

PROTEST RESOLUTION AGREEMENT

THIS AGREEMENT (the "Agreement") is entered into and made effective this the 28th day of February, 2013 (the "Effective Date"), by and between: **NATURAL RESOURCES DEFENSE COUNCIL** ("NRDC"), a New York non-profit corporation whose address is 40 West 20th Street, New York, New York 10011, **THE WILDERNESS SOCIETY** ("TWS"), a District of Columbia nonprofit corporation having an address at 1615 M. Street N.W., Washington DC 20036; and **McCOY SOLAR, LLC** ("McCoy Solar") a Delaware limited liability company whose address is 700 Universe Blvd, Juno Beach, FL 33408. Each of the foregoing entities may be individually referred to herein as a "Party", and collectively as, the "Parties."

RECITALS

WHEREAS, McCoy Solar is the applicant to the Bureau of Land Management ("BLM") for a right-of-way grant to develop the McCoy Solar Energy Project ("McCoy Project"), a solar energy generation facility and associated transmission line, on approximately 4,600 acres of public lands in the California Desert Conservation Area located approximately 13 miles northwest of the town of Blythe and approximately six miles north of the Interstate-10 freeway in Riverside County, California;

WHEREAS, the BLM has proposed an amendment to the California Desert Conservation Area Plan ("Proposed Plan Amendment") in order to accommodate the McCoy Project;

WHEREAS, in connection with the proposed management plan amendment, the BLM has prepared a final environmental impact statement ("Final EIS"), which was issued in December 2012, as required by the National Environmental Policy Act;

WHEREAS, pursuant to 43 C.F.R. § 1610.5-2, NRDC and TWS have initiated a formal protest of the Proposed Plan Amendment and Final EIS in a letter addressed to BLM protest coordinator, Brenda Williams, dated January 22, 2013 (hereinafter "the Protest Letter");

WHEREAS, the Protest Letter sets forth specific claims concerning the impact of the Proposed Plan Amendment and the McCoy Project on the wildlife and natural resources of the project area;

WHEREAS, BLM convened a meeting between the Parties on February 12, 2013 in an attempt to resolve the claims and the Parties have engaged in direct discussions both before and after that meeting; and

WHEREAS, the Parties desire to resolve certain claims set forth in the Protest Letter on the terms and conditions set forth herein.

NOW THEREFORE, for and in consideration of the mutual agreements herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to be bound as follows:

Section 1. DEFINITIONS.

As used throughout this Agreement, the following terms shall have the meanings set forth below:

1.1 The term “Applicant” shall mean McCoy Solar, LLC.

1.2 The term “BLM” shall mean the Bureau of Land Management.

1.3 The term “Environmental Groups” shall mean Natural Resources Defense Council and the Wilderness Society.

1.4 The term “Final EIS” shall mean the final environmental impact statement prepared by the BLM and issued in December 2012 by John Kalish, BLM Field Manager, for the purpose of evaluating the environmental impacts of the Proposed Plan Amendment and the McCoy Solar Project.

1.5 The term “McCoy Project” shall mean the solar generation facility proposed by McCoy Solar to be located on approximately 4,600 acres of public lands in the California Desert Conservation Area located approximately 13 miles northwest of the town of Blythe and approximately six miles north of the Interstate-10 freeway in Riverside County, California, and more particularly described in the BLM Case File for the Right of Way Application CACA-48728.

1.6 The term “McCoy Solar” shall mean McCoy Solar, LLC, a Delaware limited liability company, which has applied to the BLM for a right-of-way to develop the McCoy Project.

1.7 The term “MSEP” shall mean the McCoy Solar Energy Project or McCoy Project, as defined above.

1.8 The term “Proposed Plan Amendment” shall mean the amendment to the California Desert Conservation Area Plan of 1980 (as previously amended) proposed by the BLM in order to accommodate the McCoy Project.

1.9 The term “Protest Letter” shall mean the letter initiating the protest process for the McCoy Project and the Proposed Plan Amendment pursuant to 43 C.F.R. § 1610.5-2 signed by NRDC and TWS and addressed to BLM protest coordinator Brenda Williams, dated January 22, 2013.

Section 2. OBLIGATIONS OF McCOY SOLAR.

2.1 Lands with Wilderness Characteristics Mitigation. In order to resolve the issues relating to lands with wilderness characteristic in the Protest Letter filed by the Environmental Groups, the following revisions to content in the Final EIS addressing lands with wilderness characteristics shall be incorporated into the Record of Decision (“ROD”) for the McCoy Project. McCoy Solar supports inclusion of the following language in the ROD:

Mitigation Measure LWC-1 in Section 4.16.8 Mitigation Measures shall be revised as follows:

LWC-1: Wilderness Characteristics Mitigation. The Applicant shall provide funding to BLM for the following actions to be taken to mitigate for the loss of approximately 1,089 acres of lands with wilderness characteristics that would result from the construction of Unit 2. On-site mitigation is infeasible. The mitigation shall be focused in the Big Maria Mountains Wilderness Area, Palen-McCoy Wilderness Area or other designated wilderness areas in general proximity to the project, as identified with BLM. Mitigation will be implemented by:

1. Removal and restoration of approximately 15 miles of unauthorized vehicle routes;
2. Conversion of approximately 3 miles of vehicle route into a hiking trail; and
3. Installation of vehicle barriers and signing along publicly accessible portions of the wilderness boundaries.

The Notice to Proceed for Unit 2 of the MSEP will provide that, before any ground disturbance occurs in the area inventoried to have wilderness characteristics, the Applicant shall make payment (as described further below) to BLM to fund this work and that the work shall be completed no later than 18 months from the commencement of construction for the relevant portion of Unit 2.

The Applicant shall make a not-to-exceed payment of \$251,000 to fund the mitigation. Such payment shall be made prior to any ground disturbance in the area inventoried to have wilderness characteristics and will complete the Applicant's obligations with respect to this mitigation measure. The Applicant shall not be responsible for the cost or obligations associated with any additional design, permitting or NEPA, ESA, NHPA or related analysis required to implement the Wilderness Characteristics Mitigation or any liability arising from the undertaking of the measures.

2.2 Plan of Development; Record of Decision. McCoy Solar agrees that it shall incorporate the conditions set forth in Section 2 into a revised plan of development for the McCoy Project, which will be submitted to the BLM prior to issuance of any Notice to Proceed for Unit 2 of the McCoy Project. The Parties agree and acknowledge that BLM shall incorporate the conditions set forth in Section 2 in its Record of Decision regarding the Proposed Plan Amendment and the McCoy Project.

Section 3. OBLIGATIONS OF THE ENVIRONMENTAL GROUPS.

3.1 Limited Withdrawal of Protest. Upon execution of this Agreement and assurance from the BLM in a form reasonably satisfactory to the Environmental Groups and their counsel that the conditions imposed on the McCoy Project in this Agreement will be incorporated into the BLM's project documents, including the Record of Decision, the Environmental Groups shall withdraw and release their claims relating to lands with wilderness characteristics set forth in the Protest Letter (Sections C.1 and C.2 at pages 10-13) in writing to the BLM.

3.2 Limited Covenant Not to Sue. Upon execution of this Agreement, the Environmental Groups agree not to commence or maintain any assertion, demand, complaint, suit, intervention, or similar action, whether at law or in equity, and whether before an administrative body or in a court of law which would: (i) challenge BLM's Proposed Amendment to the California Desert Conservation Plan regarding the McCoy Project or (ii) challenge the FEIS, the ROD, the ROW Grant(s), and/or the Notice(s) to Proceed prepared by BLM in conjunction with the Proposed Amendment as to any factual or legal grounds relating in any way to lands with wilderness characteristics including, but not limited to, those factual and legal arguments set forth in the Protest Letter at Sections C.1 and C.2 (Pages 10-13) and the Environmental Group's comments on the Draft EIS (dated August 23, 2012). The Environmental Groups reserve the right to commence or maintain any assertion, demand, complaint, suit, intervention, or similar action not specifically released hereunder. The Environmental Groups also reserve the right, upon a change in conditions, to file litigation to ensure that the McCoy Project is constructed, operated and decommissioned in conformance with all state and federal authorizations, permits and applicable laws and regulations and to enforce the terms of this Agreement. Prior to commencing or maintaining any assertion, demand, complaint, suit, intervention or similar action, the Environmental Groups shall (1) make good faith efforts to communicate their concerns to and cooperate with McCoy Solar, or its affiliates, to resolve the facts or circumstances that they believe form a reasonable basis to challenge the McCoy Project, and (2) allow McCoy Solar, or its affiliates, a reasonable period of time to remedy the facts and/or circumstances that form the basis for their concerns.

Except for the obligations provided herein, McCoy Solar and each of its representatives, agents, attorneys, successors and assigns hereby unconditionally release, acquit and forever discharge the Environmental Groups and each of its representatives, participating unions, attorneys, agents, successors and assigns from any and all claims, demands, injuries, actions, causes of action, either at law or in equity or of any kind, nature or description, known or unknown, which McCoy Solar has had in the past or has up through the Effective Date against the Environmental Groups arising out of, based upon, or relating directly or indirectly to the McCoy Project.

Except for the obligations provided herein, the Environmental Groups and each of its representatives, agents, attorneys, successors and assigns hereby unconditionally release, acquit and forever discharge McCoy Solar and each of its representatives, attorneys, agents, successors and assigns from any and all claims, demands, injuries, actions, causes of action, either at law or in equity or of any kind, nature or description, known or unknown, which the Environmental Groups has had or now has against McCoy Solar out of, based upon, or relating directly or indirectly to the McCoy Project.

The Parties are aware that facts may be discovered later that are different from and/or in addition to those that the Parties now know or believe to be true. The Parties acknowledge that they have been informed by their attorneys regarding, and are familiar with, California Civil Code section 1542 which provides:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”

The Parties expressly waive all rights under Civil Code section 1542 and intend that the foregoing releases and discharges extend to all claims either Party has had or has against the other up through the Effective Date regarding the McCoy Project, including those that would otherwise be excepted by operation of Civil Code section 1542.

3.3 Mutual Obligations and Communications. None of the parties shall characterize the views of other parties regarding relative support or opposition to the McCoy Project. Should any party publicly characterize the views of another without their express permission a formal retraction shall be provided to all media outlets that carried the original statement. In any official notice or statement, the parties shall not speak negatively regarding the McCoy Project or the protest resolution process generally.

Section 4. CONFIDENTIALITY.

The discussions leading up to this Agreement are confidential, including any information, communication, memorandum or similar document that in any way relates to or results from the McCoy Project and this Agreement. These discussions, including any information, communication, memorandum or similar document, shall not be revealed by any Party in the future. In the event any Party discloses this Agreement in accordance with the terms of this paragraph, the disclosing Party shall provide prior notice of such disclosure to the non-disclosing Party.

Section 5. MISCELLANEOUS.

5.1 Term. This Agreement shall be a binding obligation on the parties as of the Effective Date, provided however, in the event the BLM does not incorporate language substantially similar to the language set forth in **Exhibit A** attached hereto into its Record of Decision regarding the McCoy Project and McCoy Solar does not submit the revised Plan of Development, including the conditions set forth in **Section 2**, to the BLM prior to issuance of a Notice to Proceed, this Agreement shall be null and void, and the parties returned to their respective positions as if the Agreement had never been signed.

5.2 Notices. Any notices required under this Agreement shall be sent to the parties at the addresses below or such other address as a party may request from time to time.

If to Natural Resources Defense Council:

Attn: Helen O'Shea

111 Sutter St., 20th floor

San Francisco, CA 94104

If to the Wilderness Society:

Attn: Nada Culver

1660 Wynkoop Street, Suite 850

Denver, CO 80202

If to McCoy Solar, LLC:

Attn: Ashley Pinnock

700 Universe Blvd, LAW/JB

Juno Beach, FL 33408

5.3 Damages. The Parties agree (i) that the performance of the obligations of this Agreement are paramount, (ii) that, in the event of a breach, monetary damages will provide inadequate relief, and (iii) that each may only seek specific performance of such obligations. The Parties expressly waive and forego the right to seek monetary damages for any breach of this Agreement.

5.4 Entire Agreement. This Agreement constitutes the entire agreement of the Parties and any prior discussions, warranties, representations, understandings or agreements are merged herein and barred hereby. Each Party warrants and represents that it is not relying on any information, projection, prediction or representation, written or verbal, from any source, except as expressly set forth in this Agreement.

5.5 No Amendment. This Agreement may not be amended except by a writing, signed by each of the Parties, which writing sets forth as its express purpose the amendment of this Agreement. This Agreement may not be amended orally, by implication, waiver, course of dealing or industry custom.

5.6 Time of the Essence. Time is of the essence under this Agreement.

5.7 Successors and Assigns. This Agreement will inure to the benefit of, and responsibilities hereunder shall bind, the Parties, their successors, heirs, and assigns.

5.8 No Third Party Beneficiaries. This Agreement shall be for the benefit of the named Parties and others as expressly provided herein. This Agreement shall not be interpreted, directly or by implication, to provide any rights, assurances or benefits to any third parties.

5.9 California Contract. This Agreement shall be a California contract. This Agreement shall be performed in, and construed under, the laws of the State of California.

5.10 No Waiver. No waiver by either Party of any breach by the other of any provision of this Agreement shall be deemed or construed to be a waiver of any subsequent or continuing breach of the same or any other provision of this Agreement; nor shall any forbearance by either Party from the exercise of a remedy for any such breach be deemed or construed to be a waiver by such party of any of his rights or remedies with respect to such breach.

5.11 Severability. If any provision of this Agreement shall for any reason be held to be invalid or unenforceable, then the remainder of this Agreement shall be unaffected thereby, and shall remain in full force and effect.

5.12 Counterpart. It is agreed that this Agreement may be signed either on a single document, or in counterpart, and when executed, such counterparts shall have the same force and effect as if originally executed on one document.

5.13 Certification. Each person executing this Agreement on behalf of an entity personally certifies and warrants to all other Parties that this transaction has been duly authorized and approved by such entity, that such person is authorized to sign on behalf of such entity, that no other signature is required to bind such entity, and that such entity shall be legally bound as set forth herein by such signature.

[The remainder of this page is intentionally left blank; signature pages to follow.]

IN WITNESS WHEREOF, the parties have entered into and made this Agreement effective as of the date first set forth above.

NATURAL RESOURCES DEFENSE COUNCIL

SIGNATURE: 

NAME: Helen O'Shea

TITLE: Director, Western Renewable Energy Project

DATE: February 28, 2013

IN WITNESS WHEREOF, the parties have entered into and made this Agreement effective as of the date first set forth above.

THE WILDERNESS SOCIETY



SIGNATURE: _____

NAME: Nada Culver

TITLE: Senior Counsel

DATE: February 28, 2013

IN WITNESS WHEREOF, the parties have entered into and made this Agreement effective as of the date first set forth above.

McCOY SOLAR, LLC

SIGNATURE: 
NAME: Gregory Schneck
TITLE: Vice President
DATE: March 1, 2013

EXHIBIT A

Form of Language to be included in the BLM Record of Decision

The Final EIS was available for a 30 day public review and protest period. The 30 day public review and protest period closed on January ___, 2013. The protests have been resolved by the Director or, as noted below, have been withdrawn by the protesting party. At the request of various interested organizations, the BLM met, in accordance with its policy (BLM Land Use Planning Handbook, Appendix E, p.6 (2005)) in an effort to resolve the protest issues raised by these groups.

As a result of these meetings, the organizations and the project applicant agreed to certain project conditions which were reduced to writing and presented to the BLM for inclusion in the BLM Preferred Alternative (Appendix _____). These conditions revise Mitigation Measure LWC-1 and require McCoy Solar to agree to provide funding to BLM to undertake environmental improvements within certain designated wilderness areas. These conditions are subject to limitations agreed upon by the parties.

According to the agreement between and among the project applicant and the organizations, these terms are being incorporated into a modified Plan of Development for the McCoy Project. The BLM has analyzed these terms and has determined that they do not require BLM to supplement the Final EIS prior to issuance of the ROD (Appendix _____).

The BLM has determined that the terms fall within the alternatives analyzed in Final EIS, has accepted these agreed upon terms as part of the amended plan of development, and has incorporated into and will administer these terms as part of the right-of-way grant in accordance with 43 CFR 2805.12(i)(5), 2807.16, and 2807.17. The agreed upon conditions are not subject to amendment without the agreement of the applicant and the organizations and only if approved by the BLM in accordance with 43 CFR 2807.20. The organizations have withdrawn their protests relating to their lands with wilderness characteristics claims (Sections C.1 and C.2 of their protest letter at pages 10-13).