

8.0 EIR/EA PREPARERS AND PERSONS AND ORGANIZATIONS CONTACTED

8.1 EIR/EA Preparers

This Environmental Impact Report/Environmental Assessment was prepared for the Bureau of Land Management and the County of Imperial by BRG Consulting, Inc., at 304 Ivy Street, San Diego, California, 92101. The following professionals participated in its preparation:

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8.2 Persons and Organizations Contacted

The following persons and organizations were contacted in preparation of this document:

Kelly Strickland of Cassidy Turley BRE Commercial, Renewable Energies Division

In addition to the scoping and EA/Draft EIR public review processes, the BLM has been consulting and coordinating with public agencies who may be requested to take action on the Imperial Solar Energy Center South project. That ongoing consultation and coordination is discussed in the following sections.

8.2.1 *United States Fish and Wildlife Service*

The BLM permit, consultation, and coordination with the United States Fish and Wildlife Service (USFWS) required for the Imperial Solar Energy Center South project complies with the Federal Endangered Species Act (ESA) regarding potential take of the flat-tailed horned lizard (FTHL). "Take" of a species listed under the Federal ESA is prohibited except as authorized through consultation with USFWS and issuance of an Incidental Take Statement under Section 7 or 10 of the ESA, depending on whether there is Federal agency action required for the proposed project (i.e., a Federal permit required or funding involved). Because Federal agency action has been identified for the Imperial Solar Energy Center South project, Section 7 consultation/conferencing between the BLM and USFWS is required prior to any take authorization for the Imperial Solar Energy Center South project under the ESA from the USFWS. The Carlsbad Field Office of the USFWS oversees ESA permitting actions in the project area.

The BLM will submit a Biological Assessment for take of FTHL to the USFWS for the Imperial Solar Energy Center South project. It is expected that the USFWS Biological Opinion will conclude that the project "...may affect, likely to adversely affect" the FTHL.

Although the FTHL is not federally listed under the ESA at this time, it is anticipated that this species may be listed during the construction or operation of the Imperial Solar Energy Center South project. To avoid or reduce possible time constraints, the FTHL was included in the Biological Assessment for the Imperial Solar Energy Center South project, should this species become Federally listed. Because the FTHL has not been listed as of July 2010, the BLM is undergoing conferencing, rather than consultation, with the USFWS for this species. Because the BLM and USFWS are signatories in the FTHL Interagency Coordinating Committee (ICC), it is anticipated that the recommendations stated in the FTHL Rangewide Management Strategy (FTHL ICC 2003) will be in the USFWS conferencing opinion. Additionally, the BLM is requesting concurrence from the USFWS that a take permit is not required for the Golden Eagle. The process of consultation of USFWS for the Imperial Solar Energy Center South project is ongoing.

8.2.2 *Native American Consultation/Coordination and Section 106 Consultation/Coordination*

Tribal Consultation Under CEQA Differs from NEPA/NHPA

Although there are some similarities in the legal requirements of CEQA, NEPA and the NHPA regarding threshold of significance, consultation requirements and mitigation of impacts to cultural resources, in this case there are enough differences between Imperial County's obligations to comply with CEQA and BLM's requirements to comply with NEPA and the NHPA, that the analysis is not merged in Section 4.7 of this EIR/EA.

Among the key differences is that NEPA and NHPA require a tribal consultation process and require that significance determinations and mitigation measures be developed through the consultation process. However, CEQA requires Imperial County to make an independent evaluation of the significance of impacts and does not require a tribal consultation. Pub Res. Code § 21082.1(c) requires the lead agency to (1) independently review and analyze any report or declaration required by CEQA; (2) circulate draft documents that reflect its independent judgment; and (3) as part of the certification of an environmental impact report, find that the report or declaration reflects the independent judgment of the lead agency. The California legislature debated whether to include a tribal consultation requirement in CEQA, but instead opted to limit tribal consultations to certain circumstances identified in the California Planning and Zoning Law. As discussed in Section 3.7 herein, Senate Bill 18's tribal consultation requirements are not applicable to the Proposed Action and Alternatives because they do not require a general plan amendment or development of an open space management plan for a post-March 15, 2005 locally-designated open space area. Archaeological resources may also qualify as "historical resources" and PRC § 5024 requires consultation with the State Office of Historic Preservation when a project may impact historical resources located on state-owned land. The Proposed Action and Alternatives do not impact a historical resource on state-owned land. As such, compliance with CEQA does not require a consultation.

As such, the BLM has invited tribes into consultation by letter dated June 24, 2010. The BLM will initiate formal consultation with the SHPO and ACHP, which may lead to the development of a Programmatic Agreement (PA), a Memorandum of Agreement (MOA) or other finding. At the time of circulation of the Draft EIR/EA, it is anticipated that a Memorandum of Agreement may be executed. Pursuant to Section 106 of NHPA, determinations of significant impacts and/or mitigation measures cannot be made without consultation and the Decision Record must include either an executed MOA or PA if there are any significant impacts. The Decision Record will likely occur after Imperial County decision-makers review the Proposed Action and Alternatives for compliance with CEQA. If there are significant impacts discovered during the consultation, then when the PA or MOA is fully executed, the Proposed Action and Alternatives will have fulfilled the requirements of the NHPA and NEPA. The PA or MOA must be executed prior to the BLM's issuance of the Decision Record.

As such, the conclusions Imperial County may draw regarding the significance of and mitigation for the Proposed Action and Alternatives' impacts to cultural resources may differ from BLM's post-consultation conclusions regarding the significance of and mitigation for the Proposed Action and Alternatives' impacts

to cultural resources. Nevertheless, the pre-final consultation mitigation measures discussed herein are alone sufficient to support a finding that any potential significant impacts are reduced to below a level of significance for purposes of CEQA. To the extent the post-final consultation analysis under NEPA/NHPA reveals new information or additional, stricter mitigation is required in the signed PA or MOA, no recirculation or Supplemental EIR is required where the project proponent agreed to adopt the mitigation measure. [14 Cal. Code Regs. 15162(a)(3)(C) and (D); See also *Laurel Heights Improvement Assn. v. Regents of University of California*, 6 Cal. 4th 1112, 1146, 1129 (1993).]

A key requirement of cultural resources analysis under CEQA, NEPA, and Section 106 of the National Historic Preservation Act of 1966, as amended 1992 (NHPA), is to ascertain if a proposed undertaking has the potential to impact historic sites and properties that qualify for inclusion on the National Register of Historic Places or the California Register of Historical Resources.

36 CFR 800, the implementing regulations for the NHPA, outlines the process to be undertaken for the identification, evaluation, effect determinations, and development of treatments for properties that might be affected. The process is undertaken in consultation between the BLM, State Historic Preservation Officer (SHPO), Advisory Council on Historic Preservation (ACHP), federally recognized Tribes (Tribes), and interested parties.

At this time, it is anticipated, that all historic properties and archaeological sites can be avoided in the Imperial Solar Energy Center South Project by selection of the proposed action/alternative. The proposed action was developed with conditions or design features to purposely avoid all archaeological sites. The BLM has made initial contacts with the SHPO and the Tribes to begin consultations towards a 'no adverse' effect determination under 36 CFR 800 for this undertaking.

The BLM initiated tribal consultation for the Imperial Solar Energy Center South Project by letter on June 24, 2010, and continues to consult with the Tribes as outlined in 36 CFR 800. The BLM must consult to identify properties of religious and cultural significance to the Tribes to be addressed in the Section 106 process. The following Tribes or tribal organizations have been invited to be consulting parties:

- Barona Band of Mission Indians
- Campo Kumeyaay Nation
- Cocopah Indian Tribe
- Ewiiapaayp Band of Kumeyaay Indians
- Fort Yuma Indian Reservation
- Jamul Indian Village
- Kwaaymii Laguna Band of Indians
- La Posta Band of Kumeyaay Indians
- Manzanita Band of Kumeyaay Indians

- Mesa Grande Band of Mission Indians
- San Pasqual Band of Diegueno Indians
- Santa Ysabel Band of Diegueno Indians
- Sycuan Band of Kumeyaay Nation
- Torres-Martinez Desert Cahuilla Indians
- Viejas Band of Kumeyaay Indians

The BLM invited the tribes into government-to-government consultation by letter on June 24, 2010. The BLM has received responses from the Fort Yuma Quechan Tribe and the Cocopah Indian Tribe indicating their interest in the project and their desire to continue consultation. The BLM, El Centro Field Office Archaeologist also received a phone call and discussed the project with Ms. Carmen Lucas of the Kwaaymii Laguna Band of Mission Indians. She requested additional information regarding the project and will continue to be consulted. The BLM is continuing to provide updates on the status of the environmental review process and the Section 106 process, invite the tribes into government-to-government consultation, and request their help in identifying any issues or concerns. The cultural resource inventory reports were sent to all tribes for their review and comment on November 1, 2010. The letter included with the reports also invited Tribes to a meeting and archaeological sites visit to be held in El Centro on November 16, 2010. The meeting presented information to the tribes regarding the proposed project and provided an opportunity for Tribes to ask questions and express their concerns regarding the proposed project. There have also been two additional letters and a meeting since November 16. A letter dated December 14, 2010 informed tribes of the release of the Draft EA/EIR, the comment period, and where they could comment. A letter dated January 31, 2011 informed the tribes that BLM is proposing to develop a MOA to resolve adverse effects to historic properties and invited the tribes to a consulting party meeting. The consulting party meeting was held in El Centro on February 23, 2011 and discussed the development of a MOA. Representatives from the Cocopah Indian Tribe, Manzanita Band of Kumeyaay Indians, and the Fort Yuma Quechan Tribe attended the meeting. The consultation process is still ongoing.