ Here, BLM has impermissibly strayed from its duty under NEPA by failing to undertake a good faith effort to examine the proposed Project's effects on the environment. In effect, BLM has misled the public by obscuring one of the most controversial aspects of the proposed Project, as well as a host of adverse effects resulting from the Project's proposed reliance on non-renewable groundwater resources. BLM's failure to adequately analyze the Project violates NEPA.

⁹⁴ *Id.* at p. 10.

⁹⁵ FEIS, Appendix, D, p. D-517; *see also* FEIS, Appendix D, p. D-417 and FEIS, p. 2-29.

⁹⁶ Joint Comments, *supra*, § I.A(i)(1).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See Center for Biological Diversity*, 349 F.3d at 1167.
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C. Failure to Take a “Hard Look” At Environmental Consequences

Section 101 of NEPA declares it is a matter of national policy to preserve important historic, cultural, and natural aspects of our national heritage. To achieve this goal, NEPA requires that agencies take a “hard look” at the environmental consequences of a proposed action.¹⁰⁰ A hard look is defined as a “reasoned analysis containing quantitative or detailed qualitative information.”¹⁰¹ The level of detail must be sufficient to support reasoned conclusions by comparing the amount and the degree of the impact caused by the proposed action and the alternatives.¹⁰² An EIS must provide a “full and fair discussion of significant environmental impacts and shall inform the decision-makers and the public of the reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.”¹⁰³ “General statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.”¹⁰⁴ “[L]ack of knowledge does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it.”¹⁰⁵

An EIS must provide a full and fair discussion of every significant impact, as well as inform decision-makers and the public of reasonable alternatives which would avoid or minimize adverse impacts.¹⁰⁶ The impacts analysis must include a discussion of the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal

¹⁰⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1284 (1st. Cir. 1996); see also *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

¹⁰¹ BLM, NEPA HANDBOOK, P. 55 (Jan. 2008) (“NEPA Handbook”), available at: http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_ha_ndbook.Par.24487.File.dat/h1790-1-2008-1.pdf.

¹⁰² NEPA Handbook, p. 55; see also 40 C.F.R. § 1502.1 (2009).

¹⁰³ 40 C.F.R. § 1502.1.

¹⁰⁴ *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998).

¹⁰⁵ *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 733 (9th Cir.2001), abrogated on other grounds by *Monsanto Co. v. Geertson Seed Farms*, 2010 WL 2471057, 12 (U.S.) (U.S., 2010) (emphasis added).

¹⁰⁶ *Id.*

should it be implemented.¹⁰⁷ The discussion of impacts must include both “direct and indirect effects (secondary impacts) of a proposed project.”¹⁰⁸

As stated in CURE’s comments on the DEIS, BLM failed to take a hard look at the Project’s effects on cultural and soil and water resources. The FEIS similarly fails to analyze the Project’s impacts on these resources.

i. BLM Failed to Take a “Hard Look” at the Cultural Resources Consequences of the Project

The cultural resources sections of the DEIS and FEIS fail to take a hard look at the Project’s effects on cultural resources.¹⁰⁹ We incorporate by reference CURE’s comments on the DEIS. The following comments address information that has been generated following the issuance of the DEIS.

A simple visual inspection of the ground surface on the proposed Project site revealed at least 453 cultural resource sites on the site.¹¹⁰ These resources include two prehistoric districts, multiple stone scatters with human worked bones, stone tools, ceramics, geoglyphs, 11 segments of a prehistoric trail system, and a considerable number of cremations on and adjacent to the Project site.¹¹¹ The Project site is located in an area that is ancestral and sacred to a number of Tribes, including the Quechan Indian Tribe, the Cocopah Indian Tribe, and the Kumeyaay Nation.

In written comments submitted by the Quechan Indian Tribe (“the Quechan”), the Quechan indicate that the Planning Area, “is located in an area confirmed to have high cultural sensitivity.”¹¹² The Quechan further note that 432 cultural resource sites have been previously recorded within the Project site, and industrialization within the Project site would also “impact sites outside the project area due to visual and glare impacts.”¹¹³ Specifically, “several cultural sites and

¹⁰⁷ *Id.* at § 1502.16.

¹⁰⁸ *Id.* at § 1502.16(b); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

¹⁰⁹ *See* CURE Comments, pp.9-10; *see also* U.S. EPA Comments, p. 17.

¹¹⁰ California Energy Commission, Supplemental Staff Assessment, Part II for the Imperial Valley Solar Project, Aug. 2, 2010, Appendix B, p. 48 (“Draft Programmatic Agreement”).

¹¹¹ California energy Commission Hearing Transcript, August 16, 2010, p. 138 (“Attach E”).

¹¹² Quechan Indian Tribe comments on the Staff Assessment/Draft Environmental Impact Statement and Draft California Desert Conservation Plan Amendment for the Imperial Valley Solar Project (SES Solar Two) May 17, 2010, (“Quechan Comments”), p. 2.

¹¹³ *Id.*, pp. 3-4.
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geoglyphs located in the Yuha area are ceremonial in nature” and the proximity of renewable generation facilities will interfere with the use of these sites and the Tribe members’ ability to see from these sites to other nearby landscapes of cultural significance.¹¹⁴ The severity of these impacts has not yet been analyzed by BLM.¹¹⁵

At an evidentiary hearing held on the Project at the CEC in May, 2010, a Kumeyaay and Quechan tribal elder expressed concerns about the value of the subsurface resources that may never be known:

MR. ARROW-WEED: I also heard that potential for discovery for construction, what if you do find -- you haven’t looked, you don’t even know what’s under there. You’re only on the surface. It could be more under there. But you want to destroy it before we ever know anyway.¹¹⁶

The concerns of tribal members were echoed by the U.S. Environmental Protection Agency in its comments on the DEIS:

[D]ue to the extremely high frequency of identified cultural resources on or adjacent to the proposed Project site, the Project could have adverse effects on a presently unknown subset of approximately 328 known prehistoric and historical surface archaeological resources . . . [i]mpacts to on an unknown number of buried archaeological deposits may result.¹¹⁷

These impacts are expected to be significant.¹¹⁸

In responses to comments, BLM confirmed in the FEIS that it had not yet fully *identified* all of the cultural resources within the Project site or evaluated the potential effect on cultural resources as a result of the proposed Project. The Draft Programmatic Agreement, included with the FEIS, sets out a purported plan for cultural resource identification and evaluation that has not yet been fully devised

¹¹⁴ *Id.* at p. 4.

¹¹⁵ See DEIS, p. C.2-133.

¹¹⁶ Attachment E, p. 199:4-9.

¹¹⁷ U.S. EPA Comments, pp. 17-18.

¹¹⁸ See DEIS, pp. ES-24, C.2-1; see also DEIS, pp. B.2-12, C.2-106. 2218-158a

by the consulting parties.¹¹⁹ For example, in recent comments on the draft Programmatic Agreement submitted by the Advisory Council for Historic Preservation (“ACHP”), ACHP notes that “BLM needs to better describe the process it plans to follow for Section III. Identification and Evaluation and Section IV. Treatment of Historic Properties . . . BLM also needs to develop a clearer consultation process for these sections.”¹²⁰ Clearly, BLM has not even begun to consider the cultural resources within the Project site or how these may be impacted by the proposed Project.

The FEIS indicates that a draft cultural resources report was prepared just in advance of the FEIS – in June 2010 – and months after the issuance of the DEIS.¹²¹ However, to date, BLM has not evaluated the ethnographic resources at the Project site. Claudia Nissley testified on August 16, 2010 that BLM had not conducted oral interviews with tribal members who can speak to the significance of the cultural sites within and in the vicinity of the Project site.¹²² Additionally, Quechan Tribal Historic Preservation Officer Bridget Nash explained that an ethnographic study was necessary to ensure that the cultural significance of the resources impacted by the Project are adequately evaluated:

MS. Nash: This is one way in which the tribes can really have some input into that associative value of the site, to allow the tribes to sit down and give their history and their knowledge of these areas. It's imperative that the tribe have an opportunity to share their cultural knowledge so that the archeologists have a better understanding of both the cultural and the ceremonial values of these resources.¹²³

To date, there is no evidence in the record that BLM has conducted any oral interviews with tribal members who can speak to the significance of the sites, and no ethnographic study has been prepared for the Project. The FEIS also fails to evaluate impacts to archaeological and built environment sites.¹²⁴

¹¹⁹ See Draft Programmatic Agreement (March 26, 2010), Appendix A.I (Identification) and A.II (Evaluation).

¹²⁰ Advisory Council on Historic Preservation, ACHP Comments on the Imperial Valley Solar Project Draft PA, May 13, 2010.

¹²¹ FEIS, p. 3.5-21.

¹²² Attachment E, p. 164:2-23.

¹²³ See Attachment E, pp. 106:1-107:3.

¹²⁴ See DEIS, pp. C.2-130, 133.

It is not surprising, given BLM's failure to establish a baseline for cultural resources at the Project site, that the impacts analysis provided in the FEIS is also vastly inadequate. BLM was able to provide only a summary table of the totality of the impact, by alternative.¹²⁵ The FEIS *assumes* that the Plan Amendment will significantly impact cultural resources within the Planning Area.¹²⁶ This sort of "analysis" is insufficient under NEPA because it is devoid of evidence that would ensure that BLM has been informed of the environmental consequences of the proposed action, and because it precludes meaningful public comment. Certainly, the discussion provided in the FEIS falls far short of the "full and fair discussion of every significant impact" that is required under NEPA.

This scant record clearly demonstrates that BLM failed to take a "hard look" at cultural resources within the Project site and its area of impact, as required by NEPA. In the absence of evidence, the only reasonable conclusion that could be drawn from the impact analysis provided is that BLM should not act at all in order to avoid significant adverse impacts to cultural resources.¹²⁷

ii. BLM Failed to Take a "Hard Look" at Indirect Impacts to the Salton Sea and the New River

NEPA requires an analysis of the indirect effects of the proposed agency action.¹²⁸ An indirect effect is a reasonably foreseeable environmental effect that is caused by the action."¹²⁹ The FEIS fails to adequately analyze potentially significant indirect Project effects on the New River and the Salton Sea. Given the Project's proximity to these waterbodies and their importance to the United States and the State of California, BLM's disregard for these resources is inexcusable.

The Salton Sea ecosystem is an extremely valuable resource for resident and migratory birds, including a large number of threatened, endangered, and other

¹²⁵ See FEIS p. 4.5-11.

¹²⁶ See FEIS, p. 4.5-21.

¹²⁷ See CDCA Plan, p.6 ("Management Principles").

¹²⁸ 40 C.F.R. § 1502.16(b).

¹²⁹ See *Sierra Club v. United States Department of Energy*, 255 F.Supp2d 1177 (D.Colo. 2002). 2218-158a

special-status species.¹³⁰ Increasing salinity and declining water quality have eliminated the marine fish species, and, with inflows that will be diminishing in the future, threaten the continued ability of the Salton Sea ecosystem to support birds and other wildlife.¹³¹ Reduced inflows will also reduce the physical size of the Salton Sea and expose lakebed sediments (playa) that, with the prevailing winds in the area, could exacerbate dust problems for an already degraded air basin.¹³²

River mouths, particularly in the southern part of the Salton Sea, provide areas of reduced salinity and higher dissolved oxygen.¹³³ These estuarine areas are relatively small, yet very productive, and they routinely support higher concentrations of birds than surrounding areas.¹³⁴ The size of the estuarine areas is influenced primarily by the amount of inflow. The New and Alamo rivers, which constitute nearly 80 percent of the inflow to the Salton Sea, support the largest estuarine areas.¹³⁵

The ephemeral washes on the western edge of the Project site drain towards Coyote Wash north of the Project site. The ephemeral washes on the eastern half of the Project site drain east across the project site to the Westside Main Canal. The Westside Main Canal and Coyote Wash are tributaries to the New River and eventually to the Salton Sea.

In comments on the DEIS, the EPA determined that the Project *may* result in, substantial and unacceptable impacts to aquatic resources of national importance . . . due to the hydrologic, biogeochemical, and habitat functions that directly affect the integrity and functional condition of waters downstream at the New River and the Salton Sea.¹³⁶

¹³⁰ California Energy Commission, In the Matter of the Application for the Imperial Valley Solar Project, Opening Testimony of Scott Cashen on Behalf of California Unions for Reliable Energy for the Imperial Valley Solar project, May 10, 2010, p. 29 (“Attachment F”).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ EPA Comments, Attachment (Detailed Comments), p. 3.
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The Project may impact the Salton Sea through from runoff laden with sediment and soluble salts from the Project site.¹³⁷ According to comments submitted by EPA, the Project's indirect effects also include,

. . .2) Increases in volume and velocity of polluted stormwater from impervious surfaces on the Project site; 3) decrease in water quality from the impairment of ecosystem services such as water filtration, groundwater recharge, and attenuation of floods; 4) disruption of hydrological and ecological connectivity upstream of the Project to the Salton Sea; [and] 5) decreases in biodiversity and ecosystem stability . .
. ¹³⁸

The FEIS now contains a cursory discussion of some of these impacts. However, the analysis in the FEIS is not sufficient to fully ascertain the impacts of the SunCatchers that would remain in the washes and stream channels.¹³⁹ BLM does not contest this defect.¹⁴⁰ Additional surveys, data collection and analysis, relating to hydraulics, sediment transport, and scour, must be conducted in order to fully evaluate and minimize such impacts.¹⁴¹

The core analysis supporting the FEIS continues to be insufficient because (1) the hydrologic analysis used for the project design is incorrect; (2) the soil erosion and sediment yield estimates are insufficient and have not been improved based on comments on the DEIS; and (3) the hydraulics and sediment transport analysis upon which the FEIS is based is still insufficient to correctly characterize the physical process occurring at the site.¹⁴² Absent adequate underlying analyses, the conclusion that Project impacts have been reduced is not justifiable.¹⁴³

D. BLM Failed to Take a “Hard Look” at the Cumulative Effects of the Proposed Project

¹³⁷ EPA Comments, Attachment (Detailed Comments), p. 7.

¹³⁸ *Id.*

¹³⁹ Attachment A, (Campbell & Bowles Comments), p.2.

¹⁴⁰ *See* FEIS, Appendix D, pp. D-511-512.

¹⁴¹ *Id.*

¹⁴² Attachment A, (Campbell & Bowles Comments), p. 4.

¹⁴³ *Id.* at p. 3.

A proper consideration of a Project's cumulative impacts requires "some quantified or detailed information; ... [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided."¹⁴⁴ The analysis "must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects."¹⁴⁵

i. Biological Resources

The FEIS fails to consider the Project's contribution to adverse cumulative effects on wildlife connectivity and other cumulative effects that will be caused by the influx of immense solar facilities in the CDCA Plan area. Specifically, the FEIS fails entirely to evaluate the cumulative effect of the proposed industrialization of the Project site on PBS movement within the CTCRA.¹⁴⁶ BLM must supplement its analysis to include consideration of the cumulative effects of the proposed Project on PBS recovery.

ii. Cultural Resources

The FEIS fails to consider the Project's contribution to adverse cumulative effects on cultural resources in the Project vicinity. At an evidentiary hearing held on the Project at the CEC, Bridget Nash explained the Project's significant cumulative impacts to the cultural landscape in her testimony:

There is no substantive quantification or detailed analysis of how these [other proposed projects in proximity] in conjunction with the Imperial Valley Solar Project are expected to impact the cultural resources of the surrounding area or the broader California desert conservation area;

In fact, there are trails that are located within the project area that trend south... Some of them start trending towards the southwest over to another project area, which also contains a large number of cremations where the Schneider Dance Circle is, and some of the geoglyphs, some of the intaglios;

¹⁴⁴ *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1128 (9th Cir. 2004), quoting *Neighbors of Cuddy Mountain*, 137 F.3d at 1379-80.

¹⁴⁵ *Id.* (internal quotations and citations omitted).

¹⁴⁶ See FEIS p. 4.3-51-52; *id.* at Appendix D, p. D-211-212; see also CURE Comments, p. 22. 2218-158a

... whatever happens within this project area is going to affect the Yuha Desert towards the south . . .¹⁴⁷

Ms. Nash concluded, that the projects must be considered together to assess the cumulative impacts on the cultural landscape.

Carmen Lucas, a Kwaaymii Indian also shared concerns about the cumulative impacts on the landscape in the Project region:

I work as a Native American monitor, I see what goes on in the southern area here, and I've very, very concerned with the overall picture, both here, as well as these power lines, and windmills, and geothermals travel up the mountains and through the grades, I wonder what we're offering to the future generations.¹⁴⁸

BLM must supplement its analysis to include consideration of the cumulative effects of the proposed Project on cultural resources in the vicinity of the Project site.

E. BLM Failed to Include a Complete Discussion of Measures Aimed to Mitigate the Project's Effects

In addition to a scientifically defensible analysis of project impacts, an EIS must include a discussion of "appropriate mitigation measures not already included in the proposed action or alternatives."¹⁴⁹ All relevant, reasonable mitigation measures that could alleviate the environmental effects of a proposed action must be identified, even if they are outside the lead or cooperating agencies' jurisdiction.¹⁵⁰ An EIS is inadequate unless it contains "a reasonably complete discussion of possible mitigation measures."¹⁵¹ Mitigation includes "avoiding the impact altogether by not taking a certain action or parts of an action."¹⁵² It also includes "minimizing impacts by limiting the degree or magnitude of the action and

¹⁴⁷ Attachment E, pp. 108:6-11; p. 109:8-14; p. 109:18-20.

¹⁴⁸ California Energy Commission Hearing Transcript, May 24, 2010, p. 299:15-20 ("Attachment G").

¹⁴⁹ 40 C.F.R. § 1502.14(f).

¹⁵⁰ NEPA Forty Questions, No. 19(b).

¹⁵¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

¹⁵² 40 C.F.R. § 1508.20(a).

its implementation.”¹⁵³ The mandate to thoroughly evaluate all feasible mitigation measures is critical to NEPA’s purposes.¹⁵⁴ Hence, a “perfunctory description” or a “mere listing” of possible mitigation measures is not adequate to satisfy NEPA’s requirements.¹⁵⁵ That individual harms are somewhat uncertain due to limited understanding of the Project characteristics and baseline conditions does not relieve BLM of the responsibility under NEPA to discuss mitigation of reasonably likely impacts at the outset.¹⁵⁶

i. BLM Failed to Include in the FEIS Reasonable Measures to Reduce Adverse Impacts to the Federally Endangered Peninsular Bighorn Sheep

Although BLM now admits that mitigation is necessary to minimize adverse effects on PBS, BLM fails to propose mitigation that will reduce the significance of those adverse effects. The FEIS states that BIO-8 and BIO-17 will mitigate for impacts to PBS.¹⁵⁷ However, BLM presents no rational basis for this conclusion. Indeed, BIO-8 nor BIO-17 do not even *mention* PBS.

BIO-8 was originally included in the DEIS to minimize the construction and operation impacts of the proposed Imperial Valley Solar Project; this measure was devised prior to BLM’s identification of potentially significant impacts to the PBS.¹⁵⁸ BLM also fails to provide any justification for its conclusion that BIO-8 may mitigate impacts to PBS. Similarly, BIO-17 was originally included in the DEIS to mitigate for impacts to state and federal jurisdictional waters.¹⁵⁹ BLM fails to identify any evidence to support its conclusion that BIO-17 may also mitigate impacts to PBS. For these reasons, BLM’s conclusion that significant adverse impacts to PBS will be substantially reduced is arbitrary and capricious and in violation of NEPA.¹⁶⁰

¹⁵³ *Id.* at subd. (b).

¹⁵⁴ *Id.* at § 1500.1(c.)

¹⁵⁵ *Neighbors of Cuddy Mountain*, 137 F.3d 1372, 1380 (9th Cir. 1998).

¹⁵⁶ *See South Fork Band Council of Western Shoshone of Nevada*, 588 F.3d at 727, citing *National Parks*, 241 F.3d at 733.

¹⁵⁷ FEIS, p. 4.3-22.

¹⁵⁸ Compare DEIS, p. C.2-80-83 (February 2010) and FEIS, p. 4.3-63-66 (July 2010).

¹⁵⁹ *See* DEIS, pp. 4.3-84-90.

¹⁶⁰ *See* 40 C.F.R. § 1502.14(f) (requiring the inclusion of “appropriate” mitigation measures in the EIS) and 5 U.S.C. § 706(2)(a) (a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in 2218-158a

ii. BLM Failed to Mitigate for Project Effects to Cultural Resources

BLM failed to include in the FEIS a reasonably complete discussion of possible mitigation measures for adverse effects on cultural resources. A final Programmatic Agreement has not yet been prepared, and the Draft Programmatic Agreement attached to FEIS is merely a shell document that lacks any substantive discussion of mitigation.¹⁶¹ A plan to make a plan does not satisfy the BLM's obligation under NEPA and the NHPA.

Moreover, consultation under section 106 of the National Historic Preservation Act has just begun. As the FEIS clearly states,

A Draft PA is currently in development and has been sent out to the Consulting Parties[i]mplementation of measures CUP-1 through CUP-11, *subject to the consultation process for the development of the Programmatic Agreement*, would reduce or resolve adverse effects[b]ecause specific treatments are being developed and consultation with all interested parties is ongoing, there is no absolute commitment to specific treatment measures until they are finalized.¹⁶²

The above perfunctory description of a plan for mitigation development, and the mere listing of mitigation measures of unknown efficacy in the FEIS do not substitute for an adequate mitigation analysis under NEPA. BLM has clearly failed to “thoroughly evaluated all feasible mitigation measures,” as required by NEPA.

iii. BLM Failed to Include in the FEIS Reasonable Measures to Reduce Adverse Impacts to Jurisdictional Waters

The Preferred Project fails to address significant impacts to jurisdictional waters.¹⁶³ Specifically, the SunCatchers remain a significant impact to those washes that have not been avoided.¹⁶⁴ In comments submitted on the DEIS, EPA specifically requested that the Applicant redesign the Project to removal all

accordance with law”); *see also Montana Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127. 1147 (D. Mont. 2004).

¹⁶¹ *See* CURE Comments, p. 36; NPS Comments, pp. 7-8; U.S. EPA Comments, pp. 17-18; Quechan Comments, p. 8. Attachment B (“Nissley Comments”).

¹⁶² FEIS, p. 4.5-23.

¹⁶³ Attachment A, (Campbell & Bowles Comments), p. 2; *see also* FEIS, Appendix D, pp. D-511-513.

¹⁶⁴ *Id.*

SunCatchers from drainages.¹⁶⁵ This suggestion has been echoed in other comments submitted on the Project.¹⁶⁶ The FEIS, however, fails to fully mitigate for this adverse effect on jurisdictional waters. BLM also fails to provide any discernable rationale for failing to employ feasible mitigation to eliminate the Project's adverse impacts to jurisdictional waters by removing ALL SunCatchers from desert drainages.¹⁶⁷

F. BLM Failed to Integrate its NEPA Review With Studies and Analyses Required Under the National Historic Preservation Act and the Federal Endangered Species Act

BLM must “to the fullest extent possible . . . prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders.”¹⁶⁸ BLM is also required to include in the “draft environmental impact statement . . . all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal.”¹⁶⁹

As detailed in these comments, BLM has made little effort to coordinate its environmental review with the development of the Programmatic Agreement under Section 106 of the NHPA and its [recently initiated] consultation with the U.S. Fish and Wildlife Service regarding impacts to PBS under Section 7 of the Endangered Species Act. In violation of NEPA, BLM also failed to include any mention of the Project's need for an incidental take permit under the Federal Endangered Species Act for the potential take of PBS. This haphazard and segmented environmental review record has greatly comprised BLM's ability to fully evaluate the environmental consequences of the Project and the public's ability to meaningfully participate in the environmental review process. BLM is required to prepare a supplemental EIS that adequately evaluates the Project's potentially significant effects to cultural, historic and biological resources.

¹⁶⁵ EPA Comments, Attachment (Detailed Comments), p. 3.

¹⁶⁶ See Attachment A, p. 2 (Campbell & Bowes Comments).

¹⁶⁷ See FEIS, Appendix D., p. D-499; FEIS, Appendix D, pp. 140-141.

¹⁶⁸ 40 C.F.R. § 1502.25(a).

¹⁶⁹ 40 C.F.R. § 1502.25(b).

II. FLPMA VIOLATIONS

Through FLPMA, Congress directed the Secretary to initiate a comprehensive planning process and to establish a long-range management plan for the “use, development, and protection of the public lands within the California Desert Conservation Area [and required that such plan] take into account the principles of multiple use and sustained yield in providing for resource use and development, including, but not limited to, maintenance of environmental quality, rights-of-way, and mineral development.”¹⁷⁰

The CDCA Plan has served as the management plan for the CDCA for approximately thirty years. One of the foundational management principles of the CDCA Plan is to respond to,

national priority needs for resource use and development, both today and in the future, including such paramount priorities as energy development and transmission, *without compromising the basic desert resources of soil, air, water, and vegetation, or public values such as wildlife, cultural resources, or magnificent desert scenery*. This means, in the face of unknowns, erring on the side of conservation in order not to risk today what we cannot replace tomorrow.¹⁷¹

Lands designated as multiple-use, limited use (Class L), are second only to wilderness areas in terms of the significance of the resources found on such lands.¹⁷² Such lands must be managed to “provide for generally lower-intensity, *carefully controlled* multiple use of resources, *while ensuring that sensitive values are not significantly diminished*.”¹⁷³ Specifically, the CDCA Plan requires BLM to manage Class L lands to

- (1) enhance surface and groundwater resources;
- (2) protect and mitigate for impacts to special status plants and wildlife;

¹⁷⁰ 43 U.S.C. § 1781(d).

¹⁷¹ CDCA Plan, p.6 (“Management Principles”).

¹⁷² See CDCA Plan, p. 13.

¹⁷³ CDCA Plan, p. 13 (emphasis added).

- (3) limit recreational use to activities that involve low to moderate user densities; and
- (4) preserve and protect Native American, archaeological and paleontological values, and to protect Native American values where applicable.¹⁷⁴

Although renewable energy generation is a *conditionally* allowed use within Class L lands, BLM ***may not dedicate such lands for renewable energy generation if the proposed use will significantly diminish the natural, scenic, ecological and cultural values of those lands.***¹⁷⁵

The Project would be located in a designated Class L area under the CDCA Plan. BLM failed to assess the proposed Project's impact on sensitive values and to ensure that such values are not significantly diminished, as required by FLPMA and the CDCA Plan.¹⁷⁶ For those resources that BLM did assess, BLM determined that the proposed Plan Amendment would significantly diminish sensitive resources. Therefore, the Project is inconsistent with the CDCA and violates FLPMA.

A. BLM May Not Approve the Project Because it Would Significantly Diminish Visual Resources Within the Project Site

FLPMA requires BLM to manage public lands “in a manner that will protect the quality of the . . . values . . .” of those lands, and to integrate visual resource management into the multiple use, sustained yield method of management mandated by the Act.¹⁷⁷ The DEIS finds that, “under the proposed project an area

¹⁷⁴ CDCA Plan, pp. 18-19.

¹⁷⁵ CDCA Plan, pp. 13 and 15.

¹⁷⁶ See Center for Biological Diversity, Comments on Draft Environmental Impact Statement and Draft California Desert Conservation Area Plan Amendment for the SES Solar Two Project (08-AFC-5) Imperial County, May 26, 2010, pp. 3-9 (“CBD Comments”); National Parks Service, U.S. Department of the Interior, Comments regarding Proposed Imperial Valley Solar Project Draft EIS – Impacts to Anza National Historic Trail (CEC#: 08-AFC-5), May 4, 2010, pp. 3-7 (“NPS Comments”); Quechan Comments, pp. 10-11.

¹⁷⁷ See 43 U.S.C. §§ 1701(a)(8), 1702(c) (defining “multiple use” as “a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, 2218-158a

of roughly 10 square miles, including 5.6 miles of frontage of Highway I-8, would experience a dramatic visual transformation from a predominantly natural desert landscape to one of a highly industrial character.”¹⁷⁸ The visual impact of industrial development within the Planning Area is deemed in the DEIS to be significant and unavoidable:

The proposed project would substantially degrade the existing visual character and quality of the site and its surroundings, including motorists on Interstate 8, recreational destinations within the Yuha Desert Area of Critical Environmental Concern and portions of the Juan Bautista Anza National Historic Trail, resulting in significant impacts. Because effective, feasible mitigation measures could not be identified by staff, these impacts are considered to be unavoidable.^{179, 180}

The FEIS does not alter this initial finding of unavoidable significant impacts.¹⁸¹

In light of this finding, BLM may not approve the Plan Amendment to allow the significant diminishment of visual resources within the Planning Area.¹⁸² Such approval would be inconsistent with the CDCA Plan.

B. BLM Failed to Evaluate and Preserve the Cultural Resources Within the Project Site

minerals, watershed, wildlife and fish, and *natural scenic*, scientific and historical values . . .” [emphasis added]).

¹⁷⁸ DEIS, p. C.13-23.

¹⁷⁹ DEIS, p. C-13-1.

¹⁸⁰ See also comments submitted by agencies and the public on the significant, unavoidable adverse impacts of proposed development within the Planning Area. CURE Comments, p. 10; *see also* NPS Comments, pp. 4, 7; Quechan Comments, pp. 11-12; Anza Trail Coalition of Arizona, Comments Regarding the Proposed Imperial Valley Solar Project Draft EIS –Impacts to the Juan Bautista De Anza National Historic Trail, May 27, 2010 (“Anza Trail Coalition Comments”); Comments of Backcountry Against Dumps, *et al.*, on Staff Assessment/Draft Environmental Impact Statement and Draft California Desert Conservation Area Plan Amendment for Imperial Valley Solar Project, May 27, 2010, pp. 5-6 (“BAD Comments”).

¹⁸¹ *See* FEIS, pp. 4.16-21 and 4.16-26-30; *see also id.* Appendix D, p. D.-294-95.

¹⁸² *See* CURE Comments, p. 10; *see also* NPS Comments, pp. 4, 7; Quechan Comments, pp. 11-12; Anza Trail Coalition of Arizona, Comments Regarding the Proposed Imperial Valley Solar Project Draft EIS –Impacts to the Juan Bautista De Anza National Historic Trail, May 27, 2010 (“Anza Trail Coalition Comments”); Comments of Backcountry Against Dumps, *et al.*, on Staff Assessment/Draft Environmental Impact Statement and Draft California Desert Conservation Area Plan Amendment for Imperial Valley Solar Project, May 27, 2010, pp. 5-6 (“BAD Comments”).

BLM failed to acknowledge and evaluate the traditional cultural properties in and around the Project site. A “traditional cultural property” is a property or a place, that is eligible for inclusion on the National Register of Historic Places because of its association with cultural practices and beliefs that are (1) rooted in the history of a community, and (2) are important to maintaining the continuity of that community’s traditional beliefs and practices.¹⁸³ The Project site is within the ancestral use area of the Quechan Tribe and other Native Americans.¹⁸⁴ Tribal members and other Native Americans have described significant non-archeological cultural resources within and in the vicinity of the Project site. These cultural resources include biological resources within the Project site that are sacred to local tribes and the sacred areas on or near the Coyote Mountains.

These resources were not analyzed in the DEIS or the FEIS; in fact, the FEIS includes no information about the direct, indirect or cumulative effects on potential traditional cultural properties. In written comments submitted by the Quechan, the Quechan indicate that the Planning Area, “is located in an area confirmed to have high cultural sensitivity.”¹⁸⁵ The Quechan further note that 432 cultural resource sites have been previously recorded within the Planning Area, and industrialization within the Planning Area would also “impact sites outside the project area due to visual and glare impacts.”¹⁸⁶ Specifically, “several cultural sites and geoglyphs located in the Yuha area are ceremonial in nature” and the proximity of renewable generation facilities will interfere with the use of these sites and the Tribe member’s current ability to see from these sites to other nearby landscapes of cultural significance.¹⁸⁷ The severity of these impacts has not yet been analyzed by BLM.¹⁸⁸

The concern of the Quechan and CURE are echoed by the U.S. Environmental Protection Agency: “due to the extremely high frequency of identified cultural resources on or adjacent to the proposed Project site, the Project could have adverse effects on a presently unknown subset of approximately 328 known prehistoric and historical surface archaeological resources . . . [i]mpacts on

¹⁸³ National Register Bulletin 38.

¹⁸⁴ Letter to Jim Stobaugh, BLM Project Manager, May 17, 2010.

¹⁸⁵ Quechan Comments, p. 2.

¹⁸⁶ *Id.* pp. 3-4.

¹⁸⁷ *Id.* at p. 4.

¹⁸⁸ *See* DEIS, p. C.2-133.

an unknown number of buried archaeological deposits may result.”¹⁸⁹ These impacts are expected to significantly diminish the cultural resources within and around the proposed Project. Industrial development within the Project site may result in significant adverse effects on “an *unknown number* of buried archaeological deposits.”¹⁹⁰ The Project “may wholly or partially *destroy all archaeological sites on the surface of the project area.*”¹⁹¹

The FEIS assumes that the Project will significantly impact cultural resources within the Project site.¹⁹² However, the FEIS does not include a means to reduce those impacts to a level of insignificance. Instead, the FEIS states that “[a] draft PA is currently in development . . . implementation of Measures CUP-1 through CUP-11, *subject to the consultation process for the development of the Programmatic Agreement*, would reduce or resolve adverse affects.”¹⁹³ In improperly deferring preparation of a final Programmatic Agreement until after the issuance of Project approval, BLM has ignored the urgings of the Quechan, and others, to devise enforceable measures to prevent the significant diminishment of these resources as a result of the proposed Project.¹⁹⁴ As such, BLM has unequivocally failed to evaluate and ensure no significant diminishment to cultural resources, as required by FLPMA and the CDCA Plan. BLM may not approve the Plan Amendment until it has ensured that cultural resource values are not significantly diminished.

C. BLM Failed to Preserve the Historic Resources Within the Project Site

BLM failed to ensure that impacts to historic resources within the Project site will not be significantly diminished. In comments submitted by the National Park Service, sister agency to the BLM, the Service states “[b]ecause the project would have significant direct and indirect impacts to the Anza NHT [National

¹⁸⁹ U.S. EPA Comments , Attach (Detailed Comments).

¹⁹⁰ DEIS, pp. ES-24, C.2-1 (emphasis added).

¹⁹¹ DEIS, pp. B.2-12, C.2-106 (emphasis added).

¹⁹² See FEIS, p. 4.5-21.

¹⁹³ FEIS, pp. 4.5-23 (emphasis added).

¹⁹⁴ See U.S. EPA Comments, p. 17 (“Given the magnitude of potential impacts to cultural and historic resources, we recommend that the FEIS include a more detailed discussion of mitigation measures . . . [i]nclude in the FEIS the completed Section 106 Programmatic Agreement and mitigation plans. Alternatively, discuss the process and timeline for completing Section 106 consultation process.”).
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Historic Trail], *the NPS* [National Parks Service] *would prefer that the project not proceed*, or that alternatives be considered which would avoid impacts to the Anza NHT.”¹⁹⁵ In its comments, NPS requested that impacts to the historic Anza Trail be mitigated to the greatest degree feasible “through the preparation of a comprehensive Interpretive Plan and a re-evaluation of the alignment of the Anza Recreational Trail in the area.”¹⁹⁶ However, NPS also clarified that it “does not believe that the impacts to the Anza NHT can be reduced to a less than significant level through mitigation. Implementation of the project will forever change the landscape of this area and irreparably degrade the integrity of the Anza NHT and it will diminish the public’s experience and understanding of the historic expedition and the cultural landscape of that period.”¹⁹⁷

Even if BLM were to disagree with NPS’s finding of unavoidable significant impacts on the Anza Trail, BLM has failed to mitigate for the significant impacts identified in the DEIS. The FEIS is devoid of measures to reduce impacts to the historic Anza Trail. **The FEIS provides that “measures to address project impacts to the Anza Trail are provided in Section 4.5 Cultural Resources, in the FEIS, and the draft Programmatic Agreement.”**¹⁹⁸ **However, Section 4.5 contains no analysis of impacts to the Anza Trail, and the “Draft PA is currently in development.”**¹⁹⁹

Clearly, a mitigation scheme for the potentially significant impacts to the Anza Trail has not been developed. In fact, it appears that little progress has been made since NPS submitted the following comments on the DEIS:

The EIS concludes that Condition of Certification CUL-1 would reduce all cultural resource impacts to less than significant. CUL-1 requires compliance with the terms of the Programmatic Agreement (PA) being prepared by BLM pursuant to Section 106 of the National Historic Preservation Act. *NPS is an invited Signatory to the PA, which is still under development and does not yet specify mitigation for the Anza NHT.*²⁰⁰

¹⁹⁵ NPS Comments, p. 1.

¹⁹⁶ NPS Comments, pp. 1-2.

¹⁹⁷ NPS Comments, p. 3; *see also* Comments of the California Unions for Reliable Energy on the Draft Environmental Impact Statement for the Imperial Valley Solar Project, May 27, 2010, p. 37 (“CURE Comments”); CBD Comments, p. 6.

¹⁹⁸ *Id.*

¹⁹⁹ FEIS, p. 4.5-23.

²⁰⁰ NPS Comments, p. 3 (emphasis added).

The Draft Programmatic Agreement in the FEIS *still* does not specify mitigation measures for the Anza Trail; it sets forth only the intention of the consulting parties to devise such measures prior to ground disturbance.²⁰¹ In short, BLM failed to ensure that historic resources will not be significantly diminished as a result of the Project. BLM may not approve the Project until it has ensured that the Anza Trail will not be significantly diminished by the proposed industrial use, as required by FLPMA and the CDCA.

D. BLM May Not Approve the Project Because it Would Significantly Diminish the Quality of Surface Waters Within the Project Site

BLM failed to ensure that Project impacts to soil and water resources within the Project site will not significantly diminish the hydrologic system. The FEIS provides that,

Although the SunCatcher arrangements would be designed to fit the local contours of the site, the density of dishes and the arrangement in straight parallel rows would result in many SunCatchers being installed into flood hazard areas and channels. It is estimated, using a rough grading plan and flood hazard information provided by the Applicant, that approximately 5,150 *SunCatchers* would be placed in flood hazard areas, *including active channels*. The actual number of SunCatchers subject to flooding is *expected to be higher* considering the flood-prone areas not mapped. . .²⁰²

During operation, disturbed and cleared areas, primarily within the SunCatcher field, would be subject to increased erosion potential due to the removal of vegetation, the removal of desert pavement, the disturbance of the surface crust, and the placement of SunCatcher foundation poles in the flow path. The result of surface disturbance and the presence of SunCatchers in the flow patch could be *long-term erosional degradation of the soil surface within the SunCatcher array and in the intervening undisturbed areas, as well as increased sediment*

²⁰¹ See FEIS, Appendix G (Programmatic Agreement), Appendix B.

²⁰² FEIS, Appendix D, p. D-510.

*discharge off-site . . . and toward the east where the Westside Main Canal and New River flow.*²⁰³

Sediment basins are proposed as mitigation for potential excess sediment production which could result from increased sediment transport capacity in the SunCatcher arrays . . . *Because of the lack of precision . . . the capacity of these basins to function as intended is not known.* Because the basins are designed for two years of annual sediment production, they . . . *could be overwhelmed by the much larger sediment transport volume of larger floods, with the resulting effect of increased sediment deposition downstream . . .*²⁰⁴

On an average annual basis, with smaller floods occurring, the basins may function as intended to remove sediment. However, this too could have an adverse impact after a long series of small floods if the basins remove too much sediment from the system.²⁰⁵

Artificial removal of sediment from a stream bed otherwise in equilibrium usually results in a lowering of the downstream bed [which] . . . could have an adverse effect on local riparian resources . . .²⁰⁶

Preliminary analysis determined that sediment transport capacity in on-site drainages would likely be increased by the project, with possible adverse effects. In the absence of a detailed, site specific sediment transport analysis specifically addressing these issues, these stream morphology impacts are considered a substantial adverse impact of the project . . .²⁰⁷

This analysis indicates that potentially significant adverse effects on the desert hydrology as a result of the Project cannot be mitigated. In other words, even with the proposed mitigation, BLM has not been able to ensure that desert hydrology,

²⁰³ FEIS, Appendix D, p. D-511 (emphasis added).

²⁰⁴ FEIS, Appendix D, p. D-511-512 (emphasis added).

²⁰⁵ FEIS, Appendix D, p. D-512.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

and water quality, within and downstream of the Project site will not be significantly diminished.

Approval of the Project would violate the CDCA Plan and FLPMA. The CDCA Plan requires BLM to manage Class L lands to “enhance” surface water resources; it does not authorize BLM to destroy them for short-term gains. BLM may not approve the Project until it has ensured that surface waters will not be significantly diminished by the proposed industrial use, as required by FLPMA and the CDCA.

III. NHPA VIOLATIONS

The NHPA has been characterized as a “stop, look and listen” provision.²⁰⁸ The NHPA requires, prior to any federal undertaking, that the relevant federal agency “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register” and “afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking.”²⁰⁹ Section 106 of the NHPA, and its implementing regulations, require the agency to undertake a three-step process.²¹⁰ Under the NHPA, the federal agency must make a reasonable and good faith effort to (1) identify historic properties; (2) determine whether identified properties are eligible for listing on the National Register; assess the effects of an “undertaking” on any eligible historic properties found and determine whether the effect will be adverse; and (3) avoid or mitigate any adverse effects.²¹¹ In carrying out its responsibilities under Section 106, the federal agency must also consult with “any Indian Tribe ... that attaches religious and cultural significance” to such properties.²¹² The federal agency may not postpone the *entire* Section 106 process until after the approval of a proposed undertaking.²¹³ Such deferral violates the NHPA.²¹⁴

²⁰⁸ *Muckleshoot Indian Tribe v. U.S. Forest Svc.*, 177 F.3d 800, 805 (9th Cir.1999).

²⁰⁹ 16 U.S.C. § 470f.

²¹⁰ *Valley Community Preservation Com'n v. Mineta*, 231 F.Supp.2d 23, 32 (D.C. Cir. 2002).

²¹¹ 36 C.F.R. §§ 60.4, 800.4(b), 800.4, 800.5, 800.8(e), 800.9, 800.9(a)-(b),

²¹² 16 U.S.C.A. § 470a(d)(6)(B).

²¹³ *Valley Community Preservation Com'n v. Mineta*, 231 F.Supp.2d at 34.

²¹⁴ *See Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 371-73 (D.C.Cir.1999).
2218-158a

In this case, BLM has opted to use a Programmatic Agreement to comply with its Section 106 obligation.²¹⁵ A Programmatic Agreement may not be used to improperly defer an agency's Section 106 obligations.²¹⁶ As detailed in the comments of the Quechan and others, here, BLM has improperly deferred Section 106 consultation until after the issuance of the Record of Decision for the proposed action. To date, BLM has failed to, (1) identify historic properties within the Planning Area; (2) determine which of these properties would be eligible for listing in the National Register; or (3) identify measures to avoid and minimize any adverse effects on eligible resources.²¹⁷ BLM may not approve the Project until it has made a good faith effort to comply with Section 106 of the NHPA.²¹⁸

A. BLM Failed to Identify Historic Properties within the Planning Area

To identify historic properties within the meaning of the NHPA, BLM must undertake the following actions all the while conducting government to government consultation with Native American representatives:

1. Determine the area of potential effects ("APE") in consultation with the State Historic Preservation Officer;
2. Review existing information on historic properties, including properties within the APE, including any data concerning possible unidentified historic properties;
3. Obtain relevant information from consulting parties;
4. Gather information from Indian tribes; and
5. Undertake a reasonable good faith effort to identify historic properties based on the resources gathered through steps 1-4, taking into account "past planning, research and studies, the magnitude and nature of the undertaking . . . the nature and extent of potential effects . . . and the likely nature and location of historic properties within the" APE.²¹⁹

²¹⁵ See 36 CFR § 800.14(b).

²¹⁶ See *Corridor H Alternatives, Inc.*, 166 F.3d at 371-73.

²¹⁷ Quechan Comments, Exhibit A, pp.16-19.

²¹⁸ See *Valley Community Preservation Com'n v. Mineta*, 373 F.3d 1078, 1089 (10th Cir. 2004).

²¹⁹ 36 C.F.R. § 800.4(a)-(b).

BLM may defer the *final* identification and evaluation of historic properties “if it is specifically provided for in . . . a programmatic agreement executed pursuant to § 800.14(b).”²²⁰ Such process “should establish the likely presence of historic properties within the area of potential effects for each alternative . . .”²²¹ BLM has failed to do that here.

BLM noticed its intention to prepare an environmental impact statement for the Project on October 17, 2008.²²² It is now August 2010 and BLM still has not identified the historic properties within the Planning Area. In other words, as of the time of writing, BLM has not yet completed step 2, above. The information gathering that has occurred to date is largely limited to the efforts of the Applicant. As recently as February 2010, BLM was provided with only a “usable sample” of 25% archaeological sites within the APE.²²³ The majority of the archaeological information provided by the Applicant was found by BLM to be “insufficient to support defensible assessments of the potential effects” of the Project.²²⁴

The DEIS also references a literature search that was performed to identify previously recorded cultural sites in and within the vicinity of the Planning Area. This literature search was performed by the Applicant’s consultant for portions of the Planning Area in 2007 and 2008.²²⁵ Based on this literature search, efforts were made to record previously recorded sites but for reasons described in the DEIS, “the location information for these sites is suspect” and could not confidently be relied upon.²²⁶

In the FEIS, published in July 2010, BLM provides that the Applicant has submitted a draft Class III Cultural Resources Technical Report, which the BLM is *currently* reviewing for adequacy.²²⁷ It should be noted, that the APE has been determined by BLM to encompass a 15 mile radius around the Project,²²⁸ whereas

²²⁰ 36 C.F.R. § 800.4(b)(2).

²²¹ 36 C.F.R. § 800.4(b)(2).

²²² 73 Fed. Reg. 61902 (Oct. 17, 2008).

²²³ DEIS, p. C.2-57-58.

²²⁴ See DEIS, p. C.2-58.

²²⁵ DEIS, p. C.2-61.

²²⁶ DEIS, p. C.2-76.

²²⁷ DEIS, p. 3.5-21.

²²⁸ FEIS, p. 3.5-17.

the Applicant's Class III survey covers only a one mile radius around the Project.²²⁹ As such, the Class III survey cannot reasonably be expected to adequately identify the cultural resources within the APE.

Consequently, BLM deferred resource identification until after Project approval. The DEIS provides that "the proposed PA will stipulate the completion of the documentation for the 75% of the surface archaeological sites in the project area of analysis . . . the execution of a program to evaluate the historical significance of archaeological landscapes and districts, archaeological site types, and individual archaeological sites . . . and refinements to and the execution of multiple treatment plans to resolve those potential effects that are found to be significant."²³⁰ This complete deferral of Section 106 consultation does not amount to a good faith effort at compliance with the NHPA.

B. BLM Failed to Determine Whether Historic Properties Within the Planning Area Are Eligible for Listing in the National Register and Which Eligible Properties Would be Adversely Affected

BLM has to date failed to determine site eligibility and whether Project effects on eligible resources would be adverse.²³¹ In February 2010, the DEIS disclosed that,

[S]taff is presently unable to identify precisely which of the different cultural [archeological] resources are historically significant and is therefore presently unable to articulate the exact character of the effects" of the Project;²³²

No . . . eligible ethnographic resources are presently known to be in the project area of analysis. Further refinements to determinations of the historical significance and to the extant assessments of the potential for visual effects to occur to other ethnographic resources known to be in the vicinity . . . would help evaluate" [the presence of effects on historically significant ethnographic resources];²³³ and

²²⁹ FEIS, p. 3.5-21.

²³⁰ DEIS, p. C.2-60

²³¹ See FEIS, p. 4.5-1.

²³² DEIS, p. C.2-130.

²³³ DEIS, p. C.2-133.

[W]hereas determinations regarding . . . eligibility of built-environment resources within the project area of analysis have not been completed, identification and assessment of impacts cannot be assessed at this time.²³⁴

The DEIS explains that “determinations on the historical significance of the resources would be made under provisions in the proposed PA.”²³⁵ The DEIS further explains that these determinations could not be completed prior to Project approval because “the time required for formal evaluations of historical significance for the complete cultural resources inventory exceeds the one-year licensing process.”²³⁶ Such deferral does not amount to a reasonable good faith effort at Section 106 compliance.

Neither NEPA, nor any federal (or state) statute applicable to BLM’s review of the proposed Project exempts BLM from complying with the requirements of the NHPA or NEPA.

C. BLM Failed to Identify Measures to Avoid and Minimize Adverse Effects on Eligible Resources

To date, BLM has failed to identify measures to avoid and minimize adverse effects on eligible resources. The Draft Programmatic Agreement indicates that all of the mitigation and avoidance options are, as of yet, to be developed by the Applicant and approved by BLM.²³⁷

The proposed Historic Properties Treatment Plans (“HPTP”) contains “neither an outline to develop treatment plans nor [does it contain] a treatment plan for historic properties.”²³⁸ By way of illustration, in comments on the Draft Programmatic Agreement, the ACHP provides as follows: “Under Appendix B . . . clarify what is meant by “individually specify how the Applicant will avoid, minimize or resolve[sic] the adverse the adverse effects.” As stated in the comments provided by Ms. Nissley, the HPTP simply requires *the Applicant* to supply a list of historic properties that will be avoided. There is no stated requirement as to what type of properties must be avoided or how much geographic or linear (buffer) space

²³⁴ DEIS, p. C.2-133.

²³⁵ DEIS, p. C.2-116.

²³⁶ DEIS, p. C.2-106.

²³⁷ Attachment B, p. 1 (Nissley Comments).

²³⁸ *Id.*

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must be available to avoid them. These discretionary decisions are deferred to the Applicant, and will be undertaken, presumably, sometime after BLM approves the Project.²³⁹ The HPTP also requires *the Applicant* to describe the measures to avoid, minimize or mitigate the adverse effects on historic properties.²⁴⁰

The Draft Programmatic Agreement also fails to resolve adverse effects, as required by Section 106 and its implementing regulations. Under the 43 C.F.R. § 800.6, BLM is required to develop options for resolution of the adverse effects on historic resources in consultation with other consulting parties, including Native American tribes. However, the Draft Programmatic Agreement improperly defers this requirement, and also impermissibly delegates its duties under the NHPA to the Applicant.²⁴¹

BLM has failed to make a reasonable good faith effort to comply with Section 106 prior to Project approval. In sum, BLM has deferred the *entire* Section 106 consultation, in violation of the NHPA.

IV. CONCLUSION

Thank you for the opportunity to submit comments on the FEIS.

Sincerely,

/s/

Elizabeth Klebaner

EK:bh

Attachments

²³⁹ *Id.* at pp. 2-4.

²⁴⁰ *Id.* at p. 2.

²⁴¹ *Id.* at p. 2.

MA-400

A U.S. aircraft carrier in San Diego harbor.



Yes, get this solar power going quickly, in Imperial County.

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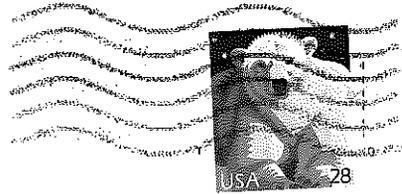


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A U.S. aircraft carrier in San Diego harbor.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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AUG 30 2010

Jim Abbott, Acting State Director
Bureau of Land Management
California State Office
2800 Cottage Way, Suite W-1623
Sacramento, CA 95825

Subject: Final Environmental Impact Statement for the Imperial Valley Solar Project
(formerly as SES Solar Two), Imperial County, California [CEQ# 20100272]

Dear Mr. Abbott:

The U.S. Environmental Protection Agency (EPA) has reviewed the Final Environmental Impact Statement (FEIS) for the Imperial Valley Solar Project (Project). Our review and comments are provided pursuant to the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) Regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act (CAA).

EPA reviewed the Joint Draft Environmental Impact Statement (DEIS) and Staff Assessment and provided comments to the California Energy Commission (CEC) and the Bureau of Land Management (BLM) on May 27, 2010. We rated the DEIS as *Environmental Objections – Insufficient Information* (EO-2), primarily due to concerns over potential impacts to waters of the United States and the alternative water supply, as well as impacts to biological resources, threatened and endangered species, air quality, and cultural resources. We asked for additional information on cumulative impacts from future actions, justification for the Project purpose and need, and evaluation of alternatives.

Previously, on November 18, 2008, EPA provided extensive formal scoping comments for the proposed Project. Also, on May 12th and June 7th, 2010, we submitted comments to the Army Corps of Engineers (Corps) on the March 15, 2010 Public Notice (Application for Permit) which highlighted our recommendations for compliance with section 404(b)(1) of the Clean Water Act Guidelines. EPA has continued to work with the Corps, fellow resource and regulatory agencies, and the applicant toward the goal of arriving at a permissible Project that protects natural resources.

We appreciate the efforts of BLM, the applicant, and its consultants to discuss and respond to our DEIS comments. We note that the preferred agency alternative identified in the FEIS addresses many of our comments and includes project design modifications that have reduced the proposed Project's total generating capacity from 750 megawatts (MW) to 709 MW by removing 1,163 SunCatchers, and increasing the use of non-standard configurations to avoid ephemeral main-stem streams. We support the reduction in the roadways on the Project site, decreased roadway widths, use of Arizona crossings, removal of culverts across main access roads, elimination of sediment basins and retention ponds, and the relocation of the Main

Services Complex. While some of these modifications are only discussed as part of the 709 MW alternative in the Draft Section 404(b)(1) Alternatives Analysis (Appendix H) and not in the FEIS, we expect all of them to be incorporated into the Record of Decision. Combined, these modifications would reduce the direct impacts to waters of the United States from 177.4 to 38.2 acres. We note that construction of a single 300 MW plant, which BLM has indicated would meet the Purpose and Need for the Project, would reduce the direct impacts to waters of the United States even further, and may be a practicable alternative that is less environmentally damaging. We request that the Record of Decision and the response to comments on the FEIS clarify the feasibility of the 300 MW alternative as a stand-alone project.

We were pleased to note additional information in the FEIS on compensatory mitigation for impacts to flat-tailed horned lizard habitat, and note that most of our suggested air quality comments were incorporated.

EPA continues to have concerns about impacts to aquatic resources, including waters of the United States, and the alternative water supply for the Project. We request additional information, clarification, and analysis of impacts to biological and cultural resources and air quality. Our primary concerns and recommendations are attached. We recommend that BLM address these issues prior to making a final decision on the proposed Project.

We are available to discuss all recommendations provided. Please send two hard copies and one CD ROM copy of the responses to FEIS comments and the Record of Decision to us when they are filed with our Washington D.C. office. If you have any questions, please contact me at 415-972-3843, or contact Tom Plenys, the lead reviewer for this Project. Tom can be reached at 415-972-3238 or plenys.thomas@epa.gov.

Sincerely,



Enrique Manzanilla, Director
Communities and Ecosystems Division

Enclosures: EPA Detailed Comments

cc: Jim Stobaugh, Program Manager, Bureau of Land Management
Tom Pogacnik, Deputy State Director, Bureau of Land Management
Colonel Mark Toy, U.S. Army Corps of Engineers
Michael Picker, California Governor's Office
Chris Meyer, California Energy Commission
Michelle Matson, U.S. Army Corps of Engineers
Felicia Sirchia, U. S. Fish and Wildlife Service
Becky Jones, California Department of Fish and Game

Aquatic Resources and Clean Water Act Section 404

Clean Water Act Section 404 prohibits avoidable discharges of dredged or fill material to waters of the United States (WUS). Among other requirements, proposals for discharges must meet EPA's regulatory standards at 40 CFR 230.10, including a comprehensive evaluation of project alternatives that avoid and minimize impacts to the aquatic environment. The only permissible discharge is the "Least Environmentally Damaging Practicable Alternative" (LEDPA). What is "practicable" is evaluated by the U.S. Army Corps of Engineers based on cost, logistical, and technological factors that impact the applicant's ability to achieve the project purpose.

We understand that the applicant has a Power Purchase Agreement with San Diego Gas and Electric (SDG&E) to provide 300 megawatts (MW) of power once on-line. In light of the contingency of Phase II of the Project upon the Sunrise Powerlink Transmission Line (SPTL), it appears that the 300 MW alternative may have been considered by the applicant or SDG&E to have independent utility. We again request clarification of the implications to the proposed Project if the SPTL is not built, and whether Phase I could be funded as a stand-alone project. This information should be provided in the response to comments on the FEIS and addressed in the ROD. We note that the 300 MW alternative would reduce temporary and permanent impacts to WUS due to a 60% reduction in Project acreage. In that case, a single 300 MW plant, which BLM has indicated would meet the Purpose and Need for the Project (at pg. 2-7), may be a practicable alternative that is less environmentally damaging and could be the LEDPA.

The Draft Section 404(b)(1) Alternatives Analysis (AA), included as Appendix H of the FEIS, describes design modifications to maximize avoidance and minimization of impacts to WUS (Appendix H at pg. 23). These modifications and updated calculations of impacts to WUS appear to have been incorporated into the 709 MW alternative (Alternative 3 in the 404(b)(1) AA), but not the other alternatives analyzed as part of the Draft Section 404(b)(1) AA. The Final 404(b)(1) AA and ROD should incorporate these modifications into all alternatives for which they are practicable, to ensure an accurate comparison of potential impacts.

Although the 404(b)(1) AA presented in the FEIS is still in draft form and certain environmental studies have not been completed nor fully incorporated into the FEIS (for example, the vegetation removal plan), we note a number of discrepancies and unconfirmed design features in the FEIS and appendices. We strongly recommend that the ROD and Final 404(b)(1) AA consistently incorporate all final project design features and mitigation measures to demonstrate avoidance and minimization of impacts to WUS. For example, we note a discrepancy in the FEIS with respect to sediment transport and sediment basins. The Draft 404(b)(1) AA indicates sediment basins were removed, which reduced the impact to sediment transfer through the Project area and decreased permanent impacts to WUS by 3.3 acres (Appendix H at pg. 25). This information conflicts with the FEIS (at pg. 4.17-19) as well as the

Responses to Comments (Appendix D at pg. 335) which indicate that sediment basins will be used and could be overwhelmed by much larger sediment transport volume of larger flows. This could result in increased sediment deposition downstream if sediment transport from the SunCatcher fields has been increased through vegetation clearing and grading of surface irregularities (at pg. 4.17-19). The Draft 404 (b)(1) AA also indicates the waterline which extends to the Seeley Waste Water Treatment Facility (SWWTF) has been co-located beneath a site arterial and maintenance road and will either be horizontally drilled or constructed to span WUS, resulting in a reduction of impacts from over 2 acres to zero. While we note that a Frac-Out Contingency Plan for horizontal drilling is mentioned in BIO-7, neither the FEIS nor the Draft 404 (b)(1) AA confirms the final design nor the technical method that will be used to eliminate these impacts.

Lastly, Appendix D (Responses to Comments) indicates that “when conditions are not conducive to the use of the metal fin-pipe foundation (for hydraulic SunCatcher pedestal installation), the foundation would consist of rebar-reinforced concrete constructed below grade” (Appendix D at pg. D-335). The 5,150 SunCatchers to be placed in flood hazard areas are subject to scour, and could also become unstable if the scour undermines their structural foundation, resulting in collapse and potentially damaging and polluting the ground surface with mirror fragments and other debris. EPA remains concerned about the increased erosion, migration of channels, local scour, and potential destabilization and damage that could result. As stated in our DEIS comments, the final project design should fully use the inherent flexibility of the SunCatcher technology to maximize avoidance of WUS and high risk flood hazard areas.

Recommendations:

- In the response to comments on the FEIS and in the ROD, clarify the implications to the proposed Project if the SPTL is not built, and discuss the practicability of the 300 MW Phase I as a stand-alone project.
- Integrate design modifications consistently across all alternatives evaluated in the FEIS and the Draft Section 404(b)(1) Alternatives Analysis to assist in alternative selection and identification of the LEDPA.
- The ROD and responses to comments on the FEIS should discuss why the selected alternative could be the LEDPA.
- The ROD and responses to comments should include a robust discussion of all avoidance and minimization measures proposed for the Project and include the final details and requirements of a compensatory mitigation plan. BIO-17 should be updated to reflect these final determinations.
- In responses to FEIS comments and in the ROD, confirm removal of sediment basins and demonstrate that downstream flows will not be disrupted due to proposed changes to natural washes, excavation of sediment or increased sedimentation due to increased vegetation clearing and grading of surface irregularities.
- Confirm and incorporate final design criteria and installation methods into the ROD for locating the waterline to the SWWTF that eliminate impacts to WUS.
- Integrate fencing design into the ROD to ensure unimpeded hydrologic flow and sediment transport through the site.

- Incorporate vegetation removal and re-establishment conditions for construction into the ROD that minimize vegetation removal in drainages, avoid impacts to drainage bank contours and require restoration using low lying native species, as appropriate, that would not require trimming or impede SunCatcher operation.
- Incorporate into the ROD the applicant's commitment to not mow, trim, or otherwise disturb vegetation, nor place SunCatchers, within streams I, K, C, H, and the areas of streams E and G south of the transmission line corridor (Appendix H at pg. 80).
- Responses to FEIS comments should fully discuss how many SunCatchers will be installed using rebar-reinforced concrete constructed below grade. Impacts from such construction to WUS should be quantified. All analyses should be updated to include a full evaluation of impacts to waters, sedimentation, scouring, etc. from locating SunCatchers in flood hazard areas.

Alternative Water Supply

The FEIS indicates in numerous places that the Project will rely on up to 40 acre-feet per year (afy) of withdrawals from State Well No. 16S.9E-36G4 (Boyer Well) within the Ocotillo-Coyote Wells Groundwater Basin (OCWGB) until water is made available from the upgraded Seeley Waste Water Treatment Facility (SWWTF). However, sections in the FEIS still indicate (see Appendix D, at pg. 334 and 509) that 50 afy will be needed for the Project. Thus, there is a discrepancy in the FEIS between the amount of water needed and the amount of water available. In addition, a question remains concerning how long the Boyer Well will be needed. The "Will Serve Letter" references a six-to-eleven month period, but the FEIS indicates up to 3 years. Unanticipated delays in the upgrade of the SWWTF could occur. The FEIS indicates that the proposed Project will not affect nearby residential/private wells, but it is still unclear whether the FEIS analysis factored in up to 67 afy of withdrawals for the Coyote Wells (CW) project in the same area. Thus, there is still some uncertainty whether nearby wells would be affected.

Recommendations:

- Resolve the 40 versus 50 afy discrepancy in the ROD and provide documentation (e.g., a letter from Imperial County or a copy of the permit for State Well No. 16S.9E-36G4) that Imperial County supports 40 afy (or whatever amount is determined to be correct) in withdrawals from the Boyer Well.
- Indicate whether other renewable energy projects and the CW project will, cumulatively, affect nearby residential/private wells, and, if so, describe the impact.
- Incorporate into the ROD an enforceable monitoring program to determine whether neighboring wells are affected by the use of Boyer Well. The ROD should describe the effectiveness of, and commitments to, proposed mitigation and monitoring plans.
- Integrate into the ROD a monitoring program to be initiated upon commencement of the use of water from the SWWTF to monitor for any indirect effects to wetlands in the New River.

Biological Resources

Detailed compensatory mitigation measures are determined on a project-specific basis, and must be contained in each project's environmental analyses and decision documents. The ROD should describe the final biological resources mitigation commitments and how they would be funded and implemented. The FEIS specifies the applicant shall contribute to the National Fish and Wildlife Foundation (NFWF) Account to compensate for loss of flat-tailed horned lizard (FTHL) habitat. For each species requiring compensatory mitigation, the ROD should state whether and how the Project applicant would use the NFWF Account, an in-lieu fee strategy, or an applicant-directed implementation strategy.

We also understand the Biological Opinion and Conferencing Opinion for peninsular bighorn sheep and the FTHL, respectively, have not been finalized (at pg. 4.3-22). As the FEIS indicates, the Conferencing Opinion for the FTHL would be converted to a Biological Opinion upon Federal listing of the FTHL. These final Biological Opinions will play an important role in informing the decision on which alternative to approve and what commitments, terms, and conditions must accompany that approval. Lastly, while additional botanical surveys were completed in Spring of 2010, it is unclear from the Responses to Comments (Appendix D at pg. D-493) whether any additional avoidance or mitigation measures were incorporated as a result of the new findings.

Recommendations:

- Incorporate final information on the compensatory mitigation proposals (including quantification of acreages, estimates of species protected, costs to acquire compensatory lands, etc.) for unavoidable impacts to Waters of the State and biological resources such as peninsular bighorn sheep and FTHL.
- If the applicant is to acquire compensation lands, the location(s) and management plans for these lands should be fully disclosed in the ROD.
- Fully incorporate mitigation measures from the Conference Opinion on FTHL into BIO-9 through BIO-11 in the ROD as contingency measures in anticipation of a Federal listing of the species.
- Provide additional supporting documentation in the responses to FEIS comments for the final acreage identified as foraging habitat for the peninsular bighorn sheep on the Project site. Update BIO-17 as appropriate.
- Include the provisions or mechanism(s) in the ROD that will ensure that habitat selected for compensatory mitigation will be protected in perpetuity.
- Fully incorporate into the ROD any mitigation measures for avoidance of rare plants during Project construction and operation that result from recent or pending botanical surveys.
- All mitigation commitments should be included in the ROD.

Air Quality

The Responses to Comments did not respond to our cumulative impact comments on air quality. The scope of the cumulative impact analysis in the FEIS remains geographically limited to focus on 'localized' cumulative impacts. Determination of the affected environment should not be based on a predetermined geographic area, but rather on perception of meaningful impacts for each resource at issue. EPA disagrees that there is never overlap for sources separated by six miles. This would depend on the emissions, size of the source, and release height, among other criteria. For example, in our air permitting process, we require modeling of the significant impact area plus 50 kilometers out. In an area classified as nonattainment for ozone, the cumulative effects study area could be the entire air basin because ozone precursors are reactive over hundreds of miles.

Additionally, we understand, based on information provided at the July 22, 2010 Renewable Energy Policy Group meeting, that the Project may now require diesel powered equipment for at least some period of the Project construction, which was not previously analyzed in the DEIS. EPA strongly recommends that this new information and the direct, indirect, and cumulative impacts associated with the use of diesel be fully analyzed and disclosed in responses to comments on the FEIS and in the ROD.

Recommendations:

- The response to comments on the FEIS should provide the rationale for limiting the scope of the cumulative impacts analysis to the specified local area. If the Project would affect the ability of other foreseeable projects to be permitted, the ROD and responses to comments on the FEIS should discuss this.
- The ROD and responses to FEIS comments should thoroughly evaluate the additional use of diesel powered equipment for Project construction and incorporate appropriate mitigation measures to reduce impacts. (Please see our May 27, 2010 DEIS comment letter for additional construction mitigation recommendations for mobile and stationary sources.) The evaluation in the ROD and responses to comments should include consideration of the feasibility and impacts of avoiding the need for diesel power by altering the construction schedule.
- At a minimum, any additional nonroad, diesel-powered engines should comply with federal requirements, as applicable, for 40 CFR Part 89.
- For those engines that will be sited and operated for 12-months or more, federal applicable requirements should be identified for, at a minimum, air quality permitting, hazardous air pollutants (40 CFR Part 63, Subpart ZZZZ), and new source performance standards (40 CFR Part 60, Subpart IIII).
- The ROD and responses to FEIS comments should discuss and address whether the diesel equipment would require a permit from the Imperial County Air Pollution Control District.

Cultural Resources

Responses to FEIS comments should provide the latest update on how any outstanding concerns raised by Tribes were addressed and resolved, provide an update on the status of the Programmatic Agreement and Tribal consultation, and indicate whether the Tribes are in agreement that the Programmatic Agreement will reduce impacts to prehistoric and sacred sites to less than significant.

Alternatives Analysis

The purpose and need statement in an EIS should be broad enough for analysis and consideration of a full range of reasonable alternatives (including off-site locations and environmentally preferable on-site alternatives) to address the underlying need. In the subject FEIS, alternatives not on BLM-managed lands are not evaluated, nor does the FEIS consider other projects under evaluation for nearby sites to be viable alternatives to the proposed Project (Appendix D at pg. 61). BLM should address conformance with the Council on Environmental Quality's guidance regarding consideration of alternatives outside the jurisdiction of the lead agency (Council on Environmental Quality's (CEQ) Forty Questions¹, #2a and #2b). While off-site alternatives are evaluated in the Draft 404(b)(1) AA(Appendix H), we continue to recommend that off-site alternatives be given full consideration under NEPA.

Recommendation:

- The ROD should reflect a full evaluation of reasonable alternatives, including off-site locations and other environmentally preferable on-site alternatives.

Adequacy of Responses to Comments in the FEIS

The format and, in some cases, cursory responses to comments in the FEIS may have resulted in unsatisfactory responses to some stakeholder comments. The FEIS grouped lengthy, substantive comments from stakeholders into 16 common response categories. Unfortunately, many of the responses in these sections seem unduly brief given the volume, substantiveness, and diversity of comments, concerns, and recommendations. The FEIS did not include responses to portions of our comments on cumulative impacts (F2-34), effects of fencing (F2-23), the alternative water supply (F2-26) and sensitive plant species and vegetation (F2-30). If the lead agency decides not to respond to a comment, it must cite the sources, authorities, or reasons that support its position (40 CFR 1503.4(a),(b)).

Recommendation:

- Responses to comments on the FEIS should more thoroughly address substantive comments received.

¹Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 40 CFR Parts 1500-1508, Federal Register, Vol. 46, No. 55, March 23, 1981.

"Joel Rathje"
<JRathje@co.las
n.ca.us>

07/29/2010 04:24
PM

<caivspp@blm.gov>

To

cc

Subject

Thank you

Thank you for your hard work on renewable energy projects. The EIS for the Tessera Solar project is a masterpiece of environmental review and will hopefully pave the way for a new energy revolution in America.

What happens when a solar collector or wind turbine fails or falls to the ground? Nothing What happens when an oil well, natural gas well, or coal mine fails?
People and wildlife die

Thank you so very much for your continued hard work.

Sincerely,

Joel Rathje

Kristie Orosco <KristieO@sanpasqualtribe.org>

To "caivspp@blm.gov" <caivspp@blm.gov>, "Carrie_Simmons@ca.blm.gov" <Carrie_Simmons@ca.blm.gov>

08/26/2010 10:42 PM

cc

Subject Comments

Dear BLM:

This comment is in regard to Imperial Solar Projects. Comments are due on or before today, Aug. 26, 2010.

I am opposed to the destruction of all cultural resources and other locations of significance to all indigenous peoples. I believe that the proposed project severely impacts the ecosystem of the desert and our ability to continue practicing our customs and traditions as Native peoples. I believe that alternatives to the projects have not been explored enough. The consultation and evaluation process has been insufficient.

Kristie Orosco
San Pasqual Culture Committee

CLEMSON

UNIVERSITY

July 26, 2010

Jim Stobaugh
Bureau of Land Management
El Centro Field Office
1661 S. 4th Street
El Centro, CA 92243

RECEIVED
BUREAU OF LAND MANAGEMENT
2010 JUL 29 PM 1:31
EL CENTRO FIELD OFFICE
EL CENTRO, CA.

Dear Mr. Stobaugh,

I am a retired biology professor who has studied reptile species diversity in the deserts of the southwestern U.S. and northern Mexico for 40 years. I am writing to express my opposition to the proposed Solar 2 Imperial Valley solar energy project. My concern rests with the threat this project presents to the survival of the Flat-Tailed Horned Lizard (FTHL), *Phrynosoma mcallii*.

The FTHL is currently under consideration for listing as a Threatened species, 75 Fed. Reg. 9377 (March 2, 2010). In November 1993, the U.S. Fish and Wildlife Service published a proposed rule to list the FTHL as a Threatened species. The Secretary of the Interior never approved it and moved to withdraw the listing proposal in 1997. Defenders of Wildlife and other conservation groups then sued the Secretary to compel a listing determination, but the government compromised by promising to address the threats to FTHL habitat on public lands. Also in 1997, Wendy Hodges prepared a report assessing the habitat loss of the FTHL in Arizona and California. At that time, Dr. Hodges had determined that the species had suffered a nearly 50 percent loss of habitat due to agricultural development and urban sprawl. Other threats included off-road vehicle use, energy developments, and military activities. Fifteen years have elapsed since a listing was first proposed, and according to the Center for Biological Diversity (Public Comment Letter, April 30, 2010) FTHL populations are still in decline.

Two important "management areas" or Areas of Critical Environmental Concern (ACECs) are the West Mesa and the Yuha Basin, so designated by the Working Group of FTHL Interagency Coordinating Committee (May 1997). The two ACECs are connected by a habitat corridor that varies in quality, but is sufficient to support the species and provide genetic connectivity. If project construction goes forward, it will destroy 6,500 acres, 75 percent of which (ca. 4,875 acres) is marginal to good FTHL habitat. Furthermore, the habitat corridor between the West Mesa and Yuha Basin FTHL populations will be disrupted, genetically



DEPARTMENT OF BIOLOGICAL SCIENCES

College of Agriculture, Forestry & Life Sciences 132 Long Hall Box 340314 Clemson, SC 29634-0314

864 656 2328 FAX 864 656 0435

isolating the two habitat areas. Conservation biologists view habitat fragmentation as one of the most pernicious factors in the decline and eventual extinction of biological populations. Lack of gene exchange between fragmented populations causes inbreeding depression and field studies have demonstrated that inbreeding depression can increase the probability of extinction (Jimenez et al. 1994 *Science* 366:271-3; Newman and Pilson, 1997 *Evolution* 51:354-62; Saccheri et al. 1998 *Nature* 392:491-4).

Dr. Patrick Mock, the expert witness for the applicant (Tessera Solar), stated that Interstate Highway 8 is a "substantial barrier to movement", and concluded that the two management areas are already effectively isolated. I disagree with this assessment because, whereas road mortality will be high, highways are not complete barriers to dispersing individuals; some individuals will successfully cross highways. Population genetic theory suggests that between one and ten migrants (dispersers that breed) per generation is sufficient to negate the negative effects of inbreeding (Wright, 1931 *Genetics* 16:97-259; Allendorf and Phelps, 1981 *Canadian J. Fisheries & Aquat. Sci.* 58:1507-14; Mills and Allendorf, 1996 *Conserv. Biol.* 10:1509-18; Vucetich and Waite, 2000 *Animal Conserv.* 3:261-6). Furthermore, experimental data from both captive and wild populations demonstrate that this level of migration has beneficial effects on fitness and survival (Soule and Mills, 1998 *Science* 282:1658-59; Westemeier et al. 1998 *Science* 282:1695-8; Vila et al. 2002 *Proc. Royal Soc. London Ser. B*, 270:91-7).

As a mitigation procedure, it has been proposed to collect all FTHLs at the project site and relocate them to safe habitat areas. Unfortunately, there is now compelling evidence that translocation inevitably fails. For example, over the past 15 years, some 10,000 desert tortoises have been moved to the Large Scale Translocation Site in Clark County, Nevada, yet there has been no measurable increase in tortoise numbers at the site, and overall there has been a steady extirpation of tortoise populations due to habitat loss. The desert is a severe environment and if the number of individuals exceeds the carrying capacity of the habitat, the excess will die. FTHLs relocated to suitable habitat will lack familiarity with their new surroundings and will succumb relatively easily to predators because their escape behavior is less efficient than that of resident lizards. Horned lizards are limited by food availability (Whitford and Bryant, 1979 *Ecology* 60:686-94). Resident horned lizards are familiar with the locations of ant mounds and ant worker columns in their territories and forage efficiently on this patchy resource (Baharav, 1975 *Copeia*:649-57; Whitford and Bryant, 1979 *Ecology* 60:686-94; Shaffer and Whitford, 1981 *Am. Midl. Nat.* 105:209-16; Munger, 1984a *Ecology* 65:1077-86; 1984b *Am. Nat.* 123:654-80). However, by increasing the number of FTHLs in an area through relocation, competition for food will intensify, increasing the probability of malnutrition for both resident and non-resident lizards. Malnutrition will have negative effects on subsequent

reproductive effort and over-wintering survival. In sum, translocation has potential negative consequences and should be abandoned as a mitigation procedure.

In conclusion, the Solar 2 Imperial Valley solar energy project should not be approved because it will destroy approximately 4,875 acres of marginal to good FTHL habitat, disrupting the habitat corridor between the West Mesa and the Yuha Basin FTHL populations which is critically important for gene exchange between the two. There are no effective mitigation options for the loss of the habitat and lizards at the project site or the loss of genetic connectivity. The FTHL has already lost more than 50 percent of its habitat from various anthropogenic activities. In 1997 the Federal Government promised to address the threats to FTHL habitat on public lands in response to a lawsuit by Defenders of Wildlife and other groups. Although I am not familiar with the exact language of the compromise, implicit in the agreement would be the protection of habitat corridors that are vitally important for gene exchange between fragmented populations. Clearly, by authorizing the Solar 2 Imperial Valley solar energy project, the Federal Government would violate the spirit, if not the letter, of its 1997 agreement with the Defenders of Wildlife and other plaintiffs.

Sincerely,



Richard R. Montanucci, PhD
Associate Professor Emeritus

Tel: 864-656-2328 (W)

FAX: 864-656-0435

E-mail: RRMNT@clermson.edu

Web page: www.clemson.edu/cafls/departments/biosci/faculty_staff/montanucci_r.html

CLEMSON

U N I V E R S I T Y

August 3, 2010

Jim Stobaugh
BLM Project Manager
P.O. Box 12000
Reno, Nevada 89520
Jim_Stobaugh@blm.gov

2010 - BLM - NSO

AUG 10 2010

9:00 A.M.

Dear Mr. Stobaugh,

This communication should be considered an addendum to my letter to you of 26 July 2010, concerning the potential impact of the SES Solar Two energy project on the Flat-Tailed Horned Lizard, *Phrynosoma mcallii*.

Dr. Patrick Mock estimated a population of 20 to 30 individuals based on 40% coverage of the area and assuming a 25% detection rate, and a finding of three individuals on the project site. I believe that this estimate is probably too low as it would constitute a non-viable population. CEC biologists made a much higher estimate of some 2,000 to 5,000 FTHLs (DEIS at C.2-22) on the proposed project site. My concern is that there may be an even higher population of lizards. If sand-raking were used to detect lizards that were subsequently captured marked, and then re-captured, it might be possible to obtain more accurate numbers. Turner and Medica (*Copeia* 1982:815-823), using mark-recapture methods, found 6 to 8 lizards per hectare in the Yuha Basin. Assuming 75% of the project area is poor to good habitat that yields 4,638 acres or 1,877 hectares of occupied habitat. If we select 6 per hectare as the "high" estimate, that would yield 11,262 FTHLs at the project site. If we take 50% of 6, or 3 per hectare, that would be 5,631 FTHLs at the project site. I believe these limits (5,631 to 11,262) are realistic. If nothing else, they tend to support the estimates from CEC biologists.

A second point concerns the applicant's decision not to place SunCatchers in some of the larger washes, claiming that the washes would serve as dispersal corridors between the Yuha Basin and West Mesa management areas. I have reviewed the extensive literature on habitat preferences, and cannot find any statements that suggest the FTHL utilize washes to any extent. My own limited field experience with this species is in agreement with the literature information on habitat. Furthermore, the washes at the project site are high energy washes that receive both winter and summer monsoon floods. Visual inspection of the washes reveals scour marks around creosote and galleta grass, indicating strong, high volume water flow. Most likely, any lizards occupying the washes would be periodically eliminated, and the area would have to be re-colonized. This suggests that wash areas, while they might be occupied periodically, would not serve well as dispersal corridors.



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Jim Stobaugh

August 3, 2010

p. 2

Sincerely,

A handwritten signature in black ink, appearing to read 'RRM', with a long horizontal flourish extending to the right.

Richard R. Montanucci, PhD
Associate Professor Emeritus

Tel: 864-656-2328 (W)

FAX: 864-656-0435

E-mail: RRMNT@clermson.edu

Web page:

www.clemson.edu/cafis/departments/biosci/faculty_staff/montanucci_r.html

NATIVE AMERICAN HERITAGE COMMISSION

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Fax (916) 657-5390
Web Site www.nahc.ca.gov
e-mail: ds_nahc@pacbell.net



July 30, 2010 Revised 8/19/2010

Mr. Erin Dreyfuss, Environmental Manager
BUREAU OF LAND MANAGEMENT
2800 Cottage Way
Sacramento, CA 95825

Re: SCH#2010074006: NEPA Notice of Completion, Final Environmental Impact Statement (FEIS) for the Imperial Valley Solar Project Final Environmental Impact Statement; Western Imperial County, California

Dear Mr. Dreyfuss:

The Native American Heritage Commission (NAHC) is the California State 'Trustee Agency' pursuant to Public Resources Code §21070 for the protection of California's Native American Cultural Resources. The NAHC is also a 'reviewing agency' for environmental documents prepared under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq*) and that are subject to the Tribal and interested Native American consultation requirements of the National Historic Preservation Act, as amended (Section 106) (16 U.S.C. 470). The provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001-3013) and its implementation (43 CFR Part 10.2) apply to this project if Native American human remains are inadvertently discovered.

The NAHC is of the opinion that the federal standards, pursuant to the above-referenced Acts and the Council on Environmental Quality (CSQ; 42 U.S.C. 4371 *et seq*) are similar to and in many cases more stringent with regard to the 'significance' of historic, including Native American items, and archaeological, including Native American items than the California Environmental Quality Act (CEQA.). In most cases, federal environmental policy require that any project that causes a substantial adverse change in the significance of an historical resource, that includes archaeological resources, is a 'significant effect' requiring the preparation of an Environmental Impact Statement (EIS). Both of the above-referenced projects contain known Native American cultural resources whose presence should be considered in the project planning of both.

A Sacred Lands File search was conducted for the project area ('area of potential effect' or APE and **Native American cultural sites were identified, including more than one set of remains, making it, in effect, a Native American burial ground.** The fact that the remains and associated grave goods may have been removed does not diminish the sanctity of this site to Native Americans. The remains were identified as 'of Native American in origin and reported to the California Native American Heritage Commission pursuant to California Health & Safety Code §7050.5. Early consultation with Native American tribes in your area is the best way to avoid unanticipated discoveries once a project is underway. Since the discovery of human remains, determined Native American, and the presence of other cultural resources at this site, the Native American Heritage Commission **is opposed to this project until such time that the concerns of local culturally-affiliated Native American elders and tribes are satisfied.**

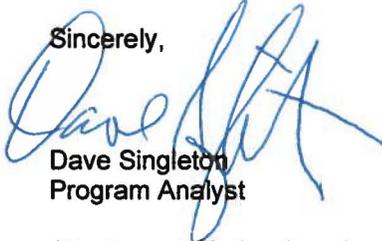
Enclosed are the names of the nearest tribes that may have knowledge of cultural resources in the project area. A list of Native American contacts is attached to assist you. It is advisable to contact the persons listed and seek to establish a 'trust' relationship with them; if they cannot supply you with specific information about the impact on cultural resources, they may be able to refer you to another tribe or person knowledgeable of the cultural resources in or near the affected project area.

Lack of surface evidence of archeological resources does not preclude the existence of archeological resources. Lead agencies should consider avoidance, in the case of cultural resources that are discovered. A tribe or Native American individual may be the only source of information about a cultural resource.

NEPA regulations provide for provisions for accidentally discovered archeological resources during construction and mandate the processes to be followed in the event of an accidental discovery of any human remains in a project location other than a 'dedicated cemetery. Even though a discovery may be in federal property, California Government Code §27460 should be followed in the event of an accidental discovery of human remains during any ground-breaking activity; in such cases California Health & Safety Code §7050.5 may apply.

If you have any questions about this response to your request, please do not hesitate to contact me at (916) 653-6251.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dave Singleton", is written over the typed name and title.

Dave Singleton
Program Analyst

Attachment: Native American Contacts list for Consultation

Steven_Ross@nps.gov
08/04/2010 11:14 AM
To
cmeyer@energy.state.ca.us, jim_stobaugh@blm.gov
cc
Carrie_Simmons@blm.gov, Naomi_Torres@nps.gov
bcc

Subject
Imperial Valley Solar Project- Impacts to and Mitigation for Anza NHT

Jim and Christopher,

Both the CEC and BLM have identified significant direct and impacts to the Anza NHT in their respective environmental documents evaluating the Imperial Valley Solar Project. The attached memorandum proposes two possible approaches to determining the value of the impact to the Anza NHT and for providing proportionate mitigation. Also included is a rough cost estimate for the examples of interpretive facilities referenced by NPS in our Draft EIS comment letter. As stated in FEIS Mitigation Measure REC-1, number and type of interpretive media would be determined through preparation of a Long Range Interpretive Plan. For your reference, pages from the NPS Wayside Guide are also included as attachments to the memorandum.

NPS is open to discussions with BLM and the applicant regarding the management, design, and cost of these facilities, and this cost estimate is only intended to provide a point of reference in determining the value of some of the mitigation we have proposed. Please don't hesitate to contact me to discuss this.

Sincerely,

Steve
(See attached file: Cost Estimate Summary.pdf) (See attached file: NPS Memo_Anza Trail Mitigation.pdf) (See attached file: Wayside Exhibit Examples.pdf)

Steven D. Ross
Outdoor Recreation Planner
Juan Bautista de Anza National Historic Trail
1111 Jackson Street, Suite 700
Oakland, CA 94607

(510) 817-1400 phone
(510) 506-2201 cell
(510) 817-1505 fax
steven_ross@nps.gov



United States Department of the Interior



NATIONAL PARK SERVICE
Pacific West Region
Juan Bautista de Anza National Historic Trail
1111 Jackson Street, Suite 700
Oakland, California 94607-4807

IN REPLY REFER TO:

(L7615(PWR-JUBA))

Christopher Meyer, Project Manager
California Energy Commission
1516 Ninth Street, MS-15
Sacramento, CA 95814

Mr. Jim Stobaugh, National Project Manager
USDI Bureau of Land Management
BLM Nevada State Office
P.O. Box 12000
1340 Financial Boulevard
Reno, NV 89520-0006

Re: Comments regarding the Final EIS and Supplemental Staff Assessment for the Imperial Valley Solar Project (CEC#: 08-AFC-5; DOI# FES 10-29)

Mr. Meyer & Mr. Stobaugh:

The National Park Service (NPS) respectfully submits the following comments regarding the California Energy Commission's Supplemental Staff Assessment (SSA) and BLM's Final Environmental Impact Statement (FEIS) prepared for the Imperial Valley Solar Project in Imperial County, California. Our comments focus on the potential impacts to, and mitigation for, the Juan Bautista de Anza National Historic Trail (Anza NHT), due to NPS's responsibility to administer, preserve and enhance this component of the National Trails System. The SSA contains several significant omissions with regard to the Anza NHT, and this letter is intended to highlight and correct those errors.

This project will forever change the landscape of this area and irreparably degrade the integrity of the Anza NHT and it will diminish the public's experience and understanding of the historic expedition and the cultural landscape of that period. Both the FEIS and SSA document this fact and conclude that the Imperial Valley Solar project would result in significant adverse impacts to the Anza NHT that cannot be fully mitigated.

The National Trails System Act (NTSA, 16 USC 1241 et. seq.) states that "National historic trails . . . will be extended trails which follow as closely as possible and practicable the original trails or routes of travel of national historic significance. . . [and] shall have as their purpose the identification and protection of the historic route and its historic remnants and artifacts for public use and enjoyment. . . components of a historic trail which are on federally owned lands and which meet the national historic trail criteria established in this Act are included as *Federal protection components*. . ." Section 7 of the

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Act also states that “Other uses along the trail, *which will not substantially interfere with the nature of and purposes of the trail*, may be permitted by the Secretary charged with the administration of the trail. Reasonable efforts shall be made to provide sufficient access opportunities to such trails and, to the extent practicable, *efforts be made to avoid activities incompatible with the purposes for which such trails were established*” (emphasis added).

Below are our comments regarding specific sections of the SSA and FEIS:

SSA Chapter C.3, Cultural Resources and Native American Values / FEIS Chapters 3.5 & 4.5, Cultural and Paleontological Resources

The CEC's summary of the Spanish Period is a misleading and inaccurate historical synthesis that emphasizes Anza's 1774 exploratory expedition and other Spanish period events (such as the Yuma Revolt), but essentially omits the more important 1775-76 colonizing expedition for which the Juan Bautista de Anza National Historic Trail was established by Congress. To clarify the record, we recommend that the Spanish Period section of Chapter C.3 be revised to accurately reflect the significance of the Anza colonizing expedition of 1775-76. Alternatively, CEC could incorporate pages 3.5-10 to 3.5-12 from BLM's FEIS into its administrative record because it provides an accurate summary of the Anza Expeditions and their cultural significance.

For example, page C.3-45 of CEC's document still includes the original text from the Draft EIS, which incorrectly states that the purpose of the expeditions was "to find an appropriate overland *route to the mission at San Diego along coastal California*." BLM's FEIS page 3.5-10 correctly states that the purpose of the expeditions was "to find an appropriate overland *route to the missions in Alta California*" (emphasis added). This is an important distinction, because neither the Anza colonizing expedition nor the exploratory expedition sought to go to San Diego. The purpose was to establish the overland route to the missions and presidios in Alta California, and to establish a new presidio and mission at San Francisco, where the strategic San Francisco Bay had recently been discovered by the Portola Expedition in 1769. Some of the same settlers later established San Jose, CA in 1777. The overland route established by Anza was also followed by another Spanish party in 1781 to establish Los Angeles and Santa Barbara. These omitted facts certainly relate to the historical significance of the Anza expedition, the significance of the Anza NHT historic corridor and recreational trail, and the potential to affect historical resources on the project site.

NPS is a consulting party of the Programmatic Agreement (PA) being prepared pursuant to Section 106 of the National Historic Preservation Act. Implementation of the PA is required by the CEC's Condition of Certification CUL-1 and BLM's Mitigation Measure CUP-11 to mitigate cultural resource impacts to the Anza Trail. The PA specifies that additional efforts to identify material remains of the Anza Trail be implemented, such as 1) a close-quarter pedestrian survey, 2) review of artifacts or faunal remains that may have been left behind by the Anza party, 3) use of infrared satellite imagery or LIDAR technology, and 4) coordination of mitigation measures for effects to the recreation trail and viewshed. NPS concurs with these conditions and the PA's proposed requirements related to the Anza NHT. However, pages

C.3-134 and p. C.3-156 refer to conditions of certification that do not exist, and must be included in the CEC's approval to mitigate impacts to the Anza NHT. Page C.3-156 states:

If material remains related to the trail are ultimately found, a trail-specific HPTP would be developed and implemented under appendix B that co-opts and augments the conditions of certification related to the trail in the Visual Resources, and Land Use, Recreation, and Wilderness sections of this SSA. If material remains related to the trail are found to be absent, those latter conditions of certification would attempt to reduce the significant impacts of the proposed action on what would then be non-cultural resources considerations. (SSA, p. C.3-156).

Refer to our comments below regarding the mitigation that must be provided to offset the project's impacts to the Anza Recreational Trail.

SSA, Chapter C.8 Land Use, Recreation, and Wilderness / FEIS, Chapters 3.12 & 4.12, Recreation

The CEC and BLM documents reach similar but different conclusions regarding the project's impacts on Recreation on the Anza Trail. Both documents conclude that the project would impact the recreational experience for visitors following the Anza Trail. The FEIS states that the project would "represent a cumulative change to the visual and historic context of the Anza Trail and impact the overall recreational experience of the Anza Trail by adding modern development in the viewscape" (FEIS, p. 4.12-9). The FEIS proposes Mitigation Measure REC-1 to address those impacts. One of the measures includes re-evaluation and completion of the Anza Recreational Trail.

CEC's SSA concludes that the project would result in "permanent preclusion of the use of the existing and planned segments of the Anza Recreational Trail alignment within and near the site" (p. C.8-1). The text seems to confuse the historic corridor that crosses through the project site, and the recreation trail, which does not necessarily lie within the historic corridor and is located along the perimeter of the site. In the project vicinity, the recreation trail follows existing dirt and paved roads and would not be precluded by implementation of the project, though it would be impacted by the construction, access roads, visual and noise impacts, as discussed on page C.8-16. The SSA states that the only potential mitigation for these impacts is realignment of the recreation trail, but the BLM has determined that realigning the Anza Trail is not feasible. The SSA includes no mitigation for recreational impacts to the Anza NHT.

To mitigate impacts to recreational visitors to the Anza NHT, we strongly recommend that the CEC include a condition of certification consistent with the BLM's Mitigation Measure REC-1, which is copied below for reference.

REC-1 **Juan Bautista de Anza National Historic Trail (Anza Trail) Corridor.** As recommended by the United States National Park Service (NPS), a Comprehensive Interpretive Plan for the Anza Trail will be prepared through applicant cooperation and coordination with the United States Bureau of Land Management (BLM) and the NPS. Potential components of this Plan as identified by the NPS could include, but not be limited to the following:

- New Interpretive Facilities
- Installation of Yuha Well Wayside Exhibit
- Additional Interpretation at the Anza Trail Overlook
- Interpretive Exhibit at Plaster City Off-Highway Vehicle (OHV) Open Area
- Supplement Exhibit at Sunbeam Rest Area on Interstate 8 (I-8)
- Anza Trail-Themed Exhibit at a Local Museum
- Anza Trail Interpretive Brochure
- Increase Accessibility of the BLM Yuha Desert Cultural History Anza Tour
- Re-evaluate and Complete the Anza Recreational Trail
- Historic Campsite Surveys (Archaeological Studies)
- Trail-Wide Mitigation Fund

It is assumed that the resources provided by the applicant that are required to prepare and implement the final Comprehensive Interpretive Plan and its components would be roughly proportionate to the degree of impact of the IVS project on the Anza Trail. (FEIS, p.4.12-8)

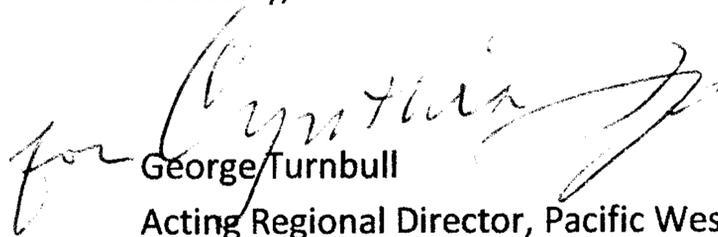
SSA, C.13 Visual Resources / FEIS, 3.16, 4.16, Visual Resources

The BLM's FEIS Visual Resources Chapter includes Mitigation Measure VIS-5 to off-set the project's unavoidable adverse impacts to visitors on the Anza Trail and the Yuha Desert ACEC. It requires the project owner to contribute funds to provide the improvements outlined in Mitigation Measure REC-1 (incorrectly referenced as REC-2 in the FEIS p. 4.16-25).

The CEC also concludes that visual impacts along the Anza Recreation Trail would be significant: "Staff does not, however, dispute that visual impacts to the recreational Anza Trail and trail corridor in general would be significant from most locations. . ." (SSA, p. C.13-20). However, CEC does not provide any mitigation to address this impact. In fact, CEC eliminated Mitigation Measure VIS-5, proposed in the Draft EIS, because the types of measures proposed in the condition would not mitigate the project's visual effects. NPS believes that reevaluation of the alignment of the recreation trail through terrain that would shield it from visual, noise, and other project impacts is a feasible mitigation measure for the Anza Trail, and we request that this condition be reinstated. Alternatively, contribution to a fund for acquisition of property or conservation easements elsewhere along the Anza Trail would also serve to mitigate the project's visual impact.

Feel free to contact Naomi Torres, Superintendent for the Anza NHT (Naomi_torres@nps.gov, 510-817-1438), or Steven Ross (steven_ross@nps.gov, 510-817-1400) Outdoor Recreation Planner, to discuss this letter.

Sincerely,


 George Turnbull
 Acting Regional Director, Pacific West Region

PUBLIC UTILITIES COMMISSION

320 West 4th Street, Suite 500
Los Angeles, CA 90013



August 23, 2010

Erin Dreyfuss
Bureau of Land Management
2800 Cottage Way
Sacramento, CA 95825

**Subject: SCH#2010074006: Comments to Imperial Valley Solar Project Final
Environmental Impact Statement**

Dear Erin Dreyfuss:

The California Public Utilities Commission (Commission) has regulatory and safety oversight over railroad crossings in California. The California Public Utilities Code requires Commission approval for the construction or alteration of crossings and grants the Commission with exclusive power on the design, alteration, and closure of crossings. Rail Crossing Engineering Section (RCES) staff is in receipt of the Bureau of Land Management Imperial Valley Solar (IVS) Project Final Environmental Impact Statement and has reviewed the document for impacts to rail crossing safety.

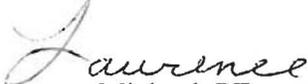
The IVS project is a privately proposed solar power farm that would be located on approximately 6, 500 acres of vacant land in southwestern Imperial County, south of Evan Hewes Highway and north of Interstate 8 (I-8). The IVS project site includes about 6, 140 acres of Federal land managed by the BLM and approximately 360 acres of privately owned land. The site is about 100 miles east of San Diego and 14 miles west of El Centro. Evan Hewes Highway and Dunaway Road provide direct access to the site.

The San Diego and Arizona Eastern Railway line parallels the northern boundary of the IVS project site between Evan Hewes Highway and the site boundary. Dunaway Road crosses the line at-grade, in addition; there is also a private dirt road crossing over the tracks at the location of the proposed main access to the IVS project site. In the Summary of Traffic Impacts for the IVS project alternative, it states that the construction of a crossing of existing railroad tracks as an impact. However, it is unclear if the existing at-grade crossing is being upgraded as part of the project or if a new crossing is being proposed.

It is Commission's policy to not authorize any new at-grade crossings, and as such, the applicant should provide clarification of the proposed crossing access into the IVS site. In particular, the applicant should state whether the project will utilize the existing private crossing to serve as the primary access point into the project site or if a new crossing location is being proposed.

If the crossing is public, a diagnostic will be required to evaluate the impact the project will have on the crossing and to identify mitigation measures to reduce any impacts. If you have any questions, you may contact me at (213) 576-7076 or ldi@cpuc.ca.gov.

Sincerely,


Laurence Michael, PE
Utilities Engineer
Rail Crossings Engineering Section
Consumer Protection and Safety Division





QUECHAN INDIAN TRIBE
Ft. Yuma Indian Reservation

P.O. Box 1899
Yuma, Arizona 85366-1899
Phone (760) 572-0213
Fax (760) 572-2102

REC'D - BLM - NSO

AUG 10 2010

9:00 A.M.

August 4, 2010

Mr. Daniel Steward, Project Lead
Bureau of Land Management, El Centro Field Office
1661 S. 4th Street
El Centro, CA 92243

Re: Imperial Valley Solar Project (SES Two) -- Section 106 Consultation

Dear Mr. Steward:

On February 4, 2010, I wrote to you regarding the Quechan Tribe's concern with BLM's evaluation of cultural resource impacts associated with the Imperial Valley Solar Project (formerly known as SES Two) and BLM's failure to consult with the Quechan Tribe as required by law. Since that date, the Tribe's concerns with this Project and BLM's review process have only increased. The Tribe requests that BLM stop rushing this process and allow adequate time to meaningfully comply with the consultation process required by law and to properly evaluate the impacts this project would have on cultural resources if approved.

The Tribe's Historic Preservation Officer (HPO) first requested a copy of the cultural report for this project over two years ago, on February 19, 2008. In subsequent meetings, BLM informed the Tribe's HPO that the cultural report would be ready for distribution in June 2008. However, the Tribe only recently received a CD containing a copy of the cultural report in early July 2010. Required consultation under Section 106 regarding the evaluation of resources and the mitigation of impacts can not even begin until the Tribe has adequate time to review the lengthy cultural resources report. Yet, BLM contends that it will be ready to consider approval of this Project within weeks. BLM is not complying with the Section 106 process or its fiduciary obligations to the Tribe.

To date, BLM has not met with the Quechan Tribal Council to discuss this project. The Tribe requests that BLM arrange a time to meet with the Tribal Council at the Fort Yuma Indian Reservation to engage in meaningful government-to-government consultation. Such consultation should occur only after the Tribe has been provided adequate time to review the relevant reports and maps describing the cultural resources present on the project site.

To be clear, notification letters and brief project updates to the general public are not adequate to comply with BLM's Section 106 consultation obligation to the Quechan Tribe. Meaningful consultation includes a timely exchange of information and requires BLM to seek

Mr. Daniel Steward, Project Lead
August 4, 2010
Page 2

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

Like BLM, the State of California is also rushing the process at the expense of cultural resource protection. The California Energy Commission (CEC) recently published its final Staff Assessment which included the evaluation and selection of its preferred alternative. Noticeably absent from the Staff Assessment was any analysis of cultural resource impacts. This is because the CEC has not completed its analysis of cultural resource impacts. *See* Supplemental Staff Assessment, Section C.3 (stating that "the Cultural Resources and Native American Values section of the Supplemental Staff Assessment will be filed subsequently and is not included in this document"). It is not clear to the Tribe how CEC can make an informed recommendation and select a preferred alternative for the project with literally no information or analysis about cultural resource impacts.

Information that has been made available to the Tribe confirms that there are numerous cultural resources located on this project site, which is located within territory traditionally used by the Quechan Tribe. The most significant impact associated with this project is the permanent loss of cultural resources within the existing cultural landscape. Based on these impacts, the most appropriate alternative may be denial of the proposed project and relocation to other federal lands that have been previously disturbed and that lack the significant cultural values of this site. Until BLM finishes its cultural analysis, consults with the Quechan Tribe in accordance with its legal and fiduciary obligations, and completes the Section 106 process, BLM may not make any final decision on this project.

BLM has a duty under federal law to consult with the Quechan Tribe and to thoroughly understand, evaluate, and mitigate impacts to cultural resources before approving a project. The Quechan Tribe expects full compliance by BLM in this case. The Tribe looks forward to engaging in future consultation with BLM regarding this project.

Sincerely,
Quechan Indian Tribe



Mike Jackson, Sr., President

cc: Ken Salazar, Secretary of the Interior
Jim Stobaugh, Bureau of Land Management
Nancy Brown, Advisory Council on Historic Preservation
Chris Meyer, California Energy Commission Project Manager
Wayne Donaldson, California State Historic Preservation Officer
Dave Singleton, Native American Heritage Commission

DRAFT

**PROGRAMMATIC AGREEMENT
AMONG THE
BUREAU OF LAND MANAGEMENT-CALIFORNIA,
THE UNITED STATES ARMY CORPS OF ENGINEERS,
THE CALIFORNIA ENERGY COMMISSION,
THE TESSERA SOLAR COMPANY,
THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER,
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING THE TESSERA SOLAR - IMPERIAL VALLEY SOLAR
PROJECT, IMPERIAL COUNTY, CALIFORNIA**

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38 **INTRODUCTION**

39

40 The purpose of this Programmatic Agreement (Agreement) is to provide processes whereby the
41 Bureau of Land Management (BLM), U.S. Army Corps of Engineers (COE), and the California
42 Energy Commission (Energy Commission), in consultation with the California State Historic
43 Preservation Officer (SHPO), Advisory Council on Historic Preservation (ACHP), Indian Tribes
44 and other consulting parties, shall determine the steps the agencies shall follow to take into
45 account effects on historic properties as required by Section 106 of the National Historic
46 Preservation Act and satisfy the requirements of the California Environmental Quality Act.

47 The **BLM** in consultation with the consulting parties to this Agreement, will consider and
48 incorporate within the Section 106 consultation process the performance standards (desired
49 future condition), the range of mitigation measures and commitment to mitigate, and monitoring
50 requirements of the Energy Commission’s Staff Assessment for the Tessera Solar Imperial
51 Valley Solar Project (Application for Certification 08-AFC-5). The BLM and the Energy
52 Commission will endeavor to make the historic properties treatment and management provisions
53 of this Agreement as consistent as possible with the objectives and terms of the Staff Assessment
54 within the context of the consultation process required by Section 106 of the NHPA.

55 Government agencies, consulting parties, and the public identified in the scoping and public
56 notification process for the Staff Assessment and Environmental Impact Statement will be
57 advised in the Supplemental Staff Assessment and Final Environmental Impact Statement (FEIS)
58 that historic properties associated with the undertaking would be treated consistent with the
59 mitigation measures or performance standards identified in the Staff Assessment and adopted by
60 the Energy Commission, and consistent with the stipulations of this Agreement. A proposed final
61 draft of this Agreement will be circulated for public comment as an attachment to the FEIS. The
62 Signatories have consulted with the Invited Signatories, Concurring Parties and Tribes on this
63 Agreement, and have taken into consideration the views and comments received regarding the
64 draft Agreement in preparing this final Agreement.

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**PROGRAMMATIC AGREEMENT
AMONG THE
BUREAU OF LAND MANAGEMENT-CALIFORNIA,
THE UNITED STATES ARMY CORPS OF ENGINEERS,
THE CALIFORNIA ENERGY COMMISSION,
THE TESSERA SOLAR COMPANY,
THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER,
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING THE TESSERA SOLAR - IMPERIAL VALLEY SOLAR PROJECT,
IMPERIAL COUNTY, CALIFORNIA**

77 **WHEREAS**, the Tessera Solar Company (Applicant) has applied for a right of way (ROW)
78 grant on approximately 6,144 acres of public lands managed by the Bureau of Land Management
79 (BLM) and has submitted a Plan of Development (POD) to construct, operate and maintain a
80 solar energy electrical generating plant (hereinafter referred to as the Imperial Valley Solar
81 Project or Project), including construction of approximately 30,000 solar dish power control
82 units (SunCatchers), a 230 kilovolt (kV) transmission lines, a water pipeline, paved arterial
83 roads, unpaved perimeter access and maintenance roads, laydown and staging areas, and support
84 facilities and infrastructure which are more fully described in Appendix D: Project Description
85 and illustrated in Appendix E: Project Maps and Illustrations attached hereto and incorporated by
86 this reference; and

87
88 **WHEREAS**, the BLM has determined that issuing a right-of-way grant (ROW) to the Tessera
89 Solar Company in accordance with the Federal Land Policy and Management Act (FLPMA)
90 (Public Law 940-579; 43 USC 1701) is an undertaking as defined at 36 CFR
91 800.16(y)(Protection of Historic Properties, August 5, 2004) of the regulations implementing
92 Section 106 of the National Historic Preservation Act (16 USC 470(f))(NHPA); and

93
94 **WHEREAS**, the United States Army Corps of Engineers (COE) may issue a Department of the
95 Army permit pursuant to section 404 of the Clean Water Act for discharges of dredged or fill
96 material into jurisdictional waters of the United States associated with the Imperial Valley Solar
97 Project , which constitutes an undertaking as defined at 36 CFR 800.16(y), and has participated
98 in this consultation and is a Signatory to this Programmatic Agreement (Agreement); and

99
100 **WHEREAS**, the BLM is the lead federal agency for these undertakings for the purpose of
101 complying with Section 106 of the NHPA and its implementing regulations found at 36 CFR
102 Part 800, and the BLM shall be responsible for managing historic properties within the Area of
103 Potential Effects (APE) for the undertaking pursuant to the NHPA; and

104
105 **WHEREAS**, in August 2005, the United States Congress enacted the Energy Policy Act of 2005
106 (Public Law 109-58). In section 211 of this Act, Congress directed that the Secretary of the
107 Interior (the “Secretary”) should, before the end of the 10-year period beginning on the date of

108 enactment of the Act, seek to have approved non-hydropower renewable energy projects located
109 on the public lands with a generation capacity of at least 10,000 megawatts of electricity; and
110

111 **WHEREAS**, by Secretarial Order No. 3285 issued March 11, 2009, the Secretary stated as
112 policy that encouraging the production, development, and delivery of renewable energy is one of
113 the Department of Interior's (DOI) highest priorities and that agencies and bureaus within the
114 DOI will work collaboratively with each other, and with other federal agencies, departments,
115 states, local communities, and private landowners to encourage the timely and responsible
116 development of renewable energy and associated transmission while protecting and enhancing
117 the Nation's water, wildlife, and other natural resources; and 
118

119 **WHEREAS**, BLM and the COE have consulted with the California State Historic Preservation
120 Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP), pursuant to 36 CFR
121 800.14(b)(3) and following the procedures outlined at 36 CFR 800.6, and is in the process of
122 considering alternatives for the Project that have the potential to adversely affect historic
123 properties and may reach a decision regarding approval of the undertakings before the effects of
124 the undertaking's implementation on historic properties have been fully determined, the BLM
125 chooses to continue its assessment of the undertaking's potential adverse effect and resolve any
126 such effect through the implementation of this Agreement; and
127

128 **WHEREAS**, the BLM and COE, in consultation with the SHPO and the ACHP and pursuant to
129 36 CFR 800.4(b)(2) where alternatives under consideration consist of large land areas, has
130 determined that a phased (tiered) process for compliance with Section 106 of the NHPA may be
131 appropriate for the undertakings; and
132

133 **WHEREAS**, the Juan Bautista de Anza National Historic Trail corridor is located within the
134 APE for the undertakings and the National Park Service (NPS) has agreed to participate in the
135 Section 106 consultation regarding the undertakings under the terms of this Agreement and is a
136 Concurring Party to this Agreement; and
137

138 **WHEREAS**, the California Energy Commission (Energy Commission) may certify the Imperial
139 Valley Solar Project located on both public and private lands pursuant to Section 25519,
140 subsection (c) of the Warren-Alquist Act of 1974 and for the purposes of consistency proposes to
141 manage all historical resources in accordance with the stipulations of this Agreement, and has
142 participated in this consultation and is an Invited Signatory to this Agreement; and
143

144 **WHEREAS**, the BLM, in coordination with the Energy Commission, has authorized the
145 Applicant to conduct specific identification efforts for this undertaking including a review of the
146 existing literature and records, cultural resources surveys, ethnographic studies, and geo-
147 morphological studies to identify historic properties that might be located within the Area of
148 Potential Effect (APE); and
149

150 **WHEREAS**, the Applicant has retained an archaeological consultant to complete all of the
151 investigations necessary to identify and evaluate cultural resources located within the Area of

152 Potential Effect (APE) for both direct and indirect effects. A review of the existing historic,
153 archaeological and ethnographic literature and records has been completed to ascertain the
154 presence of known and recorded cultural resources in the APE and buffered study area, has
155 conducted an intensive field survey for 7,700 acres of land, including all of the lands identified in
156 APE for direct effects for all project alternatives, and has completed intensive field surveys for
157 alternatives on lands that are no longer part of the project. A cultural resources inventory report
158 (*Draft Final Class III Cultural Resources Technical Report for the Imperial Valley Solar*
159 *Project, Application for Certification (08-AFC-5), Imperial Valley Solar, LLC*, prepared by URS
160 Corporation, June 2010) has been submitted that presents the results of identification efforts to
161 the BLM, the COE, and the Energy Commission. The BLM has provided the report to the
162 consulting parties and Indian Tribes for review and comment; and

163
164 **WHEREAS**, the BLM and the Energy Commission have prepared the *Staff Assessment and*
165 *Draft Environmental Impact Statement and Draft California Desert Conservation Area Plan*
166 *Amendment, SES Solar Two Project, Application for Certification (08-AFC-5) Imperial County*
167 *(2010)* to identify the project alternatives for purposes of the California Environmental Quality
168 Act (CEQA) and the National Environmental Policy Act (NEPA), and have comparatively
169 examined the relative effects of the alternatives on known historic properties; and

170
171 **WHEREAS**, the Applicant has participated in this consultation per 36 CFR 800.2(c)(4), will be
172 the entity to whom the BLM grants a ROW and the COE issues a permit related to Project
173 activities, with the responsibility for carrying out the specific terms of this Agreement under the
174 oversight of the BLM, and therefore is an Invited Signatory to this Agreement; and

175
176 **WHEREAS**, pursuant to section 101(d)(6)(B) of the NHPA, 36 CFR 800.2(c)(2)(ii), the
177 American Indian Religious Freedom Act (AIRFA), Executive Order 13175, and section 3(c) of
178 the Native American Graves Protection and Repatriation Act (NAGPRA), the BLM is
179 responsible for government-to-government consultation with federally recognized Indian Tribes
180 and is the lead federal agency for all Native American consultation and coordination; and

181
182 **WHEREAS**, the BLM has formally notified and invited the Campo Kumeyaay Nation, the
183 Cocopah Indian Tribe, the Quechan Indian Tribe, the Ewiiapaayp Band of Kumeyaay Indians,
184 the Jamul Indian Village, the Kwaaymii Laguna Band of Indians, the La Posta Band of
185 Kumeyaay Indians, the Manzanita Band of Kumeyaay Indians, the San Pasqual Band of
186 Diegueno Indians, and the Santa Ysabel Band of Diegueno Indians (Tribes), and the Ah-Mut
187 Pipa Foundation to consult on this undertaking and participate in this Agreement as a Concurring
188 Party. BLM has documented its efforts to consult with the Tribes and Tribal Organizations and a
189 summary is provided in Appendix I to this Agreement; and

190
191 **WHEREAS**, the BLM shall continue to consult with the Tribes and Tribal Organizations
192 throughout the implementation of this Agreement regarding the adverse effects to historic
193 properties to which they attach religious and cultural significance. BLM will carry out its
194 responsibilities to consult with Tribes that request such consultation with the further

195 understanding that, notwithstanding any decision by these Tribes to decline concurrence, BLM
196 shall continue to consult with these Tribes throughout the implementation of this Agreement; and .
197

198 **WHEREAS**, through consultation, Tribes and Tribal Organizations have expressed their views
199 and concerns about the importance and sensitivity of specific cultural resources that hold
200 religious and cultural significance. Tribes have expressed the connection of these resources to the
201 broader cultural landscape within and near the project area; and
202

203 **WHEREAS**, the National Trust for Historic Preservation, the Anza Society, the California
204 Unions for Reliable Energy, and the Sacred Sites International Foundation, as organizations, and
205 Edie Harmon and Greg P. Smestad, Ph.D., as individuals, have been invited to consult on this
206 undertaking and this Agreement, have been afforded consulting party status pursuant to 36 CFR
207 800.4, and have been invited to be Concurring Parties to this Agreement;
208

209 **NOW, THEREFORE**, the BLM, the COE, the SHPO, and the ACHP (hereinafter “Signatories”) and the Energy Commission and the Applicant (hereinafter “Invited Signatories”), agree that the
210 undertaking shall be implemented in accordance with the following stipulations in order to take
211 into account the effect of the undertaking on historic properties.
212

213
214

215 **STIPULATIONS**

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217
218

The Signatories and Invited Signatories shall ensure that the following measures are implemented:

219
220

I. DEFINITIONS

221
222
223
224

The definitions found at 36 CFR 800.16 and in this section apply throughout this Agreement except where another definition is offered in this Agreement.

- 225 a) **Concurring Parties**. Collectively refers to consulting parties with a demonstrated interest
226 in the Undertaking, who concur, through their ature, in this Agreement. Concurring
227 Parties may propose amendments to this Agreement. Amendments proposed by
228 Concurring Parties may be considered at the discretion of the Signatories.
- 229 b) **Cultural Resource**. A cultural resource is an object or definite location of human activity,
230 occupation, or use identifiable through field inventory, historical documentation, or oral
231 evidence. Cultural resources are prehistoric, historic, archaeological, or architectural
232 sites, structures, buildings, places, or objects and definite locations of traditional cultural
233 or religious importance to specified social and/or culture groups. Cultural resources
234 include the entire spectrum of resources, from artifacts to cultural landscapes, without
235 regard to eligibility for inclusion on the National Register of Historic Places (NRHP) or
236 California Register of Historical Resources (CRHR).
- 237 c) **Consulting Parties**. Collectively refers to the Signatory, Invited Signatory and
238 Concurring Parties to this Agreement.

- 239 d) **Day.** Singular or plural, refers to a calendar, rather than a business, day.
- 240 e) **Historic Properties.** Historic Properties are included in, or eligible for inclusion in, the
241 NRHP maintained by the Secretary of the Interior and per the NRHP eligibility criteria at
242 36 CFR § 60.4 and may include any prehistoric or historic district, site, building, structure,
243 traditional cultural property or object CFR. This term includes artifacts, records, and
244 remains that are related to and located within such properties. The term includes
245 properties of traditional religious and cultural importance to an Indian tribe or Native
246 Hawaiian organization and that meet the NRHP criteria. The term eligible for inclusion
247 in the NRHP includes both properties formally determined as such in accordance with
248 regulations of the Secretary of the Interior and all other properties that meet the NRHP
249 criteria.
- 250 f) **Historic Resources.** Historic resources meet the criteria for listing on the CRHR as
251 provided at California Code of Regulations Title 14, Chapter 11.5, Section 4850 and may
252 include, but is not limited to, any object, building, structure, site, area, place, record, or
253 manuscript which is historically or archaeologically significant, or is significant in the
254 architectural, engineering, scientific, economic, agricultural, educational, social, political,
255 military, or cultural annals of California.
- 256 g) **Invited Signatories.** Invited Signatories to this Agreement are the Energy Commission
257 and Applicant. Invited Signatories have specific responsibilities as defined in this
258 Agreement and have the same rights as the Signatory Parties to propose amendments and
259 termination of this Agreement, but their signatures are not required for execution of the
260 Agreement.
- 261 h) **Lands Administered by the U.S. Department of Interior, Bureau of Land Management**
262 (BLM) means any federal lands under the administrative authority of the BLM.
- 263 i) **Lands Regulated by the U.S. Army Corps of Engineers (COE)** means any lands subject
264 to regulation by the COE pursuant to section 404 of the Clean Water Act (33 U.S.C.
265 section 1344) or other law, and for which the COE has issued a Department of the Army
266 permit.
- 267 j) **Literature Review.** A literature review is one component of a BLM class 1 inventory, as
268 defined in BLM Manual Guidance 8100. 21(A)(1), and is a professionally prepared study
269 that includes a compilation and analysis of all reasonably available cultural resource data
270 and literature, and a management-focused, interpretive, narrative overview, and synthesis
271 of the data. The overview may also define regional research questions and treatment
272 options.
- 273 k) **Records Search.** A records search is one component of a BLM class I inventory and an
274 important element of a literature review. A records search involves obtaining existing
275 cultural resource data from published and unpublished documents, BLM cultural
276 resource inventory records, institutional site files, State and national registers, interviews,
277 and other information sources.
- 278 l) **Signatories.** Signatories to this Agreement are the BLM, COE, SHPO, and ACHP.
279 Signatories have the sole authority to execute, amend or terminate this Agreement.
- 280 m) **Traditional Cultural Property.** A traditional cultural property is defined generally as
281 property that is important to a living group or community because of its association with
282 cultural practices or beliefs that (a) are rooted in that community's history, and (b) are

283 important in maintaining the continuing cultural identity of the community. It is a place
284 that may figure in important community traditions or in culturally important activities,
285 such as traditional gathering areas, prayer sites, or sacred/ceremonial locations. These
286 sites may or may not contain features, artifacts, or physical evidence, and are usually
287 identified through consultation. A traditional cultural property may be eligible for
288 inclusion in the NRHP and the CRHR.

289 n) **Tribes.** The federally recognized and non-federally recognized Indian Tribes that BLM is
290 consulting with on this undertaking

291 o) **Undertaking.** Issuing any ROW/permit(s) individually or collectively by the BLM or
292 COE allowing or facilitating construction, operation or maintenance activities related to
293 the Project on BLM administered or COE regulated lands constitutes an undertaking as
294 defined at 36 CFR 800.16(y) and are the undertakings addressed by this Agreement.

295 p) **Windshield Survey.** A windshield survey is a common method utilized in reconnaissance
296 surveys to identify built-environment cultural resources, such as buildings, objects, and
297 structures. Windshield surveys involve surveyors driving or walking streets and roads of
298 a community and observing and recording the buildings, structures, and landscape
299 characteristics they see.

301 **II. AREA OF POTENTIAL EFFECTS**

302

303 a) The APE is defined as the total geographic area or areas within which the undertaking
304 may directly or indirectly cause alterations in the character or use of historic properties
305 per 36 CFR 800.16(d). The APE is influenced by the scale and nature of an undertaking
306 and includes those areas which could be affected by a project prior to, during and after
307 construction. For the Imperial Valley Solar Project the overall APE has been defined to
308 include a 15 mile radius around the project location. Specific APE's for the project are
309 discussed below and include the methodology used to identify historic properties. See
310 Appendix E for APE map and project illustrations.

311

312 i) Where Historic Properties could sustain direct physical effects as a result of the
313 undertaking the APE is defined to include:

314

315 (1) All areas subject to the BLM's ROW decision for the Phase I 300 megawatt
316 (MW) and the Phase II 450 MW portions of the Project area, which includes
317 approximately 6,140 acres of public lands and 360 acres of private lands. The area
318 is generally bounded by Interstate 8 on the south, Dunaway Road to the east, and
319 the Evan Hewes Highway to the north and west. A 200 foot buffer around the
320 APE was included in the survey for cultural resources within the APE per Energy
321 Commission requirements.

322

323 (2) The APE for linear elements of the undertaking includes:

324

325 (a) A ROW for an approximate 10 foot wide and 11.8 mile long water supply
326 pipeline that would extend from the Seeley Waste Water Treatment Plant. The

- 327 pipeline will be buried 30 inches below grade in the shoulder of the existing
 328 ROW of the Evan Hewes Highway. A survey corridor for cultural resources
 329 for this linear element was established as a 75-foot buffer on either side of the
 330 center line (150 foot corridor) to allow for changes in the ROW to avoid
 331 cultural resources.
- 332 (b) A ROW for temporary or permanent access roads required outside the plant
 333 footprint is approximately 30 feet. A survey corridor for cultural resources for
 334 this linear element was established as a 50-foot buffer on either side of the
 335 center line (100 foot corridor) to allow for changes in the ROW to avoid
 336 cultural resources.
- 337 (c) The ROW for the 230 kV transmission line is defined as an approximately
 338 100 foot wide and 10.3 mile long corridor that extends to the San Diego Gas
 339 and Electric Company Imperial Valley Substation. A survey corridor for
 340 cultural resources for this linear element was established as a 150-foot buffer
 341 on either side of the center line (300 foot corridor) to allow for changes in the
 342 ROW to avoid cultural resources.
- 343
- 344 ii) Historic properties not located within the areas described in Stipulation II(a)(i) within
 345 15 miles of the Project that could sustain direct or indirect effects, including visual,
 346 auditory, and atmospheric, as a result of the undertaking and is defined to include:
- 347
- 348 (1) Cultural resources identified through a review of existing literature and records
 349 search, information or records on file with the BLM or at the SIC, interviews or
 350 discussions with local professional or historical societies and local experts in
 351 history or archaeology. Specific areas of concern or cultural resources that were
 352 identified include:
- 353
- 354 (a) Cultural resources in the Yuha Area of Critical Environmental Concern
 355 (ACEC).
- 356
- 357 (2) Any cultural resource or location which has been included in the Native American
 358 Heritage Commission Sacred Lands Files, identified through a literature review or
 359 records search, or identified by a Tribe or Tribal organization, through
 360 consultation as having religious or cultural significance. Specific areas of concern
 361 or cultural resources that have been identified through tribal consultation include:
- 362
- 363 (a) Certain geological features including Signal Mountain and Coyote Mountain.
 364 (b) Human remains located within or in proximity to the undertaking including
 365 those in any state of decomposition or skeletal completeness.
 366 (c) Geoglyphs within the 15 mile radius of the project location such as those in
 367 the Yuha ACEC.
- 368
- 369 (3) Any cultural resource or location which has been identified by a consulting party,
 370 organization, governmental entity, or individual through consultation or the public

371 commenting processes as having significance or being a resource of concern.
372 Areas identified through consultation to date include:

373

374 (a) Juan Bautista de Anza National Historic Trail (Anza NHT).

375

376 (i) The Anza NHT corridor is designated pursuant to the National Trails Act.
377 The corridor has historic values, as well as recreation and visitor
378 experience values.

379 (ii) No identifiable and recognizable physical evidence or historic properties
380 associated with the historic trail have yet been identified within the APE
381 for direct effects. Specific areas of concern or cultural resources associated
382 with the NHT have been identified both south and north of the Project
383 location and include:

384

- 385 1. Anza Camp 47 (Yuha Well)
- 386 2. Anza Camp 48
- 387 3. Anza Camp 49 (San Sebastian Marsh)

388

389 Sites associated with the 1781 Rivera Expedition which utilized the Anza trail
390 corridor

391 (iii) No identifiable and recognizable physical evidence or historic properties
392 associated with the Rivera y Moncada Expedition of 1781 have yet been
393 identified to occur within the APE for direct effects.

394

395 (4) Built-environment resources

396

397 (a) The APE for the built-environment is defined to include a half-mile buffer
398 from the project site and above-ground linear facilities to encompass historic
399 properties whose historic setting could be adversely affected. Specific areas of
400 concern or cultural resources have been identified both south and north of the
401 Project location and include:

402

403 (i) Imperial Irrigation District hydraulic irrigation system components

404 (ii) Highway 80 (Evan Hewes Highway) and remnants

405 (iii) San Diego and Arizona Railroad

406 (iv) U.S. Gypsum Rail-Line

407 (v) Plaster City Gypsum Plant

408

409 (5) Cultural resources on private property identified through surveys, where access
410 was granted, and windshield surveys, where access was not allowed, within a half
411 mile of the APE for direct effects.

412

413 (6) Cultural resources identified through a literature review and records search at the
414 BLM El Centro Field Office and at the SIC, for cultural resources that are located

415 within a one mile buffer of the project area and ¼-mile from each arProject
416 feature.

417
418 (a) Historic Districts and Landscapes

419
420 (i) Yuha Basin Discontiguous Archaeological District

421
422 (7) Cultural resources identified through archaeological or other field investigations
423 for this undertaking that, as a result of project redesign to avoid direct effects to
424 cultural resources, are no longer within the Project area but could still sustain
425 indirect effects.

426
427 (a) Project redesign eliminated approximately 1200 acres of public lands on the
428 eastern perimeter of the proposed project to avoid effects to potentially
429 significant prehistoric archaeological sites and burial sites, reducing the
430 generating capacity of the proposed solar project from 900 MW to 750 MW.

431
432 b) Amending the APE: The APE encompasses an area sufficient to accommodate all of the
433 proposed and alternative project components under consideration as of the date of the
434 execution of this Agreement. If BLM determines in the future that unforeseen changes to
435 the undertaking may cause alterations in the character or use of historic properties, if any
436 such properties exist, in a geographic area or areas beyond the extent of the APE above,
437 then the BLM, in consultation with the Signatories and Invited Signatories shall modify
438 the APE using the following process:

439 i) Any consulting party to this Agreement may propose that the APE established herein
440 be modified. The BLM shall notify the other Signatories and Invited Signatories of
441 the proposal and consult for no more than 15 days to reach agreement on the
442 proposal.

443 ii) If the Signatories agree to the proposal, then the BLM will prepare a description and
444 a map of the modification to which the Signatories agree. The BLM will keep copies
445 of the description and the map on file for its administrative record and distribute
446 copies of each to the other Signatory  Invited Signatories and Concurring Parties
447 within 30 days of the day upon which agreement was reached.

448 iii) Upon agreement to a modification to the APE that adds a new geographic area, the
449 BLM shall follow the processes set forth in Stipulation III to identify and evaluate
450 historic properties in the new APE, assess the effects of the undertaking on any
451 historic properties in the APE, and provide for the resolution of any adverse effects to
452 such properties, known or subsequently discovered.

453 iv) If the Signatories cannot agree to a proposal for the modification of the APE, then
454 they will resolve the dispute in accordance with Stipulation XI.

455 **III. IDENTIFICATION AND EVALUATION**

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- a) The BLM, in coordination with the Energy Commission, has authorized the Applicant to conduct specific identification efforts for this undertaking including, but not limited to, a literature review, records search, cultural resources surveys, ethnographic studies, and geo-morphological studies to identify historic properties that might be located within the APE.
 - i) A cultural resources report (URS June 2010) has been submitted by the Applicant that presents the results of identification efforts to the BLM, the COE, and the Energy Commission and is currently under review. The BLM, the COE, and the Energy Commission will assess whether the report conforms with the field methodology and site description template required under BLM Fieldwork Authorization CA-670-06-07FA09 and Fieldwork Authorization CA-670-06-07FA10 and Energy Commission transaction number Data Requests Set 2, Part 2 #142, Docket number 08-AFC-5.
 - i) The BLM, in consultation with the Energy Commission and COE, may require additional field investigations to be conducted by the Applicant to ensure the accuracy of site recordation and to provide additional information to support site evaluations and the assessment of effects. The BLM, the COE, and the Energy Commission, separately or together, have the right and the discretion, under this Agreement, to request additional field studies.
 - ii) The BLM has consulted and shall respond to any request to consult with Tribes, Tribal organizations or tribal individuals regarding the identification of historic properties within the APE to which they attach religious or cultural significance.
- b) The BLM shall make determinations of eligibility consistent with 800.4(b)(2) and findings of effect consistent with 800.5(a)(1) prior to the Record of Decision to the extent practicable on those cultural resources within the APE, and make the agency’s determinations and findings available to the consulting parties, Tribes and the public for a 45 day review and comment period.
 - i) The BLM will respond to any request for consultation on its determinations from a consulting party to this Agreement or a Tribe.
 - ii) A consulting party may provide its comments directly to the SHPO with a copy to the BLM within the 45 day comment period.

- 495 iii) Absent comment within 45 days, the BLM may submit its determinations to SHPO
496 for final review and comment.
497
- 498 iv) Where a consulting party or Tribe objects to the BLM’s determination for a specific
499 cultural resource within the 45 day review period, the BLM shall consult with the
500 objecting party and the SHPO regarding the nature of the objection and reconsider its
501 determinations.
502
- 503 (1) If the objection is not resolved, the BLM shall further consult with the SHPO and
504 follow the processes provided at 36 CFR 800.4(c)(2) for involvement of the
505 ACHP.
506 (2) The BLM may proceed with determinations for all cultural resources not subject
507 to objection.
508
- 509 v) The BLM and the Energy Commission shall coordinate to the extent feasible and
510 practicable on determinations of eligibility for the NRHP and the CRHR.
511
- 512 (1) Historic properties formally determined eligible for inclusion in the NRHP are
513 listed on the CRHR per California Code of Regulations 4851(a)(1).
514 (2) If BLM and the Energy Commission do not agree on the eligibility of historic
515 properties for the NRHP and CRHR respectively, the BLM and the Energy
516 Commission shall consult with the SHPO for 15 days to resolve disagreements
517 with regard to eligibility.
518
- 519 (a) The SHPO shall have the final authority to resolve disagreements regarding
520 eligibility for the CRHR.
521 (i) If the SHPO determines that the cultural resource is eligible for the
522 CRHR, the SHPO shall notify the Energy Commission and BLM and may
523 request that BLM reconsider its determination.
524
- 525 vi) BLM will submit its determinations of eligibility to the SHPO for final review and
526 comment.
527
- 528 (1) SHPO will have 30 days in which to review and comment.
529 (2) Absent comments within this time frame, BLM may assume, and formally
530 document for the record, that the SHPO has elected not to comment and concurs
531 with BLM’s determinations.
532 (3) If the BLM and SHPO disagree on the determination, BLM shall follow the
533 processes provided at 36 CFR 800.4(c)(2) and seek a determination from the
534 Keeper of the National Register.
535
- 536 c) The BLM may defer the formal and final evaluation of cultural resources whose values
537 are limited to the potential to yield information about history or prehistory and where
538 testing or limited excavation is recommended to determine whether the site would be

539 eligible under Criterion D for inclusion on the NRHP . The BLM may also treat cultural
540 resources as historic properties for the purpose of project management if adverse effects
541 to those specific resources can be avoided.
542

- 543 i) If adverse effects to a cultural resource which is being treated as a historic property
544 cannot be avoided, the BLM must either evaluate the resource and make a
545 determination of eligibility or resolve the adverse effect by implementing the
546 prescriptions of the **Historic Properties Treatment Plan (HPTP)**.
547
- 548 ii) The Applicant shall submit to the BLM an analysis of the cultural resources that the
549 Undertaking appears likely to affect. The analysis shall also detail which cultural
550 resources that the undertaking appears to have no potential to affect, which cultural
551 resources the Applicant commits to avoiding through the implementation of formal
552 avoidance measures, and which cultural resources cannot be avoided and will need to
553 be evaluated and/or be treated by implementing the prescriptions of the HPTP
554 required in Section IV of the Agreement. This analysis will be included in table
555 format in Appendix H.
556
- 557 iii) The Applicant, at the direction of the BLM, the COE, and the Energy Commission,
558 may prepare the analysis required above in phases that correspond to the proposed
559 sequence of development for the Phase 1 330 MW and Phase 2 450 MW energy
560 plant, or in phases for each block of 60 SunCatchers, provided that analyses are
561 ultimately prepared for the entirety of the APE.
562
- 563 iv) Where additional evaluation efforts are required to assess the informational values of
564 cultural resources, the BLM and the Energy Commission shall ensure that cultural
565 resources located within the APE are evaluated for the NRHP and the CRHR
566 pursuant to the guidelines provided in Appendix A of this Agreement.
567
- 568 d) Where additional identification and evaluation efforts are required due to changes in the
569 project and the APE, the BLM and the Energy Commission shall ensure that cultural
570 resources located within the APE are identified and evaluated for the NRHP and the
571 CRHR pursuant to Appendix A of this Agreement.
572
- 573 e) Amendment of the identification and evaluation process as set forth herein will not
574 require amendment of this Agreement if all Signatories do so agree.
575

576 **IV. TREATMENT AND MANAGEMENT OF HISTORIC PROPERTIES**

577

- 578 a) The resolution or mitigation of effects to historic properties shall be described in one or
579 more HPTP(s) that shall be an attachment to Appendix B of this Agreement.
580
- 581 i) The BLM and the Applicant, in consultation with the consulting parties and Tribes,
582 shall seek to develop a draft HPTP prior to the ROD if feasible, or to otherwise

- 583 develop a framework and consensus on the general treatment measures for affected
584 historic properties that would be finalized in the HPTP.
585
- 586 (1) Prior to the issuance of any Notice to Proceed by BLM to initiate the undertaking
587 or any component of the undertaking, which may affect historic properties the
588 Applicant shall develop and submit to BLM one or more HPTPs.
589 (2) The HPTP will be initiated after the ROW is granted by the BLM and issuance of
590 any CWA section 404 permit by the COE but prior to the issuance of a Notice to
591 Proceed for construction in those portions of the undertaking addressed by the
592 HPTP.
593 (3) The BLM may authorize the phased implementation of the HPTP (per Stipulation
594 IX), or if appropriate, the development of HPTPs for individual cultural resources,
595 or HPTPs that are issue oriented or geographically.
596
- 597 ii) The BLM and the Energy Commission, to extent possible and consistent with the
598 guidelines provided in Appendix B(2), shall coordinate on the development of the
599 treatment or mitigation measures proposed in the Energy Commission's Conditions of
600 Certifications and the treatment measures developed through the Section 106
601 consultation process.
602
- 603 b) The BLM shall submit the HPTP to the consulting parties and Tribes for a 30 day review
604 period. Absent comments within this time frame, BLM may finalize the HPTP. BLM will
605 provide the parties with written documentation indicating whether and how the draft
606 HPTP will be modified in response to any timely comments received. If the HPTP is
607 revised in response to comments, BLM shall submit the revised HPTP to all parties for a
608 15 day review period. Absent comments within this time frame, BLM will finalize the
609 HPTP. BLM will provide the consulting parties and Tribes with a copy of the final
610 HPTP.
611
- 612 c) Where an HPTP specifically addresses treatment for adverse effects to historic properties
613 to which Tribes attach religious or cultural significance, the BLM shall submit the HPTP
614 to the Tribes and seek their views and comments through consultation, regardless of the
615 status of a Tribe as a consulting party to this Agreement.
616
- 617 i) BLM shall submit an HPTP which addresses treatment for adverse effects to historic
618 properties to which a Tribe(s) attaches religious and cultural significance to the
619 SHPO. BLM shall consult with involved Tribe(s) on distribution of the HPTP to other
620 consulting parties.
621
- 622 d) BLM shall ensure that any HPTP, developed in accordance with Appendix B of this
623 Agreement, is completed and implemented.
624
- 625 e) BLM shall ensure that a Historic Property Management Plan (HPMP), which provides for
626 the protection and management of historic properties during the operational life and

627 decommissioning of the solar energy power plant, is developed and implemented in
628 accordance with Appendix C of this Agreement.

629
630 f) Amendment of an HPTP or HPMP as set forth herein will not require amendment of this
631 Agreement if all Signatories do so agree. If the Signatories do not agree to the
632 amendment of the HPTP or HPMP, the disagreement will be resolved pursuant to the
633 procedures in Section XI of this Agreement.

634
635
636

V. DISCOVERIES AND UNANTICIPATED EFFECTS

637 a) If the BLM determines during implementation of the HPTP that either the HPTP or the
638 undertaking will affect a previously unidentified property that may be eligible for the
639 NRHP, or affect a known historic property in an unanticipated manner, the BLM will
640 address the discovery or unanticipated effect in accordance with those provisions of the
641 HPTP that relate to the treatment of discoveries and unanticipated effects. BLM at its
642 discretion may herein assume any discovered property to be eligible for inclusion in the
643 NRHP. BLM compliance with this stipulation shall satisfy the requirements of 36 CFR
644 800.13(a)(1).

645 **VI. TREATMENT OF HUMAN REMAINS OF NATIVE AMERICAN ORIGIN**

646

647 a) The Signatories and Invited Signatories to this Agreement agree that Native American
648 burials and related items discovered on BLM administered lands during implementation
649 of the terms of the Agreement will be treated in accordance with the requirements of the
650 NAGPRA. The BLM will consult with concerned Indian Tribes, Tribal Organizations, or
651 individuals in accordance with the requirements of §§ 3(c) and 3(d) of the NAGPRA and
652 implementing regulations found at 43 CFR Part 10 to address the treatment of Native
653 American burials and related cultural items that may be discovered during
654 implementation of this Agreement.

655 b) In consultation with the Tribes, the BLM shall seek to develop a written plan of action
656 pursuant to 43 CFR 10.5(e) to manage the inadvertent discovery or intentional excavation
657 of human remains, funerary objects, sacred objects, or objects of cultural patrimony. The
658 plan of action shall be included in Appendix L of this Agreement.

659 c) The BLM shall ensure that Native American burials and related cultural items on private
660 lands are treated in accordance with the requirements of §§ 5097.98 and 5097.991 of the
661 California Public Resources Code, and § 7050.5(c) of the California Health and Human
662 Safety Code.

663 **VII. STANDARDS AND QUALIFICATIONS**

664

665 a) **PROFESSIONAL QUALIFICATIONS.** All actions prescribed by this Agreement that
666 involve the identification, evaluation, analysis, recordation, treatment, monitoring, and
667 disposition of historic properties and that involve the reporting and documentation of

668 such actions in the form of reports, forms or other records, shall be carried out by or
669 under the direct supervision of a person or persons meeting, at a minimum, the Secretary
670 of the Interior's Professional Qualifications Standards (PQS), as appropriate (48 FR.
671 44739 dated September 29, 1983). However, nothing in this stipulation may be
672 interpreted to preclude any party qualified under the terms of this paragraph from using
673 the services of properly supervised persons who do not meet the PQS. Qualified Tribal
674 Monitors shall be appointed by the Tribes. Qualified Tribal Monitors shall be an
675 authorized representative of a Tribe with the training the Tribe deems necessary and
676 physically capable of doing the required work.

- 677
- 678 b) DOCUMENTATION STANDARDS. Reporting on and documenting the actions cited in
679 this Agreement shall conform to every reasonable extent with the Secretary of the
680 Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR.
681 44716-44740 dated September 29, 1983), as well as, the BLM 8100 Manual, the
682 California Office of Historic Preservation's Preservation Planning Bulletin Number 4(a)
683 December 1989, Archaeological Resource Management Reports (ARMR):
684 Recommended Contents and Format (ARMR Guidelines) for the Preparation and Review
685 of Archaeological Reports, and any specific county or local requirements or report
686 formats as necessary.
- 687
- 688 c) CURATION STANDARDS. On BLM-administered land, all records and materials
689 resulting from the actions cited in Stipulation III, IV, V and VI of this Agreement shall be
690 curated in accordance with 36 CFR Part 79, and the provisions of the NAGPRA, 43 CFR
691 Part 10, as applicable. To the extent permitted under §§ 5097.98 and 5097.991 of the
692 California Public Resources Code, the materials and records resulting from the actions
693 cited in Stipulation III and IV of this Agreement for private lands shall be curated in
694 accordance with 36 CFR Part 79. The BLM will seek to have the materials donated
695 through a written donation agreement to be curated with other cultural materials. The
696 BLM will attempt to have all collections curated at one local facility where possible
697 unless otherwise agreed to by the consulting parties.

698

699 **VIII. REPORTING REQUIREMENTS**

700

- 701 a) Within twelve (12) months after the BLM, in consultation with the Energy Commission,
702 has determined that all fieldwork required by Stipulations III and IV have been
703 completed, the BLM will ensure preparation and concurrent distribution to the
704 consulting parties and Tribes a written draft report that documents the results of
705 implementing the requirements of each Stipulation. The consulting parties and Tribes will
706 be afforded 45 days following receipt of each draft report to submit any written
707 comments to the BLM. Failure of these parties to respond within this time frame shall not
708 preclude the BLM from authorizing revisions to the draft report as the BLM may deem
709 appropriate. The BLM will provide the consulting parties with written documentation
710 indicating whether and how each draft report will be modified in accordance with any
711 reviewing party comments. Unless the reviewing parties object to this documentation in

712 writing to the BLM within 14 days following receipt, the BLM may modify each draft
713 report as the BLM may deem appropriate. All objections shall be resolved pursuant to
714 Stipulation XI. Thereafter, the BLM may issue the reports in final form and distribute
715 these documents in accordance with Stipulation VIII(b).
716

717 b) Unless otherwise requested, one paper copy of final reports documenting the results of
718 implementing the requirements of Stipulation III or IV, will be distributed by the BLM to
719 each consulting party, Tribes and to the California Historical Resources Information
720 Survey (CHRIS) Regional Information Center.
721

722 c) The BLM shall ensure that any draft document that communicates, in lay terms, the
723 results of implementing the requirements of Stipulation III or IV, to members of the
724 interested public, is distributed for review and comment concurrently with and in the
725 same manner as that prescribed for the draft technical report prescribed by Stipulation
726 VIII(a). If the draft document prescribed herein is a publication such as a report or
727 brochure, publication shall upon completion be distributed by the BLM to the consulting
728 parties, and to any other entity that the consulting parties may deem appropriate.
729

730 **IX. IMPLEMENTATION OF THE UNDERTAKING**

731

732 a) The BLM may authorize construction activities and manage the implementation of
733 HPTP(s) in phases corresponding to the construction phases of the undertaking.
734

735 i) Upon approval of the HPTP and implementation of the components of the HPTP
736 subject to determinations of compliance by the BLM for the Phase I 300 MW
737 component, BLM may authorize a Notice to Proceed for construction activities.
738

739 (1) An HPTP(s) for the Phase II 450 MW component may be developed and
740 implemented after approval of the HPTP and issuance of the Notice to Proceed
741 above for the Phase I component.
742

743 b) The BLM may authorize construction activities, including but not limited to those listed
744 below, to proceed in specific geographic areas of the undertaking's APE where there are
745 no historic properties, where there will be no effect to historic properties, where a
746 monitoring and discovery plan has been approved, an HPTP has been approved and
747 initiated, and the activity would not preclude preservation or protection of historic
748 properties in an area for which an HPTP has not been approved. Such construction
749 activities may include:

- 750
- 751 (1) demarcation, set up, and use of staging areas for the project's construction,
 - 752 (2) conduct of geotechnical boring investigations or other geophysical and
753 engineering activities, and
 - 754 (3) construction activities such as grading, constructing buildings, and installing
755 SunCatchers.

756
757 c) Initiation of any construction activities on federal lands shall not occur until after the
758 ROD and Notices to Proceed have been issued by the BLM Construction shall not occur
759 in waters of the US without the issuance of a COE 404 permit..
760

761 **X. AMENDMENTS TO THE AGREEMENT**
762

763 a) This Agreement may be amended only upon written agreement of the Signatories.
764

765 b) Any consulting party to this Agreement may at any time propose amendments.
766

767 i) Upon receipt of a request to amend this Agreement, the BLM will immediately notify
768 the other consulting parties and initiate a 30 day period to consult on the proposed
769 amendment, whereupon all parties shall consult to consider such amendments.
770

771 ii) If agreement to the amendment cannot be reached within the 30 day period, resolution
772 of the issue may proceed by following the dispute resolution process in Stipulation
773 XI.
774

775 iii) This Agreement may be amended when such an amendment is agreed to in writing by
776 all Signatories.
777

778 c) Any consulting party to this Agreement may at any time propose modifications to the
779 Appendices.
780

781 i) Each Appendix to the Agreement may be individually modified without requiring
782 amendment of the Agreement, unless the Signatories through such consultation
783 decide otherwise.
784

785 ii) Upon receipt of a request to modify an Appendix, BLM will immediately notify the
786 Signatories, Invited Signatories and Concurring Parties to consult on the proposed
787 modifications and initiate a 30 day consultation period, whereupon all parties shall
788 consult to consider such modification.
789

790 iii) If agreement on the modification cannot be reached within the 30 day period,
791 resolution of the issue may proceed by following the dispute resolution process in
792 Stipulation XI(c).
793

794 iv) Modifications to an Appendix shall take effect on the date that they are agreed to by
795 the Signatories.
796

797 d) Amendments to this Agreement shall take effect on the dates that they are fully executed
798 by the Signatories.
799

800 e) If the Agreement is not amended through the above process, any consulting party to this
801 Agreement may terminate its participation in the Agreement in accordance with
802 Stipulation XII.
803

804 **XI. DISPUTE RESOLUTION**
805

806 a) Should the Signatories or Invited Signatories object at any time to the manner in which
807 the terms of this Agreement are implemented, the BLM will immediately notify the other
808 Signatories and Invited Signatories and initiate a 30 day period in which to resolve the
809 objection.
810

811 b) If the objection can be resolved within the consultation period, the BLM may authorize
812 the disputed action to proceed in accordance with the terms of such resolution.
813

814 c) If at the end of the 30 day consultation period, the objection cannot be resolved through
815 such consultation, the BLM will forward all documentation relevant to the objection to
816 the ACHP per 36 CFR 800.2(b)(2). Any comments provided by the ACHP within 30
817 days after its receipt of all relevant documentation will be taken into account by the BLM
818 in reaching a final decision regarding the objection. The BLM will notify the other
819 Signatories, Invited Signatories, and Concurring Parties in writing of its final decision
820 within 14 days after it is rendered.
821

822 d) The BLM's responsibility to carry out all other actions under this Agreement that are not
823 the subject of the objection will remain unchanged.
824

825 e) At any time during implementation of the terms of this Agreement, should an objection
826 pertaining to the Agreement be raised by a Concurring party or a member of the
827 interested public, the BLM shall immediately notify the Signatories, Invited Signatories,
828 and other Concurring Parties, consult with SHPO about the objection, and take the
829 objection into account. The other consulting parties may comment on the objection to the
830 BLM. The BLM shall consult with the objecting party(ies) for no more than 30 days.
831 Within 14 days following closure of consultation, the BLM will render a decision
832 regarding the objection and notify all parties of its decision in writing. In reaching its
833 final decision, the BLM will take into account all comments from the parties regarding
834 the objection. The BLM shall have the authority to make the final decision resolving the
835 objection. Any dispute pertaining to the NRHP eligibility of historic properties or cultural
836 resources covered by this Agreement will be addressed by the BLM per 36 CFR
837 800.4(c)(2).
838

839 **XII. TERMINATION**
840

841 a) The Signatories and Invited Signatory have the authority to terminate this Agreement. If
842 this Agreement is not amended as provided for in Stipulation X, or if a Signatory or
843 Invited Signatory proposes termination of this Agreement for other reasons, the party

844 proposing termination shall notify the other Signatories and Invited Signatories in
845 writing, explain the reasons for proposing termination, and consult for no more than 60
846 days to resolve the objection.

- 847
- 848 b) If a Concurring Party seeks termination of this Agreement, they may terminate their
849 participation and shall notify the Signatories and Invited Signatories in writing, explain
850 the reasons for proposing termination or terminating their participation, and consult for
851 no more than 60 days to resolve the objection.
- 852
- 853 c) Should consultation result in an agreement to resolve the objection, the Signatories shall
854 proceed in accordance with that agreement.
- 855
- 856 d) Should such consultations fail, the Signatory or Invited Signatory proposing termination
857 may terminate this Agreement by notifying the other parties in writing.
- 858
- 859 e) Should the entire Agreement be terminated, then the BLM and the COE, separately if
860 necessary, shall either consult in accordance with 36 CFR 800.14(b) to develop a new
861 agreement or request the comments of the ACHP pursuant to 36 CFR 800.7(a).
- 862

863

864 **XIII. WITHDRAWAL OR ADDITION OF PARTIES FROM/TO THE AGREEMENT**

865

- 866 a) The BLM will respond to any written request for consulting party status pursuant to 36
867 CFR 800.2 and 800.3(f).
- 868
- 869 i) Should a Concurring Party determine that its participation in the undertaking and this
870 Agreement is no longer warranted, the party may withdraw from participation by
871 informing the BLM of its intention to withdraw as soon as is practicable. The BLM
872 shall inform the other consulting parties to this Agreement of the withdrawal.
- 873
- 874 ii) Should conditions of the undertaking change such that other state, federal, or tribal
875 entities not already party to this Agreement request to participate, the BLM will
876 notify the other consulting parties and invite the requesting party to participate in the
877 Agreement. The Agreement shall be amended following the procedures in Stipulation
878 X.
- 879

880 **XIV. DURATION OF THIS AGREEMENT**

881

- 882 a) This Agreement will expire if the undertaking has not been initiated and the BLM right-
883 of-way grant expires or is withdrawn, or the stipulations of this Agreement have not been
884 initiated within five (5) years from the date of its execution. At such time, and prior to
885 work continuing under the auspices of the undertaking, the BLM and the COE shall
886 either (a) execute a memorandum of agreement pursuant to 36 CFR 800.6, or (b) request,
887 take into account, and respond to the comments of the ACHP under 36 C.F.R. 800.7.

888 Prior toAt such time, the BLM and the COE may consult with the other consulting parties
889 to reconsider the terms of the Agreement and amend it in accordance with Stipulation X.
890 The BLM and the COE shall notify the Signatories as to the course of action they will
891 pursue within 30 days.

892
893 b) This Agreement expires 25 years from its effective date unless extended by written
894 agreement of the Signatories. The Signatories and Invited Signatories shall consult at
895 year 10 review this Agreement. Additionally, the Signatories and Invited Signatories
896 shall consult not less than one year prior to the expiration date to reconsider the terms of
897 this Agreement and, if acceptable, have the Signatories extend the term of this
898 Agreement. Reconsideration may include continuation of the Agreement as originally
899 executed or amended, or termination. Extensions are treated as amendments to the
900 Agreement under Stipulation X.

901
902 c) Unless the Agreement is terminated pursuant to Stipulation XII, another agreement
903 executed for the undertaking supersedes it, or the undertaking itself has been terminated,
904 this Agreement will remain in full force and effect until BLM, in consultation with the
905 other Signatories, determines that implementation of all aspects of the undertaking has
906 been completed and that all terms of this Agreement and any subsequent tiering
907 requirements have been fulfilled in a satisfactory manner. Upon a determination by BLM
908 that implementation of all aspects of the undertaking have been completed and that all
909 terms of this Agreement and any subsequent tiered agreements have been fulfilled in a
910 satisfactory manner, BLM will notify the consulting parties of this PA in writing of the
911 agency's determination. This Agreement will terminate and have no further force or
912 effect on the day that BLM so notifies the Signatories to this Agreement.

913
914 **XV. EFFECTIVE DATE**

915
916 a) This Agreement and any amendments shall take effect on the date that it has been fully
917 executed by the Signatories. The Agreement and any amendments thereto shall be
918 executed in the following order: (1) Applicant, (2) Energy Commission, (3) NPS, (4)
919 COE, (5) BLM, (6) SHPO, and (7) ACHP.

920
921 Execution and implementation of this Agreement is evidence that the BLM and the COE have
922 taken into account the effect of this undertaking on historic properties, afforded the ACHP a
923 reasonable opportunity to comment, and that the BLM and the COE have satisfied their
924 responsibilities under Section 106 of the NHPA. The Signatories and Invited Signatories to this
925 PA represent that they have the authority to sign for and bind the entities on behalf of whom they
926 sign.

927
928
929 The remainder of this page is blank.

930 **SIGNATORY PARTIES**

931

932

U.S. BUREAU OF LAND MANAGEMENT

BY: _____ DATE: _____
James Wesley Abbot
State Director

933

934

U.S. ARMY CORPS OF ENGINEERS, LOS ANGELES DISTRICT

BY: _____ DATE: _____
David J. Castanon
Chief, Regulatory Division

935

936

CALIFORNIA STATE HISTORIC PRESERVATION OFFICER

BY: _____ DATE: _____
Milford Wayne Donaldson, FAIA
State Historic Preservation Officer

937

938

ADVISORY COUNCIL ON HISTORIC PRESERVATION

BY: _____ DATE: _____
John M. Fowler
Executive Director

939

940

941 **INVITED SIGNATORY PARTIES**

942

943

CALIFORNIA ENERGY COMMISSION

BY: _____ DATE: _____

944

945

TESSERA SOLAR L.L.C.

BY: _____ DATE: _____

946 -

947 -

948 -

949 **CONCURRING PARTIES:**
950
951 (This is a potential list only)
952 CAMPO KUMEYAAY NATION
953 COCOPAH INDIAN TRIBE
954 FORT YUMA QUECHAN INDIAN TRIBE
955 EWIIAAPAYP BAND OF KUMEYAAY INDIANS
956 JAMUL INDIAN VILLAGE
957 KWAAYMII LAGUNA BAND OF INDIANS
958 LA POSTA BAND OF KUMEYAAY INDIANS
959 MANZANITA BAND OF KUMEYAAY INDIANS
960 SAN PASQUAL BAND OF DIEGUENO INDIANS
961 SANTA YSABEL BAND OF DIEGUENO INDIANS
962 AH-MUT PIPA FOUNDATION
963 KUMEYAAY CULTURAL REPATRIATION COMMITTEE
964 CALIFORNIA UNIONS FOR RELIABLE ENERGY
965 NATIONAL TRUST FOR HISTORIC PRESERVATION
966 NATIONAL PARK SERVICE
967 ANZA SOCIETY
968 EDIE HARMON
969 SACRED SITES INTERNATIONAL FOUNDATION
970 GREG P. SMESTAD, PH.D.
971
972
973

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Arnold Schwarzenegger
Governor

STATE OF CALIFORNIA
Governor's Office of Planning and Research
State Clearinghouse and Planning Unit



Cathleen Cox
Acting Director

August 24, 2010 .

Erin Dreyfuss
U.S. Department of Interior, Bureau of Land Management
2800 Cottage Way
Sacramento, CA 95825

Subject: Imperial Valley Solar Project
SCH#: 2010074006

Dear Erin Dreyfuss:

The State Clearinghouse submitted the above named Final Document to selected state agencies for review. On the enclosed Document Details Report please note that the Clearinghouse has listed the state agencies that reviewed your document. The review period closed on August 23, 2010, and the comments from the responding agency (ies) is (are) enclosed. If this comment package is not in order, please notify the State Clearinghouse immediately. Please refer to the project's ten-digit State Clearinghouse number in future correspondence so that we may respond promptly.

Please note that Section 21104(c) of the California Public Resources Code states that:

"A responsible or other public agency shall only make substantive comments regarding those activities involved in a project which are within an area of expertise of the agency or which are required to be carried out or approved by the agency. Those comments shall be supported by specific documentation."

These comments are forwarded for use in preparing your final environmental document. Should you need more information or clarification of the enclosed comments, we recommend that you contact the commenting agency directly.

This letter acknowledges that you have complied with the State Clearinghouse review requirements for draft environmental documents, pursuant to the California Environmental Quality Act. Please contact the State Clearinghouse at (916) 445-0613 if you have any questions regarding the environmental review process.

Sincerely,


Scott Morgan
Director, State Clearinghouse

Enclosures
cc: Resources Agency

**Document Details Report
State Clearinghouse Data Base**

SCH# 2010074006
Project Title Imperial Valley Solar Project
Lead Agency Bureau of Land Management

Type FIN Final Document
Description NOTE: FEIS / Review per lead.

Stirling Energy Systems (SES) merged with Tessera Solar and the applicant filed under CACA-47740 for the SES Solar Two Project. The applicant has changed its name to Imperial Valley Solar, LLC. The project name, SES Solar Two, has also been changed to the Imperial Valley Solar, LLC (IVS) project. Imperial Valley Solar, LLC submitted an application to the BLM for development of the proposed IVS Project, a concentrated solar electrical generating facility that will generate 709 megawatts of renewable power. The entire project encompasses approximately 6,144 acres of BLM-managed lands.

Lead Agency Contact

Name Erin Dreyfuss
Agency U.S. Department of Interior, Bureau of Land Management
Phone 916-978-4642 **Fax**
email
Address 2800 Cottage Way
City Sacramento **State** CA **Zip** 95825

Project Location

County Imperial
City El Centro
Region
Lat / Long
Cross Streets
Parcel No.

Township	Range	Section	Base
-----------------	--------------	----------------	-------------

Proximity to:

Highways
Airports
Railways
Waterways
Schools
Land Use

Project Issues Aesthetic/Visual; Air Quality; Archaeologic-Historic; Biological Resources; Drainage/Absorption; Economics/Jobs; Flood Plain/Flooding; Forest Land/Fire Hazard; Geologic/Seismic; Minerals; Noise; Public Services; Recreation/Parks; Soil Erosion/Compaction/Grading; Solid Waste; Toxic/Hazardous; Traffic/Circulation; Vegetation; Water Quality; Water Supply; Wetland/Riparian; Wildlife; Growth Inducing; Landuse; Cumulative Effects

Reviewing Agencies Resources Agency; Department of Conservation; Department of Fish and Game, Region 6; Cal Fire; Office of Historic Preservation; Department of Parks and Recreation; Department of Water Resources; Caltrans, District 11; California Energy Commission; Native American Heritage Commission; Public Utilities Commission; State Lands Commission

Date Received 07/27/2010 **Start of Review** 07/27/2010 **End of Review** 08/23/2010

Memorandum

To: Bureau of Land Management
2800 Cottage Way
Sacramento, CA 95825
Attn: Erin Dreyfuss

Date: August 20, 2010



Website: www.fire.ca.gov

FIN clear
08/23/10
e.

Re: Imperial Valley Solar Project Final EIS
SCH2010074006
Environmental Impact Statement (EIS-Federal)

After review of the above referenced document, I recommend the following considerations:

One; create a fuel break around project area. This action would reduce the risk of fire escaping from or into project area. The fuel break should be maintained through out the life of the project.

Two; construct an all weather access road into and around project area. This will allow emergency vehicle access when a fire occurs. The road should be maintained through out the project life.

Three; that all wires and other service lines be placed under ground. This action would greatly enhance public and firefighter safety in the event of a wild land fire and also allow access which typically is compromised because of burnt poles and down lines, which are indicative of overhead applications. This will also greatly increase aerial firefighting operational safety. I would recommend and strongly encourage that these considerations be utilized as part of the project plan.

Thank you for this opportunity to participate in this process.

Mark Ostrander
CAL FIRE
San Diego Unit
Environmental Coordinator
P.O. Box 1560
Boulevard, CA 91905

Mandated Due Date: 08/23/10
Date Document Received in Mail: 08/10/10
Comment Letter Date: 08/20/10
Date Mailed: 08/21/10



Arnold Schwarzenegger
Governor

STATE OF CALIFORNIA
Governor's Office of Planning and Research
State Clearinghouse and Planning Unit



Cathleen Cox
Acting Director

August 24, 2010

Erin Dreyfuss
U.S. Department of Interior, Bureau of Land Management
2800 Cottage Way
Sacramento, CA 95825

Subject: Imperial Valley Solar Project
SCH#: 2010074006

Dear Erin Dreyfuss:

The enclosed comment (s) on your Final Document was (were) received by the State Clearinghouse after the end of the state review period, which closed on August 23, 2010. We are forwarding these comments to you because they provide information or raise issues that should be addressed in your final environmental document.

The California Environmental Quality Act does not require Lead Agencies to respond to late comments. However, we encourage you to incorporate these additional comments into your final environmental document and to consider them prior to taking final action on the proposed project.

Please contact the State Clearinghouse at (916) 445-0613 if you have any questions concerning the environmental review process. If you have a question regarding the above-named project, please refer to the ten-digit State Clearinghouse number (2010074006) when contacting this office.

Sincerely,

Scott Morgan
Director, State Clearinghouse

Enclosures
cc: Resources Agency

NATIVE AMERICAN HERITAGE COMMISSION

915 CAPITOL MALL, ROOM 364
SACRAMENTO, CA 95814
(916) 653-6251
Fax (916) 657-5390
Web Site www.nahc.ca.gov
e-mail: ds_nahc@pacbell.net

**RECEIVED**

AUG 2 4 2010

STATE CLEARING HOUSE

July 30, 2010 Revised 8/19/2010

Mr. Erin Dreyfuss, Environmental Manager

BUREAU OF LAND MANAGEMENT

2800 Cottage Way
Sacramento, CA 95825

Re: SCH#2010074006: NEPA Notice of Completion, Final Environmental Impact Statement (FEIS) for the Imperial Valley Solar Project Final Environmental Impact Statement, Western Imperial County, California

Dear Mr. Dreyfuss:

The Native American Heritage Commission (NAHC) is the California State 'Trustee Agency' pursuant to Public Resources Code §21070 for the protection of California's Native American Cultural Resources. The NAHC is also a 'reviewing agency' for environmental documents prepared under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq*) and that are subject to the Tribal and interested Native American consultation requirements of the National Historic Preservation Act, as amended (Section 106) (16 U.S.C. 470). The provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001-3013) and its implementation (43 CFR Part 10.2) apply to this project if Native American human remains are inadvertently discovered.

The NAHC is of the opinion that the federal standards, pursuant to the above-referenced Acts and the Council on Environmental Quality (CSQ; 42 U.S.C. 4371 *et seq*) are similar to and in many cases more stringent with regard to the 'significance' of historic, including Native American items, and archaeological, including Native American items than the California Environmental Quality Act (CEQA.). In most cases, federal environmental policy require that any project that causes a substantial adverse change in the significance of an historical resource, that includes archaeological resources, is a 'significant effect' requiring the preparation of an Environmental Impact Statement (EIS). Both of the above-referenced projects contain known Native American cultural resources whose presence should be considered in the project planning of both.

A Sacred Lands File search was conducted for the project area ('area of potential effect' or APE and **Native American cultural sites were identified, including more than one set of remains, making it, in effect, a Native American burial ground.** The fact that the remains and associated grave goods may have been removed does not diminish the sanctity of this site to Native Americans. The remains were identified as 'of Native American in origin and reported to the California Native American Heritage Commission pursuant to California Health & Safety Code §7050.5. Early consultation with Native American tribes in your area is the best way to avoid unanticipated discoveries once a project is underway. Since the discovery of human remains, determined Native American, and the presence of other cultural resources at this site, the Native American Heritage Commission **is opposed to this project until such time that the concerns of local culturally-affiliated Native American elders and tribes are satisfied.**

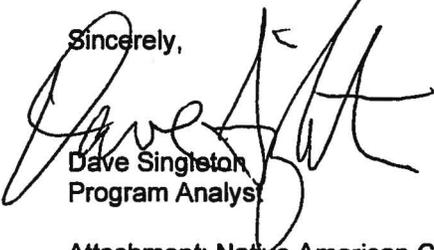
Enclosed are the names of the nearest tribes that may have knowledge of cultural resources in the project area. A list of Native American contacts is attached to assist you. It is advisable to contact the persons listed and seek to establish a 'trust' relationship with them; if they cannot supply you with specific information about the impact on cultural resources, they may be able to refer you to another tribe or person knowledgeable of the cultural resources in or near the affected project area.

Lack of surface evidence of archeological resources does not preclude the existence of archeological resources. Lead agencies should consider avoidance, in the case of cultural resources that are discovered. A tribe or Native American individual may be the only source of information about a cultural resource.

NEPA regulations provide for provisions for accidentally discovered archeological resources during construction and mandate the processes to be followed in the event of an accidental discovery of any human remains in a project location other than a 'dedicated cemetery. Even though a discovery may be in federal property, California Government Code §27460 should be followed in the event of an accidental discovery of human remains during any ground-breaking activity; in such cases California Health & Safety Code §7050.5 may apply.

If you have any questions about this response to your request, please do not hesitate to contact me at (916) 653-6251.

Sincerely,



Dave Singleton
Program Analyst

Attachment: Native American Contacts list for Consultation