



**Mojave Desert Air Quality Management District**  
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Eldon Heaston, Executive Director

2012 JUN -6 PM 4: 57

CALIF. DESERT DISTRICT  
MORENO VALLEY, CA

June 4, 2012

Bureau of Land Management  
Jeff Childers, Project Manager  
22835 Calle San Juan De Los Lagos  
Moreno Valley, CA 92553

**Re: Draft Plan Amendment and Environmental Impact Statement for the McCoy Solar Energy Project**

Dear Mr. Childers,

The Mojave Desert Air Quality Management District (District) has reviewed the Draft Plan Amendment and Environmental Impact Statement for the McCoy Solar Energy Project. This project proposes to construct, operate, maintain and decommission an up-to-750 megawatt (MW) photovoltaic (PV) solar energy generating facility and related infrastructure in unincorporated Riverside County, CA (McCoy Solar Energy Project). The majority of the project would be developed on Bureau of Land Management (BLM) administered land with approximately 477 acres of privately owned land included in the proposed solar plant site boundary. The project would generate and deliver solar-generated power to the California electrical grid through an interconnection at the Colorado River Substation owned by Southern California

The District concurs with the Applicant Proposed Measures and Management Practices, AIR-1 and AIR-2. Please note that the District requires fugitive dust best management practices (including but not limited to applicable provisions of District Rule 403.2) be implemented in the grading and construction phases of the project.

Thank you for the opportunity to review this notice of preparation. If you have any questions regarding this letter, please contact me at (760) 245-1661 or Tracy Walters at ext. 6122.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan J. De Salvio". The signature is stylized and fluid.

Alan J. De Salvio  
Supervising Air Quality Engineer

AJD/tw

McCoy Solar PA EIS.doc

**From:** Richard Dean [<mailto:rdean2733@gmail.com>]

**Sent:** Saturday, June 09, 2012 10:04 PM

**To:** BLM\_CA\_McCoySolarEnergyPlant

**Subject:** Our Support for the solar unit construction North of Blythe, California

Dear Mr. Childers:

This email is just a short note of support for the McCoy Solar Project Northwest of Blythe, California. During the next 5 to 10 years hopefully, many other such plants will be built in the Southwest of the United States. If enough alternative energy can be secured from projects such as this, the Southwest would need far less hydroelectric power from the Colorado River Basin allowing the dams along the Colorado River to keep the water behind the dams for drinking and irrigation purposes.

To reduce the impact of these projects along the Colorado River it is nice to note that many of them are proposed near existing transmission lines to get the power into the grid and to where the power is needed, especially, in the large cities of the Southwest United States.

Keep up the great effort and the good work toward more renewable power.

Sincerely,

The Dean Family  
64079 Dolomites Court  
Desert Hot Springs, CA 92240



**Matthew Rodriguez**  
Secretary for  
Environmental Protection



## Department of Toxic Substances Control

**Deborah O. Raphael, Director**  
5796 Corporate Avenue  
Cypress, California 90630



**Edmund G. Brown Jr.**  
Governor

June 26, 2012

**Mr. Jeffery Childers**  
Bureau of Land Management, Desert District Office  
22835 Calle San Juan de Los Lagos  
Moreno Valley, California 92553

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MORENO VALLEY, CA

### DRAFT PLAN AMENDMENT AND ENVIRONMENTAL IMPACT STATEMENT FOR MCCOY SOLAR ENERGY PROJECT (SCH# 2012054002)

Dear Mr. Childers:

The Department of Toxic Substances Control (DTSC) has received your submitted Notice of Preparation Report for the above-mentioned project. The following project description is stated in your document: "McCoy Solar LLC, a subsidiary of NextEra Energy Resources LLC (Applicant), proposes to construct, operate, maintain, and decommission an up-to-750 megawatt (MW) photovoltaic (PV) solar energy generating facility and related infrastructure in unincorporated Riverside County, California, to be known as the McCoy Solar Energy Project (MSEP or Project). The majority of the MSEP would be developed on public land administered by the Bureau of Land Management (BLM). Approximately 477 acres of privately owned land would be included in the proposed solar plant site boundary. The Project would generate and deliver solar-generated power to the California electrical grid through an interconnection at the Colorado River Substation (CRS) owned by Southern California Edison (SCE)".

Based on the review of the submitted document DTSC has the following comments:

- 1) The EIS should evaluate whether conditions within the project area may pose a threat to human health or the environment. Following are the databases of some of the regulatory agencies:
  - National Priorities List (NPL): A list maintained by the United States Environmental Protection Agency (U.S.EPA).

- Envirostor (formerly CalSites): A Database primarily used by the California Department of Toxic Substances Control, accessible through DTSC's website (see below).
  - Resource Conservation and Recovery Information System (RCRIS): A database of RCRA facilities that is maintained by U.S. EPA.
  - Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS): A database of CERCLA sites that is maintained by U.S.EPA.
  - Solid Waste Information System (SWIS): A database provided by the California Integrated Waste Management Board which consists of both open as well as closed and inactive solid waste disposal facilities and transfer stations.
  - GeoTracker: A List that is maintained by Regional Water Quality Control Boards.
  - Local Counties and Cities maintain lists for hazardous substances cleanup sites and leaking underground storage tanks.
  - The United States Army Corps of Engineers, 911 Wilshire Boulevard, Los Angeles, California, 90017, (213) 452-3908, maintains a list of Formerly Used Defense Sites (FUDS).
- 2) The EIS should identify the mechanism to initiate any required investigation and/or remediation for any site that may be contaminated, and the government agency to provide appropriate regulatory oversight. If necessary, DTSC would require an oversight agreement in order to review such documents.
- 3) Any environmental investigations, sampling and/or remediation for a site should be conducted under a Workplan approved and overseen by a regulatory agency that has jurisdiction to oversee hazardous substance cleanup. The findings of any investigations, including any Phase I or II Environmental Site Assessment Investigations should be summarized in the document. All sampling results in which hazardous substances were found above regulatory standards should be clearly summarized in a table. All closure, certification or remediation approval reports by regulatory agencies should be included in the EIS.
- 4) If buildings, other structures, asphalt or concrete-paved surface areas are being planned to be demolished, an investigation should also be conducted for the presence of other hazardous chemicals, mercury, and asbestos containing materials (ACMs). If other hazardous chemicals, lead-based paints (LPB) or

products, mercury or ACMs are identified, proper precautions should be taken during demolition activities. Additionally, the contaminants should be remediated in compliance with California environmental regulations and policies.

- 5) Future project construction may require soil excavation or filling in certain areas. Sampling may be required. If soil is contaminated, it must be properly disposed and not simply placed in another location onsite. Land Disposal Restrictions (LDRs) may be applicable to such soils. Also, if the project proposes to import soil to backfill the areas excavated, sampling should be conducted to ensure that the imported soil is free of contamination.
- 6) Human health and the environment of sensitive receptors should be protected during any construction or demolition activities. If necessary, a health risk assessment overseen and approved by the appropriate government agency should be conducted by a qualified health risk assessor to determine if there are, have been, or will be, any releases of hazardous materials that may pose a risk to human health or the environment.
- 7) If it is determined that hazardous wastes are, or will be, generated by the proposed operations, the wastes must be managed in accordance with the California Hazardous Waste Control Law (California Health and Safety Code, Division 20, Chapter 6.5) and the Hazardous Waste Control Regulations (California Code of Regulations, Title 22, Division 4.5). If it is determined that hazardous wastes will be generated, the facility should also obtain a United States Environmental Protection Agency Identification Number by contacting (800) 618-6942. Certain hazardous waste treatment processes or hazardous materials, handling, storage or uses may require authorization from the local Certified Unified Program Agency (CUPA). Information about the requirement for authorization can be obtained by contacting your local CUPA.
- 8) Hazardous substances would be present on the Project site during construction (e.g., fuels and lubricants, wastes from demolition and remediation, paints and solvents). If released, these substances could pose risks to human health and the environment. For example, demolition wastes containing volatile or fluid hazardous wastes, such as PCB-containing oils or residual fuels from abandoned storage tanks, should be contained and packaged in accordance with regulatory requirements and regularly transported to appropriate disposal facilities.
- 9) DTSC can provide cleanup oversight through an Environmental Oversight Agreement (EOA) for government agencies that are not responsible parties, or a Voluntary Cleanup Agreement (VCA) for private parties. For additional information on the EOA or VCA, please see [www.dtsc.ca.gov/SiteCleanup/Brownfields](http://www.dtsc.ca.gov/SiteCleanup/Brownfields), or contact Ms. Maryam Tasnif-Abbasi, DTSC's Voluntary Cleanup Coordinator, at (714) 484-5489.

Mr. Jeffery Childers  
June 26, 2012  
Page 4

If you have any questions regarding this letter, please contact me at [ashami@dtsc.ca.gov](mailto:ashami@dtsc.ca.gov), or by phone at (714) 484-5472.

Sincerely,



Al Shami  
Project Manager  
Brownfields and Environmental Restoration Program

cc: Governor's Office of Planning and Research  
State Clearinghouse  
P.O. Box 3044  
Sacramento, California 95812-3044  
[state.clearinghouse@opr.ca.gov](mailto:state.clearinghouse@opr.ca.gov)

CEQA Tracking Center  
Department of Toxic Substances Control  
Office of Environmental Planning and Analysis  
P.O. Box 806  
Sacramento, California 95812  
[nritter@dtsc.ca.gov](mailto:nritter@dtsc.ca.gov)

CEQA # 3562



# PALO VERDE IRRIGATION DISTRICT

180 W. 14<sup>TH</sup> AVENUE - BLYTHE, CALIFORNIA 92225-2714

TELEPHONE (760) 922-3144 - FAX (760) 922-8294

June 26, 2012

Attn: Jeffrey Childers, Project Manager  
McCoy Solar Energy Project  
BLM, California Desert District Office  
22835 Calle San Juan De Los Lagos  
Moreno Valley, CA 92553

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CALIF. DESERT DISTRICT  
MORENO VALLEY, CA

Re: McCoy Solar Energy Project, Draft Plan Amendment & EIS

Dear Mr. Childers:

Thank you for sending us the McCoy Solar Energy Project CD. PVID has the following comments:

1. In both Water Resource sections between Volumes 1 and 2, there is some confusion as to where the boundary between the Palo Verde Mesa Groundwater Basin (PVMGB) and Palo Verde Valley Groundwater Basin (PVVGB) lies. In Volume 1, the PVMGB was generally described as being west of the valley flood plain with the boundary between the two at the east toe of the mesa. The Palo Verde Valley was described as the entire floodplain west of the Colorado River in California. In Volume 2, Appendix G, the Palo Verde Valley was defined as being comprised of both the Mesa and the floodplain with the boundary between the two groundwater basins lying near the middle of the floodplain generally parallel with the Colorado River. Prior to this report, most locals and report writers considered the Valley to be the same as the flood plain, the mesa to be the higher ground west of the valley, and the valley between the McCoy Mountains and the Big Maria Mountains as being McCoy Wash's drainage area. In reading the different areas of the report, this distinction is interchanged. Based on Palo Verde Irrigation District's (PVID) groundwater data, consisting of reading monthly depth to groundwater in 269 observation wells on the floodplain and monthly water surface elevations on 190 gages in gravity drains in the floodplain, there are three groundwater basins: 1] Between the Colorado River and the first canal, ground water flows back to the river; 2] between the first canal west of the River and the drains along the toe of the mesa, ground water flows into our valley drainage system and eventually back to the River; and 3] under the mesa west of the drains along the toe of the mesa, ground water could flow east into the valley or west from the drain to under the mesa.

Ground on the valley flood plain naturally slopes downhill from the River at about 1.5 feet per mile to the southwest. In the 1960's, PVID deepened the valley drains south of Hobsonway dropping the groundwater under the floodplain an additional 5 feet. The valley average depth to groundwater went from 5 feet to 10 feet below the ground surface as a result of that project. As a result of that Project, there is a drop of almost 2.5 feet in the drain water level between the north and south sides of the siphon in Rannells Drain under Hodsonway. This drop would affect the ground water under the mesa to the north west of the siphon that the modelers should account for.

2. Groundwater under the mesa is being recharged naturally by rain or by deep percolation of irrigation water pumped onto the mesa from PVID's canals at 3 locations. For groundwater modeling, the Mesa groundwater basin boundary with the Valley floodplain groundwater basin should be established along the toe of the mesa. At this boundary, the groundwater for the valley either flows west from the irrigated land to the nearest agricultural drain or into the cone of depression for a mesa well. Groundwater under the mesa either flows into a well's cone of depression or east of the mesa into a valley drain. Water in the Colorado River over 6 miles east of the mesa does not reach the mesa groundwater basin due to PVID's drains intercepting any River water flowing west toward the mesa (if there is). Modeling efforts should address the problem of how much groundwater to pump from under the property without the groundwater dropping below the accounting surface proposed by the United States Bureau of Reclamation (USBR). In Riverside County's report for their EIR for this Project, they indicated the groundwater at the southeast corner of the Project was at an elevation of 254 feet AMSL. In 1994, the USBR's accounting surface at that site was at elevation 252 feet AMSL. That's only a 2 foot difference. If it drops below the proposed accounting surface elevation, then pumper will need to contact the USBR or Colorado River Board in Glendale, Ca.
3. Volume 1, Table 3.20-4 on page 3.20-5: Underflow from Colorado River should be zero since PVID's drains prevent that underflow from occurring. Irrigation Return flow is under estimated. In 2010, water users on the mesa pumped 15,501 acre feet of water for 1,882 water toll acres of crops in PVID on the mesa from PVID's canals at 3 locations. PVID does not know the acreage irrigated or volume pumped from groundwater by wells on the mesa. Water not used by the crops deep percolated into the mesa groundwater to help fill the various cones of depressions existing around various wells under the mesa.
4. Vol. 1, Tables 3.20-4 and 3.20-5: Why doesn't the Recharge from precipitation in Table 3.20-4 match one of the Infiltration values in Table 3.20-5? Aren't they the same thing? The loss of rain to evaporation needs to be accounted for. Generally, a rain event of over an inch in 1 hour and raining for several hours is needed for runoff to reach the valley floor in many of the dry desert washes. This value is not a firm

number since many factors determine if runoff will occur. The amount of rain for each event needs to be used to determine runoff not the total annual rainfall. Please keep in mind that during rain events, any water falling on the mesa that doesn't infiltrate runs into the Valley causing damages and either infiltrates to the valley groundwater, flows into a PVID canal, or flows into a PVID drain. In a normal year, PVID doesn't have to deal with the difference 102,878 acft less 216 acft or 102,662 acft so the runoff and infiltration estimates are not of the right magnitude.

5. Vol.1, page 3.20-7, Subsurface Inflow: No direct subsurface inflow from the Colorado River to the Mesa groundwater basin occurs. Deep percolation of irrigation water applied to control salinity may intercept a cone of depression for a mesa well and then flows under the mesa into the mesa ground water basin. Or, water in a PVID drain is pulled into a cone of depression for a mesa well causing underflow under the mesa. However, no water flows directly from the Colorado River past our series of drains to reach the mesa groundwater. This was confirmed by a Bureau of Reclamation Study in 1986. The comment "stable groundwater levels" ignores the drastic drops in mesa groundwater at the jojoba well sites during the early 1980's. Only now are their cones of depressions being filled by natural recharge and by the excess irrigation water being applied to control salinity buildup in the mesa crop lands from water pumped from PVID's canals. When the mesa groundwater is restored to a natural condition, the mesa ground water table will be higher than the water level in the drain system along the toe of the mesa so groundwater will flow into the drains. The 1,244 acft of inflow from the Valley Groundwater Basin is questionable. It would be valley groundwater flowing into cones of depressions for wells along the easterly edge of the mesa which should gradually decrease as the cone of depressions fill unless the well is pumping that water out.
6. Vol. 1, p. 3.20-7, Groundwater Irrigation...: At the end of the paragraph, this 6,600 AFY is low. It is the typical groundwater demand 'from wells on the mesa' not 'in the PVID'. The domestic use by people in Mesa Verde and else-where on the mesa was not estimated. Irrigation efficiency determines how much water is needed to be pumped. Crop demand determines how much water crop will use. The difference between the two is deep percolated back into the groundwater and not lost. So the net groundwater loss is only that amount used by crop and tied up in the soil.
7. Vol. 1, p. 3.20-7, Irrigation Return Flow: Estimated value of 760 acft is low. In 2010, water users on the mesa pumped 15,501 acft from 3 canals into their mesa irrigation system and storage ponds. This was used on 1,882 water toll acres. Generally, a 40 water toll acre citrus field in the valley would represent 39 cropped acres. So this water was used on about 1,835 cropped acres. Thus the total use from valley and wells was  $15,501 + 6,600 = 22,101$  acft not the 7,600 acft shown in the text. The leaching requirement for the water being applied to the mesa crops is around

15% for canal water and 20% for mesa well water to keep the crops from being damaged by salinity. Based on the Irrigation Demand section preceding this section, a 7.9 acft/ac water use value at 75% efficiency would provide an average crop need of 5.92 acft/ac. For the  $1835+461+370 = 2,666$  acres, they would need  $2,666*5.92= 15,783$  acft of water. The difference,  $22,101-15,783= 6,318$  acre feet of water being deep percolated to the mesa groundwater. This value is over 8 times more than the value in the text of 760 acft.

8. Vol. 1, p. 3.20-8, Groundwater Budget: Table 3.20-4 should be revised based on my prior comments. The Colorado River underflow is not the primary mechanism for recharge. Deep percolation of irrigation water applied to control salinity levels in the crop's root zone is. Recharge from the valley groundwater basin occurs where cone of depressions from mesa wells intercept the valley groundwater or drains.
9. Vol. 1, p. 3.20-9, bedrock: Parker Valley is more than 3 miles to the northeast.
10. Vol. 1, p. 3.20-9, last paragraph: The phrase 'groundwater "turns" (in response to the influence from the Colorado River)' is distorted. The low area along the toe of the mesa controls more than the River. Groundwater under the mesa is flowing into the valley and entering the drain along the toe of the mesa. The bedrock extension of the McCoy Mountains and the water surface in the drain controls the flow more than the Colorado River that is about 8 miles due east of the drain. On June 8, 2010 the water surface in the River at the I10 bridge was at an elevation of 251.83 ft. asl while in Rannells Drain along toe of mesa due west 8 miles from the River, it was 246.23 feet asl, a drop of .7 ft per mile.
11. Vol. 1, p. 3.20-10, Historic Groundwater...: See Comment 10. Due to limited groundwater data for mesa wells, a distorted position is reported. I believe that since the 1980's, after the jojoba program failed, over application of canal water to mesa crops to control salinity levels in the crop's root zone has almost filled the numerous cones of depressions under the mesa to get the picture we have now. For the mesa groundwater table to stabilize at current levels, natural recharge plus deep percolation of irrigation water and underflow from the Valley groundwater basin equals the water pumped from under the mesa thru the various wells. It has nothing to do with recharge from the River.
12. Vol. 1, p.3.20-12, Groundwater Quality: Generally, the water quality in groundwater under the mesa is better the longer it has been subject to being recharged by irrigation water pumped from the valley canals.
13. Vol. 1, p. 3.20-14, section 3.20.1.3: Surface water on the mesa drains into the Valley floodplain flooding fields, canals and drains not the River. The River is 6 miles or more farther east and its banks about 9 feet higher than the farmland at the toe of the mesa. For the 1976 flood from McCoy Wash, the flow of 4,000 cfs was only for an hour after water started flowing in the wash. The peak flow was 15,750 cfs about 3.5 hours after flow started. Water ran for about 12 hours into the valley.

This was a 1 in 17 year event with 2.11 inches of rain falling over the watershed in a 24 hour period.

14. Vol. 1, p. 3.20-15, Stormwater flows and Table 3.20-9 p. 3.20-16: I searched both volumes trying to find 'what storm intensity and for how long' was used in your calculations and could not find it. What values were used from what source?
15. Vol.1, p. 3.20-17, Table3.20-10: I'm not sure what this table is needed for. PVID has about 161.65 miles of drains and 244.23 miles of canals on the valley floodplain with road crossing at many section corners. I don't know why these are classified as "surface water sites". Generally: the water level in the canals is at least 2 feet above the adjacent farmland; and the water level in the drains at least 8 feet below adjacent farmland. The canals provide irrigation water to the crops, they do not collect irrigation runoff from the farmlands. The drains collect groundwater and a very small amount of irrigation runoff water from adjacent farmlands. The main drainage system collects ground water from under the farmland in the flood plain and carries it southwesterly thru the valley and back to the River about 17.6 miles south of the townsite of Palo Verde. For all 15 sites in Table 3.20-10, the longitude needs either a minus sign or a 'W'. Items 5 thru 8 have titles indicating they are from somewhere else, not this area. The latitude and longitude of Items 5 thru 7 are on the mesa west of the valley along the Bradshaw Trail but I have never seen any water flowing from the ground at those sites.
16. Vol. 2, Figure 3.20-1 and Figure 3a on p. G-28: It shows the Mesa Groundwater Basin extending easterly into the west half of the valley floodplain. The correct boundary between the valley floodplain and the mesa should be the east toe of the mesa or the center of the drain along the east toe of mesa.
17. Vol. 2, p.G-14 part 2.2: the correct name for USGS is 'U. S. Geological Survey'.

Sincerely,  
*Roger Henning*  
Roger Henning  
Chief Engineer

**From:** Jared Fuller [<mailto:jgillenfuller@yahoo.com>]  
**Sent:** Tuesday, August 14, 2012 7:05 PM  
**To:** BLM\_CA\_McCoySolarEnergyPlant  
**Subject:** McCoy solar project Draft EIS comment

The McCoy solar project would highly impact vegetation, wildlife, soils, and visual resources. The cumulative impact on these resources would be even greater because of the development's location next to the Blythe solar project and other possible solar projects. Because of these impacts, a no project alternative or reduced acreage alternative should be selected.

At minimum, in the interest of preserving biodiversity, the final version of the project should exclude nearly all areas occupied by two of the more sensitive plants on the site -- Las Animas colubrina and Harwood's milk vetch. This could be done by either requiring avoidance of these areas or preferably, by deletion of these and adjacent buffering areas from the project boundaries. The mitigation measures listed in 'Veg-10' which include land acquisition or habitat enhancement/restoration may not prove to adequately compensate for population losses resulting from the project, especially without mandatory requirements for successful propagation of new populations. By excluding these areas, impacts to other vegetation and to wildlife including desert tortoise and burrowing owl could be reduced. Also, the western route option of 'Alternative 3' is preferable because of its avoidance of sensitive plants.

Thank you.

Jared Fuller  
636 W 200 S  
Provo, Utah  
84601

The Transportation Department has reviewed the EIS and provides the following comments.

Prior to the approval of the Project, the Transportation Department would require the Project proponent to perform and provide an analysis of the pavement structure for roadways to be utilized by construction traffic. If the analysis determined the pavement would not provide sufficient load bearing capacity for the construction traffic, the Transportation Department would require the Project proponent to provide road improvements, as specified by the Director of Transportation. The Transportation Department would further require that the Project proponent restore all public roads, easements, and rights-of-way that may be damaged due to Project-related construction activities to original or near-original condition in a timely manner.

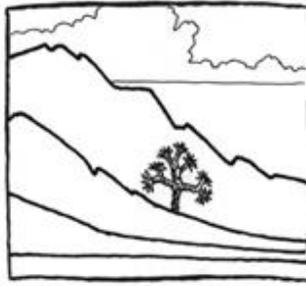
The Transportation Department would require the Project proponent to provide evidence of primary and secondary access. Secondary onsite and offsite access would be required to provide fire protection and emergency medical response to all development areas. It is not clear how secondary access is provided to the Project. The location of the secondary access would require the concurrence and approval of both the Transportation Department and the Fire Department, and would be required to be maintained throughout any Project phasing.

The EIS did not include a copy of the full traffic study with appendices. Without the traffic study, the Transportation Department is not able to verify that the data presented in the EIS is accurate or determine whether the statements of insignificance are substantiated. A copy of the full traffic study should be provided in the EIS.

If the Project encroaches upon or utilizes County road rights-of-way, the Transportation Department would require the Project proponent to obtain an encroachment permit and enter into a franchise agreement. The franchise agreement would need to be consistent with Board Policy No. B-29.

Additional to the comments above, the following comments are offered for Section 4.17 of the EIS.

- 4.17-3            The text indicates the haul trucks will utilize dedicated truck routes with each jurisdiction. Please provide an exhibit to illustrate these dedicated truck routes.  
  
                         No justification or supporting documentation is provided for the use of the 1.3 percent growth rate.
- 4.17-4            Provide the quantitative analysis to substantiate the statements found in the last paragraph of Page 4.17-4 and first paragraph of Page 4.17-5?
- 4.17-5            Provide intersection and queuing analyses which substantiates the statements found in the first paragraph.
- 4.17-12          Mitigation measures should be expanded to include permits, pavement integrity and management, video monitoring for queuing at freeway ramps, and adequate emergency access.



## **Basin and Range Watch**

August 20<sup>th</sup>, 2012

Jeff Childers; Project Manager, BLM California Desert District Office, 22835 Calle San Juan de Los Lagos, Moreno Valley, CA 92553

[camccoysep@blm.gov](mailto:camccoysep@blm.gov)

Dear Mr. Childers,

We would like to submit these comments for the Draft Environmental Impact Statement for the McCoy Solar Energy Project (CACA 48728)

Basin and Range Watch is a group of volunteers who live in the deserts of Nevada and California, working to stop the destruction of our desert homeland. Industrial renewable energy companies are seeking to develop millions of acres of unspoiled habitat in our region. Our goal is to identify the problems of energy sprawl and find solutions that will preserve our natural ecosystems and open spaces. We have visited the McCoy Solar Energy project site and are concerned about the direct and cumulative impacts that the project would have on the region.

### **Purpose and Need Statement:**

The Purpose and Need Statements in many BLM large scale renewable project EIS documents reflect a need to develop so many megawatts on so many acres of public lands. All alternatives

are now defined by a Need reflecting the recent Secretarial Order 3283: Enhancing Renewable Energy Development on Public Lands.

The goals of Section 4 in Secretarial Order 3283 clearly state a need for environmental responsibility: *“the permitting of **environmentally responsible** wind, solar, biomass, and geothermal operations and electrical transmission facilities on the public lands;*

The McCoy Solar Energy Project in its proposed location would be inconsistent with the Best Management Practices concerning the National Environmental Policy Act, the Endangered Species Act, and the Federal Lands Management Policy Act, etc and should not be considered “environmentally responsible”.

The BLM’s Purpose and Need statement in the DEIS quotes FLPMA (section 10 (c)) and claims that *“public lands are to be managed for multiple use that takes into account the long term needs of future generations for renewable and non-renewable resources.”* The McCoy Solar Energy site would take up over 7 square miles. Public land access would be extremely limited and other land use would be impaired. It would be impossible to manage these lands for multiple use when so much of the land is sacrificed for just one use. Mandates to use renewable energy can be compensated in the distributed generation alternative we have provided in these multiple use philosophy, the BLM should provide a sound, environmentally friendly alternative.

We would like to request that the Purpose and Need statement be rewritten to include mandates to protect sensitive biological, hydrological, cultural and visual resources. We would also like the statement to include a mandate to maintain access to public lands as well as preserve in the California Desert Conservation Area.

Part of the justification for the Purpose and Need is the goal to approve 10,000 MW capacity on public lands. This goal seems to have been met. The BLM has already suggested this:

“Paragraph 1.2.1.2 cites section 211 of the Energy Policy Act of 2005. It directs the Secretary of the Interior to approve non-hydropower renewable energy projects of at least 10,000 MW by 2015 (ten years after passage of the EAct of 2005). The approved capacity, according to data taken on June 28, 2012 from the undated BLM website [http://www.blm.gov/wo/st/en/prog/energy/renewable\\_energy/Renewable\\_Energy\\_Projects\\_Approved\\_to\\_Date.html](http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/Renewable_Energy_Projects_Approved_to_Date.html) approved capacity for these categories of renewable energy is 8,437 MW. At the current high rate of approval, the total will certainly exceed 10,000 MW by 2015, 2½ years from now. This Section does not qualify as a purpose and need for this activity.”

There is no need to create more environmental conflicts if we have met this goal.

**Alternatives:**

A full range of alternatives should be considered in every EIS document. That is required by NEPA. This seems to be one of the biggest problems with most of them.

Following the guidelines of the National Environmental Policy Act, the final EIS should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

**(c) Include reasonable alternatives not within the jurisdiction of the lead agency.**

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

We would like to request that the BLM consider the following alternatives for the McCoy Solar Energy Project:

**Brownfields and Degraded Lands Alternative:**

The US Environmental Protection Agency has identified over 1.5 million acres of brownfields in the United States that would be suitable for utility scale solar development. See here:

<http://www.epa.gov/oswercpa/>

<http://www.wvbrownfields.org/conferences/2010/presentations/Evans%20Paul%20-%20Jobs.pdf>

The Arizona BLM is reviewing the "The Restoration Design Energy Project"

[http://www.blm.gov/az/st/en/prog/energy/arra\\_solar.html](http://www.blm.gov/az/st/en/prog/energy/arra_solar.html) (RDEP), funded by the American Recovery and Reinvestment Act of 2009, which supports the Secretary of Interior's goals to build America's new energy future and to protect and restore treasured landscapes. The following statement is made:

**“Emphasis will be on lands that are previously disturbed, developed, or where the effects on sensitive resources would be minimized. The BLM intends to use the results of the EIS to amend its land use plans across Arizona to identify areas that are considered to be most suitable for renewable energy projects.**

**While these amendments will only apply to BLM-managed lands, the EIS will examine all lands in Arizona and serve as a resource to the public, policy makers, and energy planners.”**

**Palo Verde Mesa Solar Project Alternative:** The Renewable Resources Group has an application with Riverside County to construct a 486 megawatt solar photovoltaic facility on 3,400 acres of land that is mostly degraded. There would be no issues with biological or cultural resources.

It is filed with the Riverside County Clerk as Environmental Impact Report No. 532, Conditional Use Permit No. 3684, Public Use Permit No. 916.

The applicant is looking for someone to build this project. Because BLM is required to consider alternatives outside of the jurisdiction of the lead agency under NEPA, we would like to request that this be considered as an alternative to protect resources on public lands.

**Distributed Generation Alternative:** Distributed generation in the built environment should be given much more full analysis, as it is a completely viable alternative. This project will need just as much dispatchable baseload behind it, and also does not have storage. But environmental costs are negligible with distributed generation, compared with this project. Distributed generation cannot be “done overnight,” but neither can large transmission lines across hundreds of miles from remote central station plants to load centers. Most importantly, distributed generation will not reduce the natural carbon-storing ability of healthy desert ecosystems, will not disturb biological soil crusts, and will not degrade and fragment habitats of protected, sensitive, and rare species.

Alternatives should be looked at that are in load centers, not closest to the project site. There is a need to consider the “macro” picture, the entire state, to look at maximum efficiency. A master comprehensive plan should exist before large expensive inefficient solar plants are sited and built out in the wildlands. This plan should carefully analyze the recreational and biodiversity resources on public lands. A list of assumptions should be included detailing the plan for integrating various fuels mixes and technologies into each utility's plan, an overall state plan, and a national plan. Loads should be carefully analyzed to determine whether additional capacity is needed for peaking, intermediate, or baseload purposes. Unit size, which impacts capital and operating costs and unit capacity factors, has a direct bearing on the relative economics of one technology over another. A plan might recommend that smaller units built in cities and spaced in time offer a less risky solution than one large unit built immediately.

Right now there is no utility plan, no state plan, and no national plan. Large-scale central station energy projects have been sited very far from load centers out in remote deserts, with the only criterion being nearness to existing transmission lines and natural gas lines. Very little thought

has been given to the richness of biological resources, the cumulative impacts on visual scenery to tourists, the proximity to ratepayers, or the level of disturbance of the site.

There will be a need to build many new efficient natural gas peaker or baseload plants to back up the renewable projects planned. Instead, the renewables should be distributed generation in load centers, which will provide much more efficiency, rather than inefficient remote central station plants that reduce biodiversity and require expensive transmission lines. This reduces the risk, as distributed generation is a known technology and has been proven in countries like Germany where incentive programs have been tested. Incentive programs can be designed in an intelligent manner to vastly increase distributed generation. Incentives for large remote projects are unproven to lower risk and may actually raise debt levels with runaway costs associated with poor siting and higher-than-anticipated operating and maintenance costs. Many renewable project developers have failed to consider reasonable or viable alternatives that could serve as solutions that everybody could live with. In the case of this particular project, conflicts with endangered species, cultural resources, storm water drainage erosion, viewscapes from National Parks and wilderness areas could all be avoided with a distributed generation alternative.

**Alternatives under the Desert Renewable Energy Conservation Plan:** Several alternatives are now under review for the Desert Renewable Energy Conservation Plan. Among these alternatives are No Action designations for specific areas in the California Desert. The McCoy Solar Project Site should be considered for one of the DRECP conservation alternatives.

**Basin and Range Watch Preferred Alternative:** We would like to request a No Action Alternative that designates conservation status to the area and makes it inappropriate for large scale energy development.

#### **Affected Environment/Environmental Consequences:**

##### **Air Quality:**

Construction activity will go on for 2 to 3 years and will degrade air quality resources.

The DEIS will need to analyze the health impacts that airborne particulates from construction dust will have on the local residents of the area. Coccidioidomycosis (Valley Fever ) is a common issue that impacts desert communities when dust is stirred up.

Removal of stabilized soils and biological soil crust creates a destructive cycle of airborne particulates and erosion. As more stabilized soils are removed, blowing particulates from recently eroded areas act as abrasive catalysts that erode the remaining crusts thus resulting in more airborne particulates.

The DEIS should analyze the cumulative impacts on air quality that will result from the removal so much stabilized soil and biological soil crust.

We are concerned that industrial construction in the region will compromise the air quality to the point where not only visual resources, but public health will be impacted.

We are also concerned that Next Era will have no choice but to use more water in an already over-drafted aquifer to control the large disturbance they intend to create.

Construction should not be permitted during days of high winds. Wind speeds of 10 MPH and higher should be determining factors that limit construction. Construction should also be limited during the hottest months of the year. Evaporation rates will be greatest during the months of June, July and August.

It is unfortunate that local communities are getting almost no benefit from these large, recently approved industrial developments.

The following three photos show that there is a consistent failure of large solar and wind project developers to control and mitigate the dust emissions that have resulted from the large disturbances caused by recently approved high profile renewable energy projects. In spite of the fact that all of these developers have promised that dust emissions would not be an issue, we are finding that they are falling short of their mitigation requirements.



Ocotillo Wind Express Project, May 2012



^Dust storm from the Genesis Solar Energy Project, April, 2012. Naturally occurring dust from Ford Dry Lake was combined with newly disturbed surface soils from project construction.



Desert Sunlight Project near Desert Center, California. These dust storms were reported to be rare before the construction of the project began.



Ivanpah Solar Electric Generating System, October, 2010

### **Flash Floods:**

Some of the recently approved large energy projects on public lands have experienced damage from large flood events.

Below are photos of three projects which experienced damage from flash floods. Each one of these projects was “Fast Tracked” or “Prioritized” for approval by the Interior Department. Mitigation and planning has been deferred for many of the issues that came up. These large energy projects are being built in poorly chosen locations. While these flood events are referred to as 100 Year Floods by the applicants, it is obvious that these events take place more commonly than every 100 years. Projects that span 5 square miles may sustain flood damage on a yearly basis on different parts of the site. The McCoy Solar Project will be no exception. It has significant alluvial drainages throughout the project site especially on the west side.

These three projects received significant flood damage in less than one year under construction. It makes us wonder how wise it really is to build a project in an unstable alluvial flood zone when the goal is for that project to last three decades.



^Ivanpah Solar Electric Generating System: desert tortoise exclusion fence removed by floods.  
July, 2011



^Flooded wind turbine construction site; Ocotillo Wind Express project Site, June 2011



Unknown leftover foam from a chemical dust suppressant was spread everywhere when the Ocotillo Wind Express project site flooded in June, 2012



^The biggest flood took place at NextEra's Genesis Project on July 31<sup>st</sup>, 2012. The close proximity to a dry lake and alluvial fans make this project location one of the poorest choices to site a large solar project.



^Genesis Solar Project flood, July 31<sup>st</sup>, 2012



^Genesis Solar Project flood, July, 2012

### **Desert Pavement:**

Desert pavements are found on alluvial fans and piedmonts below mountains in the Mojave and Sonoran Deserts. Stones over fine sediments may form a weak pavement, in the case of granitic stones at the Imperial Valley Solar Project site which decompose and weather more quickly, or if derived from volcanic or limestone sources, may be densely packed, inter-locking, and resistant. Wind-blown silts and sands collect in between and below the gravel pavement. Varnish usually colors the rock surfaces exposed to air a darker color, and can be useful for aging the pavement. Varnish is the result of surface evaporation of various salts on the rock, building up a crust.

Dr. Boris Poff, hydrologist at Mojave National Preserve at the time, gave testimony at the Calico Solar Project evidentiary hearing held by the California Energy Commission on August 5, 2010. The rock surface of desert pavements stabilizes fine sediments underneath, and may potentially increase rainwater infiltration. When they are disturbed, desert pavements lose this function and surface run-off increases, as does erosion and downhill sedimentation.

Many desert pavements are extremely old, taking thousands of years to develop. North of the Calico project site in San Bernardino County, a desert pavement has been dated at 7,000 years old. There can be three feet of deep sand under the rocky cap that takes millennia to build up.

Small mining roads through desert pavements have yet to recover from this disturbance.

The National Resource Conservation Service has started a soil mapping program at Mojave National Preserve, and they have found that desert pavements have not been adequately analyzed and categorized. Much of the data is out-dated.

Conversely, other desert pavements may be younger and hide archaeological treasures. At the Calico Solar Project workshop held August 12, 2010, we learned from archaeologist Dr. David Whitley, that one cannot assume that subsurface archaeological materials are absent just because a desert pavement covers the ground. "This is a myth," he told the applicant, Tessera Solar. He explained that recently scientists have learned that some desert pavements can form quickly, and ceramics have been found underneath them.

[http://www.energy.ca.gov/sitingcases/calicosolar/documents/2010-08-05\\_Transcript.pdf](http://www.energy.ca.gov/sitingcases/calicosolar/documents/2010-08-05_Transcript.pdf)

How will the removal of thousands of acres of desert pavement affect the flood potential of the region? How will this alter the local hydrology? Will existing groundwater aquifers see less recharge? Will new locations that catch water be created? How will this impact wildlife and populations of phreatophytes that depend on flood water drainage?

### **Socio Economics/Environmental Justice and Private Property:**

While this project will be promoted as an economic win/win for everybody, nothing could be further from the truth. When you take a look at the labor crews that have been hired to work on recent federally approved solar and wind projects, it becomes obvious in many cases, that the workers are not local residents. This is because the developers make deals with Unions from larger cities. It does not seem to matter if the locals are qualified because the labor deal was made somewhere else.

After about three years of construction, an industrial photovoltaic solar project will only create about 10 to 15 full time jobs.

Large, subsidized energy projects tend to create a boom and bust effect on small communities.

### **Visual Resources:**

This project would be built adjacent to outstanding conservation areas and the impact to visual resources will degrade the visitor experience. The project would be placed next to the Palen-McCoy Wilderness Area and the Big Maria Mountains Wilderness Area. It would also be visible from McCoy Wash which contains some of the oldest microphyll habitat in the region.

The BLM should require more KOP simulations that depict all of the visual impact scenarios. All of the most potentially visible angles of light and time of day should be considered to depict the worst case scenario.

The following BLM required factors to be considered:

(2) Angle of Observation. The apparent size of a project is directly related to the angle between the viewer's line-of-sight and the slope upon which the project is to take place. As this angle nears 90 degrees (vertical and horizontal), the maximum area is viewable.

(3) Length of Time the Project Is In View. If the viewer has only a brief glimpse of the project, the contrast may not be of great concern. If, however, the project is subject to view for along period, as from an overlook, the contrast may be very significant.

(4) Relative Size or Scale. The contrast created by the project is directly related to its size and scale as compared to the surroundings in which it is place.

The 4,700 acre size of the project is large and will have the potential to impact different VRM zones of different classes. Some of the public lands on the Palo Verde Mesa are considered a Class One Visual Resource Management Zones. These areas include the Palen-McCoy Wilderness Area and the Big Maria Mountains Wilderness Area. BLM defines the objective of this class *“to preserve the existing character of the landscape. This class provides for natural ecological changes; however, it does not preclude very limited management activity. The level of change to the characteristic landscape should be very low and must not attract attention”*.

The 4,700 acre size of the project is large and will have the potential to impact different VRM zones of different classes. Some regional public lands adjacent to the project site are considered to have Class One VRM standards. BLM defines the objective of this class *“to preserve the existing character of the landscape. This class provides for natural ecological changes; however, it does not preclude very limited management activity. The level of change to the characteristic landscape should be very low and must not attract attention”*.

All impacts should be evaluated from VRM Class One Standards due to the large visual cumulative impacts.

The following Key Observation Point simulations should be included in the Visual Resources Analysis:

1. Simulations from McCoy Wash. The old- growth microphyll has both ecological and scenic value.
2. Two more simulations from the Palen-McCoy Wilderness Area. These should be from higher elevations. Often, KOP simulations do not include higher elevation view points.
3. Simulations from the Big Maria Mountains Wilderness Area
4. Simulations of dust plumes and potential dust blackout events from construction activity.
5. Two simulations from the Big Maria Mountains Wilderness Area
6. Two dark sky simulations of construction lighting and security lighting.

### **Biological Resources:**

The Biological Resource surveys in Appendix C are well done and detailed, although we have a few additions. We have observed a Long-eared owl in Palo verde-Ironwood stands within a few miles of the project site to the east, so it is probable this species uses the project site for foraging. We have observed scat and a road-killed Burro deer along highway 95 to the east of Palo Verde Mesa and believe this deer probably regularly crosses the site and forages in vegetated areas.

Kit fox have been found on the project site. Since a canine distemper outbreak has occurred during construction on the nearby Genesis Solar Energy Project in Chuckwalla Valley, the applicant should develop a regional Kit Fox Monitoring Plan to be able to detect and prevent the spread of disease in the local kit fox population. The applicant should monitor kit foxes in cooperation with California Department of Fish and Game and develop procedures in case kit fox mortality occurs. Hazing techniques should be reviewed and modified to not cause stress to the foxes during relocation from dens during construction, and coyote urine should not be used at all until it is tested for disease.

Yuma mountain lion potential scat was found in the western translocation area. This rare Colorado Desert subspecies of mountain lion should be monitored for any direct or indirect impacts from project construction in its habitat.

A CNDDDB record of a Gila monster in the northern McCoy Mountains indicates that Gila monsters may be present in the project area. The applicant should develop a Gila Monster Relocation Plan if any lizards are excavated during construction or encountered aboveground during rain events, as

Gila monster can overheat and die if mishandled in hot weather.

Bio-4 (p. 4.3-3) - Desert tortoise compensation lands should be acquired within the NECO area and as close to the McCoy Solar Energy Project as feasible to preserve similar genetic stock.

The DEIS suffers from deferred mitigation in many cases. A Weed Management Plan should be prepared now for public review, and not deferred until after project approval. Sahara mustard was found in the project area and this highly invasive weed could potentially encroach on newly disturbed areas of roads and solar panel scraped areas. How will weed invasion be avoided? Will vehicle tires be washed? Will herbicides be used? The public needs to be able to comment on these topics. This is most important for the sand dunes habitat in which Mojave fringe-toed lizards are found. How will invasive weeds be controlled here so as not to reduce habitat for this species?

A more thorough dust control plan needs to be devised before approval.

The applicant needs to prepare a Restoration Plan for vegetation now during public review and not defer this until later.

Especially egregious is the following on page 4.3-21: "**VEG-7: Biological Resources Mitigation Implementation and Monitoring Plan.**"

The Applicant shall develop a BRMIMP, and shall submit two copies of the proposed BRMIMP to the BLM AO for review and approval." The applicant needs to develop this important plan now during the public review process, and not after approval. The importance of public review of such broad mitigation measures should not be neglected.

On page 4.3-9 table 4.3-1 claims only 1.5 acres of Desert dry wash woodland of Blue palo verde and Ironwood would be impacted by the project. We did a site visit to the McCoy project proposal in June 2012 and observed more Desert dry wash woodland than that number indicates. We estimate more than 100 acres is present. Also, we observed many acres of Creosote-Big galleta grass community on the solar project itself, not just on the gen-tie line route alternatives.

For rare plant mitigation, techniques for transplanting and reseeding desert species have not been proven to be effective, and the diversity and abundance of rare plants on the project site leads us to recommend avoidance of the area instead of large-scale disturbance which will degrade and fragment this botanical resource hotspot.

Compensatory mitigation for rare plants should identify areas with the same species diversity as the project site for acquisition before approval of the project instead of later. Habitat enhancements should not be prioritized over actual land acquisition, as these are not proven by studies.

We do not believe contributing to a Special status plant distribution study qualifies as proper mitigation for the wholesale destruction of rare plants and habitats. Applicants should not be able to simply contribute funds to organizations or research institutes for studies, as so much is unknown about present rare plant distribution that will likely be forever destroyed by large-scale renewable energy projects already. The emphasis should be on conserving desert ecosystems intact and in situ. Clearing, grubbing, and grading of rare plant habitat cannot be mitigated, and this project should not be approved because of the high diversity of rare plants on the site.

A Desert Tortoise Translocation Plan should be prepared now during review, and not deferred until after project approval.

Speed limits for construction-related activities should be 20 mph, not 25 mph. In areas with Mojave fringe-toed lizard the speed limit should be 10 mph to avoid road mortality, and a biological monitor should escort traffic through habitat areas.

A Raven Management Plan should be developed now and not deferred.

An Avian Protection Plan should be developed now and not deferred until after project approval.

On page 4.4-37 a Kit fox and badger hazing program is described and the potential use of coyote urine and blocking of dens is mentioned. These stressful activities to relocate kit foxes may have possibly resulted in immune system deficiency and canine distemper outbreaks on the Genesis Solar Energy Project in Chuckwalla Valley adjacent to the Palo Verde Mesa. How will the applicant monitor for canine distemper during construction activities? A regional kit fox monitoring plan should be developed before approval to make sure kit foxes are free of this contagious disease.

On page 4.4-24 the analysis for the Mojave fringe-toed lizard states that 59.7 % of all habitat in the study area could be impacted by the cumulative build-out of proposed projects:

"The analysis of cumulative Project effects to Mojave fringe-toed lizard habitat focused on known and CNDDDB-documented populations within the Chuckwalla Valley and Palo Verde Valley. In these areas, populations are dependent upon areas with fine aeolian sand that occur in association with dunes, margins of dry lakes and washes, and isolated sand patches. The cumulative effects analysis identified approximately 1,098 acres of occupied Mojave fringe-toed lizard habitat in the study area, of which approximately 655 acres (59.7 percent) occurs in areas where future projects are proposed (Table 4.4-3). Under Alternatives 1 and 3, approximately 46 acres of habitat would be disturbed for the gen-tie line and associated access road. This represents approximately 4.2 percent of available Mojave fringe-toed lizard habitat that was identified in the cumulative study area and represents a contribution of 7 percent of the total cumulative effect on this resource. The implementation of Mitigation Measures VEG-7, VEG-8, VEG-10, VEG-11, VEG-12, and WIL-10 would minimize impacts to sensitive suitable compensatory habitat for habitat losses."

This is unacceptable. The coarse genetics of the broad populations of the Mojave fringe-toed lizard have been described, but many areas need finer analysis of genetic diversity. Cryptic species may be present in the study area, similar to the Amargosa population which was identified as genetically unique during more fine-grained analysis, and recommended for protection under the federal Endangered Species Act by Center for Biological Diversity. (See R.W. Murphy, T.L. Trepanier, D.J. Morafka, 2006. Conservation genetics, evolution and distinct population segments of the Mojave fringe-toed lizard, *Uma scoparia*. Journal of Arid Environments 67: 226–247) There could be similar cryptic species or distinct population segments worthy of protection on the project site associated features. More genetic studies of a fine-grained nature should be carried out before approval of this project, to identify any genetic diversity that may need special mitigation and protection.

The DEIS discusses mitigation of habitat loss for the MFTL, and estimates that the cumulative foreseen projects in the Chuckwalla Valley-Palo Verde Mesa region will destroy 655 acres of the 1,098 acres of MFTL habitat. Then only 443 acres of habitat would remain. BLM asks the applicants to compensate habitat at a 3:1 ratio. The Genesis Solar Energy Project provided 3:1 compensation, and other projects will most likely be asked to as well. At 3:1 ratio, cumulative projects would have to provide 1,965 acres of compensation land. But not enough undisturbed

habitat exists in the DEIS analysis area to purchase or enhance. Therefore we recommend not disturbing any habitat where MFTL are present or potential, to avoid serious loss of population density for this species.

If the applicant chooses to pay in lieu fees as authorized under California Department of Fish and Game codes, any compensation lands should be within the Eastern Colorado Desert Recovery Unit for Desert tortoises and not in distant areas.

### **Cultural Resources:**

Geoglyphs and intaglios are present scattered in the stony natural desert pavement, forming a continuum of past cultural legacies with present living traditions. Local tribes and residents consider these rock alignments and geometric patterns in the stony ground to be sacred, connecting the present with the past, and they are actively cared for. In spite of the fact that these sites are still actively used by people, the Bureau of Land Management has basically determined that these sites are not significant enough to be avoided by developers. So far, two of these sites have been damaged or completely destroyed by the first development of the Blythe Solar Energy Project.



^One of these geoglyphs on the McCoy Project Site is known as the El Tosco geoglyph

**Conclusion:** Several more environmentally friendlier alternatives exist to the proposed location for the McCoy Solar Energy Project. Approval of the McCoy Project will contribute to the cumulative larger picture scenario of replacing public lands in the California Deserts with solar energy sprawl. Specifically, the Palo Verde Mesa is threatened by several of these projects.

We support a No Action Alternative that designates the area inappropriate for utility scale solar energy.

Thank you,

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*BLC File(s): 1190.24*

21 August 2012

Jeffrey Childers, Project Manager  
BLM California Desert District Office  
22835 Calle San Juan de Los Lagos  
Moreno Valley, CA 92553

Re: McCoy Solar Project Draft Environmental Impact Statement

Dear Mr. Childers:

These comments are submitted on behalf of Californians for Renewable Energy ("CARE") and La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee ("La Cuna") regarding the draft Plan Amendment/Environmental Impact Statement ("EIS") for the McCoy Solar Energy Project. These comments supplement any other comments that may have been submitted by my clients or members of my clients. CARE and La Cuna share many of the concerns already submitted for your consideration by others. Concerns that have already been brought to the agency's attention will not necessarily be repeated here.

In light of our society's dependence on fossil fuels, coupled with the threat of global warming, we recognize the long-term importance of renewable energy development to sustaining the human existence and fully support the emission reduction goals set forth in the Global Warming Solutions Act of 2006. That being said, thorough review under the National Environmental Policy Act ("NEPA") is critical in determining whether a fair balance between renewable energy development and preservation of the environment, including cultural and other resources can be achieved in allowing a large scale solar power project move forward at the current site slated for construction. Such projects can be sustainable only if they conform to the strictest environmental standards, considering local impacts, and subsequent harm on species and habitat. The following comments are submitted with the goal of promoting the balance between developing renewable energy and the protection of environmental and cultural resources.



## A. The National Environmental Quality Act

The National Environmental Policy Act ("NEPA") requires that Federal agencies prepare a detailed statement on the environmental impacts of any proposed Federal action that significantly affects the quality of the human environment to the fullest extent possible. 42 U.S.C. § 4332©. This detailed statement is required in every recommendation or report on proposals for legislation and "other major Federal actions significantly affecting the quality of the human environment." *Id.* It must discuss the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 40 U.S.C. § 4332(2)(C)(I)-(v).

### 1. The Purpose and Need Statements Are Too Narrowly Construed

An agency "cannot define its objectives in unreasonably narrow terms." *City of Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142 (9th Cir. 1997). The statement of purpose and alternatives are closely linked since "the stated goal of a project necessarily dictates the range of 'reasonable' alternatives." *Id.* BLM has based its purpose and need sections on an unduly restrictive reading of applicable statutes and orders.

BLM states that the purpose and need for the Proposed Action is to respond to a FLPMA ROW application submitted by the Applicant. However, this only focuses on the applicant's purpose and need and not the agency's. Such a narrow description of the purpose and needs unduly restricts the alternatives analysis. Furthermore, none of the referenced policies is as narrowly tailored as requiring the siting of a utility-scale solar energy development on public lands. Executive Order 13212 calls for energy-related projects to be expedited, while maintaining safety, public health, and environmental protections. Ex. PN 1. The Energy Policy Act of 2005 encourages the Secretary of Interior to approve non-hydropower renewable energy projects on public lands with a generation capacity of at least 10,000 megawatts of electricity. Ex. PN 2. Secretarial Order 3285A1 calls for the identification and prioritization of specific locations in the United States best suited for large-scale production of solar, wind, geothermal, incremental or small hydroelectric power on existing structures, and biomass energy (*e.g.* renewable energy zones). Ex. PN 3.

### 2. The EIS Fails to Look at a Reasonable Range of Alternatives

NEPA requires that an EIS contain a discussion of the "alternatives to the proposed action." 42 U.S.C. §§ 4332(2)(C)(iii) & (E). The discussion of alternatives is at "the heart" of the NEPA process and is intended to provide a "clear basis for choice among options by the decisionmaker and

the public.” 40 C.F.R. § 1502.14. An agency must look at all reasonable alternatives. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233 (9th Cir. 2005).

### Renewable Distributed Generation

Although a DG alternative may be outside BLM’s jurisdiction, the alternatives analysis is not limited to an agency’s jurisdiction. See 40 C.F.R. § 1502.14©. Distributed rooftop photovoltaics (“PV”) have a much less significant environmental impact than utility-scale concentrated solar. As recognized by the National Renewable Energy Lab, distributed PV has benefits such as low land use and no transmission. Ex. A1. The National Renewable Energy Lab has further recognized that DG sources such as rooftop PV and small wind turbines have substantial potential to provide electricity with little impact on land, air pollution, or CO<sub>2</sub> emissions. *Id.*

If the goal is 10,000 MW of electricity by 2015 as articulated under the Energy Policy Act of 2005, distributed solar can meet that goal. On page 193 of the California Energy Commission Integrated Energy Policy Report (December 2009), it states that a 2007 estimate from the Energy Commission suggests that there is roof space for over 60,000 MW of PV capacity. Ex. A2. See also Exs. A3 & A4. In other words, California alone has the capacity to meet the goals of providing well over 10,000 MW of electricity through distributed generation.

California has taken great strides in promoting renewable DG with Governor Schwarzenegger’s Million Solar Roofs program and the legislation that followed. Exs. A5-A15. California has also gone a long way in not only implementing legislation, but actually getting a smart-grid system into operation. Exs. A18-A22. Altogether, a renewable DG alternative would encourage cooperation between states and the federal government to implement a comprehensive renewable-energy strategy.

Furthermore, the federal government has undergone a number of projects to promote distributed PV, demonstrating that a DG alternative is a reasonable alternative. For example, photovoltaics have been installed on rooftops of federal correctional facilities, military bases, and postal service buildings. Exs. A37-A44.

Altogether, an analysis of a DG alternative or an alternative that includes at least some DG component would allow for a meaningful review of the appropriate balance to strike between environmental impacts caused by land-intensive utility-scale generation and the electricity-generation capacity. Without an analysis of this alternative, the decision-makers cannot make an informed decision about what impacts are an acceptable cost for the benefit attained.



### Conservation and Demand-Side Management

Conservation, demand response and other demand-side measures can reduce congestion on the grid and meet our energy demands. *See Exs. A47 & A48.* Conservation and other demand-side alternatives are needed to provide the basis for informed decision-making about the environmental impacts of increased transmission. Therefore, this alternative should have been considered in the EIS.

Again, although a demand-side management alternative may be outside BLM's jurisdiction, the alternatives analysis is not limited to an agency's jurisdiction. *See 40 C.F.R. § 1502.14©.* The benefits of energy efficiency and demand response have landed these issues at the top of the California loading order. Ex. A30. There has been a significant amount of new research emerging on the demand side of energy management and a push both at the state and federal level for improving demand. *See Exs. A30-A34.*

### Other Federal, State, or Private Land

As shown in the preceding section, there are a number of examples of siting renewable-energy developments on federal, state, or private land. Exs. A37-A44. Looking at such an alternative is reasonable here.

Alternatives were rejected as "too difficult and expensive." DEIS 2-69. However, there is no evidence justifying this conclusion. *See Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981). More information should be provided so as to adequately justify why alternative siting, or the use of private lands, is not presented as an option for this project.

Class I land should have been considered as an alternative.

### Other Technology

The project proposes the use of solar thermal technology. Other technology should be considered that could have less significant impacts. For example, other projects have found it financially feasible to use photovoltaics rather than solar thermal and photovoltaics have a less significant impact, particularly on water supply.

### Other Use

The presented alternatives requiring an amendment – all alternatives except for alternative 1 and alternative A – would require a Plan amendment, and yet, are deficient in discussing the



BLM's management's desert-wide obligation to achieve and maintain a balance between resource use and resource protection.

### 3. Relationship with Solar Program

A programmatic EIS was recently prepared for solar energy development in the southwestern states. The EIS does not address this Project's relationship with the program. The Final EIS should address whether this project falls within one of the Solar Energy Zones identified in the programmatic EIS.

### 4. The EIS Fails to Adequately Analyze and Mitigate Air Quality Impacts

The EIS acknowledges the current ambient air quality within the Mojave Desert Air Basin (MDAB) is classified in the non-attainment category for state ozone and fugitive dust particulate matter (PM10) criteria. DEIS 3.2-2. If this project is carried out, on-site construction activities such as excavation, filling, grading, and vehicle travel during construction of the project would generate dust emissions, including emissions of PM 10 and PM 2.5. DEIS 4.2-3. Additionally, the use of off-road equipment during operation and maintenance of the project would consist of 35-horsepower diesel-powered emergency generators, both of which will contribute significant amounts of VOC, NOx, CO, SOx, PM-10, and PM-2.5 emissions. DEIS 4.25. Finally, motor vehicle emissions from on-site and off-site vehicles used during operation and maintenance of the project will generate VOC, NOx, CO, SOx, PM-10, and PM- 2.5 emissions. *Id.*

The DEIS fails to include feasible mitigation measures to reduce air quality impacts resulting from this project's construction activity. *See* AQ1. This includes the failure to include temporary traffic controls, such as a flag person to facilitate traffic and ensure unobstructed traffic flow. Efforts should be made to expose the least amount of sensitive receptor areas through the routing of construction vehicles away from such areas and minimizing vehicle trips. BLM should require that any electricity used during construction is generated from power poles and not temporary diesel or gasoline power generators. Lastly, only trucks with clean air engines should be used for this project.

The DEIS fails to adequately discuss the cumulative impact on air quality resulting from this project. The DEIS should have addressed the cumulative emissions from the project combined with other similar projects such as the Genesis and Palen solar projects. If any of these similar projects are not being considered by the BLM, a justification should be given as to why. If, on the other hand, these projects do have a cumulative impact on air quality, they should be identified, along with appropriate mitigation measures.



5. **The DEIS Fails to Adequately Analyze and Mitigate Impacts to Vegetation**

As stated in the DEIS, the unique position of the project site contributes to the presence of a number of rare and endemic plants and vegetation communities specially adapted to the region and which are not found further north in the Mojave Desert. DEIS 3.3-1, 2. Among these communities are the Sonoran creosote bush scrub, desert dry wash woodland, and vegetated ephemeral swales. *Id.*

**Dry Desert Wash Woodland**

The proposed project falls within an area containing the Dry Desert Wash Woodland, noted for its ecological significance in BLM's Northern and Eastern Colorado Desert Plan (NECO Plan). The NECO Plan contains conservation provisions for Dry Desert Wash Woodlands:

"The requirements for compensation at 3:1 replacement acres would discourage project placement in Desert Dry Wash Woodland and Desert Chenopod Scrub communities. Both of these are present in small amounts, but add greatly to overall plant diversity in the planning area. Similar compensation rates for disturbance of closed dunes and playas communities would likewise discourage projects on these very rare communities." *See Ex. B5.*

Regardless of the 3:1 habitat loss compensation requirement, this project proposes no alternative, other than its no action alternative, that steers completely clear of the Desert Dry Wash Woodland communities. Considering the importance of the Desert Dry Wash Woodland to the long term conservation on public lands in this planning area, alternatives to the proposed project that completely avoid this habitat type should be included in the final EIS.

**Revegetation**

The project applicant proposes to implement a revegetation plan to compensate for the unavoidable impacts this project will have on vegetation. DEIS 4.3-3. However, "revegetation of disturbed, arid lands is one of the great challenges of the desert." *See Ex. VE1.* As stated in "The Challenge of a Desert: Revegetation of Disturbed Desert Lands":

Where rainfall and temperature conditions approach or exceed those of the Great Basin desert, restoration of disturbed land will occur through natural revegetation processes within a reasonable period of time. This is not generally the case in the more arid Mojave Desert



areas where the moisture and temperature conditions are less favorable for germination and seeding survival. *Id.*

The final EIS should address the difficulties that will inevitably arise in implementing a revegetation plan in this area and propose how these difficulties will be overcome.

#### Desert Tortoise Habitat Compensation Plan

Finally, the project applicant proposes to implement a desert tortoise compensation plan at a ratio of 1:1 compensation. However, this ratio should be higher when considering the thousands of acres of tortoise habitat being eradicated and that replacement habitat may not meet the same standard as the habitat being eradicated. *See Ex. VE2.* In his opinion piece, California State University Polytechnic Pomona Professor Sidney Silliman suggested a ratio of 5:1 for this precise reason. *Id.* Thus, the EIS should address concerns about quality of replacement habitat for desert tortoises.

#### 6. The DEIS Fails to Adequately Analyze and Mitigate Impacts to Wildlife

The McCoy Project will have a number of adverse impacts to wildlife that have not been adequately analyzed and mitigated.

#### Desert Tortoises

BLM acknowledges that the majority of threats to the desert tortoise and its habitat are associated with human land uses. DEIS 3.4-5. Extensive research shows that all of these threats can directly kill or indirectly affect tortoises. *Id.* Among the impacts this project may have on desert tortoises are: habitat loss, fragmented habitat, loss of connectivity, and potential increases in susceptibility to predators such as ravens. *Id.* In addressing these impacts, the mitigation measures include tortoise translocation. DEIS 4.4-4. However, this measure may result in additional negative impacts to tortoises such as elevated stress hormones, changes in behavior and social interaction, spread of disease, increased predation, and death. *See B3-B8.* The risks and uncertainties of translocation of desert tortoises are well recognized in the scientific community. DEIS 4.4-9. Yet, no mitigation measures are provided for these translocation impacts and, in fact, the DEIS provides one sentence to explain the translocation plan, failing to elaborate on how it will address these negative impacts. Further, the DEIS makes no mention of conservation facilities, the estimated number of tortoises on the project site, or the site where the tortoises will supposedly be translocated.



of the Native American tribes feel about their resources being taken away. Ex. CR1. Significantly, the project will restrict access to religious and culturally-significant sites in violation of the Religious Freedom Restoration Act (RFRA), but the DEIS fails to mention the RFRA at all. In addition, the DEIS does not adequately address the project's impacts on Native American sacred sites and culturally-significant sites and artifacts, including burial grounds. These issues need to be addressed before the project can go forward.

#### **8. The EIS Fails to Adequately Analyze Environmental Justice Impacts**

The DEIS fails to account for, analyze, and mitigate the disproportionate effect the project will have on local tribes. Firstly, the census data used in the DEIS appears to be inaccurate or outdated. For instance, the DEIS lists the Native American population in the City of Blythe at 0.7 %, and in Riverside County in general at 0.5%. However, the U.S. Census Bureau actually currently lists the Native American population in the City of Blythe at 1.2% and 1.9% in Riverside County, which is higher than the general California population of Native Americans. Exs. EJ1-EJ2. This would tend to indicate that projects in these areas would affect Native Americans at a greater rate than projects would at a different location where there is a lower Native American population. In addition, the project site is located in an area rich in Native American cultural resources. Exs. CR1-CR5. The cumulative effect on the cultural resources of the Native American people similar projects has not been analyzed or mitigated for. Ex. EJ3. A proper analysis on the cumulative effect on these groups must be conducted and the effects must be mitigated for before the project can move forward. Exs. EJ3-EJ5. The number of utility-scale solar energy projects in the vicinity are having a negative and disproportionate impact on Native Americans and other minorities in the region.

#### **9. The EIS Fails to Adequately Analyze Impacts to Geology and Soils Resources**

The project site is on or near geological resources that date back hundreds of millions of years ago, all the way from the Paleozoic to Early Jurassic eras. Ex. GS1. However, the DEIS does not adequately describe these geological resources; and thus, fails to analyze the impact that project will have on these pre- ancient resources.

#### **10. The EIS Fails to Adequately Analyze the Project's Greenhouse Gas Emissions**

The DEIS states that this project could displace electricity generated by fossil fuel combustion, with lower GHG-emitting electricity for consumers. DEIS 4.8-7. However, this claim rests on several unsupported assumptions. First, the DEIS does not quantify a total amount of energy needed to satisfy future demand. Without quantifying future demand, it is impossible to know whether another solar project is even needed to meet that demand.



Second, the DEIS fails to consider the energy output of completed solar facilities, and also, the estimated output of solar projects under construction or being considered for approval. If the final EIS quantifies future demand along with energy output of existing and projected solar facilities, it might be discovered that existing solar facilities are sufficient to meet that demand. Without such a study, the claim that this project would displace electricity generated by fossil fuel combustion will continue to be baseless.

Lastly, the DEIS claims this project will displace electricity generated by natural gas and yet, fails to identify any natural gas facilities that this project will replace, or if there are any gas facilities currently being considered in lieu of this project.

The DEIS completely ignores the circumstances surrounding this project, including the growing number of solar facilities in the area, along with the current trend of pushing for additional similar projects. If the solar facilities currently existing are sufficient to meet future energy demand, this project would result in excess energy and unnecessary GHG emissions. The final EIS must provide a proper foundation to support its claim that this project would result in a net reduction of GHG emissions per year. This includes a thorough analysis of future energy demand, the projected output of all solar facilities and projects combined, and the identification of any natural gas facilities that will actually be replaced because of such projects.

#### **11. The DEIS Fails to Adequately Analyze and Mitigate Hazards**

The DEIS fails to adequately analyze and mitigate hazards resulting from this project. More specifically, it does not address what would occur should the completed project catch on fire, and what effect a fire would have on emergency response. The fact that solar panels can catch on fire is well-documented. *See* Ex. H5-H8. Should a fire break out at the project site, the lives of employees operating the project and the lives of those providing emergency response would be at risk. *See* Ex. H7. Also, emergency response may have to be slowed because firefighters cannot spray flames backed by live current without risking electrocution. *See* Ex. H5. The EIS must provide an emergency response plan to save lives and mitigate damage should a fire occur at the project site.

#### **12. The Project Is Inconsistent with Applicable Land Use Plans**

The project is inconsistent with applicable land use plans. Under the California Desert Conservation ("CDCA") Plan, you are required "to provide for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple use and sustained yield, and the maintenance of the environmental quality." 43 U.S.C. § 1781(b). "Once a land use plan is developed, '[a]ll future resource management authorization and action . . . shall conform to the approved plan.'" *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). This project is on Class lands even though there are millions

of acres of Class I lands available.

The project is also inconsistent with the County of Riverside General Plan. A project of this size and the impacts on wildlife is inconsistent with the Open Space designation under the General Plan.

**13. The DEIS Fails to Adequately Analyze and Mitigate Noise Impacts**

While the DEIS addresses this project's noise impact on residences closest to the project, it does not address the issue of noise impact on wildlife or provide any mitigation measures to reduce such an impact. Animals rely on meaningful sounds for communication, navigation, avoiding danger, and finding food against a background of noise. *See Ex. N1.* For example, studies have shown that in a variety of bird species, road noise can have a negative effect on bird populations, resulting in a decrease in population densities. *See Ex. N2.* Additionally, most researchers agree that noise can affect an animal's physiology and behavior, and if it becomes a chronic stress, noise can be injurious to an animal's energy budget, reproductive success, and long term survival. *See Ex. N3.* At the very least, the EIS must address the noise impact this project will have on the animal environment surrounding the project site and provide appropriate measures to mitigate any negative impacts.

**14. The EIS Fails to Adequately Analyze Impacts to Paleontological Resources**

The DEIS fails to adequately analyze the impact on paleontological resources. For instance, fossils from the Ice-Age have been found on or near the project site, and the project site is thought to be rich in other fossils. Exs. PR1-PR4. However, the DEIS makes no mention of many fossil resources that are known to be on or near the project site.

**15. The EIS Fails to Adequately Analyze Impacts to Recreation and Public Access**

The project is inconsistent with applicable land use plans. Under the California Desert Conservation ("CDCA") Plan, you are required "to provide for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple use and sustained yield, and the maintenance of the environmental quality." 43 U.S.C. § 1781(b); Ex. RP1. "Once a land use plan is developed, '[a]ll future resource management authorization and action . . . shall conform to the approved plan.'" *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007). This project is designated to be built on highly controlled and sensitive Class L lands (limited use) as designated by the California Desert Conservation Plan, even though Class I lands are available. Ex. RP1. For no other reason than to



find a loophole in the law, you have decided to propose an amendment to the California Desert Conservation Plan simply to allow this project to take place in an area that it is not allowed to take place in.

The Federal Land Management and Policy Act (FLMPA) declares that the BLM shall take any action necessary to prevent unnecessary or undue degradation of the lands designated for conservation. *See* 43 U.S.C. §§ 1732(b) and 1781©. However, this action is doing the exact reverse of what the law says: a plan amendment directly tailored to allow this project on these lands is the exact action necessary that would allow the unnecessary or undue degradation of the lands. Amending the desert conservation plan to specifically allow a project on otherwise protected Class L lands is undue and unnecessary when Class I lands, or other more suitable locations for solar panels (such as rooftops) are available and could be utilized for this project. Exs. A1-48.

The project site is on or near popular camping grounds. However, the DEIS does not assess how it will impact public access to the camping grounds, and whether how blocked access might affect pollution, traffic, and wildlife. Instead, the DEIS merely states on several occasions that it did not see much public access, but this is not a proper study of the amount of access needed in the area, and what blockage of the access could cause. Because the DEIS fails to assess the impact construction and operation of the project will have on public access, it fails to provide mitigation measures for this impact on the environment.

In addition, the usage of off-high way vehicles create adverse affects on the plant life and wildlife in the desert. Ex. RP. 3. However, the DEIS fails to adequately assess and mitigate for an increased usage of off-highway vehicles due to blockage of routes, construction, and operation. This needs to be addressed before the project can move forward.

## **16. The EIS Fails to Adequately Analyze Socioeconomic Impacts**

The EIS fails to address how the gas and electric bill of local ratepayers in the region would be affected. There is growing evidence that the cost of mandating renewable energy sources and providing the transmission lines to deliver it may outweigh environmental benefits, increase electricity prices, and, in the long run, reduce jobs instead of creating them. *See* Ex. PN4 & PN5. The implementation of mandates is proceeding so rapidly that energy consumers are being locked into higher rates for many years to come. *Id.* A recent study conducted by the Manhattan Institute reveals a patter of higher rates in states with renewable portfolio standards mandates compared with those states without such mandates. *Id.* A Berkeley National Laboratory study found that state implementation of renewables energy portfolio standards resulted in at least a .01% to 1% increase in ratepayer's bills. Ex. SE1. At the very least, the DEIS should have addressed the impact this project would have on rates charged to energy consumers.

**17. The DEIS Fails to Justify Approval of this Project in the Designated Areas**

The project site is contained on land subject to the Wilderness Act of 1964. The Wilderness Act defines wilderness as “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions...” Public Law 88-577, Section 2 (c). Prohibited uses include commercial enterprise, permanent and temporary roads (with exceptions for administration and emergency purposes); use of motorized vehicles, equipment, motorboats, or mechanical transport; landing of aircraft; or the erection of a structure or installation. *Id.* at 4(c). Lands that are designated as Wilderness under the Act may not be altered without an Act of Congress. *Id.* at 3(2)(b).

Construction within this wilderness area would affect vegetation and wildlife, increase dust generation, weed introduction, and wildlife migration. *See* DEIS generally. Additionally, construction would create traffic and lighting that will create temporary visual distractions. *Id.* Despite these effects, along with the Act’s express prohibition on commercial enterprise in this area, BLM arrives at the unjustified conclusion that the proposed action would have no effect on existing special designations. The EIS must address why this project, as presented, does not contravene Congress’s mandate that this area’s primeval character and influence be preserved.

**18. The DEIS Fails to Adequately Analyze and Mitigate Impacts to Traffic/Transportation**

The Regional Transportation Plan (RTP) is a long-range planning document that includes programs for traffic congestion, traffic, and roadways, among other things. *See* Ex. TR1. The Riverside County Congestion Management Program (RCCMP) was established to pursue the goals of alleviating traffic congestion, effectively using transportation funds, and improving air quality. *See* Ex. TR2. The DEIS completely fails to consider these plans, making no mention of them. The EIS must address whether this project coincides with the goals of the RTP and the RCCMP, and also, if the project will still allow for maintenance of the minimum level of service threshold required for this area’s general plan.

Agencies need not consider potential effects that are highly speculative or indefinite. They must consider only those indirect effects that are reasonably foreseeable. *Kleppe v. Sierra Club*, 427 U.S. 390 (1992). The construction phase of this project would include the building of roads to provide access to the project’s facilities. It is reasonably foreseeable that new roads providing access to the open desert area would increase off-road vehicle use in the area and access to areas that would otherwise be inaccessible. *See* Ex. H4.

**19. The DEIS Fails to Adequately Analyze and Mitigate Impacts to Utilities and Service Systems**

This project will generate solid waste during construction, operation, and maintenance. In order to reduce waste, this project should obtain its PV material from facilities that minimize waste, and air and water emissions. PV modules contain substances such as glass, aluminum and semiconductor materials that can be successfully recovered and reused, either in new PV modules or other products. *See* Ex. US1 & US3. This project should utilize the full product life cycle by obtaining its PV from a company that minimizes environmental impacts during raw material extraction, manufactures PV panels in a zero to little waste facility, provides future PV disassembly for material recovery for reuse and recycling; and minimizes the carbon footprint associated with the manufacture and transport of PV panels. *See* Ex. US2.

The growth of the PV industry results in greater waste and an increased need for PV recycling initiatives. *See* Ex. US2. Although recycling initiatives are less favorable economically, the lack of such initiatives will eventually result in hazardous material entering local waste streams. *Id.* This project applicant should utilize a PV recycling system, giving consideration to its environmental responsibility and not solely its economic benefit. To ignore this responsibility is to give an economic advantage to more environmentally destructive forms of energy production. *Id.*

**20. The EIS Fails to Adequately Analyze Impacts to Visual Resources**

The DEIS acknowledges that the project site is an excellent location for stargazing, but fails to analyze how light pollution from the operation of the solar plant will affect this visual resource. The DEIS also fails to provide any mitigation measures for light pollution that the solar plant may cause. Light pollution is a growing problem for the environment, especially for visual resources, and even the health and safety of humans and animals. Exs. VR1-VR4. The impact on the environment due to light pollution needs to be analyzed and mitigated for before the project can move forward.

**21. The EIS Fails to Adequately Analyze Impacts to Water Resources**

Water supply is an important consideration in utility-scale solar development. In fact, Congress required a study on methods to reduce the amount of water consumed by concentrating solar power systems. Ex. W1. Furthermore, the Colorado River has been under an enormous amount of pressure and is anticipated to be under even more pressure in the future due to climate-change impacts. Exs. W2-W11. The DEIS needs to accurately assess and mitigate for the impact on water sources in the area.

**22. The EIS Fails to Adequately Analyze Impacts to Wildland Fire Ecology**

The fire hazard risk in Riverside County is severe, though the DEIS calls the fire risk of the project site moderate. Exs. WF1-WF2. In addition, the study that the DEIS relies upon falsely assumes that vehicles and lightning in the area are the main causes of fire, when this study did not factor in the main causes of fire in an area where a solar plant is being constructed or operated. Solar plants present additional unique fire hazards. Ex. WF3. Because the DEIS does not properly assess the severity of the fire hazard on the project site if a solar plant were to be built there, the DEIS does not properly mitigate for this impact on the environment. This issue needs to be addressed before the project can move forward.

**23. The EIS Fails to Adequately Analyze Cumulative Impacts**

The EIS fails to adequately analyze cumulative impacts. The purpose of a cumulative impacts analysis is to examine the specific project and its interactive and synergistic adverse environmental effects when considered in the context of similar projects. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989 (9th Cir. 2004). The EIS should have considered all solar energy projects within the CDCA. Congress has recognized that “the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed.” 43 U.S.C. § 1781(a)(2). As a special area, Congress required that a “comprehensive, long-range plan for the management, use, development and protection of the public lands within the California Desert Conservation Area” be prepared. *Id.* at § 1781(d). Failing to look at similar projects, all requiring amendments to the CDCA Plan defies the Congressional mandate for a cohesive plan. See Exs. C1-7, C9-12, C23. Yet that is precisely what happened here. Section C of the attached index provides a thorough overview of the projects that should have been considered in the DEIS.

The geographic restrictions are also arbitrary with respect to cultural resources. You should have considered the impacts of all the projects on Chemehuevi, Fort Mojave and other Native American ancestral land.

**24. A Programmatic EIS Should Have Been Prepared**

A programmatic environmental impact statement (“PEIS”) should have been prepared. The Bureau of Land Management’s NEPA compliance handbook requires a PEIS under circumstances like those present here. “Connected actions are those actions that are ‘closely related’ and ‘should be discussed’ in the same NEPA document.” Ex. P1.

The Department of Interior has implicitly acknowledged that the large number of solar energy projects being proposed in the Southwest are intimately connected and a programmatic EIS is necessary by preparing a PEIS for “Solar Energy Development in Six Southwestern States.” Ex. P2. The problem is that the PEIS has not yet been approved and site-specific projects should tier off this

document. Ex. P3. Unfortunately, the McCoy Project is moving in reverse order, with a site-specific project coming before the programmatic impacts are understood.

**25. The EIS Fails to Identify Appropriate Mitigation**

“Implicit in NEPA’s demand that an agency prepare a detailed statement on ‘any adverse environmental effects which cannot be avoided should the proposal be implemented,’ 42 U.S.C. § 4332(C)(ii), is an understanding that an EIS will discuss the extent to which adverse effects can be avoided.” *Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989). NEPA requires that an EIS discuss mitigation measures with “sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Id.* A mitigation discussion must have at least some evaluation of the effectiveness of the mitigation. *South Fork Band Council of Western Shoshone v. Department of the Interior*, 588 F.3d 718 (9th Cir. 2009).

**26. The EIS Fails to Take a Hard Look at Security Issues**

The EIS fails to take a hard look at security issues, particularly with respect to transmission. As was recently demonstrated in San Diego, disruption in transmission can cause severe impacts on the electrical system. Exs. S1-S2. Furthermore, transmission systems are vulnerable as terrorism targets. Exs. S3-S4. A DG alternative is likely to reduce this risk. Ex. A48. Th security impact should be analyzed. *See, e.g., San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016 (9th Cir. 2006).

**B. The Project Violates the National Historic Preservation Act**

Consultation for this project has been inadequate. The EIS indicates that members of certain tribes were contacted, but there is no evidence of consultation. There is no indication that other interested persons or entities, such as CARE or La Cuna, were contacted despite having expressed interest in these projects repeatedly as well as having demonstrated a knowledge of the cultural resources in the area.

**C. The Project Violates the Federal Land Management and Policy Act**

The Federal Land Management and Policy Act (“FLPMA”) declares that public lands be managed for multiple uses in a manner that will protect the quality of the scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values. 43 U.S.C. § 1701 (a)(7) and (8). FLPMA provides a framework in which public lands are to be managed for the benefit of present and future generations. Congress required the BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b).



As part of FLPMA, Congress designated 25 million acres of Southern California as the Californian Desert Conservation Area (CDCA). 43 U.S.C. § 1781(c), finding that this desert and its resources are “extremely fragile, easily scarred, and slowly healed.” 43 U.S.C. § 1781(a)(2). In conjunction with this designation, Congress directed the BLM to implement a long-range plan for the management of this land within the framework of the CDCA, which is today known as the CDCA Plan. Under the CDCA Plan, BLM is required “to provide for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple use and sustained yield, and the maintenance of the environmental quality.” 43 U.S.C. § 1781(b). “Once a land use plan is developed, ‘[a]ll future resource management authorization and action . . . shall conform to the approved plan.’” *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). The CDCA Plan also requires that where an amendment is proposed, the BLM must “evaluate the effect of the proposed amendment on BLM’s management’s desert-wide obligation to achieve and maintain a balance between resource use and resource protection.” Ex. RP1.

Under Chapter 7 of the CDCA Plan, the BLM must analyze six criteria when considering a plan amendment. The BLM must 1) determine if the request has been properly submitted and if any law or regulation prohibits granting the requested amendment; 2) determine if alternative locations within the CDCA are available which would meet the applicant’s needs without requiring a change in the Plan’s classification, or an amendment to any Plan element, 3) determine the environmental affects of granting and/or implementing the applicant’s request; 4) consider the economic and social impacts of granting and/or implementing the applicant’s request; 5) provide opportunities for and consideration of public comment on the proposed amendment, including input from the public and from Federal, State, and local government agencies, and 6), evaluate the effect of the proposed amendment on BLM management’s desert-wide obligation to achieve and maintain a balance between resource use and resource protect. *See* CDCA Plan, Chapter 7, p. 121. Lastly, the BLM failed to consider alternatives that avoid the disruption of sensitive cultural resources, including the disturbance of Native American remains, which has already occurred in past similar projects. *See* Ex. B10.

A project of this scale is inappropriate for Class L lands. The project will result in an irretrievable commitment of resources and unavoidable destruction of natural resources. For example, the project will result in unavoidable adverse effects on cultural and visual resources.

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Thank you for your consideration of my client’s comments.

Sincerely,  
BRIGGS LAW CORPORATION

Mekaela M. Gladden





August 22, 2012

Jeffery Childers, MPA  
Project Manager RECO  
Bureau of Land Management  
22835 Calle San Juan De Los Lagos  
Moreno Valley, CA 92553

**Re: DEIS Comments on the McCoy Solar Energy Project**

Dear Mr. Childers:

Attached please find McCoy Solar, LLC's (McCoy's) comments on the Draft Environmental Impact Statement (DEIS) for the McCoy Solar Energy Project. McCoy has utilized the typical table format (Appendix A), adding Appendices B, C and D where more detail was needed.

McCoy would like to thank the BLM for what we generally believe to be a very comprehensive and thorough analysis and hope that our comments will be reflected in the Final EIS.

Sincerely,

A handwritten signature in blue ink that reads "Scott A. Busa".

Scott A Busa  
Executive Director, Business Development  
NextEra Energy Resources, LLC

Enclosures: Appendix A, B, C, D

August 22, 2012

ATTN: Jeffery Childers, Project Manager  
BLM California District Office  
22835 Calle San Juan de Los Lagos  
Moreno Valley, California 92553-9046  
Email: camccoysel@blm.gov



**Re: Soboba Band of Luiseño Indian's Comments on the Draft Environmental Impact Statement for the McCoy Solar Energy Project and Possible California Desert Conservation Area Plan Amendment (Federal Register, May 25, 2012 Notices, Vol. 77, No. 102: 31386)**

Dear Mr. Childers:

The Soboba Band of Luiseño Indians (Soboba Band), a federally recognized Indian tribe, submits the following comments on the Draft Environmental Impact Statement (DEIS) for the proposed McCoy Solar Energy Project (MSEP). The Soboba Band appreciates the Bureau of Land Management's observance of and the stated intent to preserve Tribal Cultural Resources during the construction, operation and decommissioning of the MSEP. The information provided to the Soboba Band on the MSEP has been assessed through our Cultural Resources Department, where it was concluded that although it is outside the Soboba Band's reservation, the project area does fall within an area of concern for the Soboba Band. The project location is in close proximity to known ancestral village sites and is located along a traditional route of migration and trade between tribes. The village sites and the migration and trade route are of cultural and religious significance to the Soboba Band and its members. Therefore the project location is regarded as highly sensitive to the people of Soboba. The Soboba Band is committed to ensuring that BLM's observance of Tribal Cultural Resources and the preservation of those resources in place are carried out for this project.

The Soboba Band requests that the BLM, the project proponent and their environmental and archeological consultants provide the Soboba Band with a thorough review of the comments submitted by the Soboba Band and that face-to-face informational and proper government-to-government consultation meetings with the Soboba Band and its Cultural Resources Department continue as required by Section 106 of the National Historic Preservation Act (NHPA), executive orders and Department of Interior and BLM regulations and policy.

The Soboba Band is concerned with the physical preservation of the ancestral village sites, the traditional tribal route of migration and trade, and the physical environment in which these historic properties/Tribal Cultural Resources are located. The physical environment surrounding these ancestral places have supported the Soboba Band's and other tribal peoples' ancestors since time immemorial. The Soboba Band maintains strong traditional ties with the land in the project area and with the Tribal Cultural Resources located there.

For these reasons, it is imperative that as America transitions to a cleaner energy future, we all do it in a manner that respects and preserves the remaining natural environment,

the animal and plant species that rely on those environments, our water resources and our historic and cultural resources. It is likewise imperative that we seek to strike a balance between near and long term impacts of large scale solar energy development on historic and cultural resources, species and the natural environment with the long term impacts of climate change.

The Soboba Band strongly supports the goals of energy independence and a move to clean renewable energy. The methods used to achieve these goals should strive for balance and sustainability. The DEIS does not manifest this type of consideration or balanced approach. The MSEP has an anticipated useful life of 30-40 years; however, after it is decommissioned it will leave behind a permanent scar of wind and water erosion, habitat degradation in a fragile desert ecosystem, and irreversible harm to historic and cultural resources. The MSEP's lasting legacy will not be one of sustainable clean energy, but one attesting to the continuing American legacy of "expediency at any cost" to Native Peoples, historic and cultural resources, species and the natural environment in the rush to achieve America's new destiny of energy independence and renewable energy.

The Soboba Band's comments are specifically directed at the DEIS and the provisions relating to Tribal Cultural Resources in particular. The Soboba Band understands that numerous environmental groups and individuals will submit comments relating to the unreasonably narrow statements of the BLM's purpose and need, the constrained consideration of alternatives, the insufficient depth of discussion of cumulative impacts, and the project impacts to biological resources, desert geology and soils resources, and water resources. To the extent that the Soboba Band shares their interests and beliefs, the Soboba Band supports the environmental groups and the individuals in their efforts to protect those resources.

The Soboba Band's specific comments, questions and concerns regarding the potential impacts on Tribal Cultural Resources discussed in Section 4.5 of the DEIS are as follows:

1. Page 4.5-1, Bullet Number 2, Under ***Area of Potential Effects***: Change from 0.5-mile buffer to a one-mile buffer.
2. Page 4.5-2, Paragraph 3; Under ***Evaluation of Historical Significance, NHPA § 106***: Please be specific when referring to the interested Indian tribes, as to how many tribes, as well as which ones, etc.
3. Page 4.5-2, Paragraph 3; Under ***Evaluation of Historical Significance, NHPA § 106***: There is no mention of the Tribal Historic Preservation Officers (THPO) amongst those whom the BLM is in consultation with for the development of the MOA. Interested tribes may differ from tribes that have official THPO programs.
4. Page 4.5-3, example "e", Under ***Assessing Effects to Historic Properties***: Please add "foreclosure" to the list.
5. Page 4.5-4, Under ***4.5.2 Applicant Proposed Measures***: Change wording from "cultural resources" to "historic properties". These proposed measures need to be sufficiently detailed out and included in the analysis.
6. Page 4.5-4, Paragraph 1, Under ***4.5.1 Direct and Indirect Impacts, Construction***: Change wording from "cultural resources" to "historic properties".

7. Page 4.5-4, Paragraph 1, Bullet 4, Under **4.5.1 Direct and Indirect Impacts, Construction**: Please include the dimension of the width for the base of the pole. Understanding specifics can be a deciding factor when evaluating any impacts.
8. Page 4.5-4, Paragraph 2, Under **4.5.1 Direct and Indirect Impacts, Construction**: Please change wording to “Constriction activities could, and in some cases will, diminish site integrity of historic properties...”
9. Page 4.5-4, Paragraph 2, Under **4.5.1 Direct and Indirect Impacts, Construction**: Please change the last sentence so that it reads “In addition, indirect effects to architectural historic properties and places of traditional importance could, and in some cases will, occur”.
10. Page 4.5-4, Paragraph 3, Under **4.5.1 Direct and Indirect Impacts, Construction**: The 6 archaeological sites that have yet to be evaluated for listing in the NRHP need to be evaluated, and their determination shall be included in the Final EIS.
11. Page 4.5-5, Paragraph 4; The Soboba Band attaches a cultural tie to the areas on and near the project area. Documented within the tribe’s oral histories, a migratory route in coincidence with Cahuilla Birdsongs extends through these locations. A more in-depth description can be provided confidentially during consultation with the Soboba Band.
12. Page 4.5-5, Paragraph 5; The issue of adverse affects on historic properties cannot be resolved unless there is complete avoidance. Please change the wording in this sentence to read “Mitigation Measure CUL-1 would serve as an attempt to lessen adverse effects to historic properties as a result of the specific provisions. Provisions to lessen the adverse effects will be described in a MOA prepared in accordance with §106.
13. Page 4.5-6, Paragraph 1, Under **Operation and Maintenance**: Change the wording throughout this paragraph from “cultural resources” to “historic properties”.
14. Page 4.5-6, Paragraph 1, Under **Operation and Maintenance**: There is in fact anticipated damage that could be done to known sites, therefore, please change the wording to read, “...under Alternative 1 is from anticipated potential damage of known sites, as well as unanticipated damage to inadvertently discovered archaeological sites.”
15. Page 4.5-6, Paragraph 1, Under **Operation and Maintenance**: Limiting the operation and maintenance activities to the project footprint would not guarantee that no additional impacts to historic properties would be expected, **rather**, by limiting operation and maintenance to footprint, **these impacts could be lessened** (please clarify and correct this in the text).
16. Page 4.5-6, Paragraph 2, Under **Operation and Maintenance**: Please specify which tribes are participating in the government-to-government consultation for this project.
17. Page 4.5-6, Paragraph 2, Sentence 2, Under **Operation and Maintenance**: This comment is repetitive of Page 5, Paragraph 4.
18. Page 4.5-6, Paragraph 1, Under **Decommissioning**: Change the wording throughout this paragraph from “cultural resources” to “historic properties”.
19. Page 4.5-9, Paragraph 1, Under **Decommissioning**: Change the wording throughout this paragraph from “cultural resources” to “historic properties”.

20. Pages 4.5-8 and 9, Paragraph 4, Under **Cumulative Impacts**: These provisions will not resolve the impact issues, they can only be lessened. The tribe feels that there are no absolute resolutions.

21. Pages 4.5-8 and 9, Paragraph 8, Under **Cumulative Impacts**: Change the wording from “cultural resources protective requirements” to “cultural resources/historic properties protective requirements”; Also second sentence should read, “...therefore, any related impacts on cultural resources/historic properties would be subject to cultural resources/historic properties -protective requirements”

22. Page 4.5-9, Under **Mitigation Measures, CUL-1**: Please be specific when referring to various Indian tribes, as to how many tribes, as well as which ones, etc.

23. Page 4.5-9, Under **Mitigation Measures, CUL-1**: There is no mention of the Tribal Historic Preservation Officers (THPO) amongst those whom the BLM is in consultation with for the development of the MOA.

24. Page 4.5-10, Paragraph 1: Please change sentence to read, “Resolution of adverse effects to historic properties will be developed in consultation and will include research documentation, data recovery excavations...”

25. Page 4.5-10, Paragraph 2: Please change sentence to read, “...a HPTP shall be prepared and implemented and shall contain procedures to avoid and/or mitigate impacts to historic properties”.

26. Page 4.5-10, example “a”: Change the wording from “the BLM may require” to “the BLM will require or shall require”.

27. Page 4.5-10, example “a”: Change the wording from “cultural resources values” to “historic properties values”.

28. Page 4.5-10, example “b”: Where is the SHPO review in this?

29. Page 4.5-10, example “c”: Please change wording to “...shall be monitored by a qualified archaeologist and designated tribal monitors”.

30. Page 4.5-10, example “f”: Change the wording to read, “A tribal cultural consultant will be required at culturally sensitive locations...”

31. Page 4.5-10, example “f”: Change the wording to read, “The Applicant shall retain all required tribal consultants.”

32. Page 4.5-11, example “g”: Change the wording to read, “...recording and evaluation of the find by a qualified archaeologist and tribal consultants, notification of the find to the BLM within 12 hours of the find, and appropriate treatment measures, including avoidance and data recovery.”

33. Page 4.5-11, Under **Residual Impacts after Mitigation Incorporated**: Change the wording throughout the paragraph from “cultural resources” to “cultural resources/historic properties”

Overall, the DEIS discussion of impacts to cultural resources is incomplete and inadequate under both NEPA and the NHPA. In the consideration of alternatives and discussion of impacts to cultural resources in Sections 4.5.3 through 4.5.8, the DEIS provides that mitigation measure CUL-1 “would serve to resolve adverse effects to historic properties as a result of the Project.” The description of mitigation measure CUL-1 in Section 4.5.10 provides that this measure will be prepared by BLM in a MOA and HPTP in consultation with the SHPO, Indian tribes and other identified consulting parties. Thus, at this time, the extent of the adverse impact to more than 95 known archeological sites/cultural resources due to damage to artifacts or features is unknown.

In addition, the Prehistoric Trails Network Cultural Landscape (PTNCL) identified in Section 3.5.1.6 of the DEIS remains unevaluated and the full impact of the project on this potential NRHP-eligible cultural landscape is unknown. As stated above, the Soboba Band ascribes cultural and religious significance to the PTNCL and an additional migratory route that coincides with Cahuilla Birdsongs. The lack of information on the impact to known cultural resources/historic properties, unevaluated resources and properties, and the lack of development of mitigation measures to address the harm to these resources fails to satisfy the requirements of NEPA and NHPA to take a “hard look” and renders the DEIS legally insufficient.

In relationship to the consideration of alternatives in Section 4.5.3 through Section 4.5.8, the primary request of the Soboba Band is avoidance of all cultural resources. In terms of the project footprint, with the exception of Alternative 4 (No Action Alternative), Alternative 1 appears to provide the best alternative for avoidance of cultural resources at this time. The Soboba Band will continue to discuss the project alternatives and the mitigation of impacts with the BLM, SHPO and other consulting parties, in appropriate government-to-government consultation.

Therefore, the Band formally requests that a face-to-face, government-to-government consultation meeting be scheduled in order to address these comments of the Soboba Band and other concerns. Please provide possible dates of availability for this meeting at your earliest convenience.

Thank you for your consideration of the Soboba Band’s comments. If you have any questions please contact me by phone or email using the contact information provided below.

Sincerely,

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Soboba Band of Luiseño Indians  
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August 28, 2012

VIA E-MAIL (ORIGINAL TO FOLLOW VIA OVERNIGHT MAIL)

Jeff Childers, Project Manager  
Bureau of Land Management  
22835 Calle San Juan De Los Lagos  
Moreno Valley, CA 92553  
Email: [jchilders@blm.gov](mailto:jchilders@blm.gov)

Re: Comments on Draft Environmental Impact Statement for McCoy Solar Energy Project

Dear Mr. Childers:

On behalf of California Unions for Reliable Energy ("CURE"), we submit these comments on the Draft Environmental Impact Statement, prepared pursuant to the National Environmental Policy Act,<sup>1</sup> for McCoy Solar LLC's ("Applicant") proposed 750-MW McCoy Solar Energy Project ("Project"). The Project requires an amendment to the California Desert Conservation Area Plan, a right-of-way from the Bureau of Land Management to construct, operate and decommission the facility, Riverside County permits, a programmatic agreement, a streambed alteration agreement and incidental take permits, among other agency actions. As explained more fully below, the DEIS does not comply with the requirements of NEPA. Therefore, BLM may not approve the CDCA Plan amendment or right-of-way until an adequate DEIS is prepared and circulated for public review and comment.

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

<sup>1</sup> 42 U.S.C. §§ 4321 et seq. (2010)

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degradation jeopardizes future growth and jobs by causing construction moratoriums, depleting limited air pollutant emissions offsets, consuming limited fresh water resources, 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 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 we offer these comments.

We have reviewed the DEIS and its technical appendices with assistance from the following technical consultants: Petra Pless (air quality), Scott Cashen (biological resources impacts), Matt Hagemann (hazardous materials impacts) and Thomas King (cultural resources impacts). Their comments and qualifications are appended hereto as Attachment A ("Pless Comments"), Attachment B ("Cashen Comments"), Attachment C1 ("King Comments"), Attachment C2 ("King 106 Comments") and Attachment D ("Hagemann Comments"). We request that you consider and respond to these consultants' comments separately and individually.

## I. INTRODUCTION

Since 2010, BLM has approved the development of renewable energy projects on more than 46,000 acres in California's desert.<sup>2</sup> That is just the beginning. Currently, BLM is reviewing applications for renewable energy projects to be developed on more than 50,000 acres in the California desert.<sup>3</sup> Recently, President Obama "fast-tracked" the development of some renewable projects in the California desert, including the Project.<sup>4</sup> While these projects will employ solar thermal, solar photovoltaic, or wind technology, each one will unavoidably tax the State's limited air, water, land, and biological resources to a potentially significant cumulative extent. The final toll taken by this historic energy boom on California's environment, public health, and natural resource base may not be known for

<sup>2</sup> [http://www.blm.gov/ca/st/en/prog/energy/Approved\\_Projects.html](http://www.blm.gov/ca/st/en/prog/energy/Approved_Projects.html).

<sup>3</sup> <http://www.blm.gov/ca/st/en/prog/energy/fasttrack.html>.

<sup>4</sup> See <http://www.whitehouse.gov/the-press-office/2012/08/07/we-can-t-wait-obama-administration-announces-seven-major-renewable-energy>.  
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several years or longer, but evidence shows that the effects may be severe. For example, during construction of NextEra's Genesis Solar Energy Project, an "unprecedented" discovery of significant cultural resources" occurred.<sup>6</sup> Specifically, "[g]rading activities associated with Project development had revealed and possibly destroyed numerous cultural items associated with a prehistoric human settlement."<sup>6</sup> The discoveries included a cremation site.<sup>7</sup>

Now, it is even more imperative that BLM's environmental review document adequately identify and analyze all foreseeable direct, indirect, and cumulative Project impacts. It is equally, if not more, imperative that any and all reasonable alternatives that are less environmentally damaging be presented and discussed as thoroughly as possible, together with any and all feasible mitigation measures. The strictures of NEPA and the maxims of sound public policy and informed environmental planning require nothing less. Based on these concerns, CURE and its members have a strong interest in ensuring that this Project complies with all applicable federal, State and local laws and regulations.

As explained below, the Project will generate a multitude of impacts in a number of impact areas, including: air quality, biological resources, cultural resources, water resources, and hazardous materials. The DEIS either mischaracterizes, misanalyzes, underestimates, or fails to identify many of these impacts. The DEIS, for example, fails entirely to identify the impacts associated with the construction of an engineered channel. Furthermore, many of the mitigation measures described in the DEIS will not in fact mitigate impacts to the extent claimed and in some instances may generate additional impacts that are not evaluated. For example, the DEIS requires the Applicant to construct Couch's spadefoot toad breeding ponds and a new water source for bighorn sheep to mitigate significant impacts to these species. However, the DEIS does not evaluate potential impacts associated with these Project features. The DEIS must be revised to resolve these inadequacies and must be recirculated for public review and comment.

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<sup>6</sup> Attachment E, Letter from Eldred Knas, Chairman of the Colorado River Indian Tribes to John Kalish, BLM, January 19, 2012, p. 1 (quoting Holly L. Roberts, Associate Field Manager, BLM, South Coast Field Office, regarding nature of discoveries at Genesis Solar Energy Project, during telephonic conference on December 6, 2011); see also Attachment F, Notice to Implement Controlled Grading Plan, February 24, 2012.

<sup>6</sup> *Id.* at p. 2.

<sup>7</sup> *Id.* at p. 5.

## II. THE DEIS FAILS TO SATISFY NEPA'S PURPOSE AND GOALS

NEPA requires that agencies take a "hard look" at the environmental consequences of a proposed action.<sup>8</sup> A hard look is defined as a "reasoned analysis containing quantitative or detailed qualitative information."<sup>9</sup> 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.<sup>10</sup> 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."<sup>11</sup> "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."<sup>12</sup> "[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."<sup>13</sup>

NEPA review makes information on the environmental consequences of a proposed action available to the public, which may then offer its insight to assist the agency's decision-making.<sup>14</sup> An EIS is more than just a disclosure device, however; it is an "action-forcing device" which ensures that NEPA's requirements are infused into the ongoing programs and actions of the federal government.<sup>15</sup> 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.<sup>16</sup> The impacts analysis must include a discussion of the relationship between short-term uses of the environment and the maintenance and

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<sup>8</sup> *Robertson v. Methuën 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) ["NEPA requires that a hard look be taken, if possible, before the environmentally harmful actions are put into effect"]

<sup>9</sup> BLM, NEPA Handbook, p. 55 (Jan. 2008) ("NEPA Handbook"), available at: [http://www.blm.gov/ngdata/et/medialib/blm/wo/Information Resources Management/policy/blm\\_nepa\\_handbook.Ppt.24487.File.dat/h1790-1-2008-1.pdf](http://www.blm.gov/ngdata/et/medialib/blm/wo/Information%20Resources%20Management/policy/blm_nepa_handbook.Ppt.24487.File.dat/h1790-1-2008-1.pdf).

<sup>10</sup> NEPA Handbook, p. 55; see also 40 C.F.R. § 1502.1 (2009).

<sup>11</sup> 40 C.F.R. § 1502.1.

<sup>12</sup> *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1872, 1880 (9th Cir. 1998).

<sup>13</sup> *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) [An injunction should issue only if the traditional four-factor test is satisfied].

<sup>14</sup> See *Robertson*, 490 U.S. at 350; *Dubois*, 102 F.3d at 1284.

<sup>15</sup> 40 C.F.R. § 1502.1.

<sup>16</sup> *Id.*

enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.<sup>17</sup> The discussion of impacts must include both “direct and indirect effects (secondary impacts) of a proposed project.”<sup>18</sup> The agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.<sup>19</sup> In this context, reasonable foreseeability means that “the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”<sup>20</sup>

In addition to a scientifically defensible analysis of project impacts, an EIS must also include a discussion of “appropriate mitigation measures not already included in the proposed action or alternatives.”<sup>21</sup> An EIS is not complete unless it contains “a reasonably complete discussion of possible mitigation measures.”<sup>22</sup> Mitigation includes “avoiding the impact altogether by not taking a certain action or parts of an action.”<sup>23</sup> It also includes “minimizing impacts by limiting the degree or magnitude of the action and its implementation.”<sup>24</sup> The mandate to thoroughly evaluate all feasible mitigation measures is critical to NEPA’s purposes.<sup>25</sup> Hence, a “perfunctory description” or a “mere listing” of possible mitigation measures is not adequate to satisfy NEPA’s requirements.<sup>26</sup> 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.<sup>27</sup>

Finally, an EIS should be “concise, clear, to the point, and supported by evidence that the agency has made the necessary environmental analyses.”<sup>28</sup> A concise and clear EIS that is supported by evidence ensures that federal agencies

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<sup>17</sup> *Id.* at § 1502.16.

<sup>18</sup> *Id.* at § 1502.16(b); see also *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

<sup>19</sup> *Sierra Club v. Marsh*, 976 F.2d at 767.

<sup>20</sup> *Id.*; see also *Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996).

<sup>21</sup> 40 C.F.R. § 1502.14(f).

<sup>22</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

<sup>23</sup> 40 C.F.R. § 1508.20(a).

<sup>24</sup> *Id.* at subd. (b).

<sup>25</sup> *Id.* at § 1500.1(c).

<sup>26</sup> *Neighbors of Cuddy Mountain*, 137 F.3d at 1380; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998).

<sup>27</sup> See *South Fork Band Council of Western Shoshone of Nevada*, 588 F.3d at 737, citing *National Parks*, 241 F.3d at 733.

<sup>28</sup> *Id.*

are informed of environmental consequences *before* making decisions and that the information is available to the public.<sup>29</sup> As the Council on Environmental Quality (“CEQ”) explains in its regulations, “[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.”<sup>30</sup>

The DEIS for the proposed Project fails to comply with these basic requirements. The DEIS fails to accurately and completely describe the Project. In addition, the BLM failed to take a hard look at all of the Project’s impacts. The DEIS also fails to adequately mitigate the Project’s significant adverse impacts. As a result, the DEIS precludes a meaningful analysis of the Project, and the BLM must revise and recirculate the DEIS for public review and comment before making a decision.

### III. THE DEIS FAILS AS AN INFORMATIONAL DOCUMENT

The purpose of NEPA is to ensure that every federal agency prepares an EIS for major federal actions significantly affecting the quality of the human environment.<sup>31</sup> 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.”<sup>32</sup>

The DEIS fails to address the magnitude of the impacts that will be posed by this Project on public lands in the fragile desert environment. The Project’s disturbance of more than 4,900 acres of desert lands will dramatically impact every aspect of the ecosystem on the Project site and surrounding area. Many of these impacts were not identified, disclosed, analyzed, or mitigated in the DEIS.

For example, the Project would potentially result in direct, indirect, and cumulative effects on numerous special-status plants, including BLM sensitive species.<sup>33</sup> However, because the Applicant has not conducted adequate surveys for these species,<sup>34</sup> the DEIS did not (and could not) adequately analyze and mitigate

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<sup>29</sup> *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996).

<sup>30</sup> 40 C.F.R. § 1502.2(g).

<sup>31</sup> 42 U.S.C. § 4332; 40 C.F.R. § 1501.

<sup>32</sup> 40 C.F.R. § 1502.1.

<sup>33</sup> DEIS, p. 4.3-6 - 7.

<sup>34</sup> *Id.* at p. 3.3-10 (“[r]are plant surveys are pending for the genetic line corridor”).  
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impacts to these species, and thus fails to disclose impacts. Similarly, the Project could result in significant impacts to Couch's spadefoot toad, a California species of concern and BLM sensitive species.<sup>36</sup> However, because the Applicant conducted Couch's spadefoot toad surveys outside of the proper identification season for the species, the DEIS did not (and could not) adequately analyze impacts to Couch's spadefoot toad and the DEIS' mitigation strategy for reducing any impacts to less than significant is completely meaningless. Additionally, the Project will adversely affect hundreds of cultural resources including cultural landscapes and buried cultural resources. The DEIS fails to adequately analyze impacts to these resources and provides no meaningful mitigation for impacts to any cultural resources. Instead, the DEIS explains that a future memorandum of agreement and historic preservation treatment plan would work out the details of a mitigation proposal<sup>36</sup> – a process that clearly violates the basic tenets of NEPA.

Many of these significant environmental resources on the Project site are irreplaceable. Once these resources are destroyed, they will be lost forever. The DEIS fails as an informational document because it does not adequately describe many of these resources. The DEIS fails to establish the Project setting, it does not fully and fairly describe the proposed action, it wholly omits discussion of a number of potentially significant environmental impacts, and it fails to adequately mitigate the Project's adverse impacts. As described below, the DEIS must be revised to fully describe the Project setting, the Project, the impacts from the Project, and mitigation. Once the DEIS' inadequacies are rectified, the revised DEIS must be circulated for public review and comment, as required by NEPA.

#### IV. THE DEIS MUST ACCURATELY DESCRIBE THE PROPOSED ACTION

A complete and consistent description of the proposed action is necessary for the public and decision makers to understand the effects of the proposed action.<sup>37</sup> A clear description results in more focused and meaningful public input and BLM participation, a more complete identification of issues, development of reasonable

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<sup>36</sup> *Id.* at p. 3.4-11.

<sup>37</sup> *Id.* at pp. 4.3-9 – 11.

<sup>38</sup> See 40 C.F.R. § 1502.15; see also *State of Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (starting point for analysis of whether a "critical decision" with respect to site development is "to describe accurately the 'federal action' being taken").

alternatives, sound analysis and interpretation of effects, focused analysis, and a sound and supportable decision.<sup>38</sup>

It follows that information in the DEIS that is incomplete and/or inaccurate will skew the environmental consequences analysis and prevent informed public input. Courts have held that “[w]here the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS [was] necessary to provide a reasonable, good faith, and objective presentation of the subjects required by NEPA.”<sup>39</sup>

Major Federal actions include not only those actions undertaken by federal agencies, but also “actions with effects that may be major and which are potentially subject to Federal control and responsibility.”<sup>40</sup> This includes “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies . . .”<sup>41</sup> Thus, when evaluating a project’s environmental impacts under NEPA, a federal agency must consider the entire project. “Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.”<sup>42</sup> This principle was established early in the development of NEPA law, and applies even when the federal involvement is limited to approving a relatively small aspect of the project.<sup>43</sup>

Further, the DEIS must address closely related “connected actions,” as well as similar actions and cumulative actions.<sup>44</sup> Under NEPA, actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

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<sup>38</sup> NEPA Handbook pp. 42-45

<sup>39</sup> *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005), citing *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988).

<sup>40</sup> 40 C.F.R. § 1508.18.

<sup>41</sup> *Id.* at § 1508.18, subd. (2).

<sup>42</sup> *Id.* at § 1502.4, subd. (a).

<sup>43</sup> *E.g.*, *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986); *Sierra Club v. Hodel*, 544 F.2d 1036, 1040-41 (9th Cir. 1976); *Cady v. Morton*, 527 F.2d 786, 795 (9th Cir. 1975).

<sup>44</sup> 40 CFR § 1508.25(a)

- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.<sup>45</sup>

Finally, where mitigation measures would, themselves, cause significant environmental impacts, NEPA requires an evaluation of those secondary (indirect) impacts.<sup>46</sup>

The DEIS completely fails to identify and analyze impacts related to the following Project components and connected actions: (1) the engineered channel,<sup>47</sup> (2) breeding ponds for Couch's spadefoot toad<sup>48</sup> and (3) a new water source for bighorn sheep.<sup>49</sup> These components are necessary parts of the Project and must be analyzed as part of the Project. The DEIS must be revised to consider these Project components and connected actions, and recirculated for public review and comment.

## V. THE DEIS FAILS TO ADEQUATELY DESCRIBE THE AREA AFFECTED BY THE PROPOSED ACTION

The BLM must analyze the Project's impacts on the affected environment.<sup>50</sup> This process begins by describing "the present condition of the affected resources within the identified geographic scope" and by providing "a baseline for cumulative effects analysis."<sup>51</sup>

Once a project begins, the "pre-project environment" becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources

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<sup>45</sup> *Id.* at §1508.25(a)(1).

<sup>46</sup> 40 C.F.R. § 1502.16(b).

<sup>47</sup> See DEIS, p. 4.3-28 (Mitigation measure VEG-10 states "[d]esign the engineered channel discharge points to maintain the natural surface drainage patterns between the engineered channel and the outlet of the natural washes that flow toward the south and east, downstream of the Project"). The DEIS contains no description of the proposed engineered channel or any analysis of impacts associated with it.

<sup>48</sup> See DEIS, pp. 4.3-43 – 44 (Mitigation measure WIT-14 requires the Applicant to create breeding ponds for Couch's spadefoot toads if breeding sites cannot be avoided). The DEIS contains no description of the ponds and no analysis of impacts associated with them (such as ground disturbance activities, habitat conversion, or water use).

<sup>49</sup> See DEIS, pp. 4.3-39 – 40 (Mitigation measure WIL-11 requires the Applicant to create a new water source to compensate for loss of bighorn sheep spring foraging habitat). The DEIS contains no description of the new water source or any analysis of impacts associated with it.

<sup>50</sup> NEPA Handbook, p. 53.

<sup>51</sup> *Id.*

impossible.<sup>62</sup> Without establishing the baseline conditions which exist in the vicinity of the proposed Project before it is built, there is simply no way to determine what effect the proposed large-scale solar facility will have on the environment and, consequently, no way to comply with NEPA.<sup>63</sup>

An accurate description of the affected environment is an essential prerequisite for an adequate analysis of Project impacts. For example, information on the type(s) and level(s) of habitat disturbance in the Project area is necessary to make inferences about the presence, abundance, and distribution of the special-status species that may be impacted by the Project. Here, however, some baseline information was *collected at the wrong time* and, in some instances, is *yet to be collected*.

#### A. The DEIS Fails to Adequately Describe the Area Affected for Biological Resources

The DEIS fails to accurately and adequately describe the area affected for numerous biological resources. Without an accurate description of the affected environment, there is no way to determine the Project's impacts to biological resources and, therefore, no way to apply appropriate mitigation for those impacts. To comply with NEPA, the DEIS must be revised to include accurate and complete descriptions of baseline conditions.

##### 1. The DEIS Fails to Disclose the Ecological Value of the Project Site

According to the DEIS, the Northern and Eastern Colorado Desert Coordinated Management Plan ("NECO Plan") is "a landscape-scale, multi-agency planning effort approved in 1992 that protects and conserves natural resources while simultaneously balancing human uses of the California portion of the Sonoran Desert ecosystem."<sup>64</sup> The DEIS recognizes that the NECO Plan provides protections to wildlife and plants beyond that of the CDCA Plan.<sup>65</sup> Yet, the DEIS largely ignores ecological values established by the NECO Plan.

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<sup>62</sup> *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988), citing *LaFlamme v. FERC*, 842 F.2d 1063, 1071 (9th Cir. 1988).

<sup>63</sup> *Id.*

<sup>64</sup> DEIS, p. 3.3-24.

<sup>65</sup> *Id.* at p. 3.3-24.

Specifically, the DEIS completely omits the fact that the Project lies in an "ecological hotspot" designated by the NECO Plan.<sup>56</sup> The DEIS ignores that, under the NECO Plan, the Project site is one of the largest unfragmented areas in the NECO Plan area<sup>57</sup> (which covers over 5 million acres).<sup>58</sup> Finally, the DEIS fails to disclose that the Project site has high animal and plant species richness compared to other locations in the NECO Plan area.<sup>59</sup> As expert biologist Scott Cashen explains in his comments, given the high ecological values of the Project site, "[t]he effects of the Project on plants, animals, and the ecological integrity of the region would be severe."<sup>60</sup> Further, Cashen shows how the DEIS' conclusion that there would be no adverse effect from the Project following mitigation is unsupported by any evidence.<sup>61</sup> Rather, "ecological consequences of eliminating a broad expanse of relatively undisturbed Colorado Desert habitat cannot be mitigated to the point of no adverse effect."<sup>62</sup>

2. The DEIS Fails to Adequately Describe the Area Affected for Sensitive Natural Vegetation Communities

The DEIS provides inconsistent information on the sensitive natural communities (as recognized by the CNDDDB) that occur on the Project site. Specifically, the DEIS states the Project site contains two sensitive natural communities -- Desert Dry Wash Woodland and Creosote Bush-Big Galleta.<sup>63</sup> This conflicts with information provided to the BLM by the Applicant's consultant, which indicates there are four sensitive natural communities on the Project site -- Palo Verde-Ironwood Woodland Alliance, Mesquite Bosque Alliance, Desert Lavender Scrub Alliance, and Big Galleta Shrub Steppe Alliance.<sup>64</sup> Also, table 3.3-1 in the DEIS suggests the Creosote Bush-Big Galleta Grass Association does not occur on the solar plant site.<sup>65</sup> This conflicts with text in the DEIS that states the solar plant site contains "ephemeral swales (supporting a desert wash scrub of creosote

<sup>56</sup> See Cashen Comments, p. 2 and Figure 1.

<sup>57</sup> See *Id.* at p. 2 and Figure 2.

<sup>58</sup> DEIS, p. 3.3-24.

<sup>59</sup> See Cashen Comments, p. 2 and Figures 3 and 4.

<sup>60</sup> Cashen Comments, p. 2.

<sup>61</sup> *Id.* at pp. 2-3.

<sup>62</sup> *Id.* at p. 2.

<sup>63</sup> DEIS, p. 3.3-2.

<sup>64</sup> See Attachment G, MSEP Response to BLM's Biological Resources Data Requests, January 11, 2012.

<sup>65</sup> DEIS, p. 3.3-2.

bush and big galleta grass).<sup>66</sup> These inconsistencies must be rectified in a revised DEIS.

Desert dry wash woodlands are designated a special natural community by the California Department of Fish and Game and the BLM, and they are designated as Waters of the State. As Cashen states in his comments, “[t]he importance of desert wash and desert riparian habitats to wildlife populations cannot be overstated. For example, these habitats support more bird species at greater densities than any other desert habitats with the possible exception of some palm oasis habitats.”<sup>67</sup> The DEIS indicates there are 4.2 acres of the Blue Palo Verde-Desert Ironwood Woodland Alliance (or “Desert Dry Wash Woodland” vegetation community) on the Project site.<sup>68</sup> Cashen obtained evidence that shows the BLM greatly underestimated the amount of Desert Dry Wash Woodland on the Project site, including vegetation surveys and the classification scheme that were used to prepare the NECO Plan, Google Earth imagery, LANDFIRE data, vegetation mapping that was conducted for the Blythe Solar Power Project, and the DEIS itself.<sup>69</sup> Because the DEIS underestimates the amount of Desert Dry Wash Woodland, it follows that the DEIS also underestimates the Project’s adverse effect on Desert Dry Wash Woodland. The DEIS must be revised to reflect the accurate baseline conditions for Desert Dry Wash Woodland and an accurate analysis of the extent of the Project’s effect on it.

### 3. The DEIS Fails to Adequately Describe the Area Affected for Rare Plants

The DEIS fails to adequately describe the area affected by the Project for numerous rare plant species. First, CDFG survey guidance states that buffer areas should be surveyed for special-status plants when indirect project effects could potentially extend offsite.<sup>70</sup> The DEIS states that the Project may indirectly impact special-status plant species offsite,<sup>71</sup> but the special-status species surveys that were conducted for the Project did not incorporate a buffer around the solar plant site.<sup>72</sup>

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<sup>66</sup> *Id.* at p. 3.3-5.

<sup>67</sup> Cashen Comments, p. 5.

<sup>68</sup> DEIS, Table 3.3-1.

<sup>69</sup> Cashen Comments, pp. 5-8.

<sup>70</sup> *Id.* at p. 10.

<sup>71</sup> DEIS, p. 4.3-7.

<sup>72</sup> Attachment G; see also BRTR, Figure 5A.  
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Second, the Applicant's consultant did not conduct special-status plant surveys or vegetation mapping along the gen-tie line and access road routes proposed for Project Alternative 3.<sup>75</sup> Nevertheless, without any evidence, the DEIS concludes Project Alternative 3 (Central and Western Routes) would result in slightly reduced impacts to Harwood's milk-vetch and Utah milkvine, but direct impacts to other special-status plants would be largely the same as Alternative 1.<sup>76</sup> The DEIS appears to suggest that surveys for the Blythe Solar Power Project ("BSPP") enable the BLM to evaluate impacts of the various gen-tie routes that are being considered for the Project.<sup>75</sup> As Cashen explains in his comments, the BLM cannot use survey data collected for another project (i.e., the BSPP) as the basis for its conclusion here because the Western Route was not surveyed for the BSPP, the consultant that surveyed the BSPP failed to conduct appropriately timed fall plant surveys and the surveys conducted for the BSPP are outdated.<sup>76</sup>

Third, the DEIS fails to identify plants to the taxonomic level necessary to determine rarity. *Chaenactis carphoclinia* was detected on the Project site.<sup>77</sup> In his comments, Cashen explains there are two varieties of *C. carphoclinia* -- *C. carphoclinia* var. *carphoclinia* and *C. carphoclinia* var. *peirsonii* -- and both varieties have the potential to occur on the Project site.<sup>78</sup> *C. carphoclinia* var. *peirsonii* is listed as a CNPS 1B.3 species with a "Heritage Rank" of G5T1/S1.3 (which indicates it is critically imperiled in the State because of extreme rarity).<sup>79</sup> The DEIS does not identify the plant variety on the Project site to the taxonomic level necessary to determine rarity and, therefore, the DEIS does not provide the information needed to evaluate Project impacts to these special-status plant species.

Finally, the DEIS itself states that some of the rare plant surveys for the Project have not been completed.<sup>80</sup> Rather than include pre-project conditions as determined by pre-project surveys, the DEIS requires that "[a]t least 30 days prior to construction, the Applicant shall ensure that botanical surveys have been fully

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<sup>75</sup> Cashen Comments, p.10.

<sup>76</sup> DEIS, pp. 4.3-12 -13.

<sup>75</sup> *Id.* at p. 4.4-18.

<sup>76</sup> Cashen Comments, p. 11.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> DEIS, p. 3.3-10.

performed and reported for the Project area.”<sup>81</sup> Similarly, the DEIS requires post-approval report of “the number or percent of the occurrence that will be directly affected, and indirectly affected by changes in drainage patterns or altered geomorphic processes.”<sup>82</sup> Post-project data does not provide the necessary baseline conditions to conduct an adequate impact analysis prior to Project approval.

In short, the Applicant’s rare plant survey effort to date does not provide an adequate basis for determining the Project’s impacts to rare plants. The Applicant must complete adequate rare plant surveys *prior to* Project approval in order to establish the environmental baseline for the Project site. This information is fundamental to evaluating impacts and formulating mitigation, and must be provided in a revised DEIS. Although the DEIS attempts to analyze the potentially significant impacts and formulate mitigation measures for rare plant species, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to rare plants are actually identified through an adequate survey effort. Hence, the DEIS fails to provide an adequate description of the area affected, analysis of the potential impacts and identification of mitigation for these rare plants. Once the Applicant submits the results of the rare plant surveys and all parties have an opportunity to review this analysis, the DEIS must be revised and recirculated for public review and comment.

#### 4. The DEIS Fails to Adequately Describe the Area Affected for Mojave Fringe-Toed Lizard

The DEIS acknowledges that many Mojave fringe-toed lizard populations are quite small and that Mojave fringe-toed lizards were detected along the gentle route south of I-10 (75 and 188 lizards during the spring and fall surveys, respectively).<sup>83</sup> The DEIS further acknowledges Mojave fringe-toed lizards: (a) have patchy distribution; (b) are vulnerable to local extirpations from habitat disturbance and fragmentation; and (c) are dependent on fragile ecosystems requiring protection against both direct and indirect disturbance.<sup>84</sup> Aside from the population on the Project site, the DEIS fails to describe the distribution and status of Mojave fringe-toed lizard populations in the region. Cashen explains that this failure precludes

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<sup>81</sup> *Id.* at p. 4.3-29.

<sup>82</sup> *Id.* at p. 4.5-30.

<sup>83</sup> DEIS, pp. 3.4-8 - 9.

<sup>84</sup> *Id.*

the ability to evaluate the relative significance of Project impacts to the population that occurs south of I-10.<sup>85</sup>

In addition, the DEIS states the Mojave fringe-toed lizard is an obligate to loose sand.<sup>86</sup> However, the map of survey results shows that a considerable number of Mojave fringe-toed lizards were detected along the genetic route east of the area that has been mapped as habitat for the species.<sup>87</sup> It is Cashen's opinion that this evidence suggests that habitat for the species was not accurately mapped.<sup>88</sup> "This is especially problematic because the BLM's proposed mitigation is based on impacts to stabilized or partially stabilized desert dune habitat, not on impacts to habitat actually occupied (or potentially occupied) by the species."<sup>89</sup>

#### 5. The DEIS Fails to Adequately Describe the Area Affected for Golden Eagles

The DEIS fails to adequately describe the affected environment for the golden eagle because the Applicant did not provide sufficient information. The Applicant conducted surveys for golden eagles in 2010 and 2011.<sup>90</sup> However, the U.S. Fish and Wildlife's Draft Eagle Conservation Plan Guidance suggests *at least three years* of golden eagle data be collected<sup>91</sup> (and, according to a U.S. Fish and Wildlife Service biologist, "three years may not be enough to develop a good trend-line on occupancy and productivity")<sup>92</sup>. Since the Applicant failed to conduct sufficient surveys, BLM could not establish an accurate baseline for the golden eagle.

Although the DEIS attempts to analyze the potentially significant impacts and formulate mitigation measures for the golden eagle, this analysis may bear little resemblance to the analysis and mitigation that will be required after considering the survey results. Hence, the DEIS fails to provide an adequate description of the affected environment, analysis of the potential impacts and identification of mitigation for the golden eagle.

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<sup>85</sup> Cashen Comments, p. 13.

<sup>86</sup> DEIS, p. 3.4-8.

<sup>87</sup> DEIS, Figure 3.4-3.

<sup>88</sup> Cashen Comments, p. 13.

<sup>89</sup> *Id.*

<sup>90</sup> DEIS, p. 3.4-13.

<sup>91</sup> Available at [http://www.fws.gov/windenergy/docs/ECP\\_draft\\_guidance\\_2\\_10\\_final\\_clean\\_omb.pdf](http://www.fws.gov/windenergy/docs/ECP_draft_guidance_2_10_final_clean_omb.pdf)

<sup>92</sup> See Attachment H, email from Joel Pagei to Tannika Engelhard, April 20, 2011.

6. The DEIS Fails to Adequately Describe the Area Affected for Bats

The NECO Plan requires the Applicant to identify all significant bat roosts within one mile of the Project's boundaries in order to identify potential impacts from loss of foraging habitat to core population units.<sup>93</sup> The BRTR acknowledges that the Applicant's consultant did not conduct focused bat surveys, and thus did not identify bat roosts within one mile of the Project site in accordance with NECO Plan requirements.<sup>94</sup> The BRTR rationalizes the omission of focused surveys because, "no bats are known to roost or hibernate in the sparse creosote bush scrub that typifies this [Project] area" and surveys are not required to conclude that the Project may permanently reduce bat foraging opportunities.<sup>95</sup> This rationale does not excuse the Applicant from complying with the NECO Plan. Thus, at a minimum, the Project does not comply with the requirements of the NECO Plan.

Cashen explains that the BRTR's rationale also includes partial and incorrect information.<sup>96</sup> First, scientific literature does not support the statement that no bats are known to roost or hibernate in the sparse creosote bush scrub habitat. To the contrary, some bats are known to roost in creosote bush habitat. For example, the Revised Staff Assessment prepared for the Genesis Solar Energy Project indicates the California leaf-nosed bat (a BLM Sensitive Species and a CDFG Species of Special Concern) has been documented "near the McCoy Mountains in creosote bush scrub habitat where approximately 300 adults were observed roosting."<sup>97</sup> Other special-status species, such as the spotted bat (a BLM Sensitive Species and a CDFG Species of Special Concern), are also known to roost in desert scrub habitat.<sup>98</sup>

Second, the BRTR acknowledges some bat species may roost in trees or rock crevices.<sup>99</sup> Trees are clearly present on the Project site, and arguably, so are rock crevices.<sup>100</sup>

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<sup>93</sup> BRTR, pp. 20 and 25.

<sup>94</sup> *Id.* at p. 25.

<sup>95</sup> *Id.*

<sup>96</sup> Cashen Comments, pp. 15-17.

<sup>97</sup> *Id.* at pp. 16-17, quoting California Energy Commission, 2010 Jun. Revised Staff Assessment for the Genesis Solar Energy Project, Biological Resources Table 4, p. C.2-59 (emphasis added).

<sup>98</sup> Cashen Comments, p. 16.

<sup>99</sup> BRTR, p. 25.

<sup>100</sup> Cashen Comments, p. 16.

Finally, a bat roost was documented on the Project site. The BRTR states, “[a] natural cavity with a small amount of bat guano, but no current use by bats, was found within the southwest corner of the Solar Plant Site (Figure 13). Based on the small amount of guano, it would not be considered a biologically significant roost.”<sup>101</sup> It also states, “[c]ave with guano. Cave in north caliche bank of large wash. One meter wide by 2 meter high with depth of > 2 m. Guano on walls and ledges.”<sup>102</sup> Cashen explains that a “small amount” of guano is no basis to conclude the roost is biologically insignificant.<sup>103</sup> According to the Organization for Bat Conservation, “[i]f you have a large roost of bats there is a chance that guano might build up just a little, however natural elements such as rain, sun, and wind will break down the guano naturally.”<sup>104</sup> Evidence shows that there are suitable bat roosting substrates on the Project site and within 1-mile of its boundaries. The DEIS must be revised accordingly.

Hence, the DEIS fails to provide an adequate description of the affected environment, analysis of impacts and identification of mitigation for bats.

7. The DEIS Fails to Adequately Describe the Area Affected for Morrison’s Blister Beetle

Morrison’s blister beetle has a NatureServe rank of G1G2 S1S2, indicating it is critically imperiled at both the global and State level.<sup>105</sup> The CNDDR has only 10 records of this species occurring in California.<sup>106</sup>

Morrison’s blister beetle was documented on the Project site during the 2011 survey effort.<sup>107</sup> This constitutes an extremely significant discovery<sup>108</sup> that was not disclosed or analyzed in the DEIS.

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<sup>101</sup> BRTR, p. 19.

<sup>102</sup> *Id.*, Appendix K.

<sup>103</sup> Cashen Comments, p. 16.

<sup>104</sup> Cashen Comments, p. 16, quoting Organization for Bat Conservation, 2012, Bat House FAQ [online]. Available at: <http://www.batconservation.org/drupal/bat-house/faq>.

<sup>105</sup> Cashen Comments, p. 17.

<sup>106</sup> *Id.*

<sup>107</sup> BRTR, Appendix F. See also 2011 Fall Plants and Supplemental Wildlife Survey Report, Appendix B.

<sup>108</sup> Cashen Comments, p. 17.

Hence, the DEIS fails to provide an adequate description of the affected environment, analysis of impacts and identification of mitigation for Morrison's blister beetle.

8. The DEIS Fails to Adequately Describe the Area Affected by Desert Rosy Boa

According to the DEIS, the Project site does not contain the preferred substrate for the desert rosy boa, and thus the species is unlikely to occur onsite. This conclusion conflicts with scientific literature, information provided in the NECO Plan, and the DEIS' discussion of habitat associated with the species.<sup>109</sup>

Hence, the DEIS fails to provide an adequate description of the affected environment, analysis of impacts and identification of mitigation for desert rosy boa.

9. The DEIS Fails to Adequately Describe the Area Affected for Ferruginous Hawk

The DEIS concludes that the ferruginous hawk is not expected to occur on the Project site. The ferruginous hawk is a USFWS Bird of Conservation Concern and a CDFG Watch List species.<sup>110</sup> Those designations apply to birds on their wintering grounds, ferruginous hawks do not breed in California.<sup>111</sup>

The DEIS indicates ferruginous hawks were not observed during Project surveys. However, the Applicant's consultant did not conduct surveys during the months that ferruginous hawks occur in California.<sup>112</sup> Ferruginous hawks have been documented at the adjacent BSPP site on several occasions, and as the DEIS acknowledges, the Project site contains suitable wintering habitat for the species.<sup>113</sup> There is no evidence to support the DEIS' conclusion that the species is "not expected to occur" on the Project site.<sup>114</sup> To the contrary, evidence shows that the ferruginous hawk will occur on the Project site.

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at pp. 17-18.

<sup>114</sup> *Id.* at p. 18.

10. The DEIS Fails to Adequately Describe the Area Affected for Burro Deer

The BRTR states “[t]here is marginal habitat for the burro deer on the Solar Plant Site, and suitable habitat within the larger washes that cross the Linear Corridor (north of I-10).”<sup>115</sup> Evidence shows otherwise. Evidence shows that burro deer are almost totally dependent on microphyll woodlands (desert washes with trees, usually ironwood and palo verde), which are present throughout much of the Project site.<sup>116</sup> The DEIS must be revised to include an adequate description for the area affected for burro deer. Without an accurate baseline description, the Project’s impacts to burro deer cannot be adequately assessed or mitigated.

11. The DEIS Fails to Adequately Describe the Area Affected for Burrowing Owl

The DEIS and BRTR provide inconsistent information regarding the baseline conditions for burrowing owl. The DEIS states that surveys identified 11 active burrows and three owl pairs on the Project site.<sup>117</sup> The BRTR reports that at least 18 active burrows were detected on the Project site.<sup>118</sup> This is a significant difference that must be rectified in a revised DEIR.

Further, it appears that even the 18 active burrows identified in the BRTR underestimates the number of active burrows on the Project site. Cashen explains that, in accordance with CDFG recommendations, four independent surveys are necessary to provide reliable information on the presence of burrowing owls.<sup>119</sup> According to the DEIS, only three protocol-level burrowing owl surveys were conducted.<sup>120</sup> Even if the Applicant had performed a sufficient number of surveys, in Cashen’s opinion, the surveys conducted were inadequate.<sup>121</sup>

The California Burrowing Owl Consortium Guidelines requires all burrows to be surveyed four times and that the Project buffer area be surveyed.<sup>122</sup> Cashen

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<sup>115</sup> BRTR, p. 48.

<sup>116</sup> Cashen Comments, p. 21.

<sup>117</sup> DEIS, p. 4.4-38.

<sup>118</sup> BRTR, Figures 11 and Appendix J.

<sup>119</sup> Cashen Comments, p. 14.

<sup>120</sup> DEIS, p. 3.4-12.

<sup>121</sup> Cashen Comments, p. 14.

<sup>122</sup> *Id.*, pp. 14-15.

reviewed the survey data in the BRTR and found that the surveys did not meet these requirements.<sup>123</sup>

Adequate surveys for burrowing owls must be conducted in accordance with the California Burrowing Owl Consortium Guidelines prior to Project approval. Only then can an accurate analysis of the Project's impacts on burrowing owls be performed.

#### 12. The DEIS Fails to Adequately Describe the Area Affected for Gila Woodpecker

The Gila woodpecker is listed as endangered under the California Endangered Species Act. The BLM has concluded that this woodpecker is not expected on the Project site because it is outside of the Gila woodpecker range, it does not contain suitable nesting habitat and the nearest record of the species is 9.4 miles east of the Project site.<sup>124</sup> Cashen reviewed the literature and documentation provided by the Applicant and found that does not support the conclusion that the Gila woodpecker does not occur on the Project site.<sup>125</sup>

The information reveals that Gila woodpeckers were recently documented at the adjacent BSPP during construction monitoring surveys.<sup>126</sup> According to Cashen, the presence of these birds during the breeding season strongly suggests they were nesting on, or in close proximity to, the BSPP site.<sup>127</sup> The DEIS completely fails to disclose this information.

The information also shows that Gila woodpeckers have been documented in Palo Verde-Ironwood woodlands at other sites west of the Colorado River.<sup>128</sup> Based on recent scientific literature, Cashen concludes that Gila woodpeckers are known to occur in mature xeric riparian woodlands, just like those that occur in the Project area.<sup>129</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> DEIS, Table 3.4-3.

<sup>125</sup> Cashen Comments, p. 18.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

Finally, the information shows that the DEIS does not accurately report nesting habitat for Gila woodpeckers. Cashen notes that several studies and surveys have documented Gila woodpeckers breeding in dry desert wash woodlands such as those that occur in the Project area.<sup>130</sup> In fact, according to the California Natural Diversity Database, 9 of the 34 (26%) documented occurrences of Gila woodpeckers within California are associated with vegetation communities similar to those present on the Project site.<sup>131</sup>

The DEIS fails to accurately describe baseline conditions for the Gila woodpecker. Without an adequate description, there is simply no way to analyze the Project's impacts to this species. Thus, the DEIS must be revised.

### 1.3 The DEIS Fails to Adequately Describe the Area Affected for Couch's Spadefoot Toad

The DEIS does not adequately describe the affected area for Couch's spadefoot toad, a BLM sensitive species, because the Applicant failed to provide sufficient information on Couch's spadefoot toads to enable BLM to determine significant impacts under NEPA. The DEIS states that the Applicant's surveys for Couch's spadefoot toads "were *conducted outside the proper identification season* for this species, which is after summer rains."<sup>132</sup> The DEIS admits that "*it is difficult to assess the potential for direct and indirect impacts to Couch's spadefoot toads without species-specific survey results for this species*"<sup>133</sup> Rather than require the Applicant to provide the necessary information prior to Project approval, "mitigation was developed to determine the potential presence of Couch's spadefoot toads in and near Project facilities..."<sup>134</sup> BLM's approach is all wrong. The presence or absence of Couch's spadefoot toad must be determined, through adequate surveys, *prior* to Project approval. Without establishing the baseline conditions for Couch's spadefoot toad before the Project is

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<sup>130</sup> *Id.* at p. 19.

<sup>131</sup> *Id.*

<sup>132</sup> DEIS, p. 3.4-11 (emphasis added).

<sup>133</sup> *Id.* at p. 4.4-13.

<sup>134</sup> *Id.* at p. 4.4-21.

built, there is simply no way to determine what effect the Project will have on the species and, consequently, no way to comply with NEPA.<sup>135</sup>

This is exactly what happened at the Genesis Solar Energy Project. Focused surveys for Couch's spadefoot were not conducted prior to project approval. Surveys and reporting were deferred until after approval. The report that was eventually prepared by the applicant stated that no potential breeding habitat exists on the Genesis site and, therefore, no impacts on the species were expected. The applicant's assessment was wrong. During construction of the project, two Couch's spadefoot toads were found.<sup>136</sup> Here, the Applicant should be required to provide focused survey data for public review prior to Project approval.

Although the DEIS attempts to analyze the impacts and formulate mitigation measures for Couch's spadefoot toad, this analysis may bear little resemblance to the analysis and mitigation that will be required after significant impacts to Couch's spadefoot toads are actually identified through an adequate survey effort. Hence, the DEIS fails to provide an adequate description of the affected environment, analysis and identification of mitigation for Couch's spadefoot toad. Once the Applicant submits the results of the surveys and all parties have an opportunity to review this analysis, the DEIS must be revised and recirculated for public review and comment.

In sum, without adequate pre-Project site surveys, the DEIS does not and cannot contain accurate or reliable analyses of the Project's significant impacts to biological resources. Surveys must be conducted and survey results considered prior to the approval of the Project so that the public and decision-makers will have an accurate picture of the biological resources that will be impacted. Only after these surveys are complete and the results included in the DEIS, can the DEIS adequately describe the affected environment, and analyze and identify mitigation measures for special-status plants and wildlife.

#### **B. The DEIS Fails to Adequately Describe the Area Affected for Cultural Resources**

The DEIS' description of baseline conditions for cultural resources is grossly inadequate. For starters, the DEIS erroneously defines "cultural resource." As

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<sup>135</sup> *Half Moon Bay Fishermen's Marketing Ass'n. v. Carlucci*, 857 F.2d at 510, citing *LoPlanche v. FERC*, 842 F.2d at 1071.

<sup>136</sup> Cashion Comments, p. 38.

explained by expert archaeologist Thomas King in his comments, BLM's definition of "cultural resource" is extremely narrow, emphasizing only specific, small sites and isolates on or in the ground that are recognized, identified, and valued by archaeologists through archaeological surveys. BLM's definition of "cultural resource" excludes "larger, more inclusive phenomena like landscapes, viewsheds...and 'districts.'"<sup>137</sup> In doing so, the DEIS "distorts and devalues even the physical, land-linked 'cultural resources' that BLM recognizes" and "discriminates against the interests of tribes and other minorities..."<sup>138</sup>

BLM's narrow "definition of 'cultural resources' allows it to ignore an unknowably large range of such resources that do not happen to fit within its definition."<sup>139</sup> For example, the DEIS fails to describe the following cultural resources: the beliefs and values of local residents and visitors (particularly as they relate to the land, air and water), the cultural values ascribed by local residents to the desert environment in general, the desert environment as expressed in art and literature, the value of desert viewsheds and natural quiet, the spiritual associations that tribes and others may have with specific locations and expansive viewsheds and landscapes, the roles played by animal and plant species in tribal and other cultural beliefs and traditions, the roles played by minerals and mineral deposits in the cultural lives of tribes and others.<sup>140</sup>

The DEIS' description of the baseline for cultural resources is also inadequate because it states that "under federal and state historic preservation law, cultural resources generally must be at least 50 years old to have sufficient historical importance to merit consideration of eligibility for listing in the NRHP or in the California Register of Historic Places."<sup>141</sup> Not only is this statement incorrect, but it also wrongly limits the DEIS' consideration of cultural resource impacts. The National Historic Preservation Act ("NHPA") (under which the National Register of Historic Places ("NRHP") is maintained) deals only with historic resources, a narrow class of cultural resources comprising parcels of real property.<sup>142</sup> By applying the NHPA historic property characterization to its NEPA analysis, the "BLM leads the reader to think that historic properties are the only kinds of 'cultural resources' that exist" and "the DEIS gives no attention to any type of

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<sup>137</sup> See King Comments, p. 3.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*, p. 4.

<sup>140</sup> *Id.*, p. 3.

<sup>141</sup> DEIS, p. 3.5-1.

<sup>142</sup> King Comments, p. 4.

cultural resource that is not a known or possible historic property."<sup>143</sup> "Cultural aspects of the environment that are not 'buildings, sites, structures, objects, and districts' are simply not recognized in the DEIS, and impacts on such cultural resources, if they exist, are ignored."<sup>144</sup>

The NIIPA does not say that places less than 50 years old are not eligible for the NRHP. The NHPA states that properties that have achieved significance in the last 50 years are *ordinarily* not eligible *unless* they have "exceptional" significance.<sup>145</sup> Rather than consider whether a less than 50 year old property is exceptionally significant, and therefore eligible for the NRHP, the DEIS dismisses these resources as too young. As a result, the DEIS completely ignores any younger property with exceptional significance that may be adversely affected by the Project.

In short, the DEIS portrays an extremely narrow view of "cultural resources." It focuses only on a subset of historic properties -- archaeological sites recognized and valued by archaeologists and identified through archaeological surveys. "There is no evidence of attention even to historic properties that might be important for non-archaeological reasons, to non-archaeologists."<sup>146</sup>

## VI. THE DEIS MUST DISCLOSE, ANALYZE, AND MITIGATE ALL PROJECT IMPACTS

The environmental consequences of a proposed action must be described in the DEIS. NEPA regulations require that this section of an EIS describe any direct, indirect and cumulative adverse environmental effects which cannot be avoided should the proposal be implemented; the relationship between short-term uses of man's 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 should it be implemented.<sup>147</sup> The DEIS must also describe possible conflicts between the proposed action and the objectives of Federal, regional, State, and local land use plans, policies and controls for the area concerned.<sup>148</sup>

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<sup>143</sup> *Id.* at p. 5.

<sup>144</sup> *Id.* at p. 5.

<sup>145</sup> 36 C.F.R. § 60.4.

<sup>146</sup> King Comments, p. 6.

<sup>147</sup> 40 C.F.R. § 1502.16.

<sup>148</sup> *Id.*

The DEIS does not consider all of the Project's significant and foreseeable environmental impacts to air quality, biological resources, cultural resources, water resources, and impacts from hazardous materials, among others. The BLM's failure to take a hard look at the Project's impacts violates the basic requirements of NEPA. The BLM must revise its impacts analysis and issue a substantially revised or supplemental DEIS for public review and comment.

#### **A. The DEIS Fails to Adequately Disclose, Analyze, and Mitigate Impacts to Air Quality**

Air quality expert Dr. Petra Pless reviewed the DEIS and technical reports related to air quality. In her attached comments, Pless concluded that the DEIS significantly underestimated emissions from Project construction, failed to identify significant impacts from nitrogen oxide and particulate matter emissions, and failed to adequately mitigate the Project's impacts to air quality.

##### **1. The DEIS Underestimates Emissions of Air Pollutants During Project Construction**

Project construction would result in significant impacts to air quality from on- and off-site emissions of fugitive dust particulate matter and air pollutants contained in combustion exhaust of construction equipment, haul trucks and construction worker commuter vehicles. The DEIS presents estimates for daily maximum emissions in pounds per day ("lbs/day") and maximum annual emissions for the four-year construction period in tons per year ("tons/year").<sup>149</sup> Dr. Pless reviewed the technical report supporting these estimates and found that the estimates are based "on a number of unrealistic assumptions and are substantially underestimated."<sup>150</sup>

Specifically, the DEIS greatly underestimates the daily hours of construction. The DEIS states emissions from construction equipment will occur for four to eight hours per day.<sup>151</sup> However, elsewhere in the DEIS it states that construction activities would occur for 12 to 24 hours per day.<sup>152</sup> Clearly, the DEIS' estimates of

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<sup>149</sup> DEIS, Table 4.2-2, p. 4.2-9 and Table 4.2-3, p. 4.2-10.

<sup>150</sup> Pless Comments, p. 2.

<sup>151</sup> *Id.*

<sup>152</sup> DEIS, p. 2-53.

maximum daily emissions based on the assumed operation of construction equipment for four to eight hours per day is substantially underestimated.<sup>155</sup>

The DEIS also substantially underestimates off-site vehicle miles traveled. The DEIS estimates emissions of off-site entrained fugitive road dust from trucks and construction worker commuter vehicles based on a daily round-trip distance of 20 miles.<sup>154</sup> To estimate combustion emissions from off-site vehicle traffic, the DEIS assumes daily round-trip distances of 50 miles per day for construction worker commuter vehicles and 25 miles per day for trucks.<sup>155</sup> These distances are much too short. As Pless explains, the Project site is located in a sparsely inhabited environment – 13 miles northwest of the City of Blythe (population less than 21,000 in 2010), 32 miles east of Desert Center (population 204 in 2010), and 6 miles north of Interstate 10. In reality, workers would likely commute from 100 miles away from more populated areas, such as Indio, Palm Springs, Palm Desert, Cathedral City, and Coachella (and therefore the proper roundtrip number is 200 miles, not 50 miles).<sup>156</sup> Similarly, delivery trucks would likely come from considerably farther away than 12.5 miles, and therefore the DEIS' daily roundtrip distance of 25 miles is significantly underestimated.<sup>157</sup>

As it stands, the DEIS underestimates emissions of air pollutants during project construction. The DEIS must be revised to include realistic assumptions of construction hours and commute distance for construction worker commuter vehicles and trucks.

## 2. The DEIS Fails to Identify and Mitigate Significant Impacts to Air Quality from NO<sub>x</sub> and Particulate Matter Construction Emissions

As a result of the unrealistic assumptions discussed above, the DEIS substantially underestimates off-site entrained road dust and combustion emissions from construction worker commuter vehicles and trucks.<sup>158</sup> Consequently, the DEIS fails to identify and mitigate significant impacts from emissions of nitrogen oxides ("NO<sub>x</sub>") and particulate matter.

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<sup>155</sup> Pless Comments, p. 3.

<sup>156</sup> DEIS, Appendix II, p. H-3.

<sup>157</sup> See AECOM Report, Attachment 1-C.

<sup>158</sup> Pless Comments, p. 3.

<sup>159</sup> *Id.* at p. 3.

<sup>160</sup> *Id.* at pp. 3-4.

Specifically, the DEIS estimates maximum daily construction emissions of NO<sub>x</sub> to be 135 lbs/day (2 lbs/day shy of the 137 lbs/day threshold of significance for NO<sub>x</sub> emissions from construction activities established by the Mojave Desert Air Quality Management District ("MDAQMD")).<sup>159</sup> During the month of maximum emissions (month 6,) off-site vehicles account for 34.9 lbs/day of NO<sub>x</sub> emissions. According to Dr. Pless, even a modest increase in the roundtrip mileage would increase estimates of NO<sub>x</sub> emissions over MDAQMD's significance threshold.<sup>160</sup> Dr. Pless provides the following example: an increase in roundtrip distances by just 10 percent would increase NO<sub>x</sub> emissions by roughly 3.5 lb/day, which puts construction emissions over the threshold.<sup>161</sup> As Pless notes, it is likely that roundtrip distances would be more than four times (or 400 percent) those assumed by the DEIS.<sup>162</sup> Accordingly, impacts on air quality from NO<sub>x</sub> emissions would be substantially greater.<sup>163</sup>

There is a similar story for particulate matter emissions. The DEIS estimates that Project construction would result in a maximum of 136 lbs/day of emissions of PM<sub>10</sub> (particulate matter smaller than or equal to 10 micrometers), including 110 lbs/day of fugitive dust from on-site sources, 19 lbs/day of entrained road dust from vehicle travel on off-site paved roads and 7 lbs/day from off-road construction equipment and construction worker commuter vehicles and trucks' exhaust emissions. This estimate, which assumes implementation of fourteen Applicant-proposed measures for control of on-site fugitive dust with an estimated 68% control efficiency, exceeds the significance threshold for PM<sub>10</sub> established by the MDAQMD of 82 lbs/day by 54 lbs/day or 66%.<sup>164</sup> Accordingly, the DEIS concludes that mitigated PM<sub>10</sub> emissions during construction would result in substantial residual Project-specific and cumulative impacts on air quality and could result in an exceedance of the California 24-hour ambient air quality standard for PM<sub>10</sub>.<sup>165</sup> However, Pless points out that, similar to NO<sub>x</sub> emissions, these estimates are too low and, consequently, PM<sub>10</sub> emissions would exceed MDAQMD's daily emissions threshold by a far greater amount than identified in the DEIS.<sup>166</sup>

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<sup>159</sup> DEIS, Table 4.2-3, p. 4.2-10.

<sup>160</sup> Pless Comments, p. 4.

<sup>161</sup> *Id.* at p. 4.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> DEIS, pp. 4.2-11 and -20.

<sup>166</sup> Pless Comments, p. 4.

8. The DEIS' Proposed Mitigation for Project Construction Emissions Is Inadequate and Additional, Feasible Mitigation Should Be Included in a Revised DEIS

The DEIS proposes mitigation that requires the Applicant to develop and implement a plan that demonstrates that off-road construction equipment (more than 50 horsepower) will achieve a Project-wide fleet-average 45 percent PM10 reduction and 20 percent NOx reduction compared to the most recent fleet average as determined by the California Air Resources Board. According to Dr. Pless, "this proposed mitigation is inadequate because emissions would continue to exceed MDAQMD thresholds of significance indicating that California's AAQS may be exceeded."<sup>167</sup> Pless recommends that additional and/or more stringent, feasible mitigation measures for control of fugitive dust and combustion exhaust emissions during construction be included in a revised DEIS.<sup>168</sup>

For starters, Pless recommends the presence of an air quality construction mitigation manager.<sup>169</sup> This would ensure the efficacy of the proposed measures.<sup>170</sup> The duties of an air quality construction mitigation manager could include

developing transportation plans for truck routes and queuing; continuously monitoring the situation at the site (e.g., vehicle speeds, e.g., by installing radar enforcement; inspection of wind sheltering; real-time portable monitoring of particulate matter; observation of dust plume opacity); requiring additional or more stringent mitigation when necessary (e.g., suspending all grading, earthmoving, or excavation activities when winds exceed 20 miles per hour; requiring pre-watering and phasing of work; pre-application of water to proposed cuts, etc.); creating construction surveys and monitoring plans to control dust, vibrations, work hours and noise; and implementing a comprehensive communications strategy including establishment of a construction mitigation hotline and address complaints in a timely manner.<sup>171</sup>

Dr. Pless also suggests that additional and/or more stringent mitigation measures for construction activities could be modeled, for example, after those required for

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<sup>167</sup> *Id.* at p. 5.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

the Genesis Solar Energy Project.<sup>172</sup> A copy of the measures is attached to Dr. Pless' comments.

## **B. The DEIS Fails to Disclose, Analyze, and Mitigate Impacts to Biological Resources**

The DEIS fails to adequately analyze and mitigate the Project's impacts to numerous species. The DEIS must be revised accordingly.

### 1. Impacts from Meteorological Towers

One or more permanent meteorological stations would be installed at the Project site to track weather patterns.<sup>173</sup> According to the DEIS, "Figure 2-9 depicts a typical meteorological station."<sup>174</sup> Figure 2-9 shows a tower with several supporting guy wires. Collisions with towers, support wires and lighted buildings are a frequent source of mortality for birds and bats.<sup>175</sup> The DEIS fails to disclose, analyze, or provide mitigation for the collision hazard that meteorological towers and guy wires pose to birds and bats.

### 2. Impacts from Night Lighting

The DEIS indicates that exterior security lighting would be installed to provide for safe access to Project facilities as well as visual surveillance.<sup>176</sup> This lighting appears to be in addition to the lighting that would be provided at the O&M building, Unit 1 and Unit 2 substations, site entrance, and switchyard.<sup>177</sup>

Light pollution is considered a serious threat to ecological communities because it has the potential to alter physiology, behavior, and population ecology of wildlife.<sup>178</sup> For example, light pollution may have an adverse effect on an organism's ability to acquire prey or avoid predators.<sup>179</sup> In addition, night lighting has the potential to disrupt the breeding and nesting behavior of sensitive bird

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<sup>172</sup> *Id.* at p. 6.

<sup>173</sup> DEIS, p. 2-14.

<sup>174</sup> *Id.*

<sup>175</sup> Cashen Comments, pp. 3-4.

<sup>176</sup> DEIS, p. 2-17.

<sup>177</sup> *Id.*

<sup>178</sup> Cashen Comments, p. 4.

<sup>179</sup> *Id.*

species (e.g., burrowing owl) if placed in close proximity to nest sites.<sup>180</sup> Night lighting also is a substantial threat to migrating birds. In 2011, at least 484 birds comprised of 29 different species died due to night lighting at the Laurel Mountain Substation in West Virginia.<sup>181</sup>

The DEIS acknowledges the adverse effects that night lighting can have on wildlife.<sup>182</sup> It also discusses mitigation measures that will be implemented to reduce those effects.<sup>183</sup> In Cashen's opinion, even with the proposed mitigation measures, night lighting will still have adverse effects on wildlife.<sup>184</sup> The extent of the adverse effects cannot be evaluated because the DEIS does not provide information on the abundance of lights at the Project site, the luminous emittance (i.e., intensity) of the bulbs, the height of light fixtures or the location of lights in relation to sensitive biological resources (e.g., habitat known to be occupied by the Mojave fringe-toed lizard and burrowing owl).<sup>185</sup> The DEIS must be revised to include this missing information and must contain an adequate analysis of the Project's impacts on wildlife from night lighting.

### 3. Impacts from Dust Suppressants

The DEIS states that concentrate from the reverse osmosis water treatment facility could be used as a dust suppressant on the Project site.<sup>186</sup> Salt, and other by-products of water treatment (e.g., chemical and biological agents), can be toxic to plants and animals.<sup>187</sup> If used as a dust suppressant, concentrate from the reverse osmosis water treatment facility also may contaminate ground and surface water supplies.<sup>188</sup> The DEIS completely fails to disclose, analyze, or provide mitigation for these adverse environmental impacts.

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> DEIS, p. 4.4-16.

<sup>183</sup> *Id.*

<sup>184</sup> Cashen Comments, p. 4.

<sup>185</sup> *Id.*

<sup>186</sup> DEIS, p. 2-21.

<sup>187</sup> Cashen Comments, p. 5.

<sup>188</sup> *Id.*

#### 4. Impacts from Fencing

The Project site would be completely surrounded by fencing, topped with three-stranded barbed wire.<sup>189</sup> Barbed wire fencing poses a mortality to sensitive species that occur in the Project area, including the burrowing owl, prairie falcon and bighorn sheep.<sup>190</sup> The USFWS has confirmed fence strikes of prairie falcons at solar facilities.<sup>191</sup> In addition, the fencing "create[s] a potential entrapment hazard to wildlife."<sup>192</sup> The DEIS completely fails to disclose, analyze, or mitigate impacts to wildlife from Project fencing. To mitigate impacts from fencing, Cashen recommends that, at a minimum, the top-most wire should be smooth. In addition, Cashen recommends that the Applicant work with BLM and wildlife agencies to develop a "wildlife-friendly" fence design.<sup>193</sup>

#### 5. Impacts to Golden Eagles

Golden eagles are protected by the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and Fish and Game Code section 3511. California law prohibits take of golden eagles. The USFWS requires a take permit to be issued for "take" of bald or golden eagles where the taking is associated with, but not the purpose of, the activity, and cannot be practicably avoided.<sup>194</sup> Take includes causing a decrease in golden eagle productivity by substantially interfering with normal breeding, feeding, or sheltering behavior.<sup>195</sup>

During breeding season, golden eagles have home ranges as small as 480 acres, with 95 percent of the activity concentrated in core areas as small as 74 acres.<sup>196</sup> The Project would permanently impact 4,903 acres of suitable foraging habitat for the golden eagle.<sup>197</sup> According to a USFWS biologist, the Applicant did

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<sup>189</sup> DEIS, p. 2-16.

<sup>190</sup> Cashen Comments, p. 24.

<sup>191</sup> Attachment I, Email correspondence between Pagel and Baird, February 2, 2012 and Email correspondence between Rodriguez and Keeler, February 28, 2012.

<sup>192</sup> *Id.*

<sup>193</sup> Cashen Comments, p. 24.

<sup>194</sup> U.S. Fish and Wildlife Service, Division of Migratory Bird Management. 2009. Final Environmental Assessment, Proposal to Permit Take. Provided Under the Bald and Golden Eagle Protection Act. Washington: Dept. of Interior.

<sup>195</sup> *Id.*

<sup>196</sup> Cashen Comments, p. 27.

<sup>197</sup> DEIS, p. 4.4-3.

not collect adequate data regarding golden eagle use of the Project site.<sup>198</sup> In his comments, Cashen explains that “[i]n the absence of empirical data on the locations of core foraging areas, one must conclude that the Project could eliminate a substantial amount of core habitat (perhaps all) used by at least one pair of breeding eagles.”<sup>199</sup> Cashen concludes that “[t]he loss of core foraging habitat is likely to lead to take, as defined in the Eagle Act.”<sup>200</sup> The DEIS completely fails to analyze or provide mitigation for the take of golden eagles (in violation of California law), and the DEIS fails to acknowledge that the Project requires a permit from the USFWS pursuant to the Bald and Golden Eagle Protection Act.

The DEIS also fails to adequately analyze impacts to golden eagles from collision and electrocution. The DEIS states, “[a]lthough there is a potential for mortality due to collision with the genetic or distribution lines, the potential is low due to the distance from known nests and nesting habitat and the lack of known prey concentrations on the Project site (Tetra Tech EC, Inc., 2011).”<sup>201</sup> Cashen explains that the DEIS’ conclusions are unsupported.

First, the Project poses a threat to eagles that are not linked to a nest site (“floaters”) and to eagles that migrate through the Project area.<sup>202</sup> Second, there is no evidence that there is a “lack of prey concentrations” on the Project site. In fact, the Applicant’s consultant did not conduct surveys to document the abundance of golden eagle prey on the Project site.<sup>203</sup> Finally, the DEIS’ proposed mitigation for the Project’s impacts to golden eagles is wholly inadequate. The DEIS requires the Applicant to implement a Golden Eagle Monitoring and Management Plan if an occupied nest is detected within one mile of the Project boundaries. It then establishes triggers for adaptive management. These triggers include, “any evidence of Project-related disturbance to nesting golden eagles, including but not limited to: agitation behavior (displacement, avoidance, and defense), increased vigilance behavior at nest sites, changes in foraging and feeding behavior, or *nest site abandonment*.”<sup>204</sup> In his comments, Cashen explains that most of these types of disturbance would constitute “take,” which is not allowed under California law or

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<sup>198</sup> Cashen Comments, p. 27.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> DEIS, p. 4.4-16.

<sup>202</sup> Cashen Comments, p. 27.

<sup>203</sup> *Id.*

<sup>204</sup> DEIS, p. 4.4-41 (emphasis added).

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without a permit from the USFWS.<sup>205</sup> Moreover, “there is no utility in adaptive management if an eagle abandons its nest.”<sup>206</sup> Consequently, the mitigation proposed in the DEIS is inadequate.

To comply with NEPA, the DEIS must be revised to adequately analyze, disclose and mitigate significant adverse effects to golden eagles.

#### 6. Impacts to Special-Status Plants

The DEIS fails to adequately disclose and analyze impacts to special-status plants. The DEIS states, without any support, “[t]he Project is not anticipated to substantially affect any populations of special-status plant species or cacti, although a number of individuals would be affected by each Alternative (as described above and summarized in Table 4.3-3).”<sup>207</sup> To the contrary, as the DEIS acknowledges, that many of the plant taxa in the Project region are at the edge of their range and it is well documented that peripheral populations have evolutionary significance and conservation value, and that they are at higher risk of extirpation.<sup>208</sup> Based on this information, Cashen concludes that the Project *would* substantially affect several special-status plant species.<sup>209</sup> Further, the CNDDE and the California Consortium of Herbaria database indicate that the Project would have a substantial adverse effect on the statewide population of several special-status plant species.<sup>210</sup> The DEIS fails to disclose this significant impact.

The DEIS also fails to adequately mitigate significant impacts to special-status plants. The DEIS requires the Applicant to provide compensatory mitigation for the Project’s impacts to special-status plant species. According to the DEIS,

Compensatory mitigation shall consist of acquisition of habitat supporting the target species, or restoration/enhancement of populations of the target species, and shall meet the performance standards for mitigation described below. In the event that no opportunities for acquisition or restoration/enhancement exist, the

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<sup>205</sup> Cashen Comments, p. 37.

<sup>206</sup> *Id.*

<sup>207</sup> DEIS, p. 4.3-16.

<sup>208</sup> *Id.*, at p. 3.3-2.

<sup>209</sup> Cashen Comments, p. 22.

<sup>210</sup> *Id.*

Applicant can fund a species distribution study designed to promote the future preservation, protection or recovery of the species.<sup>211</sup>

In Cashen's opinion, this measure is inadequate. A distribution study cannot take the place of habitat acquisition.<sup>212</sup> If a species is so rare that there are "no opportunities for acquisition or restoration/enhancement," evidence shows that any impacts to that species would likely have severe consequences on the viability of the statewide population.<sup>213</sup> For example, if the Project site contained the last known population of a species and Project construction destroyed that population, a distribution study would provide no value.

The DEIS also requires the Applicant to establish Environmentally Sensitive Areas ("ESAs") that consist of 10- to 20-foot buffers around special-status plant species.<sup>214</sup> In Cashen's opinion, the proposed buffers are too small to reliably protect the target species, and therefore the measure is inadequate. Based on an analysis by the Conservation Biology Institute, California Energy Commission Staff concluded that plant occurrences that were not protected from project activities by a 250-foot buffer should not be considered "protected."<sup>215</sup>

Finally, the DEIS allows the Applicant to acquire "unoccupied but adjacent" habitat as rare plant mitigation.<sup>216</sup> According to Cashen, the proposed strategy has questionable conservation value, and therefore the measure is inadequate.<sup>217</sup> As Cashen explains, most rare plants have specific microhabitat requirements, which are poorly understood. Presumably, a site that is unoccupied does not provide the specific microhabitat requirements needed by the target species. The only way to justify the proposed measure is to show that the species historically occurred, but no longer occurs due to some management practice (e.g., grazing), that once eliminated, would reasonably be expected to promote return of the species. Cashen suggests that the BLM require the Applicant to demonstrate the value of any "unoccupied but adjacent" habitat that is proposed for mitigation. This would be the only way by which the BLM could begin to support this questionable mitigation. In addition, the compensation ratio should reflect the inherent, uncertain value in

<sup>211</sup> DEIS, p. 4.3-33.

<sup>212</sup> Cashen Comments, p. 30.

<sup>213</sup> *Id.* at p. 31.

<sup>214</sup> DEIS, p. 4.3-28.

<sup>215</sup> Cashen Comments, p. 31.

<sup>216</sup> DEIS, p. 4.3-34.

<sup>217</sup> Cashen Comments, p. 31.

replacing occupied habitat with unoccupied habitat (i.e., the compensation ratio should be higher).<sup>218</sup>

### 7. Impacts to Cryptobiotic Soil Crusts

Cryptobiotic soil crusts are communities of cyanobacteria, lichens, and mosses. These crusts bind fine soil particles by linked cyanobacterial fibers. Several studies have suggested that the presence of cryptobiotic crusts dramatically decreases wind and water erosion. When disturbed, cryptobiotic crusts lose most of their protective qualities allowing mobilization of the underlying mineral soils.<sup>219</sup>

Cashen explains in his comments that once desert crust or pavement is removed (or damaged), sand may be blown several kilometers downwind, resulting in an area of indirect disturbance that can exceed the directly disturbed area by several-fold. Blowing sand abrades plants, resulting in leaf stripping and damage to the cambium and therefore to the plant's ability to distribute and use water. Young plants are especially vulnerable to the effect of blowing sand because they lack woody tissue. This results in the suppression of revegetation in bare areas and the loss of vegetation on adjacent lands. Nitrogen-fixing microbial communities and cryptobiotic crusts also become buried by sand, reducing inputs of nitrogen to the soil.<sup>220</sup>

The Project would involve ground disturbance activities that will destroy vegetation. Studies show that destruction of vegetation results in soil degradation which, in turn, further decreases shrub cover and increases the susceptibility of land to wind and water erosion.<sup>221</sup> The fine particles and soil organic matter that are removed by erosion are key to the healthy functioning of soils because they increase soil nutrient content, soil porosity, water-holding capacity, and cation-exchange capacity. Because new vegetation growth is inhibited by blowing sand, the ability of vegetation to stem erosion is limited. This results in a negative feedback loop that ultimately results in *severe land degradation*.<sup>222</sup>

The DEIS fails to disclose the abundance and distribution of cryptobiotic soil crusts in the Project area (even though cryptobiotic soil crusts are known to occur

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at pp. 22-23.

<sup>221</sup> *Id.* at p. 23.

<sup>222</sup> *Id.*

there).<sup>223</sup> The DEIS also fails to fully disclose or assess the landscape-level impacts that are likely to occur once vegetation and cryptobiotic soil crusts are removed from the Project site.

The DEIS acknowledges the adverse effects that can result from fugitive dust, and that fugitive dust has the potential to cause significant impacts to sensitive resources. However, it relies on the assumption that, after construction is complete, disturbed areas can be stabilized through revegetation, or with a nontoxic soil stabilizer or soil-weighting agent.<sup>224</sup> Cashen provides evidence that the DEIS' assumptions are wrong.

First, natural resource restoration is challenging under any circumstances and it can be extremely difficult in arid environments. As the DEIS acknowledges, it takes many years for plant communities to recover in desert ecosystems, and all ground disturbance activities associated with the Project should be considered permanent. Consequently, one cannot assume that impacts to cryptobiotic soil crusts can be mitigated through revegetation.<sup>225</sup>

Second, the length of time that a soil stabilizer is effective varies according to the type of product, soils, weather, application rate, and traffic conditions.<sup>226</sup> The DEIS fails to account for the fact that soil stabilizers are not effective indefinitely.

Finally, the DEIS lacks any performance standards for the proposed dust control mitigation measures, and it fails to require mitigation monitoring to ensure dust control efforts are successful in minimizing indirect impacts to sensitive biological resources.

The DEIS fails to adequately disclose, analyze or mitigate the Project's adverse effects on cryptobiotic soil crusts. The DEIS must be revised and recirculated accordingly.

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<sup>223</sup> *Id.*

<sup>224</sup> DEIS, pp. 4.3-5, 4.2-7 - 8.

<sup>225</sup> Cashen Comments, p. 23.

<sup>226</sup> *Id.* at p. 24.

### 8. Impacts to Burrowing Owls

The DEIS references CDFG's 1995 Staff Report on Burrowing Owl Mitigation to define impacts to burrowing owls.<sup>227</sup> CDFG's 1995 Staff Report has been superseded by its 2012 Staff Report on Burrowing Owl Mitigation, which incorporates a considerable amount of new information pertaining to burrowing owl impacts.<sup>228</sup> For example, CDFG's definition of impacts to burrowing owls is no longer limited to disturbance within 50 meters of an occupied burrow.<sup>229</sup> Because the DEIS fails to consider the information provided in CDFG's 2012 Staff Report, it fails to identify significant adverse effects to burrowing owls.<sup>230</sup> For example, due to the stress caused to burrowing owls from passive relocation, the 2012 Staff Report concludes that passive relocation of burrowing owls results in significant impacts to the species. The DEIS fails to identify or analyze this significant adverse effect, as required by NEPA.

The DEIS also fails to adequately mitigate the Project's impacts to burrowing owls. The DEIS requires the Applicant to acquire 19.5 acres of compensation habitat for Project impacts to burrowing owls.<sup>231</sup> This acreage value is based on the BLM's assessment that the Project would affect three pairs of owls, and that each pair requires 6.5 acres of compensation habitat. Evidence shows that the proposed measure will not mitigate the effects of the Project on burrowing owls.

First, the proposed mitigation is not commensurate with the adverse effects of the Project. The burrowing owl mitigation guidelines referenced in the DEIS establish that compensatory mitigation should be based on the number of active burrows that may be affected by an action, not on the number of owls that were observed at a site.<sup>232</sup> The DEIS states that 11 active burrows were detected on the Project site.<sup>233</sup> The BRTR, on the other hand, suggests at least 18 active burrows were detected on the Project site.<sup>234</sup> Nevertheless, meeting the mitigation

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<sup>227</sup> DEIS, p. 4.4-14.

<sup>228</sup> Cashen Comments, p. 25.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> DEIS, p. 4.4-38.

<sup>232</sup> Cashen Comments, p. 33.

<sup>233</sup> DEIS, p. 4.4-12.

<sup>234</sup> BRTR, Figures 11 and "Appendix J." See also 2011 Fall Plants and Supplemental Wildlife Survey Report, Figure 6A and B.

requirements referenced in the DEIS would dictate the need for at least 71.5-acres of compensatory mitigation – not 19.5.<sup>235</sup> Even then, given the Project would disturb more than 4,900 acres of burrowing owl habitat, acquisition of 19.5 (or 71.5) does little to offset the loss of 4,900 acres of habitat. According to the CDFG, offsite mitigation may not adequately offset the biological and habitat values impacted on a one to one basis. Consequently, the Applicant should be required to acquire more than 4,900 acres of compensatory mitigation lands.<sup>236</sup>

Second, the CDFG no longer accepts the mitigation standards recommended in the CBOC guidelines or its 1995 Staff Report on Burrowing Owl Mitigation because those standards have proven ineffective in the conservation of burrowing owl populations.<sup>237</sup> The DEIS must base its mitigation on CDFG's 2012 Staff Report on Burrowing Owl Mitigation.<sup>238</sup>

Third, the timing of preconstruction burrowing owl surveys is not consistent with CDFG recommendations. In accordance with CDFG's 2012 Staff Report on Burrowing Owl Mitigation, the BLM should require the Applicant to conduct an initial preconstruction survey within the 14 days prior to ground disturbance, followed by a subsequent survey within 24 hours prior to ground disturbance. The results of these surveys and the subsequent mitigation strategy should be approved by CDFG prior to any ground disturbance activities.<sup>239</sup>

Fourth, the DEIS allows the Applicant to evict burrowing owls from their burrows, as long as it first creates or enhances replacement burrows. The DEIS allows those replacement burrows to be placed up to one mile from the Project disturbance area.<sup>240</sup> Evidence shows that locating artificial or natural burrows more than 100 meters from the eviction burrow may greatly reduce the chances that new burrows will be used. Cashen suggests that the mitigation measure be revised to require replacement burrows as close as possible to any burrows that are destroyed by the Project. Further, any owls that cannot be "relocated" to replacement burrows within 100 meters of the eviction site should be considered

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<sup>235</sup> Cashen Comments, p. 33.

<sup>236</sup> *Id.* at p. 34.

<sup>237</sup> *Id.* at pp. 33-34.

<sup>238</sup> *Id.*

<sup>239</sup> Cashen Comments, p. 35.

<sup>240</sup> DEIS, p. 4.4-37.

permanently impacted and additional mitigation (i.e., habitat compensation) should be required.<sup>241</sup>

Fifth, CDFG recommends that burrowing owl relocation sites be protected in perpetuity (e.g., through a conservation easement).<sup>242</sup> The DEIS must be revised to reflect this.

Sixth, the DEIS' proposed buffers for active owl burrows are not consistent with CDFG's 2012 Staff Report. In addition, the mitigation monitoring imposed by the BLM is not consistent with CDFG's 2012 Staff Report.<sup>243</sup>

Finally, the DEIS allows the Applicant to provide burrowing owl compensation lands that are up to five miles from an active burrowing owl nesting territory.<sup>244</sup> Cashen explains that acquisition lands that are up to five miles from occupied habitat have little conservation value to the species unless those lands can be made suitable for occupancy. The compensation ratio applied to the mitigation measure must reflect the unpredictable value of replacing occupied habitat with unoccupied habitat (i.e., the ratio must be higher).<sup>245</sup>

#### 9. Impacts to Wildlife Corridors and Connectivity

The DEIS concludes the Project would "have a minor impact on a regional connectivity corridor for the bighorn sheep because the corridor is maintained to the west, north, and east of the solar plant site."<sup>246</sup> The DEIS' conclusion is unsupported. Further, evidence shows that the Project would have a significant adverse effect on wildlife corridors and connectivity.

The Project would be bounded on either side (north and south) by other solar power plants – BSPP and enXco McCoy.<sup>247</sup> Together, these projects take up more than 27,000 acres.<sup>248</sup> Permanent fencing for the Project and the adjacent BSPP project would create a 5-mile-long wildlife movement barrier. With the addition of

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<sup>241</sup> Cashen Comments, p. 35.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> DEIS, p. 4.4-38.

<sup>245</sup> Cashen Comments, p. 35.

<sup>246</sup> DEIS, p. 4.4-15.

<sup>247</sup> See DEIS, Figure 4.4-1.

<sup>248</sup> DEIS, Table 4.1-4

onXco fencing, the barrier would be even greater. This will impede wildlife movement, even for highly motile species.<sup>249</sup>

#### 10. Impacts to Burro Deer

The DEIS states, “[d]irect and indirect construction impacts to burro deer would be similar to those described for the Nelson’s bighorn sheep.”<sup>250</sup> Cashen explains that the DEIS’ analysis is inadequate for two reasons.

First, deer and sheep do not use washes in the same way. Sheep forage in washes following rainfall events that result in good forage production, particularly with respect to annual plant species. Deer live in those washes year round and, although they also benefit from good annual plant production following periods of rainfall, they are dependent upon the vegetation in those washes year-round for forage. Cashen concludes that making areas inaccessible to deer through fence construction will undoubtedly result in a decline in the deer population.<sup>251</sup>

Second, deer move across wide expanses of the desert to access high-quality forage that becomes available with rainfall. Fencing the Project site will not only preclude deer from accessing a vast amount of habitat, but it will also impact their ability to move through the Project area to other areas of better habitat that become temporarily available following rainfall.<sup>252</sup>

Evidence shows that the Project would significantly affect burro deer. The DEIS fails to disclose, analyze and mitigate this impact.

#### 11. Impacts to Couch’s Spadefoot Toad

The Couch’s spadefoot is listed as a BLM Sensitive Species and a California Species of Special Concern. Ten potential Couch’s spadefoot breeding pools were detected on the Project site. Because the Applicant did not conduct focused surveys for Couch’s spadefoot, the DEIS (correctly) assumes that all 10 pools are used by the species. However, the DEIS fails to disclose the ecological implications of this

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<sup>249</sup> Cashen Comments, p. 26.

<sup>250</sup> DEIS, p. 44-15.

<sup>251</sup> Cashen Comments, p. 28.

<sup>252</sup> *Id.*

impact, and thus fails to analyze the extent of the Project's impacts on Couch's spadefoot toads.

Cashen explains that Couch's spadefoot is an extremely rare species in California and its range is limited to a very small region in the southeastern portion of the state. The CNDDDB has only five documented records of the species in the State. Couch's spadefoot is susceptible to disturbance from off-road vehicles that create noise similar to rainfall, inducing emergence under highly unfavorable (hot, dry) conditions that would be almost certainly fatal to adults. Breeding sites used by the Couch's spadefoot are potentially vulnerable to disturbance that alters the percolation characteristics of the substrate in a manner that makes pools too short-lived for larvae to attain metamorphosis.<sup>253</sup> Based on these facts, Cashen concludes that Project impacts to 10 breeding pools used by the species would have severe ecological implications that must be disclosed in the DEIS.<sup>254</sup>

The DEIS' proposed mitigation for the Project's impacts to Couch's spadefoot road is also inadequate and must be revised. The DEIS establishes that if complete avoidance of the ponds or other breeding sites identified during forthcoming surveys is not possible, the Applicant will be required to create "additional breeding habitats (ephemeral pond) at least equal in area to the acreage of ponds being impacted".<sup>255</sup> As Cashen explains in his comments, this measure is inadequate for two reasons.

First, it fails to establish a mechanism that ensures the Applicant will make a good faith effort to avoid and minimize impacts to breeding ponds. Indeed, the fact that the BLM has assumed the Project would impact all 10 breeding sites, nine of which coincide with proposed linear facilities, strongly suggests the BLM has not worked with the Applicant to avoid and minimize impacts to the Couch's spadefoot. Given the status of the species, the BLM and Applicant must explore all feasible opportunities to avoid and minimize impacts to breeding ponds that may be used by the Couch's spadefoot.<sup>256</sup>

Second, the proposed measure that requires the creation of new ponds (i.e., WIL-14) does not ensure adequate mitigation. Couch's spadefoot toads have three principal habitat requirements: temporary desert rainpools with water

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<sup>253</sup> Cashen Comments, p. 29.

<sup>254</sup> *Id.*

<sup>255</sup> DEIS, p. 4.4-43.

<sup>256</sup> Cashen Comments, p. 39.

temperatures greater than 15 °C that last for at least nine days during the breeding season, subterranean refuge sites (with a loose enough substrate to permit burial) within in the vicinity of the breeding pool and an insect food base.<sup>257</sup> The mitigation proposed in WIL-14 addresses only *one* of those habitat requirements - that pools hold water for at least nine days during the breeding season -- and provides *no assurance* that this single habitat requirement will be met. Furthermore, the "breeding season" has been only loosely defined.<sup>258</sup> Thus, there is no assurance that ponds will be suitable breeding habitat and the mitigation fails.

Moreover, the proposed mitigation lacks any discussion of where created ponds would be located, how they would be conserved in perpetuity, a funding mechanism for their creation, preservation, and management, and the water supply that will be used to ensure the ponds hold water for at least nine days during the breeding season. The measure also fails to meet any minimum standards for water quality, vehicle noise and other anthropogenic disturbances may negatively affect Couch's spadefoot toads.<sup>259</sup> In addition, WIL-14 does not establish performance criteria for any of the issues (or considerations) central to reserve design. These include site selection, corridors, buffers, isolation, and fragmentation.<sup>260</sup> The measure also fails to address patch size as an important consideration in habitat suitability for Couch's spadefoot toads. In particular, once a certain patch size is reached, area alone does not increase habitat suitability.<sup>261</sup> This is especially important because the BLM's proposed mitigation does not require the Applicant to replicate the distribution and number of pools impacted by the Project; the condition only requires that mitigation be implemented for those acres that are impacted (e.g., the Applicant could create one "mega" pool to replace impacts to 10 well-distributed pools). Because distribution and abundance of pools may affect overall habitat suitability for Couch's spadefoot toads, minimum standards associated these variables must be incorporated into the BLM's mitigation.<sup>262</sup> Finally, WIL-14 fails to include monitoring that confirms spadefoot toads are breeding in any pond habitat created to mitigate impacts to the species.<sup>263</sup>

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<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at p. 40.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at p. 41.

### 12. Impacts to Special-Status Bats

The DEIS indicates that the Project could result in the direct loss of a bat roosting site that was detected on the Project site.<sup>264</sup> Yet, the DEIS provides no mitigation for this significant adverse effect, in violation of NEPA.

### 13. Impacts to Desert Kit Fox

The first documented case of canine distemper in the desert kit fox was recently discovered at the Genesis Solar Energy Project site, approximately 17 miles west of the Project site.<sup>265</sup> Since then, the disease has spread, and there is concern that the desert kit fox could suffer an epidemic similar to one that nearly wiped out the island fox population on Santa Catalina Island in 1999.<sup>266</sup> Cashen explains that the Project has the potential to exacerbate the distemper issue by stressing resident kit foxes and displacing kit foxes from their home ranges (which may lead to intermingling of healthy and diseased kit foxes). The DEIS completely fails to disclose this significant adverse impact to desert kit fox.

In light of the distemper outbreak at the Genesis Solar Energy Project, and the reasonably foreseeable impacts to kit fox from the Project, Cashen recommends that the Applicant and BLM develop a kit fox mitigation monitoring program to be approved by CDFG.<sup>267</sup>

### 14. Impacts to Nesting Birds

The DEIS requires the Applicant to have a biologist monitor active nests within the range of construction-related noise exceeding 65 dBA.<sup>268</sup> The DEIS establishes triggers for adaptive management as "evidence of Project-related disturbance to nesting birds such as...*nest site abandonment*."<sup>269</sup> Cashen explains there are two significant problems with the DEIS' approach to mitigation for the Project's impacts to nesting birds.

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<sup>264</sup> DEIS, p. 4.4-15.

<sup>265</sup> Cashen Comments, p. 30; *see also* Attachment J, Compliance reports for the Genesis Solar Energy Project, documenting kit fox deaths.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at p. 33.

<sup>268</sup> DEIS, p. 4.3-23.

<sup>269</sup> *Id.*

First, Project activities that cause a nesting bird to abandon its nest would likely constitute a take,<sup>270</sup> which is prohibited by the Migratory Bird Treaty Act.

Second, scientific literature clearly demonstrates the adverse effects of noise and other forms of human disturbance on nesting birds, including for example, sound levels above 50 dBA within 1,000 meters of the source. But there is no evidence to support the notion that impacts to nesting birds from exposure to loud noise levels can be reliably avoided through monitoring and "adaptive management."<sup>271</sup> Consequently, the mitigation measure is inadequate and must be revised to prohibit loud construction noise within a scientifically-defensible buffer zone around nesting birds.

Thus, impacts to nesting birds remain significant.

#### 15. Impacts to Mojave Fringe-Toed Lizard

The DEIS indicates there are approximately 1,098 acres of occupied Mojave fringe-toed lizard habitat within the Chuckwalla Valley and Palo Verde Valley, of which approximately 655 acres (60.7 percent) occurs in areas where future development projects are proposed.<sup>272</sup> The DEIS concludes the mitigation measures proposed in the DEIS would provide suitable compensatory mitigation for habitat losses.<sup>273</sup> Cashen provides evidence that the DEIS' proposed mitigation is inadequate.

First, future development projects would eliminate 655 of the 1,098 acres of occupied Mojave fringe-toed lizard habitat in the Chuckwalla Valley and Palo Verde Valley, leaving 443 acres. The DEIS proposes habitat compensation at a 3:1 ratio.

Assuming the other projects that impact Mojave fringe-toed lizard habitat will also provide compensation at a 3:1 ratio, the projects would cumulatively have to provide 1,965 acres of compensation habitat. This is impossible because only 443 acres of occupied Mojave fringe-toed lizard habitat will remain after development of the projects. Cumulatively, the projects would not even be able to accomplish compensation at a 1:1 ratio (which would require 655 acres).<sup>274</sup>

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<sup>270</sup> Cashen Comments, p. 37.

<sup>271</sup> *Id.*

<sup>272</sup> DEIS, p. 4.4-24.

<sup>273</sup> *Id.*

<sup>274</sup> Cashen Comments, p. 28.

Second, the Mojave fringe-toed lizard exhibits a metapopulation structure, meaning a population that has a spatially discrete distribution, and for which at least one or more local populations has a non-trivial probability of extinction.<sup>275</sup> The fate of plant and animal metapopulations depends on the dispersal of individuals, both within and among patches of habitat.<sup>276</sup> Simulation models demonstrate clearly that populations in interconnected patches have a greater survival probability (i.e., persistence) than those in isolated patches and, moreover, that survival probability in connected patches increases with the degree of clustering among patches and with corridor quality.<sup>277</sup> Based on these facts, and knowledge of other factors (e.g., deterministic and stochastic factors) that affect the persistence of small populations, Cashen concludes that the Mojave fringe-toed lizard population in the Chuckwalla Valley and Palo Verde Valleys will not persist if there is a 59.7 percent loss of habitat.<sup>278</sup> The DEIS fails to address the importance of metapopulation dynamics in maintaining a viable Mojave fringe-toed lizard population and fails to adequately disclose, analyze, and mitigate the Project's significant impacts to the Mojave fringe-toed lizard.

### C. The DEIS Must Disclose, Analyze and Propose Mitigation for Impacts to Cultural Resources

Section 101 of NEPA declares it is a matter of national policy to preserve important historic, cultural, and natural aspects of our national heritage. Policy direction in BLM Manual 8100, section 8110.05D, further provides that BLM should "[i]ncorporate cultural resource considerations into all aspects of planning and decision making." Also, under Section 106 of the NHPA, the BLM has responsibility to consult with tribes and other parties to ensure that these impacts are identified as early as possible. Consultation must provide Indian tribes a reasonable opportunity to identify concerns about historic properties, advise on the identification of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of such effects.<sup>279</sup> The DEIS fails to satisfy the requirements of NEPA and the NHPA.

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<sup>275</sup> Cashen Comments, p. 28.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> 36 C.F.R. § 800.2.

1. The DEIS Violates NEPA because BLM's Impact Analysis Focuses on a Small Subset of Cultural Resources and Ignores Others

As explained above, the DEIS' definition of "cultural resource" is extremely narrow, emphasizing only specific, small sites and isolates on or in the ground that are recognized, identified and valued by archaeologists through archaeological surveys, while excluding "larger, more inclusive phenomena like landscapes, viewsheds...and 'districts.'"<sup>280</sup> As a result, the DEIS only analyzes the Project's impacts on only those cultural resources it classifies as sites, buildings, structures, objects or districts made of up discrete landscape features.

The DEIS' narrow definition of cultural resources carries through to its definition of the Area of Potential Effect ("APE"). The DEIS defines the APE for direct effects to be where construction activities will certainly churn up the soil that may contain artifacts, and for indirect effects, a half mile buffer zone around the APE for direct effects.<sup>281</sup> According to King, the APE for both direct and indirect effects is arbitrary and narrow and reflects an assumption that only physical impacts to physical remains matter.<sup>282</sup> As a result, the DEIS completely ignores, for example, the Project's impacts to viewsheds of cultural or spiritual value that may extend beyond a half mile.<sup>283</sup> "The same applies to auditory, olfactory, and other impacts not directly related to the disturbance of archaeological sites."<sup>284</sup>

In short, the DEIS ignores the Project's impacts on cultural resources that are not historic properties recognized by the Applicant's consultants while walking on the ground surface. "By first defining out of existence all 'cultural resources' that are not archaeological sites, and then excluding all effects other than potential physical effects on such sites, the DEIS ignores most of the project's likely impacts on cultural resources."<sup>285</sup> In King's opinion, "BLM's conclusions are likely grossly underestimated."<sup>286</sup> BLM's approach violates NEPA and the DEIS must be revised to analyze the Project's impacts on all cultural resources.

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<sup>280</sup> King Comments, p. 3.

<sup>281</sup> DEIS, p. 4.5.1

<sup>282</sup> King Comments, p. 13.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at p. 14.

<sup>285</sup> *Id.*

<sup>286</sup> King 106 Comments, p. 5.

2. The DEIS Fails to Analyze the Project's Impacts on Buried Cultural Resources

The DEIS states,

[t]he distribution of artifacts across the Project site shows that few cultural resources were identified in the southwestern and eastern portions of the Project site. This may be a result of flooding events that have taken place over time. The area in question has deep washes, suggesting that a high volume of water has the potential to move through the area. There is also evidence of flooding from the McCoy Wash near the eastern edge of the Project site and beyond the surveyed area. Historic deposits in the area have likely been displaced by these flooding events.<sup>287</sup>

King explains in his comments that these flood events can “bury artifacts, features, burials, and whole sites. This enhances the likelihood of unanticipated discoveries during construction, which has happened on the Genesis Solar Energy Project.”<sup>288</sup>

In addition, the DEIS states that “Holocene-age deposits are known to contain surface and *buried* archaeological deposits near the Project area” and “the proposed Project area is underlain by late Pleistocene and Holocene-age alluvial fan, valley fill, fluvial wash, and Acolian deposits.”<sup>289</sup> As King explains,

[i]n other words, whatever the applicant's contractors noticed in their walks over the surface of the project area, there is every reason to think that there are buried cultural deposits of Holocene, if not Pleistocene, age. Here again we are being warned of the potential for a Genesis Solar situation, but the DEIS ignores the warning.<sup>290</sup>

Despite the likelihood of buried resources on the Project site, and the catastrophe that occurred at the Genesis Solar Energy Project, the DEIS completely fails to analyze the Project's impacts on buried cultural resources.

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<sup>287</sup> DEIS, p. 3.5-29.

<sup>288</sup> King Comments, p. 10. See also Attachments E and F.

<sup>289</sup> DEIS, pp. 3.5-30 - 31 (emphasis added).

<sup>290</sup> King Comments, p. 11 (emphasis in original).

3. The DEIS Fails to Adequately Evaluate the Project's Impacts on Cultural Landscapes

Without any basis, the DEIS states that NRHP "eligibility criteria are still being developed" for the two cultural landscapes identified on the Project site – the Desert Training Central Cultural Landscape and the Prehistoric Trails Network Cultural Landscape.<sup>291</sup> The DEIS is simply wrong. The NRHP's eligibility criteria have been in place since the 1960's and apply to landscapes (and any other type of property).<sup>292</sup> Also, the National Park Service issued guidelines for evaluating landscapes.<sup>293</sup> The DEIS must be revised to include analyses of the Project's impacts on cultural landscapes.

4. The DEIS Fails to Provide Adequate Mitigation for Impacts to Cultural Resources

The DEIS includes one mitigation measure for the Project's impacts to cultural resources. "CUL-1" states, "BLM's execution of an MOA" under Section 106 of the NHPA will "resolve adverse effects associated with" the Project.<sup>294</sup> According to the DEIS,

[t]he MOA will contain measures to avoid, minimize, and mitigate adverse effects to historic properties and detail the process for activities to proceed in areas where historic properties are not now known to exist; procedures for treatment of inadvertent discoveries; recognition that BLM will comply with NAGPRA; compliance monitoring; dispute resolution; and tribal participation.<sup>295</sup>

CUL-1 also states that a HPTP will be prepared that contains procedures to mitigate impacts to historic properties. The DEIS then lists measures that the HPTP *could* include.<sup>296</sup>

CUL-1 fails to include "a reasonably complete discussion of possible mitigation measures"<sup>297</sup> for impacts to cultural resources. Instead, it merely

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<sup>291</sup> DEIS, p. 3.5-30.

<sup>292</sup> See 36 C.F.R. § 60.4.

<sup>293</sup> See C.F. National Register Bulletins 18, 30 and 38, available at <http://www.nps.gov/nr/publications/bulletins>.

<sup>294</sup> DEIS, p. 4.5-9.

<sup>295</sup> *Id.* at p. 4.5-10.

<sup>296</sup> *Id.*

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provides a “perfunctory description” or a “mere listing” of possible, hypothetical mitigation measures, in violation of NEPA.<sup>298</sup> Further, CUL-1 does not provide any mitigation for the Project’s impacts to any cultural resources other than archaeological sites found on the surface of the ground and identified as eligible for the NRHP. The DEIS completely fails to satisfy the requirements of NEPA.

5. The DEIS does Not Satisfy the NHPA because there is No Evidence that BLM Consulted with Tribes

The NHPA requires BLM to consult with any Indian tribe that attaches cultural significance to historic properties that may be affected by the Project. The DEIS states that the Applicant’s consultant (AECOM) made some attempt to inform Indian tribes about the Project.<sup>299</sup> According to the DEIS, AECOM sent letters to tribes and made follow-up phone calls.<sup>300</sup> As explained by King, contact by a project applicant’s consultant does not constitute government-to-government consultation required by the NHPA.<sup>301</sup> This is made clear by the Advisory Council on Historic Preservation’s (“ACHP”) “Section 106 Archaeology Guidance” which states,

[a] federal agency may not delegate to an applicant or any other non-federal party its responsibility to consult with federally recognized Indian tribes on a government-to-government basis. The federal government’s responsibility...is established through Executive Orders, Presidential memoranda, and other authorities, and is explicitly recognized by the ACHP’s regulation [36 CFR § 800.2(c)(2)(i)(B) and (C)].<sup>302</sup>

Moreover, there is no evidence that any *meaningful* consultation occurred. The DEIS merely provides capsule summaries, without any context or analysis, of six tribes’ responses to AECOM’s contacts. Specifically, the DEIS reports:

- The Quechan Tribal Historic Preservation Officer (“THPO”) expressed “concerns about the cultural landscape” and would like a copy of the Class III report;

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<sup>297</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352.

<sup>298</sup> *Neighbors of Cuddy Mountain*, 137 F.3d at 1380; *Idaho Sporting Cong. v. Thomas*, 137 F.3d at 1151.

<sup>299</sup> DEIS, pp. 3,5-27 – 28.

<sup>300</sup> *Id.*

<sup>301</sup> King Comments, p. 7.

<sup>302</sup> Available at <http://www.achp.gov/docs/ACTIP%20ARCHAEOLOGY%20GUIDANCE.pdf>, p. 10. 2555-020ev

- The Agua Caliente TIIPO requested maps and site descriptions/evaluations;
- The Cocopah tribal archaeologist offered no response;
- A member of the Serrano wanted to be notified of updates and wanted a copy of the class III report;
- Quechan elder, Preston Arrow-weed, did not wish to participate;<sup>303</sup> and
- The Chemehuevi Chairperson had "general concerns about development in the desert."<sup>304</sup>

In his comments, King explains that,

[w]ithout knowing what kinds of letters were sent by AECOM to the tribes, or what the content of any telephone calls were, it is impossible to determine whether the DEIS' brief capsule summaries actually capture tribal views. The DEIS completely fails to evaluate the meaning of tribal concerns, or explain what might be done with them. In other words, the DEIS contains no analysis of the project's effects on tribes.<sup>305</sup>

Notably, "a lack of response" from a tribe

should not be interpreted as a lack of interest in consultation or in providing information. Rather, the tribe may choose not to respond to a query from an applicant (or its consultant or contractor) because this contact does not meet the requirement of government-to-government consultation. In those cases where a tribe has not responded to an applicant or its representative, the federal agency must contact the tribe to initiate consultation and ascertain its interest.<sup>306</sup>

Here, despite a lack of response from the Cocopah tribe and a Quechan elder's wish to not participate (perhaps because the contact did not meet the requirement of

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<sup>303</sup> The DEIS provides no reason why Mr. Arrow-weed "did not wish to participate" – perhaps it is because he did not want to talk to the Applicant's consultant.

<sup>304</sup> DEIS, Appendix D, Table 3.

<sup>305</sup> King Comments, p. 8

<sup>306</sup> ACHP "Section 106 Archaeology Guidance," p. 11 (available at <http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20GUIDANCE.pdf>).  
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government-to-government consultation), there is no evidence that BLM itself contacted the Cocopah or Quechan tribes. This is a blatant violation of the NHPA.

6. The DEIS does Not Satisfy the NHPA because there is No Evidence that BLM Consulted with Other Parties

The NHPA requires BLM to consult with tribes *and other parties*.<sup>307</sup> There is no evidence that BLM consulted with parties other than tribes who might have cultural interests in the area of the Project.

The DEIS states that the majority of the "sites" thought to be eligible for the NRHP are associated with military activities associated with the World War II General Patton training center.<sup>308</sup> Yet, there is no indication that BLM contacted military history groups about their interests in the treatment of such sites and the landscape(s) of which they are parts. Consultation is key to identifying the Project's impacts on the "Desert Training Center Cultural Landscape." In his comments, King explains, "the significance of a landscape (or site, or anything else) is not an abstract quality that an uninvolved observer can measure; it is inevitably embedded in the minds of those who know about and perhaps value the place."<sup>309</sup> Without proper consultation, it is impossible to determine the extent of the Project's impacts on the cultural landscape.

7. The DEIS does Not Satisfy the American Indian Religious Freedom Act

The American Indian Religious Freedom Act<sup>310</sup> ("AIRFA") was enacted to protect and preserve the traditional religious rights and cultural practices of Native Americans. These rights include access to sacred sites, freedom to worship through ceremonial and traditional rights and use and possession of objects considered sacred, among other rights. AIRFA requires federal agencies to respect the customs, ceremonies and traditions of Native American religions.

The DEIS states that "[t]he BLM complies with AIRFA by obtaining and considering the views of traditional religious practitioners as part of the NEPA

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<sup>307</sup> NHPA, § 106, 36 C.F.R. Part 800.

<sup>308</sup> DEIS, p. 3.5-28.

<sup>309</sup> King Comments, p. 10.

<sup>310</sup> 42 U.S.C. § 1996.

compliance process.”<sup>311</sup> The DEIS contains no evidence that the BLM has taken any action to obtain and consider “the views of traditional religious practitioners.”

#### 8. The DEIS does Not Satisfy the Native American Graves Protection Act

The Native American Graves Protection Act<sup>312</sup> (“NAGPRA”) requires federal agencies to return Native American cultural items to their respective peoples. Cultural items include human remains, associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony.<sup>313</sup> Under NAGPRA’s implementing regulations,<sup>314</sup> if the discovery of Native American ancestral remains or cultural items can be *expected* on federal or tribal land, the federal agency must consult with culturally affiliated tribes and prepare and implement a Plan of Action.<sup>315</sup>

The DEIS completely fails to comply with the requirements of NAGPRA and its implementing regulations. Instead, the DEIS states, “*if* human remains or associated funerary objects *are* discovered on public lands within the Project area, the BLM will comply with the law and regulations...”<sup>316</sup> The DEIS ignores the NAGPRA regulations that require consultation with culturally affiliated tribes and preparation and implementation of a Plan of Action if cultural items *are expected* to be found. King explains in his comments that, “[g]iven the geomorphological evidence that buried Holocene (if not Pleistocene) archaeological sites are present in the project area, a POA must be developed now, prior to project approval.”<sup>317</sup> Moreover, the DEIS states, “BLM will comply with the law and regulations” if “human remains or associated funerary objects are discovered.”<sup>318</sup> The DEIS completely ignores NAGPRA’s requirements with respect to unassociated funerary objects, sacred objects and objects of cultural patrimony.

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<sup>311</sup> DEIS, p. 3.5-32.

<sup>312</sup> 25 U.S.C. § 3001 et seq.

<sup>313</sup> 25 U.S.C. § 3001.

<sup>314</sup> 43 C.F.R. § 10 et seq.

<sup>315</sup> 43 C.F.R. § 10.3(c).

<sup>316</sup> DEIS, p. 3.5-33.

<sup>317</sup> King Comments, p. 12.

<sup>318</sup> DEIS, p. 3.5-33.

**D. The DEIS Must Disclose, Analyze and Propose Mitigation for Impacts Associated with Hazardous Materials**

**1. The DEIS Fails to Adequately Analyze, Disclose, and Mitigate Impacts Associated with the Release of Hazardous Materials from Flooding**

The DEIS states that following Project construction, “erosion would occur in a manner consistent with existing conditions relating to wind and flash flooding”<sup>319</sup> and “on-site inundation of the solar arrays during flood periods is anticipated as a matter of Project design.”<sup>320</sup> However, as explained by hazardous materials expert Matt Hagemann in his attached comments, the DEIS fails to disclose that “erosion from flooding destabilize, topple PV panel arrays and may cause evaporation ponds to overtop and release wastewater.”<sup>321</sup> This may result in the release of toxic compounds and impacts to ecological receptors.<sup>322</sup>

The Project is located on a broad alluvial fan in a piedmont.<sup>323</sup> The Project places infrastructure (including PV panels and evaporation ponds) in the path of distributary ephemeral stream channels which characteristically fill and overtop to accommodate infrequent rainfall events.<sup>324</sup> As Hagemann explains, “[d]esert piedmonts are characterized by ephemeral flow networks that convey high-velocity flows through a complex array of unstable channels which shift positions during flooding. Predicting floods in these settings is difficult because of limited amounts of measured data on flow frequency and hydraulics.”<sup>325</sup> Research shows that “conventional concepts of floodplain management (i.e., as related to perennial streams) do not transfer to alluvial fan settings and ‘flood-hazard management [...] is a particularly challenging task.’”<sup>326</sup>

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<sup>319</sup> DEIS, p. 4.7-8.

<sup>320</sup> *Id.* at p. 4.20-9.

<sup>321</sup> Hagemann Comments, pp. 1-2.

<sup>322</sup> *Id.* at p. 2.

<sup>323</sup> *Id.* at p. 3.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* (quoting Geologic Assessment of Piedmont and Playa Flood Hazards in the Ivanpah Valley Area, Clark County, Nevada, 2010, available at <http://www.nhmg.unr.edu/pubs/Ar03/index.html>). 2558-020cv

PV panels containing cadmium telluride ("CdTe") may be used for the Project.<sup>327</sup> CdTe is a hazardous substance and if panels break, CdTe could be released.<sup>328</sup> The DEIS states, without any evidence, that "if the modules were damaged, CdTe would not mobilize from the glass into the environment in any plausible Project conditions."<sup>329</sup> Evidence shows otherwise. A recent study found that cadmium from broken PV panels can leach into groundwater at concentrations that exceed Environmental Screening Levels which have been established for "protection against leaching and subsequent impacts to groundwater."<sup>330</sup> Panels that break during flooding could release CdTe (at concentrations that exceed Environmental Screening Levels) that may be carried to the McCoy Wash and the Colorado River.<sup>331</sup>

Flooding could also inundate evaporation ponds, leading to erosion, failure of the ponds' embankments and a release of wastewater.<sup>332</sup> The evaporation ponds would contain discharge from the water treatment system and would require a Waste Discharge Requirement permit from the Colorado River Regional Water Quality Control Board.<sup>333</sup> According to the DEIS, the solids produced from precipitation of minerals in wastewater would likely be classified as Class II non-hazardous industrial waste.<sup>334</sup> The DEIS contains no analysis of impacts associated with the release of industrial waste as a result of flooding.

This is particularly concerning considering the recent flood event at the Genesis Solar Energy Project that damaged approximately 200 mirrors.<sup>335</sup> The developer of the project characterized the storm as a 100-year flood.<sup>336</sup> Based on data from the Precipitation Frequency Data Server from the National Oceanic and Atmospheric Administration, Hagemann determined that the storm was actually a 500-year flood event.<sup>337</sup> The DEIS provides no analysis of the Project's impacts

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<sup>327</sup> See DEIS, p. 4.9-6 (the Applicant has not determined which type of PV panel will be used for the Project. PV panels containing CdTe is one of the options being considered).

<sup>328</sup> *Id.* at p. 2.

<sup>329</sup> DEIS, p. 4.9-6.

<sup>330</sup> Hagemann Comments, p. 2 (quoting *Screening for Environmental Concerns at Sites with Contaminated Soil and Groundwater*).

<sup>331</sup> Hagemann Comments, p. 2.

<sup>332</sup> *Id.* at pp. 3-5.

<sup>333</sup> *Id.* at p. 4.

<sup>334</sup> DEIS, p. 2-22.

<sup>335</sup> Hagemann Comments, p. 2.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

associated with a 500-year flood. Further, the DEIS only provides mitigation for 25-year and 100-year storms.<sup>338</sup> It does not provide any mitigation for a 500-year storm event. If PV panels containing CdTe are used for the Project and flooding occurs, CdTe could be released to McCoy wash and the Colorado River.

Evidence shows that flood-hazard management in alluvial fan settings is particularly challenging. Tellingly, the recent flood at the Genesis project caused significant damage. According to Hagemann, the DEIS' mitigation measures for impacts associated with 25-year and 100-year storms

would clearly not be adequate in the event of a storm of the magnitude which occurred on the Genesis Solar Energy Project site on July 30-31, 2012. The rainfall event at the Genesis Solar Energy Project shows that flooding that is not anticipated can occur in the desert where estimating the likelihood of flood events is notoriously difficult... Flooding of the magnitude observed on July 30-31, 2012 at the Genesis Solar Energy Project site would have the potential to cause widespread damage to PV panel arrays and to the evaporation ponds, impacts not analyzed in the DEIS.<sup>339</sup>

In light of this evidence, the DEIS must be revised to include an analysis of impacts and mitigation associated with the release of CdTe from PV panels and industrial waste from evaporation ponds.

2. The DEIS Fails to Adequately Disclose, Analyze, and Mitigate the Project's Potential to Violate Water Quality Standards and Waste Discharge Requirements

The Project includes up to eight evaporation ponds for discharge from the water treatment system. The Project will also impact 185 acres of waters of the State, including ephemeral drainages.<sup>340</sup> Hagemann explains in his comments that discharge of wastewater to the evaporation ponds would require a Waste Discharge Requirement permit from the Colorado River Regional Water Quality Control Board.<sup>341</sup> He also notes that any fill placement (e.g. during road construction) or placement of PV panel supports across ephemeral drainages would require a

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<sup>338</sup> DEIS, pp. 4.20-18 19.

<sup>339</sup> Hagemann Comments, p. 4.

<sup>340</sup> DEIS, p. 4.3-6.

<sup>341</sup> Hagemann Comments, p. 4.

permit.<sup>342</sup> The DEIS fails to evaluate those permit requirements. An analysis is necessary to show that the Project will not cause or contribute to an exceedance of water quality standards established for surface water and groundwater under the Basin Plan, to ensure full compliance with the requirements of the Porter-Cologne Water Quality Control Act and the California Water Code, and to show that wastewater discharge and fill placement will not cause adverse effects to wildlife and waters of the State.

Further, the California Water Code requires the Applicant to prepare a Report of Waste Discharge for approval from the Colorado River RWQCB<sup>343</sup> prior to Project approval. Hagemann notes that other solar projects with evaporation ponds and fill placement were required to prepare ROWDs prior to Project approval.<sup>344</sup> The ROWD should be included in a revised DEIS so that the public can review the Project's potential impacts on water resources and biological resources. Hagemann explains that,

[t]he ROWD should include documentation about wastewater pond construction (including design specifications, sizing (including flood event considerations) and evaluation of the need for leak detection), provisions for monitoring and reporting water quality and biological impacts (including bird mortality), and an evaluation of the need for groundwater monitoring.<sup>345</sup>

None of this information has been disclosed.

### 3. The DEIS Fails to Adequately Analyze, Disclose, and Mitigate Hazards Associated with Former Military Use of the Site

The DEIS identifies unexploded ordnance ("UXO") in the Project area, and generally describes the history of General Patton's World War II Desert Training Center.<sup>346</sup> The DEIS also generally describes the Muroc Army Air Field located south of the Project site, which was used as a heavy bombardment crew training base during World War II.<sup>347</sup> The DEIS states that

<sup>342</sup> *Id.* at pp. 4-5.

<sup>343</sup> Cal. Water Code, § 13280.

<sup>344</sup> Hagemann Comments, pp. 5-6.

<sup>345</sup> *Id.* at p. 5.

<sup>346</sup> DEIS, p. 3.22-4.

<sup>347</sup> *Id.*

bombs and explosive materials, and possible incendiary and pyrotechnic materials, were stored on airfield grounds in up to five magazines or bunkers. A gunnery range, skeet range, and jeep type target range, all with ammunition storage, were constructed and used by Army personnel.<sup>348</sup>

The DEIS acknowledges that "UXO presents an immediate risk of acute physical injury from fire or explosion resulting from accidental or unintentional detonation" and "unidentified UXO could be present on the solar plant site or along the proposed linear facilities."<sup>349</sup> Specifically,

surface and shallow sub-surface UXO could be disturbed by vehicles, workers walking, and/or excavation using shovels or similar hand tools, and deeper sub-surface UXO could be disturbed by earth movement and excavation processes that would be required for development of the Proposed Action.<sup>350</sup>

Mr. Hagemann reviewed the DEIS with respect to hazards associated on the site from remnants of the military's use of the site. Hagemann also conducted his own research regarding the military's use of the Project site. Hagemann concluded that the DEIS' analysis and mitigation for the Project's impacts associated with former military use of the Project site is inadequate.

Hagemann discovered that the "[p]ractice bombing range underlies a majority of the Project area" and a Jeep Range underlies "the eastern generator tie line alignment and an access road."<sup>351</sup> Mr. Hagemann's research also revealed that "high explosive bombs" were used at the firing and bombing area.<sup>352</sup> According to Hagemann, "[t]he former Firing and Bombing Area, which underlies much of the Project footprint, represents an area where UXO may be present in the form of practice bombs and incendiary devices."<sup>353</sup> Notably, during limited surveys of the neighboring Blythe Solar Power Project, seven UXO findings were reported.<sup>354</sup> It is likely that more UXO would be found if the entire Blythe project site were surveyed.<sup>355</sup> Hagemann concludes that "almost assuredly, hazardous materials and

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<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at p. 4 22-5.

<sup>350</sup> *Id.*

<sup>351</sup> Hagemann Comments, pp. 6-7.

<sup>352</sup> *Id.* at p. 7.

<sup>353</sup> *Id.* at p. 8.

<sup>354</sup> *Id.* at p. 9.

<sup>355</sup> *Id.*

unexploded ordnance will be found in areas where earthwork will take place, putting workers at risk..."<sup>356</sup>

Hagemann's conclusion is particularly concerning because, "in addition to the explosion hazard represented by the UXO, toxic chemicals may be found in the soil associated with the practice bombs and incendiary devices."<sup>357</sup> Specifically, "[t]he bullets and impacted soil may contain lead and other metals, including copper, zinc, tungsten, arsenic, antimony and nickel at concentrations that would pose a risk to workers excavating soil."<sup>358</sup> The DEIS completely fails to identify the potential for contamination associated with bullets that, according to Hagemann, are likely to be found on the Project site.<sup>359</sup>

The DEIS also completely fails to disclose and analyze the presence of contamination on the Project site from the presence of pyrotechnic, incendiary or tracer ammunition. In his comments, Hagemann explains that compounds of concern used in pyrotechnic munitions include perchlorates.<sup>360</sup> Perchlorates can be inhaled via soil dust.<sup>361</sup> Perchlorates inhibit thyroid function and are a risk to human health.<sup>362</sup> To prevent significant risk to worker safety and public health, Hagemann recommends that soil sampling be conducted on the Project site prior to Project approval.<sup>363</sup>

Given the intensity of the military maneuvers on the Project site and in the Project vicinity, the DEIS' analysis of associated impacts is extremely deficient. The DEIS must be revised to include full disclosure of military uses of the Project area, including any soil contamination hazards posed by the military use. Impacts from soil contamination must be evaluated prior to Project approval and mitigation for those impacts must be provided.

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<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at p. 8.

<sup>358</sup> *Id.* at p. 7.

<sup>359</sup> *Id.* at p. 8.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

**E. The DEIS Must Disclose, Analyze, and Propose Mitigation for Impacts to Water Resources**

**1. The DEIS Fails to Adequately Analyze Impacts Associated with Flooding**

The DEIS states that “unless suitably protected from flooding, the proposed on-site buildings could become inundated during a heavy storm event.”<sup>364</sup> Mitigation measure WATER-4 requires “all on-site buildings, maintenance areas, designated parking lots, and associated facilities be constructed at an elevation of at least 2 feet above the highest anticipated flood flows during a 100-year event.”<sup>365</sup> The DEIS also states, “[t]he potential for the MSEP to result in increased stormwater flows, such that existing or planned stormwater drainage facilities could be insufficient to convey flows, is considered minor.”<sup>366</sup>

Recently, a massive flood occurred at the Genesis Solar Energy Project. In its environmental review of the Genesis project, the BLM concluded that “mitigation measures ensure that potential GSEP drainage and flooding related impacts would be minimized.”<sup>367</sup> Measures included constructing engineered channels to redirect water flow around the project site.<sup>368</sup> However, the recent flood resulted in significant damage, including (among other things):

- One-half mile to one mile of tortoise fencing was washed out;
- Debris from the project site was moved up to one mile off-site by floodwaters;
- 195 mirrors were broken;
- Caissons were damaged by three to six feet of soil erosion;
- A temporary V-ditch was destroyed;
- A channel on the east side of project site was scoured from flood waters;
- The main access road was impassable (and a temporary road had to be graded to evacuate the site);

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<sup>364</sup> DEIS, p. 4.20-9.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at p. 4.20-8.

<sup>367</sup> Final Environmental Impact Statement for Genesis Solar Energy Project, August 2010, p. 4.19-25.

<sup>368</sup> *Id.*

- Approximately six inches of sediment deposits accumulated in the mirror field;
- Approximately 81,300 cubic yard of soil was displaced;
- Construction trailers were flooded; and
- The tortoise crossing was washed out.<sup>369</sup>

To repair the damage, NextEra had to grade a temporary road outside of the project's right-of-way, replace the tortoise fencing and use off-highway vehicles and other equipment to retrieve debris that was carried off-site, among other things.

According to NextEra, the flooding damage was so significant because,

[w]ith construction unfinished, the full design of handling storm-water was not realized. Open underground power and piping trenches channeled water to non-designated areas. As water follows the path of least resistance, open trenches, material storage, unfinished grading, along with other minor items allowed additional erosion and sedimentation build-up.<sup>370</sup>

This significant damage results in unanalyzed significant adverse effects. For example, the Project site will need more grading which will result in additional significant adverse effects to air quality and biological resources, among other impacts.

Clearly, BLM was incorrect when it concluded that mitigation measures would minimize impacts from flooding at the Genesis project site. It appears that construction phases were not properly timed. For example, mirrors were erected before stormwater prevention measures were completed. Instead, to prevent significant damage, it makes sense that all features necessary to handle stormwater be in place *prior to the commencement of other construction.*

Evidence shows that it is reasonably foreseeable that a flood at the Project site could cause significant damage. The DEIS must disclose all reasonably foreseeable impacts associated with a major flood and propose all feasible mitigation. In addition, BLM should require the Applicant to construct all Project features necessary to handle stormwater prior to all other construction.

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<sup>369</sup> See Attachment K, Genesis Solar Energy Project Major Rain Event on 7/31/2012 [Conversations with NextEra Compliance on 8/1], Genesis Flood Damage Assessment, and Flood Event Photos, available at: [http://www.energy.ca.gov/sitingcases/genesis\\_solar/compliance/submittals/July-31-2012\\_Flood\\_Event/](http://www.energy.ca.gov/sitingcases/genesis_solar/compliance/submittals/July-31-2012_Flood_Event/)

<sup>370</sup> *Id.*

2. The DEIS Fails to Adequately Analyze and Mitigate Impacts to the Colorado River

The Project site overlies the Palo Verde Mesa Groundwater Basin.<sup>371</sup> The DEIS states that water for the Project will come from,

two or three primary wells and a sufficient number of back-up wells...All wells would be constructed and operated within the solar plant site at the eastern end of Unit 1; the *precise location of the well field would be defined during the detailed design. If possible, one of the wells would be located near the proposed water treatment system area. As currently planned, the wells would pump groundwater from the PVMGB, where the water table has been measured at or near 254 feet amsl.*<sup>372</sup>

The DEIS acknowledges that “[s]ubsurface inflow into the PVMGB occurs from the Colorado River via the PVVGB.”<sup>373</sup> According to the DEIS, the PVMGB “is hydrologically continuous with the PVVGB. Therefore, both basins are considered together in support of the water supply assessment” and “the two basins are collectively referred to as the Palo Verde Groundwater Basin.”<sup>374</sup> Further, “[g]roundwater migrating from the Colorado River through the PVMGB represents most of the subsurface inflow to the basin.”<sup>375</sup> The DEIS also states that the “PVMGB is tributary to the lower Colorado River, and is part of the Colorado River aquifer.”<sup>376</sup> Finally, the PVMGB “is likely subject to the Colorado River Compact, 1922, the Boulder Canyon Project Act, and the Consolidated Decree 547 U.S. 150 (2006),”<sup>377</sup> which, together with other laws, regulations and contracts, make up the “Law of the River.” Yet, the DEIS concludes, without any evidence, that “groundwater connection between the Colorado River and the PVMGB is not anticipated.”<sup>378</sup> The DEIS provides no analysis of the Project’s impact on the Colorado River.

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<sup>371</sup> DEIS, p. 3.20-4.

<sup>372</sup> *Id.* at p. 2-18.

<sup>373</sup> *Id.* at p. 3.20-7 (emphasis added).

<sup>374</sup> *Id.* at p. 4.18-2.

<sup>375</sup> *Id.* at p. 3.20-7.

<sup>376</sup> *Id.* at p. 3.20-4.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at p. 3.20-7.

Pursuant to the Law of the River, any diversion or consumptive use of lower Colorado River mainstream water without an entitlement is illegal.<sup>379</sup> Consumptive use of the mainstream includes “water drawn from the mainstream by underground pumping.”<sup>380</sup> The accounting surface methodology was developed in the 1990s by the U.S. Geological Survey, in cooperation with the Bureau of Reclamation, to identify wells outside the Colorado River floodplain that yield water that will be replaced by water from the River and require an entitlement.<sup>381</sup> Under the accounting surface methodology, any well that pumps water from below the accounting surface is presumed to be pumping Colorado River water and therefore requires an entitlement.<sup>382</sup>

According to USGS’ Update of the Accounting Surface Along the Lower Colorado River report, the accounting surface at the Project site appears to be in the range of 252 to 256 feet.<sup>383</sup> Because the Project would pump water from “two or three primary wells and a sufficient number of back-up wells” in undetermined locations “at the eastern end of Unit 1... where the water table has been measured *at or near* 254 feet amsl,”<sup>384</sup> there is potential for the Project to pump water from below the accounting surface. Without any evidence to the contrary, it must be assumed that the Project would pump Colorado River water and the Applicant must obtain an entitlement. The DEIS completely fails to analyze or mitigate this significant adverse effect.

## VII. THE DEIS FAILS TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES

### A. The Purpose and Need Statement is Arbitrarily Narrow and Promotes Private Interests

An EIS must briefly describe the underlying purpose and need to which the agency is responding in proposing the alternatives, including the Proposed Action.<sup>385</sup> The BLM’s *NEPA Handbook* mandates that the purpose and need statement for an externally generated action must describe the BLM’s purpose and

<sup>379</sup> *Arizona v. California*, 547 U.S. 150, 156 (2006).

<sup>380</sup> *Id.* at 153.

<sup>381</sup> See Attachment I, Update of the Accounting Surface Along the Lower Colorado River, Scientific Investigations Report 2008-5113.

<sup>382</sup> *Id.* at p. 3.

<sup>383</sup> *Id.* at, p. 14, Figure 6.

<sup>384</sup> DEIS, p. 2-15 (emphasis added).

<sup>385</sup> 40 C.F.R. § 1502.13.

need, not an applicant's or external proponent's purpose and need.<sup>386</sup> The "need" for the action is the underlying problem or opportunity to which the BLM is responding with the action.<sup>387</sup> The "purpose" is the goal or objective that the BLM is trying to reach.<sup>388</sup> Clearly distinguishing the purpose and the need clarifies for the public and decision makers why the agency is proposing to spend large amounts of taxpayers' money, while at the same time causing significant environmental impacts.<sup>389</sup> As recently repeated by the Ninth Circuit, "an agency cannot define its objectives in unreasonably narrow terms."<sup>390</sup>

The DEIS contains an arbitrarily narrow purpose and need statement that impermissibly promotes private objectives. The purpose and need statement states that the BLM's purpose and need for the Project is to respond to the application for the ROW.<sup>391</sup> This narrowly defined statement implies that BLM stands to gain nothing more than a rubber-stamped document at the end of this process. It is nonsensical to think that the BLM would spend taxpayer money and impact the environment for such an inconsequential result. While the introduction to the purpose and need statement recites statutes, regulations and orders that encourage the development of renewable energy on public lands, these sources of authority do not encourage the development of some parcels over others.<sup>392</sup>

## B. Reasonable Alternatives Omitted from Analysis

Under NEPA, federal agencies must consider alternatives to their proposed actions as well as their environmental impacts.<sup>393</sup> The alternatives analysis has been called the "linchpin" of the Environmental Impact Statement.<sup>394</sup>

An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly

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<sup>386</sup> NEPA Handbook p. 35 (citing 40 C.F.R. § 1502.13).

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> Ronald W. Bass et al., *The NEPA Book* 89 (2d. ed. 2001).

<sup>390</sup> *National Parks & Conservation Ass'n v. Bureau of Land Management* (2010) 2010 WL 1980717, 8 (9th Cir. 2010), quoting *City of Carmel-By-The-Sea v. United States Dep't. of Transp.*, 123 F.3d 1142, 1156 (9th Cir. 1997).

<sup>391</sup> DEIS p. 1-2.

<sup>392</sup> *Id.*

<sup>393</sup> 40 CFR § 1502.14.

<sup>394</sup> *Monroe County Conservation Council, Inc. v. Volpe* (2d Cir. 1972) 472 F.2d 693.

discuss the reasons for their having been eliminated.”<sup>395</sup> It is “absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that courts have characterized as ‘the linchpin of the entire impact statement.’”<sup>396</sup> This is particularly true in cases where there may be “unresolved conflicts concerning alternative uses of available resources.”<sup>397</sup>

The alternative discussion must include not only primary alternatives, *i.e.*, substitutes for the agency’s proposed action that accomplish the action in another manner, but also secondary alternatives, which are means of carrying out the action in a different manner.<sup>398</sup> The range of alternatives to be discussed is governed by a “rule of reason.” Agencies have a duty “to study all alternatives that appear reasonable and appropriate for study . . . as well as significant alternatives suggested by other agencies or the public during the comment period.”<sup>399</sup> Reasonable alternatives are those that may be feasibly carried out based on technical, economic, environmental, and other factors. It is well established that an alternative is not infeasible merely because the project proponent does not like it or is not capable of implementing it.<sup>400</sup> “The ‘existence of a viable but unexamined alternative renders an environmental impact statement inadequate.’”<sup>401</sup>

If an EIS is prepared in connection with an application for a permit or other federal approval, the EIS must rigorously analyze and discuss alternatives that are

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<sup>395</sup> 40 C.F.R. § 1502.14(a).

<sup>396</sup> *NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (citation omitted); see *Silva v. Lynn*, 482 F.2d at 1285; *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) [a thorough discussion of the alternatives is “imperative”].

<sup>397</sup> See 42 U.S.C. § 4332(2)(E); *California v. Block*, 690 F.2d 753, 766-767 (9th Cir. 1982).

<sup>398</sup> See *Methow Valley Citizens Council v. Regional Forester*, 838 F.2d 810 (9th Cir. 1987), *rev’d on other grounds*, 490 U.S. 332 (1989); see also Mandelker, *NEPA Law and Litigation* (2d ed., vol. 8, 2000).

<sup>399</sup> *Roosevelt Campobello Int’l Park Comm’n v. United States EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (quotations omitted); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 95 F.3d 892, 903 (9th Cir. 1996).

<sup>400</sup> See CEQ, *Forty Most Asked Questions Concerning CEQ’s NEPA Regulations* (1981), question No. 2(a), 46 Fed. Reg. 18026, 18027 (March 23, 1981).

<sup>401</sup> *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993), quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992); see *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) [Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot “bring into compliance with NEPA an EIS that by itself is inadequate”].

“reasonable,” *regardless of whether the proponent or applicant likes or is itself capable of carrying out a particular alternative.* “Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.”<sup>402</sup> Courts have shown little reluctance in striking down EISs that fail to include a thorough discussion of reasonable, less environmentally damaging alternatives.<sup>403</sup> Finally, an EIS must include a discussion of “natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.”<sup>404</sup>

#### 1. The DEIS Failed to Seriously Consider Alternative Sites

The BLM must consider reasonable alternatives, even if the Applicant does not like the alternative or is incapable of implementing the Project on an alternative site.<sup>405</sup> The DEIS states “[a]n all-private land alternative was not carried forward for detailed evaluation in the PA/EIS because no private parcels or combinations of parcels of sufficient size were available that met the minimum requirements.”<sup>406</sup> These requirements, according to the DEIS, are a minimum of 1,500 contiguous (or nearly contiguous) acres listed for sale or lease located within 20 miles of the Colorado River Substation and in proximity to a reasonable genetic line option.<sup>407</sup> BLM’s decision not to consider alternate sites on private land that do not meet these requirements is impermissible because it is based on an arbitrarily narrow purpose and need -- to respond to the Applicant’s request for a ROW. The BLM may not adopt private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives.<sup>408</sup>

As drafted, the DEIS violates NEPA’s basic requirement to consider alternatives to the proposed Project. Numerous environmental organizations have recommended criteria to consider when selecting land for siting renewable energy projects.<sup>409</sup> The proposed site for the Project does not satisfy any of these criteria. The proposed Project site is not ideal for long-term energy generation. This

<sup>402</sup> Forty Most Asked Questions Concerning CEQ’s [NEPA] Regulations at Question 2a.

<sup>403</sup> See, e.g., *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179 (9th Cir. 1990); *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996).

<sup>404</sup> 40 C.F.R. § 1502.16(f), *emphasis added*.

<sup>405</sup> See CEQ, Forty Most Asked Questions Concerning CEQ’s NEPA Regulations No. 2(a) (1981).

<sup>406</sup> DEIS, p. 2-59.

<sup>407</sup> *Id.*

<sup>408</sup> NEPA Handbook p. 50.

<sup>409</sup> See Attachment M, Renewable Siting Criteria for California Desert Conservation Area, 2553-020cv

particular site lies within undisturbed desert habitat that contains untouched and intact environmental resources. As discussed at length in the preceding sections, the site is characterized by desert scrub vegetation, desert washes, and sand dunes. Special-status species were observed on the site. In addition, many cultural resources exist on-site.

The BLM should consider an alternate site on disturbed land. In the desert to the northwest of the Project site, for example, there is an extensive amount of abandoned farmland that would facilitate long-term energy generation while reducing the Project's impacts on environmental resources.<sup>410</sup> These areas have existing infrastructure and are near roads and existing power lines. The BLM must evaluate siting the Project on these alternate sites, or risk failing to evaluate a viable alternative.

2. The DEIS Improperly Eliminated Alternative Solar Energy Technologies From Consideration

The DEIS fails to adequately analyze alternative solar energy technologies. The DEIS, without any analysis or evidence, states that other types of energy projects would not reduce impacts. For example, the DEIS dismisses distributed solar as an alternative to the Project.<sup>411</sup> The DEIS provides no analysis or evidence to support elimination of this alternative technology. In reality, because distributed solar technologies could be installed in urban and other developed areas that have already been disturbed, they would have substantially fewer environmental impacts.

3. The DEIS Must Consider The Above Alternatives Regardless of The Applicant's "Preference"

Lost there be any lingering belief that the applicant's desires dictate the range of alternatives that NEPA requires be discussed in an EIS, we wish to state emphatically that this is not the case under applicable law. The fact that BLM is acting in a permitting role, rather than initiating the project itself, in no way limits the extent of its obligations under NEPA. CEQ and the courts have repeatedly declared that the duty to discuss alternatives in an EIS is no different when the

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<sup>410</sup> See Attachment N, Map: Abandoned Farmland – Eastern Riverside County, Conchella Valley Assoc. of Governments.

<sup>411</sup> DEIS, p. 2-61.

action is initiated by a Federal agency or by private parties,<sup>412</sup> BLM must therefore consider all alternatives that are reasonably related to the project and evaluate them in the EIS.

In this case, the Project's purpose and need could be fully satisfied by an off-site alternative or by a technological alternative that requires less acreage and resources. Each of these approaches is feasible, economic, and will minimize or avoid potentially significant impacts. Under NEPA, it is imperative that they be evaluated in detail irrespective of the applicant's preference.

### **C. Alternative 3 – Central Gen-tie Route – is the Environmentally Preferable Alternative**

NEPA regulations state "that agencies shall...[i]dentify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference."<sup>413</sup> The DEIS states that BLM's preferred alternative is the proposed Project.<sup>414</sup> Yet, the DEIS' summary of impacts by alternative reveals that Alternative 3—Central Gen-tie Route would have substantially less impacts to numerous resources. For example, Alternative 3 would affect 20 to 24 fewer known cultural resource sites.<sup>415</sup> The DEIS should be revised to identify Alternative 3—Central Gen-tie Route as the environmentally preferred alternative.

In addition, because the Applicant now owns the adjacent BSPP<sup>416</sup> (the site through which the central gen-tie route runs), the Applicant must construct both projects in a way that affords the most environmental protection. For example, because Alternative 3—Central Gen-tie Route could be used for both projects, and it would greatly decrease impacts associated with two separate transmission routes, the BLM should require the Applicant to develop this route.

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<sup>412</sup> CBQ, *Guidance Regarding NEPA Regulations*, 58 Fed. Reg. 34263 (1993), available at: <http://ceq.hhs.gov/nepa/cees/1988/1983guid.htm> (as of July 1, 2010).

<sup>413</sup> 40 C.F.R. § 1502.14(e).

<sup>414</sup> DEIS, p. ES-4.

<sup>415</sup> DEIS, p. ES-8.

<sup>416</sup> See <http://online.wsj.com/article/BT-GO-20120627-714633.html>.  
2553-020cv

## VIII. THE DEIS FAILS TO COMPLY WITH THE FEDERAL LAND POLICY AND MANAGEMENT ACT

The Federal Land Policy & Management Act ("FLPMA") establishes requirements for land use planning on public land.<sup>417</sup> FLPMA requires that BLM, under the Secretary of the Interior, "develop, maintain, and when appropriate, revise land use plans" to ensure that land management be conducted "on the basis of multiple use and sustained yield."<sup>418</sup> The process for developing, maintaining, and revising resource management plans is controlled by FLPMA regulations.<sup>419</sup> Under FLPMA, if BLM wishes to change a resource management plan, it can only do so by formally amending the plan:

An amendment shall be initiated by the need to consider monitoring and evaluation findings, new data, new or revised policy, a change in circumstances or a proposed action that may result in a change in the scope of resource uses or a change in the terms, conditions and decisions of the approved plan. An amendment shall be made through an environmental assessment of the proposed change, or an environmental impact statement, if necessary, public involvement as prescribed in § 1610.2 of this title, interagency coordination and consistency determination as prescribed in § 1610.3 of this title and any other data or analysis that may be appropriate.

<sup>420</sup>

The objective of resource management planning by the Bureau of Land Management is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state, and local governments, Indian tribes, and appropriate federal agencies. Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for

<sup>417</sup> 43 U.S.C. §§ 1701-1785 (2006).

<sup>418</sup> 43 U.S.C. §§ 1701(a)(7), 1712(a); see also *Kern v. Bureau of Land Mgmt.*, 281 F.3d 1062, 1067 (9th Cir. 2002) (holding that FLPMA "requires the BLM to prepare [resource management plans] for the various districts under its control.")

<sup>419</sup> 43 CFR §§ 1601.0-1610.8 (2006).

<sup>420</sup> 43 CFR § 1610.5-5.

2558-020cy

resources and uses.<sup>421</sup> "Consistent" means that the BLM plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans.<sup>422</sup>

#### A. The Project is Inconsistent with the CDCA Plan

The CDCA plan was developed in accordance with FLPMA to inventory CDCA resources and to prepare a comprehensive land use management plan for the area.<sup>423</sup> Under the CDCA plan, BLM inventoried the desert area with public input and identified areas appropriate for wilderness, limited, moderate and intensive uses.

The CDCA plan describes areas that were inventoried for biological resources, cultural resources, recreational uses, grazing, mineral development, and many other uses. The Project site is designated Class L. Under the CDCA plan, Multiple-Use Class L (Limited Use) protects sensitive, natural, scenic, ecological, and cultural resource values.<sup>424</sup> Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished.<sup>425</sup>

The BLM is considering amending the CDCA plan to allow for solar power development on the Project site. This is fundamentally incompatible with the BLM's Class L designation because the solar power plant will significantly impact the biological and cultural resource values on the site, as described above. The habitat that now exists on the site will be destroyed and the site will not likely recover for centuries or longer. The Project will not be designed to accommodate sensitive, natural, scenic, ecological, and cultural resource values on the project site, as is required by the CDCA Limited Use designation. The Project is incompatible with the CDCA plan designation adopted through a comprehensive planning effort. The BLM should not override the wisdom of this planning effort for the short-term benefits that may or may not occur from the siting of this experimental power plant.

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<sup>421</sup> *Id.* at § 1601.0-2.

<sup>422</sup> *Id.* at § 1601.0-5.

<sup>423</sup> California Desert Conservation Plan of 1980 as amended, p. 5.

<sup>424</sup> *Id.* at p. 13.

<sup>425</sup> *Id.*

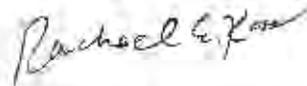
August 23, 2012

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## IX. CONCLUSION

The DEIS fails as an informational document and, thus, is inadequate under NEPA. The DEIS fails to establish the Project setting, does not fully and fairly describe the proposed action, provides incomplete analyses of some Project impacts and wholly omits discussion of other potentially significant adverse effects, and fails to adequately mitigate the Project's adverse impacts. The DEIS must be revised to cure these deficiencies and must be circulated for public review and comment. We respectfully urge the BLM to do so prior to taking any action on the Applicant's pending federal permit applications.

Sincerely,



Rachael E. Koss

REK:lv  
Attachments



*protecting and restoring natural ecosystems and imperiled species through  
science, education, policy, and environmental law*

***via email and USPS***

8/23/2012

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**Re: Comments on Draft Plan Amendment (PA) to the California Desert Conservation Area Plan, 1980, as amended (CDCA Plan), and Draft Environmental Impact Statement (DEIS) for the McCoy Solar Energy Project (MSEP)**

Dear Mr. Childers:

These comments are submitted on behalf of the Center for Biological Diversity's more than 378,000 staff, members and supporters in California and throughout the western states, regarding the Draft Plan Amendment (PA) to the California Desert Conservation Area Plan, 1980, as amended (CDCA Plan), and Draft Environmental Impact Statement (DEIS) for the McCoy Solar Energy Project (MSEP).

The development of renewable energy is a critical component of efforts to reduce greenhouse gas emissions, avoid the worst consequences of global warming, and to assist California in meeting its required emission reductions. The Center for Biological Diversity (the "Center") strongly supports the development of renewable energy production, and the generation of electricity from solar power, in particular. However, like any project, proposed solar power projects should be thoughtfully planned to minimize impacts to the environment. In particular, renewable energy projects should avoid impacts to sensitive species and habitats, and should be sited in proximity to the areas of electricity end-use in order to reduce the need for extensive new transmission corridors and lines and the efficiency loss associated with extended energy transmission. Only by maintaining the highest environmental standards with regard to local impacts, and effects on species and habitat, can renewable energy production be truly sustainable.

We support the comments submitted by Defenders of Wildlife, Natural Resources Defense Council, Sierra Club, the Wilderness Society and Audubon California and incorporate those comments herein. In addition to the issues identified in that letter, we have the additional following concerns:

## Joint Review With Blythe Solar Project Amendment Is Needed

As the BLM is aware, the Blythe Solar Project adjacent to the proposed McCoy project was previously issued a right of way grant by BLM. Since that time, some site clearing was begun but no construction of the solar project was ever undertaken and Solar Millennium/Solar Trust of America entered bankruptcy. The Blythe project – whatever it may currently entail--was recently acquired by NextEra from the STA bankruptcy and NextEra has applied to amend its permit from the California Energy Commission<sup>1</sup>, because of changes in technology from a solar-trough project to a photovoltaic project. The BLM will also be reviewing amendments including a change in the technology for the Blythe project from solar trough to PV. Therefore, because both the Blythe project and the McCoy project are connected – intending to share the same gen tie lines and roads—and because they are adjacent proposals from the same developer, the BLM should undertake joint NEPA review of the two projects. Such joint review will allow for greater flexibility in meeting the renewable energy goals and reduce impacts due to siting of the project components and infrastructure. BLM must seize this opportunity to further reduce environmental impacts of these projects by engaging in joint coordinated NEPA review.

While we anticipate that NextEra and the BLM may argue that each of these projects could go forward independently, the facts show that they are connected actions<sup>2</sup>—even if one is not necessary for the other to proceed. NEPA’s implementing regulations explain that agencies *should* consider connected, cumulative, and similar actions in the same impacts statement. “Connected actions” *must* “be considered together in a single EIS.” *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985); 40 C.F.R. § 1508.25(a)(1), and where two actions are “inextricably intertwined” they are connected actions that *must* be considered together. *Thomas*, 753 F.2d at 759; *Save the Yaak Committee v. Block*, 840 F.2d 714, 720 (9th Cir. 1988). Here some project features will be shared, such as roads and gen-tie lines/corridors and therefore the two projects are intertwined and should be considered together.

Even actions that are considered cumulative to each other and are proceeding at the same time through the NEPA process should be considered in the same NEPA review. Cumulative actions “which when viewed with other proposed actions have cumulatively significant impacts [] should [] be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(2). Similarly, reasonably foreseeable actions also should be considered together in the same environmental review document when the actions “have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography,” and the “best way to assess adequately [their] combined impacts [...] or reasonable alternatives” is to consider them together. 40 C.F.R. § 1508.25(a)(3).

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1 [http://www.energy.ca.gov/sitingcases/solar\\_millennium\\_blythe/compliance/documents/amendment/](http://www.energy.ca.gov/sitingcases/solar_millennium_blythe/compliance/documents/amendment/)

2 Connected actions are those actions that:

- i. Automatically trigger other actions which may require environmental impact statements.
  - ii. Cannot or will not proceed unless other actions are taken previously or simultaneously.
  - iii. Are interdependent parts of a larger action and depend on the larger action for their justification.
- 40 C.F.R. § 1508.25(a)(1).

The requirements that connected actions, cumulative, and/or similar actions be evaluated together prevents an agency from dividing a single project into segments that individually seem to have limited environmental impact, but as a whole have considerable impact. *See Thomas v. Peterson*, 753 F.2d at 758. It is important for federal agencies to consider connected actions together in a single NEPA process as opposed to segmenting review. *Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975) (where actions are interconnected in terms of fulfilling a joint purpose it may be necessary to conduct a single NEPA review); *Sierra Club v. U.S. Dept. of Energy*, 255 F. 2d 1177, 1184 (D. Colo. 2002).

As noted above, considering the actions together will also provide significant benefit to the environment because it can minimize impacts and ensure any conservation measures – such as avoiding the washes – are consistent across the two projects and the landscape.

### **Dissected Fan Landscape/Project Alignment**

We strongly suggest that the BLM consider an alternative in which both projects (MSEP and Blythe Solar Energy Project) are re-aligned to avoid the ecologically and hydrological important dissected fan area as identified in BLM's Northern and Eastern Colorado Plan (NECO). We submit Attachment 1, which shows the overlap of MSEP boundaries with the dissected fan landscape in the area. Clearly over half of McCoy Unit 2 is inappropriately sited and at odds with conservation of the dissected fan landscape. In addition to all of the biological benefits that the dissected fan landscape provides to desert tortoise and other desert wildlife, including rare and common migratory birds, its value to hydrological processes should be strongly considered. NextEra's Genesis solar project recently sustained significant, expensive impacts due to flooding<sup>3</sup>, because it is also inappropriately sited on an area with dissected fan on an alluvial floodplain. The areas proposed for development of the McCoy project should be moved out of the dissected fan landscape to avoid impacts to desert species habitat, soils, surface hydrology, and project infrastructure.

Desert washes, especially in this part of the California Desert Conservation Area (CDCA), are important habitat for desert tortoise and other wildlife even if they do not support any trees or have only sparse trees common to the desert dry wash woodlands. In fact the DEIS documents that one of the dominant components of the vegetated ephemeral swales is galleta grass (at 3.3-2), a preferred food plant for desert tortoise. While we recognize that only one desert tortoise was identified on-site during the single year survey, we note that it and additional sign and burrows were documented in the dissected fan landscape indicating that these areas are part of the desert tortoise home ranges for local individuals and further reinforcing the need to abandon the western portion of the proposed project in order to avoid desert tortoise impacts.

### **Desert Kit Fox**

The DEIS recognizes that the desert kit fox is a protected animal as a furbearing mammal under California Code of Regulations Title 14 Section 460 (DEIS at 3.4-3) and recognizes that desert kit fox occurs on site (at 3.4-16). In fact 57 kit fox natal dens were identified on the

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<sup>3</sup> [http://www.energy.ca.gov/sitingcases/genesis\\_solar/compliance/submittals/July-31-2012\\_Flood\\_Event/](http://www.energy.ca.gov/sitingcases/genesis_solar/compliance/submittals/July-31-2012_Flood_Event/)

project site and gen-tie alignment during spring 2011 surveys. However, density estimates were not quantified for the number of desert kit fox that will be displaced and “taken” by the proposed project. As the BLM is well aware, the first documentation of a deadly outbreak of canine distemper was confirmed in late 2011 in desert kit fox, when dead kit foxes found on and adjacent to the Genesis industrial solar project during construction were necropsied by state veterinarians.

The state wildlife veterinarian for the California Department of Fish and Game isn't certain the distemper outbreak is connected to the construction activities, but has concluded that habitat disturbance causes stress, and when animals succumb to stress they become more susceptible to disease.

Kit foxes have great fidelity to their natal burrows and as documented on the Genesis project site are not easily evicted from their burrows and home ranges through “passive relocation” or hazing. The DEIS incorrectly states that no “take” permits are given for desert kit fox, but as the BLM is aware, the California Department of Fish and Game did give take permits for desert kit foxes on Genesis to allow for trackable electronic collars for monitoring of some animals and inoculation of others against distemper. If any hazing activities are approved for desert kit fox as part of the project, we request that take permits be sought for the onsite kit foxes to monitor the ultimate outcome of the any hazing activities.

Despite the efforts of state and federal biologists, who tried to prevent the disease from spreading the efforts have not been successful, and so far the kit fox distemper epidemic has spread over eleven miles south of the Genesis project site. Hope is dimming that the epidemic can now be contained. The BLM must ensure that this devastating impact to the desert kit fox population from fast-track industrial development is not repeated at the McCoy site or any other. Additional disruption of native populations of desert kit foxes from hazing them off the McCoy proposed project site, will result in additional displaced animals wandering the desert and potentially spreading the disease farther through the population. This is unacceptable.

The DEIS fails to quantify how many kit fox territories overlap the proposed project site, or analyze the impacts to this species from the proposed project. The measures proposed at 4.4-36 for kit fox and badger are the same type of measures implemented for the Genesis project that failed to control the distemper outbreak and indeed may have caused it. Clearly a supplemental or revised DEIS needs to include a substantial section on the status of the on-site desert kit fox population, direct, indirect, and cumulative impacts to the species, and should require a Desert Kit Fox avoidance, minimization and relocation plan that sets out clear strategies to first avoid impacts to the species through re-design and then minimize and mitigate any remaining impacts to this species.

### **Burrowing Owls**

The DEIS notes that three burrowing owl pairs and at least 11 active burrows are located in the proposed project area (DEIS at 3.4-12). Preliminary results from the 2006-7 statewide

census identified that the Sonoran desert in California harbors few Western burrowing owls.<sup>4</sup> Even more worrisome is the documented crash of burrowing owls in their former stronghold in the Imperial Valley. The Imperial Valley has had a recently documented decline of 27% in the past years<sup>5</sup>, resulting in an even more dire state for burrowing owls in California. Because burrowing owls are in decline throughout California, and now their “stronghold” is documented to be declining severely, the burrowing owls on this proposed project site (and on other renewable energy projects) become even more important to species conservation efforts. The recirculated or supplemental DEIS needs to evaluate the potential impact of the proposed project on this regional distribution of owls.

While habitat acquisition specifically for burrowing owls as identified in the DEIS, the proposed mitigation of only 6.5 acres per “active burrow” is too low (DEIS at 4.4-38), especially in the Colorado Desert, as it is outdated agency guidance. Mean burrowing owl foraging territories are 242 hectares in size, although foraging territories for owl in heavily cultivated areas is only 35 hectares<sup>6</sup>. Regardless, the acquisition of only 19.5 acres (8 hectares) fails to mitigate for one bird even if it was relying on a heavily cultivated area. Therefore, additional mitigation acreage needs to be required – calculated using the mean foraging territory size times the number of owls. Using the average foraging territory size for mitigation calculations may not accurately predict the carrying capacity and may *overestimate* the carrying capacity of the proposed project site, since the proposed project site at 1300 acres – it may be that in this area of the Colorado desert 1300+ acres is necessary to support one burrowing owl. While the DEIS fails to incorporate the guidance from CDFG from 2012<sup>7</sup>, the carrying capacity is tied to habitat quality, language should be included that mitigation lands that are acquired for burrowing owl be native habitats on undisturbed lands, not cultivated lands, which are subject to the whims of land use changes. The long-term persistence of burrowing owls lies in their ability to utilize natural landscapes, not human-created ones.

While “passive relocation” does minimize immediate direct take of burrowing owls, ultimately the burrowing owls’ available habitat is reduced, and “relocated” birds are forced to compete for resources with other resident burrowing owls and may move into less suitable habitat, ultimately resulting in “take”. While the DEIS proposes to require the development of a Burrowing Owl Mitigation Plan (4.4-37) and passively relocate burrowing owls, no draft plan is provided and it is unclear if any monitoring targeting “passively relocated” burrowing owl survivorship will occur. No requirements of the plan are provided.

Indeed, another reason for pulling the project development away from the western side is that during the fall surveys for plants, at least 8 burrowing owls remained on site and were located “in the western half of the Solar Plant Site Survey Area” (Appendix C – Fall Plant Surveys at pg. 14). And another reason to support avoiding the dissected fan landscape is that burrowing owls are also found in these areas, as the survey notes burrowing owls “were flushed from wash banks in incised washes” (Ibid).

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4 IBP 2008; Wilkerson and Seigel 2010

5 Manning 2009.

6 USFWS 2003

7 [www.dfg.ca.gov/wildlife/nongame/docs/BUOWStaffReport.pdf](http://www.dfg.ca.gov/wildlife/nongame/docs/BUOWStaffReport.pdf)

## **Golden Eagle**

While the DEIS identified seven golden eagle nests within a ten mile radius of the proposed project site and that they represented four eagle territories (at 3.4-13). It is unclear how many territories are affected by the proposed project. Furthermore, the DEIS fails to present exactly how to mitigate the loss of a substantial amount of foraging habitat for the golden eagle from this project and other permitted projects within the territories. The fact still remains that significant amounts of foraging habitat will decrease carrying capacity of the landscape and could result in a potential loss of habitat needed to support a nesting pair, which would impact reproductive capacity.

Scientific literature on this subject is clear - the presence of humans detected by a raptor in its nesting or hunting habitat can be a significant habitat-altering disturbance even if the human is far from an active nest<sup>8</sup>. Regardless of distance, a straight-line view of disturbance affects raptors, and an effective approach to mitigate impacts of disturbance for golden eagles involves calculation of viewsheds using a three-dimensional GIS tool and development of buffers based on the modeling<sup>9</sup>. Golden eagles have also been documented to avoid industrialized areas that are developed in their territory.<sup>10</sup> Additionally, the DEIS does not actually clearly analyze the impacts to and mitigations for the golden eagle under the Bald Eagle and Golden Eagle Protection Act, which prohibits, except under certain specified conditions, the take, possession, and commerce of such birds. Any anticipated “take” of golden eagles by the project must first be permitted under the Bald and Golden Eagle Protection Act—the BLM should not issue any approval until that permit is secured.

## **Cryptobiotic Soil Crusts and Desert Pavement**

The proposed project is located in the Mojave Desert Air Quality Management District area, which is already in non-attainment for PM-10 particulate matter<sup>11</sup>. The construction of the proposed project further increases emissions of these types of particles because of the disruption and elimination of potentially thousands of acres of cryptobiotic soil crusts. Indeed, the proposed project site fits the description identified by USGS as most vulnerable to wind erosion<sup>12</sup>.

Cryptobiotic soil crusts are an essential ecological component in arid lands. They are the “glue” that holds surface soil particles together precluding erosion, provide “safe sites” for seed germination, trap and slowly release soil moisture, and provide CO<sub>2</sub> uptake through photosynthesis<sup>13</sup>.

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8 Richardson and Miller 1997

9 Camp et al. 1997; Richardson and Miller 1997

10 Walker et al. 2005

11 <http://www.mdaqmd.ca.gov/index.aspx?page=214>

12 <http://ag.arizona.edu/OALS/ALN/aln51/chavez.html>

13 Belnap 2003, Belnap et al 2003, Belnap 2006, Belnap et al. 2007

The DEIS does not describe the on-site cryptobiotic soil crusts. The proposed project will disturb an unidentified portion of these soil crusts and will likely cause them to lose their capacity to stabilize soils and trap soil moisture. The DEIS fails to provide a map of the soil crusts over the project site, and to present any avoidance or minimization measures. It is unclear how many acres of cryptobiotic soils will be affected by the project. The revised or supplemental DEIS must identify the extent of the cryptobiotic soils on site and analyze the potential impacts to these diminutive, but essential desert ecosystem components as a result of this project.

While desert pavements are mentioned as occurring on the proposed project site (DEIS at 3.7-10), quantitative acreage of pavement are not identified. The impact to air quality from disturbance of desert pavement is not analyzed. Clearly, avoidance of any impacts from construction to desert pavements will leave these ancient formations in place and protect the air quality of the region.

### **Conclusion**

Thank you for your consideration of these comments. In light of the many omissions in the environmental review to date, we urge the BLM to revise and re-circulate the DEIS for both this project and the connected Blythe solar project redesign or prepare a supplemental DEIS addressing these issues and others before making any decision regarding the proposed plan amendment and right-of-way application. In the event BLM chooses not to revise the DEIS and provide adequate analysis, the BLM should reject the right-of-way application and the plan amendment. Please feel free to contact me if you have any questions about these comments or the documents provided.

Sincerely,



Heene Anderson  
Biologist/Desert Program Director

cc: (via email)

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**References:** (Provided in electronic format on disk)

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August 23, 2012

# COLORADO RIVER INDIAN TRIBES

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***Re: McCoy Solar Energy Project Draft Environmental Impact Statement***

Dear Mr. Childers:

The Colorado River Indian Tribes ("CRIT" or "Tribes") submits these comments on the Draft Environmental Impact Statement ("DEIS") prepared by the Bureau of Land Management ("BLM") for the McCoy Solar Energy Project (the "Project"). BLM proposes to construct a utility-scale solar facility and a generation-intertie ("gen-tie") transmission line on 4,900 acres of undeveloped land in the Mohave desert near the Colorado River Indian Reservation and within the Tribes' ancestral and cultural homeland. Because of the Tribes' strong past and ongoing connection to the proposed site, CRIT is deeply concerned about the Project's impacts on cultural and other resources.

CRIT's people, particularly its Mohave and Chemehuevi members, have lived in the Project area since time immemorial, passing through and near the Project site on ancient trails, conducting religious ceremonies in the surrounding mountains, and using the rocks, native plants, and other resources in the area to produce tools, harvest food, and engage in ceremonial practices. Even today, CRIT's members continue to use the area as part of their traditional and religious practices. For example, Salt Song trails pass through the area; these trails and their associated songs—which include specific references to the surrounding mountains—are still used and sung by CRIT's Chemehuevi members with spiritual and cultural clan responsibility. According to Mohave elders, the CRIT's Mohave members also hold spiritual runs on the trails in the area.

Given this historic and ongoing use of the area, constructing a 5,000-acre solar field on the proposed Project site will have devastating cultural resource impacts. As both BLM and the Applicant know from recent experience at the Genesis Solar Energy Project (“Genesis”), it is very likely that the proposed grading, vegetation removal, and ground-disturbing activities will unearth and damage buried cultural artifacts (such as manos and metates, flakes, lithics, hammerstones, pottery, and other objects) left behind by CRIT’s ancestors and held sacred by its present-day members. Disturbing these artifacts, which are strongly associated with the ancestors who used them, is taboo to CRIT’s Mohave members, causing them significant emotional, spiritual, and cultural harm. Should any human remains be disturbed, the harm felt by CRIT’s members will likewise be significant. This spiritual harm cannot be mitigated by the remedial provisions of the Native American Graves Protection and Repatriation Act. Finally, and without any doubt, the proposed Project will also significantly contribute to the wholesale transformation of the region from an untouched desert landscape to an industrial one. Not only will this transformation impact discrete archaeological resources (the narrow focus of the DEIS), it will also adversely impact the ongoing cultural and spiritual practices of CRIT’s members.

In sum, the proposed Project is the most recent in a series of misguided attempts to solve the problems caused by the nation’s excessive consumption of fossil fuels by destroying the natural and spiritual landscapes of the American Southwest. Rather than continue down this misguided path, CRIT urges BLM to revise the DEIS to include a Project alternative that joins energy conservation efforts and distributed generation of solar power. Such an alternative would have *no* impacts on cultural resources or any other natural resources threatened by the industrialization of the desert. It would also address the environmental injustice of placing the burden of solving climate change on CRIT and other native people, who have contributed little to the problem and have, throughout history, been forced to sacrifice what they hold sacred to satisfy the “needs” of the rest of the nation.

Moreover, the agency cannot approve the proposed Project on the record before it. As detailed below, the DEIS, as currently drafted, violates the National Environmental Policy Act, 42 United States Code § 4321 *et seq.* (“NEPA”). The information contained in the DEIS also indicates that BLM’s actions are running afoul of the National Historic Preservation Act, 16 United States Code § 470 *et seq.* (“NHPA”). These federal laws require that, before an agency approves a project, it must identify cultural resources that may be impacted by a Project, determine how the Project will impact these resources, and analyze measures to mitigate or avoid these impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA’s procedures “require that agencies take a ‘hard look at environmental consequences’ and . . . provide for broad dissemination of relevant environmental information.”) (citations omitted); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (“Section 106 of NHPA is a ‘stop, look, and listen’ provision that requires each federal agency to consider the effects of its programs.”). The DEIS repeatedly

falls short of these standards by deferring the identification of cultural resources and the development of mitigation measures until some future date.

### **I. The DEIS Fails to Identify and Analyze the Project's Significant Cultural Resource Impacts.**

NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must take a "'hard look at environmental consequences' [and] provide for broad dissemination of relevant environmental information." *Robertson*, 490 U.S. at 350 (citations omitted). This "hard look" must include information about the project's impacts to cultural resources. See 40 C.F.R. § 1508.27 (An EIS must include information about "the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources."). Likewise, the NHPA requires federal agencies to consider the effects of their actions on historic properties, including significant cultural resources, before committing to those actions. *Muckleshoot*, 177 F.3d at 805.

Here, the DEIS's discussion of cultural resource impacts contains numerous flaws and deficiencies. For example:

**Definition of Cultural Resources.** As a preliminary matter, the DEIS suffers from a critically flawed definition of "cultural resources," which undermines the accuracy and quality of its subsequent analysis. The DEIS states at the outset that:

A cultural resource is a location of human activity, occupation, or use identifiable through field inventory, historical documentation, or oral evidence. Cultural resources include both archaeological, historic, or architectural sites, structures, or places with important public and scientific uses, and may include definite locations (sites or places) of traditional cultural or religious importance to specified social and/or cultural groups, e.g., "traditional cultural property." The cultural resources that are evaluated in this section may fall under one of the following resource types: prehistoric archaeological resource, ethnographic resource, and historic-period archaeological and built-environment resources. Cultural resources may be but are not necessarily eligible for the National Register of Historic Places (NRHP).

DEIS at 3.5-1. The document does not provide any information on how BLM developed this definition of cultural resources, nor cite to legal authority in support of this definition. However, five paragraphs later, BLM further narrows the definition, stating, "[c]ultural resources are categorized as buildings, sites, structures, objects, and districts for the

purposes of complying with federal law (NEPA and the National Historic Preservation Act of 1966 [NHPA] § 106).” DEIS at 3.5-1. There is no basis for asserting that this narrow definition of “cultural resources” is compelled, or even allowed, by NEPA. BLM’s second, narrower definition of cultural resources simply parrots NHPA’s definition of “historic resource”:

“Historic property” or “historic resource” means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.

16 U.S.C. § 470w(5). In contrast, NEPA guidelines specify that EIRs must address impacts to “historic *and* cultural resources.” 40 C.F.R. § 1502.16(g) (emphasis supplied). BLM offers no justification for substituting the definition of “historic resources” in one statute for the definition of “cultural resources” in another statute. By paring its analysis of cultural resources under NEPA down to only those tangible phenomena listed in the NHPA definition of “historical resources,” BLM excludes from consideration a host of important tangible and intangible cultural resources that are potentially affected by the project, such as viewsheds and landscapes, plants and animals used in and/or central to cultural and religious practices and creation stories, and religious and customary practices (e.g., hunting and gathering, religious ceremonies, and trail-walking).

Even when describing tangible archaeological resources, BLM artificially narrows its analysis. While the DEIS repeatedly acknowledges that “[c]ultural resources may be but are not necessarily eligible for the National Register of Historic Places (NRHP),” BLM nevertheless relies exclusively on that definition in undertaking its analysis. DEIS at 3.5-1; *see also* DEIS at 3.5-31 (“Cultural resources need not be determined eligible for the National Register of Historic Places (as in the NHPA) to receive consideration under NEPA”). Throughout its assessment of the affected environment and environmental consequences, BLM treats NRHP eligibility as determinative of whether an archaeological resource is a significant cultural resource for purposes of the NEPA analysis and ignores impacts on those sites that are not eligible. For example, Table 4.5-1 describes only the NRHP-eligible sites within the Project area that would be affected. DEIS at 4.5-5. It does not address the Project’s impacts to the non-eligible archaeological sites. This is a significant oversight, as these prehistoric artifacts represent a tangible and significant connection to the ancestors of CRIT members. Their removal from CRIT’s ancestral homeland, and the possibility of damage during excavation, represent a significant environmental and cultural consequence that cannot be ignored by the EIS.

**Deferred Ethnographic Assessment.** The DEIS’s analysis of cultural resources focuses almost exclusively on archaeological resources, i.e., prehistoric artifacts, that could be impacted by the Project. DEIS at 4.5-3 to 4.5-6. When known archaeological resources are

discussed in the DEIS, they are discussed in terms of their scientific significance rather than their cultural or spiritual significance to native people and tribes. *E.g.*, DEIS at 3.5-29 (finding site MS-MH-P-001, a prehistoric ceramic scatter, eligible only under Criteria D, rather than Criteria A). By focusing on the scientific significance of these artifacts, the DEIS ignores their cultural and religious importance to CRIT and other nearby tribes.

BLM has implicitly acknowledged the inadequacy of this approach by proposing to conduct an Ethnographic Assessment (“Assessment”) of the area that will purportedly assist BLM in identifying places of Native American cultural and spiritual significance, traditional practices, and other concerns that might be affected by the Project. McCoy Solar Energy Project Ethnographic Assessment Work Plan at 1. While CRIT agrees that such an Assessment is necessary, this work should have been completed *prior* to development of the DEIS. If the Ethnographic Assessment truthfully recognizes that the Project Area includes places of cultural and spiritual significance—as it is purportedly designed to do—this information will come too late to be of any real value. The Project is already designed, the public already will have had its one opportunity to comment on the environmental review document, and BLM will be well on its way to approving the project in time for the Obama Administration’s December 2012 deadline.<sup>1</sup> Under these circumstances, the Ethnographic Assessment appears to be little more than an after-the-fact effort by BLM to show that it “took into account” the views of Indian tribes. *See also* Letter from Shute, Mihaly & Weinberger to Messrs. John Kalish & Jeffrey Childers re: McCoy Solar Energy Project Ethnographic Assessment Work Plan and Literature Review (2008(P) LLCAD06000 CACA-48728) (July 26, 2012).

Moreover, the DEIS ignores existing information regarding the cultural importance of both the region and the Project area. In the 1970s and 1980s, CRIT members participated in the designation of lands in the California Desert Conservation Area. This effort resulted in the creation of two maps regarding cultural resources and Native American concerns (attached as Exhibits 1 and 2). While these maps do not depict the full extent of cultural resources in the area, they are a helpful starting place. The Native American Element map in particular shows the sensitivity of the Project site and surrounding area. Yet BLM has uniformly ignored these existing resources for understanding the cultural sensitivity of the Project area and instead deferred its analysis to later studies.

**Buried Resources.** The DEIS briefly acknowledges the general possibility that the Project will unearth and damage buried cultural resources during grading and construction:

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<sup>1</sup> See The White House, Office of the Press Secretary “We Can’t Wait: Obama Administration Announces Seven Major Renewable Energy Infrastructure Projects that Would Power 1.5 million Homes to be Expedited” (August 7, 2012).

Ground-disturbing construction activities associated with project could directly affect cultural resources by damaging or displacing artifacts. . . . These historic properties, and any additional archaeological sites that are inadvertently discovered during construction, would be located within the full extent of the Project's below ground impacts . . . .

DEIS at 4.5-4. In addressing the impacts of the Project, however, the DEIS makes no effort to quantify the likelihood of this occurrence, to identify areas that may be more or less likely to contain buried resources, or to suggest non-invasive methods of ensuring that such resources are not harmed. The DEIS's effort in this regard can hardly be called a "hard look" at the environmental consequences of the proposed action. Instead, this statement amounts to a useless generality<sup>2</sup>—following similar logic, no area of the American Southwest is more or less suitable for utility-scale solar development, as all areas contain the "possibility" of additional discoveries.

Importantly, the DEIS elsewhere contains information that portions of this site are particularly likely to reveal buried resources if the Project applicant is allowed to grade the site to 20 feet. DEIS at 3.5-30 to 31 (stating that the site contains Holocene-age deposits with a high potential for buried archeological deposits and late Pleistocene deposits with a medium to high potential for shallow subsurface deposits); DEIS at 4.5-4. Given this information, NEPA requires BLM to complete additional analysis, revise the impact section to explain where these deposits are in relation to the Project impacts, and to identify alternatives and mitigation that would avoid these resources or lessen the likelihood of harm.

The DEIS also vastly understates the harm that will be caused by unearthing buried artifacts. As discussed above, the impact to CRIT goes beyond just the loss of scientific information about the people who occupied this place in the past; disturbing these artifacts causes cultural and spiritual harm to CRIT's members. This impact must be given adequate recognition in the DEIS.

To be clear, however, CRIT does not condone the use of invasive techniques to determine the location of these buried resources. CRIT has made repeated, direct efforts to express to BLM and the Obama administration that the wholesale transformation of our ancestral homeland is resulting in profound spiritual, cultural, and religious harm. These efforts have been uniformly rebuffed. As a consequence, CRIT is forced to resort to the procedural protections given by NEPA and the NHPA to make our voice heard and to hold BLM

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<sup>2</sup> Even more egregiously, when buried resources are ultimately discovered, BLM will undoubtedly point to this short section to argue that supplemental environmental review is not required, as at the Genesis Solar Energy Project.

accountable for its actions. NEPA requires a hard look at all environmental consequences of an action; in this instance, NEPA requires BLM to conduct further analysis to provide more than vague generalities regarding the Project's impacts on buried resources. This statement does not mean, however, that CRIT agrees with or supports NEPA's requirements. Under CRIT's view, disturbance of buried resources causes harm; it does not matter if such resources are disturbed in the name of "analysis" or project development.

Finally, the DEIS fails to acknowledge that the development of the Project could expose buried resources to an additional source of harm: flash floods. Flooding is common in this area—the proposed Project is located within a desert wash—and historic deposits in the area likely have been displaced by recurrent floods already. DEIS at 3.5-29, Appendix B-24. The removal of vegetation, grading, and other development activity required by the Project will increase the chances that these floods will unearth buried resources and expose them to damage by Project workers. See DEIS at 4.7-6 (stating that the preferred alternative will result in a "noticeable and possibly substantial increase in water erosion rates during low frequency, high intensity rainfall events"). Recent flooding at the Genesis site during project construction exposed and moved scores of buried artifacts that otherwise would have remained buried and intact.

**Prehistoric Trails Network Cultural Landscape.** The Project area overlaps with a network of prehistoric trails heading from past village sites to springs in the surrounding mountains and to the Colorado River, a source of spiritual cleaning. Many Tribal members hold this area to be sacred, as it is inextricably tied to mystical and spiritual world and has served as an abundant and sustainable source of food and medicine. The DEIS acknowledges that the Prehistoric Trails Network Cultural Landscape ("PTNCL") is a potential cultural landscape, and indicates that "[a]rchaeological sites that may not be eligible for inclusion in the NRHP or CRHR on their own may still be eligible as contributing elements to these potential cultural landscapes if the sites have integrity and can be tied to significant elements of the district as a whole." DEIS at 3.5-29. According to the DEIS, the NRHP criteria for the potential PTNCL are still being developed. DEIS at 3.5-50. However, BLM does not proposed or implemented an interim methodology for determining which non-NRHP-eligible prehistoric sites may contribute to the PTNCL. BLM has identified several prehistoric sites within the APE that it has determined are ineligible for NRHP listing, including lithic scatters, artifact scatters, and cairns (DEIS at D-8, Table 4), but it has not attempted to evaluate these sites for their relationship to the PTNCL. By failing to do so, it has improperly excluded these sites from consideration as part of the cultural landscape of the PTNCL, and has understated the Project's potential cultural resource impacts.

**Avoidance.** The DEIS finds that 18 "unevaluated archaeological and historic sites within the Project area of potential effects would be avoided by Project design and through the imposition of site management conditions." DEIS at 4.5-5. However, the location and description of these sites is absent, and the DEIS does not elaborate on how impacts to

them will be avoided. While CRIT understands the need to keep information about the location of these sites confidential, tribes with connections to these resources, such as CRIT, must not be asked to take on faith the assertion that unspecified “conditions” will avoid them. At the very least, the DEIS should specify exactly what “site management conditions” will be used, how they will be implemented, and how effective they will be. CRIT also requests information about how the project will be designed to avoid impacts to these known sites.

**Cumulative Impacts.** The DEIS focuses its discussion of cumulative impacts to cultural resources too narrowly, and does not consider them in the context of the larger push to transform federally owned land in this area of the American Southwest into a region for solar energy development. See Bureau of Land Management, Final Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwest States, Appendix B (listing 8 approved and 50 pending solar project applications in Arizona and California, totaling nearly 600,000 acres, as of May 31, 2012); White House Office of the Press Secretary “We Can’t Wait: Obama Administration Announces Seven Major Renewable Energy Infrastructure Projects that Would Power 1.5 million Homes to be Expedited” (August 7, 2012). The DEIS should be revised to include a description of this phenomenon and to analyze the cumulative impacts the Project will have on the Tribes’ cultural resources and ancestral homeland within the broader context of increased project development in the region as a whole. See 40 C.F.R. § 1508.7; *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998) (NEPA requires analysis of the cumulative impacts of all “reasonably foreseeable” future projects); *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339, 347 (D.C. Cir. 2002) (holding that where many projects across a geographic area contribute to a similar environmental impacts, the cumulative impacts of all projects must be analyzed under NEPA). The cultural resources in the this region of the American Southwest are finite. They are also irreplaceable. While this Project concerns only 5,000 acres, when its impacts are combined with those of the myriad other projects in the region, it is clear that, in aggregate, the depletion and degradation of these resources is vast. The DEIS does not acknowledge, let alone take a hard look at, this issue.

Even BLM’s list of reasonably foreseeable future projects downplays the extent of impacts across the landscape. The list of proposed projects focuses almost exclusively in eastern Riverside County. Numerous solar projects in Arizona, located less than 10 miles from the Project site, are relegated to a single line in the cumulative projects table. DEIS at 4.1-13. In particular, the analysis fails to mention that the Quartzite Project (AZA 034666), a 1,500-acre power tower, is already undergoing environmental review and is located less than 25 miles from the Project. The cumulative impact section must be revised to more fully explain these Arizona projects and to take their cumulative impacts into account.

**Visual Resources.** The Visual Resources section of the DEIS does not address the cultural implications of the Project's disruption of the visual landscape. While the DEIS considers impacts to motorists on Interstate Highway 10, and "[u]sers of OHV routes on the Palo Verde Mesa and dispersed users of the surrounding mountains seeking solitude and unconfined recreation" (DEIS at 4.19-10), it fails to consider the Project's visual impact on Tribal members. The Palo Verde Mesa and the McCoy and Big Maria Mountains are more than a recreational resource for the Tribes; they have longstanding cultural and spiritual significance as ancestral lands. Any large-scale visual alteration to this space disturbs the sanctity of the outdoor environment and constitutes a significant impact. Despite this special significance, the DEIS does not mention the visual impact on CRIT members in the Visual Resources section, and the DEIS does not indicate that CRIT was consulted for this section. The DEIS also does not include a vantage point in the McCoy Mountains as a "Key Observation Point." BLM should consult with the Tribes' representatives to determine the full significance of the visual landscape of the Palo Verde Mesa and the McCoy and Big Maria Mountains as a cultural resource, and to explore possible additional or alternative mitigation that would best minimize visual impacts as a whole.

Similarly, by ignoring tribal use of the area, BLM erroneously assigns a visual sensitivity rating of "medium" to the areas affected by the Project solar plant site. DEIS at 3.19-9. The DEIS states that this rating is based on "relatively low levels of recreation use, a history of low-level development of private lands in the area, and use as a transportation and utility corridor." *Id.* In other situations where the visual landscape has important cultural and religious values, BLM has acknowledged an increased visual sensitivity. *See, e.g.,* Draft Environmental Impact Statement for the Quartzsite Solar Energy Project. This recognition is appropriate: tribal users are not able to simply choose a new destination if a project causes severe visual impacts to a landscape. Here, applying the correct sensitivity rating of "high" would necessarily change the EIS's analysis. It would shift the Project area into a VRM Class II classification (see DEIS Table 3.19-3), the objective of which is to "retain the existing character of the landscape." DEIS at 4.19-1. According to the DEIS's own analysis, the Project does not conform with these management objectives. DEIS at 4.19-6 to 10.

**Impact to Sacred Plants.** CRIT is also concerned about the harm to certain biological resources that are important to our culture. The DEIS does not discuss the impact to plants as a cultural resource, either in the cultural resources section (as discussed above), or in the biological resources section. Creosote (*Larrea tridentata*) and mesquite (*Prosopis glandulosa*) in particular are valuable to the Tribes, both medicinally and aesthetically. For centuries, creosote has been utilized and respected for its cleansing and healing properties. Further, as one of the oldest, longest-living flowering plants in the region, it holds particular value to the area ecosystem, as habitat, shade, and a source of visual beauty. Mesquite wood is an integral part of the Mohave creation story, and thus has had a direct bearing on the existence of the Mohave people since time immemorial. In addition, it has played and continues to play significant functional and ceremonial roles throughout the lives of CRIT

members, including as cradle board for children, as a source of food and fuel, and in cremation ceremonies.

The DEIS indicates the Project would directly impact 4,711 acres of creosote bush scrub habitat, and all mesquite trees in the 4,960-acre Project site. DEIS at 4.3-5 to 7. The loss of these plants is a significant cultural impact that is not addressed in the DEIS.

The measures proposed in the DEIS as mitigation for impacts to creosote and mesquite are inadequate to avoid or reduce the cultural resource impacts of their loss. The DEIS states only that a special-status species avoidance and mitigation plan will somehow compensate for the loss of native plant communities. *Id.* The off-site compensation portion of this plan is not yet developed, and could include land acquisition, restoration projects, or simply a “special status plant species distribution study.” DEIS at 4.3-33 to 39. It is unclear how a special status plant study could remedy the loss of native habitats as a cultural resource. Even if the other mitigation options are available, it is unclear whether Tribal members will be able to continue to use the plants in their traditional fashion and/or whether the compensation lands will be located within CRIT’s traditional homeland. The DEIS must be revised to analyze the impacts of the loss of this plant species on the Tribes and to minimize or mitigate for these cultural impacts.

**Consultation with Tribal Parties.** BLM’s consultation with CRIT has been perfunctory at best. Consultation under the NHPA means more than an invitation to comment. See *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, 1119 (S.D. Cal. 2010) (“While public informational meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don’t amount to the type of ‘government-to-government’ consultation contemplated by the regulations.”). Meaningful government-to-government consultation with CRIT requires that BLM meet with CRIT’s Tribal Council and acknowledge and address the Tribes’ concerns and input. To date, this has not occurred. CRIT encourages BLM to set up a time to meet with CRIT’s Tribal Council to discuss the Tribe’s concerns.

In addition, the “Native American Coordination” section of the Cultural Resources analysis, DEIS at 3.5-27, must include a more extensive review of all of the consulted Tribes’ participation in the environmental review process in order to fully disclose those Tribes’ concerns.

**Environmental Justice.** One of the most substantial environmental costs of the proposed Project is the destruction of cultural resources. This cost is borne exclusively by the people who are indigenous to the area, including CRIT’s members. The power produced at the proposed Project, however, will likely go to serve residents of southern California. The climate change benefits will be spread across the globe. This imbalanced allocation of costs

and benefits, which disproportionately disadvantages a minority population while providing them little or no benefit from the project, satisfies any recognized definition of environmental injustice. *See, e.g.*, Executive Order 12898, “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations” (Feb. 11, 1994) (defining environmental justice as addressing “disproportionately high and adverse [] environmental effects of [] programs, policies, and activities on minority populations and low-income populations”). As BLM has elsewhere acknowledged regarding the federal government’s environmental justice policy, “[t]he spirit of this policy—and not a mechanical threshold—should guide any analysis of disproportional impact.” Bureau of Land Management, Final Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwest States, Response to Comments at 181.

Nonetheless, the DEIS concludes that, because of the Colorado River Indian Reservation’s “extended geography” and distance of 15 or more miles from the project site, the project’s potential for disproportionately high adverse impacts on the people living on the Reservation is “diminished.” It therefore concludes that the Reservation is not within the affected area for purposes of considering environmental justice. DEIS at 4.6-3. BLM offers no justification for summarily concluding on these grounds that Tribal members are not disproportionately affected by the project. The Reservation contains a population for which nearly two-thirds identify as minority, and over one quarter of the population lives below the federal poverty line. DEIS at 3.6-3. Additionally, many tribal members live outside the Reservation but in proximity to the Project area. Given the significant environmental impacts created by the Project on resources and land that are uniquely important to the Tribes, and on which they have depended for centuries, this section should be revised to acknowledge the significant environmental justice impacts to the Tribes.

Finally, as a technical issue, Section 3.6 of the DEIS does not acknowledge that areas within the designated environmental justice impact area have poverty levels “meaningfully greater” than the general population. Please revise accordingly.

## **II. The DEIS Improperly Defers the Development of Mitigation.**

The DEIS also fails to identify adequate mitigation measures, as required NEPA. 40 C.F.R. § 1502.14(f); *Robertson*, 490 U.S. at 352 (“omission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action-forcing’ function of NEPA”). In fact, the document contains only one proposed measure to mitigate impacts to cultural resources, which, BLM admits, may not fully avoid project-related impacts on cultural resources. DEIS at 4.5-11. The measure, CUL-1, calls simply for the future execution of a Memorandum of Agreement (“MOA”) between BLM and consulting parties and the future preparation of a Historic Properties Treatment Plan (“HPTP”). DEIS at 4.5-9. Neither of these documents has yet been developed. By declining to discuss any specific mitigation measures that will be used to minimize or avoid impacts to cultural resources on the Project

site, the DEIS fails to identify in sufficient detail the ways in which impacts to cultural resources will actually be avoided or minimized, and fails as an informational document.

BLM's deferral of identifying and detailing specific mitigation measures until the execution of the MOA and the development of the HPTP means that CRIT and other interested parties currently have no way of determining what the mitigation measures will actually be, or, therefore, what the impacts will eventually be. The Tribes cannot submit meaningful comments on the impacts to cultural resources without a fuller understanding of how BLM and the project proponent propose to avoid or minimize these impacts. BLM has provided no justification for deferring the development of reasonably detailed mitigation measures until after the public has had an opportunity to comment on them.

Because the DEIS finds that Mitigation Measure CUL-1 would reduce but may not fully avoid impacts on cultural resources (DEIS at 4.5-11), BLM's proposal to develop mitigation measures in the future and acknowledgment that those future measures may not be effective in avoiding impacts to cultural resources is tantamount to avoiding NEPA's mitigation requirement entirely.

Moreover, both the NHPA and the proposed Monitoring and Treatment Plan contemplate that cultural resources should be avoided if possible. DEIS 3.6-2, 4.6-8; 36 C.F.R. § 800.6. However, if the Project is planned and approved before any substantive cultural resources analysis is complete, it will be practically impossible to modify those plans later to avoid resources once they are found. This cart-before-the-horse approach resulted in serious conflicts at the Genesis Solar Energy Project when scores of buried artifacts were found in a 100-acre area of the Project site during project construction. Following the discovery, the project applicant argued to BLM that it would be economically infeasible to avoid the resources at that point because the Project had already been approved and was in the midst of construction. BLM apparently concurred. As a result, those cultural artifacts, which are sacred to the Tribes and which the Tribes believe should not be disturbed, were unearthed and damaged by project grading. As is clear from this experience, the only way to avoid areas where cultural resources exist are to determine where those areas are *before* Project approval.

The DEIS also states that BLM's obligations under Section 106 of the NHPA will be satisfied upon execution of the MOA. Not so. The MOA is simply a plan for carrying out the agency's obligations under federal law; failure to comply with the plan is a violation of the NHPA. 36 C.F.R. § 800.6 ("A memorandum of agreement executed and *implemented* pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts."); see *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, 1110 (S.D. Cal. 2010). The DEIS should be revised to clarify this point.

### III. The DEIS' Identified "Purpose and Need" Artificially Constrain Consideration of Alternatives.

The DEIS states that "BLM's purpose and need for the [Project] is to respond to the Applicant's application under Title V of the Federal Land Policy and Management Act . . . for a ROW grant to construct, operate, maintain and decommission a solar PV facility on public lands . . ." DEIS at ES-2. This statement casts BLM in an entirely reactionary role. Instead of addressing a valid public purpose—the development of renewable energy—this statement of purpose and need responds only to NextEra's proposal at this particular site. Such a narrow scope impermissible constrains the analysis in the DEIS. The Ninth Circuit held that BLM violated NEPA for a similarly confined EIS in *National Parks and Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1072 (9th Cir. 2010). In that case, BLM's purpose and need included one valid public purpose (meeting long-term landfill demand) along with three developer-oriented goals. In striking down the EIS, the court held that BLM may not "adopt[] private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives." But BLM has done exactly that—responded nearly exclusively to NextEra's private interests—in this case.

This tactic has severe consequences for the DEIS's consideration of alternatives. In particular, the DEIS eliminated a distributed solar technology alternative from detailed analysis, based in part on the alternative's failure to "meet BLM's purpose and need." DEIS at 2-61.<sup>3</sup> According to the DEIS, this alternative passes the feasibility test. *Id.* Moreover, while the DEIS contains no discussion of this alternative's environmental impacts (*see id.*), it is clear that distributed generation generally has less environmental impacts than utility-scale solar facilities, as such technology can be readily incorporated in the built environment. If BLM were to redefine the purpose of the Project to express more directly the *public* goals—reducing dependence on greenhouse gas emissions, providing energy, creating jobs, and reducing dependence on foreign energy sources—it is clear that the distributed generation alternative should be given a detailed analysis.

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<sup>3</sup> While the DEIS concludes that this alternative also fails because it is "remote and speculative," this reasoning is unsupported. DEIS at 2-61 to 62. The DEIS states that "approximately 3,500 acres of distributed generation" would be required to match the Project's output, but provides no information to support the conclusion that statewide development of this scope this would be infeasible. *Id.*

#### **IV. The Significant Diminishment of Sensitive Values by Industrial Development of Class L Lands Violates FLPMA.**

Under the Federal Land Policy and Management Act (“FLPMA”), Congress determined that the California Desert contains “historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population” and as such, these resources, including “numerous archeological and historic sites, are seriously threatened.” 43 U.S.C. § 1781. In response, Congress directed BLM to prepare a land use management plan for the area that would protect these fragile and threatened resources. *Id.*

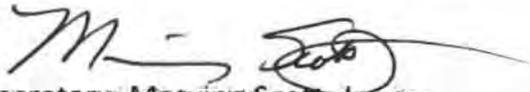
BLM’s subsequent California Desert Conservation Act Plan (“CDCA Plan”) includes four land use classifications (Classes C, L, M, and I) that direct the multiple uses accommodated on BLM land into appropriate areas. The Project area falls entirely within Class L, which is intended to “protect[] sensitive natural, scenic, ecological, and cultural resource values.” DEIS at 3.10-3. Therefore, lands designated as Class L must be “managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while *ensuring that sensitive values are not significantly diminished.*” *Id.* (emphasis added).

As outlined in this comment letter, it is clear that sensitive values within the Project site—particularly cultural and visual resources—are significantly diminished by the proposed Project. CRIT does not concur with BLM’s determination that all cultural resources impacts and all adverse effects to places of traditional cultural or religious importance can be “resolved” via a MOA under the NHPA (DEIS at 4.10-11 to 12), particularly given that BLM has acknowledged it does not yet know what the full extent of Project impacts will be. As such, any approval of the Project as currently designed would violate both the CDCA Plan and FLPMA. *See also* CDCA Plan, Table 1 (requiring projects within Class L lands to preserve and protect archaeological resources and Native American cultural and religious values).

#### **V. Conclusion**

The DEIS for the McCoy Solar Energy Project contains significant flaws. As CRIT has seen on a number of solar energy projects throughout the region, BLM seems intent on pushing analysis of cultural resource impacts further and further down the road, until it becomes little more than an after-the-fact effort to acknowledge the significant detrimental effect of these projects only after construction has begun. CRIT strongly objects to this tactic in general and to any project—including the McCoy Solar Energy Project—that is reviewed by BLM in such circumstances.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mervin Scott, Jr.', with a large, stylized flourish extending to the right.

Secretary, Mervin Scott, Jr.  
Colorado River Indian Tribes

430106.1

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August 23, 2012

Jeffrey Childers, Project Manager  
Bureau of Land Management  
California Desert District  
22835 Calle San Juan de Los Lagos  
Moreno Valley, CA 92553.  
camccoyssep@blm.gov

**RE: Draft Plan Amendment / EIS for the McCoy Solar Energy Project prepared by BLM Palm Springs – South Coast Field Office, Publication Index #BLM/CA-ES-2012-012+1793, Department of Interior (“DOI”) Control #DES 12-21, and Application #CACA-048728**

Dear Mr. Childers,

I am writing on behalf of Laborers International Union of North America, Local Union No. 1184, and its members living in Riverside County (“LIUNA Local Union No. 1184” or “Commentors”), concerning the Draft Plan Amendment / EIS for the McCoy Solar Energy Project prepared by BLM Palm Springs – South Coast Field Office, Publication Index #BLM/CA-ES-2012-012+1793, Department of Interior (“DOI”) Control #DES 12-21, and Application #CACA-048728. McCoy Solar LLC is seeking to build an up-to-750 megawatt (“MW”) photovoltaic (PV) solar energy generating facility in unincorporated Riverside County. In order to build the project would require BLM granting a 7,700-acre right-of-way and amending the California Desert Conservation Area Plan of 1980 (“CDCA Plan”).

We have prepared these comments with the assistance of Michael F. McGowan, Ph.D., an expert wildlife biologist with more than 25 years of experience that includes conducting ecological research, teaching university classes in ecology, teaching post-graduate environmental management on topics such as NEPA, CEQA, permitting and regulatory compliance, and drafting portions of other EIR and EIS documents including those for solar energy development in Southern California. His comments and curriculum vitae are attached hereto as Exhibit 1 and are incorporated by reference in their entirety. Each of McGowan’s comments must be commented to separately.

LIUNA Local Union No. 1184 recognizes that the development of renewable energy is critical for the reduction of greenhouse gas emissions. Renewable energy is essential to forestall the worst consequences of climate change and to help the state of California meet its ambitious emissions reductions goals. LIUNA Local Union No. 1184 supports the development of renewable energy production, including the development of solar power generation through both appropriately sited solar "farms" and distributed solar power generation. All solar power projects must be properly sited and carefully planned to minimize impacts on the environment. Renewable energy projects should avoid impacts to sensitive species and habitats and should be sited in proximity to electricity consumers to reduce the costs and impacts associated with new transmission corridors. Only by maintaining the highest standards in these and other ways can renewable energy production be truly sustainable. Unfortunately, the proposed project falls short in these and other ways. As a consequence, the Draft Environmental Impact Statement ("DEIS") will need to be revised and recirculated, as set forth below.

## **I. BACKGROUND**

McCoy Solar LLC, a subsidiary of NextEra Energy Resources LLC, proposes to construct, operate, maintain, and decommission an up-to-750 megawatt (MW) photovoltaic solar energy generating facility and related infrastructure in unincorporated Riverside County, California, to be known as the McCoy Solar Energy Project ("MSEP"). The majority of the MSEP would be developed on public land administered by the Bureau of Land Management (BLM). Approximately 477 acres of privately owned land would be included in the proposed solar plant site boundary. The Project would generate and deliver solar-generated power to the California electrical grid through an interconnection at the Colorado River Substation (CRS) owned by Southern California Edison (SCE).

McCoy Solar LLC has submitted a Standard Form (SF)-299 to the Bureau of Land Management ("BLM") requesting a right-of-way (ROW) for the approximately 7,700-acre portion of the MSEP that would be developed on BLM-administered land. Moreover, a land use plan amendment to the California Desert Conservation Area Plan of 1980 ("CDCA Plan") identifying the area in which the MSEP is to be developed as appropriate for the proposed use is required.

Additionally, McCoy Solar LLC filed an Application for Land Use and Development with the Riverside County (County) Planning Department seeking a Conditional Use Permit ("CUP") for the portion of the solar plant site that would be developed on private land under the County's land use jurisdiction and a Public Use Permit (PUP) for the portion of the gen-tie line that would be developed on private land and on a small area of County-owned property.

The MSEP is proposed to be constructed on approximately 7,700 acres of BLM land and 477 acres of private land. The MSEP would be located in the southern California inland desert, approximately 13 miles northwest of the City of Blythe and 6 miles north of the Interstate 10 (I-10) freeway in Riverside County, California.

## **II. STANDING**

Members of LIUNA Local Union No. 1184 live, work, and recreate in the immediate vicinity of the proposed Project site. These members will suffer the impacts of a poorly executed or inadequately mitigated Project, just as would the members of any nearby homeowners association, community group, or environmental group. Hundreds of LIUNA Local Union No. 1184 members live and work in areas that will be affected by traffic, air pollution, and water pollution generated by the Project.

In addition, construction workers will suffer many of the most significant impacts from the Project as currently proposed, such as from air pollution emissions, poorly maintained or controlled construction equipment and other impacts. Therefore, LIUNA Local Union No. 1184 and its members have a direct interest in ensuring that the Project is adequately analyzed and that its environmental and public health impacts are mitigated to the fullest extent feasible.

## **III. LEGAL STANDARDS**

### **A. National Environmental Policy Act (“NEPA”)**

Congress enacted NEPA in recognition of the “profound impact of man’s activity on the interrelations of all components of the natural environment,” including “industrial expansion, resource exploitation, and new and expanding technological advances.” 42 U.S.C. § 4331(a). NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).

NEPA requires that federal agencies prepare a “detailed statement” — known as an EIS — for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. The environmental impact statement (“EIS”) is intended to create an open, informed, and public decision-making process that insures “that environmental information is available to public officials and citizens before decisions are made and before actions are taken” and “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1. A federal agency’s obligation to prepare an EIS extends to any federal action that “will or may” have a significant effect on the environment. 40 C.F.R. § 1508.3. The federal agency must “[r]igorously explore and objectively evaluate” a range of alternatives to proposed federal actions and their impacts in the EIS. 40 C.F.R. § 1502.14(a).

The evaluation of mitigation measures is an essential component of an EIS. A federal agency is required to evaluate possible mitigation measures in defining the scope of the EIS, in examining impacts of the proposed action and alternatives, and in explaining its ultimate decision. *See* 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2(c), 1508.25(b).

Agencies must insure the professional integrity, including scientific integrity, of the discussion and analysis in an EIS. 40 C.F.R. § 1502.24. The information in an EIS must be of high quality, as accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. 40 C.F.R. §§ 1500.1(b), 1502.24.

### **B. The Federal Land Policy and Management Act (“FLPMA”)**

FLPMA sets forth the general management framework for the public lands based on the principles of multiple use and sustained yield. *See* 43 U.S.C. § 1732(a). FLPMA requires that BLM “develop, maintain, and, when appropriate, revise land use plans” for the public lands, 43 U.S.C. § 1712(a), and that the agency “[i]n managing the public lands . . . take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b).

FLPMA establishes a heightened standard for the management of the CDCA — the act specifically provides “for the immediate and future protection and administration of the public lands in the California desert within the framework of a program of multiple use and sustained yield, and the maintenance of environmental quality.” 43 U.S.C. § 1781(b).

FLPMA mandated the preparation of the California Desert Conservation Area Plan, *see* 43 U.S.C. § 1781(d), the goal of which is:

to provide for the use of the public lands, and resources of the California Desert Conservation Area, including economic, education, scientific, and recreational uses, in a manner which enhances wherever possible—and which does not diminish, on balance—the environmental, cultural, and aesthetic values of the Desert and its productivity.

(BLM, The California Desert Conservation Area Plan 1980 as amended at 5-6 (1999)).

The BLM derives its authority to grant ROWs for the distribution of electric energy from FLPMA, Title V (43 U.S.C. §§ 1761-1771) and its implementing regulations (43 C.F.R. Part 2800). FLPMA authorizes BLM to “grant, issue, or renew rights-of-way over, upon, under, or through” the public lands for, among other uses, “systems for generation, transmission, and distribution of electric energy.” 43 U.S.C. § 1761(a). Each ROW shall contain terms and conditions that, among other purposes, will “require compliance with State standards for public health and safety, environmental protection...if those standards are more stringent than applicable federal standards.” Each ROW permit must contain terms and conditions which will

“minimize the damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” 43 U.S.C. § 1765(a)(ii). Furthermore, each ROW shall contain terms and conditions that “require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards.” 43 U.S.C. § 1765(a)(iv).

Under 43 C.F.R. § 2805.12(a), the project applicant is obligated to comply with the Secretary’s terms and conditions in the ROW permit requiring compliance with all existing Federal laws and regulations and state laws and regulations applicable to the authorized use, with the Secretary’s terms and conditions relating to preventing damage to “[s]cenic, aesthetic, cultural, and environmental values, including fish and wildlife habitat” 43 C.F.R. § 2805.12(i)(3)(i), and “[p]ublic health and safety” 43 C.F.R. § 2805.12(iii) and with those state standards that are more stringent than federal standards and that relate to public health and safety, environmental protection, and siting, constructing operating and maintaining any facilities on the ROW. 43 C.F.R. § 2805.12(i)(6).

### **C. Endangered Species Act (“ESA”)**

The ESA, 16 U.S.C. § 1531 et seq, protects threatened and endangered species listed under the Act. The ESA prohibits the unauthorized “take” of a listed species. 16 U.S.C. § 1538(a)(1)(B). Federal agencies are required to ensure that “any action *authorized* [by the agency] . . . is not likely to jeopardize the continues existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .” 16 U.S.C. § 1536(a)(2).

Formal consultation with the United States Fish & Wildlife Service (“USFWS”) is required for any federal action that may adversely affect a federally listed species. 16 U.S.C. § 1536. The lead agency for a federal project must initiate a consultation through the preparation and submittal of a Biological Assessment (“BA”), 16 U.S.C. § 1536(c), which would describe the Proposed Action to the USFWS. Following review of the BA, the USFWS is required to issue a Biological Opinion (BO). The lead agency must complete its consultation prior to releasing a Final Environmental Impact Statement.

### **D. The Administrative Procedure Act (“APA”)**

The APA provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. The APA provides that a court shall set aside agency “findings, conclusions, and actions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

#### **IV. THE DEIS VIOLATES NEPA**

##### **A. Biological Soil Crust**

Michael F. McGowan, Ph.D., an expert wildlife biologist with more than 25 years experience, concluded that the DEIS failed to consider impacts to the invaluable soil crust of the California desert.

Construction and operation of the MSEP would permanently damage critical biological soil crust habitat. Biological soil crust supports critical microorganisms, reduce erosion, and provide habitat for desert plants and animals.<sup>1</sup> Human activity generally affects biological soil crusts to diminish their ecological functioning, leading to negative effects on landscape stability, biodiversity, and biogeochemistry. Recovery of biological soil crusts may take up to 300 years so impacts to them by the Project should be considered permanent.

The DEIS only gives passing references to the impact that the MSEP would have on biological soil crust. The DEIS on p. 3.7-10 mentions biological soil crusts as being an important factor with regard to limiting erosion. In Chapter 4 p. 4.3-7 the DEIS lists as a potential indirect impact to special status plants, “disturbance of the structure and ecological functioning of biological soil crusts, which may affect seed germination, reduce soil nutrition, and render the soil vulnerable to water and wind erosion.”

The treatment of biological resources in the DEIS is incomplete without a complete discussion of potential impacts to biological soil crusts in the project area. This discussion should include distribution maps as well as the kinds and significance of impacts to the soil crusts and the consequences of these impacts to plants, animals, hydrology, erosion, and generation of dust. Mitigation for these impacts should consider the uncertainty of restoration and the environmental consequences of a permanent change to such an important desert feature.

##### **B. Mitigation Measures**

Michael F. McGowan, Ph.D., an expert wildlife biologist with more than 25 years experience, concluded that the DEIS failed to consider mitigation measures that would be required to be implemented as part of the project. A federal agency is required to evaluate

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<sup>1</sup> States, J. S. Commentary on Biological (Microphytic) Soil Crusts in the Rawlins Resource Management Area. [http://www.voiceforthewild.org/greatdivide/states\\_soil.html](http://www.voiceforthewild.org/greatdivide/states_soil.html) accessed 8/20/2012 (Exhibit 2); Nagy, M. L., Perez, A., and F. Garcia-Pichel. 2005 The prokaryotic diversity of biological soil crusts in the Sonoran Desert (Organ Pipe Cactus National Monument, AZ). *FEMS Microbiology Ecology* 54 (2005):233–245 (Exhibit 3); Belknap, J., et al. 2001. Biological soil crusts: ecology and management. Technical Reference 1730-2. BLM/USDI/ST-01/001+1730 (Exhibit 4).

possible mitigation measures in examining the impacts of the proposed action and alternatives as well as in its' final decision. *See* 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2(c), 1508.25(b).

Several of the mitigation measures cited in the EIS refer to unspecified mitigation measures that will be implemented as part of unwritten plans: the Biological Resources Mitigation Implementation & Monitoring Plan, the Invasive Weed Management Plan, the Special-Status Species Plant Impact Avoidance and Mitigation Plan, and several wildlife mitigation, relocation, and monitoring plans (DEIR p. 4.3-21).

BLM is required to evaluate possible mitigation measures as part of the EIS, examine the impacts of the proposed action in light of the mitigation measures, and explain why the agency believes that those mitigation measures are sufficient. In particular 40 C.F.R. § 1502.14(f) states that the alternatives section of an EIS must “[i]nclude *appropriate mitigation measures . . .*” 40 C.F.R. § 1502.16(h) states that the environmental consequences section of an EIS must state the “*means to mitigate* adverse environmental impacts.” Moreover, 40 C.F.R. § 1505.16(h) requires that the final Record of Decision after an EIS has been adopted “[s]tate *whether all practicable means to avoid or minimize environmental harm* from the alternative selected have been adopted.” BLM cannot finalize the NEPA process without stating, *with specificity*, the environmental mitigation measures that MSEP will be required to implement.

### **C. Toxic Chemical Impacts Related to Cadmium Telluride**

The DEIS inadequately analyzes toxic chemical risks related to the Project. The Project may install thousands of panels containing cadmium telluride (“CdTe”) encapsulated between two sheets of glass. The potential for cadmium to leach from broken panels has been observed in research papers.<sup>2</sup>

A recent study conducted on the potential leaching risks of cadmium from broken PV panels found cadmium concentration in water at the point of breakage to be between 4 micrograms per liter (“µg/L”) to 6 µg/L.<sup>3</sup> This exceeds the groundwater and surface water (freshwater) Environmental Screening Levels established by the California Regional Water Quality Control Board (“ESLs”) of 0.25 µg/L by more than three times for the “protection of aquatic habitats” and “protection against leaching and subsequent impacts to groundwater.”

At the end of their life, all of these panels are likely to end up in a landfill. Panels containing CdTe are likely to cause significant problems with landfill leachate and disposal – similar to the problems caused by household batteries containing mercury and cadmium, which

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<sup>2</sup> Fate and Transport Evaluations of Potential Leaching Risks from Cadmium Telluride Photovoltaics (2012). Environmental Toxicology and Chemistry, Vol. 31, No. 7 (Exhibit 5).

<sup>3</sup> Salton Sea Restoration, Final Preferred Project Report, Salton Sea Authority, July 2004, available at [http://www.saltonsea.ca.gov/media/ppr\\_final.pdf](http://www.saltonsea.ca.gov/media/ppr_final.pdf) (Exhibit 6).

are now a significant problem at landfills throughout the state. Failing to analyze this foreseeable impact now constitutes both an inadequate project description and a piecemealing of the project, which will necessarily involve both installation and disposal.

The EIR should consider the alternative of requiring the use of less toxic silicon-based PV panels, which are readily available. An EIR must describe a range of reasonable alternatives to the Project, or to the location of the Project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.

## **D. Air Quality Impacts**

### **1. Valley Fever**

The DEIS fails to address the possibility that MSEP could increase occurrences of valley fever among residents of Riverside County as well as those who may work on the Project.

Valley Fever is an illness caused by the *C. immitis* fungus that usually affects the lungs.<sup>4</sup> *C. immitis* grows in areas of low rainfall, high summer temperatures, and moderate winter temperatures. The Valley Fever fungus is found in some areas of the southwestern United States, and in parts of Mexico and Central and South America, which have soil and weather conditions that allow the fungus to grow. The fungal spores are generally found in the upper 30 centimeters of the soil horizon, especially in virgin undisturbed soils. The spores become airborne when uncultivated soil is disturbed by winds, construction, farming, and other activities. An estimated 150,000 *Coccidioides* infections occur each year in the United States, although more than half of these infections do not produce any symptoms.

In susceptible people and animals, infection occurs when a spore is inhaled. Valley Fever infection is highest in California from June to November. People working in occupations such as construction, agriculture, and archeology have an increased risk of exposure and disease because these jobs result in disturbance of soils where fungal spores may be found. Valley Fever symptoms (fatigue, cough, chest pain, fever, rash, headache and joint aches) generally occur within 3 weeks of exposure. There is currently no vaccine.

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<sup>4</sup> Nat'l Institute for Health, Valley Fever: San Joaquin Valley Fever; Coccidioidomycosis PubMed Health(2011), available at <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002299/> (Exhibit 7).

BLM should explore the impact that the MSEP would have on Valley Fever occurrences in Riverside County as well as possible mitigation measure. BLM should adopt mitigation measures adopted by the County of San Luis Obispo to protect worker safety at the MSEP site.<sup>5</sup>

## **2. Diesel Particulate Matter (“DPM”)**

The DEIS fails to discuss the impact of DPM emissions, generated from diesel-powered engines, on construction worker health and regional air quality from any activities associated with Project construction and operation. Project construction and operation will require the use of diesel-powered trucks and equipment, including on-site diesel emergency power generators and diesel-fueled off-road vehicles. (DEIS 3.2-8). Construction activities at the site are going to be so heavily dependent upon diesel powered equipment to necessitate erecting an above-ground 3,600-gallon diesel tank during construction. (DEIS p. 4.9-5). The Project will generate significant DPM emissions and impact construction worker health.

Exposure to DPM may cause irritation to the eyes, nose, throat, and lungs, as well as neurological effects. DPM is classified as a “likely carcinogen.”<sup>6</sup> The California Office of Environmental Health Hazard Assessment (“OEHHA”) states that truck drivers and equipment operators who are exposed to diesel exhaust are more likely to develop cancer than those not exposed. Short-term exposures to diesel exhaust include eye, nose, throat, and lung irritation, coughs, headaches, nausea, and lung tissue damage.<sup>7</sup>

To protect worker health and to estimate impacts on regional air quality, DPM emissions must be quantified. If emissions are found to be harmful to human health, as determined by a risk assessment, and found to further degrade regional air quality, mitigation needs to be identified to include measures commonly implemented under CEQA and NEPA:

- Regular preventive maintenance to prevent emission increases due to engine problems;
- Use of low sulfur and low aromatic fuel meeting California standards for motor vehicle diesel fuel;
- Reduce equipment and vehicle idle times. Diesel equipment standing idle for more than five minutes shall be turned off. This includes trucks waiting to

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<sup>5</sup> San Luis Obispo County Health Agency Public Health Bulletin, Spring 2008, *available at* <http://www.slocounty.ca.gov/Assets/PH/Bulletins/2003+to+2008/2008+Spring+SLO+Public+Health+Bulletin.pdf> (Exhibit 8); San Luis Obispo County Health Agency, Valley Fever Recommendations, *available at* <http://www.slocounty.ca.gov/Assets/PH/Epidemiology/Cocci+Recomendations.pdf> (Exhibit 9).

<sup>6</sup> Diesel Particulate Matter, U.S. Environmental Protection Agency, Region 1: EPA New England, *available at* <http://www.epa.gov/region1/eco/airtox/diesel.html> (Exhibit 10).

<sup>7</sup> Health Effects of Diesel Exhaust, Office of Environmental Health Hazard Assessment, *available at* [http://oehha.ca.gov/public\\_info/facts/dieselfacts.html](http://oehha.ca.gov/public_info/facts/dieselfacts.html) (Exhibit 11).

deliver or receive aggregate or other bulk materials. Rotating drum concrete trucks could keep their engines running continuously as long as they were onsite;

- Use of low-emitting Diesel engines meeting federal emissions standards;
- Diesel engines from 50 to 750 horsepower are to meet Tier 3 California Emission Standards for Off-road Compression-Ignition Engines;
- Off-road equipment with diesel engines larger than 750 horsepower shall meet Tier 2 California Emission Standards;
- All equipment shall be turned off when not in use. Engine idling of all equipment shall be minimized;
- All equipment engines shall be maintained in good operating condition and in tune per manufacturers' specification; and
- Meet Tier 3 California emission standards for off-road compression-ignition engines (for engines between 50 horsepower and 750 horsepower).

Despite the likelihood that there may be potentially significant impacts from DPM emissions associated with Project construction on construction worker health and regional air quality, the DEIS does not analyze this issue. A revised DEIS must be prepared that identifies, evaluates, and quantifies these emissions.

### **3. Greenhouse Gas Emissions (“GHG”)**

The DEIS improperly disregards the significant amount of GHG emissions that would be generated by the project. The DEIS estimates that lifetime GHG emissions from the MSEP, including construction, operation, and decommissioning, would total 8,313 metric tons of carbon dioxide equivalent (“MTCO<sub>2</sub>E”) per year. (DEIS p. 4.8-7). The DEIS also states that these emissions are below a GHG threshold of 25,000 MTCO<sub>2</sub>E per year and therefore, the Project’s GHG emissions are not significant. (*Id.*)

The 25,000 MTCO<sub>2</sub>E threshold cited by the DEIS is not a threshold but a reporting limit set by EPA.<sup>8</sup> This reporting limit has been set by EPA and requires that industrial facilities emitting over 25,000 MTCO<sub>2</sub>E report their emissions and obtain a permit.<sup>9</sup> Therefore, this is not an appropriate threshold to compare the Project’s GHG emissions. Although the Mojave Desert Air Quality Management District does not have GHG thresholds, the nearby County of San

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<sup>8</sup> Fact Sheet: Mandatory Reporting of Greenhouse Gases (40 CFR part 98), U.S. Environmental Protection Agency, June 2011, available at <http://www.epa.gov/climatechange/emissions/downloads09/FactSheet.pdf> (Exhibit 12).

<sup>9</sup> Fact Sheet -- Proposed Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, U.S. Environmental Protection Agency, available at <http://www.epa.gov/nsr/fs20090930action.html> (Exhibit 13).

Diego recommends a threshold of 900 MTCO<sub>2</sub>E per year based on a paper by the California Air Pollution Control Officer Association (“CAPCOA”).<sup>10</sup>

The Project’s construction and operational GHG emissions are significant when compared to the 900 MTCO<sub>2</sub>E/year CAPCOA threshold. A revised DEIS needs to be prepared that compares Project emissions to appropriate thresholds and identify them as significant. It must provide mitigation measures to reduce these emissions to the maximum extent feasible, to include:

- Require preparation of a traffic control plan;
- Demonstrate proper inspection and maintenance of construction equipment;
- Implement a carpool program for construction workers;
- Employ a construction site manager to verify that engines are properly maintained and keep a maintenance log;
- Configure construction parking to minimize traffic interference;
- Consolidate truck deliveries when possible;
- Provide dedicated turn lanes for movement of construction trucks and equipment on and off site;
- Suspend use of all construction equipment operations during second stage smog alerts;
- Establish a staging zone for trucks that are waiting to load or unload material at the work zone in a location where diesel emissions from the trucks will have minimum impact on abutters and the general public;
- Locate construction equipment away from sensitive receptors such as fresh air intakes to buildings, air conditioners and operable windows;
- Require all diesel trucks used by construction contractor(s) at the site, or for on-road hauling of construction material, to be post-1996 models;
- Diesel portable generators less than 50 horsepower (“hp”) shall not be allowed at the construction site;
- Use of hybrid and fuel efficient construction equipment and support vehicles (e.g., pick-up trucks);
- Use of grid electricity for smaller equipment such as saws, pumps, and welders;<sup>11</sup>

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<sup>10</sup> Draft Count of San Diego Interim Guidelines for Determining Significance and Report Format and Content Requirements Climate Change, Dept. of Planning and Land Use, Department of Public Works, Oct. 23, 2008 - Nov. 21, 2008 (circulated for public review), available at <http://www.co.san-diego.ca.us/dplu/docs/bpr/ccguidelines.pdf> (Exhibit 14).

<sup>11</sup> Quantifying Greenhouse Gas Mitigation Measures - A Resource for Local Government to Assess Emission Reductions From Greenhouse Gas Mitigation Measures, California Air Pollution Control Officers Association, Aug.

- Reduction in vehicle miles traveled in construction crew commutes through carpooling, trip reduction, and bus service measures; and
- Use of a Heavy-Duty Off-Road Vehicle Plan to ensure compliances with construction mitigation measures (e.g., hourly meters on equipment, documenting the serial number, horsepower, manufacture age, fuel, etc. of all onsite equipment and daily logging of the operating hours of the equipment).<sup>12</sup>

## VIII. THE PROJECT VIOLATES FLPMA

### A. Land Use Amendment Process

The MSEP DEIR fails to make required findings under the CDCA Plan Amendment Process. In particular, the CDCA Plan Amendment Process requires that the BLM District Manager:

1. Determine if the request has been properly submitted and if any law or regulation prohibits granting the requested amendment;
2. Determine if alternative locations within the CDCA are available that would meet the applicant's needs *without requiring a change in the plan's classification*, or an amendment to any plan element;
3. Determine the environmental effects of granting and/or implementing the applicant's request;
4. Consider the economic and social impacts of granting and/or implementing the applicant's request;
5. Provide opportunities for and consideration of public comment on the proposed amendment, including input from the public and from federal, state, and local government agencies; and
6. Evaluate the effect of the proposed amendment on BLM management's desert-wide obligation to achieve and maintain a balance between resource use and resource protection.

(DEIR p. 1-7) (emphasis added).

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2010, at 47, available at <http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf> (Exhibit 15).

<sup>12</sup> *Id.* at 431.

The MSEP DEIR, while it reviews possible alternative sites (DEIR p. 2-59–60), does not find whether any of these potential sites do not require a plan amendment. The CDCA Plan requires that all sites associated with power generation or transmission not identified in the 1980 Plan will be considered through the plan amendment process. If the project is approved, a plan amendment will be necessary. The CDCA already contains multiple sites where energy generation is permitted under the Plan, and where construction and operation of a photovoltaic solar energy generating facility and related infrastructure would not require amending the CDCA plan.

### **B. California Desert Conservation Area**

The MSEP falls within an area of the CDCA classified as Class L for limited use. The BLM is required to manage Class L lands “to protect sensitive, natural, scenic, ecological, and cultural resource values . . . [providing] for generally lower-intensity, carefully controlled multiple uses that do not significantly diminish resource values.” Bureau of Land Management, The California Desert Conservation Plan 1980, as amended 13 (1999).

The CDCA Plan establishes four multiple use classes, multiple use class guidelines, and plan elements for specific resources or activities, such as motorized vehicle access, recreation, and vegetation. The MSEP site is currently classified as Multiple Use Class L (Limited Use). Approximately 4 million acres of public lands are classified as Class L. These lands are managed to protect sensitive, natural, scenic, ecological, and cultural resource values. They provide for generally lower-intensity, carefully controlled multiple uses that do not significantly diminish resource values. *Id.*

In addition to defining the required analyses and Decision Criteria for Plan Amendments, the CDCA Plan Energy Production and Utility Corridors Element (Energy Element) provides additional guidance for the location of energy facilities and utility corridors. The Energy Element identifies nine decision criteria to be evaluated when considering locating a new energy facility within the CDCA Plan area. These criteria are as follows:

1. Minimize the number of separate ROWs by using existing ROWs as a basis for planning corridors.
2. Encourage joint use of corridors for transmission lines, canals, pipelines, and cables.
3. Provide alternative corridors to be considered during the processing of applications.
4. *Avoid sensitive resources wherever possible.*
5. *Conform to local plans whenever possible.*

6. *Consider wilderness values and be consistent with final wilderness recommendations.*
7. Complete the delivery system network.
8. Consider ongoing projects for which decisions have been made.
9. Consider corridor networks that take into account power needs and alternative fuel resources.

(DEIR p. 1-7-8) (emphasis added).

The MSEP violates the CDCA plan because it fails to avoid sensitive resources, fails to conform to local plans (in particular the ACEC and Management Plan), it is inconsistent with wilderness values and is inconsistent with wilderness recommendations (in particular the ACEC and Management Plan).

## **IX. THE PROJECT VIOLATES THE ESA**

### **A. Section 7 Consultation**

The BLM should issue its Final EIS only after completing Section 7 Consultation with USFWS. USFWS requires that Section 7 Consultation be completed before a FEIS is issued. U.S. Fish & Wildlife Services, National Marine Fisheries Service, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act 4-11 (1998). In addition, BLM is required to submit the Section 7 Biological Opinion issued as a result of a Section 7 Consultation for public comment through the NEPA process, and provide the public comments to USFWS. 50 C.F.R. § 402.14(g)(5).

Moreover, BLM should have already integrated the findings of the Section 7 Consultation with USFWS at the draft stage. 40 C.F.R. § 1502.25 states that “draft environmental impact statements . . . [shall be] integrated with environmental impact analyses . . . required by . . . the Endangered Species Act . . . .”

The MSEP DEIS implies that BLM could complete the NEPA process without including the results of the Section 7 consultation. The MSEP DEIS states that the terms and conditions issued as a result of the Section 7 Consultation process would be “identified” within the MSEP’s Biological Resources Mitigation Monitoring Plan. BLM is required to integrate the results of its Section 7 consultation, not merely “identify, into the BRMMP and submit them for public comment as part of the FEIS prior to approval of the MSEP.

## **X. CONCLUSION**

McCoy Solar Energy Project DEIS Comment  
August 23, 2012

LIUNA Local Union No. 1184 believes the DEIS is wholly inadequate and requires significant revision, recirculation and review. Moreover, LIUNA believes that the Project as proposed would result in too many unmitigated adverse impacts on the environment to be justified. Thank you for your attention to these comments. Please include this letter and all attachments hereto in the record of proceedings for this project.

Sincerely,



Gideon Kracov

Attorney for LIUNA Local Union No. 1184



THE METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA

Office of the General Manager

August 23, 2012

**Via Electronic & U.S. Mail**

Jeffery Childers, Project Manager  
California Desert District Office  
U.S. Bureau of Land Management  
22835 Calle San Juan de Los Lagos  
Moreno Valley, California 92553-9046.

Dear Mr. Jeffery Childers:

**Notice of Availability of the  
Draft Plan Amendment and Environmental Impact Statement for the  
Proposed McCoy Solar Energy Project (MSEP), Riverside County, CA**

The Metropolitan Water District of Southern California (Metropolitan) reviewed the McCoy Solar Energy Project (MSEP) Draft Plan Amendment and Environmental Impact Statement (EIS). The U.S. Bureau of Land Management Palm Springs/South Coast Field Office, Palm Springs, California (BLM) prepared the Draft and EIS related to McCoy Solar, LLC's right-of-way (ROW) application for the McCoy Solar Energy Project (MSEP), a 750-megawatt (MW) photovoltaic (PV) solar electricity generation project, which may include an amendment to the California Desert Conservation Area Plan (1980 as amended).

Metropolitan is pleased to submit comments for consideration by BLM during the public comment period for the EIS. In sum, Metropolitan provides these comments to ensure that any potential impacts on its facilities or properties in the vicinity of the Project and on Colorado River water resources are adequately addressed. Metropolitan is pleased to submit these comments for consideration in preparing the final EIS.

**Background**

Metropolitan is a public agency and regional water wholesaler. It is comprised of 26 member public agencies serving more than 19 million people in six counties in Southern California. One of Metropolitan's major water supplies is Colorado River water, conveyed via Metropolitan's Colorado River Aqueduct (CRA). Metropolitan holds an entitlement to water from the Colorado River. The CRA consists of tunnels, open canals and buried pipelines. CRA-related facilities also include above and below ground reservoirs and aquifers, access and patrol roads, communication facilities, and residential housing sites. The CRA, which can deliver over 1.2 million acre-feet of water annually to the southern California coastal plain, extends 242 miles

from the Colorado River, through the Mojave Desert to Lake Mathews. Metropolitan has five pumping plants located along the CRA, which consume approximately 2,400 gigawatt-hours of energy when the CRA is operating at full capacity.

Concurrent with its construction of the CRA in the mid-1930s, Metropolitan constructed 305 miles of 230 kilovolt (kV) transmission lines that run from the Mead Substation in Southern Nevada, head south, then branch east to Parker, California, and then west along Metropolitan's CRA. Metropolitan's CRA transmission line easements lie on federally-owned land, managed by BLM. The transmission lines were built for the sole and exclusive purpose of supplying power from the Hoover and Parker projects to the five pumping plants along the CRA.

Metropolitan's ownership and operation of the CRA and its 230 kV transmission system is vital to its mission to provide Metropolitan's 5,200 square mile service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way.

### **Project Understanding**

The Applicant proposes to construct, operate, maintain, and decommission the MSEP in a location approximately 13 miles northwest of the City of Blythe, California, 32 miles east of Desert Center, and 6 miles north of Interstate Freeway-10 (I-10). The MSEP solar plant site would be developed on approximately 4,315 acres of public land administered by BLM and on approximately 477 acres of private land subject to Riverside County's (County's) land use jurisdiction.

The key components of the Project are:

1. The solar plant site, i.e., all facilities that create a footprint in and around the field of solar panels, including: the solar field (consisting of up to two solar power plants identified as Unit 1 and Unit 2), up to two on-site substations (the Unit 1 and Unit 2 substations), an operations and maintenance (O&M) facility to be shared by Unit 1 and Unit 2 (if constructed); and related infrastructure and improvements;
2. A double-circuit, overhead 230 kV gen-tie line;
3. A 230 kV switchyard located near the Colorado River Substation (CRS);
4. Two telecommunications lines;
5. A Southern California Edison (SCE)-owned and operated distribution line; and
6. An access road providing access to the solar plant site.

The Project would operate year-round, and would generate electricity during daylight hours when electricity demand is at its peak. The MSEP would generate and deliver solar-generated power to the regional electrical grid through an interconnection at the CRS.

The MSEP would be constructed in up to two units. Unit 1 is expected to have a 250 MW capacity comprising an estimated 125 complete or equivalent partial 2 MW blocks. Unit 2 would have an up to 500 MW capacity consisting of up to 250 complete or equivalent partial 2 MW blocks. The construction of Unit 1 would include the access road, water treatment system, initial gen-tie line (consisting of the support towers and first circuit), O&M building, parking area, and the first 125 complete or equivalent partial 2 MW blocks. Proposed facilities on private and County-owned land would be limited to solar arrays and inverters, and a portion of the access road, gen-tie line, distribution line, and telecommunication line. Of the total Project, approximately 50 MW is expected to be developed on private land.

In the substation of each Unit, the voltage would be stepped up to 230 kV to match the voltage of the gen-tie line that would interconnect MSEP generation output with the SCE CRS. The MSEP gen-tie line route would extend south from the solar plant site along the eastern and south-eastern border of the Blythe Solar Energy Project (BSEP) site as proposed, or if a different route alternative is selected, either through the center of the BSEP site or along the western border of the BSEP site before turning south to cross the I-10 and west toward the CRS south of I-10. The MSEP gen-tie line route is estimated to be approximately 12.5 to 15.5 miles long, including 2 miles within the solar plant site boundary.

No water service is available at the proposed site. Groundwater in the area is contained within the Palo Verde Mesa Groundwater Basin (PVMGB) of the Colorado River Hydrologic Region. The Applicant does not propose to extend municipal water or sewer service to the Project site. Water in sufficient quantity and quality to serve Project needs is expected to be available from two or three primary wells and a sufficient number of back-up wells, which would be used in the event the primary wells are shut down for maintenance. All wells would be constructed and operated within the solar plant site at the eastern end of Unit 1; the precise location of the well field would be defined during the detailed design phase. If possible, one of the wells would be located near the proposed water treatment system area. As currently planned, the wells would pump groundwater from the PVMGB, where the water table has been measured at or near 254 feet amsl.

Construction-related water use would support site preparation (including operation of a portable batch plant, if needed) and grading activities. During earthwork for the grading of access roads, foundations, equipment pads, and other components, the primary uses of water would be for compaction and dust control. Smaller quantities would be required for preparation of the concrete required for building foundations and other minor uses. Subsequent to the earthwork activities, the primary water use would be for dust suppression. Based on similar projects, the Applicant estimates that the average water usage rate during construction would be approximately 180 to 200 gallons per minute. The total water usage during construction of Unit 1

is estimated to be approximately 450 acre-feet (AF), based on similar projects. The water demand associated with the construction of Unit 2 would be reduced relative to Unit 1, because elements common to the units would have been installed as part of Unit 1. The total water usage during construction of Unit 2 is estimated to be approximately 200 to 300 AF.

Drinking (potable) water would be supplied for construction workers on-site, and is estimated to be approximately 10,000 gallons per month (approximately 0.5 acre-foot per year (AFY)), varying seasonally and by work activities. The potable water could be brought to the solar plant site by tanker truck, or groundwater could be used with a package water treatment system to treat the water to meet potable standards.

Based on the anticipated uses (including drinking water, showers, restroom facilities, panel washing, dust suppression, and 3,000-gallon dedicated fire supply, among other uses), the estimated quantity of water needed for operation and maintenance of the MSEP would be approximately 15 to 22 AFY per Unit, plus a total of 1 AFY of potable water (31 to 45 AFY for the entire Project). The primary use of water during operation and maintenance-related activities would be for panel washing and dust control (the proposed PV technology requires no water for the generation of electricity).

#### **Land Use Issues: Potential Impacts on Metropolitan Facilities**

Although Metropolitan has not yet identified any direct impacts, the Project is in the general vicinity of Metropolitan facilities, perhaps as close as 8 miles. As described above, Metropolitan currently has a significant number of facilities, real estate interests, and fee-owned rights-of-way, easements, and other properties (Facilities) located on or near BLM-managed land in southern California that are part of our water conveyance system. A map of the Project in relation to Metropolitan's Facilities is enclosed for reference. Metropolitan is concerned with potential direct or indirect impacts that may result from the construction and operation of any proposed solar energy project on or near our Facilities. In order to avoid potential impacts, Metropolitan requests that the final EIS include an assessment of potential impacts to Metropolitan's Facilities with proposed measures to avoid or mitigate significant adverse effects.

#### **Water Resources: Potential Impacts on Water Supplies**

Metropolitan is concerned about the Project's potential direct and cumulative impacts on water supplies, specifically potential impacts on Colorado River supplies. As noted above, Metropolitan holds an entitlement to imported water supplies from the Colorado River. Water from the Colorado River is allocated pursuant to federal law and is managed by the Department of the Interior, Bureau of Reclamation. In order to lawfully use Colorado River water, a party must have an entitlement to do so. See Boulder Canyon Project Act of 1928, 43 U.S.C. §§ 1501, et seq.; *Arizona v. California* (Consolidated Decree), 547 U.S. 150 (2006).

The Project proposes to use up to 750 acre-feet of water during construction and up to 45 acre-feet per year for long-term operations, from wells located on site. The total MSEP water usage

would be 1,650 acre-feet apportioned over the 33-year life of the project. The entire project site overlies the "Accounting Surface" area designated by U.S. Geological Survey (USGS) Scientific Investigation Report 2008-5113. The Accounting Surface is defined to represent the elevation and slope of the static water table in the river aquifer outside the flood plain and the reservoirs of the Colorado River that would exist if the water in the river aquifer were derived only from the river. The accounting surface extends outward from the edges of the flood plain or a reservoir to the subsurface boundary of the river aquifer. The USGS Report indicates that the aquifer underlying the lands is considered to be hydraulically connected to the Colorado River and groundwater withdrawn from wells located on these lands would be replaced by Colorado River water, in part or in total. Wells that have a static water-level elevation near (within  $\pm 0.84$  feet at the 95-percent confidence level), equal to, or below the elevation of the Accounting Surface are presumed to yield water that will be replaced by water from the Colorado River. Wells that have a static water-level elevation above the elevation of the Accounting Surface are presumed to yield water that will be replaced by water from precipitation and inflow from tributary valleys. This means that if it is determined that these wells are, in fact, pumping water that will be replaced by water from the Colorado River, the use of such water would need to be accounted for as consumptive use of Colorado River water as required under the Consolidated Decree in *Arizona v. California*. In addition, page 4-20.4 of the Draft EIS states that model results indicated that there would be a total change of about 128 acre-feet in the Palo Verde Irrigation District (PVID) drain mass balance at the end of the operation and maintenance period. If this were to result in a reduction in PVID return flows to the Colorado River over the construction or operation period, Metropolitan's Colorado River water supply would be reduced.

All of California's apportionment to use of Colorado River water during normal, shortage, and Intentionally Created Surplus conditions is presently contracted, meaning that no new water entitlements are available for uses in California during these conditions. The project proponent would have to obtain imported water supplies from an existing contract holder or other non-Colorado River resource.

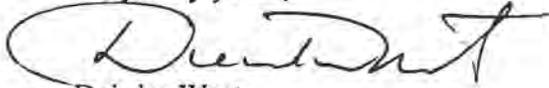
Recognizing the limitations on alternate water supplies, Metropolitan is willing to consider terms and conditions of a water sale agreement to furnish supplemental water to the proponent. Section 131(b) of the Metropolitan Water District Act provides Metropolitan with authority to enter into contracts to provide water to any private corporation or public agency for use in connection with generation of electric power at plants located outside of Metropolitan so long as a major portion of the power is used within Metropolitan's service area in Southern California. Any supplemental water sold for this Project would be an exchange of non-Colorado River water available to Metropolitan for Colorado River water available to Metropolitan.

Metropolitan requests that it be copied on all groundwater monitoring and reports for the Project because of the potential impacts to Metropolitan's supplies from use of water that would be replaced by Colorado River water. Finally, on page 3.20-17, the distance from the MSEP for site numbers 4, 5, and 6 shown in Table 3.20-10 should be revised. Rather than 14 miles from the MSEP, these sites are much further away, located near the Arizona-Sonora boundary.

Mr. Jeffery Childers  
August 23, 2012  
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We appreciate the opportunity to provide input to your planning process and we look forward to receiving future environmental and related documentation on this project. If we can be of further assistance, please contact Mr. Michael Melanson at (916) 650-2648.

Very truly yours,

A handwritten signature in black ink, appearing to read "Deirdre West". The signature is fluid and cursive, with a large initial "D" and a stylized "W".

Deirdre West  
Manager, Environmental Planning Team

LIM/lim  
(J:\Environmental Planning Team\COMPLETED JOBS\August 2012\Job No. 2012082301)

Enclosure: 1) Map – Renewable Energy Projects



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August 23, 2012

Jeff Childers  
Project Manager  
Bureau of Land Management  
U.S. Department of the Interior  
1201 Bird Center Drive  
Palm Springs, CA 92262-8001  
VIA EMAIL: jchilders@blm.gov

**RE: Comments on Draft Plan Amendment / Environmental Impact Statement for the McCoy Solar Energy Project**

Dear Mr. Childers:

I am submitting this comment on behalf of our client, Renewable Resources Group, Inc., (RRG). We appreciate the opportunity to comment on the Draft Plan Amendment / Environmental Impact Statement (PA/EIS) for the McCoy Solar Energy Project (MSEP), dated May 2012.

RRG owns and manages agricultural land throughout California, including land in eastern Riverside County near the MSEP. On some portions of its land, RRG facilitates development of solar energy generation facilities. As a landowner, RRG works with solar companies to sell them the land up-front or to engage in partnerships whereby RRG obtains necessary entitlements from governmental agencies and then transfers the land to them.

I am writing to provide the BLM with accurate information regarding lands that RRG owns, which are addressed in the Draft PA/EIS analysis of alternatives and cumulative impacts. The Draft PA/EIS describes a project labeled "X" and "CUP03677," and indicates that ownership is not known. (See Figure 4.1-1 and Table 4.1-4 in the cumulative analysis.) RRG owns these lands.

The northern section of the land labeled project CUP03677 in the Draft PA/EIS is incorrectly described as being developed for solar energy generation. RRG is not pursuing solar energy development of that northern piece. The large, contiguous southern piece is intended to be

Jeff Childers  
August 23, 2012  
Page 2

developed for solar energy development. Since RRG does not have a solar company technology partner for that land, RRG is seeking entitlements to allow a solar photovoltaic energy plant to be built and operated on that site, either as a stand-alone project called the "Palo Verde Mesa Solar Project" (PVMS), or to be combined with another nearby solar project if that project has undergone environmental review. (See the enclosed maps of the PVMS lands.)

The PVMS lands are comprised of 3,250 acres of private, contiguous and previously disturbed parcels. The site can support up to 486 megawatts of solar photovoltaic energy generation and lies near the Colorado River Substation. RRG acquired control of these lands between June 2010 and January 2011. Pursuant to its customary business plan, RRG has been actively and openly seeking a buyer or solar company technology partner to develop the PVMS lands for solar energy generation.

For the purposes described above, RRG has submitted an application to Riverside County for a conditional use permit for a solar generation facility (EIR No. 532/Conditional Use Permit No. 3684/Public Use Permit No. 916/Palo Verde Mesa Solar Project). Cultural and biological surveys, for both wildlife and plants, have already been conducted on the PVMS lands, and draft studies are being reviewed by appropriate agencies. If those studies (or other information) would assist the BLM in its analysis of cumulative impacts or alternatives, RRG will provide them.

More than 90 percent of the PVMS site has already been disturbed by agricultural activities, so its development for solar energy generation would avoid or reduce impacts compared with development of undisturbed lands. Biological surveys completed to date have detected no federal or state threatened or endangered species on PVMS lands. For example, no desert tortoises or their sign have been observed on the site. Additionally, no kit fox were detected on the site. The surveys revealed that the site does not include Lands with Wilderness Characteristics, microphyll woodlands, or unavoidable federal or state jurisdictional waters.

If you have additional questions, please do not hesitate to contact me.

Sincerely,



Barbara J. Schussman  
Attachments



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

AUG 23 2012

Jeffery Childers, Project Manager  
California Desert District Office, BLM  
22835 Calle San Juan De Los Lagos  
Moreno Valley, California 92553

**Subject:** Draft Environmental Impact Statement for the Proposed McCoy Solar Energy Project and California Desert Conservation Area Plan Amendment, Riverside County, California (CEQ #20120164)

Dear Mr. Childers:

The U.S. Environmental Protection Agency has reviewed the Draft Environmental Impact Statement for the proposed McCoy Solar Energy Project (MSEP) and California Desert Conservation Area Plan Amendment. Our review and comments are provided pursuant to the National Environmental Policy Act, the Council on Environmental Quality Regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act.

EPA continues to support increasing the development of renewable energy resources in an expeditious and well planned manner. Using renewable energy resources such as solar power can help the nation meet its energy requirements while reducing greenhouse gas emissions. We encourage BLM to apply its land management and regulatory authorities in a manner that will promote a long-term sustainable balance between available energy supplies, energy demand, and protection of ecosystems and human health.

On September 27, 2011, EPA provided extensive formal scoping comments for the project, including detailed recommendations regarding purpose and need, range of alternatives, cumulative impacts, biological and water resources, and other resource areas of concern. We are pleased that the DEIS indicates that there will be limited grading of the project site and the layout of the solar field will allow existing drainage patterns to be maintained where possible. We commend the inclusion of a comprehensive hydrological section and a detailed discussion of the groundwater and surface water modeling analyses. EPA also commends the early analyses of key resource areas, such as jurisdictional waters of the United States, impacts to threatened and endangered species, and cultural resources. This information is important to determine a project's viability and avoid potential project delays.

Notwithstanding the positive aspects of the proposed project, the DEIS identifies potential impacts to aquatic resources, air quality, desert pavement, biological resources, and tribal resources, as well as the cumulative impacts associated with other large-scale solar energy projects proposed in the area. Based on our review of the DEIS, we have rated the project and document as *Environmental Concerns – Insufficient Information* (EC-2) (see the enclosed "Summary of EPA Rating Definitions").

We recommend that the FEIS clearly explain the rationale for identifying Alternative 1 as BLM's preferred alternative. In addition, we recommend that the Final EIS include additional discussion of impacts to aquatic resources from disc-and-roll grading and the use of engineered channels, and the effectiveness of the proposed mitigation measures to account for stormwater drainage and impacts from flooding events. We also recommend clarification of the subsurface connection of the Palo Verde Mesa Groundwater Basin to the Colorado River. With respect to PM<sub>10</sub> air quality impacts resulting from the 46-month construction period, we recommend requiring additional mitigation measures as proposed in the neighboring South Coast Air Quality Management District (SCAQMD) Rule 403, phased construction,

and early coordination among multiple renewable energy project construction schedules to minimize adverse air quality impacts in the region.

We recommend that the Final EIS provide the outcome of government-to-government consultation between the BLM and the tribal governments and update discussions of, and demonstrate consistency with, the Desert Renewable Energy Conservation Plan and the Solar Programmatic EIS. The latter discussion should be supported by up-to-date maps illustrating proposed Solar Energy Zone development boundaries.

We appreciate the opportunity to review this DEIS, and are available to discuss our comments. Please note that starting October 1, 2012, EPA Headquarters will not accept paper copies or CDs of EISs for official filing purposes. Submissions on or after October 1, 2012, must be made through the EPA's new electronic EIS submittal tool: *e-NEPA*. To begin using *e-NEPA*, you must first register with the EPA's electronic reporting site - [https://cdx.epa.gov/epa\\_home.asp](https://cdx.epa.gov/epa_home.asp). Electronic submission does not change requirements for distribution of EISs for public review and comment, and lead agencies should still provide one hard copy of the Final EIS released for public circulation to the EPA Region 9 office in San Francisco (Mail Code: CED-2). If you have any questions, please contact me at (415) 972-3843 or contact Anne Ardillo, the lead reviewer for this Project. Anne can be reached at (415) 947-4257 or [ardillo.anne@epa.gov](mailto:ardillo.anne@epa.gov).

Sincerely,



Enrique Manzanilla, Director  
Communities and Ecosystems Division

Enclosures: Summary of EPA Rating Definitions  
EPA's Detailed Comments

Cc: Bill Miller, U.S. Army Corps of Engineers  
Joe Marhamati, Department of Energy  
Tera Keeler Baird, US Fish and Wildlife  
Magdalena Rodriguez, California Department of Fish and Game

Jeff Grubbe, Acting Chairman and Jeanne Jussila, ED, Agua Caliente Band of Cahuilla Indians  
Maryann Green, Chairperson and Bill Anderson, ED, Augustine Band of Cahuilla Indians  
David Roosevelt, Chairman and Darlene Coombes, ED, Cabazon Band of Mission Indians  
Luther Salgado, Sr., Chairman and Brian Bahari, ED, Cahuilla Band of Indians  
Charles Wood, Chairman and Tom Pradetto, Environmental Director (ED), Chemehuevi Indian Tribe  
Sherry Cordova, Chairperson and Kevin Conrad, ED, Cocopah Indian Tribe  
Eldred Enas, Chairman and Guthrie Dick, Acting ED, Colorado River Indian Tribes  
Timothy Williams, Chairperson and Luke Johnson, ED, Fort Mojave Indian Tribe  
Keeny Escalanti, President and Chase Choate, ED, Quechan Indian Tribe  
Robert Martin, Chairperson and Liz Bogdanski, ED, Morongo Band of Cahuilla Mission Indians  
Joseph Hamilton, Chairman and Reginald Agunwah, ED, Ramona Band of Cahuilla  
James Ramos, Chairman and Clifford Batten, ED, San Manuel Band of Serrano Mission Indians

**Scott Cozart, Chairman and Erica Helms-Schenk, ED, Soboba Band of Luiseno Indians**  
**Maxine Resvaloso, Chairwoman and Gerardo Bojorquez, ED, Torres Martinez Desert Cahuilla Indians**  
**Darrell Mike, Chairperson and Marshall Cheung, ED, Twenty-Nine Palms Band of Mission Indians**



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Ecological Services  
Palm Springs Fish and Wildlife Office  
777 East Tahquitz Canyon Way, Suite 208  
Palm Springs, California 92262



In Reply Refer To:  
FWS-ERIV-10B0592-12TA0545

AUG 23 2012

## Memorandum

To: District Manager, California Desert District, Bureau of Land Management  
Moreno Valley, California  
Attention: Jeffery Childers, Project Manager

From: <sup>504</sup> Assistant Field Supervisor, Palm Springs Fish and Wildlife Office  
Palm Springs, California

Subject: Comments on the Draft Environmental Impact Statement/Draft California  
Desert Conservation Area Plan Amendment for the Proposed McCoy Solar Project  
(Application CACA-048728), Riverside County, California

This memorandum transmits the U.S. Fish and Wildlife Service's (Service) comments on the above-referenced draft Environmental Impact Statement/California Desert Conservation Area Plan Amendment (EIS/CDCA PA) for the proposed McCoy Solar Energy Project (MSEP or Project). The comments provided herein are based on the information provided in the draft EIS/CDCA PA; the Service's knowledge of sensitive and declining wildlife populations and vegetation communities; and our participation in regional renewable energy conservation planning efforts.

We offer the following comments on the draft EIS/CDCA PA as they relate to potential impacts on public trust resources. The primary concern and mandate of the Service is the protection of fish and wildlife resources and their habitats. The Service has legal responsibility for the welfare of migratory birds, anadromous fish, and threatened/endangered animals and plants occurring in the United States. We are also responsible for administering the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). We recognize the need for development of renewable energy and the challenge of balancing solar energy development with conserving natural resources in the southwest. We are working with the agencies involved in this effort and offer our assistance to help achieve the various State and Federal renewable energy goals and policies guiding renewable energy programs.

NextEra Energy Resources, LLC (NextEra or applicant) has filed an application for a right-of-way (ROW) grant with the Bureau of Land Management (BLM) to construct, operate, maintain, and decommission an up-to-750 megawatt (MW) photovoltaic (PV) solar energy generating facility and related infrastructure in unincorporated Riverside County, California. The majority of the Project would be developed on public land administered by the BLM. Approximately

7,700 acres of the Project is proposed on BLM-administered land and 477 acres of privately owned land would be included in the proposed site boundary. Within the BLM-administered lands, construction and operation the preferred alternative would disturb approximately 4,900 acres. Remaining acreage that would not be disturbed would be excluded from the ROW. The BLM's stated purpose and need for the proposed Project is to construct, operate, maintain, and decommission a solar PV facility on public lands in compliance with the Federal Land Policy and Management Act of 1976 (43 USC §1701 *et seq.*), BLM ROW regulations and other applicable Federal laws. NextEra also has a loan guarantee application pending with the U.S. Department of Energy (DOE). If the DOE decides to enter into negotiation of a possible loan guarantee with the Applicant, the DOE would likely become a cooperating agency in developing the final Environmental Impact Statement (EIS).

Based on our review of the DEIS we are commenting to two categories of concern: (1) impacts to the federally threatened Mojave desert tortoise (*Gopherus agassizii*), particularly on the western boundary of the project; and (2) potential project impacts on golden eagle (*Aquila chrysaetos*) and migratory birds, and the need for additional surveys to meet stated goals. The draft EIS presents and evaluates six alternatives for the project, and we will be addressing the first three alternatives. Alternative 1, the proposed action and BLM-preferred alternative, would consist of Units 1 and 2 for a combined capacity of at least 500 MW and up to 750 MW. The proposed action gen-tie line would run on the eastern border of the project along the border of Blythe Solar Power Project (BSPP) and continue south to interconnect with the Colorado River Substation. Alternative 2, Reduced Acreage Alternative, would consist of only Unit 1, for a capacity of 250 MW. It would permanently disturb 1,693 acres of BLM-administered land and 477 acres of privately owned land under Riverside County jurisdiction. Alternative 3 includes two options for alternate gen-tie line routes a central or western route. The central route would be a total of 12.5 miles long, 5.5 miles of which would differ from the Proposed Action gen-tie line. It would be collocated with the approved gen-tie line for the adjacent BSPP. The western route would be 15.5 miles long, 8.5 miles of which would differ from the proposed action gen-tie line. It would be located farther west than either the proposed route or the central route, and would travel along the western side of the adjacent BSPP.

### Desert Tortoise

Areas of higher concentration of active desert tortoise sign were strongly associated with the upper alluvial fans and incised drainages on the western portion within Unit 2 of the Project. Therefore, the Reduced Acreage Alternative (Alternative 2) is preferred by the Service because it minimizes potential impacts to desert tortoise by excluding higher quality habitat of Unit 2. The Service is concerned about the design of the western boundary (Unit 2) in the agency preferred alternative. The western side of the project consists of deeply incised desert dry washes interspersed with desert pavement. As proposed, the western boundary would wrap fencing and maintenance roads tightly around desert pavement and then cross drainages, creating extreme inter-digitation that maximizes edge to area ratios of the project.

Although this design excludes some of the larger riparian drainages, the fingers of fencing that exclude larger incised washes extend relatively great distances into the western edge of the project. These development fingers create a potential entrapment hazard to wildlife. The extreme inter-digitation would unnecessarily create a wildlife management problem that threatens local wildlife populations with an unnecessarily high mortality and predation risk. Given the extreme/steep topography and unstable slopes, any fence design could not be relied upon to keep wildlife out of the development area, especially after heavy rainfall events. Various wildlife species could become disoriented both inside and outside the fence, and would suffer increased predation/mortality risk. Therefore, the Project design is neither reasonable nor prudent from a wildlife management perspective, and we recommend reconfiguration to develop a more compatible project in this wildland setting.

In an agency/applicant meeting on August 14, 2012, the Service discussed pursuing an alternative fence alignment for the preferred alternative that would reduce potential edge effects of the project by truncating the fingers of solar panels extending to the west into wildlands and higher quality desert tortoise habitat. If the preferred alternative is selected, we recommend designing a two unit project with a combined capacity up to 500 MW, reducing the acreage on the western boundary, and using a central collocated gen-tie line with adjacent BSPP. The area between McCoy Mountains, the Project site, and along the BSPP site forms a continuous band of occupied habitat along the upper alluvial fans that links tortoise populations north and south. This area is modeled higher quality habitat according to the U.S. Geological Survey desert tortoise habitat model (Nussear et al. 2009) and desert tortoise protocol survey results validate higher densities in this area. The protection of habitat linkages for resident populations is necessary to maintain a viable population of the species in this area. Therefore, we recommend protecting the translocation areas, the upper bajadas (mapped as “dissected fans” in the BLM northern and eastern Colorado Desert Coordinated Management Plan landforms map) and prohibiting additional renewable energy development of within the unused portion of the 7,700 acres ROW from all future development.

### Golden Eagle

To fully analyze the potential risks to golden eagles, the draft EIS should present up-to-date biological information about eagles that breed, feed, shelter, and/or migrate in the vicinity that will potentially be affected by the proposed activity. However, surveys conducted to date consisted of primarily nesting season helicopter work and spring/summer avian point count plots that do not adequately address year-round eagle presence within or adjacent to the project footprint. We recommended that surveys follow the Service’s Interim Golden Eagle Inventory and Monitoring Protocols (Pagel et al. 2010), but the dates of the aerial surveys were generally outside of what the Service recommends as time periods suitable for initial reconnaissance and surveys of Mojave/Sonoran Desert habitat per the nesting chronologies of birds in that area. The document does not adequately evaluate potential threats to golden eagle via direct or indirect loss of foraging habitat or increased disturbance at or near known territories. At this time, the Service has not adopted specific guidance for the potential loss of golden eagle foraging habitat near an

active nest. The conclusions drawn about the direct and indirect impacts of foraging habitat are based on incidental observations of prey during other focal species surveys and limited eagle survey data.

Cumulative analyses should use the appropriate geographic and temporal boundaries and we do not consider a 10-mile radius of the project footprint to be appropriate scale. This is an adequate scale to inventory golden eagles that occur near a project but it is not suitable to determine cumulative impacts. We recommend evaluating cumulative impacts at the local area population level, which is based on dispersal distances from a nest or 140 miles (Pagel et al. 2010).

In summary, we understand that the BSPP and McCoy projects are separate with different permitting processes and schedules. However, since both projects share the same ownership and boundary, the public has a unique opportunity for increased flexibility to work with the applicant to minimize adverse impacts. Therefore, if the preferred alternative is selected, we request the applicant and BLM to cooperatively work with the Service, California Department of Fish and Game, and interested public in a minor reconfiguration of the western end of the McCoy project to reduce edge effects to wildlife. With over 11,700 acres of approved/proposed development between these two projects, or even the 4,900 acres for the MSEP alone, this reconfiguration represents only minor change in acreage. Eliminating the western-most fingers of development would eliminate approximately 600 acres of MSEP, which represent 12 percent of the overall project footprint, and 5 percent of the two projects combined. Therefore, we consider a project modification of this scale to be both technically and economically feasible and more conveniently accommodated because power purchase agreement has not been approved for Unit 2 of the Project.

We look forward to working with BLM to refine the design of the western end of the MSEP so that the public, State, and Federal interests do not overlook an important opportunity to plan a project consistent with fundamental reserve design planning principles. If you have any questions regarding these comments, please contact Tera Baird of this office at 760-322-2070, extension 205.

cc:

Magdalena Rodriguez, CDFG, Ontario, California

#### Literature Cited:

- Nussear, K.E., Esque, T.C., Inman, R.D., Gass, Leila, Thomas, K.A., Wallace, C.S.A., Blainey, J.B., Miller, D.M., and Webb, R.H. 2009. Modeling habitat of the desert tortoise (*Gopherus agassizii*) in the Mojave and parts of the Sonoran Deserts of California, Nevada, Utah, and Arizona: U.S. Geological Survey Open-File Report 2009-1102.
- Pagel, J.E., D.M. Whittington, and G.T. Allen. 2010. Interim golden eagle inventory and monitoring protocols; and other recommendations. Division of Migratory Bird Management, U.S. Fish and Wildlife Service.

**COLORADO RIVER BOARD OF CALIFORNIA**

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August 23, 2012

State Clearinghouse  
1400 Tenth Street  
P.O. Box 3044  
Sacramento, CA 95812-3044

**RECEIVED**  
AUG 27 2012  
ADMINISTRATION  
RIVERSIDE COUNTY  
PLANNING DEPARTMENT

Regarding SCH# 2012 054 002: Notice of Completion & Environmental Document Transmittal Form for the Draft Plan Amendment and Environmental Impact Statement for the McCoy Solar Energy Project (May 2012, Bureau of Land Management) in Riverside County, California; and SCH# 2011 101 007: Riverside County Planning Department Conditional Use Permit No. 3671/Public Use Permit No. 911/McCoy Solar Energy Project

To Whom It May Concern:

The Colorado River Board of California (Board) has received and reviewed a copy of Notice of Completion & Environmental Document Transmittal Form for the Draft Plan Amendment and Environmental Impact Statement (EIS) (May 2012, Bureau of Land Management) for the McCoy Solar Energy Project (MSEP) in Riverside County, California.

The Board's earlier comments on the Notice of Preparation of a draft Environmental Impact Report for the MSEP regarding potential Colorado River water use due to the groundwater pumping at this project site have not been addressed in this Draft EIS. The earlier comments contained in the October 28, 2011 comment letter were addressed to Mr. Scott Morgan, Director of the State Clearinghouse and may be found on Page B-200 of the Draft EIS. A copy of the Board's earlier comment letter is attached here for reference. As neither the Executive Summary nor Chapter 1 through 4 of the Draft EIS address the Board's previous comments on the potential for groundwater pumped for the MSEP to be replaced by Colorado River water, as the static water elevation in MSEP wells could be at an elevation near to, equal to, or below the Colorado River "Accounting Surface" elevation once the MSEP wells begin pumping water, these comments should be addressed in the Final EIS.

In this Draft EIS, the estimated groundwater extraction from the Palo Verde Mesa Groundwater Basin (PVMGB) is stated to be about 2,100 acre-feet, including a total of 750 acre-feet during the 46-month construction period and a total of 1,350 acre-feet during the operational 30-year period. Based on information contained in the U.S. Geological Survey Scientific Investigation Report 2008-5113, groundwater at the location of the proposed MSEP wells at a static water elevation near to, equal to, or below the "Accounting Surface", if pumped, is presumed to be replaced by water from the Colorado River. Any amount of groundwater withdrawn from the wells that will be replaced by Colorado River water, in total or in part, is considered a consumptive use of Colorado River water.

According to the Consolidated Decree of the U.S. Supreme Court in the case of *Arizona v. California, et al.* entered March 27, 2006, (547 U.S. 150, 2006), the consumptive use of water means

“diversion from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation” and consumptive use “includes all consumptive uses of water of the mainstream, including water drawn from the mainstream by underground pumping”. Additionally, pursuant to the 1928 Boulder Canyon Project Act (BCPA) and the Consolidated Decree, no water shall be delivered from storage or used by any water user without a valid contract between the Secretary of the Interior and the water user for such use, i.e., through a BCPA Section 5 contract.

Prior to the issuance of the Decree in *Arizona v. California, et al.*, BCPA Section 5 contracts had been entered into between users of Colorado River mainstream water in California and the Secretary of the Interior for the use of water in amounts that exceed California's apportionment under a normal condition as set forth in the Consolidated Decree. Thus, no additional Colorado River water is available for use by any new water users near the Colorado River under shortage, normal, or Intentionally Created Surplus conditions, except through an agreement with an existing BCPA Section 5 contract holder, through an exchange of non-Colorado River water in order to off-set any potential use of Colorado River water.

As a result of discussions associated with the use of water by other solar energy projects, including the Blythe Solar Power Project, Palen Solar Power Project, Desert Harvest Solar Project, and the Genesis Solar Energy Project, the Board has consistently suggested that a mechanism exists for obtaining a legally authorized and reliable water supply for these proposed projects should they be determined to be using groundwater which would be replaced by Colorado River water. Currently, that option involves obtaining water through an existing BCPA Section 5 contract holder, i.e. The Metropolitan Water District of Southern California. Although other options may be available, it is the Board's current assessment that these other options may not be implementable in a timely manner and/or address the requirement that Colorado River water consumptively used can only be satisfied via a valid BCPA Section 5 contractual entitlement.

If you have any questions or require further information, please feel free to contact me, or Dr. Jay Chen of my staff, at (818) 500-1625.

Sincerely,

  
Christopher S. Harris  
Acting Executive Director

Attachments

State Clearinghouse  
August 23, 2012  
Page 3

cc: Mr. Terrance J. Fulp, Ph.D., Acting Regional Director, Lower Colorado Regional Office,  
U.S. Bureau of Reclamation  
Mr. Steven C. Hvinden, Director, Boulder Canyon Operations Office,  
U.S. Bureau of Reclamation  
Mr. John Kalish, Field Office Manager, Palm Springs-South Coast Field Office, BLM  
Mr. Jeffrey Childers, Project Manager, California Desert District Office, BLM  
Ms. Eileen Allen, Manager, California Energy Commission  
Mr. Jay Olivas, Project Planner, Riverside County Planning Department  
Mr. William J. Hasencamp, Manager of Colorado River Resources,  
The Metropolitan Water District of Southern California

**Defenders of Wildlife  
Natural Resources Defense Council  
Sierra Club  
The Wilderness Society  
Audubon California**

August 23, 2012

Jeff Childers, Project Manager  
California Desert District  
Bureau of Land Management  
22835 Calle San Juan De Los Lagos  
Moreno Valley, CA 92553  
(Via email: [jchilders@blm.gov](mailto:jchilders@blm.gov))

Re: Comments on Draft Plan Amendment (PA) to the California Desert Conservation Area Plan, 1980, as amended (CDCA Plan), and Draft Environmental Impact Statement (DEIS) for the McCoy Solar Energy Project (MSEP)

Dear Mr. Childers:

Thank you for the opportunity to provide comments on the Draft PA and DEIS for the proposed MSEP. These comments are submitted on behalf of Defenders of Wildlife (“Defenders”), the Natural Resources Defense Council (“NRDC”), the Sierra Club, The Wilderness Society (TWS) and Audubon California (“Audubon”), all non-profit public interest conservation organizations with offices in California as well as elsewhere in this country. These five organizations have been intensively involved in the permitting and decision-making processes for development of renewable energy on public lands particularly here in California over the past three years.

Defenders has more than 1 million members nationwide with more than 170,000 members and supporters in California. Defenders is dedicated to protecting all wild animals and plants in their natural communities. To this end, we employ science, public education and participation, media, legislative advocacy, litigation, and proactive on-the-ground solutions in order to impede the accelerating rate of extinction of species, associated loss of biological diversity, and habitat alteration and destruction.

NRDC has over 1.2 million members and online activists nationwide, more than 250,000 of whom live in California. NRDC uses law, science and the support of its members and activists to protect the planet's wildlife and wild places and to ensure a safe and healthy environment for all living things. NRDC has worked to protect wildlands and natural values on public lands and to promote pursuit of all cost effective energy efficiency measures and sustainable energy development for many years.

The Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters (approximately 250,000 of whom live in California) dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass protecting our public lands, wildlife, air and water while at the same time rapidly increasing our use of renewable energy to reduce global warming.

The mission of The Wilderness Society is to protect wilderness and inspire Americans to care for our wild places. We have worked for more than 70 years to maintain the integrity of America's wilderness and public lands and ensure that land management practices are ecologically sustainable and based on sound science. With more than half a million members and supporters nation-wide, TWS represents a diverse range of citizens.

Audubon California is the state office of National Audubon Society with 150,000 members and supporters in California. Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. For more than a century, Audubon has built a legacy of conservation success by mobilizing the strength of its network of members, Chapters, Audubon Centers, state offices and dedicated professional staff to connect people with nature and the power to protect it.

As we transition toward a clean energy future, it is imperative for our future and the future of our wild places and wildlife that we strike a balance between addressing the near term impacts of large scale solar energy development with the long-term impacts of climate change on our biological diversity, fish and wildlife habitat and natural landscapes. To ensure that the proper balance is achieved, we need smart planning for renewable power that avoids and minimizes adverse impacts on wildlife and wild lands. These projects should be placed in the least harmful locations near existing transmission lines and on already disturbed lands.

We strongly support the emission reduction goals found in the Global Warming Solutions Act of 2006, AB 32, including the development of renewable energy in California. However, we urge that in seeking to meet our renewable energy portfolio standard in California, project proponents and land managers ensure that projects are designed from their inception in the most sustainable manner possible. This is essential to ensure that project approval moves forward expeditiously and in a manner that does not sacrifice our fragile desert landscape and wildlife in the rush to meet our renewable energy goals.

#### Summary of comments:

Our comments, detailed below, address recommendations for avoiding and minimizing impacts to natural communities, biological resources and lands with wilderness characteristics; expanding the

range of alternatives to include a combined federal-private land project involving the Reduced Acreage alternative plus the Palo Verde Mesa Solar Project (“PVMSP”) private lands available for solar energy development; and analyzing opportunities for coordinated environmental review and development of both the McCoy and Blythe solar projects that would provide for a reasonable level of solar energy development while protecting federal lands with significant natural resources and values.

Brief description of the proposed project:

The DEIS analyzes the proposed MSEP, a 750 MW solar electricity generation facility utilizing PV technology located approximately 13 miles northwest of Blythe, CA. It includes arrays of PV panels, access roads, a 16-mile long generation tie-line, communication lines and switch-yard adjacent to the Colorado River Substation. The proposed project would be located on 7,700 acres of public land, and 470 acres of private land under the land use authority of Riverside County.

The facilities to be located on private land would include some of the solar panel arrays, inverters, and portions of the access road, generation tie-line, electric power distribution line, and a telecommunications line. The proposed 16-mile generation-tie line (gen-tie), with a right-of-way width of 100 feet, will require about 200 acres of public and private lands. The proposed 20-acre switch yard will be located adjacent to and connect into Southern California Edison’s Colorado River Substation located southwest of Blythe and south of Interstate 10.

Our specific comments are as follows:

**1. Introduction.** Our organizations recognize the need to develop our nation's renewable energy resources and to do so rapidly in order to respond effectively to the challenge of climate change. Unique natural resources here in California are already being affected by climate change, including, for example, American pikas in the Sierra Nevada and Joshua trees in the Mojave Desert. We also recognize that renewable energy development can help create jobs in communities which have been impacted by the current economic situation. For these and other related reasons, our organizations are working with regulators and project proponents to move properly sited renewable energy projects forward. That said, renewable energy development is not appropriate everywhere on the public lands and must be balanced against the equally urgent need to protect unique and sensitive resources of the CDCA. California is fortunate in having ample renewable resources, and especially solar energy, in many areas of the State, which provide opportunities for development of renewable energy generation and transmission in an environmentally and economically sound manner.

We strongly support renewable energy production and utilization, but we do not consider the construction of large-scale projects, and especially the very large solar energy projects proposed on relatively undisturbed public lands in the CDCA, to be the only way, or even the best way, to achieve our renewable energy goals. We strongly advocate that, ideally, such large scale solar projects

should be located on degraded or disturbed land such as abandoned agricultural fields, industrial sites, and near existing infrastructure rather than on public lands containing intact natural biological communities, particularly those that include threatened, endangered or other at-risk species.

As we and our colleagues at other organizations have repeatedly stated, the best way to develop the renewable resources of the CDCA is through comprehensive, pro-active planning involving federal, state and local governments to identify the most appropriate areas for such development -- *i.e.*, development zones -- and to guide development to those zones. *See, e.g.*, letter dated June 29, 2009 to Interior Secretary Salazar and California's Governor Schwarzenegger and signed by eleven organizations, including our own, attached to this letter.

Although the proposed MSEP is located within the Proposed Riverside East Solar Energy Zone (SEZ), a large majority of the project is located on undisturbed and sensitive public lands containing Microphyll woodland, comprised of small-leaved trees including Blue palo verde (*Cercidium floridum*), Ironwood (*Olneya tesota*), and Smoke tree (*Psoralea argophylla*) that are confined to washes and small drainages where soil moisture is relatively high. In comments submitted by our organizations on the Solar PEIS, we recommended that the BLM exclude these woodlands from solar energy development. Another significant feature within the MSEP is the Dissected Fans landform, identified and mapped by BLM in the Northern and Eastern Colorado Desert Coordinated Management Plan (NECO Plan). This landform is comprised of alluvial fans that are dissected by numerous drainages or washes that have formed incised channels in response to precipitation runoff. This landform has special significance with regard to Desert tortoise conservation in the region, which is addressed in greater detail in this letter. Furthermore, portions of the proposed MSEP are on public lands having wilderness characteristics, which are also addressed in greater detail. Of note, there is significant overlap between these important resources and the proposed MSEP.

Our comments on the proposed project are intended to offer ways in which the project can be made more environmentally sensitive, and we hope that the project proponent as well as the BLM will give them serious consideration.

**2. Cooperating agencies.** The DEIS is intended to satisfy the requirements of the California Environmental Quality Act (CEQA) as well as those of NEPA, but it does not appear local jurisdictions are jointly participating in the environmental analysis at this time. The DEIS indicates that in March 2012, the County of Riverside returned the application for use of 470 acres of private lands as part of the proposed MSEP, and that BLM anticipates that application will be re-filed at a later date. Thus, the NEPA and CEQA processes will not occur simultaneously, which BLM describes as a “bifurcated.”

**Comment:** The proposed MSEP appears dependent on both public and private lands. Please indicate how the CEQA and NEPA analyses and the associated mitigation requirements would be

coordinated. We would like to know if any special requirements stemming from CEQA, other than fully mitigating impacts to state listed species and state jurisdictional resources (e.g., ephemeral streams) will be applied to the entire project or simply limited to those occurring on private lands.

### **3. Sensitive and Significant Lands and Resources**

Lands with Wilderness Characteristics. In April 2011, the wilderness characteristics inventory of WIU #325 was updated and was used to determine whether public lands within the proposed Riverside East Solar Energy Zone (SEZ) have wilderness characteristics. The area in the vicinity of the proposed MSEP, identified as the East McCoy sub-unit (#325-1) is approximately 30,200 acres in size, of which about 27,640 acres are on public lands. This inventory sub-unit is generally bounded on the south by I-10, on the west by the foot of the McCoy Mountains, on the north by St. John's Mine Road/Arlington Mine Road, on the east by Gas Line Road to I-10.

In October 2011, based on this inventory, 11,925 acres of WIU #325-1 on the eastern side of the SEZ (in the area of McCoy Wash) was found to have wilderness characteristics. These lands include 1,256 acres of Unit 2 of the proposed MSEP.

**Comment:** The proposed McCoy solar project would impact 1,256 acres of BLM-identified "Lands with Wilderness Characteristics," or LWC. These LWC were identified by the BLM during the solar programmatic EIS (SPEIS) planning process, per BLM's authority to do so under section 201 of FLPMA. See Supplemental PEIS at pp. C-58 – C-60. Under section 201 of FLPMA, the BLM has the authority to identify LWC, and an obligation to consider impacts to these lands in planning documents such as the PEIS. See BLM Manual 6310, BLM Manual 6320.

The LWC identified in the SPEIS are adjacent to the Palen-McCoy wilderness. This wilderness area is important for Nelson's bighorn sheep and Golden eagles. The lands encompassed by the LWC also contain Microphyll woodland, a special habitat important to a variety of species including Kit fox, migrating songbirds, Desert mule deer and Desert tortoises.

Our organizations are deeply concerned about the precedent of agency-identified LWC being included in ROW applications and impacted by utility-scale solar energy development. BLM should remove these lands from the ROW application area. If that is not possible, then BLM should identify these lands as a permanent exclusion area within the ROW application area.

We do not believe that the loss of rare LWC can be appropriately mitigated on site given the nature of the proposed MSEP in altering the landscape. However, if construction is approved on LWC, we then recommend the BLM require specific measures that, while they will not mitigate for the loss of LWC on the site, will at least help to offset irreversible impacts to agency-identified LWC and help to compensate for the loss of these important lands.

In order of preference, we request that the BLM:

1. Avoid impacts by removing LWC lands from consideration for the MSEP.
2. Offset or compensate for LWC lands impacts through the purchase of a comparable amount of land within designated wilderness (i.e., inholdings) in proximity to the project or within designated wilderness areas within the Eastern Riverside County Region.
3. Funding of wilderness restoration (e.g., road closures, etc.) in designated wilderness adjacent to the Riverside East SEZ or within the Eastern Riverside County region.

**Plant Communities.** The western half of project area contains most, if not all, of the Microphyll woodland (Dry Desert Wash Woodlands) and Creosote bush-Big galleta communities, both considered sensitive by the California Department of Fish and Game because of their importance in sustaining the diversity and movement of biological resources in the region. Both these communities are associated with drainages, which naturally meander over alluvial fans over long periods of time through fluvial processes.

**Comment:** Microphyll woodland and Creosote bush-Big galleta communities, rather than simply the individual drainages supporting these plant assemblages, should be accounted for in assessing impacts of the project and in developing impact avoidance, minimization and compensatory mitigation. Wildlife inhabiting the area, including the Desert tortoise, move from drainage to drainage across the overall community that includes the desert pavement areas. Impact avoidance of these communities should be a priority. Furthermore, animal species richness in the Microphyll woodland community is much higher than in other community types in the desert, and is slow to recover from disturbance. (see NECO Plan, page 3-29). The general area northwest of Blythe, CA that includes the McCoy Wash drainage system has been identified by BLM as high in animal species richness, and this same area supports a large expanse of Microphyll woodland (see NECO Plan, Map H-3). The proposed MSEP appears to overlap with this area and should be addressed in the FEIS and excluded from development.

**Dissected Fans.** Dissected Fans is a landform described and mapped by BLM in the NECO planning area (see NECO Plan, Map 3-4). Dissected Fans in the NECO planning are important in sustaining and conserving Desert tortoises, as they are not only occupied by this species, but provide regional habitat linkages enabling gene flow among designated conservation areas and critical habitat, units which is critical to recovery of the species. In various biological opinions for solar projects in this region, the U.S. Fish and Wildlife Service has included the following conservation recommendation, thus strengthening the importance of preventing further loss of Dissected Fans habitat:

“We recommend that the BLM amend the CDCA Plan to prohibit additional renewable energy development (i.e., utility-scale solar and wind energy facilities) within the upper bajadas (mapped as “dissected fans” on the Landforms Map 3-4 in

BLM 2002) adjacent to the mountains of northeastern Riverside County. This recommendation is intended to protect the higher quality desert tortoise habitats in the recovery unit.”<sup>1</sup>

**Desert tortoise.** The MSEP is located within the Colorado Desert Recovery Unit for the Desert tortoise.<sup>2</sup> The eastern boundary of the preferred alternative footprint overlaps with habitat for desert tortoise that has been modeled as having a habitat suitability index of up to 0.7, according to the widely referenced USGS Desert tortoise habitat suitability model<sup>3</sup>.

**Comment:** While the rest of the project area was modeled as having a habitat suitability index of 0.6 and under, it is important to recognize that Desert tortoise habitat is characterized differently in the Sonoran/Colorado desert than in the Mojave Desert. In the Sonoran desert, drainages that support vegetation provide important cover, food and other resources that are critical to Desert tortoise survival. The vegetated washes that meander through the desert pavement and alluvium on the MSEP site are important habitat for the local Desert tortoise population in this region, especially because the surrounding desert pavement does not provide the same cover and resources.

**Comment:** While the density of Desert tortoise in the project area is relatively low, it is important to note that the individuals that persist on the periphery of the Desert tortoise range have a specific set of adaptations that allow them to survive in less ideal environments. In the face of environmental fluctuations, including but not limited to climate change, flood events, extreme temperatures, etc, individuals on the edge of the Desert tortoise range can play a significant geographic and genetic role in the population as a whole. In a study of 245 imperiled species worldwide, Channell and Lomolino (2000)<sup>4</sup> found that 68% of surveyed species retained a greater than expected portion of their distribution in habitat peripheral to the historical range; thus, areas supporting peripheral populations can function as refugia against environmental catastrophes. The population of Desert tortoise on the edge of the Mojave sub-species’ range in the vicinity of the McCoy project may prove to be just as important to the long-term survival of the species as larger core populations.

**Comment:** For the reasons given above and the confirmation from the DEIS that “nearly all [tortoise] use [is] concentrated in the western portion of the site” (DEIS p. 3.4-8), we consider the western half of the MSEP site to be inappropriate for solar energy development, and these lands should be excluded from not only this project but from future development that would result in a loss of habitat.

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<sup>1</sup> Fish and Wildlife Service. 2010. Section 7 Biological Opinion on the Blythe Solar Power Project, California. Carlsbad Fish and Wildlife Office, Carlsbad, CA. 43 pp.

<sup>2</sup> Fish and Wildlife Service. 2011. Revised Recovery Plan for the Mojave Population of the Desert Tortoise. Sacramento, CA.

<sup>3</sup> Nussear, K.E., Esque, T.C., Inman, R.D., Gass, Leila, Thomas, K.A., Wallace, C.S.A., Blainey, J.B., Miller, D.M., and Webb, R.H., 2009, Modeling habitat of the desert tortoise (*Gopherus agassizii*) in the Mojave and parts of the Sonoran Deserts of California, Nevada, Utah, and Arizona: U.S. Geological Survey Open-File Report 2009-1102, 18 p.

<sup>4</sup> Channell, R. and M.V. Lomolino. 2000. Dynamic biogeography and conservation of endangered species. *Nature* 403:84-86.

**4. Alternatives.** NEPA requires that BLM consider a range of alternatives, which is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. NEPA requires BLM to “rigorously explore and objectively evaluate” a range of alternatives to proposed federal actions. See *id.* §§ 1502.14(a) and 1508.25(c). “An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action.”<sup>5</sup> An agency violates NEPA by failing to “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action.<sup>6</sup> This evaluation extends to considering more environmentally protective alternatives and mitigation measures.<sup>7</sup> NEPA requires that an actual “range” of alternatives is considered, so that they will “preclude agencies from defining the objectives of their actions in terms so unreasonably narrow that they can be accomplished by only one alternative (i.e. the applicant’s proposed project).”<sup>8</sup> This requirement prevents the EIS from becoming “a foreordained formality.”<sup>9</sup>

**Comment:** As we indicated in our scoping comments on the proposed MSEP, NEPA’s implementing regulations explain that agencies should consider connected, cumulative, and similar actions in the same environmental impact statement. “Connected actions” must “be considered together in a single EIS.”<sup>7</sup> Likewise, cumulative actions “which when viewed with other proposed actions have cumulatively significant impacts should be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(2). Similar, reasonably foreseeable actions also should be considered together in the same environmental review document when the actions “have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography,” and the “best way to assess adequately [their] combined impacts or reasonable alternatives” is to consider them together. 40 C.F.R. § 1508.25(a)(3). Thus, we believe it is imperative that BLM consider the effects of both the MSEP and the Blythe connected actions in a single NEPA analysis, including a range of alternatives that applies to the entire development area in a consistent and coordinated manner.

**Comment:** We believe that the Reduced Acreage Alternative (Alternative 2) should be given further consideration for the reasons articulated below:

- The Reduced Acreage Alternative would protect public lands and sensitive resources occurring in the proposed Unit 2 of the project. Under this alternative, 2,700 acres located on the western half of the application area would not be approved for development. This area contains a large majority of the sensitive resources described previously – Lands with

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<sup>5</sup> Northwest Env’tl. Defense Center v. Bonneville Power Admin., 117 F.3d 1520, 1538 (9th Cir. 1997).

<sup>6</sup> City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990) (quoting 40 C.F.R. § 1502.14).

<sup>7</sup> See, e.g., Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1122-1123 (9th Cir. 2002) (and cases cited therein).

<sup>8</sup> Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1174 (10th Cir. 1999), citing Simmons v. United States Army Corps of Engineers, 120 F.3d 664, 669 (7th Cir. 1997).

<sup>9</sup> City of New York v. Department of Transp., 715 F.2d 732, 743 (2nd Cir. 1983). See also Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002).

Wilderness Characteristics, Desert tortoise, Microphyll woodland and vegetated drainages, Creosote bush-Big galleta swales, and dissected fans. Specifically, the Reduced Acreage Alternative would allow the BLM to avoid relocation of any tortoises and concentration of tortoises in the proposed relocation area.

- The Reduced Acreage Alternative conforms to the management guidelines for Limited Use Class public lands in the CDCA. Limited Use Class is a BLM designation described in the CDCA Plan, as follows:

“Multiple-Use Class L (Limited Use) protects sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished.”<sup>10</sup>

In recognition of the sensitive resources occurring in the region where the proposed MSEP is located, BLM designated public lands as Limited Use Class specifically to protect sensitive resources that occur on and surrounding the proposed MSEP. We consider the BLM’s Preferred Alternative to be inconsistent with the provisions of the CDCA Plan because of the size, intensity and duration of the proposed MSEP and its significant adverse impacts on sensitive public lands and resources.

- The Reduced Acreage Alternative would provide for a successful, reasonably-sized project that entails the use of approximately 2,200 acres of public land and 470 acres of adjacent private land, which the applicant has acquired and proposes to utilize in support of the MSEP. This portion of the proposed MSEP is referred to as Unit 1 and would generate approximately 250 MW using PV technology. It is noteworthy that NextEra has a power purchase agreement with the Southern California Edison Company for 250 MW, which corresponds to the planned power output of Unit 1 of the proposed MSEP. It makes little sense to entertain a project greater than 250 MW at this time (i.e., the Reduced Acreage Alternative) considering the significant public land resources that would be lost due to the MSEP as proposed by the applicant, and the number of renewable energy projects available to the utilities at a lesser environmental (and likely economic) cost. At this time it is uncertain whether any investor-owned utility (“IOU”) has the interest or capacity to procure renewable energy resources on this scale, given that the IOUs have more than met California’s 2020 renewable portfolio standard goals and many of the larger public land projects have had high failure rates.

**Comment:** The DEIS for the MSEP fails to consider an obvious “Disturbed Lands Alternative” using neighboring disturbed lands to the east of the proposed project location. Instead of siting the

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solar plant mostly on public land with only a small portion on private lands, as the MSEP is currently proposed, BLM could consider shifting portions of the project eastward so that a larger percentage of the project would be on disturbed, private lands and a smaller percentage would be on native, public lands. This would allow BLM to preserve for resource protection significant natural vegetation communities, undisturbed habitat and areas of great diversity and density of biological resources.

The most reasonable location for this alternative would involve eliminating from the project the public lands on its western portion that are proposed for MSEP Solar Unit 2, and replacing them with the disturbed private lands to the southeast that comprise the southern piece of the project labeled “X” and “CUP03677” in Figure 4.1-1 and Table 4.1-4 of the DEIS. The southern portion of these “CUP03677” lands is adjacent to the Blythe Solar Power Project site, which is contiguous to MSEP and is controlled by the MSEP applicant, NextEra.

Since at least the fall of 2011, the company that controls the “CUP03677” lands, Renewable Resources Group (RRG), has openly discussed its solar development plans for those lands with several non-profit public interest conservation organizations (and presumably with others). According to RRG, the southern portion of the “CUP03677” lands are previously disturbed by agricultural use, are the site of a conditional use permit application submitted to Riverside County for solar photovoltaic development of up to 486 megawatts, and are available to other solar developers and have been since fall of 2011.

This alternative would clearly constitute a feasible and reasonable Disturbed Lands Alternative. This Disturbed Lands Alternative would achieve the environmental benefits of the Reduced Acreage Alternative (see above) in the DEIS, which proposes use of only the eastern half of the MSEP project site, and would use previously disturbed lands to preserve the project’s ability to produce up to 750 MW of renewable power.

BLM’s duty to consider such a Disturbed Lands Alternative arises under both the California Desert Conservation Plan and under NEPA. The Desert Plan requires, for lands such as the Project site that carry the Multiple-Use Class L designation, that “all State and federal listed species and their critical habitat *will be fully protected.*” (MUC L Guidelines ## 10 and 17, DEIS pages 3.10-5 and 3.10-6; emphasis added) Due to uncertainties regarding desert tortoise counts and mitigation effectiveness, avoiding impacts to valuable desert tortoise habitat achieves the Desert Plan’s goals far more effectively than continuing to allow such development when other sites on disturbed land are readily available.

NEPA also requires analysis of feasible alternatives to the proposed action. As explained below, the Disturbed Lands Alternative is feasible, it would enable production of up to 750 MW of renewable energy, and it would avoid the most environmentally damaging impacts of the project. It is BLM’s responsibility to study such an alternative in a Supplemental DEIS for the McCoy project.

The Disturbed Lands Alternative would be beneficial for the same reasons the Reduced Acreage Alternative is preferred; primarily because it would allow BLM to avoid the most biologically sensitive areas of the MSEP site (see this letter, Section 3, Sensitive Resources), avoid the Lands with Wilderness Characteristics designations, and avoid the Class L (Limited Use Class) BLM lands in the Western portion of the project area (Unit 2). Additionally this proposed Disturbed Lands Alternative should be considered for the following reasons:

- This alternative would implement the screening criteria in BLM Instructional Memorandum 2011-61 which places a high priority on previously disturbed sites or areas adjacent to previously disturbed or developed sites.
- This alternative would shift development eastward, away from Solar Unit 2 and avoid the most concentrated areas of cultural resources. (DEIS, Vol. 1, page 3.5-29)
- This alternative would still enable a substantial portion of the solar plant to be sited on BLM lands, and thus achieves BLM mandates to determine appropriate sites on public lands for development of solar energy facilities.
- Since the Preferred Alternative includes 470 acres of private lands, the BLM “anticipates that the Applicant will re-file its [Conditional Use Permit] application [with Riverside County] at a later date” and the DEIS “assumes that the portion of the Project proposed on privately owned land could be implemented. . . .” (DEIS, page 1-1). Thus, the Disturbed Lands Alternative is similar in feasibility to the Preferred Alternative and a similar conclusion is appropriate for the Disturbed Lands Alternative.

## **5. Cumulative Impacts/Relationship to Blythe Solar Power Project**

The applicant for the proposed project, NextEra Energy, has recently acquired the adjacent Blythe Solar Power Project which was permitted by the California Energy Commission and BLM in 2010. NextEra intends to develop the Blythe project using photovoltaic technology rather than solar thermal trough technology for which the project was permitted. Thus, the Blythe project will require a new plan of development and environmental review by both the California Energy Commission and BLM.

**Comment:** The acquisition of the Blythe solar project by NextEra and its plan to convert the project to photovoltaic technology creates significant opportunities for coordinating development and sharing infrastructure such as staging and laydown areas, roads and transmission facilities, thereby minimizing the adverse effects of each project. In addition, the photovoltaic technology that will now be used on both projects provides much greater project layout flexibility compared to solar-thermal trough technology.

We recommend that BLM expand the range of alternatives, and consider the MSEP and Blythe projects in one NEPA analysis because they are interrelated and interdependent, and plan on sharing common facilities including the gen-tie transmission line to the Colorado River Substation, a common east-west boundary, staging and assembly areas, and the same PV technology. Such an

analytical approach will provide coordinated opportunities for avoiding and minimizing impacts for the entire project area, such as including an alternative that would eliminate the western half of each project area where the biological resource values are significantly higher and reduce the cumulative impacts to sensitive biological resources.

**Comment:** A revised environmental review and analysis, such as a supplemental DEIS/EIS that addresses both projects as a single development should be prepared, and issued for public review and comment for 90 days. This is required by NEPA because the projects share a common purpose and need, affect the same biological resources, share common technology and infrastructure and are proposed by the same applicant, NextEra. The projects are clearly connected actions and should be analyzed as such.

**Conclusion:** This concludes our comments on the DEIS for the MSEP. Please contact us if you have any questions, and thank you again for the opportunity to participate in the analysis of this proposed project. We would welcome an in-person meeting with BLM management and staff to discuss our issues and recommendations contained in this letter.

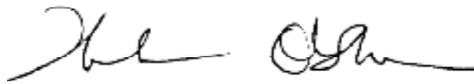
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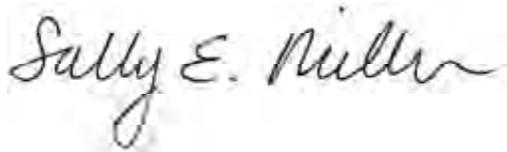
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**California Native Plant Society \* California Wilderness Coalition**  
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**Desert Protective Council \* Mojave Desert Land Trust**  
**National Parks Conservation Association**  
**Natural Resources Defense Council \* Sierra Club \* The Nature Conservancy**  
**The Wilderness Society \* The Wildlands Conservancy**

## **Renewable Siting Criteria for California Desert Conservation Area**

Environmental stakeholders have been asked by land management agencies, elected officials, other decision-makers, and renewable energy proponents to provide criteria for use in identifying potential renewable energy sites in the California Desert Conservation Area (CDCA). Large parts of the California desert ecosystem have survived despite pressures from mining, grazing, ORV, real estate development and military uses over the last century. Now, utility scale renewable energy development presents the challenge of new land consumptive activities on a potentially unprecedented scale. Without careful planning, the surviving desert ecosystems may be further fragmented, degraded and lost.

The criteria below primarily address the siting of solar energy projects and would need to be further refined to address factors that are specific to the siting of wind and geothermal facilities. While the criteria listed below are not ranked, they are intended to inform planning processes and were designed to provide ecosystem level protection to the CDCA (including public, private and military lands) by giving preference to disturbed lands, steering development away from lands with high environmental values, and avoiding the deserts' undeveloped cores. They were developed with input from field scientists, land managers, and conservation professionals and fall into two categories: 1) areas to prioritize for siting and 2) high conflict areas. The criteria are intended to guide solar development to areas with comparatively low potential for conflict and controversy in an effort to help California meet its ambitious renewable energy goals in a timely manner.

### **Areas to Prioritize for Siting**

- Lands that have been mechanically disturbed, i.e., locations that are degraded and disturbed by mechanical disturbance:
  - Lands that have been “type-converted” from native vegetation through plowing, bulldozing or other mechanical impact often in support of agriculture or other land cover change activities (mining, clearance for development, heavy off-road vehicle use).<sup>1</sup>
- Public lands of comparatively low resource value located adjacent to degraded and impacted private lands on the fringes of the CDCA:<sup>2</sup>
  - Allow for the expansion of renewable energy development onto private lands.
  - Private lands development offers tax benefits to local government.
- Brownfields:
  - Revitalize idle or underutilized industrialized sites.
  - Existing transmission capacity and infrastructure are typically in place.

- Locations adjacent to urbanized areas:<sup>3</sup>
  - Provide jobs for local residents often in underserved communities;
  - Minimize growth-inducing impacts;
  - Provide homes and services for the workforce that will be required at new energy facilities;
  - Minimize workforce commute and associated greenhouse gas emissions.
- Locations that minimize the need to build new roads.
- Locations that could be served by existing substations.
- Areas proximate to sources of municipal wastewater for use in cleaning.
- Locations proximate to load centers.
- Locations adjacent to federally designated corridors with existing major transmission lines.<sup>4</sup>

### **High Conflict Areas**

In an effort to flag areas that will generate significant controversy the environmental community has developed the following list of criteria for areas to avoid in siting renewable projects. These criteria are fairly broad. They are intended to minimize resource conflicts and thereby help California meet its ambitious renewable goals. The criteria are not intended to serve as a substitute for project specific review. They do not include the categories of lands within the California desert that are off limits to all development by statute or policy.<sup>5</sup>

- Locations that support sensitive biological resources, including: federally designated and proposed critical habitat; significant<sup>6</sup> populations of federal or state threatened and endangered species,<sup>7</sup> significant populations of sensitive, rare and special status species,<sup>8</sup> and rare or unique plant communities.<sup>9</sup>
- Areas of Critical Environmental Concern, Wildlife Habitat Management Areas, proposed HCP and NCCP Conservation Reserves.<sup>10</sup>
- Lands purchased for conservation including those conveyed to the BLM.<sup>11</sup>
- Landscape-level biological linkage areas required for the continued functioning of biological and ecological processes.<sup>12</sup>
- Proposed Wilderness Areas, proposed National Monuments, and Citizens' Wilderness Inventory Areas.<sup>13</sup>
- Wetlands and riparian areas, including the upland habitat and groundwater resources required to protect the integrity of seeps, springs, streams or wetlands.<sup>14</sup>
- National Historic Register eligible sites and other known cultural resources.
- Locations directly adjacent to National or State Park units.<sup>15</sup>

## **EXPLANATIONS**

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<sup>1</sup> Some of these lands may be currently abandoned from those prior activities, allowing some natural vegetation to be sparsely re-established. However, because the desert is slow to heal, these lands do not support the high level of ecological functioning that undisturbed natural lands do.

<sup>2</sup> Based on currently available data.

<sup>3</sup> Urbanized areas include desert communities that welcome local industrial development but do not include communities that are dependent on tourism for their economic survival.

<sup>4</sup> The term "federally designated corridors" does not include contingent corridors.

<sup>5</sup> Lands where development is prohibited by statute or policy include but are not limited to:

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National Park Service units; designated Wilderness Areas; Wilderness Study Areas; BLM National Conservation Areas; National Recreation Areas; National Monuments; private preserves and reserves; Inventoried Roadless Areas on USFS lands; National Historic and National Scenic Trails; National Wild, Scenic and Recreational Rivers; HCP and NCCP lands precluded from development; conservation mitigation banks under conservation easements approved by the state Department of Fish and Game, U.S. Fish and Wildlife Service or Army Corps of Engineers a; California State Wetlands; California State Parks; Department of Fish and Game Wildlife Areas and Ecological Reserves; National Historic Register sites.

<sup>6</sup> Determining “significance” requires consideration of factors that include population size and characteristics, linkage, and feasibility of mitigation.

<sup>7</sup> Some listed species have no designated critical habitat or occupy habitat outside of designated critical habitat. Locations with significant occurrences of federal or state threatened and endangered species should be avoided even if these locations are outside of designated critical habitat or conservation areas in order to minimize take and provide connectivity between critical habitat units.

<sup>8</sup> Significant populations/occurrences of sensitive, rare and special status species including CNPS list 1B and list 2 plants, and federal or state agency species of concern.

<sup>9</sup> Rare plant communities/assemblages include those defined by the California Native Plant Society’s Rare Plant Communities Initiative and by federal, state and county agencies.

<sup>10</sup> ACECs include Desert Tortoise Desert Wildlife Management Areas (DWMAs). The CDCA Plan has designated specific Wildlife Habitat Management Areas (HMAs) to conserve habitat for species such as the Mohave ground squirrel and bighorn sheep. Some of these designated areas are subject to development caps which apply to renewable energy projects (as well as other activities).

<sup>11</sup> These lands include compensation lands purchased for mitigation by other parties and transferred to the BLM and compensation lands purchased directly by the BLM.

<sup>12</sup> Landscape-level linkages provide connectivity between species populations, wildlife movement corridors, ecological process corridors (e.g., sand movement corridors), and climate change adaptation corridors. They also provide connections between protected ecological reserves such as National Park units and Wilderness Areas. The long-term viability of existing populations within such reserves may be dependent upon habitat, populations or processes that extend outside of their boundaries. While it is possible to describe current wildlife movement corridors, the problem of forecasting the future locations of such corridors is confounded by the lack of certainty inherent in global climate change. Hence the need to maintain broad, landscape-level connections. To maintain ecological functions and natural history values inherent in parks, wilderness and other biological reserves, trans-boundary ecological processes must be identified and protected. Specific and cumulative impacts that may threaten vital corridors and trans-boundary processes should be avoided.

<sup>13</sup> Proposed Wilderness Areas: lands proposed by a member of Congress to be set aside to preserve wilderness values. The proposal must be: 1) introduced as legislation, or 2) announced by a member of Congress with publicly available maps. Proposed National Monuments: areas proposed by the President or a member of Congress to protect objects of historic or scientific interest. The proposal must be: 1) introduced as legislation or 2) announced by a member of Congress with publicly available maps. Citizens' Wilderness Inventory Areas: lands that have been inventoried by citizens groups, conservationists, and agencies and found to have defined “wilderness characteristics.” The proposal has been publicly announced.

<sup>14</sup> The extent of upland habitat that needs to be protected is sensitive to site-specific resources. For example: the NECO Amendment to the CDCA Plan protects streams within a 5-mile radius of Townsend big-eared bat maternity roosts; aquatic and riparian species may be highly sensitive to changes in groundwater levels.

<sup>15</sup> Adjacent: lying contiguous, adjoining or within 2 miles of park or state boundaries. (Note: lands more than 2 miles from a park boundary should be evaluated for importance from a landscape-level linkage perspective, as further defined in footnote 12).

# La Cuna de Aztlan Sacred Sites Protection Circle

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Moreno Valley, CA 92553

## **Comments by Alfredo Acosta Figueroa on the BLM Public meeting for the McCoy Solar Energy Project Draft Environment Impact Statement, of Thursday June 28, 2012 at the City of Blythe Multi-Purpose Room located at 235 N. Broadway**

My name is Alfredo Acosta Figueroa and I am a native of the Colorado River, born and raised in Blythe, California. I am also Elder/Historian and Chemehuevi Tribal Monitor as well as Coordinator/Founder of La Cuna de Aztlan Sacred Sites Protection Circle and I am hereby submitting these public comments of our opposition to the McCoy Solar Power Project.

These comments are a follow-up to the BLM public meeting for the McCoy Solar Energy Project DEIS. La Cuna de Aztlan Sacred Sites Protection Circle members Phil Smith and I gave public testimony concerning the McCoy Solar Project but to our knowledge, no one was recording our comments. For this reason, we are submitting this letter.

### **La Cuna de Aztlan Sacred Sites Protection Circle**

Our group La Cuna de Aztlan Sacred Sites Protection Circle is a Native American organization comprised of mostly Native America individuals dedicated to physically protecting sacred sites. The mission of the Protection Circle is to protect and preserve sacred indigenous sites that are located along the Colorado River.

On February 15, 2008, La Cuna de Aztlan Sacred Sites Protection Circle signed a Memorandum of Understanding (MOU) together with the Southern Low Desert Resources Conservation & Development Council with the Bureau of Land Management.

The MOU specifies the formation of partnership of cultural resources and protection of the world famous Blythe Giant Intaglios, as well as over 300 geoglyph (intaglios), thousands of petroglyphs, hundreds of pictographs, surrounding mountain images and several hundred sacred sites that are located along the Colorado River extending from Needles, California to Yuma, Arizona.

In December 2009, I was designated by the Director of the Chemehuevi Tribe's Cultural Center to serve as one of the Tribal Sacred Sites Monitors to represent the tribe and educate the general public on the importance of the protection of sacred sites and artifacts.

### **History of Aztlan in the Lower Colorado River Valleys**

For the past 58 years we have been studying Aztlan, "*The Aztec Place of Origin*" here in the Palo Verde/Parker Valleys. After examining geographical and linguistic evidence, our research concludes that *The Island of Aztlán* was located within the Colorado River Indian Tribes Reservation at the base of the Moon Mountains.

In the Parker Valley, there is a dried river channel adjacent to the Moon Mountains where the Aztec built dikes that separated the water from the river that flowed nearby. The water was channeled into a lake called "*Mexico*," around an island where they settled and built Aztlán.

Aztlán means, "*Place of the Herons*," due to the abundance of herons in the Palo Verde/Parker Valleys. It also means "*Land of Whiteness*," because of the large white limestone deposits that are seen on the slopes of the surrounding mountains. The name of the Aztec Nation is also derived from Aztlan, this is why we know that the "*Aztecs*" came from the Colorado River. In addition, Aztlán means, "*Land of the Rising Sun*," because the sun rises during the equinoxes in between two peaks that outline a letter "U" in the Moon Mountains (Are seen from the Blythe Giant Intaglios in the west). This "U" represents the vulva of the women's womb and it is being impregnated by the rising sun.

The island was located in what today is called the Moon Mountain Ranch located at the base of the Mountain range of the same name. The geoglyphs, pictographs, petroglyphs, intaglios, mountain images, rivers and swamps of the Lower Colorado River Basin Valleys bear witness to the indigenous nation creation story and their subsequent migrations. These artifacts, along with Mohave and Chemehuevi oral traditions, Nahuatl language, and codex as well as the names of mountain ranges and sites are essential in understanding the history of Aztlán. All this information and more is found in our book "*Ancient Footprints of the Colorado River*," (2002).

For thousands of years, the Chemehuevi people have traditionally occupied, traveled, traded, and utilized resources within a broad geographical area located primarily with the desert lands of modern-day Southern Nevada, California and Arizona. The traditions of visiting the sacred sites and engaging in ceremonies on the land express the history and tradition of our people.

Unfortunately, there are cultural and sacred sites that have been ignored by the Bureau of Land Management during the drafting of the environment-review documents for the McCoy Solar Power Project. As a large-scale solar commercial facility, the Project directly and indirectly threatens to destroy the sacred sites and traditions of our Native people.

Not only are the cultural sites directly impacted, but it is important to note that part of the significance of these sites is how they connect and relate to one another. These sites, both on and off the project sites, together tell the Creation Story of the Uto-Aztecan and Hokan Linguistic families.

Most of the Native American languages have been lost in large part due to attempts by the federal government to stop people from speaking the language and practicing their cultural and traditions. So much has been lost that the survival of our culture now depends on what remains on the ancestral ground, where the projects are proposed to be built. Cultural sites allow for the revival of language through stories and songs explaining the sacred images, land, and practices of traditional ceremonies including spiritual runs, the singing of Salt Songs and so on.

The location of artifacts in their environment serves as the strongest links to our past. Therefore, harm to the encompassing surrounding areas is tantamount to direct harm to the artifacts and sacred images because they are irreparable. The construction of Solar Projects will destroy hundreds of culturally significant sites, artifacts, and remains of the Chemehuevi and other Native American Tribes—none of which can be repaired, replaced, or re-created.

### **The Sacred Mule Mountains**

In 1975, the Riverside County Tribes and our group organized opposition against the proposed Sun Desert Nuclear Power Plant projected to be built at the base of the Sacred Mule Mountains called "*Calli*." *Calli* means "*Earth/House*" and its glyph is on the Aztec Sun Stone Calendar with the 20-day glyphs.

The origin of word "*California*" derives from "*Calli-Fornax*" meaning "*The Hot House*." In the Aztec cosmic tradition when the body of a person dies they first go to "*Calli*." There at *Calli*, "*The Great Spirit Cicimilt*," takes the spirit to one of the four final resting places all based on how the person died and how they lived during their life.

In the beginning of the 19th century, the Mule Mountains were referred to as the "*Upside-down Mountains*" and as the "*Molcajete Mountain*," because of their 3-peaks. In Nahuatl "*Molcajete*" represents "*Mortar Stone*."

Ron Van Fleet, a Mohave Elder descendent of the last Traditional Mohave Chief Peter Lambert, explains that "*Mastumho*," with his magic wand, stirred the content of a three-legged pot, or "*molcajete*." He threw the contents up behind him, thus creating the Milky Way, the entire universe, water and air. When he was finished, he placed the empty pot upside down on earth, with the three legs up, which created the three peaks of "*Hamock Avi*," the Mule Mountains (15-miles southwest of Blythe, California). The Mohave oral creation story Hamock-Avi is similar to the Aztec creation story.

The Mule Mountains also represent the "*Giant Calafia*," (The Giant Amazon Women Warrior) which image is seen east from Palo Verde Valley. Also, the name Calafia represents the center of government of Mexicali, Baja California, Mexico. "*Mexicalli*" is also derived from "*Calli*" meaning "*The House of the Mexica*."

On September 9, 2012 The Desert Sun Newspaper included an article by reporter K. Kaufmann which revealed that within the proposed Rio Mesa Project Site the remains of many mammoth ivory fossils and teeth of non-extinct prehistoric horses to hundreds of desert tortoise fossils including rare eggshell fragments carbon-dated at up to 13,700 years old were found within the area. This information alludes to our Indigenous Creation Story and the sacredness of the Mule Mountains.

### **The McCoy Solar Project**

The McCoy Solar Project is an extension to the north of the Blythe Solar project and part of the overall expansion of NextEra Inc. Natural Gas Power Plant. In 2000, they displace over 500 citrus workers by destroying over 1500 acres of citrus trees to obtain the Colorado River water rights.

During April-May 2011, the "*Sun Geoglyph*" which is part of the "*Kokopilli/Cicimitl*" group was partly destroyed and completely destroyed was the 5-foot wide by 50-foot long "*True North Geoglyph*" (Also within the group are over 10 large images on the small mesa). The Quechan North/South trail and other East/West trails were also destroyed when the company leveled a 150-foot wide by 5-miles long transmission line roadway.

On June 17, 2011, the Blythe Solar Company, CEO made complete fools of Secretary of Interior Ken Salazar, Governor of California Jerry Brown, Assemblyman Manuel Perez and the rest of the VIP's that were bused in from Palm Springs, California to participate in what was supposed

to be the official ground breaking event at the project site. However, the site had already been bulldozed a month prior to the ground breaking ceremony. During this event, no local citizens or Natives were invited to participate.

The McCoy Solar Project is proposed to be built in the sacred McCoy Valley and the McCoy Wash runs through it. The McCoy valley is formed by the McCoy Mountains on the west and northwest; the Little Maria and the Big Maria Mountains form the northeast part of the valley, and if seen northwest from Blythe, CA the McCoy Valley is clearly outlined.

At the extreme northwest of the McCoy Valley is the majestic Granite Peak that resembles a pyramid, and among the native oral cosmic tradition it forms the letter "X." The top triangle of the "X" represents the cosmos and the bottom triangle represents earth. Thus the phrase "*Where the Sky meets Earth.*" The "X" also depicts the image of an hourglass and is seen on the petroglyphs throughout the southwest and Mexico. In the Aztec Codex Granite Peak it is called "*Tamoanchan,*" "*Ta=Tata/Grandfather*", "*Moan=Meets,*" "*Chan/Chanti=House/Earth,*" all together this means "*Where grandfather meets his House.*"

The McCoy project will destroy the giant geoglyphs of El Tosco (100-feet long by 30-feet wide) and the other large geoglyphs, trails, stone monuments and mazes. El Tosco represents the descending of the Great Spirit to earth from Tamoanchan and the geoglyph is directly aligned with Granite Peak.

The McCoy Mountains in the Uto-Aztecan language are called "*Nonoalcatepetl*" meaning "*Where she is stretched out in her house in the Mountain Ridge.*" This image portrays a sleeping woman with her head towards the north and face looking up and she is called "*Quetzalpetlatl,*" and is the duality of "*Quetzalcoatl.*" This image is seen west of the McCoy project site on top of the McCoy Mountain ridge. Directly west of the Sleeping Woman is the McCoy Well that has over 1,000 petroglyphs. It is one of the most condensed areas of petroglyphs in the Colorado River Desert.

In the Big Maria Mountain there is a large white limestone Thunderbird Eagle image. The eagles' wings are over one half mile wide and are facing south towards west Blythe where the old Chemehuevi neighborhood of "*La Liebre*" (Jackrabbit) is located. According to our Chemehuevi elders, in the Uto-Aztecan language this neighborhood was called "*Acacitli*" which means "*Jackrabbit in the Swamp/Tullies,*" and it used to be an island before it was destroyed by thousands of Colorado River floods and modern day agriculture fields. The Thunderbird Eagle is called "*Cuautlehuaniitl,*" meaning "*Ascending Eagle.*" It is the image of the origin of the Mexican Flag and is where the Bird Songs originated. The Bird Songs are famous chants that reveal the migrations to and from the Colorado River and are depicted in the Siguenza Codex.

The Thunderbird Eagle image is directly six-miles west of the Blythe Giant Intaglios next to Marie Peak and there is a mountain pass and a series of trails that pass west through the base of the eagle from the Blythe Giant Intaglios. This is where most of the main trails lead from and go west and pass through the proposed McCoy Solar Project site. Also, this is one of the main areas where Native American traditionalists continue to perform their ceremonial rituals. And in between the base of the Thunderbird Eagle and the small black peak that is directly in front, is where a cradle shape small valley is formed. This valley represents "*La Cuna*" in Spanish meaning "*Cradle*" thus, the name of our organization La Cuna Aztlan Sacred Sites Protection Circle.

The McCoy Solar Power Project will destroy thousands of acres of pristine desert environment and will exterminate thousands of scared turtles, horny toad, as well as other animals that live within the area. The turtle and the horny toad are one of the most venerated sacred animals among all the Indigenous nations, especially along the Colorado River. The turtle is the "*Nahualli*" (animal representation) of Mother Earth and its image is seen in the center of the Aztec Sun Stone Calendar. The Horny Toad is the "*Nahualli*" of the "*Great Spirit Cicimilt*, and it is represented by the Arica Mountains that are located 30-miles north of the project site.

### **Setback of Solar Power Projects in the Desert**

In 2009, the 862 billion dollar economic stimulus fast-track package that was signed and promoted by President Barack Obama was a complete failure as we have seen with the 528 million loan package that was given to Solyndra, Inc., a now-bankrupt solar panel manufacturer company from Fremont, California. The Solyndra Inc. has declined to testify before the congressional hearings that are investigating the 585 million government loan, thus making a complete mockery of these solar projects.

The southern California blackout of September 10, 2011 proves that the government should build these solar power projects in urban areas. This is where the majority of the energy is needed because of the risk of another blackout. As we now experienced, one man's mistake paralyze 6 million people's lives and as we know the long distance transmission lines can easily be sabotaged. According to The Press Enterprise article of September 11, 2011, "*the nation's transmission lines remain all too vulnerable to cascading failure.*"

### **Summary of Conclusions by the California Energy Commission & Laws/Resolutions of Indigenous Rights**

The California Energy Commission: Resource Docket #09-AFC-8, recorded on June 22, 2010, the summary of conclusions testimony of Elizabeth A. Bagwell, Ph.D., and Beverly E. Bastian, reveals the following:

*“Staff finds that the GSEP construction impact, when combined with impact from past, present, and reasonably foreseeable projects, contribute in a small but significant way to the cumulatively considerable adverse impacts for cultural resources at both the local I-10 Corridor and regional levels. This analysis estimates that more than 800 sites within the I-10 Corridor, and 17,000 sites within the Southern California Desert Region, will potentially be destroyed. Mitigation can reduce the impact of this destruction, but not to a less-than-significant level.”*

For this reason, we are opposing the construction of solar panel projects because of their gross violation to the following Indigenous, State, Federal and United Nation laws that support our demands and why these projects should not be constructed within sacred areas:

- **Inter-Tribal Council of Arizona: Resolution 0212, opposing the Department of Interior Fast-Track Polices of Renewable Energy Projects on Ancestral Homelands, June 29, 2012**
- **National Congress of American Indians: Resolution #LNK-12-036, opposing the Department of Interior Fast-Track Polices of Renewable Energy Projects on Ancestral Homelands, June 17, 2012.**
- **Colorado River Indian Tribes Resolution and Letter to President Barack Obama: opposing the construction of Solar Power Projects within 50-miles from the CRIT Reservation boundary of February 27, 2012.**
- **United Nations Declaration on the Right of Indigenous People Resolution of 2007: was adapted by the General Assembly during the 107<sup>th</sup> plenary meeting and was signed by President Barack Obama on December 15, 2010.**
- **Native American Sacred Places, March 6, 2003(S.B. 18)**
- **Native American Sacred Lands Act, June 11, 2003 (H.R. 2419)**
- **The Sacred Land Protection Act, July 18, 2002 (H.R. 5155)**
- **The Native American Sacred Sites Protection Act, February 22, 2002 (S.B. 1828)**
- **Accommodations of Sacred Sites and Federal Land, Signed by President Bill Clinton on May 24, 1996 (Executive Order 13007)**

- **Native American Graves Protection & Repatriation Act of 1990**
- **Archeological Resources Protection Act of 1979**
- **American Indian Religious Freedom Act, August 11, 1978**
- **The Civil Right Act of 1968**
- **Antiquities Act of 1906**

We however, do not oppose to solar panels, we feel that they should be placed in areas that have already been disturbed as well as placing them on roof-tops and in urban areas where energy is mostly needed (warehouses, supermarkets, apartment complexes, abandoned air bases, and along the current electrical transmissions lines). In a recent study, it shows that the solar panels in the above mentioned areas are meeting the requirement by the state to create renewable energy.

Please feel free to contact us regarding any questions or for an onsite tour of the mentioned sites.

Enclosed are aerial photographs of The Sun Complex Geoglyph and the True North Geoglyph which were destroyed by the 150-foot grid roadway of the Blythe Solar Project as well as pictures of Granite Peak & El Tosco Geoglyph, Quetzalpetlatl.

Sincerely,



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**Kokopilli Geoglyph**

**Before 2010**

**True North Geoglyph**



**Cicimitl Group**

**Sun Geoglyph**

**After April 2011**



**150ft wide x 5-miles long road**

**Destroyed Sun Geoglyph**

**These are aerial photographs of the geoglyph images of Kokopilli (Kokopelli) and Cicimitl which shows the destruction of the Sun Complex & True North Geoglyphs.**



**Quetzalpetlatl's mountain image in the center of the McCoy Mountains**

In this picture you can see Quetzalpetlatl laying north to south in what is called Nonoalcatepetl on the east side of the McCoy Mountain where she is doing penance...“After Quetzalcoatl gets drunk he orders his attendants to bring his elder sister Quetzalpetlatl to share in his revel and she goes and joins him.”  
(Anales de Cuauhtitlan)



**Quetzalpetlatl's mountain image as seen further south**

“She came to were Quetzalcoatl was and sat next to him and accepted 4 cups of pulque and finally her 5<sup>th</sup>, her libation. Both were throughly drunk and when dawn came and they awakened they were fully aware of what they had done during the night and were completed distraughted with grief.” In this image the head of Quetzalcoatl (Mc Coy Peak) forms the feet of Quetzalpetlatl.  
(Anales de Cuauhtitlan)

Granite Peak "*Tamocanchan*" (*Where the Cosmos & Earth meet*)  
located northwest from the McCoy Solar Project site



Photo of El Toseco Geoglyph (Descending from Granite Peak) & Aerial photo of El Toseco





# THE CRADLE OF AZTLAN

BY: LA CUNA DE AZTLAN SACRED SITES PROTECTION CIRCLE

