

Director's Protest Resolution Report

**Palen Solar Project
Supplemental
Environmental Impact
Statement / Environmental
Impact Report / and
Proposed California Desert
Conservation Area Plan
Amendment
(EIS/EIR/CDCA)**

October 29, 2018



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Reader's Guide

How do I read the Report?

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

Report Snapshot

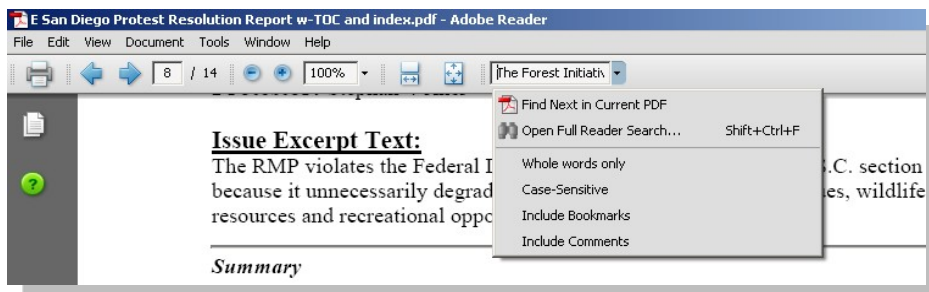
The diagram shows a report layout with several sections and callouts:

- Topic heading:** *Issue Topics and Responses*
- Submission number:** NEPA
- Issue Number:** PP-CA-PalenSolar-18-02
- Organization:** The Forest Initiative
- Protesting organization:** (Callout pointing to the organization name)
- Protester:** John Smith
- Protester's name:** (Callout pointing to the protester's name)
- Issue Excerpt Text:** Rather than analyze these potential impacts, as required by NEPA, the BLM postpones analysis of renewable energy development projects to a future case-by-case analysis. (Callout: Direct quote taken from the submission)
- Summary:** The BLM inadequately analyzes NEPA for renewable energy projects in the PRMP/FEIS. (Callout: General statement summarizing the issue excerpts (optional).)
- Response:** BLM's response to the summary statement or issue excerpt if there is no summary. (Callout: BLM's response to the summary statement or issue excerpt if there is no summary.)

Specific renewable energy projects are implementation-level decisions rather than RMP-level decisions. Upon receipt of an application for a renewable energy project, the BLM would require a site-specific NEPA analysis of the proposal before actions could be approved (FEIS Section 2.5.2, p. 2-137). Project specific impacts would be analyzed at that time (including impacts to surrounding properties), along with the identification of possible alternatives and mitigation measures.

How do I find my Protest Issues and Responses?

1. Find your submission number on the protesting party index which is organized in the order protest letters were received by the BLM.
2. In Adobe Reader search the report for your name, organization or submission number (do not include the protest issue number). Key word or topic searches may also be useful.



List of Most Commonly Used Acronyms

APE	Area of Potential Effects	BA	Biological Assessment
BLM	Bureau of Land Management	IM	Instruction Memorandum
BO	Biological Opinion	MOU	Memorandum of Understanding
CEQ	Council on Environmental Quality	CRIT	Colorado River Indian Tribes
CFR	Code of Federal Regulations	NHPA	National Environmental Policy Act of 1969
CWA	Clean Water Act	NHT	National Historic Preservation Act
DEIS	Draft Environmental Impact Statement	NOA	National Historic Trail
DM	Departmental Manual (Department of the Interior)	NOI	Notice of Availability
DOI	Department of the Interior	NRHP	Notice of Intent
EA	Environmental Assessment	PRMPA	National Register of Historic Places
EIS	Environmental Impact Statement	RMZ	Proposed Resource Management Plan Amendment
EO	Executive Order	ROD	Recreation Management Zone
EPA	Environmental Protection Agency	ROW	Record of Decision
ESA	Endangered Species Act	SHPO	Right-of-Way
FEIS	Final Environmental Impact Statement	THPO	State Historic Preservation Office Tribal Historic Preservation Officer Trail Management Corridor
FLPMA	Federal Land Policy and Management Act of 1976	TMC	
FO	Field Office (BLM)		
HPMP	Historic Properties Management Plan	KOP	Key Observation Points

Protesting Party Index

Protester	Organization	Submission Number	Determination
Lisa T. Belenky	Center for Biological Diversity	PP-CA-PalenSolar-18-01	Denied / Issues and Comments
Sara A. Clark	Shute, Mihaly, and Weinberger, LLP	PP-CA- PalenSolar-18-02	Denied / Issues and Comments
Kim Delfino	Defenders of Wildlife	PP-CA- PalenSolar-18-03	Denied / Issues and Comments
John A. Belcher	Save Our Mojave	PP-CA- PalenSolar-18-04	Denied / Issues and Comments
Kevin Emmerich, Laura Cunningham	Basin and Range Watch	PP-CA- PalenSolar-18-05	Denied / Issues and Comments

Issue Topics and Responses

Impacts Analysis - ACEC

Issue Number: PP-CA-PalenSolar-18-02

Organization: Shute, Mihaly, & Weinberger, LLC

Protester: Sara A. Clark

Issue Excerpt Text:

However, in CRIT's comment letter, the Tribes pointed out that this ACEC is "designated to protect 'the largest and most well preserved assemblage of late prehistoric and archaic era petroglyphs,' representing human habitation over several thousand years. Notably, it is a 'critically important cultural use site for a variety of tribes that claim ancestral ties with the Chuckwalla Valley.' 'It is also a site of high religious importance to many tribes' and 'associated with several spiritual trails and songs ..., rooted deep(ly) in their oral histories.' Crucially, areas of petroglyphs and cleared circles are located in 'strategic' areas because of their 'clear view of the [Chuckwalla Valley] landscape from an elevated position, including the proposed Project site.'" FSEIS at I-275 (citing ACEC Special Unit Management Plans). However, BLM simply looked at the geologic formation rather than the petroglyph sites or cleared circles at high vantage points. Had BLM properly analyzed the resources protected by this ACEC, it would likely have found an adverse visual impact to the site as a result of the Project.

Finally, BLM makes several incorrect comments about the Chuckwalla ACEC. First, it claims "no ACEC would be directly affected by the proposed Project. Construction and other activities would occur outside of all ACEC boundaries." FSEIS at I-419. However, "[a] portion of proposed gen-tie line would be located within the Chuckwalla ACEC, impacting approximately 3.2 acres (120-foot-wide by 0.22-mile-long corridor)." FSEIS at 4.15-3. This direct impact goes unanalyzed in the FSEIS. And BLM's claim that the Chuckwalla ACEC is outside the APE is flatly wrong. FSEIS at I-419. As noted, the gen-tie line runs through and directly impacts this ACEC.

Summary:

The BLM failed to analyze impacts to the visual resources to the Chuckwalla ACEC, violating NEPA and the National Historic Preservation Act. Additionally, the FSEIS contains inconsistencies regarding if the project is in or outside of the Chuckwalla ACEC. Direct impacts to the Chuckwalla ACEC were not considered in the FSEIS.

Response:

The CEQ regulations implementing NEPA describe how that data and analyses in an EIS should be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 500.1(b)). The BLM is required to take a "hard look" at potential environmental impacts of adopting the Palen Solar Project Land Use Plan Amendment. Under the National Historic Preservation Act (NHPA), the BLM must determine whether cultural properties listed or eligible for listing in the National Register will be affected by an undertaking. An undertaking has an effect on a historic property when the undertaking may alter characteristics of

the property that may qualify the property for inclusion in the National Register (36 CFR 800.9(a)). The introduction of visual elements that are out of character with the property or alter its setting is a type of adverse effect (36 CFR 800.9(b) (3)).

The relevance criteria for the Chuckwalla ACEC include cultural, scenic, wildlife, and vegetative values. (Final SEIS/EIR p. 3.15-8). The BLM notes that this ACEC could be affected by the Palen Solar Project on pages 4.15-2 - 4.15-3 of the Final SEIS/EIR. The Final SEIS/EIR establishes that the viewshed potentially impacted by the Palen project is expansive and includes a number of sensitive features. The BLM indeed analyzed the impacts, including the visual impacts, of the proposed action and alternatives on specific cultural resources.

This analysis notes that the gen-tie would connect to the Red Bluff Substation near the ACEC, “adding to the large existing nearby visible industrial facility... as well as degradation of this [sic] historic resources in this unique cultural setting.” Visual impacts to the viewshed, including in ACECs, are analyzed in section 4.18. This ACEC was established based on its suitability for wilderness designation and to protect cultural and scientific resource values, not to protect visual resources. Regarding scenic resources, the original Palen Solar Power Project EIS (2011), established an interim Visual Resource Management Class III for the project site and transmission line corridor (PSPP Final EIS at 3.19-6). This VRM was confirmed by the DRECP, which designated most of the ACEC to be managed as VRM Class II, but designated portions near Interstate 10 as VRM Class III (DRECP LUPA Appendix B at 150). The gen-tie would be located within the Class III portion of the ACEC near the I-10 corridor adjacent to multiple existing transmission lines.” Thus, the BLM complied with NEPA’s requirement to analyze the environmental impacts to visual resources in the Palen Solar Project Final SEIS/EIR.

. A portion of the proposed gen-tie line would be located within the Chuckwalla ACEC, impacting approximately 3.2 acres (120-foot-wide by 0.22-mile-long corridor). The ACEC, as defined in the CDCA as amended by the DRECP, is 508,920 acres (DRECP LUPA Appendix B page 146). Rights-of-way may be considered, up to a 0.5% disturbance cap. Construction and other activities would occur outside of all ACEC boundaries.

Additionally, direct effects to the Chuckwalla ACEC were specifically considered in the FSEIS, and include noise, fugitive dust, and lighting during construction and decommissioning which could reduce the experiences of recreational users in the ACEC (Palen Solar FSEIS/EIR pg. 4.15-2). The BLM was indeed technically incorrect when, in its responses to comments, it stated that “[c]onstruction and all other activities would occur outside of all ACEC boundaries” (Response to Comments p. I-419). This should be included in the Record of Decision (ROD) as errata. However, the language in FSEIS/EIR Section 4.15.2, Special Designations: Direct and Indirect Effects on pg. 4.15-3 is accurate.

Range of Alternatives

Issue Number: PP-CA-PalenSolar-18-05

Organization: Basin and Range Watch

Protester: Kevin Emmerich and Laura Cunningham

Issue Excerpt Text:

BLM did not clearly identify a true environmentally preferable alternative. Section 1505.2(b) requires that, in cases where an EIS has been prepared, the Record of Decision (ROD) must identify all alternatives that were considered, “specifying the alternative or alternatives which were considered to be environmentally preferable.” The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA’s Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources. CEQ further clarifies that, “the Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. The public and other agencies reviewing a Draft EIS can assist the lead agency to develop and determine environmentally preferable alternatives by providing their views in comments on the Draft EIS.” (ibid.) The public (including Basin and Range Watch) are also encouraged to address this question, which we did with our Distributed Generation alternative. This is by far the most environmentally preferable alternative, yet was dismissed by BLM without further analysis. The agency must identify the environmentally preferable alternative in the ROD.

Summary:

The BLM violated CEQ regulations because it did not identify an environmentally preferred alternative. Additionally, an alternative that would have less impacts to the human environment was dismissed from detailed analysis.

Response:

The CEQ regulations require the BLM to identify the environmentally preferred alternative in the Record of Decision (ROD) (40 CFR 1505.2(b)) which will follow this protest period. The BLM has not violated these regulations. Additionally, the BLM has, according to the California Environmental Quality Act (CEQA), identified the Avoidance Alternative (Alternative 2) as the Environmentally Superior Alternative and is therefore in conformance with applicable laws, regulation, and policy. See FEIS, Section ES.9 for the discussion of the Environmentally Superior Alternative.

The BLM followed policy when it dismissed the proposed Distributed Solar Technology Alternative (Palen SFEIS/EIR, p. 2-49) as it did not respond to the BLM purpose and need for the project.

Purpose and Need

Issue Number: PP-CA-PalenSolar-18-03

Organization: Defenders of Wildlife

Protester: Kim Delfino

Issue Excerpt Text:

Inconsistency with NEPA: The purpose and need statement, an essential component of the NEPA analysis, is overly narrow because BLM states that it's need is to respond to the applicant's proposal for a 500 MW project. BLM, as it has on all other solar energy projects proposed on public lands, is focused on meeting the objectives of the applicant and on amending the CDCA Plan for those objectives only. This is evident given BLM's proposed decision to approve a 500 MW project, exactly the size sought by the applicant. This bias has resulted in BLM not seriously considering adoption of the less-impacting Avoidance Alternative, which would allow for a project generating between 200-230 MW.

Issue Excerpt Text:

The actual Purpose and Need Statement does not include a "need" to comply with the other more conservation oriented Orders such as MTBA or ARPA, Below the Statement, however, are specific orders that are complementary to the development of the project. So that does represent a bias. The NEPA Handbook states: "For many types of actions, the 'need' for the action can be described as the underlying problem or opportunity to which the BLM is responding with the action. The 'purpose' can be described as a goal or objective that we are trying to reach. https://www.ntc.blm.gov/krc/uploads/366/NEPA_Handbook_H-1790_508.pdf." This indicates that the BLM is putting a bias towards project approval by only listing the development friendly orders under the Purpose and Need Statement.

Issue Number: PP-CA-PalenSolar-18-05

Organization: Basin and Range Watch

Protester: Kevin Emmerich and Laura Cunningham

Issue Excerpt Text:

While it says that BLM will consider "changing the route or the location of the proposed facilities," the BLM unreasonably narrowed the objective of the proposed action by focusing on this particular application, rather than the public goals of providing renewable energy. This narrowing limited the range of reasonable alternatives considered.

Summary:

The Purpose and Need statement is overly narrow and biased toward development. Therefore, the BLM did not consider alternatives that would meet the need to provide electrical utility while avoiding impacts to the human environment and is therefore inconsistent with the NEPA.

Response:

The BLM will comply with all applicable laws and policies. As explained in the Palen FSEIS/EIR (see Section 5.5 Public Comment Process), BLM has discretion in defining the purpose and need of the proposed action (40 CFR 1502.13). And in accordance with regulation and BLM policy, the

purpose and need reflects the agency's purpose and need while recognizing the proposed action necessitating the NEPA review.

The BLM's purpose and need at FSEIS page 1-4 meets its obligation to frame the purpose and need in terms of agency obligations to respond to a ROW amendment application appropriately filed under applicable law. The purpose and need provided the appropriate scope to allow the BLM to analyze a range of reasonable alternatives.

Cumulative Effects/ Connected Actions

Issue Number: PP-CA-PalenSolar-18-05

Organization: Basin and Range Watch

Protester: Kevin Emmerich and Laura Cunningham

Issue Excerpt Text:

The project is close enough to the Palen/McCoy Mountains to contain adequate ridgelines to support habitat for medium and large migrating birds. A red-tailed hawk can cover about 50 miles in a day and that is just one example. Juveniles will disperse across ranges. The statement by BLM undermines the potential for the habitat to support large birds. Equally, as BLM should be aware, the solar projects mimic the water bodies and this is a large problem. As BLM is aware, both the Desert Sunlight and Genesis Project have produced a very high quantity of bird mortality including one Federally Endangered Yuma clapper rail. Furthermore, BLM conducted their own study on bird mortality called Background Avian Mortality across the California Desert Region: A Pilot Study. It concluded that the desert background mortality rate determined from line distance sampling in 2015 was 0.024 birds/acre/year. This could be broken down further to 0.004 large birds/acre/year, 0.0026 medium-sized birds/acre/year, and 0.0214 small birds/acre/year. But on three unnamed solar projects, Fesnock explained that the avian mortality rate increased to 1.7 birds/acre/year, 0.4 birds/acre/year, and 0.6 birds/acre/year. The SEIS fails to fully recognize the cumulative impact a 3,200 acre PV facility would have when built so close to other solar facilities that have had large numbers of avian mortality.

Issue Number: PP-CA-PalenSolar-18-05

Organization: Save Our Mojave: Law Offices of John Belcher

Protester: John A. Belcher

Issue Excerpt Text:

Thus, while the EIR suggests that the Desert Harvest Project is an independent project, it is owned by EDF RE and will likely be operated as a single project with the Palen Project. The impact of the two projects, including dust, traffic and water usage, should thus be analyzed together as a single project. The EIR, however, analyzes the cumulative impact of the two projects as if they are independent and potentially unrelated.

In particular, EDF's 150 MW Desert Harvest Project (located about 8 miles northwest of the PSP) may be under construction at the same time as the Palen Solar Project, due to the potential for them to be linked through a single power purchase agreement.

Under Cumulative Impact Analysis, the EIR states, In particular, EDF's 150 MW Desert Harvest Project (located about 8 miles northwest of the PSP) may be under construction at the same time as the Palen Solar Project, due to the potential for them to be linked through a single power purchase agreement. For the reasons discussed below, the EIR must be rewritten to reflect the full environmental impacts of EDF RE's entire project. The EIR's cumulative impacts analysis must be redone to account for the EIR's failure to acknowledge common ownership of the two projects.

Summary:

The Palen FSEIS/EIR does not adequately address the cumulative impacts to migrating birds caused by building an additional solar facility in a region that contains two other existing solar facilities, both of which have experienced large numbers of avian mortality. The BLM should analyze the Palen and Desert Harvest solar projects as a single project because of their proximity to each other, their likely common construction schedule, potential future linkage, and common ownership; rather than as unrelated projects with cumulative impacts.

Response:

The CEQ regulations define cumulative effects as "...the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" (40 CFR 1508.7). The Palen FSEIS/EIR discusses cumulative effects analysis methodology in Section 4.1.5.2. The report addresses the cumulative impacts to migrating birds from past, existing and future foreseeable projects, including the Desert Harvest Solar Farm; concluding that in combination with past, present, and foreseeable future projects, the Project could have a cumulatively substantial impact on special status species and migratory bird populations. Section 4.1.5.2 of the FSEIS, Methodology for Cumulative Impact Analysis, identifies thirteen existing and seventeen future foreseeable projects in the project area (Tables 4.1-1 and 4.1-2 of the FSEIS) and explains that "each resource analysis considers these projects and lists the projects included in their cumulative geographic scope in their respective sections (page. 4.1-5)." Appendix A, Figure 4.1-1 presents the location and extent of each cumulative project listed on Tables 4.1-1 and 4.1-2. Page 4-21.30 of the FSEIS describes how the "Proposed Action and Alternatives 1 and 2 would contribute to cumulative direct and indirect impacts to migratory birds including: habitat loss and fragmentation; construction impacts to nesting birds; an increase in noise and lighting, avian predators, and collisions and electrocutions." and "In combination with past, present, and foreseeable future projects, the Project could have a cumulatively substantial impact on special status species and migratory bird populations."

While BLM has ongoing avian monitoring at the Genesis and Desert Sunlight Solar projects, the data has not been fully analyzed to answer the extent of mortality.

Neither Palen nor Desert Harvest triggered the other action – each was proposed independently by EDF multiple years apart. EDF does not indicate in its purpose and need that Palen is contingent on Desert Harvest and as Desert Harvest was proposed many years prior to Palen, clearly, there was no anticipation of developing both projects simultaneously. Additionally, there are many solar projects

in California that are 150 MW (the size of Desert Harvest) so there is no reason to believe that Desert Harvest would not proceed unless Palen were built. EDF has stated that the reason it did not build Desert Harvest was because it did not have a Power Purchase Agreement. As it now does have a Power Purchase Agreement, EDF would build Desert Harvest regardless of whether Palen were approved. These two projects are about 8 miles apart and are not interdependent parts of a larger action – they are each independent actions. The Palen Solar FSEIS/EIR discloses that with implementation of mitigation measures as described in Section 4.21.2, most of these impacts to wildlife resources would be mitigated to less-than-significant levels under CEQA by minimizing habitat impacts to the extent practicable, mitigating direct impacts to special-status wildlife, avoiding impacts to nesting and migratory birds, controlling potential subsidies for ravens or other predators, providing for long-term conservation and management of native habitat on compensation lands, and other actions as described above. Adverse residual impacts (Section 4.21.6) would remain but most would be less than significant under the CEQA criteria (Refer FSEIS/EIR pp 4.21-56). Additionally, all the solar project development and nearby construction, even if unrelated to the Proposed Action, would need to comply with regulations regarding wildlife resources, migratory birds and other California regulations. The FSEIS Monitoring and Mitigation Report (Appendix J) describes measures to be taken to minimize or offset project’s impacts.

Unnecessary or Undue Degradation (FLPMA)

Issue Number: PP-CA-PalenSolar-18-03

Organization: Defenders of Wildlife

Protester: Kim Delfino

Issue Excerpt Text:

BLM’s proposed decision to approve a 500 MW project under the Reduced Footprint Alternative would substantially add to the cumulative loss of occupied sand-based habitat for the BLM Sensitive Mojave fringe-toed lizard. This would result in unnecessary and undue degradation of public lands because BLM has arbitrarily selected a project that meets the applicant’s “need” for a 500MW project over the Avoidance Alternative that includes numerous measures (CMAs) designed to substantially minimize adverse impact to sensitive resources within the project area, such as the Mojave fringe-toed lizard. . . . The BLM requested a revised project footprint that would avoid development within the large microphyl woodland and its associated desert wash that occurs within the project area. In its request, BLM did not request a modification of the project footprint that would lessen adverse impacts to occupied habitat for the Mojave fringe-toed lizard, a BLM Sensitive Species.

Issue Excerpt Text:

Although BLM concludes that the Reduced Footprint would result in less habitat loss, it is a mere eight (8) percent smaller than the applicant’s proposed project (3100 acres vs. 3381 acres), an insignificant reduction in size, and is designed to only avoid loss of Microphyl woodland in the large wash located in the central portion of the project site. Based on the above, BLM’s proposed decision to adopt the Reduced Footprint Alternative would result in both unnecessary and undue degradation of public lands and their sensitive resources, contrary to the FLPMA.

Summary:

The BLM is causing unnecessary or undue degradation, violating FLPMA, because it did not design an alternative specifically to protect the Mojave fringe-toed lizard, nor did it choose the alternative that provides the most protection for sensitive resources, including the Mojave fringe-toed lizard.

Response:

Section 302(b) of FLPMA requires that “in managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” Of note, neither FLPMA nor its implementing regulations define the term “unnecessary or undue degradation” as it relates to the type of project at issue. In this circumstance, BLM seeks to render decisions that avoid resultant effects beyond those considered usual and reasonably anticipated from an appropriately mitigated development.

The Palen FSEIS/EIR provides for the balanced management of the public lands in the planning area. The Proposed Land Use Plan Amendment itself does not authorize any use of the public lands, much less any which would result in unnecessary or undue degradation. A planning decision like this one cannot cause UUD. Moreover, in developing the alternatives for the Palen SEIS/EIR as a whole, the BLM fully complied with its planning regulations (43 CFR 1610), the requirements of NEPA, and other statutes, regulations, and Executive Orders related to environmental quality. The Palen FSEIS/EIR identifies appropriate allowable uses, management actions, and other mitigation measures that prevent the unnecessary or undue degradation of public lands.

The Avoidance Alternative avoids all the suitable MFTL habitat (shown on Figure 3.21-5 in Appendix A of the Final EIS). If one compares the suitable MFTL habitat and the Avoidance Alternative boundary, they are the same. This is because the shapefile of the suitable MFTL habitat from the Biological Resources Technical Report was used to define the area of development for the Avoidance Alternative (shown on Figure 2-9 in Appendix A). While there is a minor area (68 acres) of the Avoidance Alternative that corresponds with a portion of the sand transport corridor (Zone III), it is outside the MFTL estimated suitable habitat so would not result in impacts to the species.

The BLM discouraged the applicant from siting its project in locations that would present significant environmental concerns (Palen FSEIS/EIR p. 2-46). Additionally, the BLM did fully analyze an alternative, the Avoidance Alternative, which would substantially reduce impacts to the Mojave fringe-toed lizard (Palen FSEIS/EIR pp. 4.21-22). The BLM’s Special Status Species Management Manual (MS-6840) directs that, during planning, the BLM “shall address Bureau sensitive species and their habitats in land use plans and associated NEPA documents. When appropriate, land use plans shall be sufficiently detailed to identify and resolve significant land use conflicts with Bureau sensitive species without deferring conflict resolution to implementation-level planning.” BLM has complied fully with the Special Status Species regulations (Refer to the Response in this report under Special Status Species). The BLM has followed this policy with respect to the Mojave fringe-toed lizard by considering impacts to the lizard and its habitat throughout the SEIS/EIR and incorporating mitigation measures into each action alternative.

Congress recognized that through the BLM's multiple-use mandate, there would be conflicting uses and impacts on the public land. Because the Palen Solar Project Proposed Land Use Plan Amendment would not authorize any uses of the public lands, and the alternatives evaluated in the Final SEIS/EIR comply with all applicable statutes, regulations, and policy, including the BLM's Special Status Species policy (BLM Manual 6840), the amendment would not cause unnecessary or undue degradation under Section 302(b) of FLPMA.

Mitigation

Issue Number: PP-CA-PalenSolar-18-01

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

For example, it fails to provide all of the detailed mitigation plans to the public for review regarding, among other things, desert tortoise, the Mojave fringe-toed lizard, rare plants.

Issue Excerpt Text:

Details of all Mitigation Measures and needed plans are not yet developed and not included in the documents provided to the public. For example, the SFEIS/R requires a Desert Tortoise Relocation/Translocation Plan (SFEIS/R, Appx J at 117-118 ("MM WIL-2. Desert Tortoise Relocation/Translocation Plan"); and SFEIS/R, Appx. J at 80-82 (MM WIL-10. Sand Dune Community/Mojave Fringe-toed Lizard Mitigation). For Mojave fringe-toed lizard, no detailed plan is provided for avoidance during construction including daily frequent clearance of Mojave fringe-toed lizards out of harm's way during construction which is critically important to maintain these local populations. The only information provided ("APM 9. If suitable habitat characteristics are identified during the habitat assessment, clearance surveys for Mojave fringe-toed lizard will be performed in suitable habitat areas", Id. at J-109) is far too general to ensure that this species will be adequately protected.

Issue Excerpt Text:

However, the documents are not provided in either draft or final form, frustrating public review and comment. Public review of these plans is important to ensure these plans are adequate to provide the needed mitigation.

Issue Number: PP-CA-PalenSolar-18-02

Organization: Shute, Mihaly, & Weinberger, LLC

Protester: Sara A. Clark

Issue Excerpt Text:

Long-term curation of cultural resources discovered on the Project site is not mitigation and in fact causes significant additional harm to CRIT's members. Removing the footprint of tribal members ancestors from the landscape is a significant cultural harm. FSEIS at 1-278. CRIT requested that BLM reconsider its position on reburial and revise CUL-3, CUL-6, CUL-7, CUL-9, and CUL-10 accordingly. And at the very least, the Agencies should permit reburial of any isolates or other non-eligible prehistoric archaeological resources. FSEIS at I-278. However, BLM responds by citing inapplicable laws and regulations. FSEIS at 1-421. The Archaeological Resources Protection Act (ARPA) does not require permits for excavation or removal activities that occur as part of an otherwise lawful activity-which the Project's construction and operation would be. 43 C.F.R. 7.3(a) 6). In this case, the land manager is referred specifically to the Native American Graves Protection and Repatriation Act (NAGPRA), which protects only certain artifacts and allows reburial. 43 CFR 7.3(a) 6); FSEIS at 1-421. CRIT strongly requests that BLM reconsider its interpretation of these laws and allow tribal reburial of artifacts as an alternative to long-term curation, at least for previously unknown resources with no formal treatment plan.

Summary:

The Palen FSEIS/EIR fails to provide detailed mitigation plans for Mojave fringe-toed lizards, Desert Tortoise relocation/translocation, and rare plants to the public for review. Additionally, the mitigation plan for archaeological resources will cause harm to the culture of Indian tribes.

Response:

The CEQ regulations implementing NEPA require the BLM to include a discussion of measures that may mitigate adverse environmental impacts (40 CFR 1502.14(f), 40 CFR 1502.16(h)). Potential forms of mitigation include: (1) avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20).

Mitigation measures WIL-2, WIL-10, and VEG-10 of the Palen FSEIS/EIR describe the mitigation measures for Desert Tortoise relocation/translocation, Mojave fringe-toed lizards, and special status plants, respectively. In some cases, indeed, these mitigation measures would require the applicant to submit and the BLM (and other agencies as appropriate) to approve mitigation and monitoring plans prior to grading and/or construction (see the above-referenced mitigation measures as

described in Appendix J). The FEIS Appendix J is exclusively devoted to Mitigation and Monitoring Report Program. The Applicant Proposed Measures (APMs) were derived from the Conservation Management Actions included in the DRECP. The APMs are an integral part of the detailed mitigation plan. WIL-1 (Appendix J p. J-115), regarding Desert Tortoise protection, describes the situations in which located Desert Tortoises would be moved. Reviewing the translocation plan is not necessary for making a reasoned choice between alternatives or for evaluating the impacts of the alternatives on Desert Tortoises. The translocation plan, which WIL-2 specifies will “minimize stress, disturbance, and injuries to relocated/translocated tortoises,” is common to all action alternatives (Appendix J p. J-117). WIL-10 (Appendix J p. J-80) describes detailed requirements for mitigation of direct impacts to Mojave fringe-toed lizard and its habitat (Please Refer also to the Response under Special Status Species). As the plan associated with this mitigation will depend on the approved footprint of the project, the applicant cannot complete it now. This mitigation measure is also common to all alternatives. VEG-10 (Appendix J p. J-62) provides detailed instructions for mitigating impacts to special-status plants, including requiring the applicant to submit a plan for mitigating impacts to certain special status plants according to the BLM’s criteria. Again, this applicant-prepared plan, which must include “a description of the avoidance and minimization measures that would achieve complete avoidance of occurrences on the project linears and construction laydown areas,” among other criteria, is not necessary for making a reasoned choice between alternatives or to evaluating the impacts of the alternatives on special status plants. VEG-10 is common to all alternatives.

The curation of cultural resources is not for mitigation purpose. As stated in the Appendix I.4 Responses to Comments (page I-421), the disposition of artifacts located on BLM-managed land is governed generally by two statutes. The Native American Graves Protection and Repatriation Act (NAGPRA) governs the discovery and repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony. The DOI/BLM regulations at 43 CFR 10 outline the specific process the BLM must follow when such items are discovered, and recent policy allows for the possibility of reburial of NAGPRA materials on public lands contingent on approvals at the field and state offices and subject to environmental review. For those cultural resources that are not subject to NAGPRA, the BLM must comply with the Archaeological Resources Protection Act (ARPA), which requires curation to specific standards for non-NAGPRA archaeological resources excavated or removed under the authority of an ARPA/cultural resource use permit. Artifacts (even those considered “isolates”) may be archaeological resources under ARPA, NAGPRA materials, or historic properties under NHPA. If such resources fit any of those definitions, they are subject to the processes and procedures set forth in the relevant laws and regulations. ARPA requires that when archaeological resources are excavated or removed from public lands, they are subject to the ARPA regulations, including those requiring curation. The BLM must operate in accordance with the required regulations.

Special Status Species

Issue Number: PP-CA-PalenSolar-18-01

Organization: Center for Biological Diversity

Protester: Lisa T. Belenky

Issue Excerpt Text:

As detailed above in this protest and in the comments submitted to the BLM (and the County) on the Draft SEIS by the Center, the proposed plan amendment for the Reduced Footprint Alternative is inconsistent with the CDCA Plan, FLPMA and other policies, laws, and regulations to the extent it fails to provide adequate protection for the Mojave fringe-toed lizard and its habitat and Desert Tortoise connectivity, and the NEPA review for the plan amendment is inadequate. Therefore, the Center protests the adoption of the proposed CDCA Plan amendment for the proposed Reduced Footprint Alternative for the Palen Solar project in Riverside County, California

Summary:

The proposed plan amendment for the Palen Solar Project Final SEIS/EIR/LUPA does not comply with the BLM's Special Status Species policy because it fails to provide adequate protection for the Mojave fringe-toed lizard (Bureau Sensitive Species) or designated desert tortoise connectivity corridors.

Response:

The BLM is in compliance with the BLM Special Status Species policy. Special Status Species policy (Manual 6840 - Special Status Species Management) establishes that "Bureau sensitive species will be managed consistent with species and habitat management objectives in land use and implementation plans to promote their conservation and to minimize the likelihood and need for listing under the ESA" (6840.06). It further states "In compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA, the BLM shall designate Bureau sensitive species and implement measures to conserve these species and their habitats... to promote their conservation and reduce the likelihood and need for such species to be listed pursuant to the ESA." (6840.2). This policy directs that "When appropriate, land use plans shall be sufficiently detailed to identify and resolve significant land use conflicts with Bureau sensitive species..." (6840.2B).

The BLM's plan amendment associated with the approval of the Palen Solar Project does not propose any changes to the multiple-use classifications of the lands within the decision area. The Final Supplemental EIS/EIR/LUPA states, "The project site is located on Multiple-Use Class M lands within the CDCA [California Desert Conservation Area].... Public lands classified as Multiple-Use Class M (Moderate Use) are managed to provide a controlled balance between higher-intensity use and protection of public lands. Energy and utility development uses are allowed. Accordingly, no re-classification is being considered" (2-38).

As the BLM is making no change to planning-level decisions for the multiple-use classification of lands within the decision area, there is no decision upon which a protest stating that the BLM's decision to change the protections being afforded to the Mojave fringe-toed lizard can be made. Additionally, through this multiple-use classification the BLM has identified the land use plan specific measures in which the BLM shall manage at a planning-area scale to promote the conservation of the Mojave fringe-toed lizard in compliance with existing laws, including the BLM multiple use mission as specified in the FLPMA. In designing the planning-area-wide strategy for management of Bureau Sensitive Species, lands classified as Multiple-Use Class M lands in the California Desert Conservation Area RMP have species and habitat objectives that are consistent with energy development, while other areas within the California Desert Conservation Area RMP are classified to provide management for the conservation of the Mojave fringe-toed lizard. The BLM's existing multiple-use classifications across the planning area comply with BLM Special Status Species policy to manage species consistent with species and habitat objectives in the land use plan. The BLM has identified no need to change the Multiple-Use Class M designation for the decision area of this amendment to allow for the decision to identify the decision area for solar power generation.

There are no designated desert tortoise connectivity corridors located within the decision area. The Final Supplemental EIS/EIR/LUPA states "Two former Wildlife Habitat Management Areas identified in the [Northern and Eastern Colorado Desert Coordinated Management Plan NECO Plan

overlap the project site: the Palen-Ford Proposed [Wildlife Habitat Management Area] WHMA and the Desert Wildlife Management Area (DWMA) Continuity WHMA. These land use designations are overridden by the [California Desert Renewable Energy Conservation Plan] DRECP [land use plan amendment] LUPA and are no longer in effect.” (3-15.4). Therefore, the planning-level amendment decision to identify the decision area for solar power generation cannot be in conflict with areas designated for desert tortoise connectivity.

Impacts Analysis – Cultural Resources and Landscapes

Issue Number: PP-CA-PalenSolar-18-02

Organization: Shute, Mihaly, & Weinberger, LLC

Protester: Sara A. Clark

Issue Excerpt Text:

As the Seven Prehistoric Sites Destroyed By the Project Contribute to Cultural Landscapes, Their Removal Constitutes a Significant Impact. Because BLM has failed to consider the prehistoric cultural landscapes, it also fails to find direct impacts to cultural resources despite the destruction of seven known prehistoric sites within the Project area. FSEIS at 3.4-50. Specifically, the FSEIS fails to evaluate whether any of these seven prehistoric archaeological sites contribute to the cultural landscapes discussed in the prior section. Even if these resources are not significant on their own a characterization that the Tribes reject the FSEIS must evaluate whether these resources are significant because of their contribution to a broader cultural landscape. The California Energy Commission recognized this possibility. The Commission’s Final Decision in 2010 concluded that “direct impacts to nine prehistoric archaeological sites,”-some of which will be impacted by the proposed Project were significant, given that they were all potential contributors to a prehistoric cultural landscape (historic district) identified by Staff.” PMPD at 6.3-33. The FSEIS’s analysis inappropriately silos these archaeological resources. Under its logic, if an individual resource is not independently significant, it does not merit protection. However, NEPA, the NHPA, and CEQA do not take such a cabined view. In response, BLM simply points the Tribes back to its response to CRIT’s previous comment. FSEIS at 1-419. But this response does not address CRIT’s specific concern and is therefore inadequate. Previous comments in record: CRIT DSEIS Comment Letter, at FSEIS at I-274.

Issue Excerpt Text:

However, BLM fails to evaluate the cultural resource values and sites for which the Palen-Ford Dunes ACEC was designated. As noted in CRIT’s comment letter, the Palen-Ford Dunes ACEC was designated to protect ‘major trail networks [that] transit through the area’ and “evidence from [] trade and travel.’ It also protects evidence of early human occupation, with a significant presence dating back 10,000 years.” FSEIS at I-275 (citing ACEC Special Unit Management Plans). However, despite this site’s location within the indirect Area of Potential Effects (APE) and its cultural resources, BLM fails to identify any sites within this area or discuss why identification was not possible.

Issue Excerpt Text:

Next, in the Alligator Rock ACEC, BLM purports to have considered the Alligator Rock geologic formation and concluded that it was “not eligible for the NRHP under the Criteria A, B, and C, and

therefore would not be indirectly affected by the Project.” FSEIS at 4.4-10. However, in CRIT’s comment letter, the Tribes pointed out that this ACEC is “designated to protect ‘the largest and most well preserved assemblage of late prehistoric and archaic era petroglyphs,’ representing human habitation over several thousand years. Notably, it is a ‘critically important cultural use site for a variety of tribes that claim ancestral ties with the Chuckwalla Valley.’ ‘It is also a site of high religious importance to many tribes’ and ‘associated with several spiritual trails and songs ..., rooted deep(ly) in their oral histories.’ Crucially, areas of petroglyphs and cleared circles are located in ‘strategic’ areas because of their ‘clear view of the [Chuckwalla Valley] landscape from an elevated position, including the proposed Project site.” FSEIS at I275 (citing ACEC Special Unit Management Plans). However, BLM simply looked at the geologic formation rather than the petroglyph sites or cleared circles at high vantage points. Had BLM properly analyzed the resources protected by this ACEC, it would likely have found an adverse visual impact to the site as a result of the Project.

Issue Excerpt Text:

However, the agencies ignored information provided by the Tribes, thereby omitting analysis of Tribal Cultural Resources, as required by CEQA. FSIES at 1-420 to 421.

Issue Excerpt Text:

Further, BLM’s contention in its discussion of traditional cultural properties that “BLM has not found sufficient information through tribal consultation or through relevant ethnographic and historical studies to evaluate whether the eight resources in the indirect APE meet the criteria in BLM Manual 8110.22D to qualify as traditional cultural properties” is insufficient. FSEIS at I-421. It places an overly onerous burden on tribes especially given the known difficulty of obtaining tribal information, and the lack of indirect impact conclusion is premised on the erroneous assumption that these resources are only important for archaeological values. If properly treated as traditional cultural properties, then the impact analysis would be different. This error renders the document inadequate.

Summary:

Because the Palen FSEIS/EIR did not consider impacts to prehistoric cultural landscapes, the impacts analysis for culturally sensitive resources is flawed and incomplete. The FSEIS does not evaluate if the seven prehistoric sites that would be destroyed by the project contribute to the cultural landscape, does not consider impacts to the cultural landscape from destruction of the seven prehistoric sites, and does not evaluate if the combined impacts to the seven prehistoric sites are significant. Cultural resources are a value of the Palen-Ford Dunes ACEC, which is located within the project’s indirect APE. However, the FSEIS does not identify cultural resource sites within the indirect APE associated with the Palen-Ford Dunes ACEC or explain why identification was not possible. The FSEIS considered impacts to the Alligator Rock ACEC geological formation but did not consider impacts to the cultural resources the ACEC was designated to protect; or to the cultural uses or visual resources of the ACEC. Because information provided by the Tribes was not considered, impacts to Tribal Cultural Resources were not analyzed. The impact analysis did not consider cultural resources as traditional cultural properties.

Response:

The Palen FSEIS/EIR (p. 3.4-60) explains the reasons the BLM is not using the prehistoric cultural landscapes concepts for proposed cultural landscapes, stating the proposed cultural landscapes are:

“geographically massive in scale, encompassing millions of acres of federal and nonfederal lands. The Pacific to Rio Grande Trails Landscape (PRGTCL) spans portions of six states (from the southern California coast to the Rio Grande River in New Mexico) as well as a portion of northern Mexico. The Prehistoric Trails Network Cultural Landscape (PTNCL) is also geographically massive encompassing a large swath of the Mojave Desert from the Colorado River to near the Los Angeles Basin. The BLM has determined that, for the current Project, the cost would be exorbitant to conduct field archaeological inventories, ethnographic and historical studies, and tribal consultation required to attempt to identify these two geographically massive proposed landscapes including defining their legal boundaries; classifying them as districts, sites or another recognized cultural property type; identifying and describing their contributing elements; and taking other steps to evaluate and assess effects to them, in accordance with DOI/BLM policy and standards”.

The direct APE for the Project has been 100 percent intensively surveyed for cultural resources with seven prehistoric sites identified within the direct APE. All seven of these prehistoric sites have been recorded to professional standards and evaluated under all four National Register of Historic Places Criteria and determined by the BLM (with SHPO concurrence) to be not eligible for inclusion on the National Register of Historic Places. As part of this evaluation, possible connections for forming a prehistoric district which may be eligible for the National Register were considered among the sites and other sites in the surrounding area; however, no evidence of connections was found, as detailed in the cultural resource technical report for the Project. (Palen Solar FSEIS/EIR pgs. 3.4-51 and 52, and pg. 4.4-8.). This report details the documentation and study of the prehistoric sites within the direct APE. No chronological or evidence was found at the sites to indicate that they possess a linkage and form a district united by physical development.

Page 3-15-9 of the Palen Solar FSEIS/EIR states that one of the purposes of the Palen-Ford Playa Dunes ACEC is to protect cultural resources related to the Palen and Ford playas and ban activities that may result in adverse effects to landscapes or to National Register Eligible sites or artifacts. The FSEIS/EIR (p. 4.4-9) states that four culturally sensitive areas eligible for the NRHP are within the indirect effects APE, specifically identifying the Palen-Ford Playa Dunes ACEC as one of the four.

Impacts to the cultural resources of the Alligator Rock ACEC are specifically addressed. Page 4.4-10 of the Palen FSEIS/EIR states that the culturally sensitive resources within the Alligator Rock ACEC were considered within the indirect APE and were found through analysis using KOPs to be not indirectly affected by the project. Further, page 3.4-57 of the FSEIS explains that the North Chuckwalla Prehistoric Quarry District is within the Alligator Rock area and was listed on the NRHP under Criterion D but not eligible under A, B, or C.

Comments from the tribes were specifically addressed in the Palen FSEIS/EIR. A Programmatic Agreement (PA) was executed on October 7, 2010 with CRIT as an invited concurring party to the PA. The Palen FSEIS/EIR states that “through consultation, many important cultural resources were identified in the project study area and incorporated into the PSPP design and analysis (p. 5-5).” The Palen Solar FSEIS/EIR pages 5-4 through 5-14 provide a detailed description of tribal consultation, including a summary of meetings, field trips, correspondence, and data sharing

between the BLM and tribes. Page 5-13 specifically states: “All tribal comments (provided in government-to-government meetings, written comments, etc.) were considered in Section 106 NHPA review and discussed in the BLM’s consultation letters with the SHPO.”

The Palen FSEIS/EIR (p. 3.4-58) of the specifically addresses traditional cultural properties. This section clarifies BLM’s traditional cultural properties policy (BLM Manual 8110 .22 D) which specifies traditional cultural properties can be found to meet NRHP eligibility criteria and should be located, described, and evaluated at the same stage in the Section 106 compliance process as the field inventory for historic properties; and that traditional cultural properties must meet one or more National Register criteria in order to be determined eligible for the National Register (BLM Manual 8110.31).

The Palen FSEIS/EIR concludes that the while the BLM made a reasonable and good faith effort to identify traditional cultural properties potentially affected by the proposed Project and identified eight resources within the indirect APE as culturally sensitive to Tribes, the BLM has not found sufficient information through tribal consultation or through relevant ethnographic, historical studies, and identification efforts to evaluate whether any the cultural resources within the APE meet the BLM Manual 8110.31 criteria to qualify as traditional cultural properties.

Public Involvement / Consultation

Issue Number: PP-CA-PalenSolar-18-02

Organization: Shute, Mihaly, & Weinberger, LLC

Protester: Sara A. Clark

Issue Excerpt Text:

As detailed in the Tribes’ comment letter, government-to-government consultation for this Project has been inadequate. Neither BLM nor the County has met with the CRIT Tribal Council and received information about the significant cultural resource harms that will result from construction of this Project.

Issue Number: PP-CA-PalenSolar-18-02

Organization: Shute, Mihaly, & Weinberger, LLC

Protester: Sara A. Clark

Issue Excerpt Text:

Likewise, BLM asserts that the County sent a letter to Amanda Barrera, Tribal Secretary of the CRIT, on January 3, 2017, requesting consultation pursuant to AB 52. The Tribes have review their files and have been unable to locate such correspondence. As a result, CRIT requests that the County reopen AB 52 consultation to adequately engage with the Tribes.

Summary:

The protester claims that government-to-government consultation with the Colorado River Indian Tribes (CRIT) is insufficient and that they were not notified regarding the opportunity from consultation.

Response:

The BLM consulted with 16 Tribes, including the Colorado River Indian Tribes, during Section 106 and NEPA review for the Project. Regarding this project, the BLM met or corresponded with the CRIT on multiple occasions between 2016 and 2018. In addition to written correspondence, these occasions include field visits, public meetings, and government-to-government meetings with individual Tribes. AB52 is CEQA law -- the BLM has no requirement to comply with it. The record of contacts between the BLM and CRIT regarding the Project is discussed in 5.3.3 of the FSEIS (with supporting documentation in Appendix D).

Best Available Information

Issue Number: PP-CA-PalenSolar-18-02

Organization: Shute, Mihaly, & Weinberger, LLC

Protester: Sara A. Clark

Issue Excerpt Text:

However, despite the information provided by the Tribes, BLM states “neither cultural landscape (PTNCL and PRGTL) proposed by the CEC for the PSEGS project are sufficiently defined at this point in time for BLM to analyze them as cultural properties under Section 106 NHPA or as cultural resources under NEPA for the proposed Project. Nor can BLM analyze specific cultural resources as contributing to the PTNCL and PRGTL based upon the evidence available to date” (FSEIS at 3.4-59). This contention is unsupported. The CEC spent pages analyzing these cultural landscapes and BLM barely mentions them (PMPD 6.3-51 to 63).

Issue Excerpt Text:

To reach its conclusion that neither landscape is sufficiently defined, the FSEIS relies on BLM's 2011 Final EIS for the Palen Solar Power Project, which stated that at that time there was not sufficient information to determine the boundaries of the landscapes. FSEIS at 3.4-59 and 1-417. However, in 2011, the CEC had yet to complete any of its analysis. BLM cannot now rely on this outdated information. Further, BLM's contention that the cost of obtaining the information required to identify the PTNCL and PRGTL in accordance with Department of the Interior (DOI)/BLM Section 106 NRHP and NEPA policy would be exorbitant" is unsupported by the fact that the CEC has already done the work and the work required of BLM would only be focused on the Chuckwalla Valley portions of these cultural landscapes. FSEIS at 1-417. Under BLM's reasoning, there will never be a proper time to obtain this information since BLM can always say that the cultural landscapes are too "geographically massive in scale, encompassing millions of acres of federal and nonfederal lands" to ever justify "the cost of obtaining the information." FSEIS at 1-417. BLM has the opportunity to examine the Chuckwalla Valley portion of both these landscapes now, and significant research and analysis has already been done by the PMPD and was included in CRIT's comment letter. FSEIS at I-273.

Issue Excerpt Text:

This Chapter must be revised to evaluate which tribes may be adversely and inequitably affected by the proposed Project. BLM's response is inadequate. In one paragraph, BLM states that the previous SEIS/EIR's "analyses were based on the same data for the Colorado River Indian Reservation as used in this SEIS/EIR, quantifying this Tribe as a low-income population of concern." FSEIS at 1-425. Yet in the very next paragraph BLM states that "data was unavailable to quantify whether any tribal members would qualify as low-income population of concern. Furthermore, such data was not provided by the commenter." FSEIS at 1-425. If the data was available during previous analyses and BLM says that it was used during this SEIS, then there is no reason that it should suddenly be unavailable. Given that previous analyses utilized this data, CRIT was not aware that it now needed to provide its own data to BLM at this late stage.

Issue Excerpt Text:

BLM then states that it "believes that the information is not relevant to reasonably foreseeable significant adverse impacts on the human environment nor is it essential to a reasoned choice among alternatives" (FSEIS at 1-417). However, the FSEIS claims that the project will have no adverse, direct impact. Leaving the landscape impacts out of the analysis is therefore highly prejudicial. See FSEIS at 4.4-34. And BLM's claim that it "has analyzed direct, indirect, and cumulative impacts to the culturally sensitive resources" is undermined by the fact that it has failed to consider the impacts at a landscape level. FSEIS at 1-418.

Issue Excerpt Text:

BLM then falls back on its contention that it has not been able to verify the existence of prehistoric and/or aboriginal trails which CRIT has identified through the Project site. FSEIS at I-418. However, trails are not always physical, linear disturbances. CRIT's Mohave and Chemehuevi members have songs that direct their members along these trails and believe that their ancestors still follow these trails, and when they die, they too will follow them.

Summary:

The Palen Solar Project EIS/EIR failed to use the best available information when it: declined to

analyze cultural resources on a landscape level in the planning area; said that data was unavailable to support the Colorado River Indian Tribes (CRIT) as a low-income population of concern while also saying that it had determined the CRIT to be a low-income population of concern; and failed to use the CRIT's information related to the location of culturally significant trails.

Response:

The Council on Environmental Quality's NEPA regulations require the BLM to obtain information if, among other qualifications, "the overall cost of obtaining it is not exorbitant" (40 CFR 1502.22). The National Historic Preservation Act Section 106 regulations include a requirement that an agency make a reasonable and good faith effort to carry out appropriate identification efforts (36 CFR 800.4(b)(1)).

As the BLM stated in its response to comments on the issue of cultural landscapes, to identify certain cultural landscapes -- the Prehistoric Trails Network Cultural Landscape and the Pacific to Rio Grande Trails Landscape -- would have an exorbitant cost, and would go beyond the reasonable-and-good-faith standard (Response to Comments at I-417). For the BLM to conduct the studies necessary to allow them to evaluate the landscapes' eligibility for inclusion in the National Register of Historic Places, or to determine the impacts to the landscapes as cultural resources under NEPA, would be extremely burdensome and expensive.

The proposed cultural landscapes span millions of acres. The work required would include conducting field archaeological inventories, ethnographic and historical studies, and tribal consultation over those millions of acres in order to define the landscapes' legal boundaries, classify them as recognized cultural property types, identify and describe their contributing elements, and obtain any other information required to evaluate and assess impacts to them. While the BLM might make such a determination in the future, at this time, without much precise information to define the landscapes and with the landscapes being so large compared to the project's footprint, it would be unreasonably burdensome and expensive for the BLM to attempt to identify and analyze them for this project.

The BLM considered that cultural resources *within* the landscapes could be impacted by the project, and reviewed the information accumulated by the California Energy Commission (CEC) accordingly (Final SEIS/EIR at 3.4-49, 3.4-59). However, the information provided by the CEC is not specific enough for the BLM to confirm that resources contribute to the landscapes (Final SEIS/EIR at 3.5-59).

Given that the BLM is unable to identify the landscapes or areas of the landscapes as cultural resources for analysis under NEPA or Section 106, it follows that the BLM would not then analyze impacts to these potential landscapes or their components. This is not prejudicial.

Regarding low-income populations of concern, the BLM used the same *geographic* data it had used in previous analyses, which quantified the Colorado River Indian Reservation, given its *geographic location*, as belonging to a low-income population of concern. However, as the BLM explained in its Response to Comments (p. I-425), it is unable to locate via typical sources, and has not been provided, *demographic* information that would identify the CRIT as a whole, separate from the geographic location of the reservation, as a low-income population of concern.

Though the protesting party did not describe the trails that it claims the BLM should have recognized as cultural resources, the BLM notes that the Final SEIS/EIR describes the Salt Song Trail on page 3.4-21, and explains that it has not been identified within the Area of Potential Effects for this project.