

1 STEPHAN C. VOLKER (CSB #63093)
DANIEL P. GARRETT-STEINMAN (CSB #269146)
2 JAMEY M. B. VOLKER (CSB #273544)
LAW OFFICES OF STEPHAN C. VOLKER
3 436 14th Street, Suite 1300
Oakland, California 94612
4 Telephone: (510) 496-0600
Facsimile: (510) 496-1366

5 Attorneys for Plaintiffs
6 THE PROTECT OUR COMMUNITIES FOUNDATION, *et al.*

7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 THE PROTECT OUR COMMUNITIES) Civ. No.
FOUNDATION, BACKCOUNTRY AGAINST)
11 DUMPS, EAST COUNTY COMMUNITY) **COMPLAINT FOR DECLARATORY**
ACTION COALITION, and DONNA TISDALE,) **AND INJUNCTIVE RELIEF**
12)
Plaintiffs,)
13)
vs.)
14)
KEN SALAZAR, in his official capacity as)
15 Secretary of the United States Department of)
the Interior; ROBERT ABBEY, in his official)
16 capacity as Director of the United States Bureau)
of Land Management; UNITED STATES)
17 BUREAU OF LAND MANAGEMENT, a)
federal agency; and UNITED STATES)
18 DEPARTMENT OF THE INTERIOR, a federal)
agency,)
19)
Defendants)
20)

21 **INTRODUCTION**

22 1. In 1976 Congress enacted unprecedented protection for the California Desert
23 Conservation Area in recognition of the fact that “the California desert environment is a total
24 ecosystem that is extremely fragile, easily scarred, and slowly healed,” and because “the
25 California desert environment and its resources, including certain rare and endangered species of
26 wildlife, plants, and fishes, and numerous archeological and historic sites, are seriously
27 threatened by air pollution, inadequate Federal management authority, and pressures of increased
28 use” 43 U.S.C. §§ 1781(a)(2) and (3). Congress directed the Secretary of the Interior to

1 “prepare and implement a comprehensive, long-range plan for the management, use,
2 development, and protection of the public lands within the California Desert Conservation Area”
3 in part “to conserve these resources for future generations.” 43 U.S.C. §§ 1781(d), 1781(a)(4).
4 The Bureau of Land Management first published its California Desert Conservation Area Plan in
5 1980, and has since amended it numerous times. The California Desert Conservation Area Plan
6 recognizes the critical importance of pursuing activities such as “energy development and
7 transmission . . . *without compromising* the basic desert resources of soil, air, water, and
8 vegetation, or public values such as wildlife, cultural resources, or magnificent desert scenery.”
9 California Desert Conservation Area Plan (“CDCA Plan”) at 6 (emphasis added).

10 2. Among the “rare and endangered species of wildlife” Congress and the California
11 Desert Conservation Area Plan intended to be protected are the flat-tailed horned lizard and the
12 Peninsular bighorn sheep. Other resources Congress and the California Desert Conservation
13 Area Plan intended to be safeguarded include vital groundwater systems, such as the Ocotillo-
14 Coyote Wells Sole Source Aquifer, and the wealth of paleontological, archaeological and other
15 cultural treasures sequestered throughout the California Desert Conservation Area.

16 3. But in an ill-conceived rush to accommodate massive renewable energy projects
17 vying for multi-billion dollar federal tax credits¹ originally due to expire on December 31, 2010,
18 the federal defendants precipitously approved unnecessarily destructive energy development of
19 the California Desert Conservation Area without first conducting adequate environmental
20 reviews. Recognizing the impossibility of completing adequate environmental reviews within
21 this initial deadline, Congress wisely extended the period for energy companies to qualify for
22 these tax credits by one year, to December 31, 2011. That extension provides the federal
23 defendants with a rare and invaluable opportunity – guided by this Court’s review – to address
24 and rectify the significant errors and omissions that plagued their unduly hasty initial review of
25 the Imperial Valley Solar Project (“IV Solar” or the “Project”) whose approval is challenged
26 herein.

27
28 ¹ By and large, these were made available by the American Recovery and Reinvestment
Act (“ARRA”) of 2009.

1 4. Plaintiffs The Protect Our Communities Foundation (“POC”), Backcountry Against
2 Dumps (“BAD”), East County Community Action Coalition (“ECCAC”) and Donna Tisdale
3 (collectively, “plaintiffs”) bring this action to rectify defendants’ failure to comply with critically
4 important environmental laws when approving the Project. Defendants violated the National
5 Environmental Policy Act (“NEPA”), 42 U.S.C. section 4321 *et seq.*, the Federal Land Policy
6 Management Act (“FLPMA”), 43 U.S.C. section 1701 *et seq.*, the National Historic Preservation
7 Act (“NHPA”), 16 U.S.C. section 470 *et seq.*, and the Administrative Procedure Act (“APA”), 5
8 U.S.C. sections 701-706. This Court’s review will afford the defendants the time and direction
9 they need to avoid unnecessary harm to the California Desert Conservation Area and needless
10 waste of scarce taxpayer resources.

11 5. Defendants violated NEPA by preparing a legally inadequate Environmental Impact
12 Statement (“EIS”). Defendants violated FLPMA by approving the Project despite its
13 inconsistency with that law’s policy and procedural mandates. Defendants violated NHPA by
14 preparing an Programmatic Agreement (“PA”) instead of inventorying the historic properties
15 affected by the Project and completing its other procedural duties under the law. By approving
16 the Project despite these violations, defendants failed to proceed in the manner required by law, in
17 violation of the APA.

18 6. The Project proposes the development of a ten square mile power generation
19 facility located in the extremely sensitive California Desert Conservation Area. Plaintiffs and
20 many other citizens, organizations and governmental agencies, including the federal
21 Environmental Protection Agency (“EPA”), expressed concerns about, among other issues, the
22 defendants’ failure to adequately describe the Project; the Project’s lack of an adequate and
23 reliable water supply; the Project’s potential groundwater impacts; the Project’s potentially severe
24 impacts on species listed – or proposed for listing – under the Endangered Species Act; the
25 Project’s unstudied impacts on cultural resources; defendants’ failure to analyze the impacts of
26 actions connected to the Project; defendants’ unlawful deferral of mitigation measure
27 formulation; and defendants’ failure to consider feasible alternatives to the Project. Nevertheless,
28 defendants declined to address these concerns, and failed to take the required “hard look” at the

1 Project's environmental impacts.

2 7. Accordingly, plaintiffs seek orders from this Court: (1) granting preliminary
3 injunctive relief, restraining defendants from taking any action that would result in any change to
4 the physical environment in connection with the Project pending a full trial on the merits; (2)
5 declaring that defendants violated the APA by failing to comply with NEPA's requirements for
6 adequate environmental review of the Project; (3) declaring that defendants violated the APA by
7 approving the Project in violation of FLPMA's requirements; (4) declaring that defendants
8 violated the APA by approving the Project in violation of NHPA's requirements; and (5) granting
9 permanent injunctive relief pending defendants' compliance with NEPA, FLPMA, NHPA, and
10 the APA.

11 **JURISDICTION AND VENUE**

12 8. This Court has jurisdiction in accordance with 28 U.S.C. section 1331 (action
13 arising under laws of United States); 28 U.S.C. section 1346 (United States as defendant); 28
14 U.S.C. section 1361 (action to compel officers of the United States to perform their duties); 28
15 U.S.C. sections 2102-2202 (power to issue declaratory and injunctive relief in cases of actual
16 controversy); and 5 U.S.C. sections 701-706 (APA).

17 9. Venue is proper under 28 U.S.C. section 1391(e) because a substantial part of the
18 events or omissions giving rise to plaintiffs' claims occurred in this district, and a substantial part
19 of the property that is the subject of this action is situated in this district.

20 10. This claim is timely filed within all applicable statutes of limitations.

21 11. Plaintiffs have standing to assert their claims because they and their members use
22 and enjoy the federal public lands and resources that the Project would harm, as discussed below.

23 **PARTIES**

24 12. Plaintiff THE PROTECT OUR COMMUNITIES FOUNDATION is a community
25 organization formed in 2009 as the successor to The Protect Our Communities Fund, which had
26 been formed in 2006. POC is composed of numerous individuals and families residing in
27 Southern California who are directly affected by approval of the Project. POC's purpose is the
28 promotion of a safe, reliable, efficient, economical, renewable and environmentally responsible

1 energy future. POC's members have in the past used, and intend to continue using in the future,
2 the Project site and vicinity for aesthetic, educational, scientific, historic, cultural, recreational
3 and spiritual enjoyment. The environmental, aesthetic, recreational, scenic, scientific, historic
4 and cultural interests of POC and its members would be adversely affected by defendants' failure
5 to comply with applicable laws in the respects alleged herein, unless the requested relief is
6 granted.

7 13. Plaintiff BACKCOUNTRY AGAINST DUMPS is a community organization based
8 in Boulevard, California, comprising individuals and families who live or recreate in Southern
9 California, including Imperial County where the Project is located. Members of BAD are directly
10 affected by BLM's land use planning and management of the Project area because that is where
11 they live and recreate. BAD's members have in the past visited, and intend to continue visiting in
12 the future, the Project site and vicinity, in order to enjoy its wildlife and other natural resources
13 for health, recreational, scientific, spiritual, educational, aesthetic and other purposes. The
14 environmental, aesthetic, recreational, scenic, scientific, historic and cultural interests of BAD
15 and its members would be adversely affected by defendants' failure to comply with applicable
16 laws in the respects alleged herein, unless the requested relief is granted.

17 14. Plaintiff EAST COUNTY COMMUNITY ACTION COALITION is a coalition of
18 community groups with the common goal of preserving the rural quality of life and the natural
19 resources of eastern San Diego County. ECCAC and its members seek to maintain the ecological
20 integrity, scenic beauty, wildlife, cultural resources, recreational amenities, watershed values and
21 groundwater resources in the rural areas of eastern San Diego County and western Imperial
22 County where the Project is located. ECCAC's members have in the past used, and intend to
23 continue using in the future, the Project site and vicinity for aesthetic, educational, scientific,
24 historic, cultural, recreational and spiritual enjoyment. The environmental, aesthetic, recreational,
25 scenic, scientific, historic and cultural interests of ECCAC and its members would be adversely
26 affected by defendants' failure to comply with applicable laws in the respects alleged herein,
27 unless the requested relief is granted.

28 15. Plaintiff DONNA TISDALE lives on Morningstar Ranch in Boulevard, California.

1 She is a member of co-plaintiffs POC, BAD and ECCAC, and is Chairwoman of the County of
2 San Diego's Boulevard Planning Group. Mrs. Tisdale advocates for the preservation of rural
3 areas in Southern California. She has in the past used, and intends to continue using in the future,
4 the Project site and vicinity for recreational and spiritual activities. The Project – and defendants'
5 failure to comply with the applicable laws in the respects alleged herein – would adversely impact
6 Mrs. Tisdale's interests unless the requested relief is granted.

7 16 To the extent required, plaintiffs exhausted all available administrative remedies.
8 No administrative appeals are available.

9 17. Plaintiffs have no plain, speedy, or adequate remedy at law, as defendants' unlawful
10 actions are not otherwise reviewable in a manner that will ensure compliance with the laws whose
11 violation is alleged herein. Accordingly, plaintiffs seek injunctive and declaratory relief from this
12 Court to rectify defendants' unlawful acts.

13 18. Defendant UNITED STATES DEPARTMENT OF INTERIOR ("DOI") is the
14 federal agency charged with managing most of the nation's federally owned lands, including the
15 Project site managed by the Bureau of Land Management at issue here, and also charged with
16 ensuring compliance with applicable laws, including but not limited to NEPA, FLPMA and
17 NHPA, in the management of those lands.

18 19. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT is an agency
19 within DOI. Under federal law, BLM is charged with the management of federal lands including
20 the Project site for the benefit of the public and consistent with all applicable laws.

21 20. Defendant BOB ABBEY is the Director of BLM, and is sued in his official
22 capacity. In that capacity, he is generally responsible for the activities of BLM nationwide.
23 Defendant ABBEY is responsible for BLM's October 5, 2010, approval of the Record of
24 Decision ("ROD") for the Project.

25 21. Defendant KEN SALAZAR is the Secretary of DOI, and is sued in his official
26 capacity. Defendant KEN SALAZAR is the federal official charged with responsibility for the
27 proper management of BLM and is responsible for the actions of BLM. Defendant KEN
28 SALAZAR, like defendant ABBEY, is responsible for BLM's October 5, 2010, approval of the

1 ROD for the Project.

2 **PROCEDURAL HISTORY**

3 22. This case challenges defendants' October 5, 2010 approvals, embodied in the ROD,
4 of (1) a right-of-way grant to a private corporation, and (2) a Land Use Plan Amendment to the
5 California Desert Conservation Area Plan. As discussed, these two approvals were unlawful for
6 three separate reasons: they were based upon a legally inadequate EIS under NEPA; they violate
7 the requirements of FLPMA; and they violate the requirements of NHPA.

8 23. The Project approval process was formally initiated when the Project applicant,
9 Imperial Valley Solar, L.L.C. (formerly Stirling Energy Systems Solar Two, L.L.C.),
10 submitted (1) an application for certification to the California Energy Commission ("CEC")
11 and (2) a request for a right-of-way to BLM.

12 24. On February 26, 2010, EPA published a Notice of Availability of the jointly
13 prepared BLM/CEC Staff Assessment and Draft Environmental Impact Statement and Draft
14 California Desert Conservation Area Plan Amendment ("DEIS"). This commenced a 90-day
15 public comment period. Plaintiffs timely submitted multiple comments prior to the close of
16 this comment period, identifying the DEIS' s numerous inadequacies.

17 25. On July 28, 2010, EPA published a Notice of Availability of BLM' s Proposed
18 Resource Plan Amendment/Final Environmental Impact Statement ("FEIS") for the Project, to
19 which was appended a Determination of NEPA Adequacy discussing the numerous changes
20 made to the Project between the issuance of the DEIS and the FEIS. EPA' s notice
21 commenced a 30-day public comment and protest period. Plaintiffs timely submitted both
22 comments on the FEIS and a protest of BLM' s Proposed Resource Management Plan
23 Amendment for the California Desert Conservation Area.

24 26. In September, 2010, a string of related documents and federal approvals were
25 issued for the Project. On September 15, 2010, BLM entered into a Final PA under NHPA.
26 On September 21, the U.S. Army Corps of Engineers ("USACE") issued its Final 404(b)(1)
27 Alternatives Analysis for the Project. And on September 23, 2010, the United States Fish and
28

1 Wildlife Service (“ FWS”) issued a Biological Opinion (“ BiOp”) for the Project.²

2 27. On October 4 and 5, 2010, defendants Abbey and Salazar respectively signed and
3 approved both the California Desert Conservation Area Plan Amendment and the Right-of-Way
4 and Route Closure Authorization. These approvals were contained within BLM’ s ROD for
5 the Project, to which was appended another Determination of NEPA Adequacy discussing new
6 information and Project changes made after the FEIS was issued. Because defendant Salazar,
7 the highest official in DOI, signed and approved these actions, the actions may not be
8 administratively appealed within DOI.

9 **FACTUAL BACKGROUND**

10 28. The IV Solar Project is one of the many industrial-scale renewable energy projects
11 in the southern deserts of California – and the southwestern United States more broadly – that
12 have either been approved or are being considered by BLM. According to BLM,
13 approximately *one million* acres of desert lands in southern California alone are proposed for
14 solar and wind energy development. DEIS at ES-31. The extent, concentration and rate of the
15 proposed renewable energy developments is unprecedented in the United States. Further,
16 many of the proposed projects would be located in extremely sensitive areas harboring
17 threatened, endangered and rare plant and animal species, unique cultural resources and
18 breathtaking vistas. The IV Solar Project, for example, would be located atop a sole source
19 aquifer in an area with rapidly dwindling water supplies. The Project site is also home to a
20 substantial population of the flat-tailed horned lizard, a species proposed for listing as
21 threatened under the federal Endangered Species Act (“ ESA”), 16 U.S.C. section 1531 *et seq.*,
22 and provides critical habitat connectivity for the endangered Peninsular bighorn sheep.
23 Furthermore, there are more than 459 surface cultural resource sites, and additional – but as of
24 yet, uninventoried – subsurface cultural resources within the Project’ s Area of Potential
25 Effects. FEIS at 4.5-1.

26 29. Nonetheless, in its rush to process project applications so the applicants could
27

28 ² The BiOp is actually a joint Biological Opinion on the Project’s Peninsular bighorn
sheep impacts and Conference Opinion on the Project’s flat-tailed horned lizard impacts.

1 take advantage of federal funds made available by ARRA, BLM failed to first prepare a
2 programmatic environmental impact statement to study how to best promote renewable energy
3 while protecting the unique and sensitive desert ecosystems and cultural resources. Despite
4 lacking the type of organized plan and ecosystem-wide information a programmatic EIS would
5 have provided, BLM prepared an EIS for and approved the Project anyway.

6 30. BLM published the IV Solar DEIS on February 22, 2010. According to the DEIS,
7 the proposed Project would use 30,000 SunCatchers – on 6,500 acres of land – to generate 750
8 MW of electricity. As proposed, the Project would not have used any groundwater, nor would it
9 have used diesel-powered equipment for construction. Besides the proposed Project, the DEIS
10 only fully analyzed three other alternatives. It discarded the other alternatives without serious
11 consideration, including all three alternative sites evaluated under CEQA only and the distributed
12 solar technology alternative. The DEIS also did not identify or analyze any connected actions.

13 31. On July 28, 2010, BLM issued the IV Solar FEIS, which identified numerous
14 substantial Project changes. Most prominently, BLM selected as its preferred alternative a 709
15 MW facility option that had not been considered *at all* in the DEIS. Indeed, the selected
16 alternative was still not fully developed at the time the FEIS was issued.

17 32. BLM provided only a rudimentary description of the selected Project in its FEIS
18 and ROD, omitting essential details and environmental analysis of the differences between the
19 selected Project and the original Project proposal. To ascertain the salient Project features, the
20 public has to locate and read USACE’s 404(b)(1) Alternatives Analysis for the Project, which
21 was not even completed until September 21, 2010 – after the public comment period had closed
22 and barely two weeks before BLM approved the Project on October 5, 2010. However, even
23 USACE’s analysis omits certain details and environmental evaluations that BLM should have
24 provided in the IV Solar EIS. Further, the Project description and impact analysis in USACE’s
25 alternatives analysis conflict sharply with the obsolete and incomplete information provided in
26 BLM’s FEIS and ROD.

27 33. According to the FEIS and ROD, the selected Project site would encompass 6,500
28 acres – *10 square miles* – in southwestern Imperial County, adjacent to Plaster City. The Project

1 would consist of 28,360 SunCatchers, each of which contains a solar heat exchanger and a
2 closed-cycle engine that converts solar power to rotary power that drives an electrical generator.
3 The Project would be built in two phases, both of which would rely on shared facilities that
4 would be constructed along with the first phase, including a substation, an administration
5 building, a maintenance building , three assembly buildings, a water supply pipeline and a 230-
6 kV transmission line. Upon completion of both phases, the Project would generate a total of 709
7 MW of electricity.

8 34. Besides the reduction in the number of SunCatchers and the Project’s electrical
9 generating capacity, there are other significant differences between the selected Project and the
10 proposed Project that were not even mentioned in the FEIS or ROD. For example, the selected
11 Project changes the number of roads and methods of travel by which the SunCatcher units would
12 be accessed for maintenance. To wit, all the east-west roads and all stabilized spur access roads
13 would be removed, such that maintenance workers would be forced to access many of the
14 SunCatcher units by *off-road* driving. Additionally, the selected Project would impact seven
15 *more* main stem washes than would the originally proposed Project.

16 35. Other major changes to the Project unrelated to the selection of the 709 MW
17 alternative were also made after publication of the DEIS. Among them, the Project’s water
18 supply changed entirely. Instead of the treated wastewater identified in the DEIS, the Project
19 would initially – and perhaps permanently – rely completely on an uncertain groundwater supply
20 from a Sole Source Aquifer on which the local community relies exclusively for its water supply.
21 Another change from the DEIS is that Project construction now requires diesel-powered
22 equipment.

23 36. Despite these major Project changes, BLM failed to adequately analyze them in the
24 FEIS or a supplemental EIS. BLM’s two Determinations of NEPA Adequacy, respectively dated
25 July 9 and September 28, 2010, similarly fail to rectify or justify those inadequacies.

26 37. The FEIS, like the DEIS, also violates NEPA in numerous other ways. To wit,
27 among other deficiencies, the FEIS (1) fails to take a “hard look” at the Project’s hydrologic,
28 biological, cultural, visual, cumulative and growth-inducing impacts; (2) dismisses feasible

1 alternatives; (3) defers the formulation of mitigation measures; (4) segments review of connected
2 actions; and (5) fails to adequately respond to public comments. In addition, BLM prepared the
3 EIS and approved the Project without first developing as a guidepost a programmatic EIS on
4 renewable energy development in the southwestern United States, and particularly the deserts of
5 southern California.

6 38. BLM also issued the FEIS before it had fulfilled its duties under NHPA section
7 106. Specifically, BLM decided to prepare a Programmatic Agreement (signed September 15,
8 2010) and defer making National Register of Historic Places eligibility determinations and
9 findings of effect for the cultural resources that the Project would impact until after issuing the
10 ROD and approving the Project. However, BLM failed to provide a satisfactory rationale for
11 preparing a PA instead of fulfilling its section 106 obligations prior to approving the Project.
12 Further, the PA does not include provisions for public review of and comment on BLM’s section
13 106 cultural resource effects determinations.

14 39. On October 4, 2010, defendant Abbey signed and approved both the California
15 Desert Conservation Area Plan Amendment and the Right-of-Way and Route Closure
16 Authorization for the Project. Defendant Salazar also signed and approved these actions on
17 October 5, 2010. These approvals are contained within BLM’s ROD for the Project. The
18 approvals – and the future issuance of notices to proceed – are conditioned on implementation of
19 mitigation measures and monitoring programs identified in the ROD, the FEIS, the BiOp, the PA,
20 USACE’s Final 404(b)(1) Alternatives Analysis for the Project, and the conditions of
21 certification contained in CEC’s August 26, 2010 Presiding Member’s Proposed Decision
22 (“PMPD”).

23 **FIRST CLAIM FOR RELIEF**

24 (Violation of the National Environmental Policy Act)

25 (Against All Defendants)

26 40. The paragraphs set forth above are realleged and incorporated herein by
27 reference.

28 41. Defendants’ actions in approving the Project and certifying its EIS constitute

1 violations of NEPA, 42 U.S.C. section 4321 *et seq.*, and its implementing regulations, 40
2 C.F.R. section 1500 *et seq.* These regulations apply to BLM by virtue of 43 C.F.R. subpart
3 1610.

4 42. Defendants’ approval of the Project without complying with NEPA constitutes a
5 failure to proceed in accordance with law in violation of the APA, 5 U.S.C. section 706(2)(A)
6 and (D). Without limitation, the BLM Defendants’ actions violate NEPA and are therefore
7 unlawful in the respects alleged below.

8 **BLM Failed to Adequately Describe the Project**

9 43. An EIS must “properly define[.]” (40 C.F.R. §1502.4(a)) the proposed project and
10 provide a “clear presentation of the alternatives including the proposed action.” *Id.* §1502.10.

11 44. Here, the IV Solar EIS violates NEPA because it never provides a complete
12 description of the selected Project, the 709 MW alternative. “BLM did not anticipate this
13 alternative in the DEIS,” so the first mention of the selected Project is in the FEIS. FEIS at 2-6.
14 However, even the FEIS provides barely any information on the selected Project, stating only that
15 it would generate less electricity (709 MW instead of 750) and require fewer SunCatchers
16 (28,360 instead of 30,000). The FEIS and the ROD *never* mention – much less address – most of
17 the salient engineering and locational differences between the proposed, and the selected, Project,
18 nor the resulting significant changes in environmental impacts, such as increased off-road vehicle
19 use for Project maintenance and impacts to seven *more* main stem washes. Instead, BLM papers
20 over these substantial differences by wrongly claiming that “the 709 MW Agency Preferred
21 Alternative is *essentially similar* to the 750 MW proposed action.” *Id.* (emphasis added). BLM
22 was required – but failed – to fully and clearly describe the selected Project. *See* 40 C.F.R. §§
23 1502.4(a), 1502.10.

24 45. BLM’s description of the Project’s components in the FEIS conflicts with
25 USACE’s description of the Least Environmentally Damaging Alternative (“LEDPA”) in its
26 404(b)(1) Alternatives Analysis for the Project, despite the fact that the FEIS’ selected
27 alternative supposedly *is* the LEDPA. FEIS at lvii. For example, while the Draft 404(b)(1)
28 Alternatives Analysis (Appendix H at 25) indicates that sediment basins were removed, the FEIS

1 and BLM’s responses to the public’s DEIS comments state to the contrary that sediment basins
2 *would be used*. FEIS at 4.17-19, D-335. Such inconsistencies contravene NEPA by preventing
3 informed public participation in the EIS process. The public cannot know “what the agency
4 intends to do” when there are conflicting project descriptions. *California v. Block*, 690 F.2d 753,
5 772 (9th Cir. 1982).

6 **BLM Unlawfully Segmented Review of Connected Actions**

7 46. NEPA requires that connected actions be considered together in the same EIS. 40
8 C.F.R. §1508.25; *Thomas v. Peterson*, 753 F.2d 754, 758-759 (9th Cir. 1985). Connected actions
9 include those that “cannot or will not proceed unless other actions are taken previously or
10 simultaneously.” 40 C.F.R. §1508.25. Further, the connected action mandate “extends to non-
11 federal actions undertaken exclusively by private parties if the federal actions are so interrelated
12 as to constitute ‘links in the same bit of chain.’” *Alpine Lakes Protection Society v. U.S. Forest*
13 *Service*, 838 F.Supp. 478, 482 (W.D.Wash. 1993).

14 47. Here, BLM violated NEPA by failing to analyze *any* of the Project’s connected
15 actions. Among others, the Sunrise Powerlink Transmission Line Project and the Seeley
16 Wastewater Treatment Plant (“SWWTP”) Upgrade Project are connected actions that should have
17 been analyzed in the IV Solar EIS. As BLM admits in the FEIS, “Phase II of the [IV Solar]
18 project, and delivery of the additional renewable power generated by the total 750 MW [IV Solar]
19 project to the San Diego regional load center, would require the construction of the 500-kV
20 Sunrise Powerlink transmission line proposed by [San Diego Gas & Electric Company].” FEIS at
21 2-32. It is thus clear from the text of the EIS that the Project “cannot or will not proceed unless”
22 the Sunrise Powerlink Transmission Line is completed. 40 C.F.R. §1508.25. The Sunrise
23 Powerlink Transmission Line Project should have been analyzed in the IV Solar EIS as a
24 connected action.

25 48. Similarly, the Project is dependent on the SWWTP upgrades, which would provide
26 the only potential long-term source of water for the Project identified in the EIS. *See* FEIS at
27 4.17-9, B-15, E (entire appendix). The SWWTP upgrades are likewise contingent on the Project,
28 as they would be funded by the Project applicant and the Project would use about eighty percent

1 of the reclaimed water made available by the upgrades. *See* FEIS at 2-69 to 70. It is thus clear
2 from the text of the EIS that *neither* the Project *nor* the SWWTP upgrades will proceed without
3 the other. Therefore, BLM should have analyzed the SWWTP upgrades in the IV Solar EIS as a
4 connected action. BLM’s failure to analyze the SWWTP upgrades and the Sunrise Powerlink
5 Transmission Line Project defeats NEPA’s informational purposes.

6 **BLM Failed to Prepare a Programmatic EIS**

7 49. In addition to requiring analysis of connected actions in project-specific EISs,
8 such as the IV Solar EIS, NEPA requires agencies to prepare a programmatic EIS where the
9 agency is considering a group of related actions, including actions that are connected,
10 cumulative or similar. *Piedmont Environmental Council v. Federal Energy Regulatory*
11 *Commission*, 558 F.3d 304 (4th Cir. 2009) (citing 40 C.F.R. § 1508.25(a)(1)-(3)). Agencies
12 may not “unreasonably constrict[] the scope of . . . environmental evaluation” by segmenting
13 review of an overall program or group of related actions. *National Wildlife Federation v.*
14 *Appalachian Regional Commission*, 677 F.2d 883, 888 (D.C. Cir. 1981).

15 50. Here, the Project is one of the many proposed renewable energy projects in the
16 southern deserts of California that either require BLM approval or could not proceed without
17 BLM approval of a related facility. Other such projects include the Sunrise Powerlink
18 Transmission Line, the Ivanpah Solar Electric Generating System, the Tule Wind Project, the
19 Esmeralda-San Felipe Geothermal Project, the Genesis Solar Energy Project, the Chevron
20 Energy Solutions Lucerne Valley Solar Project, the Calico Solar Project, the Blythe Solar
21 Project, the Energia Sierra Juarez Generator Tie-Line, the ECO Substation Project, the Wind
22 Zero Project, the Campo Wind Project, the Manzanita Wind Project, the Jordan Wind Project,
23 and all the projects listed in the FEIS cumulative impacts section (FEIS at 2-59), among others.
24 These projects are interrelated in multiple ways. For one, as mentioned, all the projects are
25 located in whole or in part in the California desert and require some form of BLM approval.
26 Additionally, all the projects would connect to the high-voltage wholesale power grid managed
27 by the California Independent System Operator. Further, they are all intended to help
28 California – and the utilities therein – meet their Renewables Portfolio Standard. The projects

1 are also intended to help fulfill the Obama Administration’ s goal of harnessing renewable
2 energy resources. Indeed, most of the projects are reliant on federal funds made available for
3 renewable energy facilities by ARRA.

4 51. Before conducting project-specific NEPA reviews for each of these interrelated
5 renewable energy projects, like the IV Solar Project, BLM should have, and must now,
6 prepare a programmatic EIS to (1) study the impacts of widespread industrial-scale energy
7 developments in the southern California deserts and elsewhere in the Southwest, (2) provide
8 guidance on where, if anywhere, to locate the developments, and (3) analyze alternatives to
9 developing renewable energy facilities in sensitive desert ecosystems far from load centers,
10 including locally distributed generation such as roof-top solar arrays. Without such a
11 programmatic EIS, BLM has improperly segmented – and will continue to improperly segment
12 – its NEPA review of the unprecedented development of renewable energy facilities in the
13 deserts of southern California and the greater Southwest.

14 52. BLM, along with the Office of Energy Efficiency and Renewable Energy, is
15 currently developing a Solar Energy Development Programmatic EIS, but its zones of analysis
16 do not include the IV Solar Project site or many of the other sites in California for which
17 renewable energy developments have been or are likely to be proposed. Thus, while
18 commendable, the Solar Energy Development Programmatic EIS cannot satisfy NEPA with
19 respect to the IV Solar Project and many other similar projects in California.

20 **BLM Unlawfully Rejected Feasible Alternatives**

21 53. NEPA requires that an EIS “[r]igorously explore and objectively evaluate all
22 reasonable alternatives” in order to provide a choice that includes environmentally preferable
23 options “so that reviewers may evaluate their comparative merits.” 40 C.F.R. §1502.14. “The
24 existence of a viable but unexamined alternative renders an environmental impact statement
25 inadequate.” *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

26 54. Here, the EIS fails to analyze a reasonable range of alternatives. Without adequate
27 justification, the EIS eliminates from detailed analysis *all* alternatives not on BLM-managed
28 lands even though many of them – like all three alternative sites evaluated only under the

1 California Environmental Quality Act – “would have fewer environmental and engineering
2 constraints.” DEIS at B.2-1. BLM’s sole rationale for eliminating these alternatives is that
3 “alternatives that are not within BLM jurisdiction would not be considered reasonable.” *Id.* at
4 B.2-7. However, this justification conflicts with NEPA’s direction that agencies may not refuse
5 to analyze alternatives merely because they *may require approvals or participation by others.*
6 *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974). By failing to analyze the feasible
7 alternatives that are located on lands other than those it manages, BLM violated NEPA.

8 55. BLM also violated NEPA by eliminating from detailed consideration the feasible
9 distributed generation alternative identified in the EIS. BLM’s primary justification for
10 eliminating the distributed generation alternative was that it is unlikely 750 MW of
11 “distributed solar will be available within the timeframe required for the [Project].” DEIS at
12 B.2-5. This timeframe, however, is only relevant to the applicant’s desire to obtain federal
13 ARRA funds. The applicant’s strategy for avoiding federal taxes cannot trump BLM’s duty
14 to consider the distributed generation alternative. It “is the *BLM* purpose and need for action
15 that will dictate the range of alternatives.” BLM NEPA Handbook, H-1790-1, at 35 (2008)
16 (emphasis added).

17 **BLM Unlawfully Deferred the Formulation of Mitigation Measures**

18 56. Under NEPA, an agency “may not ‘act first and study later.’” *Western Land*
19 *Exchange Project v. United States Bureau of Land Management*, 315 F.Supp. 2d 1068, 1092 (D.
20 Nev. 2004) (quoting *National Parks & Conservation Association*, 241 F.3d at 734). NEPA
21 requires mitigation measures to be “reasonably complete,” containing “sufficient detail to ensure
22 that environmental consequences have been fairly evaluated.” *Robertson v. Methow Valley*
23 *Citizens Council*, 490 U.S. 332, 352 (1989). Furthermore, mitigation measures are inadequate
24 unless they contain “supporting analytical data.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1029.

25 57. Here, the IV Solar EIS repeatedly relies on yet-to-be developed mitigation measures
26 to mitigate the Project’s significant impacts. For example, cultural resource mitigation measures
27 are wholly absent. “Where feasible,” cultural “resources shall be protected from direct project
28 impacts by project redesign. Complete avoidance of impacts to such resources shall be the

1 preferred protection strategy.” FEIS at 4.5-24. If BLM decides that impacts are unavoidable,
2 further studies are required. *Id.* NEPA requires the public to be given the information to
3 determine for themselves whether cultural resource impacts are unavoidable rather than mitigable
4 and mandates that the public be given an opportunity to propose mitigation measures to reduce
5 impacts. By failing to include cultural resource mitigation measures in the EIS itself, BLM
6 violated NEPA.

7 58. Additional examples of unlawfully deferred mitigation measures include, among
8 others, the following:

9 • Project construction “*will* require a Storm Water Pollution Prevention Plan which
10 *would* specify BMPs to prevent all construction pollutants including erosion products from
11 contacting storm water.” FEIS at 4.17-12 (emphasis added); *see also* FEIS at 4.17-39.

12 • The Project’s Drainage, Erosion, and Sediment Control Plan (“DESCP”) requires
13 the applicant to develop best management practices (“BMPs”) “designed to control dust and
14 stabilize construction access and roads.” FEIS at 4.17-37. The public is unlawfully precluded
15 from assessing or commenting on the effectiveness of these best management practices by BLM’s
16 failure to identify them in the EIS.³

17 • The project applicant “*will develop* and implement a glare management plan” that
18 may involve the construction of additional enormous structures to mitigate impacts on visual
19 resources, and will contribute an unspecified amount of funds to be used in an unknown manner⁴
20 by the National Park Service to mitigate the Project’s impacts on the Juan Bautista De Anza
21 National Historic Trail. FEIS at 4.16-25 to 26 (emphasis added).

22 • The applicant “*shall . . . develop* and implement a construction traffic control plan
23

24 ³ The Plan “has been developed” but “the calculations and assumptions used to evaluate
25 potential . . . impacts are imprecise and have limitations and uncertainties associated with
26 them.” Thus, “the magnitude of potential impacts that could occur cannot be determined
27 precisely without additional detailed modeling of project effects,” which has not
28 occurred. DEIS at C.7-65.

⁴ The funds would be used pursuant to a Comprehensive Interpretive Plan that has not
been developed. FEIS at 4.12-8.

1 . . . to mitigate any potential adverse impacts” on traffic. FEIS at 4.15-24 to 25 (emphasis added).

2 • The Project’s Biological Resources Mitigation Implementation and Monitoring
3 Plan is undeveloped (FEIS at 4.3-60 to 63), as are other plans to mitigate impacts to birds,
4 badgers, kit foxes, burrowing owls, and special status plant species (FEIS at 4.3-81 to 84, 92 to
5 94).

6 **BLM Unlawfully Failed to Take a “Hard Look” at the Project’s Impacts**

7 59. NEPA requires federal agencies to take a “hard look” at the environmental impacts
8 of proposed major actions and “provide a full and fair discussion of significant environmental
9 impacts” for the public’s review. 40 C.F.R. § 1502.1. “[G]eneral statements about “possible”
10 effects and “some risk” do not constitute a “hard look” absent a justification regarding why more
11 definitive information could not be provided.” *Blue Mountains Biodiversity Project v.*
12 *Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (quoting *Neighbors of Cuddy Mountain v.*
13 *United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998)). BLM failed to discharge this
14 mandate in the following respects, among others:

15 **Impacts from the Selected Project**

16 60. Just as the EIS fails to describe the selected Project, the 709 MW alternative, it also
17 fails to adequately analyze its impacts. For example, the selected Project would impact seven
18 *more* main stem washes than the originally proposed Project, yet the FEIS makes no mention of
19 this, instead claiming wrongly that the “Agency Preferred Alternative would result in soil and
20 water impacts *similar* to those described [for the originally proposed Project].” FEIS at 4.17-26
21 (emphasis added).

22 61. Another example of impacts caused by the selected Project that the EIS fails to
23 analyze are those that would result from the removal of numerous east-west roads and all
24 stabilized spur access roads that were included in the originally proposed Project. Without these
25 roads, maintenance workers would presumably have to access many of the SunCatcher units by
26 *off-road* driving. This would not only change the location of numerous environmental impacts, it
27 would likely increase some of the negative effects. For instance, the off-road driving would
28 likely increase erosion and sediment transport into nearby washes, as well as exacerbate public

1 health risks by increasing the amount of dust – and thus particulate matter and the Valley Fever-
2 inducing *coccidioides immitis* fungus – in the air. All of these and other impacts unique to the
3 selected Project should have been analyzed in the EIS. BLM violated NEPA by failing to do so.

4 Water Supply Uncertainty and Impacts

5 62. Water supply has long been a pivotal issue in California and elsewhere in the arid
6 southwestern United States. Given water’s scarcity in these areas – and particularly in the deserts
7 – it is imperative that water be used efficiently and that proponents of new land use projects
8 procure a reliable long-term water supply before breaking ground. Nonetheless, as of the date the
9 ROD was published, neither BLM nor the Project applicant had identified – let alone analyzed –
10 an adequate and reliable water supply for either the construction or operational phases of the
11 Project.

12 63. First, with respect to Project construction, the EIS indicates that more – and
13 potentially *much* more – than 51 acre-feet per year (“AFY”) would be required throughout the 39-
14 month construction process. *See* FEIS at 4.17-11. However, the only potential water supply
15 identified for the first three years of the construction period is the Dan Boyer Water Company
16 well (State Well No. 16S/9E-36G4) (“Boyer Well”), which has a pumping cap of 40 AFY
17 imposed by Imperial County. Further, Dan Boyer Water Company’s current customers are
18 already pumping 6 AFY from the well, leaving only 34 AFY available – at least 17 AFY less than
19 the Project would need. Moreover, Dan Boyer Water Company’s “Will Serve Letter” to the
20 Project applicant only discusses providing water to the Project for a *six-to-eleven month* period,
21 far less time than the *three years* during which the Project would have no other water source
22 besides the Boyer Well. For these and other reasons, the Project does not have – and the EIS
23 does not analyze – an adequate or reliable water supply for construction.

24 64. Second, with respect to Project operation, the EIS indicates that more than 32.7
25 AFY would be required throughout the Project’s expected 40-year life. FEIS at 4.17-24. Yet the
26 EIS again fails to explain how that water demand would be met. As discussed, there is no
27 guarantee that the Boyer Well would serve the Project beyond the six-to-eleven month period
28 described in the will serve letter. Further, CEC’s condition of certification Soil & Water-2, which

1 BLM adopted as a condition for its approval as well, expressly prohibits the Project from relying
2 on groundwater for more than three years unless the owner seeks a Project Amendment. The only
3 other source potentially available to the Project in the long term is the Seeley Wastewater
4 Treatment Plant (“SWWTP”). However, before the SWWTP can supply any water to the Project
5 it must be substantially upgraded and a 12-mile pipeline from the facility to the Imperial Valley
6 Solar water treatment plant must be built. The SWWTP upgrades are still undergoing
7 environmental review and there is no guarantee they will ever be completed. For these and other
8 reasons, the Project does not have – and the EIS does not analyze – an adequate or reliable water
9 supply for operation.

10 65. The EIS’s failure to identify an adequate and reliable water supply for the Project
11 precluded the required analysis of the Project’s impacts on water resources and public health.
12 BLM therefore violated NEPA’s mandate that it take a “hard look” at the Project’s impacts.

13 **Impacts of Pumping from the Ocotillo-Coyote Wells Sole Source Aquifer**

14 66. The Boyer Well – the one short-term water source identified in the EIS – draws
15 from the Ocotillo-Coyote Wells Sole Source Aquifer. The Sole Source Aquifer designation,
16 made by the Administrator of the federal Environmental Protection Agency, means that the
17 “aquifer is the sole or principal drinking water source for the area and . . . , if contaminated, would
18 create a significant hazard to public health.” 42 U.S.C. § 300h-3(e); *see also* 61 Fed.Reg. 47752-
19 53. Compounding this already high risk of public health impacts is the fact that the groundwater
20 basin is in overdraft. *See* CEC Supplemental Staff Assessment for the Imperial Valley Solar
21 Project (“SSA”) at C.7-53. Yet despite the fragility and importance of the Ocotillo-Coyote Wells
22 Sole Source Aquifer, the EIS fails to take a hard look at the major impacts the Project would have
23 on it.

24 67. First, the Project would have significant hydrologic and public health impacts by
25 exacerbating overdraft in the aquifer and drawing down the water level in nearby private wells.
26 The FEIS summarily dismisses these impacts “because the [Boyer Well] is already permitted for
27 the groundwater use and the water would be used on an interim basis.” FEIS at 4.17-34. That
28 statement misses the point. While the Dan Boyer Water Company is permitted to pump 40 AFY

1 from its well, only 16.8 AFY on average has been pumped. SSA at C.7-53. Thus, the Project
2 would cause *at least* 23.2 additional AFY to be pumped from the aquifer – and likely more, as the
3 Project eventually takes over existing Boyer Well users’ allocations and they are forced to seek
4 other wells to pump. According to CEC, this would increase depletion of the aquifer by 18 acre-
5 feet per year, with an accompanying decline in the water table of six feet. *Id.*

6 68. The impacts on nearby private wells and aquifer overdraft would be even
7 greater if the Project were to use the Boyer Well for more than three years, a possibility that the
8 EIS does not analyze despite the fact that the only identified long-term water source – the
9 SWWTP upgrades – may never be completed and able to meet the Project’s operational water
10 needs, as discussed. When combined with the current 0.21 feet per year decline in groundwater
11 level in the aquifer, and the fact that at least two of the ten private wells closest to the Boyer Well
12 have only five feet of water above their well screens, pumping 40 AFY from the Boyer well for
13 the 40-year life of the Project would have a significant impact on the aquifer and the area’s water
14 users whose sole water supply is the aquifer. Such extended pumping could also permanently
15 deplete the aquifer by 1,600 acre-feet, substantially exacerbating overdraft. Further, this does not
16 even take into account the cumulative impacts caused by the groundwater pumping of other
17 current and reasonably foreseeable future projects overlying the aquifer, such as the Wind Zero
18 project. The EIS lacks *any* analysis of these cumulative and foreseeable impacts and therefore
19 violates NEPA.

20 69. Second, the EIS ignores the fact that the Project’s use of the Boyer Well would
21 increase concentrations of total dissolved solids in the Ocotillo-Coyote Wells Sole Source
22 Aquifer, potentially by as much as 4.5 percent. It is undisputed that pumping in the Holocene
23 alluvium portion of the aquifer causes upflux of lower-quality water from the underlying Palm
24 Springs and Imperial formations. Yet the EIS *entirely omits* an examination of the groundwater
25 contamination caused by pumping from the Boyer Well. This omission is inexcusable, especially
26 given that the Ocotillo-Coyote Wells Aquifer is a *sole source* aquifer – the *only* water source for
27 many people in the area. By failing to analyze these impacts, BLM violated NEPA.

28 ///

1 **Impacts on Cultural Resources**

2 70. The EIS' lack of information on and analysis of cultural resources is astounding.
3 No comprehensive cultural resource inventory was conducted prior to the FEIS and BLM's
4 approval of Project . As BLM admits, "testing has not been completed" and no subsurface
5 studies had been done. FEIS at 4.5-8. Furthermore, BLM admits that no "evaluat[ion of] the
6 significance of all potentially affected cultural resources" has occurred. FEIS at 4.5-23. Instead
7 of providing this essential evaluation, BLM impermissibly defers this task by requesting that the
8 applicant "provide sufficient technical data to enable" this evaluation to be made. *Id.* CEC
9 concedes the utter inadequacy of BLM's cultural resource review prior to Project approval:

10 Given the American Recovery and Reinvestment Act (ARRA) deadlines, [CEC and
11 BLM] staff have not had time to provide a detailed evaluation of each resource
12 potentially eligible for historic register nomination. . . . *There likely are
undiscovered resources on the site and they will be permanently changed and/or
destroyed during construction.*

13 PMPD at VI.C-3 (emphasis added). BLM must comply with NEPA regardless of whether it is
14 convenient for the agency and project applicant. The Project applicant's desire to pursue federal
15 ARRA funds is not an excuse to eviscerate NEPA's mandate that BLM take a pre-approval "hard
16 look" at the Project's cultural resource impacts.

17 **Impacts on Biological Resources**

18 ***Impacts on Peninsular Bighorn Sheep***

19 71. The FEIS claims that the Project is not likely to adversely affect the Peninsular
20 bighorn sheep because, while they have been observed in the Project vicinity, their use of the
21 Project area is "transitory" and "incidental." FEIS at 4.3-22. But "transitory use" is a vital
22 migratory component of the Peninsular bighorn sheep's habitat. As the expert testimony of Dr.
23 Vernon Bleich explains, "the presence of PB[]S moving through the Project site strongly suggests
24 that the site functions as a movement corridor." Exhibit 3 to Comment Letter of BAD, *et al.*, on
25 FEIS, at 1. The FEIS unlawfully fails to analyze or mitigate the Project's impacts on seasonal
26 and long-distance movements by Peninsular bighorn sheep. *Id.* at 1-6.

27 72. For similar reasons, the FEIS also fails to analyze or mitigate the Project's impacts
28 on the essential connectivity between Peninsular bighorn sheep habitats. *Id.* at 6-8.

1 ***Impacts on the Flat-Tailed Horned Lizard***

2 73. Notwithstanding its acknowledgment that the “[P]roject is likely to adversely
3 affect” the flat-tailed horned lizard, the EIS overlooks a number of significant Project impacts on
4 this imperiled species.

5 74. The FEIS relies upon a Raven Management Plan to “reduce the severity of [e]ffects
6 on the [flat-tailed horned lizard].” Yet the Raven Management Plan cannot accomplish this aim
7 because it (1) ignores the effects of *non-raven* predation on flat-tailed horned lizards; (2)
8 proposes inadequate monitoring methods; (3) contains a success criterion that is scientifically
9 indeterminable; and (4) overlooks the necessity of adaptive management for ravens, a highly
10 adaptable predator. *See* Exhibit 2 to Comment Letter of BAD, *et al.*, on FEIS.

11 75. If flat-tailed horned lizards are encountered on the Project site, they will be
12 “move[d] . . . out of harm’s way.” FEIS at 4.3-27. This strategy of translocation is unproven and
13 virtually guaranteed to result in the death of these rare creatures, as experts have testified.

14 76. The EIS fails to adequately analyze or mitigate impacts on flat-tailed horned lizard
15 habitat connectivity; the Project would cause considerable fragmentation of the remaining habitat
16 of this species.

17 ***Impacts on Phreatophytic Vegetation***

18 77. The FEIS ignores the Project’s impacts on phreatophytic vegetation (vegetation
19 whose roots reach the groundwater table). As discussed, the Project would lower the
20 groundwater table in the Project vicinity, potentially killing its phreatophytic vegetation. NEPA
21 requires such impacts to be acknowledged, analyzed and, where possible, avoided or mitigated.

22 **Impacts on Visual Resources**

23 78. The EIS fails to adequately describe the Project’s aesthetic impacts on certain
24 offsite areas including but not limited to the Jacumba Wilderness, Coyote Mountain Wilderness,
25 Painted Gorge, and Yuha Basin. “Fast-track time constraints” prevented the creation of visual
26 simulations, so the magnitude of impacts are unknown beyond that they would be sizeable. *See*
27 DEIS at C.13-10, C.13-18; *see also* FEIS at 4.16-9 (“simulations were not prepared for these
28 viewpoints”). NEPA requires more. This Project would devastate the visual landscape.

1 **Growth-Inducing Impacts**

2 79. The Project would likely bring additional workers and/or residents into the remote
3 Project area for the Project’s construction and/or operation. DEIS at C.10-8; FEIS at 4.13-3. But
4 the EIS concludes that any potential increase in population would be beneficial, for example due
5 to higher local tax revenues. The EIS fails to acknowledge the reasonably foreseeable
6 environmental impacts that may result from this increase in population, including increased
7 development, traffic, noise and groundwater use, loss of habitat and other open space, and
8 increased demand for public services.⁵

9 **BLM Failed to Adequately Respond to Public Comments**

10 80. “NEPA’s public comment procedures are at the heart of the NEPA review
11 process.” *Block*, 690 F.2d at 770. “Agencies are . . . obligated to provide a ‘meaningful
12 reference’ to all responsible opposing viewpoints concerning the agency’s proposed decision.
13 40 C.F.R. § 1510(a). . . Moreover, ‘there must be good faith, reasoned analysis in
14 response.’ ” *Id.* at 773 (internal brackets and citation omitted).

15 81. The IV Solar EIS fails to provide “reasoned analysis in response” to a number of
16 comments submitted about the Project. For example, the FEIS did not include responses to
17 substantial portions of plaintiffs’ DEIS comments, including their comments on mitigation
18 measures for impacts to special status plant species and numerous other topics. *See* Comment
19 Letter of BAD, *et al.*, on DEIS, at 1. Therefore BLM’s approval of the EIS, and Project, was
20 unlawful and must be set aside.

21 **BLM Must Prepare a Supplemental EIS**

22 82. NEPA requires agencies to “prepare supplements to . . . environmental impact
23 statements” where “substantial changes” are made to the Project or “significant new
24 circumstances or information” were added to the environmental document. 40 C.F.R. §

26
27 ⁵ For example, “local schools are currently at capacity” and the local district “expects
28 additions to enrollment based on projected growth rates and development.” FEIS at 4.13-
7. Yet the FEIS falsely asserts that “therefore, operation of the . . . [P]roject would not
require construction of new or physically altered school facilities.” *Id.*

1 1502.9(c)(1).

2 83. Contrary to this command, BLM made many “substantial changes” to the Project
3 in the FEIS and afterwards, yet failed to adequately describe those changes or analyze their
4 impacts in any NEPA document. For example, as discussed, BLM selected an entirely new
5 alternative in the FEIS, but failed to describe many of its substantial differences from the
6 originally proposed Project and how the selected Project’s impacts would be different. To
7 properly describe and analyze this and other changes, BLM must prepare a supplemental EIS.

8 **Allegation Regarding Preliminary and Permanent Injunctive Relief**

9 84. The threatened construction and operation of the Project, enabled by defendants’
10 approvals, would cause irreparable harm to the environment, to plaintiffs, and to the public, in
11 the respects alleged hereinabove. Therefore, this Court should issue preliminary and
12 permanent injunctive relief staying and setting aside defendants’ approvals of the Project.

13 **SECOND CLAIM FOR RELIEF**

14 (Violation of the Federal Land Policy Management Act)

15 (Against All Defendants)

16 85. The paragraphs set forth above are hereby realleged and incorporated herein by
17 reference.

18 86. The BLM Defendants’ approval of the Project violated FLPMA, 43 U.S.C.
19 section 1701 *et seq.*, in the respects alleged below. Defendants’ approval of the Project without
20 complying with FLPMA constitutes a failure to proceed in accordance with law in violation of
21 the APA, 5 U.S.C. section 706(2)(A) and (D).

22 87. FLPMA mandates that the “Secretary shall manage the public lands under
23 principles of multiple use and sustained yield, *in accordance with the land use plans . . .*
24 *developed under [43 U.S.C. section] 1712 . . . when they are available,*” with an exception not
25 relevant here. 43 U.S.C. § 1732(a) (emphasis added). BLM violated this command. The
26 governing land use plan here is the California Desert Conservation Area Plan as amended.
27 The Project is a high-intensity, single use of resources that would displace all other uses and
28 destroy nearly ten square miles of pristine desert habitat in the California Desert Conservation

1 Area, among other impacts. It is plainly inconsistent with the California Desert Conservation
2 Area Plan.

3 88. The California Desert Conservation Area Plan as amended provides for four
4 distinct multiple use classes (“MUC”) based on the sensitivity of resources in each area. The
5 proposed Project site is in MUC Class L. Multiple-Use Class L (Limited Use) “protects
6 sensitive, natural, scenic, ecological, and cultural resources values. Public lands designated as
7 Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of
8 resources, while ensuring that sensitive values are not significantly diminished.” CDCA Plan at
9 13. Here, the Project is *high*, not low, intensity. Its operation would significantly diminish an
10 extraordinary number of sensitive natural resources, as detailed above. Therefore, the Project
11 conflicts with the California Desert Conservation Area Plan.

12 89. FLPMA also requires the Secretary to “prepare and maintain on a continuing
13 basis an inventory of all public lands and their resource and other values . . . , giving priority
14 to areas of critical environmental concern.” 43 U.S.C. § 1711(a). Here, no such inventory
15 exists: BLM does not even know, for example, what cultural and paleontological resources the
16 Project site contains, as “testing has not been completed” and no subsurface studies have been
17 done. FEIS at 4.5-8; *see also id.* at 4.5-23.

18 90. Hand-in-hand with FLPMA’s resource inventory requirement is its mandate that
19 “[i]n managing the public lands the Secretary shall . . . take any action necessary to prevent
20 unnecessary or undue degradation of the lands.” *Id.* § 1732(b). Because the Secretary
21 approved the Project in the absence of an adequate inventory of environmental resources, it
22 failed to ascertain whether the Project would unduly or unnecessarily degrade public lands, and
23 therefore could not guard against such unnecessary or undue degradation, as required. BLM
24 accordingly violated FLPMA.

25 **THIRD CLAIM FOR RELIEF**

26 (Violation of the National Historic Preservation Act)

27 (Against All Defendants)

28 91. The paragraphs set forth above are hereby realleged and incorporated herein by

1 reference.

2 92. Defendants' actions in approving the Project and adopting the Programmatic
3 Agreement (" PA") constitute violations of the National Historic Preservation Act (" NHPA"),
4 16 U.S.C. section 470 *et seq.*, and its implementing regulations, 36 C.F.R. section 800 *et seq.*,
5 in the respects alleged below. Defendants' approval of the Project without complying with
6 NHPA constitutes a failure to proceed in accordance with law in violation of the APA, 5
7 U.S.C. section 706(2)(A) and (D).

8 **BLM Failed to Complete Its Section 106 Duties Prior to Approving the Project**

9 93. NHPA section 106 mandates that agencies " shall, prior to approval of the
10 expenditure of any Federal funds on the undertaking or prior to the issuance of the license, as
11 the case may be, take into account the effect of the undertaking on any district, site, building,
12 structure or object that is included in or eligible for inclusion in the National Register." 16
13 U.S.C. § 470f. This duty includes (1) identifying historic properties within the area of
14 potential effects, (2) determining the significance of the project' s effects on those properties,
15 and (3) resolving the adverse impacts through the use of mitigation measures. Under certain
16 circumstances, not present here, agencies may defer completion of their section 106 duties by
17 preparing a programmatic agreement prior to project approval. 36 C.F.R. § 800.14(b)(1).

18 94. Instead of completing its section 106 duties prior to approving the Project, BLM
19 decided to prepare a PA. Thus, at the time BLM issued its ROD, it had not yet identified the
20 properties on or eligible for listing on the National Register of Historic Places, evaluated the
21 Project' s impacts on those properties or developed concrete mitigation measures. By
22 deferring completion of its section 106 duties, BLM violated NHPA.

23 95. The only reasons given by BLM for preparing a PA are that the Project is
24 " complex" and that " effects on historic properties . . . [could] not be fully determined prior to
25 approval of the undertaking." FEIS at lxiv. However, BLM provides no evidence or
26 explanation as to why the section 106 process could not be fully completed prior to execution
27 of the ROD. Nor could it. Meeting a deadline for the Project applicant to obtain federal
28 financing is not a valid reason to rush through or defer NHPA review

1 96. Further, none of the other circumstances under which agencies are allowed to
2 prepare programmatic agreements are present here. 36 C.F.R. § 800.14(b)(1).

3 **The PA Fails to Adequately Provide for Public Review and Comment**

4 97. At all three stages of the section 106 process – identifying historic properties,
5 evaluating how the undertaking would impact them, and developing mitigation measures –
6 agencies must “ seek and consider the views of the public.” 36 C.F.R. § 800.2(d); *see also* 36
7 C.F.R. §§ 800.3(e), 800.6(a)(4).

8 98. Even if BLM were allowed to defer completion of its section 106 duties by
9 preparing a programmatic agreement, the agency would still have violated NHPA because its PA
10 is inadequate. The PA fails to provide for *any* general public review of and comment on BLM’s
11 evaluation of the Project’s effects on cultural resources or its development of mitigation measures
12 to address those impacts. This violates NHPA. *See* 36 C.F.R. § 800.2(d)(2).

13 **PRAYER FOR RELIEF**

14 1. WHEREFORE, plaintiffs respectfully request that the Court:

15 2. Adjudge and declare that the defendants’ October 5, 2010 approvals of a right-
16 of-way and route closure, and a California Desert Conservation Area Plan amendment, violate
17 the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, the Federal Land Policy
18 Management Act, 43 U.S.C. § 1716, the National Historic Preservation Act, 16 U.S.C. § 470
19 *et seq.*, their implementing regulations, and the Administrative Procedure Act, 5 U.S.C. § 701
20 *et seq.*;

21 3. Order the BLM Defendants to withdraw their EIS for the Project until such time
22 as the BLM Defendants have complied with the requirements of the National Environmental
23 Policy Act, the Federal Lands Policy Management Act, the National Historic Preservation Act,
24 and their implementing regulations;

25 4. Preliminarily and permanently enjoin all defendants from initiating any activities
26 in furtherance of the Project that could result in any change or alteration of the physical
27 environment unless and until defendants comply with the requirements of NEPA, FLPMA,
28 NHPA, and their implementing regulations;

