

***Land Use Planning  
Protest Resolution Report***

for the

**Crimson Solar Project Final  
Environmental Impact  
Statement and Proposed  
Land Use Plan Amendment to  
the California Desert  
Conservation Area Plan**

April 30, 2021

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## *Acronyms and Abbreviations*

<b>Term</b>	<b>Definition</b>
ACEC	Area of Critical Environmental Concern
APE	Area of Potential Effect
ARPA	Archaeological Resources Protection Act
BLM	Bureau of Land Management
CDCA	California Desert Conservation Area
CDFW	California Department of Fish and Wildlife
CEQ	Council on Environmental Quality
CEQA	California Environmental Quality Act
CESA	California Endangered Species Act
CFR	Code of Federal Regulations
CMAAs	Conservation Management Actions
Crimson Solar FEIS/Proposed CDCAPA	Crimson Solar Project Final Environmental Impact Statement and Proposed Land Use Plan Amendment to the California Desert Conservation Area Plan
CRIT	Colorado River Indian Tribes
DEIS	Draft Environmental Impact Statement
DRECP	Desert Renewable Energy Conservation Plan
EIS	Environmental Impact Statement
EO	Executive Order
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
HPTP	Historic Properties Treatment Plan
KOP	Key Observation Point
MDP	Monitoring and Discovery Plan
MOA	Memorandum of Agreement
MUC	Multiple-Use Class
NAGPRA	Native American Graves Protection and Repatriation Act
NECO Plan	Northern and Eastern Colorado Desert Coordinated Management Plan
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NRHP	National Register of Historic Places
PV	Photovoltaic
RFRA	Religious Freedom and Restoration Act
ROD	Record of Decision
ROW	Right-of-Way
SEZ	Solar Energy Zone
SHPO	State Historic Preservation Office
USC	United States Code
USFWS	U.S. Fish and Wildlife Service
VRI	Visual Resource Inventory
VRM	Visual Resource Management

## ***Introduction***

The Bureau of Land Management (BLM) California State Office released the Crimson Solar Project Final Environmental Impact Statement and Proposed Land Use Plan Amendment to the California Desert Conservation Area Plan (Crimson Solar FEIS/Proposed CDCAPA) for public protest on February 12, 2021. The BLM received three protest letters during the 30-day protest period.

The planning regulations at 43 Code of Federal Regulations (CFR) 1610.5-2 outline the requirements for filing a valid protest. The BLM evaluated all protest letters to determine which protest letters were complete and timely, and which persons held standing to protest. Of the three letters received, all met these criteria. One letter had comments only, and two letters had valid protest issues and comments. The BLM documented the responses to the valid protest issues raised in the letters in the protest resolution report. The decision for each protest, regarding its validity and its approval or denial, was recorded in writing along with the reasons for the decision.

As described in Section 1.2.1, the Crimson Solar FEIS supports both a planning decision to amend the CDCA Plan to identify the Crimson Solar Project site as suitable for solar energy generation and allow for construction of a high-voltage transmission line outside of a designated utility corridor and an implementation level decision to approve, approve with modifications, or deny issuance of a ROW grant to the Applicant. The proposed amendment to the CDCA Plan is a planning decision that does not approve or compel the issuance of, the ROW grant. The decision to issue the ROW grant is a separate implementation-level decision. Therefore, any land use plan protest submissions related only to the implementation decision, including project-level mitigation requirements raised here, are not subject to protest under BLM planning regulations. The BLM, however, has elected to respond to certain incoming comments below in order to provide additional information and clarification.

After careful review of the report by the Secretary and her staff, the Secretary concluded that the BLM California State Director followed the applicable laws, regulations, and policies and considered all relevant resource information and public input. The Secretary will issue this Protest Resolution Report to protesting parties and posted the report on the BLM's website; no changes to the Proposed California Desert Conservation Area Plan Amendment were necessary. The decision was sent to the protesting party by certified mail, return receipt requested. The decision of the Secretary is the final decision of the Department of the Interior.

The report is divided into sections each with a topic heading, excerpts from individual protest letters, a summary statement of the issues or concerns raised by the protesting parties, and the BLM's response to the protest issue summary statement.

## ***Protesting Party Index***

<b>Letter ID</b>	<b>Protesting Party</b>	<b>Organization</b>	<b>Determination</b>
PP-CA-CrimsonSolar-21-001*	Kevin Emmerich, Co-Founder	Basin & Range Watch	Dismissed – Comments only
PP-CA-CrimsonSolar-21-002	Sara A. Clark, Attorney	Shute, Mihaly & Weinberger LLP, representative for the Colorado River Indian Tribes	Denied – Issues and comments
PP-CA-CrimsonSolar-21-003†	Lisa T. Belenky, Senior Attorney	Center for Biological Diversity	Denied – Issues and comments

\* Letter PP-CA-CrimsonSolar-21-001 had multiple signatories. The second signatory to the letter is Laura Cunningham, California Director, Western Watersheds Project.

† Letter PP-CA-CrimsonSolar-21-003 had multiple signatories. The second signatory to the letter is Geary Hund, Executive Director, Mojave Desert Land Trust.

## ***Failure to Comply with the Western Solar Plan and Desert Renewable Energy Conservation Plan***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-40):** The FEIS maintains the claim that the Project qualifies as a "pending" application that is not subject to either the Western Solar Plan or the Desert Renewable Energy Conservation Plan (DRECP). FEIS at 1-4 to -5. BLM argues that the Project is exempt from Western Solar Plan and DRECP given that "the initial application for this Project was filed before June 30, 2009" and "the site is located within a Solar Energy Zone." FEIS at ES-1. CRIT pushed back on this position, pointing out that the original ROW grant application had undergone significant changes since 2009. FEIS, Appx. V at XX. These modifications included changes to the type of technology proposed, the size of the project, and the energy output. Id. As CRIT explained, "the DEIS evaluates a substantially different Project than the one originally proposed in 2009 [and a]s such, it should be evaluated under the Western Solar Plan and the DRECP." Id. In response, BLM made no mention of the evolution of the ROW and Plan of Development. Indeed, the agency largely sidestepped the Tribes' comment altogether, arguing that the DRECP process "inherently informed" BLM's decision-making for projects as discussed in Appendix F. FEIS, Appx. W, Response to Comment 11-35. But "informing" decision-making is not the same as actually complying with the DRECP's requirements. Consequently, this response is inadequate under NEPA. BLM should revise its analysis to fully address CRIT's comments and the modifications to the Project application over the years.

### **Summary:**

The BLM failed to adequately respond to the Tribe's comments on the Draft Resource Management Plan Amendment/Draft Environmental Impact Statement (DRMPA/DEIS) regarding failure to analyze the Project's modifications since the initial 2009 application and comply with requirements under the Western Solar Plan and DRECP.

### **Response:**

Regarding the BLM's failure to respond to comments, see the response at the end of the report titled "Failure to Adequately Respond to Public Comments."

Section 202 (c)(9) of Federal Land Policy and Management Act (FLPMA) requires that "land use plans of the Secretary under this section shall be consistent with state and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act." However, the BLM land use plans may be inconsistent with state, local, and Tribal plans where it is necessary to meet the purposes, policies, and programs associated with implementing FLPMA and other Federal laws and regulations applicable to public lands (43 CFR. 1610.3-2(a)).

The Western Solar Plan, adopted through the October 2012 Record of Decision (ROD) (BLM 2012b), included amendments to 89 BLM land use plans, including the CDCA Plan, to support solar energy development on public lands and to minimize potential environmental, cultural, and socioeconomic impacts. As part of the Western Solar Plan, the BLM explicitly exempted pending applications for utility-scale solar energy development on BLM-administered lands from the ROD and the associated land use plan amendments. Specifically, it defined "pending" applications within proposed Solar Energy Zones (SEZs) as those that were filed prior to June 30, 2009 and determined that those applications would not be subject to any decisions adopted by the ROD for the Western Solar Plan (Appendix B.1.2). Rather, the BLM would process pending solar applications consistent

with existing land use plan decisions in place prior to amendment by the Western Solar Plan and take into consideration existing policies and procedures at that time (Appendix B.1.2). Further, amendments to pending applications are similarly exempted, provided that such amendments “either (1) do not change the boundaries of the pending ROW applications; or (2) are related to avoiding resource or land use conflicts, adapting the project to third-party-owned infrastructure constraints, or using or designating translocation or mitigation lands.”

As further detailed in section 1.3.3 of the Final Environmental Impact Statement (FEIS), the Project site is located within the identified Riverside East SEZ. The Western Solar Plan recognizes the Project as a “pending” right-of-way (ROW) application, and such applications are not subject to the land use planning decisions in the Western Solar Plan (Western Solar Plan ROD Section B.1.2) or to the CDCA Plan amendments made in that decision. If the BLM elects to approve the ROW grant application for the Project, a Project-specific plan amendment would be required to permit the development specifically at the proposed site. Therefore, the BLM complied with all applicable requirements under the Western Solar Plan in the development of the FEIS. Subsequently, the DRECP, which amends CDCA Plan, carried forward decisions in the Western Solar Plan related to SEZs, with some minor adjustments, including the exemption for projects pending prior to June 30, 2009 (DRECP Record of Decision, page 26). The application for the Crimson Solar Project was originally submitted to the BLM on May 12, 2009 on lands that would subsequently be designated as the Riverside East SEZ. While the boundaries of the Project have changed since the application was first filed, those modifications were related to avoiding and minimizing resource conflicts (Crimson Solar FEIS/Proposed CDCAPA, page 1-2). Therefore, because the application was filed before June 30, 2009 and the changes in the boundary fall within one of the exemptions in Appendix B of the Western Solar Plan, the application is not subject to the terms of the DRECP or the Western Solar Plan.. The Crimson Solar FEIS/Proposed CDCAPA has been appropriately processed consistent with the existing land use plan decisions in place prior to amendment by the Western Solar Plan—in this case the CDCA Plan, and on the BLM’s renewable energy siting, data collection, and impact analysis requirements that were in place prior to the adoption of the DRECP. Therefore, all applicable requirements under the Western Solar Plan and the DRECP were met.

The Project site is currently classified as Multiple-Use Class (MUC) Moderate (M) in the CDCA Plan. The BLM determined that a CDCA Plan amendment would be required in order to process an application for a ROW for the Project to address the proposed development footprint as suitable for the proposed type of solar energy use and to authorize the proposed gen-tie corridor. Appendix F of the FEIS, Relationship with the DRECP, provides further detail of the data, land use allocations, and management actions taken. Additionally, the BLM completed the process for the Crimson Solar FEIS/Proposed CDCAPA process in compliance with FLPMA, the National Environmental Policy Act (NEPA), and all other relevant Federal laws, executive orders, and BLM management policies.

The BLM complied with all applicable requirements under FLPMA, the Western Solar Plan, DRECP, all other relevant laws and policies, and adequately responded to public comments of the Crimson Solar FEIS/Proposed CDCAPA. Accordingly, this protest is denied.

## ***Executive Order 12898 Violation***

### ***Colorado River Indian Tribes***

#### ***Sara A. Clark***

**Issue Excerpt Text (2-31):** In response to comments, BLM seems to neglect that an environmental justice analysis is required under NEPA. FEIS at Appx. W, Response to Comment 11-28. NEPA requires BLM to consider, to the extent practicable, whether there is or will be an impact on the natural or physical environment that significantly and adversely affects Native American Tribes.



Specifically, BLM must consider whether significant environmental effects may have an adverse impact on Native American Tribes that appreciably exceeds impacts on people in the general population. See, e.g., Presidential Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994); U.S. Interior Department Environmental Justice Strategic Plan.<sup>4</sup> These analyses are required for an adequate consideration of environmental justice impacts.

**Summary:**

The BLM violated NEPA and Executive Order 12898 by failing to adequately analyze environmental impacts that may disproportionately affect Native American tribes over the general population, and the BLM failed to respond to comments on the DEIS.

**Response:**

Regarding the BLM's failure to respond to comments, see the response at the end of the report titled "Failure to Adequately Respond to Public Comments."

NEPA directs that data and analyses in an EIS must 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 1500.1(b)). The BLM is required to take a "hard look" at potential environmental impacts of the Crimson Solar FEIS/Proposed CDCAPA.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action. A land use planning-level decision is broad in scope. For this reason, analysis of the land use plan amendment alternatives is typically broad and qualitative rather than quantitative or focused on site-specific actions.

The BLM is responsible for implementing the provisions of Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. Accordingly, the BLM must analyze whether the alternatives would adversely and disproportionately affect minority populations, low-income communities, and tribes and consider the aggregate, cumulative, and synergistic effects of its actions along with the actions taken by other parties. While environmental justice analysis is specifically concerned with disproportionate effects on environmental justice communities, the social and economic analysis produced in accordance with NEPA considers all potential social and economic effects, positive and negative, on any distinct group (BLM Land Use Planning Handbook, Appendix D, page D-11).

The BLM identified the Colorado River Indian Reservation as an environmental justice community in Section 3.13-2 (page 3.13-3) of the Crimson Solar FEIS/Proposed CDCAPA. The BLM addressed the requirements of NEPA and Executive Order 12898 in Section 3.13, Socioeconomics, Environmental Justice, Population and Housing. The environmental justice discussion in Section 3.13 draws conclusions as to whether minority, low-income, and/or tribal peoples have a disproportionate share of the negative environmental consequences resulting from the Project and/or plan amendments. As part of the environmental justice analysis in Section 3.13, the BLM reviewed the findings and analysis contained in the Air Resources, Biological Resources, Geology and Soils, Cultural Resources, Hazards and Hazardous Materials, Noise and Vibration, Recreation, Socioeconomics, Transportation, Visual Resources, Water Resources, and Wildland Fire sections of the FEIS to determine whether there were disproportionate impacts to minority, low-income, and/or

tribal peoples as a result of the Project. The environmental justice analysis considered potential impacts and mitigation measures and whether a disproportionately high and adverse impact would result for the area that includes the Colorado River Indian Reservation. The BLM determined that the action alternatives were expected to cause disproportionately high or adverse impacts on minority and/or low-income populations, inclusive of tribal peoples and the Colorado River Indian Reservation (Crimson Solar FEIS/Proposed CDCAPA, page 3.13-7). The BLM complied with EO 12898 requirement to analyze the environmental justice impacts in the Crimson Solar FEIS/Proposed CDCAPA. Accordingly, this protest is denied.

## ***FLPMA – Unnecessary or Undue Degradation***

### ***Center for Biological Diversity***

***Lisa T. Belenky***

**Issue Excerpt Text (3-4):** The proposed plan amendment is not consistent with FLPMA which requires BLM to prevent unnecessary or undue degradation of public lands. 43 U.S.C § 1732(b). The BLM has failed to show that it is necessary to approve the proposed large-scale solar industrial project on this site and that there are no other suitable alternative sites within the CDCA that would have less impacts to resources or that distributed solar and storage projects would not provide the needed renewable energy without impacts to habitats.

#### **Summary:**

The BLM is in violation of FLPMA because the amendment does not analyze other suitable alternative sites within the CDCA to prevent unnecessary or undue degradation of the public lands.

#### **Response:**

Section 102(a)(7) of FLPMA declares that it is the policy of the United States that management of the public lands be on the basis of “multiple use” and “sustained yield.” Section 302(a) of FLPMA provides “[t]he Secretary shall manage the public lands under the principles of multiple use and sustained yield, in accordance with the land use plans... except that where a tract of such public land has been dedicated to specific uses according to any other provision of law it shall be managed in accordance with such law.” Section 103(c) of FLPMA defines "multiple use" as the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people. Under FLPMA, the BLM has broad discretion to allocate the public lands to particular uses, and to employ the mechanism of land use allocation to protect for certain resource values, or, conversely, develop some resource values to the detriment of others as long as the agency insures that such uses will not cause unnecessary and undue degradation. 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.” The FLPMA authorizes the BLM to issue ROW grants for systems of generation, transmission, and distribution of electric energy. In processing a land use plan amendment, the BLM also must comply with its planning regulations (43 CFR Part 1600) and the BLM Land Use Planning Handbook (H-1601-1; March 2005).

The Crimson Solar FEIS/Proposed CDCAPA provides for the balanced management of the public lands in the planning area. In developing the Crimson Solar FEIS/Proposed CDCAPA, 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 Crimson Solar FEIS/Proposed CDCAPA identifies appropriate allowable uses, management actions, and other

mitigation measures that prevent the unnecessary or undue degradation of public lands. It does not authorize any use of the public lands, much less any that would result in unnecessary or undue degradation. As discussed above, in enacting FLPMA, Congress recognized that through the BLM's multiple-use mandate, there would be conflicting uses and impacts on the public lands. The Final EIS discusses the considerations of suitable alternative locations and the site selection criteria for this large-scale solar Project. Both private land alternatives and alternate BLM-administered land site alternatives were evaluated for potential siting of solar facilities. Ultimately, the Applicant determined that the vicinity of the existing Colorado River Substation would be a feasible location for interconnection of an energy source. Further details of the selection criteria and additional alternatives considered, but eliminated from detailed analysis can be found in the Section 2.10, "Alternatives Considered but Eliminated from Detailed Analysis" of the FEIS.

The BLM-administered lands in the California Desert District are managed by the CDCA Plan. The Project site is located within MUC M (Moderate Use), defined in Appendix G, "CDCA Plan Consistency", of the FEIS. The CDCA Plan, while recognizing the potential compatibility of solar generation facilities on public lands, requires that all sites associated with power generation or transmission not specifically identified in the CDCA Plan (like the Project site) be considered through the plan amendment process, and that NEPA requirements be met for the proposed use. The proposed plan amendment decisions are described in Section 2.3 of the FEIS. The planning criteria, description of the plan amendment process, decision criteria for the BLM's evaluation of a plan amendment, and analysis of consistency of the proposed plan amendment with the CDCA Plan are provided in Appendix G of the FEIS.

The Crimson Solar FEIS/Proposed CDCAPA meets the BLM's FLPMA requirements for consideration of the Project, including prevention of unnecessary or undue degradation, and therefore this protest is denied.

## ***NEPA – Purpose and Need***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-34):** The purpose and need provided in the FEIS retains the flaw of impermissibly narrow purpose under NEPA for several reasons, most importantly because it foreclosed meaningful alternatives review in the FEIS. BLM's response to comments asserts that the narrow purpose and need is "reasonable and consistent with governing principles." FEIS at Appx. W, Response to Comments 11-30 and 13-20. Yet again, BLM's conclusion is inaccurate and misleading. An agency cannot unreasonably narrow the objective of the proposed action to limit the range of alternatives considered.

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-36):** BLM states that "[t]he Applicant and Lead Agencies considered multiple alternative locations for the proposed solar development, including sites on private land and on other BLM-administered lands." FEIS at 2-19. However, the alternative locations considered were all rejected. FEIS at 2-19 to -21. Relying on its improperly narrow statement of purpose and need, BLM failed to consider alternative technologies, projects, or locations that could meet the same renewable energy goals as the proposed Project without the same devastating environmental and cultural impacts. Because the alternatives analyses are at the center of NEPA review and affect nearly all other aspects of the EIS, on this basis and others, BLM must revise and re-circulate the FEIS.

***Colorado River Indian Tribes******Sara A. Clark***

**Issue Excerpt Text (2-38):** CRIT appreciates BLM acknowledging the DEIS comments urging the agency to adopt a preferred alternative that incorporates design elements from both Alternative C and Alternative B. FEIS at 2-18; Appx. W, Response to Comment 11-32. While CRIT does not support any development of the site, this hybrid approach appears to be more protective. However, while the FEIS does clarify its preferred alternative, the FEIS does not adequately explain the impacts and implications of this hybrid approach. *Id.* Alternative B and Alternative C are independently analyzed across several pages of the FEIS. FEIS at 2-14 to -17. However, the public does not receive a similar level of explanation for the agency's preferred alternative with elements of the two combined. The extent of BLM's analysis of its preferred alternative is relegated to a brief summary in Table 2-5 comparing Alternative B and Alternative C. FEIS at 2-18. This is insufficient. The public should not be tasked with assessing the impacts from Alternative C and Alternative B in order to surmise the impacts of a hybrid approach combining elements from both alternatives. BLM must engage in a separate analysis of its preferred alternative.

**Summary:**

The BLM's purpose and need is impermissibly narrow under NEPA because it foreclosed meaningful alternatives review in the FEIS. Also, the BLM failed to provide an analysis of the preferred alternative in the DEIS.

**Response:**

In accordance with NEPA, the BLM has discretion to establish the purpose and need for a proposed action (40 CFR 1502.13). The BLM must construct its purpose and need to conform to existing decisions, policies, regulation, or law (BLM Handbook H-1790-1, Section 6.2). The purpose and need may not be so narrow that only one alternative becomes a foreordained outcome, and may not be so broad that an infinite number of possibilities could accomplish the goals of the Project.

The BLM established the purpose and need for the Crimson Solar FEIS/Proposed CDCAPA which is described at Section 1.2 of the FEIS, ("Purpose and Need and Project Objectives") to meet Title V of the FLPMA of 1976 (43 USC §1761(a)(4)). The Federal action being considered by the BLM is to respond to a ROW application to construct, operate, maintain, and decommission a solar photovoltaic (PV) project on lands administered by the BLM. In connection with its decision to approve, approve with conditions, or deny issuance of the ROW, the BLM would decide whether to amend the CDCA Plan. The CDCA Plan, while recognizing the potential compatibility of solar generation facilities on public lands, requires that all sites associated with power generation or transmission that are not identified in the CDCA Plan be added to it through the land use plan amendment process. The BLM considered three action alternatives consisting of a plan amendment and one No Action alternative described in Chapter 2.0 ("Project and Alternatives") of the FEIS.

The Council on Environmental Quality (CEQ) regulations (40 CFR 1502.14(e)) direct that an EIS identify the agency's preferred alternative or alternatives, if one or more exists. Identification as the "preferred alternative" is a preliminary indication of the lead agency's preference of action among the alternatives. Consistent with these regulations, various parts of separate alternatives that are analyzed in the draft can be "mixed and matched" to develop a complete alternative in the final. If a new alternative is added after the circulation of a DEIS, no additional analysis is necessary if the new alternative lies within the spectrum of alternatives analyzed in the DEIS or is a minor variation of an alternative analyzed in the DEIS (BLM NEPA Handbook, Section 5.3.2). In accordance with NEPA (40 CFR 1502.14(e)), the BLM preliminarily identified Alternative C, as modified by the two design elements from Alternative B, as the preferred alternative in the Crimson Solar Project

DEIS/Environmental Impact Report and Draft Land Use Plan Amendment to the CPCAP. Section 2.8 (“Federal Lead Agency Preferred Alternative”) of the FEIS details the elements of Alternative B which were incorporated into Alternative C in order to minimize impacts to air quality, biological resources, surface waters, and groundwater.

The Crimson Solar FEIS/Proposed CDCAPA analyzes a broad range of alternatives and provides a detailed rationale for the alternatives and management options considered and rationale for the selection of the BLM’s preferred alternative combining elements of Alternative B and C in Section 2.8 (see pg. 2-17 to 2-18; see 40 CFR § 1502.14(a)). As noted by the BLM on page 2-18, “...the preferred alternative would require the smallest solar plant site to produce the same amount of electricity as the other alternatives, would use the least water during construction, and would minimize ground disturbance and vegetation removal. As analyzed in Section 3.2 (Air Resources), Section 3.3 (Biological Resources), and Section 3.18 (Water Resources), it appears on the basis of the analysis in this Final EIS and Proposed PA that this combination would minimize impacts to air quality, biological resources, surface waters, and groundwater.” The proposed plan is a combination of alternatives analyzed in the DEIS, therefore it is within the range of alternatives analyzed and presented to the public in the DEIS, in accordance with the requirements of NEPA and the BLM NEPA Handbook.

The BLM properly established the purpose and need for the Crimson Solar FEIS/Proposed CDCAPA and provided the required level of analysis for the preferred alternative. Accordingly, this protest is denied.

## ***Archaeological Resources Protection Act Violation***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-45):** While BLM studiously avoids any discussion of this issue in the FEIS, the Tribes are aware that BLM California considers such mitigation measures-ones that would allow tribes to rebury cultural resources on nearby or adjacent Federal lands-to be inconsistent with Federal law. But BLM California's position is contrary to both the letter and intent of the Archaeological Resources Protection Act, 16 U.S.C. 470aa-470mm (ARPA). ARPA was enacted to ensure protection of the nation's archaeological resources. 16 U.S.C. § 470aa ("The purpose of this Act is to secure, for the present and future benefit of the American people, the protection of archaeological resources."). Such resources are defined as "any material remains of past human life or activities which are of archaeological interest." 16 U.S.C. § 470bb. And yet, BLM California is apparently interpreting ARPA to prohibit the careful protection and reburial of cultural resources that are not "of archaeological interest." In other words, BLM California believes that ARPA requires the agency to have the solar developers simply destroy or grade over such resources. This result is absurd and offensive. BLM's argument appears to be based on Subpart B of the ARPA regulations. See 43 C.F.R. Part 7, Subpart B. Under those regulations, BLM can officially determine that a cultural resource is not an archaeological resource (i.e., no longer of archaeological interest), and therefore not subject to the Act's requirements. 43 C.F.R. § 7.33. But BLM California has never explained why it cannot comply with Subpart B procedures during project construction, as BLM Arizona is readily doing on other projects. See Exhibit 3. Nor has it explained how it is lawful for BLM to allow solar developers to destroy the resources - without complying with any of the procedures found in §7.33 - but allegedly unlawful to allow tribes to place them out of harm's way.

***Colorado River Indian Tribes******Sara A. Clark***

**Issue Excerpt Text (2-4):** the FEIS also fails to consider any mitigation measures that could reduce this adverse consequence of the Project.<sup>2</sup> Namely, the FEIS fails to consider mitigation measures that would allow the Colorado River Indian Tribes, or other tribal entities, to simply move the resources to adjacent land, out of harm's way, prior to the initiation of ground disturbing activities. This common sense, low-cost, and efficient mitigation measure has been adopted by BLM Arizona (see FEIS, Appendix V, Letter 11, Exhibit B) and is supported by numerous solar companies (see FEIS, Appendix V, Letter 11, Exhibit A; Exhibits 1, 2). Indeed, even Recurrent Energy- the parent company of the Applicant-has indicated to the Tribe that it supports such measures. CDFW has also acknowledged the importance and feasibility of the measure during its consultation activities with the Tribes. Instead of following this precedent, BLM claims that the non-eligible resources affected by the proposed Project do not warrant mitigation under NEPA and, therefore, no mitigation is necessary.

***Colorado River Indian Tribes******Sara A. Clark***

**Issue Excerpt Text (2-7):** The Tribes will always prefer that cultural resources of any kind are avoided and left in place as tribal ancestors intended. But if avoidance is infeasible, then reburial is an effective, culturally sensitive, and lawful mechanism for addressing some of the Project's harms. See 40 C.F.R. § 1508.1(s) (defining mitigation to include actions to "reduc[e] or eliminat[e] the impact . . . by preservation"). The FEIS's failure to consider this mitigation measure was arbitrary and capricious and the FEIS must be revised.

**Summary:**

The BLM is in violation of the ARPA by failing to consider mitigation measures recognized by tribes, such as artifact removal and reburial, to reduce impacts to cultural resources.

**Response:**

As described in Section 1.2.1, the Crimson Solar FEIS supports both a planning decision to amend the CDCA Plan to identify the Crimson Solar Project site as suitable for solar energy generation and allow for construction of a high-voltage transmission line outside of a designated utility corridor and an implementation level decision to approve, approve with modifications, or deny issuance of a ROW grant to the Applicant. The proposed amendment to the CDCA Plan is a planning decision that does not approve or compel the issuance of, the ROW grant. The decision to issue the ROW grant is a separate implementation-level decision. Therefore, any land use plan protest submissions related only to the implementation decision, including project-level mitigation requirements raised here, are not subject to protest under BLM planning regulations. The BLM, however, has elected to respond to this incoming comment about compliance with the Archaeological Resources Protection Act of 1979, as amended (ARPA).

ARPA provides for the protection and management of archaeological resources through the approval of permits for their excavation or collection and the imposition of civil and criminal penalties. ARPA Section 4(c) requires the responsible Federal land manager to notify the appropriate Indian tribe before approving a heritage resource use permit (see MS-8150) for the excavation or collection of archaeological resources (see 43 CFR 7.3), if the Federal land manager determines that a location with cultural or religious importance to the tribe may be harmed or destroyed by the permitted activity. Neither ARPA, nor its implementing regulations, require specific mitigation measures for projects permitted on public lands.

As stated in Appendix W, Response to Comments of the FEIS (page W-23, response 11-16), the Department of the Interior/BLM regulations outline the specific process the BLM must follow regarding artifacts. The ARPA, the regulations, and BLM policy require curation to specific standards for non-NAGPRA archaeological resources excavated or removed under the authority of an ARPA/cultural resource use permit. ARPA requires that when archaeological resources, as defined by the statute, are excavated or removed from public lands, they are subject to the ARPA regulations, including those requiring curation, but ARPA does not require any specific mitigation. The BLM operates in accordance with the required regulations, which require the BLM to ensure that curation and disposition of all archaeological and historical materials and data excavated or removed from Federal lands conform to 36 CFR 79 and the Secretary of the Interior's Standards for Archaeological Documentation. Federal law and regulation require Federal collections be deposited in an established professional curation repository that can provide long-term care (curation or curatorial services) and whose demonstrated mission is to house, preserve, document, research, interpret, and exhibit the material in trust for present and future generations. The requirements for treatment and disposition of museum objects discovered on BLM lands are laid out in California IB-2016-007.

CRIT indicates in its protest letter that it has "requested reburial of non-eligible resources" and that "these resources are clearly not subject to curation requirements." Subpart B of 43 CFR 7 outlines the process for determining that such resources lack archaeological interest, but the BLM has not yet engaged in that process here. In the event that BLM follows that process and determines that the particular resources lack archaeological interest, curation would not be required.

As discussed above, reburial of cultural resources as a mitigation requirement for the ROW grant is not a valid protest issue, which is limited to the land use plan decision. Further, the BLM complied with all requirements of ARPA in determining the appropriate mitigation for cultural resources on the project site. Therefore, this protest is dismissed/denied. Nevertheless, the BLM acknowledges that this is an important issue, and discussions with CRIT and the project proponent regarding appropriate mitigation for cultural resources as a result of the potential grant of a ROW to the proponent continue, including regarding the process for how BLM may determine that resources lack archaeological interest and are therefore not subject to curation. The BLM will provide additional clarification in the ROD.

## ***Government to Government Consultation and Religious Freedom Restoration Act Violation***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-11):** The chart in Appendix F suggests that Project mitigation or alternatives will somehow alleviate these potential access issues, but BLM does not point to any specific mitigation measure or provide any evidence or analysis to support its conclusions. This cursory reversal is hardly an adequate response to CRIT's comments about sacred site access. To the extent that this proposed Project and its impacts prevent access to the Mule Mountains for traditional practitioners or destroy the landscape connectivity necessary for traditional cultural practices, and thereby present a substantial burden on their religious free exercise, the federal government violates the Religious Freedom Restoration Act. See *Burwell v. Hobby Lobby Stores, Inc.* (2014) 573 U.S. 682. The agencies must engage in lawful and thorough consultation to fully understand these important issues.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-15):** While CRIT appreciates that BLM made some progress on its formal eligibility determinations, as compared to the DEIS, the Tribes take serious issue with the manner in which BLM undertook this analysis. As explained further below, BLM failed to fulfill its consultation responsibilities in making these determinations. Instead, BLM has moved forward with its NRHP analysis without tribal input and now has an incomplete understanding of these prehistoric sites. The appropriate process would have been to engage in government-to-government consultation on these eligibility determinations and then complete the NRHP analysis with a re-release of the DEIS for public comment. Previous comments in record: CRIT DEIS Comment Letter at FEIS, Appx. V, Letter 11, 11-7 to 11-10.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-43):** CRIT requested by letter government-to-government consultation with BLM on April 22, 2016. CRIT has also shared its Government-to-Government Consultation Policy and requested that prior to scheduling an in-person consultation with Tribal Council, BLM review and acknowledge the Policy. To date, the BLM Palm Springs South Coast Field Office has refused to acknowledge CRIT's Policy. Consequently, BLM has been unable to fulfill its government-to-government consultation obligations with the Tribes.

**Summary:**

The BLM violated Section 106 of NHPA by failing to conduct adequate government-to-government consultation. The BLM violated the Religious Freedom Restoration Act by failing to adequately protect landscape connectivity necessary for traditional cultural practices.

**Response:**

. Section 101(d)(6) of the NHPA requires that “in carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties [of traditional religious and cultural importance to be eligible for inclusion on the National Register].” It is the BLM’s policy to “consult with affected tribes to identify and consider their concerns in BLM land use planning and decision-making, and [the BLM] shall document all consultation efforts” (BLM Manual Section 8120.06.E). While the BLM manager must give tribal concerns and preferences due consideration and make a good-faith effort to address them as an integral part of the decision-making process, final decisions may not always conform with the preferences and suggestions of the tribes (BLM Handbook H-8120-1, page V-11).

The BLM has consulted with tribal governments throughout the development of the Crimson Solar FEIS/Proposed CDCAPA. The BLM’s consultation with tribal governments is summarized in Section 4.2.2 of the Crimson Solar FEIS/Proposed CDCAPA (page 4-2 through 4-6).

A specific legal requirement to notify Native Americans can generally be met through certified mail, return receipt requested, or delivery confirmation from a delivery service (BLM Handbook H-8120-1, page V-7). The BLM has reviewed the CRIT consultation policy and the District Manager, California Desert District, has sent a response letter to CRIT outlining the BLM’s established policies and procedures for Government-to-Government Consultation with Tribal Governments (MS-1780). For the Crimson Solar Project, the BLM has consulted, and continues to consult, with 15 tribes, including the Agua Caliente Band of Cahuilla Indians, Augustine Band of Cahuilla Indians, Cabazon Band of Mission Indians, Cahuilla Band of Mission Indians, Chemehuevi Cultural



Center, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe, Fort Yuma Quechan Tribe, Morongo Band of Mission Indians, Ramona Band of Cahuilla Mission Indians, San Manuel Band of Mission Indians, Soboba Band of Luiseno Indians, Torres Martinez Desert Cahuilla Indians, and Twenty-Nine Palms Band of Mission Indians.

As noted in Section 4.2.2.2 of the Crimson Solar FEIS/Proposed CDCAPA, the BLM notified the tribes and requested government-to-government consultation at every key juncture in the Section 106 and NEPA processes for the proposed Project. The BLM formally notified and invited 15 Indian tribes (see list in Section 4.2.2.1) to participate in government-to-government consultation by letter dated February 19, 2016, at the earliest stages of planning for the proposed Project. The BLM further notified tribes, including CRIT, and invited them to engage in government-to-government consultation regarding the proposed Project by letter in July 2016 (regarding the proposed Area of Potential Effect [APE] and scope of identification efforts); October 2016 (transmittal of the draft cultural resources work plan, research design, and Class I inventory); July 2018 (regarding notice to issue an ARPA permit for site evaluations involving subsurface testing); August 2018 (regarding further notice to issue an ARPA permit); July 2019 (regarding further notice to issue an ARPA permit); early November 2019 (regarding notice of release of the DEIS; late November 2019 (regarding the proposed APE and proposed determinations of NRHP eligibility and findings of effect); February 2020 (regarding re-notice of proposed determinations and findings); and July 2020 (regarding updated proposed determinations and findings as well as response to tribes' earlier written comments if any were provided).

After the BLM presented its proposed Section 106 determinations and findings for the proposed Project in late November 2019, the BLM held an informational meeting for consulting parties in Blythe, California on December 4, 2019. The meeting also included a field visit to the proposed Project area, also on December 4, 2019. Following the November 2019 letters and December 4, 2019 meeting, the BLM received written comments from five tribes, including the CRIT, then followed up by holding meetings with four of the tribes; the CRIT did not respond to a request for a meeting.

After the BLM sent its updated proposed determinations of NRHP eligibility and findings of effect to tribal consulting parties in July 2020, BLM professional staff followed up with telephone call(s) to each tribe in late August 2020 to verify receipt of the letter by the appropriate tribal staff and to answer any questions.

Throughout consultations, CRIT and other tribes raised issues related to data sharing, artifact treatment (including relocation to other nearby BLM-administered lands for long-term protection), and cultural landscapes. The BLM has taken tribal concerns about prehistoric artifact treatment into consideration and has notified the tribes it will require an archaeological monitoring and discovery plan, developed in consultation with CRIT and other tribes, should the proposed Project be approved and move to the construction phase.

The BLM adequately consulted with tribal governments regarding the Crimson Solar FEIS/Proposed CDCAPA, and the protest is denied.

The Religious Freedom Restoration Act of 1993 (RFRA) provides that governmental activity may not substantially burden a person's free exercise of religion unless the activity is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest (42 USC § 2000bb-1[a-b]).

The BLM did not violate the RFRA with the management actions identified in the alternatives as the BLM has determined that access to the Mule Mountains and other sacred areas would be maintained for traditional uses (see Appendix W, Response to Comments, Comment 11-5 page W-20). Therefore, the protest is denied.

## ***Tribal Interests and Resources – Inadequate Analysis***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-3):** The FEIS offers scant information regarding the Project's impact to cultural resources that do not meet the eligibility requirements of the NHPA. The FEIS notes that the dozens of cultural resources identified in the direct Area of Potential Effect (APE) "could be directly affected by the Project." FEIS at 3.5-11 (emphasis added); see also FEIS at 3.5-13 (Alternative C). But the FEIS never actually informs the reader- including an agency decisionmaker, tribal member, or member of the public-that the Project will cause direct, adverse effects to these resources. Project construction, including grading and excavation, will be permitted to occur directly on top of these resources. As a result, they will be damaged, destroyed, or rendered inaccessible below the Project's footprint.<sup>1</sup> The FEIS makes no mention of these impacts, let alone the adverse religious, cultural, and spiritual impacts that this destruction will have on CRIT and its members. This omission is fatal: BLM has not taken the requisite hard look at cultural resource impacts.

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-9):** Yet, the analysis utterly fails to consider the real risks to cultural resources that come from being in the vicinity of a large development: vandalism, destruction, visual intrusion, loss of cultural value and tribal connection to the landscape, etc. BLM attempts to discount these risks, arguing that CRIT's concerns about vandalism and destruction are "speculative and not supported by evidence," FEIS, Appx. W, Response to Comment 11-4, but the Tribes submitted cultural resource documents from other projects that provide extensive recognition of and protection from these very issues. See Appx V, Letter 11, Exh. B (Ten West Link Programmatic Agreement). Moreover, by narrowly focusing on whether a visitor could see the project from a particular vantage point and whether the identified sites might be impacted by noise or dust, the FEIS ignores the impacts that come from industrializing an adjacent landscape. FEIS at 3.5-12. The FEIS analysis must be revised to adequately consider these impacts and respond to CRIT's comments.

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-12):** Federal law recognizes that cultural resources include cultural landscapes. See National Register Bulletin, "Guidelines for Evaluating and Documenting Traditional Cultural Properties" ("A culturally significant natural landscape may be classified as a site" eligible for the National Register). Indeed, evaluation and protection of such landscapes is necessary to ensure adequate protection of both individual resources and their historic context. Yet, despite these laws, "BLM has concluded there is no basis for connecting the prehistoric sites and isolates of the study area into a larger cultural resource entity such as a district that can be analyzed under Section 106 or NEPA." FEIS, Appx. W, Response to Comment 11-6. This conclusion is contrary to law, and not supported by the significant evidence available to the agency. Further, BLM's assertion that "[a] more refined understanding of the timing and nature of Native American use, the ethnolinguistic affiliation of the users, and whether individual sites are actually linked in terms of physical development cannot be demonstrated" blatantly ignores all the evidence CRIT has provided to that effect in comment letters and via oral communication.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-13):** Yet, BLM appears to have undermined its consideration of the prehistoric trail system and landscape connectivity. BLM has removed "lithic scatters" from the list of important ceremonial locations considered in the FEIS without any explanation or justification. Compare DEIS at 3.5-4 with FEIS at 3.5-4 (omitting "lithic scatters" from DEIS's list of "intaglios, petroglyphs, lithic scatters, and cleared circles"). Given the FEIS's acknowledgment that lithic scatters of white quartz or other materials often indicate prehistoric trail locations, this new dismissal of lithic scatters from consideration undermines the Tribes' input regarding the prevalence of the prehistoric trail system and the cultural sensitivity of these resources, and results in an incomplete understanding of the landscape's interconnectivity. FEIS at 3.5-3. BLM's refusal to acknowledge the importance of these scatters-both for their inherent cultural value to tribes and for their value in establishing landscape-level eligibility for the area-violates NEPA.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-14):** BLM's arbitrary decision ignores the overwhelming support in favor of cultural landscapes designation violates NEPA. The analysis must be revised to properly consider the evidence of landscape eligibility and mitigate the impacts to the landscape- scale resource. Previous comments in record: CRIT DEIS Comment Letter at FEIS, Appx. V, Letter 11, 11-6.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-41):** The FEIS fails to acknowledge the cultural significance of desert species to local tribes-either in the cultural resource analysis or the biological impacts discussion. A number of the animals at greatest risk from the proposed project (Mojave desert tortoise, Mojave fringe-toed lizards, golden eagles, Western burrowing owls, American badgers, desert kit foxes, and other various birds) are important to tribal culture because they hold power and spiritual value in Native American belief systems and oral traditions. However, decisionmakers will not have a nuanced understanding of the significance of desert species because the FEIS opts to ignore these impacts. BLM further states that it "acknowledges" the importance of native species and plants, particularly creosote, and asserts it has conducted the necessary analysis. FEIS at W-27. However, the FEIS's biological resources analysis is silent regarding specific impacts to local tribes and cultural practices. See FEIS at 3.3-1. "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look'" under NEPA. *Neighbors of Cuddy Mt. v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). The FEIS must clearly analyze the cultural impacts from the Project's damage to the creosote scrub habitat and desert dunes. Creosote has topical and internal medicinal purposes for tribal members, and was traditionally used by Mohave and Chemehuevi craftspeople for a number of utilitarian purposes, including waterproofing of baskets, cordage objects, and pottery. Once these and other desert sensitive plants have been destroyed through surface disturbing activities, this loss of traditional cultural lifeways cannot be readily mitigated.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-46):** Although the FEIS acknowledges that indirect effects could occur at the Mule-McCoy Linkage ACEC and the Mule Mountains ACEC due to their proximity to the Project site, the FEIS reaches the same cursory conclusion offered in Section 3.5 and insists that the Project will have no indirect impacts because it will be visible only in part. FEIS at 3.14-2. The FEIS offers no explanation for why the significant cultural resources protected by the other ACECs may not be indirectly and adversely impacted by the proposed Project other than distance, but never actually says how far away those ACECs are from the Project. FEIS at 3.14-3. BLM's position is that "[t]he resources within ACECs...are the same as those addressed in Section 3.5 [so] a

duplicative analysis in Section 3.14 is not necessary." FEIS, Appx. W, Response to Comment 11-11. This reasoning completely ignores the purpose of and law governing ACECs. "ACECs are areas with special resource values or management concerns that are established through the BLM land use planning process; in this case, through the California Desert Conservation Area (CDCA) Plan (1980) and later the Desert Renewable Energy Conservation Plan (DRECP (2016)." FEIS at 3.14-1. This special designation requires BLM to consider impacts to the ACEC as a whole. As demonstrated above, these cultural resources include areas sacred to area tribes, linked to cultural practices, and grounded in the undisturbed cultural landscape. The addition of a massive, industrial system to the area directly adjacent to the Mule Mountains has the real potential to adversely impact these values. The agencies must consider these impacts in a revised FEIS.

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-47):** As BLM is aware, such events can exacerbate exposure of cultural resources, which happened at the Genesis Solar Energy Project. BLM claims that this issue is addressed in Section 3.18 (Water Resources), but CRIT cannot locate a substantive discussion of cultural resource impacts from increased erosion in this section. The agency further insists that the Storm Water Management Plan developed for the site "would include post-construction measures to manage stormwater and minimize changes in the existing drainage patterns, so that natural stormwater could flow through the site to the greatest practical extent." FEIS, Appx. W, Response to Comment 11-13. BLM insists that this maintenance of existing flows with accommodations to allow for flows beneath Project structures is distinct from Genesis, which relied on "substantial infrastructure for redirection of storm flows." *Id.* However, requiring some mitigation is not the same as providing a meaningful analysis of whether the Project will result in increased erosion and deposition, including in a manner that would adversely impact cultural resources. The FEIS must be revised to include this analysis.

### **Summary:**

The BLM failed to adequately analyze potential impacts on cultural resources that do not meet the eligibility requirements of the NHPA. The BLM also failed to adequately analyze the religious, cultural, and spiritual impacts on CRIT and its members that could result from the Project, including reducing landscape connectivity, vandalism, destruction, visual intrusion, erosion, and loss of cultural value.

Additionally, the BLM did not analyze cultural resources in the context of a culturally significant natural landscape and the BLM disregarded Tribal input regarding the values that the Tribe associates with the resources. The BLM also failed to analyze the impacts on native wildlife and plant species cultural significance to local tribes and cultural practices.

### **Response:**

The Council on Environmental Quality's (CEQ) regulations implementing NEPA require that agencies use "high quality information" (40 CFR 1500.1(b)). NEPA regulations require the BLM to "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements" (40 CFR 1502.24).

The BLM NEPA Handbook also directs the BLM to "use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed" (BLM Handbook H-1790-1, page 55). NEPA directs that data and analyses in an EIS must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are significant to the action in question, rather than

amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a “hard look” at potential environmental impacts of adopting the Crimson Solar FEIS/Proposed CDCAPA.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action. Analysis of a land use plan amendment is typically broad and qualitative rather than quantitative or focused on site-specific actions. The baseline data provides the necessary basis to make informed land use plan-level decisions.

The BLM provided a comprehensive review of cultural resources in section 3.5 (“Cultural Resources”) of the Crimson Solar FEIS/Proposed CDCAPA as well as in Appendix K (“Cultural and Historic Resources”) using the accepted methodology of applying the NHPA Section 106 process about the potential effects on historic properties from the proposed undertaking. The BLM defined the resources that would be included in the analysis on page 3.5-1 through 3.5-2. Further the BLM provided baseline information from the Class I existing information inventory, and ethnographic/ethnohistoric literature review, and a Class III field survey as described in Section 3.5.2.4 (“Identified Cultural Resources”) on page 3.5-6. Page 3.5-14 notes that the loss of sites that do not meet any of the eligibility criteria for the National Register would not constitute an adverse impact under NEPA as these sites do not yield information important to the understanding of the region’s history or prehistory.

As part of the baseline information provided in section 3.5.2.2 Ethnographic Setting (page 3.5-3 to 3.5-4), the BLM provides information on the area tribes’ spiritual beliefs and connections to the landscape. Section 3.5 of the FEIS describes direct, indirect, and cumulative impacts to cultural resources within the area of potential effect, including resources identified as part of ethnographic studies. Additionally, as discussed in Section 4.2.2.2, during government-to-government consultation the BLM received comments that the Mule Mountains are important to Tribes’ religious beliefs and practices, and that the proposed Project, if constructed, would interfere with these beliefs and practices. The BLM held a consultation meeting with the tribe that raised these concerns during which, the tribe disclosed that they are opposed to the location any solar projects on BLM-administered lands in the Chuckwalla Valley/Palo Verde Mesa area because they believe that the entirety of undeveloped desert lands within their ancestral territory, including the cultural and natural resources found here, are of great importance to tribal culture and identity. The BLM acknowledged the importance of BLM-administered lands within the APE (and larger landscape of the lower Colorado River) to the tribes’ history and contemporary culture and identity, however, those meetings and subsequent government-to-government consultation did not result in the agency receiving information from the tribes that changed its assessment of Project effects to identified historic properties within the APE, or that led to the identification of previously unknown historic properties in this area, pursuant to the Section 106 regulations. Further, in response to comments on the DEIS, the BLM notes on pages W-19 and W-20 of Appendix W that none of the publicly available documents associated with the project disclose the location of culturally sensitive sites within the project vicinity and would not increase public access to these sites compared to baseline conditions, therefore indirect impacts such as vandalism and destruction due to the Project are unlikely and, thus it is reasonable for the BLM to conclude that such alleged, indirect impacts are purely speculative and not required to be included in the NEPA analysis. While the BLM’s analysis is framed in terms of “possible” effects and “some risk,” it satisfies the “hard look” requirements of NEPA because, more definitive information on the potential impacts to spiritual beliefs and connections to the landscape were not provided during government-to-government consultation or the Section 106 consultation process.

Geoarchaeological field investigations were conducted and surface and subsurface sediments were analyzed and described on page 3.5-10 in Section 3.5 and found that the Project Area has a low sensitivity for buried archaeological materials. Additionally, the results of a visual effects analysis on historic properties are provided on page 3.5-12 and concluded that the Project would not pose an adverse effect to historic properties from visual, auditory, or atmospheric effects. Also, as explained in Section 3.14.4.1, the Project is not located within any Areas of Critical Environmental Concern (ACECs) and, as described in Section 3.5, the Project would have not indirect impacts on cultural resources, therefore cultural resources protected by ACECs would not be effected by the Project.

A discussion of the landscape-level studies conducted during the inventory phase is provided on pages 3.5-6 through 3.5-8 and were considered in the cumulative effects analysis in Section 3.5.6. The Class I inventory, research design, and work plan for the Project were provided to all consulting parties, including tribes, for comment on October 7, 2016 and the documents were updated and finalized only after addressing tribal comments. The BLM determined from the results of the Class I existing information inventory, the ethnographic/ethnohistoric literature review, and the Class III field survey that there is no basis for connecting the prehistoric sites and isolates of the study area into a larger cultural resource entity.

The Project will not prevent access to the Mule Mountains. Similar to the comment submitted on the DEIS, the protesting party has failed to describe what landscape connectivity is necessary to traditional cultural practices in this context and how that connectivity is being impacted. Appendix F clarifies that, despite not being subject to the DRECP ROD, the Project is nonetheless consistent the requirements of the DRECP Conservation Management Actions (CMAs) with mitigation incorporated and/or with alternatives considered, including LUPA-CUL-3 (See Appendix W, W-20).

Regarding the importance of native wildlife and plant species to local tribes and cultural practices, the cumulative impacts analysis in Section 3.3.6 (“Cumulative Effects”) discusses impacts to native wildlife and plant species from this Project and others and mitigation measures are provided to avoid, minimize, and mitigate impacts to these species. For example, Mitigation Measures BIO-18, BIO-19, and BIO-20 would cause the planting of desert flora endemic to the area to compensate for the loss of native plants. While the FEIS does not include analysis of the impacts from the project specific to species of cultural significance to local tribes and cultural practices, the FIES provides a robust analysis of the direct, indirect, and cumulative impacts for all native wildlife and plant species in the project area. Further, the cumulative impacts analysis provides a broader geographic context for the impacts of this and other nearby projects to the total impacts on each resource. The FEIS also includes mitigation measures to avoid, minimize, and mitigate impacts on sensitive habitats and special-status species, including culturally significant species, based on the need to mitigate overall impacts on these resources in proportion to the impacts attributable to this Project (See Appendix W, W-20). The preferred alternative would reduce impacts on native wildlife and plant species through design elements that would facilitate post-construction residual habitat value and post-operations/site reclamation success by requiring the proponent to minimize grading during site preparation, to maintain more on-site vegetation by not mass mowing and rolling vegetation, and reduce grading in the vicinity of each array transformer, inverter, and energy storage systems by placing them on elevated support structures (FEIS, Section 2.5, 2-14).

The BLM complied with NEPA’s requirement to analyze the environmental consequences/impacts to cultural resources in the Crimson Solar FEIS/Proposed CDCAPA. Accordingly, this protest is denied.

## ***Cultural Resources – Cumulative Impacts***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-18):** As the agency conducting the NEPA analysis for the vast majority of the projects on the cumulative list, BLM has a responsibility to track, record, and disclose the cultural resource impacts of those projects. These impact numbers should be readily available. Moreover, BLM offers no explanation as to why other completed projects from the cumulative list—such as the Modified Blythe Solar Power Project, McCoy Solar Energy Center, or Desert Sunlight—do not appear in Table 3.5-3. This incomplete information unlawfully understates cumulative impacts.

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-48):** Cultural resources represent a direct linkage between present-day tribal members and their ancestors. Once such resources are gone, it will be difficult, if not impossible, for the Tribes to prove that these lands are part of their ancestral homeland, and that their ancestors lived and worked on these lands since time immemorial. The FEIS's methodology fails to acknowledge this devastating impact and provides the public with an inaccurate cumulative picture. Although the FEIS still concludes that proposed mitigation "may not fully prevent Project-related cumulative impacts on cultural resources," the FEIS fails to fully analyze the cumulative impacts of past projects and to consider non-eligible resources within those impacts. FEIS at 3.5-16. BLM must revise this analysis before proceeding.

#### **Summary:**

The BLM failed to adequately analyze potential impacts on cultural resources by not tracking, recording, and disclosing cultural impacts in the cumulative projects list.

The BLM failed to adequately analyze the cumulative impacts of past projects and to consider non-eligible resources within those impacts on resources of tribal interest.

#### **Response:**

The BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM Handbook H-1790-1, Section 6.8.3). 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 regardless of what agency (Federal or non-Federal) or person undertakes such actions" (40 CFR 1508.7).

The BLM has complied fully with the requirements of 40 CFR 1508.7 and Section 6.8.3.5 of the BLM NEPA Handbook and prepared a cumulative impact analysis based on the broad nature and scope of the proposed management options under consideration at the land use planning level. The cumulative impact analysis considered the effects of the planning effort when added to other past, present, and reasonably foreseeable (not highly speculative) Federal and non-Federal actions. Section 3.1.6, Cumulative Scenario, identifies all actions that were considered in the cumulative impacts analysis, and provides a basis for the cumulative impacts analysis for each affected resource (see FEIS pages 3.1-4 through 3.1-8).

Following release of the Crimson Solar DEIS/CDCAPA, Section 3.5.6 was revised to include additional information regarding impacts on cultural resources that have occurred or are reasonably foreseeable as result of the projects in the cumulative scenario. Additional information was added for known NRHP-eligible prehistoric and historic resources within cumulative scenario projects in

Table 3.5-3 (see FEIS page 3.5-15) and the cumulative analysis under each alternative was expanded to account for project impacts of the cumulative scenario. The number of prehistoric and historic resources for the NRG Blythe PV project, the Blythe Solar Power Generation Station, or the Blythe Energy Project II was not included in Table 3.5-3 because no information was found regarding the number of resources impacted within the footprints for these projects.

Additionally and as stated in that section, because ineligible historic- and prehistoric-period sites within the Project's direct effects APE do not meet any of the eligibility criteria for the NRHP, their loss would not constitute an adverse cumulative impact under NEPA because these sites would not yield information important to the understanding of the region's history or prehistory, they are not otherwise eligible for the NRHP, and they appear to represent cultural resource types that are known to be common within the geographic scope of the cumulative effects analysis (see FEIS p 3.5-14). These revisions clarify the cumulative analysis presented in Section 3.5.6 of the Crimson Solar FEIS/Proposed CDCAPA and do not change the conclusions regarding the Project's contributions to cumulative impacts or identify any new previously undisclosed impacts.

For purposes of NEPA, the Crimson Solar FEIS/Proposed CDCAPA includes information gathered as part of the NHPA Section 106 process about historic properties and the potential effects to such properties from the proposed undertakings. Section 106 of the NHPA requires that the agency take into account the effects of undertakings on historic properties, defined as any district, site, building, structure, or object that is included in or eligible for inclusion in the NRHP. Although, by definition, a non-eligible site would have a finding of "no effect" under Section 106, the BLM still used the information from the field inventory investigations, including non-eligible sites and isolates as described on pages 3.5-15 of the Crimson Solar FEIS/Proposed CDCAPA. Furthermore, the section includes a discussion of the landscape-level studies conducted during the inventory phase and Traditional Cultural Properties and Tribal Cultural Resources (see FEIS pages 3.5-6 through 3.5-10) that were considered when looking at the cumulative analysis in Section 3.5.6.

The analysis took into account the relationship between the proposed action and these reasonably foreseeable actions. This served as the determining factor as to the level of analysis performed and presented. The information presented in the Crimson Solar FEIS/Proposed CDCAPA enables the decision-maker to make a reasoned choice among alternatives. All the archaeological resources have been evaluated under all four NRHP eligibility criteria. To ensure tribal input regarding the importance of resources is included in the assessment of impacts, government-to-government consultation between the California Department of Fish and Wildlife (CDFW) and California Native American tribes, and the BLM and Indian tribes, has continued through the duration of the California Environmental Quality Act (CEQA) and NEPA and Section 106 analyses and is ongoing. The BLM adequately analyzed cumulative effects in the Crimson Solar FEIS/Proposed CDCAPA; therefore, this protest is denied.

## ***Cultural Resources – Mitigation***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-25):** BLM continues to insist that preparation of an HPTP "would be premature because the purpose of the HPTP would be to identify appropriate treatment for National Register-eligible or listed cultural resources that cannot be protected from adverse direct and/or indirect effects." FEIS, Appx. W, Response 11-19. BLM does provide a list of protocols that would be included in a Monitoring and Discovery Plan if Alternative C is approved, but continues to suggest that an HPTP is optional rather than making it mandatory. See FEIS, Appx. B at B-30 (CUL-5). Without these additional details, BLM cannot conduct the requisite "assessment of



whether the proposed mitigation measures can be effective." South Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior, 588 F.3d 718, 727 (9th Cir. 2009). Similarly, BLM failed to respond to and incorporate the Tribes' comments regarding consultation and notice standards into CUL-5

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-27):** Despite this special significance, the FEIS does not mention the visual impact on CRIT members in the Visual Resources section. Id. In its response to comments, BLM claims that the FEIS includes several mitigation measures to minimize visual impacts and preserve cultural value. FEIS, Appx. W, Response to Comment 11-24. This is inaccurate. The proffered mitigation measures that attempt to assuage the Tribes' concerns fail to consider the Project's visual impact on Tribal members.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-28):** The other mitigation measures similarly involve identifying and incorporating "visual design elements," managing potential impacts during construction, and taking steps to keep the facility in good repair. See FEIS, Appx. B at B-37 to -41. None of these measures address the significant and adverse impacts that will degrade Tribal Cultural Resources. BLM must consult with the Tribes to determine the full significance of the visual landscape of the Mule and McCoy Mountains as cultural resources.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-32):** As the Council on Environmental Quality NEPA implementing regulations state, these impacts can include those that are "ecological... aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." Council on Environmental Quality, Environmental Justice: Guidance Under the National Environmental Policy Act (1997); see FEIS at 3.13-3. While the FEIS generally recognizes the disproportionate impact of the project on Native Americans and tribal members, the document does little to actually analyze this impact and nothing to identify potential mitigation measures to address this injustice.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-33):** The FEIS itself notes the various ancestral and ongoing Tribal connections to the area. See, e.g., FEIS at 3.5-3, 3.5-4, 3.13-4. Yet, the FEIS fails to analyze and properly mitigate the loss of cultural identity that would result from the Project development in the region. Through its revisions and responses to comments, BLM continues to display a fundamental misunderstanding of the specific issues facing the Tribes. The EIS must do more than just recognize tribes as an environmental justice population. NEPA requires analyzing and discussing the specific cultural resource impacts that affect tribal populations more directly than the general population. This FEIS is entirely silent on these impacts and does not proffer specific environmental justice mitigation. See FEIS at 3.13-5. Consequently, the FEIS must be revised to recognize the significant environmental justice impacts of the proposed Project on CRIT and other affected tribes.

**Summary:**

The BLM failed to consider mitigation measures recognized by the tribes to reduce impacts to cultural resources in violation of NEPA. Specifically, the BLM failed to analyze the specific cultural resource impacts that disproportionately affect tribal populations more directly than the general population due to loss of cultural identity. Additionally, the BLM failed to adequately analyze the effectiveness of potential mitigation measures due to not requiring a Historic Properties Treatment

Plan (HPTP) and Monitoring and Discovery Plan, or by offering specific environmental justice mitigation measures. The BLM failed to respond to and incorporate changes regarding tribal consultation and notification into the stipulations.

**Response:**

As described in Section 1.2.1, the Crimson Solar FEIS supports both a planning decision to amend the CDCA Plan to identify the Crimson Solar Project site as suitable for solar energy generation and to allow for construction of a high-voltage transmission line outside of a designated utility corridor and an implementation-level decision to approve, approve with modifications, or deny issuance of a ROW grant. The proposed amendment to the CDCA Plan is a planning decision related to the ROW decision; however, it does not approve, nor does it compel, the issuance of the ROW. The decision to issue the ROW grant is a separate, implementation-level decision supported by the analysis in the Final EIS. Therefore, any submissions related to that implementation decision, including project-level impacts and mitigation requirements raised here, are not subject to protest under BLM planning regulations, but are appealable after the BLM issues a ROD and Approved RMP Amendments. However, the BLM has opted to respond to this comment in the protest response due to the sensitivity of the issue raised.

NEPA requires 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).

Similarly, Section 106 of the NHPA requires a Federal agency to consider the potential effects of its undertaking on historic properties. When a Federal agency has found that an undertaking may adversely affect historic properties, it must develop and consider alternatives or measures to avoid, minimize, or mitigate such effects. The State Historic Preservation Office (SHPO) concurred with the BLM's findings in January 2021, including the assessment of effects for Alternatives A (Proposed Action) and B, which have the potential for direct adverse effects on historic properties. The SHPO also concurred with the BLM's determination that there would be no adverse effects if Alternative C became the selected alternative. Should Alternative A or B be selected—thus leading to adverse effects to NRHP-eligible cultural resources under Section 106—the BLM will develop a Memorandum of Agreement (MOA) to resolve the adverse effects (see mitigation measure CUL-1). The MOA will be prepared in consultation with the Advisory Council on Historic Preservation, SHPO, Applicant, tribes, and other identified consulting parties. The MOA will contain measures to avoid, minimize, and mitigate adverse effects to historic properties. While the BLM acknowledges the importance of all prehistoric cultural resources in the proposed Project area to CRIT, the BLM did not find that the non-eligible resources affected by the proposed Project warrant mitigation under NEPA and no such mitigation is proposed. The cultural resource studies prepared for the proposed Project are the basis of this finding. Further, it is not feasible for the proposed Project to avoid all of the non-eligible resources.

The regulations implementing NHPA Section 106 (36 CFR Part 800) allow a range of options when determining what constitutes appropriate mitigation of adverse effects on historic properties; alternative mitigation is not prohibited and there is no prescription for specific measures (36 CFR § 800.6(a)). The BLM may opt to develop alternative, creative measures with cooperating agencies,

project applicants, and tribal governments, including compensating for the impact by providing substitute resources or funding, as part of resolving adverse effects.

The Crimson Solar FEIS/Proposed CDCAPA includes appropriate measures to mitigate effects on cultural resources and describes future tribal participation. As stated in the Crimson Solar FEIS/Proposed CDCAPA, Section 106 government-to-government consultation with interested Native American tribes is ongoing. Should Alternative A or B be approved, mitigation measures CUL-1 and CUL-2 would serve to mitigate adverse effects on historic properties as a result of the Project (see FEIS pp 3.5-11 through 3.5-13). Government-to-government consultation will occur between the BLM and Native American tribes during implementation of mitigation measures CUL-1 and CUL-2. Under CUL-1, provisions to resolve the adverse effects on historic properties would be described in an MOA and an HPTP prepared in accordance with Section 106 of the NHPA. Mitigation measure CUL-1 would only apply if Alternative A or B becomes the selected alternative because only Alternatives A and B have the potential result in direct adverse effects on unknown historic properties. However, mitigation measures CUL-2 through CUL-7 would still apply if Alternative C became the selected alternative. As explained in Section 3.5, Alternative C would avoid impacts to all resources determined eligible for NRHP listing, thereby avoiding adverse effects to identified historic properties. As such, CUL-1 would not be necessary (see FEIS page 3.5-13).

As noted in Appendix B of the Crimson Solar FEIS/Proposed CDCAPA, mitigation measures have been developed from a combination of sources and regulatory requirements of other Federal, state, and local agencies. Mitigation measure CUL-5 was revised following the release of the Crimson Solar DEIS/CDCAPA to ensure avoidance of post-review discovered historic resources. Mitigation measure CUL-5 (Crimson Solar FEIS/Proposed CDCAPA, Appendix B, page B-30) states: “The MDP [Monitoring and Discovery Plan] shall address the authority to halt ground disturbance during construction.” It also states that additional procedures regarding halting ground disturbance to address a post-review discovery or unanticipated effects shall be described in the MDP, which will be developed in consultation with all consulting parties, including tribes.

As stated in Section 3.17.3.2 of the Crimson Solar FEIS/Proposed CDCAPA, in order to be consistent with the guidance provided in BLM Manual 8431 and 43 CFR Section 1610.5-3(b), the BLM has assigned the Project area as an interim Visual Resource Management (VRM) Class IV. As stated in that section, the strong visual contrast created by the Project would be consistent with VRM Class IV objectives. Nonetheless, the overall VRM goal is to minimize visual impacts even where VRM objectives are met. Therefore, the recommendation of mitigation measures VIS-1 and VIS-3 is consistent with the BLM’s VRM policy.

The BLM is responsible for implementing the provisions of Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. Accordingly, the Crimson Solar FEIS/Proposed CDCAPA analyzed whether the alternatives would adversely and disproportionately affect minority populations, low-income communities, and tribes and considered the aggregate, cumulative, and synergistic effects of its actions along with the actions taken by other parties (see FEIS pages 3.13-5 through 3.13-13). While environmental justice analysis is specifically concerned with disproportionate effects on environmental justice communities, the social and economic analysis produced in accordance with NEPA considers all potential social and economic effects, positive and negative, on any distinct group (BLM Land Use Planning Handbook, Appendix D, page D-11). As described in Section 3.13.5.1, Alternatives A and B would result in potential adverse impacts on cultural resources which could result in disproportionately high and adverse impacts on Native American populations. Mitigation measures CUL-1 through CUL-7 would incorporate input and monitoring from the tribes and would mitigate the overall impact of Alternatives A and B on cultural resources (see FEIS, pages 3.13-7 and 3.13-9).

The Crimson Solar FEIS/Proposed CDCAPA includes appropriate measures to mitigate effects on cultural resources and describes future tribal participation, accordingly this protest is denied. Section 106 government-to-government consultation with interested Native American tribes is ongoing. Should the Proposed Action be approved, mitigation measures CUL-1 and CUL-2 would serve to mitigate adverse effects on historic properties as a result of the Project. Government-to-government consultation will occur between the BLM and Native American tribes during implementation of mitigation measures CUL-1 and CUL-2.

## ***Visual Resources – Inadequate Analysis***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-56):** the FEIS's mitigation measures are insufficient. The FEIS concludes, without support, that the mitigation measures will reduce the Project's significant visual resource impacts to less-than-significant levels. FEIS at 3.17-12. None of the minor "visual design" alterations will appreciably reduce the strong contrast and visual intrusion of the project on the landscape, especially from vantage points on Mule Mountain. FEIS at 3.17-5 (noting that from KOP 4, "visual contrast would be strong due to the scale of the Project . . . , the broad, flat form and dark, reflective surface of the solar panels against the existing muted tones of the landscape" and that the project would "dominate" the landscape). This is demonstrated through the KOP simulations, which presumably take into account the minor mitigation efforts. The FEIS must be revised to either accurately acknowledge that the Project, even with mitigation, will create significant visual resource impacts, or to better support the conclusion that some paint and revegetation efforts will somehow result in a massive project that blends into the otherwise undisturbed landscape. Alternatively, BLM should explore possible additional or alternative mitigation that would best minimize visual impacts as a whole.

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-55):** The Mule and McCoy Mountains are more than a recreational resource for the Tribes; they have longstanding cultural and spiritual significance as ancestral lands. Any large-scale visual alteration to this space disturbs the sanctity of the outdoor environment, degrades cultural values, and constitutes a significant impact. Despite this special significance, the FEIS does not mention the visual impact on CRIT members in the Visual Resources section. Id. In its response to comments, BLM claims that the FEIS includes several mitigation measures to minimize visual impacts and preserve cultural value. FEIS, Appx. W, Response to Comment 11-24. This is inaccurate. The proffered mitigation measures that attempt to assuage the Tribes' concerns fail to consider the Project's visual impact on Tribal members. FEIS at 3.17-2; Appx. B at B-39. BLM misleadingly points to Mitigation Measures VIS-1 and VIS-3 as responsive. FEIS, Appx. W, Response to Comment 11-24. However, Mitigation Measure VIS-1 merely proposes insignificant design changes, such as reducing contrast caused by graded roads and color treatment for structures to reduce contrasts with the existing landscape "where feasible." FEIS, Appx. B at B-39. Mitigation Measure VIS-3 similarly avoids discussing the cultural and spiritual significance of the landscape and instead provides for the maintenance of solar panel color treatment. FEIS, Appx. B at B-39 to 40. The other mitigation measures similarly involve identifying and incorporating "visual design elements," managing potential impacts during construction, and taking steps to keep the facility in good repair. See FEIS, Appx. B at B-37 to -41. None of these measures address the significant and adverse impacts that will degrade Tribal Cultural Resources. BLM must consult with the Tribes to determine the full significance of the visual landscape of the Mule and McCoy Mountains as cultural resources.

**Summary:**

The BLM failed to adequately analyze potential impacts, including visual intrusion and the loss of cultural value in the Mule and McCoy Mountains, on tribal members and tribal cultural resources, and failed to include adequate mitigation measures to address the tribal impacts.

**Response:**

The CEQ regulations implementing NEPA describe how the data and analyses in an EIS must 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 1500.1(b)). Here, the BLM is required to take a “hard look” at potential environmental impacts of amending the Crimson Solar FEIS/Proposed CDCAPA.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action. The baseline data provide the necessary basis to make informed land use plan-level decisions. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

Per BLM Manual 8400, the BLM is responsible for identifying and protecting visual values on all BLM lands. In 2019, a Visual Resources Technical Report (Crimson Solar FEIS/Proposed CDCAPA Appendix T) was prepared that included the use of multiple viewshed models and an analysis of the study area defined as a 20-mile radius surrounding the Project area. Impacts to visual resources were assessed using a combination of: (1) the Visual Contrast Rating Procedure (BLM 1986), and (2) the Visual Resource Inventory (VRI) analysis. The results of these analyses were collectively used to inform a conformance determination of VRM Class II and IV Objectives assigned to the Project area.

Additionally, the BLM provided a comprehensive review of potential impacts to visual resources in Section 3.17 of the Crimson Solar FEIS/Proposed CDCAPA (see FEIS, pages 3.17-1 through 3.17-15) as well as in Appendix T. As mentioned in that section, mitigation measures are recommended to reduce the strong contrast that would occur in an area of high visual value (VRI Class II) and would require that the Applicant incorporate visual design elements into the final Project to reduce contrasts in form, line, and color. Additional mitigation measures (VIS-3) would require maintenance and monitoring of visual resources mitigation compliance, including revegetation and long-term maintenance of color-treated facilities to reduce contrast (see FEIS, page 3.17-6). These recommendations and the FEIS have been analyzed for consistency with other existing uses and use restrictions that are currently in place. See Appendix B for more information related to mitigation measures for impacts on visual resources (see FEIS, pages B-36 through B-40).

The BLM complied with NEPA’s requirement to analyze the environmental impacts of the Crimson Solar Project on visual resources. Accordingly, the protest is denied.

***Wildlife – Inadequate Analysis***

***Center for Biological Diversity***

***Lisa T. Belenky***

**Issue Excerpt Text (3-5):** Failing to adequately identify and analyze all of the likely impacts to desert tortoise, Mojave fringe-toed lizards and other rare resources from the project including direct, indirect, and cumulative impacts. The FEIS fails to adequately address the impacts on these species

and its habitats. The mitigation ratio of 1:1 desert tortoise habitat is far too low and does not provide any mitigation for indirect impacts or fragmentation impacts due to the proposed industrial-scale solar project in this remote location nearby wildlands, ACECs and wilderness areas.

**Summary:**

The BLM failed to adequately analyze potential impacts on desert tortoise, Mojave fringe-toed lizard, and their habitats and provide adequate mitigation.

**Response:**

The CEQ regulations implementing NEPA describe how the data and analyses in an EIS must 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 1500.1(b)). Here, the BLM is required to take a “hard look” at potential environmental impacts of amending the Crimson Solar FEIS/Proposed CDCAPA.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action. The baseline data provide the necessary basis to make informed land use plan-level decisions. The analysis focuses on the direct, indirect, and cumulative impacts that could potentially result from on-the-ground changes. This analysis identifies impacts that may result in some level of change to the resources, regardless of whether that change is beneficial or adverse.

The Crimson Solar FEIS/Proposed CDCAPA addresses the impacts from the proposed Project, acknowledging potential direct, indirect, and cumulative impacts to desert tortoise, Mojave fringe-toed lizards, and other species (see Sections 3.3.4 and 3.3.6). Additionally, multiple mitigation measures and associated compensatory mitigation requirements are identified based on the CDCA Plan, as amended by the Northern and Eastern Colorado Desert Coordinated Management Plan (NECO Plan) for impacts to the desert tortoise and Mojave fringe-toed lizard (see FEIS, Appendix B, pages B-17 through B-21 and B-22 through B-23).

Further, as noted in the Biological Opinion (Appendix I.13), “[t]o fully mitigate for habitat loss and potential take of desert tortoise, in compliance with the California Endangered Species Act (CESA) of 1970, the Applicant will provide compensatory mitigation via land acquisition or in-lieu fee payment at a 1:1 ratio for impacts to approximately 2,201 acres. To satisfy this measure, the Applicant will acquire, protect, and transfer 1 acre of desert tortoise habitat for every acre of habitat within the final Project footprint, and provide associated funding for the acquired lands.” Additionally, the Applicant developed a Desert Tortoise Translocation Plan (Ironwood 2019) that was reviewed and approved by BLM, CDFW, and the U.S. Fish and Wildlife Service (USFWS).

The BLM complied with NEPA’s requirement to analyze the environmental consequences/impacts to wildlife in the Crimson Solar FEIS/Proposed CDCAPA; accordingly, this protest is denied.

***NEPA – Impact Analysis – Baseline Data***

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-8):** Despite providing what is supposed to be a final environmental review, BLM has still not completed a full buried site sensitivity analysis for this Project and instead bases

its analysis "almost wholly on interpretation of satellite imagery." FEIS at 3.5-9. This deferral-even after CRIT cited this omission in its DEIS comments-violates NEPA.

**Summary:**

The BLM failed to use the best available information to analyze impacts to tribal resources by not completing a full buried site sensitivity analysis for the Project.

**Response:**

The CEQ regulations implementing NEPA require that agencies use "high quality information" (40 CFR 1500.1(b)). NEPA regulations require the BLM to "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements" (40 CFR 1502.24).

The BLM NEPA Handbook also directs the BLM to "use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed" (BLM Handbook H-1790-1, page 55). Under the BLM's guidelines for implementing the Information Quality Act, the BLM applies the principle of using the "best available" data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

The Crimson Solar FEIS/Proposed CDCAPA describes geoarchaeological field investigations that were conducted concurrently with archaeological test excavations, in addition to the analysis based on satellite imagery, soil mapping, and geologic mapping discussed in Section 3.5 (see FEIS, pp 3.5-9 through 3.5-10). The findings of this analysis are discussed in Section 3.5, where both surface and subsurface sediments were examined. Government-to-government consultation to discuss these and other issues between the BLM and the Indian Tribes, including CRIT, is ongoing. The Crimson Solar FEIS/Proposed CDCAPA also includes a bibliography (see FEIS, Appendix C), which lists information and sources considered by the BLM in preparation of the discussion of sensitivity for buried archaeological resources for the Crimson Solar FEIS/Proposed CDCAPA.

It is not necessary to complete a buried site sensitivity analysis for the Crimson Solar FEIS/Proposed CDCAPA. The BLM considered conducting a buried site sensitivity analysis to determine if the information would lead to substantially different information than the information considered and cited in the Crimson Solar FEIS/Proposed CDCAPA. A buried site sensitivity analysis would not provide additional information that would result in effects outside the range of effects already discussed in the Crimson Solar FEIS/Proposed CDCAPA.

The BLM relied on high quality information and the best available data in preparation of the Crimson Solar FEIS/Proposed CDCAPA. Accordingly, this protest is denied.

## ***Failure to Adequately Respond to Public Comments***

### ***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-10):** As discussed in CRIT's previous comment letter, much of the traditional value of these cultural resources to the Tribes comes from maintaining the connectivity between cultural resource sites stretching south from Spirit Mountain in Nevada. The Mule Mountains play a key role in maintaining this connectivity within Tribal members' ancestral landscape. BLM has ignored this fact in its FEIS, asserting that CRIT "fails to describe what landscape connectivity is necessary to traditional cultural practices." FEIS, Appx. W, Response to Comment 11-5. This response disregards both the contents of the Tribes' comment letters and oral

input provided to BLM Staff. As CRIT has repeatedly explained, the connectivity needed to maintain traditional cultural resource value comes from the continued existence of these sites and resources and from tribal members' ability to recognize and visit the geographic locations described in their traditional songs and stories. Destruction of cultural resources and interruption of geographic relationships resulting from projects such as this one destroy that connectivity

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-40):** The FEIS maintains the claim that the Project qualifies as a "pending" application that is not subject to either the Western Solar Plan or the Desert Renewable Energy Conservation Plan (DRECP). FEIS at 1-4 to -5. BLM argues that the Project is exempt from Western Solar Plan and DRECP given that "the initial application for this Project was filed before June 30, 2009" and "the site is located within a Solar Energy Zone." FEIS at ES-1. CRIT pushed back on this position, pointing out that the original ROW grant application had undergone significant changes since 2009. FEIS, Appx. V at XX. These modifications included changes to the type of technology proposed, the size of the project, and the energy output. *Id.* As CRIT explained, "the DEIS evaluates a substantially different Project than the one originally proposed in 2009 [and a]s such, it should be evaluated under the Western Solar Plan and the DRECP." *Id.* In response, BLM made no mention of the evolution of the ROW and Plan of Development. Indeed, the agency largely sidestepped the Tribes' comment altogether, arguing that the DRECP process "inherently informed" BLM's decision-making for projects as discussed in Appendix F. FEIS, Appx. W, Response to Comment 11-35. But "informing" decision-making is not the same as actually complying with the DRECP's requirements. Consequently, this response is inadequate under NEPA. BLM should revise its analysis to fully address CRIT's comments and the modifications to the Project application over the years.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-31):** In response to comments, BLM seems to neglect that an environmental justice analysis is required under NEPA. FEIS at Appx. W, Response to Comment 11-28. NEPA requires BLM to consider, to the extent practicable, whether there is or will be an impact on the natural or physical environment that significantly and adversely affects Native American Tribes. Specifically, BLM must consider whether significant environmental effects may have an adverse impact on Native American Tribes that appreciably exceeds impacts on people in the general population. See, e.g., Presidential Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994); U.S. Interior Department Environmental Justice Strategic Plan.<sup>4</sup> These analyses are required for an adequate consideration of environmental justice impacts.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-34):** The purpose and need provided in the FEIS retains the flaw of impermissibly narrow purpose under NEPA for several reasons, most importantly because it foreclosed meaningful alternatives review in the FEIS. BLM's response to comments asserts that the narrow purpose and need is "reasonable and consistent with governing principles." FEIS at Appx. W, Response to Comments 11-30 and 13-20. Yet again, BLM's conclusion is inaccurate and misleading. An agency cannot unreasonably narrow the objective of the proposed action to limit the range of alternatives considered.



***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-15):** While CRIT appreciates that BLM made some progress on its formal eligibility determinations, as compared to the DEIS, the Tribes take serious issue with the manner in which BLM undertook this analysis. As explained further below, BLM failed to fulfill its consultation responsibilities in making these determinations. Instead, BLM has moved forward with its NRHP analysis without tribal input and now has an incomplete understanding of these prehistoric sites. The appropriate process would have been to engage in government-to-government consultation on these eligibility determinations and then complete the NRHP analysis with a re-release of the DEIS for public comment. Previous comments in record: CRIT DEIS Comment Letter at FEIS, Appx. V, Letter 11, 11-7 to 11-10.

***Colorado River Indian Tribes***

***Sara A. Clark***

**Issue Excerpt Text (2-9):** Yet, the analysis utterly fails to consider the real risks to cultural resources that come from being in the vicinity of a large development: vandalism, destruction, visual intrusion, loss of cultural value and tribal connection to the landscape, etc. BLM attempts to discount these risks, arguing that CRIT's concerns about vandalism and destruction are "speculative and not supported by evidence," FEIS, Appx. W, Response to Comment 11-4, but the Tribes submitted cultural resource documents from other projects that provide extensive recognition of and protection from these very issues. See Appx V, Letter 11, Exh. B (Ten West Link Programmatic Agreement). Moreover, by narrowly focusing on whether a visitor could see the project from a particular vantage point and whether the identified sites might be impacted by noise or dust, the FEIS ignores the impacts that come from industrializing an adjacent landscape. FEIS at 3.5-12. The FEIS analysis must be revised to adequately consider these impacts and respond to CRIT's comments.

**Summary:**

The BLM failed to adequately respond to the Tribe's comments on the Crimson Solar DEIS/CDCAPA regarding:

- Significance of the Mule Mountains spiritual connectivity to their ancestral landscape,
- Consistency with the Western Solar Plan and DRECP,
- Environmental justice impacts from significant and adverse effects on Native American Tribes,
- The BLM's narrow purpose and need statement,
- Government-to-government consultation, and
- Vandalism and destruction of tribal resources.

**Response:**

The BLM is required to assess, consider, and respond to all substantive comments received (40 CFR 1503.4). Substantive comments are those that reveal new information, missing information, or flawed analysis that would substantially change conclusions (BLM Handbook H-1601-1, pages 23-24). In compliance with NEPA, the BLM considered all public comments submitted on the Crimson Solar DEIS/ CDCAPA. The BLM complied with 40 CFR 1503.4 by performing a detailed comment analysis that assessed and considered all substantive comments received. Appendix W ("Response to

Comments”) of the Crimson Solar FEIS/Proposed CDCAPA presents the BLM’s responses to all substantive comments.

The BLM summarized the issues raised by each comment letter and provided a meaningful response. The BLM’s response identified any modifications to the alternatives, improvements to the impacts analysis, or factual corrections made as a result of public comment. The BLM’s response also explained why certain public comments did not warrant further agency response.

Evaluation of potential impacts of the Project and alternatives on cultural resources is based in part on review of legal responsibilities established under NEPA (42 USC Sections 4321, 4331-4335), the NHPA, and other relevant authorities. To carry out NEPA, the Federal Government has a “continuing responsibility...to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may...preserve important historic, cultural, and natural aspects of our national heritage...” (42 USC Section 4331(b)(4)). NEPA requires the Federal agency to take a “hard look” at the impacts on cultural resources associated with a Project and alternatives. The analysis considers direct, indirect, and cumulative impacts. For purposes of NEPA, the Crimson Solar FEIS/Proposed CDCAPA included information gathered as part of the NHPA Section 106 process about the potential effects on historic properties from the proposed undertaking, i.e., the BLM’s decision whether or not to issue the requested ROW grant and approve the CDCA Plan amendment. Each step of the Section 106 process requires consultation with the State Historic Preservation Officer, federally recognized Indian tribes, local governments, other identified consulting parties, and the public.

As discussed in Section 3.5 of the Crimson Solar FEIS/Proposed CDCAPA, geomorphological field investigations of the Project APE were conducted concurrently with archaeological test excavations in August 2019 and included detailed geomorphic mapping and field inspection of a representative sample of the geomorphic surfaces tentatively identified on satellite imagery. The information from the investigations and the results of any future geoarchaeological investigations of the Project area will be used to inform the plan for archaeological monitoring and post-review discoveries to be developed and implemented if the Project advanced to construction (see FEIS, page 3.5-10).

The BLM responded to the Tribe’s comments regarding the significance of the Mule Mountains spiritual connectivity to their ancestral landscape in Appendix W (see FEIS, Appendix W, pages W-22 through W-23). In that response, the BLM explained that the statement “Access to places of traditional cultural and religious importance may not be maintained” on page 22 of Appendix F, comes from preliminary analysis provided by the Applicant. Furthermore, it was explained that Appendix F was revised in the FEIS/Proposed CDCAPA to clarify the Project’s consistency with the intent of the Conservation Management Actions (CMAs) in the DRECP with mitigation incorporated and/or with alternatives considered. Appendix F now explains that the Project would be consistent with the intent of LUPA-CUL-3, by adding “Following identification of places of traditional cultural and religious importance, the BLM has determined that access to these sites would be maintained for traditional use.”

The BLM responded to the Tribe’s comments on the Crimson Solar DEIS/Proposed CDCAPA regarding consistency with the Western Solar Plan and DRECP in Appendix W as well as above in the “Failure to Comply with the Western Solar Plan and Desert Renewable Energy Conservation Plan” protest issue section of this report. The BLM’s response also explains why certain portions of the comment did not warrant further agency response (see FEIS, Appendix W, page W-26).

Appendix W of the Crimson Solar FEIS/Proposed CDCAPA responds to the Tribe’s comments regarding the environmental justice analysis as well as above in the “Executive Order 12898 Violation” protest issue section of this report. In the response, the BLM explained that Section 3.13.2.2 of Crimson Solar FEIS/Proposed CDCAPA accurately identified both the Colorado River

Indian Reservation and Native Americans living in the Project area outside of the reservation, and acknowledged that Native Americans living in the region, whether or not they are a part of an identified minority or low-income community, represented a community that may be at risk for environmental justice impacts and that the analysis considered the Project's impacts together with existing or foreseeable environmental burdens experienced by nearby communities (see FEIS, Chapter 3, pages 3.1-4 through 3.19-6).

The BLM responded to the Tribe's comments on the Crimson Solar DEIS/Proposed CDCAPA regarding the purpose and need statement in Appendix W as well as above in the "NEPA Purpose and Need" protest issue section of this report. The BLM thoroughly explained how the purpose and need statement for the Project was reasonable, consistent with governing directives and the requirements of Title V of FLPMA, and satisfied the requirements of NEPA (see FEIS, Appendix W, page W-49). The BLM also explained why inclusion of alternatives that do not respond to the purpose and need statement were rejected from more detailed consideration (see Crimson Solar DEIS/Proposed CDCAPA, Section 1.2.1).

As stated in Appendix W, Response to Comments, the Crimson Solar FEIS/Proposed CDCAPA includes measures to identify and reduce construction-related impacts on cultural resources inadvertently encountered during construction and government-to-government consultation between the BLM and the Indian Tribes is ongoing. Consultation addresses the topic of post-review discovery of cultural resources and appropriate mitigation measures to reduce Project-related impacts. Additionally, mitigation measures have been put in place to reduce potential impacts to cultural resources as described in Appendix W, page W-19, "CUL-5 requires the preparation of a Plan for Archaeological Monitoring, Post-Review Discoveries, and Unanticipated effects (also referred to as a Monitoring and Discovery Plan or MDP). The MDP shall either be appended to the MOA if an MOA is required or will be standalone document. The MDP will be developed in consultation with all consulting parties including Indian tribes." See also the response above in the "Government to Government Consultations and Religious Freedom" protest issue section of this report.

The BLM considered and responded to the Tribe's comments regarding direct effects of cultural resources through vandalism and destruction in Appendix W (see FEIS, Appendix W, pages W-19 through W-20). In the response, the BLM determined that additional discussion of and protection measures against vandalism and destruction in the FEIS were not necessary because the BLM nor any other publicly available documentation discloses the locations of cultural sites in the Project vicinity. See also the response above in the "Tribal Interests and Resources – Inadequate Analysis" protest issue section of this report.

The BLM adequately responded to public comments on the Crimson Solar FEIS/Proposed CDCAPA; therefore, the protest is denied.



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