

## NATIONAL PUBLIC LANDS NEWS

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Department of Interior  
Bureau of Land Management  
NEPA Coordinator  
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California Energy Commission  
Dockets Office  
MS-4, Docket No. 09-RENEW E0-01, Scoping Comments  
1516 Ninth St.  
Sacramento CA 95814-5512

Re: Public Scoping for the Desert Renewable Energy Conservation Plan EIR/EIS

To whom it may concern:

I have been commenting on public land issues in the California Desert since 1970 as a citizen and recently as Vice-Chair of National Public Lands News (NPLNews is a non-profit public education organization).

NPLNews has been providing reliable and timely information about public lands to citizens since 1999.

The following constitutes our comments:

1. We are requesting an extension on this comment period, as the BLM/NREL Solar PEIS has not issued a formal ROD, which could possibly re-write this effort.
2. Who is the NEPA lead? Since federal lands are involved, it must be a federal agency with jurisdiction over the lands. It cannot be both the California Energy Commission (CEC) – since it is not a federal land management agency and does not have a legal mandate from the American people. The US Constitution (Article IV section 3) vests the power for disposition of the public lands to Congress.

Congress passed and the President signed the Federal Land Policy and Management Act in 1976 (FLPMA) and mandated the Secretary of the Interior the responsibility for management of the public lands. The mission of the Department of the Interior (and its agencies) is to manage, conserve and preserve the land and the resources under its jurisdiction.

Besides the lack of legal basis for the CEC to take the lead is the fact that the CEC is a permitting agency not an allocation and management agency. In other words it has a single mission and focused on issuing a permit while BLM has a multiple -use mandate directed by FLPMA to balance the use and the conservation of the resources.

It is more appropriate for the CEC to be a cooperative agency under NEPA since it does have a permitting component of the project.

3. There is a fundamental flaw in the process.

This is really a resource management planning (RMP) process not ONLY a NEPA process. It is a mega RMP since we are talking about a huge area. It will trigger land-use plan amendments to California Desert Plan (CDP).

In other words, the federal action involves millions of acres of public lands that are currently governed by their respective land use plan/RMP that speak for the disposition of those lands under the CDP, tribal and military jurisdictions.

The DRECP cannot possibly address all of the complex issues that will result if the federal action is implemented, since millions of acres are involved. The DRECP will not serve a practical purpose on the ground because it is structurally flawed from the outset.

DOI and DOE does not have a good track record in this area. In 2005-2006 the Wind PEIS was completed and after 4 years of field experience, it has been totally ineffective in managing wind energy Type II and Type III applications on public lands.

So what is the purpose of doing this DRECP? It seems to be just another regulatory burden on top of the many that businesses and citizens have to deal with? We are all overregulated already.

The US Constitution delegates the disposition of public lands to Congress not the Executive Branch (see my earlier comment). The administration should not allocate public land resources without congressional approval or without going thru the RMP amendment process with full disclosure.

In FLPMA, there is an entire section on the California Desert, which was to be managed as a single unit called the CDCA - in order to balance the conservation and use of the public lands. The California Desert Plan (CDCA Plan or Desert Plan) was completed in September of 1980 in conformance with the Congressional intent.

The Desert Plan outlined certain processes and procedures for all to follow in order to

keep with the letter and spirit of FLPMA.

For example, in the CDCA Plan of 1980, the 2<sup>nd</sup> management element was in regards to coordination with the Native Americans.

### **“Chapter 3 of the Desert Plan Native American Element”**

Prominent features of the CDCA landscape, wildlife species, prehistoric and historic sites of occupation, worship, and domestic activities, and many plant and mineral resources are of traditional cultural value in the lives of the Desert's Native people. In some cases these resources have a religious value. Specific sites or regions may be important because of their role in ritual or the mythic origin of an ethnic group. These values will be considered in all CDCA land- use and management decisions. The outline for this element is as follows:

#### **GOALS**

The Native American Element addresses both the contemporary and traditional concerns of Native Americans and organized tribal governments. The Plan inventory has attempted to identify the full spectrum of Native American cultural values. The element deals with these values in two distinct contexts: those values associated with traditional heritage and religious concerns: and values and concerns which arise from the long-range goals and planning efforts of reservation governments in, or adjacent to the California Desert Conservation Area (CDCA). The goals of this program are to:

(1) Achieve the full consideration of Native American values in all land-use and management decisions. The BLM will seek to manage and protect these values, wherever possible and feasible. Guidance is provided through this element to insure that this management is consistent not only with the applicable legislation but also with the concerns and cultural values of the appropriate Native American group(s).

(2) Provide guidance for contact and consultation with tribal organizations and reservation governments as specified in the Memorandum of Agreement between BLM and the California State Native American Heritage Commission (NAHC). Inconsistencies in the manner and degree of involvement of these organizations in projects adjacent to Federal lands has often reflected an absence of effective channels of communication between the Federal Government and representative Native American government organizations.

This element seeks to correct these inadequacies within the CDCA by:

- (1) identifying regional tribal governments, associations, and inter-tribal government organizations;
- (2) identifying the National Environmental Policy Act notice responsibilities of the BLM and Native American Heritage Commission, relative to the Native American community and setting these forth in a Memorandum of Agreement (appendix VIII to the Proposed Plan, October 1980) ;
- (3) providing an outline for contact procedures and the identification of "appropriate and informed" tribal groups.

During the Solar PEIS Barstow public meeting, the Chairman of the Chemeuvi Indian Tribe expressed his deep disappointment in the lack of consultation by the lead federal agencies with the affected tribes by the Solar PEIS. In the previous meeting held in Indian Wells, on February 8, 2011 the Native American Tribes that spoke out against this plan was not properly recorded under the clear intent of NEPA. To date, these comments have not been documented on the PEIS Website nor has final decisions been made in regards to this.

It is clear that the CEC, BLM and Fish & Wildlife Services did not conduct adequate consultation with the tribes in accordance with federal laws and regulations. The scoping meetings were held in Ontario and Sacramento without native representation.

Making the CEC lead gives a question that is not clearly addressed. I was not aware that the State of California, specifically the CEC, has the right to enter into agreements with other nations, such as Tribal.

Specifically, in the California Desert Conservation Area (where the Solar PEIS is proposing to designate SEZ areas), the BLM and NREL failed to comply with the letter and spirit of the Native American Element (Chapter 3) goals and objectives just as this DRECP is:

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*(2) Provide guidance for contact and consultation with tribal organizations and reservation governments as specified in the Memorandum of Agreement between BLM and the California State Native American Heritage Commission (NAHC). Inconsistencies in the manner and degree of involvement of these organizations in projects adjacent to Federal lands has often reflected an absence of effective channels of communication*

*between the Federal Government and representative Native American government organizations.*

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The CDCA Plan provides the overall guidance for federal land-use decisions. Chapter 7 of the CDCA Plan outlines the amendment process and how citizens, organizations and state and local government can bring land management issues to the BLM for inclusion in the consideration for periodic amendments to the CDCA Plan.

The California Desert Conservation Plan already has "land management zones" and other designations. The DRECP is regulatory initiative that qualifies as an amendment to the existing framework and therefore requires full disclosure and public ratification.

For example, the DRECP has ignored the possible impacts of the acquisition and protection of compensatory habitat. The DRECP only analyzes the effects on recreation directly where the projects are sited. Places that will be acquired and set aside as compensatory habitat will likely be restrictive or will likely be places that had considerable conservation opportunity. People who enjoy the desert for recreation regularly use those places. Those recreation activities may be motorized, motor dependent, or non-motor dependent. These are activities such as back-country touring, bicycling, camping, collecting and trapping, cultural site stewardship, educational enrichment, equestrian staging, gem and mineral collecting, hunting, model rocketry, even dog mushing and carting. Yes. There is general OHV driving, four-wheel drive touring, picnicking and photographs, rock climbing, solitude seeking, spiritual renewal. All of these activities have/can have a motor-dependent aspect to it."

Many of existing roads, trails and highways in the CDCA are subject to Revised statute 2477, which does not include a legal right of way to access and use.

Section of Highway 395 and 190 are examples of RS 2477 routes without a FLPMA right of way.

We have great concern that as these routes are acquired on a piece by piece, the designated motorized route network will be destroyed.

Regarding mineral resources under the DRECP: The compensation for lost mineral deposits has not been clearly addressed. Mineral deposits typically cannot be moved to compensate lands even if there was enough land for all the other compensation that will have to be dealt with. A complete socio-economics has not been evaluated for all the multiple uses that will be compromised in this DRECP.

Regarding the SEZ areas under the Solar PEIS, again, these are land-use designations under FLPMA and it is legal or appropriate to use the NEPA process to conduct and resource management land-use designation with a DRECP.

It is not clear if the DRECP affects PELT (Payment in Lieu of Taxes) and have the counties affected by these designations been consulted regarding that matter?

Not only are recreational, but water, socio-economics and other existing rights are left out entirely leaving the public sorely lacking in being informed, a clear violation of NEPA.

By limiting access to many of these SEZ zones, many wildlife areas will be severely impacted. Guzzlers, seeps, springs, etc. will no longer get the attention that they need for maintenance and repairs. These special areas cannot be moved.

The map that is on the website is not at a scale that the American Public can readily read and interpret whether mitigation is of significant distance to require additional review.

We could not find any mention of the appeals process. This should be better documented. The public cannot be expected to comment on an inadequate process. The CEC/BLM/F&W cannot just say that they will give their information to the final DRECP and then sign the ROD. They have already proven that they have excluded tribal commentaries at the Ontario and Sacramento Meeting. Will the general public commentaries be excluded at the end?

An alternative that was never mentioned in this DRECP was using private land roof-tops closer to the energy usage and not desecrating scenic vistas and precious water basins.

In closing, it is disappointing to see how the State and Federal government wastes precious taxpayer dollars on a flawed process. Providing each BLM field office the funds to amend their respective RMP and deal with the local issues as they are presented could have better spent the dollars. One-size fits all cookie cutter DRECP is misguided the wrong approach and above all does a disservice to the public lands. Americans deserve better from their government.

One item that should be closely inspected is the actual language of the BLM's Rights of Way Program:

**Authority:** 43 U.S.C. 1733, 1740, 1763, and 1764.

**Source:** 70 FR 21058, Apr. 22, 2005, unless otherwise noted.

Subpart 2801—General information

§ 2801.2 What is the objective of BLM's right-of-way program?

It is BLM's objective to grant rights-of-way under the regulations in this part to any qualified individual, business, or government entity and to direct and control the use of rights-of-way on public lands in a manner that:

- (a) Protects the natural resources associated with public lands and adjacent lands, whether private or administered by a government entity;
- (b) Prevents unnecessary or undue degradation to public lands;
- (c) Promotes the use of rights-of-way in common considering engineering and technological compatibility, national security, and land use plans; and
- (d) Coordinates, to the fullest extent possible, all BLM actions under the regulations in this part with state and local governments, interested individuals, and appropriate quasi-public entities.

Additional language that needs close inspection:

The NCCP Act states that the Department of Fish and Game must approve any NCCP (F&G Code §2820(a)). The NCCP Act also provides that the Department may enter into a planning agreement with any person or public entity, "in cooperation with a *local* agency that has land use permit authority over the activities proposed to be addressed in the plan." Section 2820(f) then allows the department discretion in providing regulatory assurances to plan participants (which apparently may be persons, public entities, etc.) Finally, Section 2835 provides that the department may authorize "by permit" "the taking of any covered species whose conservation and management is provided for in a natural community conservation plan approved by the department." However, a total take for the State of California needs to be imposed because each project has the reality of taking 1400 per project.

Regarding the May 4, 2011 draft DRECP Conservation Framework Strategy Report recognizes that "The plan area supports a diverse range of outdoor recreation activities and opportunities, including numerous non-motorized and motorized uses over large areas of public lands. Demand for recreation on desert lands in California, especially on BLM and other public lands, is increasing due to several factors and trends, including a growing appreciation of natural, cultural, aesthetic, and other values in desert landscapes, and saturation of other outdoor recreation areas closer to southern California urban centers."

The DRECP has the potential to have a significant impact on access to public land, both directly and indirectly, if the plan does not properly address several issues. First, individual covered activities will create project footprints that will necessarily preclude the use of an area previously available for public use, including recreation. Not only will the project area no longer be accessible, it could also impact the recreational use of lands located nearby.

Projects could sever existing routes and block access to other areas and regions; thereby restricting connectivity and compounding the loss of access. Each individual project has the potential to result in some loss of access either directly or indirectly. Taken together the covered activities will contribute to a cumulative loss that must be minimized. To help prevent this from occurring, we recommends that the DRECP incorporate the potentially applicable mitigation measures found in the Solar Energy Development Draft

Programmatic Environmental Impact Statement Volume 1, Chapter 5, Section 5.5.3 that states:

#### Potentially Applicable Mitigation Measures

- Public access through or around solar facilities should be retained to permit continued use of public lands and non-BLM administered lands.
- Solar facilities should not be placed in areas of unique or important recreation resources.
- Replacement of access lost for OHV and other uses should be considered as part of the analysis of project-specific impacts. Any process for designating a replacement route would include the consideration of the designation criteria for routes as specified in 43 CFR 8342.1, and would be consistent with existing land use plans.

Any additional loss of access and recreational opportunity in the California deserts must be put into perspective. Over the last eight decades various management decisions, legislative actions and litigation have vastly limited the activities allowed on public lands. 25 million acres were congressionally designated the California Desert Conservation Area. In 1976, 25 percent was still private and 25 percent was now exclusively used by the military or designated as state and national parks (activities restricted to certain uses), leaving 50 percent for limited public use. In 1980 the Bureau of Land Management was directed to develop a management plan for the remaining 50 percent. The imbalance in the desert is favoring closed access at a ratio of 9:1 (9 acres closed for each one acre open) - not fair and balanced by any standard of measurement.

The roughly 12.5 percent of limited-use areas that remain today will be impacted by the DRECP and its implementation. The DRECP must also consider other forthcoming changes that have the potential to affect access and recreational opportunities. For example, the planned expansion of the Marine Corps Air Ground Combat Center Twenty-Nine Palms, California certainly has the potential to remove a large amount of land from public use.

The potential significant direct impacts to access and recreation exist, but indirect impacts are also possible. For example, if an activity results in the taking of a threatened species, it will increase pressure to identify mitigation necessary to offset the taking.

This mitigation should not become the responsibility of other multi-use stakeholders or occur at the expense of other uses. Simply stated, recreation and public access should be curtailed or limited to accommodate the possible loss of species resulting from other activities.

The DRECP must fully examine recreation, access, and the relationship between the two. A disbursed motorized off-highway route network exists throughout the DRECP planning area and is utilized to pursue and support various activities. For this reason, data and specific information about the extensive recreational uses within the DRECP planning area is essential in developing the plan. The potential impact of the plan on recreation

cannot be overlooked and must be a consideration when developing the conservation plan.

We recommend that the development of the DRECP must include a process by which geographic information is gathered and inventoried for the decision making process.

Recreational activities have been occurring within the DRECP for generations. An examination of the areas where recreation occurs and the access required partaking in them must be a part of the DRECP planning process.

For myself and the National Public Land News,

Sophia Anne Merk, Chair

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