

February 20, 2015

California Energy Commission
Docketing Office MS-4
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Via email: docket@energy.ca.gov



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Re: **Docket No. 09-RENEW EO-01**, Comments of **Eagle Crest Energy Company** on Draft
Desert Renewable Energy Conservation Plan

Dear Docketing Official:

This firm represents Eagle Crest Energy Company (“Eagle Crest”), an energy company headquartered in Santa Monica, California. On June 19, 2014, Eagle Crest was granted a license by the Federal Energy Regulatory Commission (“FERC”) to construct, operate and maintain the Eagle Mountain Pumped Storage Hydroelectric Project (“Eagle Crest Project” or “Project”) on certain fee and public lands in the area of the Desert Renewable Energy Conservation (“DRECP”) planning area for Riverside, County.¹ The Eagle Crest Project is a 1300MW closed-loop pumped storage project located on the site of the Eagle Mountain Mine, near the town of Desert Center, Riverside County, CA. We are filing this comment to make you aware that aspects of the DRECP proposed landuse allocations are in direct conflict with the FERC-issued license for the Eagle Crest Project and exceed the limited landuse planning authority that the Bureau of Land Management has over lands withdrawn for Federal Power Act purposes. 16 U.S.C. § 818. Those proposed landuse allocations should not go forward in the DRECP Record of Decision.

As we understand the DRECP it “would create a framework to streamline renewable energy permitting by planning for the long-term conservation of threatened and sensitive species and other resources on more than 22 million acres The Draft DRECP is a landscape-scale plan that uses science to inform the siting of renewable energy development projects and the conservation of species” DRECP, Executive Summary at 6. There are three planning components: a BLM Land Use Plan Amendment (“LUPA”); General Conservation Plan (“GCP”) for incidental take permits from California and the U.S. Fish and Wildlife Service (“FWS”); and a Conceptual Plan-wide Natural Community Conservation Plan (“NCCP”) that addresses wildlife and plant protections in the context of renewable energy and transmission projects across the entire area by the California Department of Fish and Wildlife (“CDFW”). DRECP, Executive Summary at 9.

¹ *Eagle Crest Energy Company*, 147 FERC ¶ 61,220 (June 19, 2014). <http://www.ferc.gov/whats-new/comm-meet/2014/061914/H-7.pdf>

In our review of this complex planning document, it appears that there are several proposed landuse designations that would conflict with the Eagle Crest Project. *See* Exhibit A., Map. Exhibit A. illustrates the location of the Eagle Crest Project and the rights-of-way for the water and transmission lines approved in the FERC license and long-pending before the BLM, Palm Springs Field Office and California Desert District Office. *See infra*. It appears that BLM intends in the DRECP Preferred Alternative to designate portions of the Project rights-of-way as Areas of Critical Environmental Concern (“ACECs”) and National Landscape Conservation Areas. Each of those designations provides for heightened protections of federal land and limit uses on lands so designated. In addition, *central* areas of the Eagle Crest Project are proposed for inclusion in DRECP Conservation Planning Areas.² These proposed landuse allocations conflict with the FERC-licensed Eagle Crest Project and exceed BLM’s legal authority and they should not be included in the Record of Decision.

Eagle Crest submits these comments to underscore that this Project is a separately permitted and authorized activity on lands that are withdrawn from federal land management and “reserved” for Federal Power Act purposes. Thus, BLM does not have the management authority to make decisions in the LUPA (*See e.g.* at DRECP, Executive Summary at 11) that would interfere with the Federal Power Act purposes of the Project. Moreover, the Project-specific federal and State permitting and environmental review processes have been thorough. In addition to the FERC-issued license, Final Environmental Impact Statement (“FEIS”), pursuant to the National Environmental Policy Act (“NEPA”), and associated FWS Biological Opinion and National Historic Preservation Act Section 106 consultation for the FERC action, the State of California has issued all necessary permits for the Project, including undertaking a Clean Water Act Section 401 certification process,³ a California Environmental Quality Act (“CEQA”) environmental information report (“EIR”) and the Bureau of Land Management, California Desert District and the Palm Springs South Coast Field Office (“BLM”) are in the process of reviewing two, discrete linear right-of-way requests that support the Project. In sum, the Federal Power Act has withdrawn this land from BLM management, FERC has issued the license to operate the pumped storage Project and federal and state agencies have analyzed and mitigated the environmental impacts of the Project pursuant to their authorities under State and federal law.

BACKGROUND

Eagle Crest Project

The Eagle Crest Project will provide California with 1300 MW in hydroelectric storage capacity enabling a critical component for the successful integration of intermittent renewable energy, in particular, the wind and solar resources that are a focus of the DRECP. By storing and then using surplus power that is generated at night, the Project will help with the integration of wind and solar resources. This will assist California in meeting two important goals – the 33% renewable energy portfolio standard by 2020 (and the 50% benchmark by 2030) and the AB

² The Exhibit A. Map also includes certain lands denoted in white that underlie the Project transmission and water lines. The color designation white is not included in the Map key. We are unclear what this designation might indicate, but again BLM lacks the authority to provide for landuse allocations that conflict with Federal Power Act purposes.

³ *Id.*

2514 directive to add 1.3 GW of storage by 2020. The Project's previously disturbed iron ore mine site with two existing reservoir sites at appropriate elevations presents a unique opportunity to create significant new storage capacity with minimal additional surface disturbance.

The Eagle Crest Project is licensed for a total of 2,527 acres of which 1827.9 acres are owned by Kaiser Eagle Mountain LLC and Mine Reclamation Corporation (*collectively* "Kaiser") and 699.2 acres are federal land managed by BLM. The Eagle Crest Project overlaps approximately 449 acres that were exchanged by BLM out of federal management to Kaiser in fee in 1999, but as a result of a legal challenge and the 2014 settlement of the litigation these lands are now back in federal management.⁴ The lands to be used for the Eagle Crest Project were at all times withdrawn by FERC pursuant to the Federal Power Act ("FPA") from BLM's federal land management authority and were "excepted" from the 1999 BLM/Kaiser land exchange. Two linear rights-of-way that support the Project will cross lands managed by the BLM. Eagle Crest filed an SF-299 application with BLM for a Federal Land Policy Management Act ("FLPMA") Title V right-of-way which has been pending during the entire DRECP process. 43 U.S.C. § 1706 *et seq.* See CACA 50946. With the June, 2014 issuance of the Project FERC license, BLM has begun its review of the Eagle Crest right-of-way application.⁵

Federal Power Act Withdrawal for Eagle Crest Project

The FERC permitting process for the Eagle Crest Project began when Eagle Crest filed an application for, and was granted, a preliminary permit for the Project in 1991. Pursuant to the provisions of Section 24 of the FPA⁶, the federal land, managed by BLM, was "withdrawn" for power project development.⁷ The FPA withdrawal provision provides that the federal lands included in an application are "from the date of filing of application . . . reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by [FERC] or by Congress."⁸ An application for a license under Section 24 of the FPA results in automatic withdrawal of the land from any use other than allowed under the FPA.⁹

BLM has repeatedly recognized the constraints of the FPA Project withdrawal on its management authority, so it is puzzling that the DRECP does not similarly recognize those limitations. As noted above, a portion of the federal lands subject to the Eagle Crest Project

⁴ *Charpied v. U.S. Department of the Interior* (Civ. No. ED. CV. 99-0454 RT) and *National Parks Conservation Association v. Bureau of Land Management* (Civ. No. ED. CV. 00-0041 RT), "Final Judgment and Order of Dismissal" (December 18, 2014).

⁵ See letter, J. Kalish, Manager, BLM Palm Springs FO to S. Lowe, Eagle Crest Energy Company (December 9, 2013) ("The BLM proposes to conduct the NEPA analysis for the proposed transmission line and water pipeline with an Environmental Assessment . . . [t]he National Historic Preservation Act Section 106 process is underway . . . similarly, the BLM will continue to consult with the U.S. Fish and Wildlife Service as required . . . The BLM will begin processing the application for a right-of-way for the transmission line and water pipeline when [Eagle Crest] is issued the FERC license.")

⁶ 16 U.S.C. § 818.

⁷ Over the years that followed this initial submission in 1991, Eagle Crest Energy has filed and FERC has granted a total of four preliminary permits. Through the various filings and FERC approvals, the Eagle Crest Project FERC withdrawals have remained in effect during the Project licensing process that culminated with the ECE 2009 Application and FERC's issuance of the license in June, 2014. See *supra* at n. 1.

⁸ 16 U.S.C. § 818.

⁹ 43 C.F.R. § 2320.1.

FERC withdrawal overlapped a portion of the BLM/ Kaiser 1999 exchange property. The FERC withdrawal blocked the BLM from taking any further action affecting this overlapping property. At BLM's request, on June 7, 1996, FERC made a "no injury determination" that its FPA withdrawal would not be injured or destroyed for the purposes of power development if the lands were conveyed to Kaiser pursuant to the proposed Eagle Mountain Land Exchange.¹⁰ In the federal land patent granted by the United States to Kaiser as part of the 1999 Eagle Mountain land exchange, and filed in the Riverside County land records, the BLM "Excepted and Reserved" to the United States:

"As to those lands which lie within the boundary of the license application filed by Eagle Crest Energy Company with the Federal Energy Regulatory Commission on April 29, 1994, for Power Project No. 11080, . . . the right to itself, its permittees or its licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Federal Energy Regulatory Commission, for the purposes of Part 1 of the Federal Power Act"

In 2012, BLM identified a conflict with the FPA purposes for the Project in two of the solar projects under consideration by BLM in the same general area. Eagle Crest, FERC and BLM worked on a "no injury" determination for the Desert Sunlight, CACA 48649, and Desert Harvest, CACA 49491, solar projects. More recently, in August 2014, BLM initiated a "Supplemental Environmental Impact Statement" to address direction from the court in the above-described BLM/Kaiser land exchange litigation. 79 *Fed. Reg.* 47,668 (August 14 2014). In that proposed action, now since discontinued due to the settlement referenced above (*see* n. 4), BLM recognized and discussed the Eagle Crest Project as an existing encumbrance on the land.¹¹

FERC Licensing and Environmental Review of Eagle Crest Project

On June 22, 2009, Eagle Crest filed the application that resulted in the issuance of the FERC license for the Eagle Mountain Pumped Storage Hydroelectric Project. On January 11, 2010, FERC issued a public notice to commence its environmental review and licensing process for the Project. BLM has been a participant in the FERC NEPA process. A draft environmental impact statement ("DEIS") was issued by FERC on December 23, 2010. Public meetings in California were held and public comments accepted through February 28, 2011. On January 30, 2012, FERC issued the FEIS. The U.S. Department of the Interior on behalf of the National Park Service ("NPS") and BLM filed comments on the FEIS. On May 8, 2013, FERC staff met with BLM to address the Bureau's comments "and issues associated with land withdrawals under section 24 of the FPA." *See* License, n.1, at ¶8. On June 19, 2014, FERC approved the issuance

¹⁰ *See* letter from J. M. Robinson, Director of FERC Division of Project Compliance and Administration, to E. Hastey, State Director of BLM California State Office (June 7, 1996) ("the power value of any United States lands within the boundary of Project No. 11080, . . . will not be injured or destroyed for the purposes of power development by their conveyance to Kaiser Eagle Mountain, Inc., subject to the provisions of Section 24 of the Federal Power Act.")

¹¹ *See*, BLM Eagle Mountain Land Exchange webpage, http://www.blm.gov/ca/st/en/fo/palmsprings/Eagle_Mountain-Land_Exchange.html. "BLM Kaiser Land Exchange, Preliminary Scoping Information," map at p. 7 ("443 acres were encumbered by the power site withdrawal in sections 25 and 31 . . .") and "BLM Background Information Documents," Document 13 (maps of Eagle Crest Project).

of an original license to Eagle Crest to construct the Eagle Crest Project. *Id.* Requests for rehearing were filed by the U.S. Department of the Interior on behalf of NPS, Kaiser and the Desert Protection Society and are under consideration by FERC. *See* FERC, *Eagle Crest Energy*, “Order Granting Rehearing for Further Consideration” (August 20, 2014).

EAGLE CREST COMMENTS ON DRECP

BLM’s Proposed LUPA Decisions

BLM’s LUPA would amend the California Desert Conservation Plan to create Development Focus Areas (“DFAs”) for renewable energy and transmission, conservation designations, Special Recreation Management Areas and make other landuse allocations. DRECP, Executive Summary at 11. The four DRECP “action alternatives” (exclusive of the “no action alternative” that continues current management) largely differ on the configuration of DFAs and the balance between avoidance and mitigation. *Id.* at 39. The Preferred Alternative recommends the creation of a DFA in the general area of the Project, but inexplicably includes the Project rights-of-way in proposed ACECs and National Landscape Conservation Areas and portions of the central Project in a Conservation Planning Area. *See*, Exhibit A. As explained above, no matter which LUPA alternative is selected by BLM it will not change the operation of the FPA which withdrew the federal land from BLM’s management for the purposes of the Eagle Crest Project. BLM’s patent to Kaiser in the land exchange recognized this and “excepted and reserved” the lands described in the Eagle Crest Project application for purposes of the FPA. BLM lacks FLPMA management authority over these withdrawal lands and cannot create landuse allocations that conflict with the FERC-authorized Project. The balance of the Project site is located on fee land owned by Kaiser as noted above. Eagle Crest has been issued a license by FERC to proceed with construction. No action BLM takes in the DRECP can change that independent authorization.

Project Environmental Review

One of the stated goals of the DRECP is to expedite the permitting of renewable energy projects by “zoning” the projects into DFAs and adding certainty to the mitigation process through the conservation elements of the DRECP, the GCP and NCCP. In the case of the Eagle Crest Project, it is sited on a previously disturbed iron ore mine and industrial site. The use of previously disturbed areas to site renewable energy projects is strongly encouraged by federal and state governments. Their suitability as a site for a “Conservation Planning Area” is not obvious. Moreover, the federal and state environmental review processes for the FERC license process have been thorough in addressing many of the same issues that the DRECP considers. As noted *supra* the Project was reviewed by FERC in a NEPA process including the preparation of a Draft and Final EIS. Eagle Crest was required by FERC to comply with the following laws designed and implemented by other federal and State agencies to protect numerous resources: the Fish and Wildlife Coordination Act (FWS); Section 18 of FPA (FWS fishway prescriptions); Section 4(c) of FPA (BLM land management conditions); Section 10(j) of FPA (CDFG); Clean Water Act Section 401 certification (CA State Water Board); CEQA EIR (State Water Board); Endangered Species Act Section 7 consultation (FWS); Coastal Zone Management Act consistency)(CA Coastal Commission); and National Historic Preservation Act (CA SHPO). In

addition, FERC regulations and the NEPA and CEQA processes required ongoing consultation with numerous state and federal agencies and several opportunities for public comment. License, n. 1, at 5-16.

Several environmental issues that are a focus of the DRECP were carefully considered in the environmental review of the Eagle Crest Project. For example, the FERC FEIS and license address in detail Project impacts to water resources, including the issues of groundwater levels and water budget considerations that are addressed in the DRECP. *See e.g.* License, n.1, Section 3.3.2, “Water Resources,” at 74-78 (groundwater levels); 79-82, 96-115 (groundwater pumping and recharge); and the FERC response to DEIS Comments, License, Appendix A at A-29 to A-69 (*see* A-38 on why the U.S.G.S. Colorado River Accounting Surface does not apply in the case of the Project’s groundwater use.) Similarly, the impacts of the Project on wildlife, particularly sensitive species and threatened and endangered species and the FWS Biological Opinion are addressed in detail. *See* License, Section 3.33, “Terrestrial Resources,” at 125-144; 152-171 (wildlife and sensitive species, including the Desert Bighorn Sheep); 171-189 (threatened and endangered species, including the Desert Tortoise); FERC response to DEIS Comments, License, Appendix A at A-72 to A-94. After these NEPA, CEQA and ESA analyses, FERC imposed a comprehensive series of required measures to mitigate identified environmental impacts. *See id.* Section 5.2, “Comprehensive Development and Recommended Alternative” at 310-334.

Public Comments about Project in DRECP Process

Advocates for the NPS have presented comments during the DRECP planning process and made comments to the media that the Project should not be allowed to be sited adjacent to the Joshua Tree National Park (“JTNP”), the Project lands should be “returned” to the JTNP and that the DRECP should not approve the Project.¹² These arguments misunderstand the law governing the Project and the DRECP planning process and ignore the history of these lands and the formation of the Park. Moreover, these statements ignore the stated intention of Eagle Crest to continue negotiations with the NPS to mitigate impacts to JTNP and to convey lands not necessary for Project purposes to NPS.

First, we emphasize that, absent an Act of Congress (16 U.S.C. § 818), the BLM DRECP ROD can’t alter the FPA authorization for Eagle Crest to use the subject lands - private and public - for the development of a power project. The BLM in the DRECP has recognized that in making its planning decision, the Bureau must “[c]omply with all applicable federal laws . . .” DRECP Executive Summary, at 11. In this instance, the BLM must ensure that it’s DRECP planning decisions comply with the FPA withdrawal of these lands for power act purposes. There is no authority in the DRECP process for BLM, FWS or any other participating state agency to “deny” the Project or to enforce landuse allocations that interfere with Project purposes. That decision was for FERC to make and it has issued the Project license in 2014 after careful review of environmental impacts including impacts to the JTNP recreation mission. *See*

¹² Comments of David Lamborn, National Parks Conservation Association (“NPCA”), DRECP Comment letter (January 20, 2013), D. Lamborn, NPCA, oral comments at California Energy Commission DRECP hearing (October 29, 2014); and D. Lamborn comments to local and national media concerning the Project and DRECP (*see e.g. E&E News* September 24, 2014).

e.g. License, n.1, at 189-191 and FERC response to DEIS Comments, License, Appendix A at A-107.

Second, as to the history of the Eagle Crest Project lands, BLM has recently recognized that the area was removed from JTNP (then a National Monument) in 1950 to further the national objective of mining and development of the steel industry.” 79 *Fed. Reg.* 47,668 at 47,670 (August 14, 2014). Many of the lands in the Eagle Mountain Mine site bear the impacts of a century of mining and industrialization. Although some in the public argue that the legislation creating the Joshua Tree National Monument requires that the entire Eagle Mountain Mine site revert to the government when its mining use ends, that is not a correct statement of the legislation. The only reversionary provision applicable to the Mine site is contained in Private Law 790 (1952) and applies *only* to the 465 acre town site and a 200 foot linear right-of-way for the Mine’s railroad. The reversionary interest in the town site was conveyed by BLM to Kaiser and Kaiser conveyed the railroad right-of-way to BLM in the Eagle Mountain land exchange. In 2014, as part of the settlement of litigation, Kaiser re-conveyed the town site to BLM, but BLM retained the lands Kaiser had provided in exchange.

Moreover, shortly before this 1952 Private Law was enacted, Congress reduced the size of the Joshua Tree Monument by one-third to permit mining and mineral exploration in the lands chiefly valuable for those purposes. Pub. Law 81-837, 64 Stat. 1033 (September 25, 1950). *See also* License, n.1, at 232-233. At that time, the U.S. Department of the Interior and NPS supported the removal of 265,000 acres, including the 29,000 acres in the Eagle Mountain Area, from the Monument. Those excluded 29,000 acres include the Mine and Eagle Crest Project lands. The U.S. Department of the Interior reasoned the land remaining in the Monument “will be sufficient for the proper care and management of the objects requiring protection . . .” and the Senate Committee on Public Lands noted “[b]ecause of mining and the presence of considerable privately owned land in this section of the monument, it is now considered impractical to preserve the once unique scenery and scientific features of the area proposed for elimination to the degree required for National Monument purposes.” Senate Committee on Public Lands Report No. 2236 (June 13, 1950). Indeed, contrary to assertions made by some who support the return of all Kaiser lands to JTNP, this Act contained a provision to *add* additional lands to the Monument-land removal list should the lands be found more valuable for mining. Public Law 81-837, Section 4 (directing a survey of lands *within* the new boundaries of the Monument to determine “to what extent the said area is more valuable for minerals than for the National Monument purposes for which it was created.”)

In the 1994 law creating and enlarging the JTNP, Congress added “contiguous federal lands of essential and superlative natural, ecological, archeological, paleontological, cultural, historical and wilderness values . . . of national park caliber . . .,” which additional lands *did not* include the Kaiser or Eagle Crest Project lands previously eliminated in 1950. California Desert Protection Act, Public Law 103-433, Title IV section 402, 108.Stat.4488, 16 U.S.C. § 410aaa (October 31, 1994 at Section 401 (3)-(5)).

Third, Eagle Crest has taken a number of steps to address the concerns of JTNP including: night sky minimization measures; groundwater analysis, monitoring wells and seepage management plans; desert tortoise protection plans; predator control plan; avian

protection plan; special status plants protection plan; invasive species monitoring and control plan; air and water quality measures; and the development of an historic and cultural properties management plan. Moreover, Eagle Crest has stated previously and reiterates here that the Company is willing to work with NPS to assist in their conservation goals for the JTNP and negotiate the conveyance of lands *outside* the footprint of the Eagle Crest Project¹³ to the JTNP. In addition, Eagle Crest continues to work with NPS on additional mitigation and conservation measures that would support the conservation and management goals of the JTNP for groundwater, wildlife, inholdings and public education.

CONCLUSION

Eagle Crest Energy appreciates this opportunity to comment on the DRECP to make clear the unique position of the Project in this planning process. The proposed DRECP landuse allocations that conflict with the FPA purposes for the FERC-licensed Eagle Crest Energy Project must not be carried forward in the Record of Decision for the DRECP.

Sincerely,



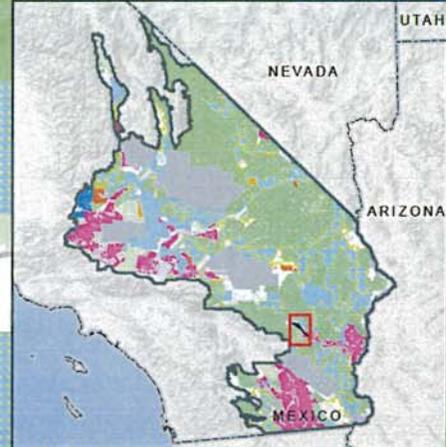
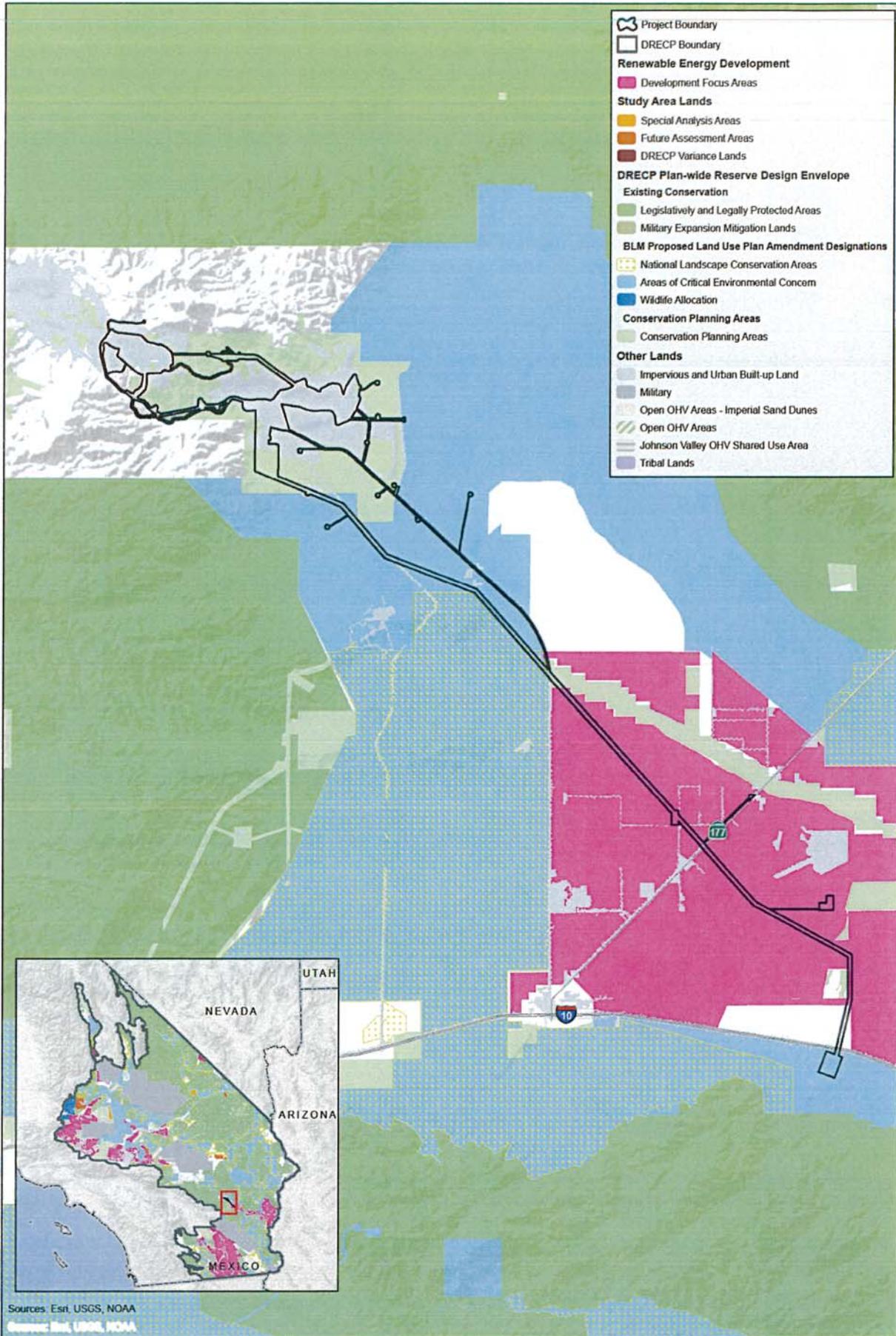
Rebecca W. Watson

For Eagle Crest Energy Company

cc: *Via Email:*

J. Kenna, BLM-CA
T. Raml, BLM-CA Desert Dist.
D. Smith, NPS, JTNP
C. Lehnertz, NPS-Pacific West Reg.
N. Kornze, BLM-WO
J. Jarvis, NPS-WO

¹³ The Kaiser Eagle Mountain site consists of 10,108 acres of which 8,636 are fee (including the 465 acre townsite now returned to BLM) and 1,472 acres are held as mining claims. If, in the future, Eagle Crest should acquire these lands from Kaiser, Eagle Crest is willing to consider a conservation purpose for any land not needed for the Project. At that time, Eagle Crest would work with NPS and BLM to reach an agreement to support conservation goals on lands outside the Project footprint.



Sources: Esri, USGS, NOAA
 Geographic Data, USGS, NOAA



Eagle Mountain Pumped Storage Project
 Eastern Riverside County, California

Eagle Crest Energy Company



PROJECT BOUNDARY AND
 DRECP PREFERRED ALTERNATIVE

FEBRUARY 2015

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